



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT OF LAND COURT OF KENYA**

**AT ELDORET**

**E&L NO. 931 OF 2012**

*Formerly HCC 49 of 2008*

**WELLINGTON LUSWETI BARASA & 75 OTHERS.....PLAINTIFFS**

**VS**

**LANDS LIMITED.....1ST DEFENDANT**

**KIBOGY PROPERTIES LIMITED.....2ND DEFENDANT**

*(Adverse possession; whether employees or persons who are in possession by virtue of employment can assert adverse possession; whether licencees can claim adverse possession; plaintiffs being on suit land by dint of their employment with the defendants; held that they are licencees and cannot claim title by way of adverse possession; suit dismissed)*

**JUDGMENT**

**A. INTRODUCTION, PLEADINGS AND PRELIMINARIES**

1. This is a very old case that was commenced by 75 persons on 21 December 1990 in the High Court at Nairobi . The suit was registered as Nairobi High Court Civil Suit No. 188 of 1991 (O.S). The suit was initiated by way of an Originating Summons (O.S) taken out pursuant to the provisions of the then Order XXXVI Rule 3D of the Civil Procedure Rules. The said provisions allowed a party to file an Originating Summons claiming land by way of adverse possession. The O.S as originally filed was only against one respondent, Lands Limited. The case of the applicants (whom I will also refer to as the plaintiffs) was that they have acquired title, by way of adverse possession, to the land parcel LR No. 8319 situated in Moiben, Uasin Gishu District (the suit land). In the O.S it was stated that the plaintiffs had been on the land for a period in excess of 30 years, that they had built their homesteads, and had enjoyed open , peaceful and quiet possession of the suit land. It is not clear whether the O.S was accompanied by a supporting affidavit for I could not be able to trace any.

2. Together with the O.S, the plaintiffs filed an application for injunction to stop the defendant from interfering with their quiet possession pending hearing of the suit. They also sought orders to have a caveat lodged on 16 February 1988 extended until the conclusion of the matter. The application was heard and a ruling delivered on 9 July 1991. In the ruling, Mbitio J was not convinced that the plaintiffs had laid out a prima facie case and he dismissed the application for injunction.

3. Apart from the application for injunction, there have been numerous other applications in this file. I will only mention those that I think are significant.

4. Through an application dated 30 November 1999, the plaintiffs sought to introduce Kibogy Properties Limited as defendants to the suit. That application was allowed by consent on 16 February 2000. But the O.S was not amended, and it appears as though Kibogy Properties Limited, continued to participate in the proceedings with reference being made to them as Third Party rather than defendant.

5. On 31 March 2005, a second application for injunction was filed by the plaintiffs on the grounds that the respondents were interfering with their quiet enjoyment of the suit land. That application seems to have been compromised by a consent entered into on 13 December 2006, where parties agreed to maintain the status quo. Some of the plaintiffs also died in the course of time, and there have been some applications for substitution.

6. There was also an application dated 16 August 2002 whereby the plaintiffs applied to transfer this suit to the High Court of Kenya at Eldoret, which application seems to have been forgotten for a long while and was only allowed on 11 March 2008, when the parties by consent agreed to have the suit transferred to Eldoret High Court. That is how this suit came to be at the High Court in Eldoret and it was registered as Civil Suit No. 49 of 2008 (O.S). It was later transferred to the Environment and Land Court in the year 2012 and given the number Eldoret E&L Case No. 931 of 2012.

7. When the matter first came before me on 28 November 2012, it will be an understatement to say that the matter was in a confusing state of affairs. I discovered that the suit has passed through about 10 firms of advocates for the plaintiffs. It was in fact difficult even to know which parties were still in the suit and who represented them. Some parties were in person, while the law firm of M/s Chemwok & Company Advocates, appeared for some 36 plaintiffs. I was of the view that given the large number of the plaintiffs, it would be best that they appoint one or two, or such small manageable number, and they be deemed to be representing the interests of the rest. The issue was settled with the firms of M/s Chemwok & Company Advocates and M/s Rioba Omboto & Company Advocates representing two lots of the plaintiffs. Subsequently it was discovered that although Kibogy Properties Ltd had been enjoined as defendant to the suit, the pleadings had not been amended, and neither had Kibogy Properties Ltd filed any reply to the suit. I gave directions that the O.S be amended and allowed the defendants to file replies to the Amended O.S. This was done and the respondents filed replies to the Amended O.S.

