



REPUBLIC OF KENYA



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**Mung'au & 5 others v Matafari & 10 others (Environment & Land Case  
101 of 2015) [2024] KEELC 1254 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1254 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 101 OF 2015**

**EC CHERONO, J**

**MARCH 7, 2024**

**BETWEEN**

**GEORGE OLEL MUNG'AU ..... 1<sup>ST</sup> PLAINTIFF**  
**AMBROSE CHELONGO SOITA ..... 2<sup>ND</sup> PLAINTIFF**  
**GLADYS N. OLUNGA ..... 3<sup>RD</sup> PLAINTIFF**  
**JULIUS NDIWA MASARANGA ..... 4<sup>TH</sup> PLAINTIFF**  
**EDITH AKINYI YAMO ..... 5<sup>TH</sup> PLAINTIFF**  
**ELIMINA ATTANG'A MAKHANU ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**JOSEPH SITUMA MATAFARI ..... 1<sup>ST</sup> DEFENDANT**  
**MELAB ANGAI WASIKE ..... 2<sup>ND</sup> DEFENDANT**  
**ROBERT WANJALA ..... 3<sup>RD</sup> DEFENDANT**  
**CHARLES SIFUNA ..... 4<sup>TH</sup> DEFENDANT**  
**MOSES WAFULA ..... 5<sup>TH</sup> DEFENDANT**  
**PATRICK JUMA ..... 6<sup>TH</sup> DEFENDANT**  
**MOSES KHAEMBA ..... 7<sup>TH</sup> DEFENDANT**  
**MOSES MAKACHA ..... 8<sup>TH</sup> DEFENDANT**  
**EDWARD KHAEMBA ..... 9<sup>TH</sup> DEFENDANT**  
**GABRIEL WEKESA ..... 10<sup>TH</sup> DEFENDANT**  
**JACK WANYAMA ..... 11<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. By way of an amended plaint dated 7<sup>th</sup> February, 2022 the Plaintiff sought for the following orders against the Defendants;
  - i. Permanent injunction and eviction orders as per paragraph 14.
  - ii. Costs.
  - iii. Interest.
2. In their plaint, the Plaintiffs contend that they are the registered proprietors of individual parcels of land no. Bungoma/Kamakoiwa/5087, 5088, 5089, 5090, 5091 and 5092 ('the suit plots') respectively. It is averred that one Nicholas Makhanu Chelongo the father of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> plaintiffs, was involved in a case with the 1<sup>st</sup> defendant being Bungoma High Court Civil Case No. 156 of 1995 in relation to Land parcel no. Bungoma/Kamakoiwa/298 which case was determined in favour of Nicholas Makhanu Chelongo. It is said that the 1<sup>st</sup> defendant being aggrieved by this decision appealed in the Court of Appeal Kisumu Civil Appeal No. 351 of 2002 and the appeal was dismissed.
3. It is this Land parcel no. Bungoma/Kamakoiwa/298 ('the suit land') which gave rise to the suit plots i.e. Bungoma/Kamakoiwa/5087, 5088, 5089, 5090, 5091 and 5092. It is further averred that the 1<sup>st</sup> defendant during the pendency of the suit had sold portions of Land parcel no. Bungoma/Kamakoiwa/298 to the 2<sup>nd</sup> to 11<sup>th</sup> defendants wherein vacant possession had been surrendered. The plaintiffs contend that the defendants jointly have occupied the suit plots and are using them unlawfully to their detriment. The plaintiff listed the illegalities and unlawful conduct of the defendants and sought to have them evicted from the suit plots and permanently restricted from re-entering.
4. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants entered appearance and filed their amended defence and counter-claim dated 25<sup>th</sup> February, 2022 wherein they stated that they were not parties in the alleged cases i.e. Bungoma High Court Civil Case No. 156 of 1995 and Court of Appeal Kisumu Civil Appeal No. 351 of 2002. They denied knowledge of the subdivision of Land parcel no. Bungoma/Kamakoiwa/298 and averred that if any was done the same was fraudulent and in violation of their proprietary rights and interests. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants who are members of one family stated that the land they occupy which measures 5 acres was purchased in 1991 from the 1<sup>st</sup> defendant and they have been in occupation of the same since the purchase to the exclusion of the plaintiffs.
5. It was further their defence that they have not been engaged in any illegalities with regard to the lands since they lawfully acquired the same. It was averred that they have extensively developed their portions of land which now falls within Land parcel no. Bungoma/Kamakoiwa/5087 without any interruption for the past 12 years and that there is a clear demarcation of their alleged parcels. It was their contention that the 1<sup>st</sup> plaintiff got registered as the proprietor of the whole piece of land illegally, unlawfully and fraudulently. The 2<sup>nd</sup> defendant claimed that she was an innocent purchaser for value without notice.
6. They proceeded to particularize particulars of fraud and illegality against the plaintiffs. It was their argument that the 1<sup>st</sup> plaintiff holds 5 acres in trust for them. It was further their contention that the 1<sup>st</sup> plaintiffs title has been extinguished by operation of the law by virtue of the doctrine of adverse possession. They sought to have the 1<sup>st</sup> plaintiff ordered to transfer 5 acres to them and in default for



