



**Ahmed v Tanui (Environment & Land Case 97 of 2021)  
[2024] KEELC 771 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 771 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 97 OF 2021  
MN MWANYALE, J  
FEBRUARY 14, 2024**

**BETWEEN**

**ZARAH AHMED ..... PLAINTIFF**

**AND**

**KIPRUTO TANUI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff Zahra Ahmed via her Complaint dated 8<sup>th</sup> March 2018 and Amended on 8<sup>th</sup> December, 2021, prays for Judgment against the Defendant, Kipruto Tanui for:
  - a) Declaration that the Defendant is not entitled to impede the Plaintiffs Proprietary right of possession of any part or portion of that parcel of land known as Nandi/kamobo/6695 and the Defendant's occupation of the said portion is illegal and unlawful and amounts to trespass on the same.
  - ai) A declaration that the Defendants entry, occupation, use and remaining upon the suit property in excess of 0.04 Ha axed from the initially registered as Nandi/kamobo/6695, Nandi/kamobo/6696(hereinafter referred to as the suit properties) whether by himself, his agents and/or any person whomsoever claiming through him is illegal and amounts to trespass.
  - a ii) A declaration that the intended Cancellation of title of registration Of Nandi/kamobo/6695, Nandi/kamobo/6696 "the suit properties" registration of Nandi/kamobo/4016 is an illegal function of fraud thus null and void.
  - a iii) A permanent Injunction barring the Defendant from entering upon, remaining upon, trespassing upon, working upon, occupying, residing upon, possessing, dealing with, transacting with, leasing, letting, creating any proprietary interests and entitlements in favour of any other third party in respect to the excess of 0.04 HA of the suit properties formerly



registered as Nandi/kamobo/4016 and now registered as Nandi/kamobo 6695 and/or Nandi/kamobo/6696.

- aiv) An order for a fresh re-survey of the suit property to determine the exact ground size what may be legally right for occupation by each party.
- av) An Order of forceful eviction of the Defendant whether himself, his agents and/or a person whosoever claiming through the Defendant from the suit properties and any section beyond what he may be entitled to (0.04 HA) from the properties registered Nandi/kamobo/6695, and/or Nandi/kamobo/6696 and the demolition and/or removal all structures and other features put up on the excess of the 0.04 HA of the same properties by the defendant and/or his agents, at the Defendants costs under Kapsabet OCS police supervision.
- b) Costs of the suit
- ci) Loss of user
- cii) General Damages
- ciii) Exemplary Damages
- civ) Punitive damages
- cv) Damages for abuse of the Plaintiff's proprietary rights by the Defendant
- c. Any other orders as the Court may deem fit.

### **Plaintiff's Case And Evidence**

2. The Plaintiff avers that:

- (i) She is the legal and registered owner of the parcel of land known as Nandi/kamobo/6695 measuring 0.12 Ha and Nandi/kamobo/6696 measuring 0.04 located in Kapsabet and has the title deeds thereof issued in her name.
- ii) It is her further claim that the Defendant who was a purchaser of a portion of land Nandi/komobo/6696 measuring 0.04 HA. or thereabouts, without any lawful cause or reason moved in with subtlety and eventually forcefully occupied and claimed the suit land Nandi/komobo/6695 to the detriment of the Plaintiff and by the said defendant's actions, abuses, insults, and threats of violence (been charged and found guilty with offence of threatening to kill the Plaintiff) the Plaintiff has been greatly prejudiced and has had to move out elsewhere after being denied user, occupation and possession.
- iii) that the 2 parcels; Nandi/kamobo/6695 measuring 0.12 and Nandi/kamobo/6696 measuring 0.04 were subdivided from the mother parcel Nandi/kamobo/4016 which was measuring 0.16 Ha by the Plaintiff in the year 2018, closing the mother title and new titles issued on the 6<sup>th</sup> February, 2018.
- iv). That in the year 2001, the Plaintiff and the Defendant entered into an oral land sale agreement whereby the Plaintiff agreed to sell to, and the Defendant to purchase from the Plaintiff, a portion of land measuring 0.04 HA from the Land parcel Nandi/kamobo/4016 which measurement, is in their local parlance referred to as 1 (one) point or simply a point, at the cost of Kshs 500,000/- the property of the Plaintiff, before the same parcel was subdivided into Nandi/komobo/6695 and Nandi/komobo/6696.