8. The case of the plaintiffs in the Amended O.S is not a major departure from the O.S filed in the year 1990. They still claim the suit land by way of Adverse Possession only that they have added a second prayer for a declaration that the transfer of title and/or instrument of transfer in favour of the 2nd defendant is null and void.

9. The case of the 1st defendant, Land Limited, as captured in the replying affidavit is that they became registered as proprietors in the year 1967. They then leased out the land to the 2nd defendant in the year 1970 and later the property was sold to the 2nd defendant and the transfer registered on 29 September 1994. On their part, the 2nd defendant's reply was basically to the effect that the plaintiffs were employees and therefore not entitled to the suit land.

10. I gave directions that the matter do proceed by way of viva voce evidence and the hearing eventually commenced on 3 February 2014.

## **B. EVIDENCE OF THE PARTIES**

### ***(i) The plaintiffs' evidence.***

11. PW-1 was Wellington Barasa Lusweti. He testified that the plaintiffs reside on the suit land which is identified as Benmoi Farm. According to his evidence, the land was originally owned by a European settler called Nijo Kilbern Taylor, who settled in the farm in the year 1946 after the 2nd world war. The first African to enter the land thereafter was one William Lusweti Nabiswa, who was employed by the settler as a driver in the year 1948. It was said that Nabiswa worked for Taylor till the year 1963 when the

country attained independence. PW-1 testified that the two had a good relationship and when Taylor left, he left to Nabiswa the whole of the farm. In 1964 another white farmer came into the farm. This was William Dudley Owen. He farmed the land from the year 1964 to the year 1966. Nabiswa was still on the land. When Owen left, the Agriculture Development Corporation (ADC) took over the farm under one of its companies, Lands Ltd, the 1st defendant herein and they remained in the farm till the year 1969.

12. ADC employed a good number of workers (about 800). The workers at that time were residing in 6 camps and they engaged ADC to have them (the workers) buy the land. PW-1 stated that ADC agreed to deduct a bit of their salary so that they could raise the purchase price and that the sum of Kshs. 200,000/= was deducted. In 1970, John Kiplagat Kibogy took over the farm under a 15 year lease. The witness stated that Mr. Kibogy farmed about 3/4 of the land with the other 1/4 being either hilly or forested areas, or areas occupied by the workers. Some of the workers were cultivating various acreages of some parts of the land. On his part, PW-2 was ploughing 2 acres. In 1987, a census was done and it was found that there were 350 persons on the land. The District Officer called a meeting between the plaintiffs (whom PW-1 described as squatters) and Mr. Kibogy. The D.O had called the meeting because after Mr. Kibogy's 15 year lease expired in the year 1985, the "squatters" wanted the land but Mr. Kibogy was still on it. There were also problems because Mr. Kibogy had refused the workers to keep livestock, even chicken, or plough any portion of the land. They were only allowed access to their houses. Mr. Kibogy's position was that they could only remain on the farm as his employees and if they were not satisfied with the terms, they were free to leave.

13. After the meeting, the D.O wrote a letter dated 2 October 1987. The said letter was produced as an exhibit. I will give the details of the letter a little later in my decision, but in brief, the letter was one addressed to the District Commissioner, asking him that the "squatters" at Benmoi Farm be considered by the Government to be settled on the farm as they had been on the farm for a long period. The interested squatters then lodged a caveat in the register of the suit land on 16 February 1988. The caveat was registered by 3 persons on behalf of others.

14. He testified that they have continued living on the suit land to date. He also stated that the 2nd defendant is not properly registered as owner of the suit land as the transfer has not been signed by the Land Registrar. He testified that the plaintiffs claim the whole of the suit land. He also testified that the Government allowed them to purchase the suit land.