an order to issue for the Deputy Register to execute the transfer documents and the plaintiffs claim generally dismissed.

7. The 1<sup>st</sup> defendant filed his amended defence dated 21<sup>st</sup> March, 2022. It was his contention that the mentioned cases i.e. Bungoma High Court Civil Case No. 156 of 1995 and Court of Appeal Kisumu Civil Appeal No. 351 of 2002 were dismissed on a procedural technicality and specifically the fact that the requisite statutory period for adverse possession had not crystallized and that the issue of purchase and possession was not challenged. The 1<sup>st</sup> defendant averred that the title to Land parcel no. Bungoma/Kamakoiwa/298 was acquired through fraud and contrary to his rights and interest.
8. The 1<sup>st</sup> defendant particularized fraud on the part of the plaintiffs. He denied the particulars of fraud particularized by the plaintiff and averred that he has been in occupation of the suit land since 1971 to date and that Nicholas Makhanu Chelongo sold Land parcel no. Bungoma/Kamakoiwa/298 to Dismas Situma Matifari. It was stated that the plaintiff's interests are subject to the defendant's interest as per Section of 27(1)(a) of the Land Registration Act and that the plaintiffs are merely registered as trustees.
9. After pre-trial directions were completed, directions were taken for the matter to proceed by viva voce evidence. In support of their case the plaintiffs called six witnesses while the 1<sup>st</sup> defendant called 2 witnesses, and the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants called 1 witness each.

#### **b) Parties Evidence**

10. PW1 George Olel Mungau testified that he was the registered owner of land parcel no. Bungoma/Kamakoiwa/5087. He thereafter proceeded to adopt his statement dated 1<sup>st</sup> September, 2015 as his evidence in chief. He equally produced into evidence the list of documents dated 15<sup>th</sup> September, 2015 as the plaintiff's documentary evidence containing 7 items as PExhibit no. 1-7. It was further his evidence that the plaintiffs did not obtain their titles fraudulently. He testified that each plaintiff obtained their titles separately and that it was not true that the 2<sup>nd</sup> plaintiff has been living in the suit land since 1992.
11. When cross examined by the 1<sup>st</sup> defendant, he stated that he was born in 1976 in Naitiri within Bungoma. It was his evidence that his father is one Nicholas Makhanu Chelongo and that he was not aware that his said father had sold the suit land to one Dismas Matifari. He testified that he is aware that the 1<sup>st</sup> defendant resides in his share of land i.e. plot no 5087 which measures 10 acres. It was his testimony that the 2<sup>nd</sup>, 11<sup>th</sup> and 10<sup>th</sup> defendants also live in the suit land but he didn't know how they entered into the land. The witness testified that he is aware that some of the defendants were in occupation of the suit land when sub-division and the beacon placement was being done. He asked the court to look at the judgments in Bungoma High Court Civil Case No. 156 of 1995 and Court of Appeal Kisumu Civil Appeal No. 351 of 2002.
12. During re-examination the witness testified that the judgment of the CoA was delivered on 31<sup>st</sup> July 2007 which case involved his father Nicholas Makhanu Chelongo and the 1<sup>st</sup> defendant Joseph Mutafari Situma who was the appellant. It was his testimony that his plot no. 5087 was registered on 14<sup>th</sup> December, 2011 which was long after the determination of the abovementioned cases.
13. PW2 Julius Ndiwa Kasangara testified that his land is Bungoma/Kamakoiwa/5090 which he bought from Nicholas Makhanu Chelongo in the year 2010. He testified that since he acquired the land he has never taken possession. He denied the argument that the 1<sup>st</sup> and 3<sup>rd</sup> defendants utilize the land.
14. When cross-examined by the 1<sup>st</sup> defendant, the witness testified that he purchased the plot on 3<sup>rd</sup> January, 2010 but he did not have his agreement in support of this position. It was his testimony that