- v) That the Defendant paid a deposit of Kshs. 480,000/- on the Plaintiff's Kenya Post Office Savings Account Number KNAKOSS0844103 on 19th July, 2001, the Plaintiff gave vacant possession of Nandi/kamobo/4016
  - vi) The Plaintiff, entrusted the Defendant to survey, confirm and/or establish the size and boundaries of the new parcels, and demarcate the same in her and allowed him to put up a home and settle, before finalizing the sale transaction.
  - vii) The Plaintiff avers that the defendant hived out an extra 0.3 acres and in total 0.4 acres contrary to the agreed portion and beyond the contract terms. And she was caused to believe that that the portion of land taken by the defendant measured 0.1 acre in Nandi /kamobo 6696 as they had agreed.
  - viii) It is the Plaintiff's further case that the defendant thus took possession of more than the 0.04 acres that they had agreed on and occupies apportion that is in excess and become abusive insulative and threatening and has not paid the balance of kshs 20,000/-
  - ix) The Plaintiff discovered that the defendant was occupying more than 0.04 ha in 2014 and approaching the defendant seeking restitution she was threatened by the Plaintiff
3. on the strength on the above averments the plaintiff sought judgment against the defendant as set out at paragraph 1 of this judgment.
  4. The Plaintiff Zahra Ahmed testified as PW1 and adopted her witness statements dated 8/8/2022, 8/12/2021, 8/3/2018 and 29/4/22, as part of her evidence in chief. She also produced a document listed in the list of documents dated 8/12/2021 containing 14 documents as P exhibit 1 to 14.
  5. It was her testimony that she had purchased the property in 1980 and the title number was Nandi/kamobo/1364 acres. She sold to the Defendant 0.1 acre but did not subdivide the same. It was the Defendant who subdivided same in her absence. The Defendant subdivided 0.4 acres and took possession of the same without any transfer. The subdivision was done by a Mr. Hussein Mohamed who was a broker in 2001 and the same resulted into Nandi/kamobo/4015 and 4016 and both titles were issued in the Plaintiff's name.
  6. The mutation for the subdivision were produced as P Exhibit 10 (a) and 10(b). title number 4015 has no issue it is title number 4016 that has issue. The title was produced as P Exhibit 1 (a) and green card P Exhibit 1 (b). 4016 was thereafter subdivided into 6695 and 6696 where the Plaintiff lives in both parcels. The titles were produced as P Exhibits 2 and 3. The witness stated that he sold to the Defendant 0.1 acre, which he paid kshs 480,000 through a cheque which she produced as P Exhibit 6 (a) and P (6). She stated that she was summoned by the DO to confirm whether she had appeared before LCB and she was given a copy of the LCB application and mutation. She asked for the Court to evict the Defendant from 6695 so as to remain in 6696.
  7. In cross – examination, the Plaintiff stated that she sold a portion in 1364 and showed the Defendant where the portion was, that the Defendant demolished a stall and built on 0.1 acre that had been sold to him. On P Exhibit 4 was photograph where the Defendant had built but the Defendant continued utilizing parcel 6696 from 2001.  
  
The mutation was done on 27/7/2001 on physical property, there is no demarcation by way of fence.
  8. In 2018, the Plaintiff went to land office to subdivide. She took no action for 17 years. The Plaintiff stated that she was paid kshs 480,000/= and that Hussein as the broker took 20,000/=.



9. In re- examination, the Plaintiff stated that the mutation done in 2001 was not done by her. The Defendant had started living on the property in 2002 and that she was paid kshs. 480,000/= via a cheque, although she had agreed on the purchase price to be 500,000/= hence there was a balance of kshs 20,000/=.
10. PW2, Corporal Francis Mubiga testified on behalf of the Plaintiff and adopted his witness statement dated 2/5/2022 as part of his evidence in chief and he produced documents in the Plaintiff's further list of documents dated 29/4/2022 as P Exhibit 18 to 22.
11. It his further testimony that the DCIO Nandi Central had received a letter dated 26/10/2021 from Emmanuel Wanyonyi Advocates, the said letter was (P Exhibit 21) with a request to investigate suspected forged documents, which were application for Land Control Board and Letter of Consent for L. R. NO. Nandi/kamobo 4016, signatures of Zahra Ahmed on the application for LCB consent dated 23/10/2001.
12. The findings were that the signature appended on the LCB letter of consent dated 23/10/2001 were found to be forged. The witness prepared a Memo and forwarded the document examiner, the witness had written to the Executive Officer Kapsabet (P Exhibit 17) requesting Court to issue documents requested therein.
13. He was supplied with the documents by the Deputy Registrar. Once he had received the documents from the Deputy Registrar, the Deputy County Commissioner Nandi and the Land Registrar & Assistant County Commissioner, he sent the documents to the document examiner in Nairobi.
14. From the DCC he had received sample signatures from the District Commissioner Mr. Titus L. Ngoyoni (now deceased) and the sample was sent to the document examiner, where the document was found to be forged and the Defendant was charged in Criminal Case No. E 546/2022 which was pending before Court.
15. The mutation for Nandi/kamobo/1364 was not part of criminal case because the reverse side of the consent application was blank.
16. This witness PW2, was stood down to await the outcome of Kapsabet Criminal Case No. E 546/2022, which this Court directed it be heard expeditiously.
17. Upon conclusion of the criminal case the witness PW2 was recalled to give evidence. It was his further evidence upon being recalled that the Defendant had been charged with two counts of forgery and making false documents and he was convicted and jailed a 3-year non- custodial sentence, and he concluded that the Criminal Case had been properly investigated and a conviction was made.
18. On cross- examination by Mr. Rotich he stated that he did not visit the suit property but visited the same after conclusion of the criminal case. He stated that he was investigating Nandi/kamobo/4016 and that there was an iron sheet fence between the Plaintiff and the Defendant's parcel. The witness stated that he did not get to know the size of Nandi/kamobo/4016, but the same could have been 0.4 acres and fully occupied by the Defendant and there was no subdivision on the property. Nandi/kamobo/1304 was presented for subdivision on 27/7/2001 and the copy of mutation form for Nandi/kamobo/1364 that the witness had was blank on the reverse side; while the Advocates copy was certified by the County Land Surveyor. The witness could not remember when Kipruto Tanui took possession of the property but it could be from 2001. The witness stated that he did not know who subdivided the property and that it was the Plaintiff who had custody of the titles for both Nandi/kamobo/4015 and Nandi/kamobo/4016. Nandi/kamobo/4016 is still registered in the name of Zahra Ahmed but was subdivided into Nandi/kamobo/6695 and Nandi/kamobo/6696 on 6/2/2018 and both titles were