15. In cross-examination, PW-1 affirmed that William Lusweti Nabiswa is his father. He himself was born in the year 1955. He stated that his father entered into the suit land as an employee of Mr. Taylor. When Mr. Owen took over, he kept the employees employed by Mr. Taylor. Out of the 75 claimants, 50 of them worked for Mr. Owen. The other 25 claimants were still young. When Lands Ltd took over the land in 1967, they retained most of the employees of Mr. Owen. Out of the 75 claimants, only 8 did not work for Lands Ltd, but the parents of the 8 worked for Lands Ltd. He testified that all the 75 claimants comprise of those who were either employed, or children of those who were employed in the farm. He stated that before Mr. Kibogy came to take over the land, they could farm even upto 10 acres per person, but when Mr. Kibogy took over, he reduced the acreages to a maximum of 5-7 acres. He himself used to farm about 7 acres but Mr. Kibogy only allowed him use of about 2 acres where he also had some semi-permanent structures. He agreed that the caveat lodged indicated that they had a licensee interest in the land.

16. He testified that initially the workers used to be in camps but they are now scattered around the farm. There are however no boundaries nor markings showing where the 75 claimants live. He agreed that they have not been living peacefully on the land owing to persistent interference by Mr. Kibogy. He also agreed that the 2nd defendant has been farming on the land.

17. Pushed as to whether they claim the land as a gift, or as purchasers, or licensees, or landless people PW-1 stated that they claim the land as licensees.

18. I questioned the witness on the size of the land that the 2nd defendant utilizes and he answered that it cultivates about 1/2 of the land. I wondered why the plaintiffs' claim is for the whole land and the witness

stated that it is because of the recommendation of the D.O.

19. In re-examination, he testified that the land is about 2,098 acres and save for 200 acres which they occupy, the 2nd defendant utilizes the rest of the land. He however asserted that they claim the whole land. He testified that they should be allowed to keep the farm since the 2nd defendant has another farm which is 1800 acres (Tenden Farm).

20. PW-2 was Peter Chemweno Chebet. He testified that he moved into the suit land in the year 1956. He worked for Mr. Taylor and was absorbed by Mr. Owen. He was employed as a milkman. ADC took over the land in the year 1967 and he was retained to continue with the same work. The successor, Mr. Kiplagat Kibogy retained him to milk cows. He worked for Mr. Kibogy until the year 1974 when he was laid off but he stated that continued to reside on the land and utilize about 10 acres of it. In the year 1987 they called a meeting. The meeting was held because the claimants wanted to buy the land, as in their view, Mr. Kibogy's lease had expired 15 years after 1970. He testified that Mr. Kibogy did not allow them to farm the land in peace as at times he would come with a tractor and plough over maize that the claimants had farmed. He stated that if he is to be evicted, he has nowhere to go. He testified that their population has now swelled to over 800 people.

21. In cross-examination by counsel for the 1st defendant, PW-2 stated that ADC allowed its workers to make use of the land. For those with larger families, they would be allowed to use larger portions, up to 5 acres. On his part, he was allowed use of 2 acres. He testified that between 1970 and 1985, Mr. Kibogy was using the whole land. He stated that the claimants now use differing acreages. When Mr. Kibogy took over the land, he reduced the acreages that the workers were using but his use of 10 acres was not affected as it is far from the large farm tracts. His children are however employed by the 2nd defendant. He was of the view that the 2nd defendant does not own the land but that it is owned by the Government. He stated that they are asking the Government for the land.

22. Cross-examined by Mr. Wafula for the 2nd defendant, PW-2 stated that the 75 claimants at one time or another have worked for Kibogy. He testified that although they have been on the suit land, they have not lived on it peacefully, since Kibogy would at times come and plough over land that they had cultivated. This he said has been happening since the year 1980.