- at the time of the purchase, the 1<sup>st</sup> defendant was living on the plot and he has never visited the plot since this case was commence.
15. During re-examination, it was PW1's testimony that when he purchased the plot. he visited the same and the beacons were pointed out to him then he completed the transfer procedures. He confirmed that the 1<sup>st</sup> defendant was on the land during this time and that he informed him there was a case over the suit land. However, the same was determined in the year 2007.
  16. PW3 Gladys Nanjala Olunga testified that her land is Bungoma/Kamakoiwa/5090 which portion she was given by her father Nicholas Makhanu Chelongo in the year 2010. During cross-examination she testified that she was born in 1965. It was her testimony that her portion measures 5 acres and that at the time possession was given to her, the 4<sup>th</sup> and 5<sup>th</sup> defendants were occupying it but she was not aware how they entered therein.
  17. PW4 Elmina Attanga Makhanu testified that she is the widow of Nicholas Makhanu Chelongo who was the respondent in CoA Civil Appeal No. 351 of 2002. It was her evidence that her land was Bungoma/Kamakoiwa/5092 which measures 5 acres. In cross-examination, the witness testified that her husband sold land to one Dismas Matifari the father of the 1<sup>st</sup> defendant.
  18. In cross-examination, the witness stated that they moved to Endebes in 1971 and they have never visited the suit land since thus she did not know who occupies the land but is aware that the same is occupied by the defendants who have built houses and are tilling the land. During re-examination, she testified that the contract between her husband Nicholas Makhanu Cherongo and Joseph Matifari was cancelled in 1976 as evidence in the various court judgments in Bungoma High Court Civil Case No. 156 of 1995 and Court of Appeal Kisumu Civil Appeal No. 351 of 2002. It was her contention that the defendants therefore did not have any authority to be on the land and that their occupation was therefore unlawful and illegal.
  19. PW5 Edith Akinyi Yamo testified that her land was Bungoma/Kamakoiwa/5091. She adopted her statement dated 19<sup>th</sup> July, 2021 as her evidence in chief. In cross-examination she testified that the land was given to her on 14<sup>th</sup> January, 2011 by her father in law Nicholas Makhanu Cheongo. It was her evidence that her husband Bernard Okada died. PW5 stated that she knew where her land was and that it is currently been occupied by Edward Khaemba (9<sup>th</sup> defendant) and that she has never utilized the suit land. She denied the allegation that she obtained the suit land fraudulently. It was her evidence that she did not know how the defendants obtained the suit land.
  20. In re-examination, the witness stated that she did not enter into an agreement to acquire the land since she did not buy it. It was her testimony that no encumbrances had been registered on the land prior to the sub-division and the suit land has never been registered in the name of the 1<sup>st</sup> defendant.
  21. PW6 AMBROSE CHELONGO SOITA testified that his land was BUNGOMA/KAMAKOIWA/5088. He sought to adopt as his evidence- in -chief his statement dated 19<sup>th</sup> July, 2021. It was his evidence that he has not been utilizing the land and that the same was being occupied by Joseph Makacha the 8<sup>th</sup> defendant herein. During cross-examination, he testified that the suit land was given to him by his father Nicholas Makhanu Chelongo and that he did not have a sale agreement since he did not buy it. It was his evidence that the land has clear boundaries and beacons. PW 6 denied allegations that the land was transferred to him fraudulently. The witness testified that visiting the suit land was dangerous since the last time his father visited, he was attacked. He testified that he did not give permission to the 2<sup>nd</sup> defendant to use the land.