- still in the name of the Plaintiff. There is no subdivision on the ground as there were no boundaries. The titles were under the name of the Plaintiff.
19. In re-examination, the witness stated that there was a difference between the two mutation forms of Nandi/kamobo/1364, one was certified while the other one was not certified. He had not obtained the mutation form, he was not aware who subdivided but the titles are in the name of the Plaintiff. There were no boundaries in the parcels.
  20. PW3, Chief Inspector Elosy Wanja Njeru testified, she was a qualified Forensic Document Examiner for more than 4 years, and had worked at the Directorate of Criminal Investigation. She gave a short history of her qualifications.
  21. It was her testimony that on 19/1/2022 an exhibit Memo and exhibits were received under Escort of Corporal Francis Mutiga (PW2) the documents were;
    - i) Exhibit marked (a) and (b) were questioned documents, while exhibit (c) and (d) were known signatures of Zahara Ahmed, Exhibit E, E2, E3 were specimen signatures of Zahara Ahmed Exhibit F1 and F2 were known signatures of the deceased Titus L. Ngoyoni.
  22. The witness was to examine the documents and to ascertain whether the signature or question document A arrowed in red ink when compared with known signature of Zahara Ahmed on document marked (c) and (d) arrowed in blue ink and specimen signature of Zahara Ahmed marked E, E2 and E3 were made by the same author.
  23. She examined the documents and returned a finding that the signatures were made by different authors.
  24. The witness stated that he examined questions 2 where it was desired to ascertain the questioned document marked B arrowed in red ink when compared with known signatures of the deceased Titus L. Ngoyoni on document marked F1 and F2 arrowed in blue ink were made by the same author.
  25. The witness stated that he had examined and same and had prepared a report signed on 21/01/2022.
  26. On cross – examination, the witness stated that he had not been given specimen signature of the Defendant Kipruto Tanui, and neither was he given specimen handwriting of Kipruto Tanui. That none of the documents were made by Kipruto Tanui, but she did not know the source of the documents. She did not examine mutation form for Nandi/kamobo/1364, the letter of consent with known signature of Titus Ngoyoni was presented to him, she was given examinable photocopies of the documents.
  27. The Donor of the Power of Attorney was Zahara Ahmed and Donee was Bashir Nor, Zahara had not signed the Power of Attorney dated 18/7/1995.
  28. The known signatures of Titus Ngoyoni were a condolence message dated 8/6/2001 and a letter to Kenya Times dated 16/8/2001, which were the documents she used to examine the questioned documents that Titus Ngoyoni did not sign.
  29. The objective was to find out whether Zahara Ahmed and Titus Ngoyoni had not signed the documents; but not to confirm whether Kipruto Tanui had signed the documents. She stated that her work was based on her personal opinion but was verified by other experts.
  30. In re-examination by Mr. Udoto the witness stated that the purpose of the Power of Attorney was for the known signature of Zahara Ahmed. She stated that when they were different signatures, there is a variation but the characters remained the same. It was her conclusion that Zahara Ahmed did not



sign the application for LCB consent to subdivide and that Titus K. Ngayoni did not sign the letter of LCB consent.