23. PW-3 was one Wilson Shiuka Mwangi. He testified that his parents moved from Ziwa, where he was born, to Moiben and were employed at Tendin Farm. The owners of Tendin Farm and Benmoi Farm (the suit land) were the same. In 1964 when Owen took over the farms, he moved all workers to Benmoi Farm and that is how they started living in Benmoi Farm. He started work the same year. He testified that ADC took over the Farms in the year 1967 and retained the workers. In 1970, Mr. Kibogy succeeded ADC and absorbed the workers. He worked for Mr. Kibogy as a supervisor. He continued working as supervisor until this suit was filed (although he also said that he stopped working for Kibogy in the year 1982).

24. When they learnt that Mr. Kibogy's lease had expired, they proposed to buy the farm, but Mr. Kibogy insisted that it was his farm. They then decided to file this case. On his part, he stated that he farms 7 acres and has 3 cows while others have varying acreages of land. He described that the claimants do not live in one area but are scattered in the farm. They graze their cattle on a forested area which is not good for cultivation. He stated that they live on the whole of the land.

25. Cross-examined by Mr. Nyamu for the 1st defendant, PW-3 stated that he was in agreement with the evidence of PW-1 and PW-2, that the 2nd defendant has been disturbing their peace. He stated that the 2nd defendant utilizes about 1000 acres of the land. He agreed with the description of "licencee" which was placed in the caveat, as they were on the land with the permission of Kibogy. He stated that they have a right to be given the land as they were employees and now squatters.

26. Cross-examined by Mr. Wafula, PW-3 agreed that among the claimants are 4 of his sons, the eldest of whom is now 40 years old. One of them, Robert Ochami was born between 1985-1987. He testified that his sons are on the land through him. He stated that among the plaintiffs are former workers and their children. He agreed that the children came into residence, because of the position of their parents as

employees, and some worked for Mr. Kibogy. He testified that he wants 20 acres of the suit land although he currently utilizes 7 acres. The land that he occupies borders the tracts that Kibogy cultivates. He denied that Kibogy had troubled them over their occupation of the suit land. He however agreed with the contents of the letter of 2 October 1987 written by the D.O which stated that Kibogy had refused them to use the land. He agreed that they went to the D.O because Kibogy had demanded that they leave. He agreed that they placed a caveat because Kibogy was disturbing their use of the land and that Kibogy did not want them to keep livestock.

27. He testified that the plaintiffs are split into two groups (one represented by Mr. Omboto and the other by Mr. Chemwok), and in his group of 36, they use about 70 acres. He stated that they ask the Government out of its own mercy to allow them to live on the land. He agreed that he was permitted to occupy the 7 acres by the previous employers. The purpose of allowing workers to use some of the land was to reduce temptation to steal from the land ploughed by the owners. He agreed that their occupation of the land arose out of employment. He stated that Kibogy has 2 farms, but that they (the plaintiffs) are poor and ask for small portions of about 20 acres each. He was of the view that this is proper as Kibogy has the other big farm. In re-examination, PW-3 affirmed that the areas they occupy are the same areas that the white settlers allowed them to occupy, and that the 2nd defendant, cultivates the same portion that was under cultivation by the white settlers.

28. With the above evidence, the plaintiffs closed their case.

## **(ii) Evidence of the Defendants**

29. DW-1 was Samwel Kipngetch Bundotich. He is a senior manager with ADC. He testified that Lands Ltd, the 1st defendant, is a wholly owned subsidiary of ADC. All the land owned by ADC is registered under Lands Ltd. He testified that the suit land was previously owned by Lands Ltd. In 1970, Lands Ltd leased the suit land to Mr. Kibogy. The lease was registered in the year 1973. In 1978, Kibogy bought the land for the sum of Kshs. 783,540/=. The agreement was approved by the Land Control Board and consent to transfer was granted. The property was then transferred to Kibogy Ltd. He stated that the plaintiffs came to be on the land courtesy of their employment. At some point, they developed an interest in purchasing the land. This was reflected in the correspondences dated 5/1/1981 , 15/7/1987 and 2/10/1987 which were produced as exhibits. This was after the land had already been sold to the 2nd defendant. With that evidence the 1st defendant closed his case.