22. For the 1<sup>st</sup> defendants' case, DW1- Joseph Situma Matafari was sworn and sought to adopt his witness statement dated 27<sup>th</sup> May, 2016 as his evidence- in -chief. He also produced into evidence a list of documents containing one item a DExhibit 1. In cross-examination, the witness testified that he and his mother sold to the 2<sup>nd</sup> defendant land measuring 5 acres to be curved out of Bungoma/Kamakoiwa/298. It was his testimony that when the sale was made, they he did not inform the 2<sup>nd</sup> defendant that there was a pending case involving the suit land. It was the 1<sup>st</sup> defendant's testimony that after the sale, the 2<sup>nd</sup> defendant took occupation of the suit property and developed the same. It was stated that the land the 2<sup>nd</sup> defendant is occupying is registered in the name of George Olel-the 1<sup>st</sup> plaintiff.
23. During cross-examination, he testified that after the subdivision of Bungoma/Kamakoiwa/298, he now lives in Bungoma/Kamakoiwa/5087. It was his evidence that he entered into the suit land by virtue of his father. The witness stated that he sued one Nicholas Makhanu Chelongo for the suit land which he was claiming under the doctrine of adverse possession in Bungoma High Court No156 of 1995 which case went up to the Court of Appeal in Kisumu as Civil Appeal No. 351 of 2002 and the said cases were concluded in favour of Nicholas Chelongo. DW1 stated that they have been in court since 1984 to 2007 over the suit land and that they sold the land in 1991 to the 2<sup>nd</sup> defendant during the pendency of the above mentioned cases.
24. The witness testified that at the time of the sale, he did not have a title deed of the land. He stated that the said Nicholas once visited the suit land and he attacked him and he has never come back since. It was further his testimony that there is a case filed in the Land District Tribunal and reference was made to D-Exhibit. The witness testified that the proceedings in the tribunal were dated 9<sup>th</sup> May, 2007 and that once the tribunal gave its award, the same was presented for adoption in Kimilili Chief Magistrates Court. He testified that he had not produced the order adopting the tribunals award.
25. In re-examination, the witness testified that he entered the suit land in 1971 after his father bought the land. It was his testimony that when they sold the land to the 2<sup>nd</sup> defendant, there was no order stopping them from conducting the sale. Lastly, he stated that by the time they received an award from the land district tribunal, the Court of Appeal had delivered its judgment.
26. DW2 Agnes Naliaka Dismas testified and sought to adopt her witness statement as her evidence- in -chief. During cross-examination, she confirmed that with the 1<sup>st</sup> defendant, they sold a portions of the suit land measuring 5 acres to the 2<sup>nd</sup> defendant and that indeed they did not inform her of the pending court case. She testified that the 2<sup>nd</sup> defendant and her children live on the land and that the 2<sup>nd</sup> defendant has buried her 8 children on the suit land.
27. During cross-examination, the witness stated that her husband, one Dismas Matifari bought land parcel no Bungoma/ Kamakoiwa/298 in 1971 from Nicholas Makhanu Chelongo through an agreement. She testified that the said Dismas died in the year 1979 and the title had not been transferred to him yet which prompted the 1<sup>st</sup> defendant to institute a suit against Nicolas Chelongo for the title. She confirmed that there have been pending court cases over the suit land since 1987. She confirmed that at the time they approached the Tongaren Land Tribunal, the Court of Appeal had delivered its judgment over the land.
28. In re-examination, the witness testified that she and her husband purchased the suit land from Nicholas Makhanu Chelongo and that the said Nicholas left to go and buy land elsewhere and gave them vacant possession of the land in 1971 and that it was only after her husband died in 1979 that the said Nicholas came to the land and asked them to vacate.