31. PW4, Kipruto Kibet the Deputy Court Administrator, Kapsabet Law Court Chief Magistrates Court testified and produced the file Kapsabet Criminal Case No. E 546/2022, Republic vs Kipruto Tanui and produced the same as P Exhibit No. 23.
32. The witness was not cross – examined and re-examined.
33. PW6, Mohamed Said from Kakamega testified. He adopted his witness statement dated 29/4/2022 as his evidence in chief.
34. On cross – examination, he stated that the Defendant paid Plaintiff a cheque of kshs 480, 00/=. He knew Mohamed Hussein who was the broker in the transaction and had sourced Kipruto Tanui as the purchaser, he did not know whether the Plaintiff was paid in cash. He was present when the payment was made, and the site visit had taken place before the exchange of the cheque of kshs 480,000/= at about 11.00 am. The Plaintiff identified the property. The witness did not know about the fencing.  
The witness was not re-examined.
35. PW6, Mubarak Kimutai Kogo, a retired village elder of Cheplungu village elder of Cheplungu village testified and adopted his witness statement dated 12/11/2018 as his evidence in chief.
36. On cross – examination, the witness stated that Surungai was in Kapsabet Municipality but was called Cheplengu in the rural area.
37. The witness stated that he knew the suit property which was in Surungai and knew the late Kibisu Kogo who was a village elder of Surungai. The witness was not present when the agreement was executed. He was not aware that the Defendant had paid kshs 500,000 for the property. The Plaintiff had reported that some of her trees had been felled in 2018. He did not know how long Mr. Kipruto Tanui had lived on the property as his involvement was from 2018.
38. On re-examination, the witness stated that the purchase price was for the general valuation for the area. He confirmed that he was not around during the time of the sale, but he was involved as the senior village elder during the time the trees were felled.  
On further cross – examination the witness stated that the price of 500,000/= varied in the Surungai area.
39. With the testimony of the 6 witnesses, the Plaintiff closed his case.

**Defence Case And Evidence: -**

40. The Defendant pleaded to have been in occupation of Nandi/kamobo/4016 which had been illegally subdivided to Nandi/kamobo/6695 and Nandi/kamobo/6696.
41. The Defendant pleaded further that further to the occupation, the Plaintiff was now holding title in trust for him by virtue of Section 18 of the Limitation of Action Act, and that he had legally acquired the title under the decision in Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR and Public Trustee vs Wanduru (1984) KLR 314 at 234.
42. The Defendant further averred that he had been in actual physical occupation of Nandi/kamobo/4016 measuring 4 points since the purchase and the subdivision undertaken by the Plaintiff was irregular as was held in the case of Jacob Mwanto Wangora vs Mary Waruga Wokabi & 3 others.



43. The Defendant pleaded that the Plaintiff's suit was statute barred, and untenable in law as it offends Section 7, 13,17,18,26 -31, 38 and 39 of the Limitation of Action Acts.
44. By way of a counterclaim the Defendant now Plaintiff claiming 0.16 acres equivalent to 4 points from the Plaintiff that he had purchased.
45. By virtue of his occupation of the 0.16 acres of Nandi/kamobo/4016 for more than 12 years the Defendant moved Plaintiff pleaded that the Plaintiffs title had been extinguished by virtue of adverse possession.
46. In the counterclaim, the Plaintiff sought for;
- a) a declaration that Nandi/kamobo/4016 now subdivided to Nandi/kamobo/6695 and Nandi/kamobo/6696 measuring 0.4 acres was extinguished in 2013 upon expiry of 12 years since the Defendant now Plaintiff took possession in 2001.
  - b) the defendant-now-Plaintiff has acquired land title number Nandi/kamobo/4016 which has now been subdivided Nandi/kamobo/6695 and 6696 by adverse possession since 2001.
  - c) a declaration that the subdivision in 2018 of land parcel number Nandi/kamobo/4016 was void ab initio and the register of said parcel be rectified by cancellation of the subdivisions and all entries effecting the Defendants' as proprietors thereof be expunged, registered to the original land parcel number Nandi/kamobo/4016.
  - d) The District Land Registrar Nandi County be ordered to register the Defendant-now-Plaintiff as the proprietor of land parcel number Nandi/kamobo/4016
  - e) In the alternative and without prejudice to the foregoing, this Honourable Court be pleased to declare whether the Plaintiff now Defendant in the counterclaim has been holding the title to Nandi/kamobo/4016, which has now been subdivided Nandi/kamobo/6695 and 6696 in trust for the Defendant now Plaintiff pursuant to the principles of prescriptive rights and/or constructive trust and issue an order to compel the Plaintiff now Defendant in the counter-claim to transfer Nandi/kamobo/4016 which has now been subdivided to Nandi/kamobo/6695 and 6696 to him within 30 days from the date of judgment. In default thereto, the Executive Officer of Kapsabet SPM Court be authorized and ordered to execute the transfer documents.
  - f) Costs of the suit and counterclaim
  - g) Any other reliefs this honorable Court deems fit.
47. DW1, The Defendant Kipruto Tanui testified and adopted his witness statement dated 21/3/2018 as part of his evidence in chief and he produced the documents listed in the list of documents dated 21/3/2018 as D Exhibit 1, 2, 3, 4 while the photographs listed as document 6 was produced as D Exhibit 5 (a -l) D Exhibit 1 was a letter from the chief dated 19/3/2018 who sought assistance to effect transfer in the Defendants name and D Exhibit 2 was a letter from Kibisu Kogo a village elder dated 19/3/2018 which explained the purchase from the Plaintiff in 2001, and he had placed the boundary from 2001, occupied the same peacefully since then.
48. The witness stated that D Exhibit 3 related to mutation form in respect of Nandi/kamobo/1364 dated 27/7/2001.
49. The subdivision was done by Zahra Ahmed and property was subdivided to Nandi/kamobo/4015 and Nandi/kamobo/4016 had no dispute, it measured 0.30 hectares and belongs to the Plaintiff, while