30. DW-2 was Edwin Munoko Wafula. He is a Lands Registrar based in Nairobi. He testified that the current proprietor of the suit land is Kibogy Properties Ltd, the 2nd defendant, who came to be registered on 29 September 1994. Prior to the registration of the transfer, there was no restriction. He testified that a caveat had been placed on 16 February 1988 by William Lusweti Nabisa, Wellington Barasa Lusweti and Daniel Kiptarus Rono on behalf of others claiming a licencees interest. He did not see any problem with the title of the 2nd defendant which in his view was properly registered.

31. DW-3 was Jeremy Kiptoo Kibogy. He is a director of Kibogy Properties Ltd, the 2nd defendant, alongside two others. He stated that the 2nd defendant purchased the suit land from Lands Ltd. He testified that they have been utilizing the land since the year 1970. They cultivate about 1,600 acres of the land. The other sections are either too steep or forested. He stated that there are some workers on the land some of whom are the claimants. He testified that the persons on the farm are either workers or children of workers. They would allow the children of workers, when they grew up, to occupy some land separate from their parents and build structures so that they can live independently. Previously, the workers were housed in camps, but these were disbanded owing to social disturbances, and thus the workers were moved to separate areas of the farm. Around 1987-1989 some of the workers started making inquiries as to whether the land had been sold or not and from then on, there was no peace. He stated that they should be evicted. He testified that they were in control of all portions used by the workers and could reduce and re-allocate the land used by the workers.

32. In cross-examination, he confirmed that the 2nd defendant also owns Tenden Farm. He stated that the workers were initially in camps which were disbanded in 1985. It is then that workers were relocated.

They would communally organize for a structure to be built for a worker then he would move with his family. The company would supply the building materials. They allowed the relocated workers to cultivate an acre or two. He testified that the claimants include workers and their children and that they had allowed the children to occupy some land separate from their parents.

33. With that evidence the 2nd defendant closed its case.

### C. SUBMISSIONS OF COUNSEL

34. Counsel for the 1st defendant submitted that the plaintiffs came to be in possession of the suit land by virtue of employment and others were children of the employees. He submitted that they were mere licencees. He also submitted that time only started running when the lease of the 2nd defendant expired in the year 1985, a period of 6 years to the filing of the suit. He further submitted that it was not demonstrated the exact amount of land that the claimants are occupying. He was also of the view that time could not run while the 1st defendant was owner of the land, since ADC is a state corporation. He submitted that the claim for fraud could not be filed alongside that of adverse possession. He relied on the cases of **Joseph Mutafari Situma v Nicholas Makhanu Cherongo** and **Joel Kalei Mutiso v Bonface Muthiani Mutiso**.

35. Counsel for the 2nd defendant submitted that the 2nd defendant got title after the orders of injunction and caveat were discharged through the ruling of 9 July 1991 and that their ownership is above board. He submitted that it was not clear who the claimants are or their numbers. He was of the view that the claimant is only one, Barasa Lusweti, the son of William Lusweti Nabiswa. He further submitted that the claimants were employees or their children and are on the land at the mercy of the owners of the suit land. He submitted that even on the areas not being cultivated by the 2nd defendant, the 2nd defendant is still in control of them. He submitted that the claimants could not identify the exact acreage of land that they claim or demonstrate the exact location of their occupation. He also submitted that there was continued disturbance of their possession by the 2nd defendant. He added that the plaintiffs themselves admitted through the caveat that they were licencees. He submitted that time could not run while Lands Ltd was registered owner as it is a subsidiary of a state corporation. He asked that the suit be dismissed and further asked that upon dismissal the court do order the eviction of the plaintiffs from the suit land. He relied on the cases of **Samuel Katana Nzunga & 102 Others vs Salim Abdalla Bakshwein & Another, Malindi HCCC No. 40 of 2008 (2013) eKLR**, **Michael Githinji Kimotho vs Nicholas Muratha Kimotho, Nairobi Civil Appeal No. 53 of 1995 (unreported)**, **Kimoi Ruto & Another v Samwel Kipkosgei Keitany & Another, Eldoret ELC No. 378 of 2012 (unreported)** and **Eric Chepkwony Aengwo v Jonathan Rutto Kibiesang, Eldoret ELC No. 743 of 2012 (unreported)**.