29. For the 2<sup>nd</sup> 10<sup>th</sup> and 11<sup>th</sup> defendants, they called one case Melab Angai Wasike (DW1) who testified on oath and sought to adopt her witness statement dated 21<sup>st</sup> November, 2019 as her evidence in chief. She also produced her list of documents of even date as her documentary evidence containing 6 items as D2Exhibit 1-6. She testified that she has been on the suit land since 1991 when she bought it from the 1<sup>st</sup> defendant and that the plaintiffs have never been on the suit land since she entered. It was her testimony that when she bought the land, she was not aware of the existing court case involving the suit land.
30. In cross-examination by the 1<sup>st</sup> defendant, she reiterated her evidence as above. When cross examined by counsel for the plaintiff, it was her testimony that she did not know the land registration number and that she was utilizing 5 acres of the portion which she has fenced with sisal. It was her further testimony that she entered into an agreement for sale for the portion and she referred to D2Exhibit 1. She stated that she currently occupies a part of land parcel NO. 5087. She produced photographs as D2-Exhibit 5 of the portion of land. She also produced a letter from the chief as D2-Exhibit 6 which she confirmed did not mention anything about the suit land. She testified that she was not aware of any dispute over the land as she knows the land belongs to the Matofari family having purchased the same from Nicholas Chelongo.
31. The witness confirmed that at the time she bought the land, the 1<sup>st</sup> defendant and his mother had not obtained letters of administration for the estate of Dismas Matofari. She also stated that she did not conduct a search on the property before purchasing the same. When re-examined, she testified that she has never seen the plaintiffs on the suit land since she bought the property and that her purchase was witnessed by the village elders.
32. For the 10<sup>th</sup> defendants' case, DW1 Gabriel Wekesa gave sworn testimony and sought to adopt his witness statement recorded on 21<sup>st</sup> November, 2019 as his evidence- in -chief. In cross- examination by the 1<sup>st</sup> defendant, he reiterated D2's testimony. During cross-examination by the plaintiffs, he stated that when the 2<sup>nd</sup> defendant purchased her portion of land, he was 33 years and reaffirmed the 2<sup>nd</sup> defendant's testimony.
33. For the 11<sup>th</sup> defendants' case, DW1 Wanyama Wasike was sworn and sought to adopt his statement recorded on 21<sup>st</sup> November, 2019 as his evidence- in -chief. Throughout his evidence, he restated the 2<sup>nd</sup> and 10<sup>th</sup> defendant's testimony.

### **c) Parties Submissions**

34. Directions were thereafter taken and the parties agreed by consent to file and exchange their written submissions
35. The plaintiffs filed their submissions dated 10<sup>th</sup> January, 2024 where they submitted on 8 issues. In summary it was submitted that as shown by documentary evidence through certificates of title produced, it is clear that the plaintiffs are the registered owners of the suit properties having been subdivided from the mother title NO. Bungoma/ Kamakoiwa/298. It was submitted that the 1<sup>st</sup> defendant's claim, just like all the other defendants claim that the pronouncements of the Court of Appeal in Joseph Mutafari Situma vs. Nicholas Makhanu Chelongo (2007) eKLR extinguished their right over the suit land, if any.
36. It was further argued that the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants are on the suit plots illegally. The plaintiff argued that the alleged sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant was not executed by either party to the agreement contrary to Section 3(3) of the Law of Contracts Act and that the 1<sup>st</sup> defendant and his mother did not have letters of administration for the estate of Dismas Mutafari authorizing



them to conduct the sale. It was further argued that the family of the late Dismas Mutafari did not have good title capable of being passed to the 2<sup>nd</sup> defendant. Reliance was placed in the case of Kenya Anti-Corruption Commission vs. Online Enterprises Limited & 4Others (2019)eKLR, and Katende vs. Haridar & Company Limited (2008) 2 E.A.173.

37. The plaintiffs argued that the defendants had not led any evidence to prove that they(plaintiffs) fraudulently acquired the titles to the suit plots. They quoted the case of Gladys Wanjiru Ngacha vs. Teresa Chepsaat & 4 others (2013) eKLR. On the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants counter-claim on adverse possession, it was submitted that the 12year period since 2007 when the Court of Appeal case was determined to the date of filing this suit in 2015 had not lapsed. Further, they submitted that it has emerged from evidence that efforts to access the land were repelled. It was submitted that the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants claim 5 Acres allegedly acquired by adverse possession but have not produced any surveyor's report which would definitively indicate the boundary features of the portion they claim. They quoted the case of Makokha vs. Makokha (Suing as the legal representatives of the estate of Makokha Cheloti) ELC case no. E003 of 2023. [2023] KEELC 20311(KLR) As such, it was the plaintiffs' contention that the claim of adverse possession cannot stand
38. Lastly, the plaintiffs urged that they are protected under Section 24, 25 and 26 of the Land Registration Act and that the defendants need to be evicted from the suit land which they illegally occupy. They relied on the cases of Simon Njage Njoka vs. Simon Gatimu Kanyi (2007) eKLR and Joel Kipchirchir Kitur vs. David Kimuti Langat & Another (2017) eKLR.
39. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants filed their submissions dated 22<sup>nd</sup> December, 2023 where they submitted on 7 issues. In summary it was argued that the 5 witnesses who testified before the plaint was amended cannot rely on the amendments made in that plain thus their claim was unanchored. It was also submitted that the plaintiffs had not met the standard of proof required in establishing their claim.
40. In relation to the counterclaim, counsel submitted on the doctrine her referred to as les pendens which I want to believe he meant lis pendens. It was also submitted that the 2<sup>nd</sup> defendant was a bonafide purchaser for value without notice as it emerges from the evidence of DW1 and DW2.
41. They argued that by the time the 1<sup>st</sup> plaintiff was acquired title to LR NO Bungoma/Kamakoiwa/5087 in 2010, the 2<sup>nd</sup> 10<sup>th</sup> and 11<sup>th</sup> defendants had already acquired the same under the doctrine of adverse possession. They quoted the case of Albert Fred Ekirapa vs. Nyongesa Sirar & 5 Others(2017) eKLR. Chevron (K)LTD vs. Harisson Charo wa Shutu (2016) eKLR among others. Lastly, it was submitted that the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants had proved their counter-claim under the doctrine of adverse possession and that the change of ownership does not affect land acquired under that doctrine. They cited the case of Joseph Macharia Kairu vs. Kenneth Kimani Muiruri (2021) eKLR.
42. As for the 1<sup>st</sup> defendant, they had no filed their submissions by the time this Court withdrew to write this judgment.