- Nandi/kamobo/4016 measuring 0.16 hectares belongs to him and he had developed and occupied the same from 2001. He had fenced the property and the Plaintiff put up an iron sheet fence and the fences were in situ; and the fences divided nandi/kamobo/4016 and Nandi/kamobo/4016.
50. D Exhibit 4 copy of green card of Nandi/kamobo/4016, it was registered in the name of Zahara Ahmed and was opened on 14/10/2002 and register was closed on 31/01/2019 upon subdivision. The Defendant had lived for 16 years upon closure of the register. The witness stated that he did not produce the letter of consent since it had a pending appeal, while D Exhibit 3 (a) was a posho mill that was erected in September 2001; 5 (b) shop erected on Nandi/kamobo/4016 5(c)a residential house built in 2015 5 (d) was a tap, 5 (e) was cattle shed and he had built toilet and bathroom in late 2001. 5 (f) – house belonging his sons built in 2003, while 5 (g) was an entry gate into the compound built of iron sheets while D Exhibit 5 (h -k) backyard garden for vegetables.
  51. The Defendant stated that he took possession through an agreement, where after he paid for the parcel, and it was surveyed. The Plaintiff had pointed the property for subdivision. In 2018, the witness was informed by the area chief of the Plaintiffs intention to subdivide Nandi/kamobo/4016 and she subdivided and made a complaint against the Defendant which resulted into Kapsabet Criminal Case No. 989/2018 where the Defendant had been charged with threatening to kill contrary to Section 232 and was convicted and fined.
  52. He stated that he had paid kshs 125,000 per point for all 4 points totaling to kshs 500,000/=
  53. On cross – examination the witness stated that the photographs D Exhibit 5 (a – l) were taken before the Court case but the rusted iron sheets are proof that the fence had been erected in 2001.
  54. The witness stated that D Exhibit 5 (f) (i) and 5 (k) had no iron sheets but only trees which the Court could not tell were planted in 2001. The witness stated that they were no dates on the photographs and there was nothing to show that the photographs were taken on the Defendants property. The witness insisted that the photographs belonged to him. The witness stated that he did have the building clearance to show that the house was built in 2005 in reference to D Exhibit 5l. He stated in further cross – examination that he had abandoned the issue of letter of consent since there is an appeal pending the High Court, and the mutation form did not indicate that he was to be a beneficiary of the subdivision.
  55. The witness stated that he had reported to the chief about the transfer who wrote D Exhibit 1, he had commenced the process of transferring in 2001. The witness stated that he had paid a total of kshs 500,000/=, kshs 400,000/= by a cheque and kshs 100,000/= in cash. He did not have a copy of the cheque but it was drawn by KCB, he did not have proof of payment of kshs 100,000/= in cash. He stated that the surveyor who handled the transaction was a firm called Marcos and Nicholas was the surveyor. He stated that he had not sued the Plaintiff in any other Court before today.
  56. The witness stated that he had had 2 disputes with the Plaintiff in which he was found guilty but the disputes did not relate to land.
  57. On re-examination, the witness stated that they had been no objection on D Exhibit 5 (a-l), the Plaintiff had confirmed that the photographs were from the suit properties. The witness stated that he was a beneficiary of Nandi/kamobo/4016 from 2001 as the intention was to subdivide the suit property to him. The witness said that the Plaintiff had been paid as she admitted the same by producing a cheque.
  58. The witness stated the name of the survey firm was Marcos, and a Mr. Nicholas was the surveyor from the that firm which belonged to a Mr. Mullusa.



59. DW2, Mr. Andrew Kiprop Bett testified and he adopted his witness statement dated 21/3/2018. It was his testimony that he had constructed the fence on the suit property in 2002, built the posho mill, together with temporary houses and toilets, he had operated the posho mill from 2001 to 2003.
60. The Plaintiff had seen him build the posho mill and there were no protests. He identified D Exhibit 5 (b) as a kiosk on the suit property 5 (c) as a new toilet, 5 (d) as the home of Kipruto Tanui.
61. The witness stated that there was no dispute between 1002 and 2003 and he heard of the dispute in 2018. The witness stated that when he erected the fence the Defendant erected iron sheets on her side.
62. On cross – examination; the witness stated that he was not a witness to the transaction but only erected the fence. He stated that he was not aware of how much was paid for the property.
63. The witness stated that he had fenced 0.4 acres of the property. He had about the dispute in 2018, he had left the suit property after 3 years. He had built the posho mill on D Exhibit 5 (a) and that there was nothing on the photographs to show that the photographs had been taken on the suit property. He erected the property together with a MR. Kiplagat the Defendants son who is now deceased but the Defendant was not present. The surveyor was not the survey and a MR. Mohamed Hussein was with the Plaintiff.
64. On 13/11/2023, the Plaintiff being the Defendant sought to re-open the case but the Court summarily dismissed the application and the reasons for the dismissal have been separately delivered.