36. Mr. Omboto for the first lot of plaintiffs inter alia submitted that the plaintiffs had demonstrated continued occupation of the suit land, which period ought to be calculated from the year 1954-1963, when the plaintiffs started occupying and or working on the suit land. He stated that even if the period is from the year 1970, this would still be about 20 years, to the year 1990 when the suit was filed, and is more than the 12 years required to sustain a claim for adverse possession. He submitted that the plaintiffs have demonstrated a clear claim for adverse possession as there is sufficient degree of physical custody and control coupled with the intention to possess. He submitted that the possession was without force and that no attempt was ever made to remove them. He submitted that the change of ownership has not affected the rights of the plaintiffs. He relied on the cases of **Harrison Okumu Amaliani v Jackson Omoto, Busia HCCC No. 42 of 2002 (O.S) (2013) eKLR** and **Githu v Ndeete (1984) KLR 776**.

37. Mr. Chemwok for the 2nd lot of plaintiffs, submitted that the plaintiffs entered the farm in the year 1957. He submitted that they have been on the land since and that they have been in peaceful occupation. He also submitted that the change in ownership cannot affect the running of time. He was of the opinion that Lands Ltd is a limited liability company and time could run against it. He submitted that it is not a

corporation listed under Section 2 of the Limitation of Actions Act. He also submitted that the defendants had failed to demonstrate that the plaintiffs were its employees. He submitted that the occupation of the plaintiffs was adverse to that of the defendants. He further submitted that the title of the 2nd defendant was acquired fraudulently as the transfer was done when there was a caveat and the same lacked the requisite signatures. He relied on various authorities being *Tsuma Lewa Deche, Clyde Baya Kijana vs Board of Trustees National Social Security Fund, Mombasa Civil Suit No. 109 of 2008, Symon Gatutu Kimamo & 587 Others vs East Africa Portland Cement Co. Ltd, Mount Carmel Investments Limited vs Peter Thurlow Ltd, William Koipat Mayon v Samren Oepaki Kuku & Another* and *J.A Pye (Oxford) Ltd vs Graham & Another*.

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

#### **D. DECISION**

39. The suit land is LR No.8319 which is easily described as Benmoi Farm. It is 2098 acres. I have looked at the title of the suit land. It is a leasehold title for a term of 999 years from 1 August 1955. The first registered proprietor was the Agriculture Settlement Trust who became registered as proprietors on 1 August 1955. Entry No. 2 in the title was registered on 12 June 1964, which entry shows that the suit land was leased to William Dudley Owen. The term of the lease was from 16 May 1963 to 31 August 1995. There is an entry No. 3 varying the said lease but I cannot tell what the variation was. The 4th entry was made on 20 April 1967. The entry shows that the land was transferred to Lands Limited subject to entries 2 and 3. Entry No. 6 is a caveat lodged on 14 July 1972 by one William Chemweno claiming a purchaser's interest. This was removed by entry No. 8. Entry No. 9 is a lease to John Kiplagat Kibogy for 15 years from 1 January 1970. Entry No. 10 was registered on 16 February 1988 and is a caveat by William Lusweti Nabisa, Wellington Barasa Lusweti and Daniel Kiptarus Ronoh *"on behalf of others. Claiming licencees interest by virtue of a verbal agreement and a copy of certified list from the area chief dated 5.8.1985 attached to the caveat absolutely."* Entries No. 11 and 12 are court orders and entry No. 13 is transfer to Kibogy Properties Limited merging with the lease in entry No. 9. It was entered on 29 September 1994. That is the last entry in the title.

40. Although the plaintiffs testified that the land was first owned by Nijo Kilbern Taylor after the 2nd world war, there is no record of a Mr. Taylor ever having been proprietor of the suit land. I cannot tell whether such a person was ever on the land, but the record is clear that even if he were, he never held a lease nor any other recognizable title. It was stated by the plaintiffs, that Mr. Taylor gave out the whole land to William Lusweti Nabiswa. Clearly, he could not, for he never held any title to the suit land. One cannot give out what he does not own. The plaintiffs cannot therefore rely on any grant of the suit land by Mr. Taylor to sustain their claim.