#### **d) Analysis And Determination**

43. I have considered the amended Plaint, amended Defences and the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendant's counter-claim, witness testimonies, exhibits and submissions and find that the following are the issues for determination:
  - a. Whether the plaintiffs are entitled to the orders sought,
  - b. Whether the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants have acquired 5 acres of the suit land by way of adverse possession.



- c. Who shall bear the cost of the suit.
44. From the pleadings and evidence tendered by the parties, it is not in dispute that the suit properties are resultant parcels from Land parcel NO. Bungoma/Kamakoiwa/298, that the plaintiffs are the registered proprietors of the suit plots and that the defendants are the ones in occupation of the suit plots.
45. The plaintiffs contend that the suit plots were allocated to them by one Nicholas Makhanu Chelongo as a gift since they are his children with the 6<sup>th</sup> plaintiff being his wife. They seek to have the defendants evicted from the suit plots claiming that the defendants' occupation of the suit plots is irregular and unlawful. All the plaintiffs gave evidence in support of their claim.
46. The 1<sup>st</sup> defendant on the other hand alleged that his father Dismas Mutafari Situma bought the suit land from the plaintiff's father, Nicholas Makhanu Chelongo and that after the purchase which is said to have happened in 1971, the family of Mutafari took quiet possession of the suit land and subsequently sold to the defendants who also took possession and have been enjoying peaceful possession ever since.
47. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants claim was that the 1<sup>st</sup> defendant who is the 10<sup>th</sup> and 11<sup>th</sup> defendants mother purchased the suit land from the 1<sup>st</sup> defendant and his mother in 1991 and have been living in the suit property ever since. They argued that they have acquired title to the portion they occupy (5 acres) through the doctrine of adverse possession
48. From the evidence tendered, I note that the 1<sup>st</sup> defendant's claim over the suit land arises from the assertion that his father purchased the suit land and also for having been on the suit land since 1971. In rebuttal to this assertion, the plaintiffs testified through PW5 that indeed the said Nicholas Makhanu Chelongo sold the suit land to Dismas Mutafari Situma but the said agreement was cancelled and the Mutafari's were ordered to vacate from the suit land and as such, their occupation of the suit land was unlawful.
49. Further, it emerged that the said Nicholas Makhanu Chelongo asked the family of Mutafari to vacate from the land in the years 1972, 1976 and 1984 and that at one time when he visited the land in a bid to have them vacate, the 1<sup>st</sup> defendant attacked and beat him. Further it transpired that the 1<sup>st</sup> defendant as the legal representative of the estate of his father Dismas Mutafari Situma sued Nicholas Makhanu Chelongo in Bungoma HCCC NO. 156 OF 1995 for orders that they had acquired title to the suit land under the doctrine of adverse possession and on 26<sup>th</sup> March, 1996 the Court found that the requirements of adverse possession had not been established and that the 1<sup>st</sup> defendant's father held on to the land forcefully.
50. It emerged that the 1<sup>st</sup> defendant was aggrieved by this judgment and preferred an appeal to the Court of Appeal at Kisumu vide Civil Appeal No. 351 of 2002 and the Court of Appeal in determining the matter upheld the high court's decision in its judgment delivered on 31<sup>st</sup> July, 2007. The 1<sup>st</sup> defendant in his defence contend that these cases were dismissed on technicalities and the plaintiffs cannot therefore rely on them. However, I have had the chance to peruse the decisions in these two cases and I note that that position is incorrect for the simple reason that the doctrine invoked by the 1<sup>st</sup> defendant in the said cases is one that all the elements have to be proved sequentially such that if one fails, then the claim cannot hold. This was the position in the 1<sup>st</sup> defendant's case and having failed to prove a single element for the doctrine to succeed, the claim failed and the court held that he was on the land forcefully.
51. DW1 produced into evidence proceedings of the Tongaren Land District Tribunal filed on 13<sup>th</sup> February, 2007 wherein DW2 had sued Nicholas Makhanu Chelongo over the suit land. The Tongaren