**Plaintiff's Submissions: -**

65. The Plaintiff filed lengthy submissions which can be summarized as follows;
  - i) whether the suit is time barred, on this head the Plaintiff submits that the suit is not time barred under Section 7 and 13 of the Limitation of Action Act.
66. Firstly the Plaintiff having pleaded breach of Trust on the part of Defendant and by Mr. Mohamed Hussein, making the suit fall under Section 20 of the Limitation of Action Act as an exception, and the Plaintiff cites the case of Mae Properties Limited vs Joseph Kibet to support this limb of submissions.
67. Secondly, the Plaintiffs submits that he suit is not time barred because of the Fraud committed by the Defendant, in this regard the Plaintiff's submission is twofold, that firstly pursuant to the fraud committed by the Plaintiff at the entry on the suit property, the same could not result into adverse possession and the Plaintiff has cited the decision in the case of Georgie Power Company vs Irvin 267 Ga 760 and secondly that under Section 26 of the Limitation of Action Act due to the fraud committed by the Defendant, which extends the Limitation period in case of fraud or mistake. In this limb of submissions, the Plaintiff has cited the decision in the case of Ismael Ithongo vs Geoffrey Ithongo Thindiu (1981) eKLR.
68. The Plaintiff submits that since Nandi/kamobo/4016 was registered in 2018 the same cannot be subject to a claim of adverse possession and lastly the Plaintiff submits that since the Defendant acknowledged the title of the Plaintiff adverse possession could not occur. In this limb of submissions, the Plaintiff places reliance on the decision on Mistry Valji vs Jarendra Rachand and 2 others C. A. No. 46 of 2015.
69. On the strength of the above submission the Plaintiffs urges the Court to allow her case and dismiss the Defendant's defence and counterclaim.



### **Defendants Submissions: -**

70. In his defence the Defendant had at paragraph 7 B and 7E pleaded that the Plaintiff suit was time barred and the Defendant submitted that the Plaintiffs suit is statute barred and untenable in law for offending provisions of Section 7, 13, 17, 18, 26 – 31, 38 and 39 of the Limitation of Action Act and the Defendant submits that the period from 2001 to 2018 was 17 years hence the Plaintiffs suit was time barred. In support of this limb of submission, the Defendant places reliance in the decision in the case of Edward Moonge Lengusuranga vs James Lamaiyan and another.
71. The Defendant submits on the issue of whether adverse possession can be brought by way of a defence and counterclaim.
72. Under this head the Defendant submits that is proper to commence adverse possession by way of a defence and counterclaim as he had pleaded and has cited the decision of the Court of Appeal. In the case of Chevron (K) Ltd vs Harrison Charo wa Shutu (2016) eKLR.
73. The Defendant submits on constructive trust, as having being proven and places reliance on the decision in Peter Mbiri Michuki vs Samuel Mugo Michuki.
74. On the strength of the above submissions the Defendant prays for judgment to be entered as prayed for in the counterclaim and for the Plaintiffs suit to be dismissed.

### **Issues For Determination:**

75. Before framing the issues for determination, a number of factual issues were settled in the course of hearing and determination, which the Court notes as follows;
  - i) That in July 2001, the Plaintiff and Defendant entered into an oral agreement for sale for portion within Nandi/kamobo/1364, at a consideration of kshs 500,000/=
  - ii) It is not disputed that no transfer for the agreed portion was effected and that the dispute arose in 2018 as to the acreage that had been sold to the Defendant; the Defendant claiming to have bought 4 points to wit, 0.16 acres, and the Plaintiff claiming to have sold 1 point to which was 0.04 acres
  - iii) It is not also disputed that the Defendant now claims adverse possession over Nandi/kamobo/4016 having pleaded the same in the defence and counterclaim?
76. It is common ground that the Defendant was convicted of an offence of forgery and making false documents in relation to an application for Land Control Board consent to subdivide, as well as the letter of consent to subdivide, in Kapsabet CM Criminal case E546/2022.
77. From the pleadings, evidence and submissions of the parties, the Court frames the following as the issues for determination;
  - i) whether the Plaintiffs suit is time barred as pleaded by the Defendant
  - ii) Has the Plaintiff proved her case on a balance of probabilities or whether the Defendant has proven entitlement to adverse possession?
  - iii) What reliefs ought to issue?
  - iv) Who bears the costs of the suit?