41. The core case of the plaintiffs is that they are entitled to the suit land by way of adverse possession. The evidence produced by the plaintiffs themselves, is that the plaintiffs, came into the suit land as employees of the persons then in charge of the land. Some of the plaintiffs were born on the suit land, as sons or daughters, of the ones who were employed in the suit land. There was no contrary evidence coming from any quarter, of any of the claimants having entered the suit land in any other independent way. All claimants were therefore either employed or were children of employees. Some were employees as way back as the year 1957, whereas the younger ones came into employment much later, when Mr. Kibogy took a lease of the property in the year 1970.

42. From the evidence, it would appear that the owners of the land allowed the plaintiffs and their families to occupy some non strategic areas of the farm which was away from the core cultivation blocks. They were allowed to have houses and even till some bit of the land for their subsistence. This was so as to discourage them from stealing the crop of their employer. The owners before Mr. Kiplagat Kibogy seem to have been more liberal in how they allowed the employees to use the land. But things seem to have changed with the entry of Mr. Kibogy who appears to have been hard on the employees. He limited the areas that they could cultivate and banned them from keeping livestock. He however did not evict them, but allowed them to reside on the suit land so long as they complied with his terms. He otherwise invited those who could not comply with his terms to leave the land. This caused some friction in the

farm.

43. With expanding families, the numbers in the farm was obviously rising. The persons seem to have been under the impression that Mr. Kiplagat Kibogy still only held a lease for 15 years from the year 1970, which would expire in the year 1985, and were oblivious of the 1978 sale agreement that Lands Ltd had with Mr. Kibogy. That is why after 1985, which would otherwise have signaled the expiry of the lease, the persons in the farm started agitating to be given the land by the Government. This is what led to the D.O calling a meeting on 10 September 1987. The events of the meeting are captured in the D.O's letter of 2 October 1987 produced as plaintiffs' exhibit 2 (a). A section of the letter states as follows :-

*"The problem with squatters started when Kibogy told them to have bought the farms and they must not herd their sheep or goats in his farm. They have no place to go with their children because this was since the preindependence days (sic) they were in the farm."*

44. It therefore appears to me that the plaintiffs were always under the control of Mr. Kibogy. They would complain when Mr. Kibogy issued instructions that they were not happy with but Mr. Kibogy took a tough stance and held his ground.

45. The above seems to have been the arrangement under which the plaintiffs were resident on the farm. Can such arrangement sustain a claim for adverse possession ?

46. For one to sustain a claim for adverse possession, he must demonstrate possession that is *nec vi, nec clam* and *nec precario*; that is, possession which is without force, without secrecy, and without permission. Such possession must also be accompanied by the necessary *animus possidendi*, which is an intention to acquire the land as one's own. Such possession must have been continuous and uninterrupted for a duration of at least 12 years.

47. In my view, the entry of the plaintiffs on the suit land and their continued occupation was by virtue of their employment and no more. Even those who were not employed by the defendants remained in possession of the land because they had family who were employed by the owners. Such possession was clearly with the permission of the land owner which permission was granted for the reason that they had an employer-employee relationship. It was a licence granted by the land owner.

48. It is trite law that a person who occupies as licensee cannot claim land by dint of the doctrine of adverse possession. This was settled in the case of ***Hughes v Griffin (1969) All ER 460*** where it was held that a licensee or tenant at will, does not have time running in his favour, for the purposes of a claim for adverse possession. ***Hughes v Griffin*** has been applied in Kenya in various decisions one of which is the case of ***Delamere Estates Limited vs Ndung'u Njai & 42 Others, Nakuru HCCC No. 184 of 2003 (2006) eKLR***. This was a suit by an employer seeking to evict some former employees. The defendants pleaded adverse possession. This defence was rejected by Musinga J (as he then was). He stated thus :

*"If a person is an employee of another and by virtue of his employment he is allowed to reside on his employer's property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with permission of his employer."*

49. The possession of the plaintiffs as licensees is indeed acknowledged in their application for the caveat that was eventually registered on 16 February 1988. The plaintiffs themselves stated that they were licensees. Their own acknowledgement that they were licensees automatically defeats any claim for adverse possession.