### **Analysis And Determnation: -**

78. On issue number 1, it is the Defendants submissions that the Plaintiffs suit being a suit to recovery land is time barred having been filed 17 years which is more than 12 years since the agreement for sale was concluded.
79. The Plaintiff in response and as summarized in their submissions submit that having pleaded breach of Trust between a Mr. Mohamed Hussein and the Defendant the suit is a recovery of Trust property by a beneficiary and is under Section 20 (i) of the Limitation of Action Act excepted.
80. The Plaintiff further submits that since fraud was proved under Section 26 of the Limitation of Action Act, then the course of action arose from when the fraud was discovered and the suit is not time barred.
81. Whereas the Plaintiff pleaded a Trust as existing between the Defendant and herself, having been created once the Plaintiff left the original documents in the custody of a Mr. Mohamed Hussein and the Defendant, thus creating a fiduciary relationship, none of the parties called the said Mr. Mohamed Hussein to testify as to whether indeed that was the case. The issue of the creation of fiduciary relationship of trust pleaded by the Plaintiff was not proved and the Court is hesitant to infer any trust having been created between the Plaintiff and Defendant, by depositing the original documents with the Defendant and his agent by the Plaintiff.
82. The Court is not satisfied that the suit by the Plaintiff falls within the ambits of Section 20 (i) which would apply in express trust or customary trusts, but not in the circumstances of this case. Consequently, that limb of submissions by the Plaintiff fails.
83. The Plaintiff had submitted on the application of Section 26 (a) of the Limitation of Action Act, and the Court finds that Section 26 of the Limitation of Action Act applies for reasons that the Defendant was convicted for forgery and uttering false documents as per P Exhibit 23, which was the judgment in Kapsabet Criminal case No. E 546/2022 and from the definition of fraud as per Section 2 of the Limitation of Action Act, a conviction of forgery and making false document would fall squarely on the same.
84. Consequently the cause of action herein accrued to the Plaintiff upon discovery of the fraud in 2018 and the conviction confirms the same.
85. In her evidence vide her witness statement before Court dated 8<sup>th</sup> December 2021 at paragraph 5 (d) thereof, the Plaintiff has stated a mistake, that she was under a mistaken belief that the Defendant was occupying 0.04 acres which she had agreed to sale to him, and she was not aware that the Defendant had taken an excess acreage till the year 2014.
86. This statement is significant since in her Amended Plaint at paragraphs 5, she pleaded the said mistake, and hence her suit by virtue of Section 26 (c) of the Limitation of Action Act having been founded on a mistake the cause of action arose in 2014 and it having been filed in 2018 was not statute barred.
87. Thus in answer to issue number 1 the Court finds that the Plaintiffs suit is not statute barred.
88. On whether the Plaintiff has proved her case, it was the Plaintiff's evidence that there was an oral agreement between her and the Defendant and that the same was witnesses by a Mr. Mohamed Hussein. In the Plaintiffs mind she had sold 0.04 acres which was called in the local parlance as 1 point at kshs 500,000/=.
89. That she showed the Defendant the said 0.04 acre, and she mistakenly believed that the Defendant had fenced the same only to discover that the Defendant had fraudulently caused subdivision and fenced



- the whole of Nandi/kamobo/6695 measuring 0.16 acres. On his part the Defendant believed that he had bought 4 points at kshs 125,000/= thus making it kshs 500,000/= for 4 points totaling 0.16 acres.
90. The Plaintiff stated that she was paid kshs 480,000/= by way of a cheque. The Plaintiff produced a statement from Kenya Post Office savings bank confirming payment of kshs 480,000/= on 19/7/2001.
  91. The Defendant stated that he paid kshs 400,000/= to the Plaintiff by cheque kshs 100,000/= by way of cash.
  92. In view of the two versions of the mode of payment, one backed up by documentary evidence, the Court is inclined to accept that the Plaintiff was paid kshs 480,000/= by way of cheque which she deposited in her account.
  93. At the time of the sale, the suit property was Nandi/kamobo/1364 D exhibit 3 the mutation form of Nandi/kamobo/1364 had only the first page exhibited. It indicates the proposal to subdivide Nandi/kamobo/1364 to Nandi/kamobo/4015 and Nandi/kamobo/4016, and this proposal was done on 27/7/2001.
  94. The letter for consent was found to have been forged was dated 23/10/2001 and was supported by the application for LCB letter of consent found to have been forged too.
  95. The Plaintiff in her evidence stated that she entrusted the documents to a Mr. Mohamed Hussein and the Defendant after she had been paid on 19/07/2001. PW5 confirmed that the site visit was made before the cheque was given, hence it was made on or before 19/7/2001.
  96. The mutation was done on 27/7/2001 while the application for LCB consent and letter for consent were done on 23/10/2001. DW2 told the Court that he erected the fence after the survey was done. The survey process was done without the involvement of the Plaintiff and the reasonable conclusion is that the Defendant surveyed alone hence the return on findings and took occupation of more than the acreage that he had bought hence the need to forge the Plaintiff's signature on the application for consent, and eventually the letter of consent. The Plaintiff was candid she had left the documents with the Defendant and Mr. Mohamed Hussein effects the survey.
  97. The Court finds that the Plaintiff has proven fraud and mistake on the acreage fenced by the Defendant and has proven her case on a balance of probabilities.
  98. On the adverse possession and constructive trust as pleaded by Defendant in his counterclaim does not succeeded for the reasons that;
    - i) the cause of action pleaded by the Plaintiff being founded on a mistake as provided for under Section 26 (c) of the Limitation of Action Act, time started running upon discovery of the mistake in 2014 and hence the occupation by the Defendant from 2001 to 2014 had no time running in his favour.
    - ii) The Plaintiff equally pleaded and proved fraud, so under Section 26 (a) time started running from the time the fraud was discovered in 2018 but since he had pleaded mistake and the mistake was discovered before the fraud the cause of action arose when the mistake was discovered in 2014.
    - iii) the third reason why the adverse possession claim filed by the Defendant cannot succeeded is that the Defendant having been convicted of the offence of forgery and making false documents in relation to an application for consent, and noting that DW2 indicated that the entry by the Defendant was after the survey which survey was premised on the forged documents the Defendant, cannot seek the Court to allow him to benefit from his wrong



doing. Under the doctrine of *ex turpi causa non oritur actio* as well as the public policy principle of *ex dolo malo non oritur actio*.

99. The principle of *ex dolo malo non oritur actio* as quoted in the case of *Standard Chartered Bank Limited vs Intercom Services Limited and 4 others* where the Court of Appeal referred to the English case of *Homan vs Johnson* 775 – 1802 ALL ER 98 where the Court held as follows;

“the principle of public policy is that *ex dolo malo, non ortu actio*, no Court will lend its aid to a man who found his cause of action on immoral own stating or otherwise the cause of action appears to arise *ex-turpi causa* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is on this ground the court goes not for the sale of the Defendant, but because they will not lend their aid to such Plaintiff.”

100. The above excerpt was quoted with approval in the decision in the case of *Michael Mwaura Njoroge vs Peter Kamau Munene, Beatrice Kori (interested Party)* 2019 eKLR where in the said Court found quoted the decision in *Scott vs Brown Denning 2 McNab Company* 31892 20B 724 where the Court stated *ex turpi causa non oritur actio*, this old and well known legal maxim is founded in good sense and expresses a clear and well recognized legal principle, which is not confined to indictable offences.

“No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the Notice of the Court; and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether he has not. If the evidence adduced by the Plaintiff proves illegality by the Court ought not assist him.”

101. I say no more on this. The result on issue number 2 is that the Plaintiff has proven her case while the Defence and counterclaim are dismissed.

102. On what reliefs ought to issue, the Court notes that some of the prayers sought in the Amended Plaintiff are repetitive and shall issue the orders in the disposition hereinafter.

103. From the evidence on record, there was a purchase of 0.04 acres by the Defendant and at paragraph 7 of the amended Plaintiff, the Plaintiff pleaded her willingness to transfer the portion measuring 0.04 acres now known as Nandi/kamobo/6696 to the Defendant and that portion is thus awarded to the Defendant.

104. Since the Plaintiff did not claim for the balance of purchase of 20,000/= and led no evidence to loss of user, the same are not awarded.

**Disposition: -**

105. Accordingly judgment is entered for the Plaintiff in terms of;

- a) declaration that the Plaintiff is the bonafide and absolute registered owner of Nandi/kamobo/6695 being a subdivision of Nandi/kamobo/4016.
- b) permanent injunction is issued to the Defendant by himself his servants and/or from remaining on Nandi/kamobo/6695 after the expiry of the notice to be issued to him under Section 15 (a) of the *Land Act*.
- c) Any structures belonging to the Defendant on Nandi/kamobo/6695 to be demolished after lapse of the Notice to be issued to the Defendant under Section 15 (a) of the *Land Act*.



- d) The Defendant to give vacant possession and/or be evicted after the lapse of the notice under Section 15(a) of the Land Act.
- e) The Plaintiff to issue the Notices under Section 15 (a) of the Land Act within 30 days of this judgment.
- f) The Plaintiff to transfer Nandi/kamobo/6696 to the Defendant within 30 days of this judgment failure to which the Deputy Registrar of this Court to execute all necessary documents for consents and transfers.
- g) The Plaintiff is awarded costs of the suit and counterclaim.

106. Judgment accordingly

**JUDGMENT, DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF FEBRUARY 2024.**

**HON. M. N. MWANYALE,**

**JUDGE**

**In the presence of;**

Mr. Maritim holding brief for Mr. Rotich for Defendant

Mr. Serem holding brief for Mr. Wanyonyi for Plaintiff