50. Apart from the above, the plaintiffs also never tendered evidence to show their actual occupation on the ground. It was their onus to prove occupation which they never did. They could easily have produced a valuation report or surveyor's report which would have shed light as to their occupation. None was tendered and this court has absolutely no evidence of what possession, if any, the plaintiffs have on the ground, and of what acreage. In their claim, they asserted title to the whole land, yet in their own evidence, they stated that a majority of the land is utilized by the 2nd defendant. They are certainly not in

possession of the whole land and cannot therefore assert title to the whole of it. As I have stated above, their own possession has not been clearly demonstrated and it is not clear what and where in the farm, the plaintiffs claim possession. Their case would still have failed for failure to demonstrate exactly what they are in occupation of.

51. A lot was said about the running of time against Lands Ltd. However, I do not think that it is necessary for me to make any holding on it, since I have already held that the possession of the land by the plaintiffs as licencees, automatically defeats their adverse possession claim.

53. Apart from the claim for adverse possession, the Amended Originating Summons has also sought an order sought to declare the transfer of the suit land to the 2nd defendant as null and void. I am afraid that this prayer cannot be reconciled with the main prayer for adverse possession. If I am to declare the transfer as null and void, then automatically, the plaintiffs cannot assert title against the 2nd defendant for adverse possession, for the 2nd defendant will not have a title which the plaintiffs can then assert adverse possession against. A party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud. The two orders cannot be made in the same suit, for to sustain a claim for adverse possession, there must be a title, to which the party claims possession that is adverse to that of the title holder.

54. But that said, I do not see anything wrong with the title of the 2nd defendant. The evidence shows that the 2nd defendant held a 15 year lease from the year 1970. In the year 1978, the then owner, Lands Ltd, sold the suit land to the 2nd defendant. The transaction was approved by the Land Control Board and consent to transfer was issued. The land was eventually registered in the year 1994. The registration cannot be said to be fraudulent in any way. It was contended that at the time the registration was done, the caveat of 16 February 1988 was in place, but to me, that cannot be so. In the application for injunction that was filed together with the original pleadings, they sought orders inter alia for the extension of that caveat pending hearing and determination of the suit. Through the ruling of 9 July 1991, the court dismissed the prayers. Mbitio J, who heard the matter had this to say in conclusion.

*"In view of the above and for the reasons hereinbefore stated it is my view that the applicant has not made out a case for injunction or extension of caveat. I therefore dismiss the application with costs."*

55. Clearly, from the above ruling, the learned judge declined the order for the extension of the caveat. That order appears to have been registered in the register of the title of the suit land, and effectively, that extinguished the caveat that had been put in place. It cannot therefore be said that the suit land was transferred when there was a caveat in place. There was none at the time the land was transferred in the year 1994. Issues were also raised on some signatures not appearing but in my view this was well explained by DW-2. In any event the certificate of title has the transfer duly signed by the land registrar. I do therefore do not find any substance to the arguments that the title of the 2nd defendant was obtained improperly or by way of fraud.

56. The effect of the above is that the case of the plaintiffs based on adverse possession and/or fraud must fail. For now all that the plaintiffs hold is a licence which can be terminated at any time by the 2nd defendant and the plaintiffs will have no choice but to vacate the suit land if ordered by the 2nd defendant.

57. I sympathise with the plaintiffs who believe that they have been forgotten by the Government. Indeed, at times I felt as if the plaintiffs were lamenting about the failure by the Government to give them land, rather than properly agitating the claim presented in their pleadings. They deduce that the system is not fair, that one can have so much land, while many others have nothing. It is a sound moral argument which however cannot override the Constitutional provisions that give and protect the right of one to own property. The law is unfortunately not on their side and I am afraid that they have failed to succeed. Their case is hereby dismissed with costs.

58. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***