LDT ruled that the claimant was the rightful owner of Bungoma/ Kamakoiwa/298 and ordered to have its transfer effected in favour of the claimant therein.

52. Regarding the abovementioned proceedings of the Tongaren LDT, it is clear that the same were filed during the pendency of the court of appeal case. This raises the issue whether the Tongaren Land Disputes Tribunal had the jurisdiction to hear the matter considering that it was a matter pending before court. I find that it was mischievous for DW2 to allege that she was not aware that there was an active case in the court of appeal considering that the same was instituted by her son with whom she was living together. In my view, the filing of a claim with the Tongaren LDT was in bad faith and meant to frustrate the ongoing court case.
53. Further, it is imperative to note that the suit land was a registered property and the claimant in the tribunal was claiming ownership as the legal representative of Dismas Matafari Situma who allegedly purchased the said land through a sale agreement. Section 3(1) of the Land Disputes Tribunal Act (now repealed) limits the jurisdiction of the tribunal.
54. In Joseph Malakwen Lelei & another Vs Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal and states as follows:

On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

- 3(1) subject to this Act, all cases of a civil nature involving a dispute as to:-
- (a) The division of, or the determination of boundaries to land, including land held on in common,
  - (b) A claim to occupy, or work land or
  - (c) Trespass to land.”

Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process, must be construed as a nullity...

55. In M’Marete Vs Republic & 3 others, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 (2004) eKLR the court held-

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the Appellant. In our view, the Tribunal acted in excess of its jurisdiction.”



56. Bearing in mind the provisions of Section 3 (1) of the Land Disputes Act (now repealed) and the judicial decisions referred to in the preceding paragraphs, it is evident that the Land Disputes tribunal exceeded its jurisdiction and its decision was therefore null and void. The 1<sup>st</sup> defendant's argument therefore that the Tongaren LDT ruled in their favour awarding them the land and that they are entitled to the suit land fails since the award is inconsequential. The actions of the 1<sup>st</sup> defendant and his witness are actually what is termed as forum shopping considering that he (DW1) had filed a case with the courts on the very subject matter.
57. The 1<sup>st</sup>, 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants alleged that the plaintiffs obtained title over the suit land fraudulently. In the case of *Kinyanjui Kamau-vs-George Kamau (2015) eKLR*, the Court of Appeal held:-
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo (2008)1KLR (G & F) 742* wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.” In case where fraud is alleged it is not enough to simply infer fraud from the facts”
58. Having considered the evidence presented by the said defendants, I find that no evidence was led to prove that the plaintiffs acquired the title to the suit properties fraudulently or at all. They actually seem to have abandoned those pleadings completely.
59. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants also invoked the provisions of Section 7 of the *Limitation of Actions Act*. This section is construed to pave way for a trespasser or a person in actual possession of land whose owner has been disposed or indolent in asserting his rights as a proprietor for twelve years to demand to be issued with title in place of the true owner. The ingredients of the doctrine of adverse possession as set out in case law are not disputed by the parties herein. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants alleged that they purchased the suit land in 1991 and have been in occupation of the suit land since then have made extensive developments thereon. It is therefore their argument that they have acquired ownership of 5 Acres that they occupy under the doctrine of adverse possession.
60. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi [2015] e KLR* the Court of Appeal stated as follows:
- “Adverse possession is essentially a situation where a person takes possession of land and assets rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve years. The process springs into action essentially by default or inaction of the owner. The essential pre-requisitions being that the possession of the adverse possessor is neither by force nor stealth nor under license of the owner. It must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the title owner.”
61. However, it is worth noting that at the time the defendants purport to have purchased the suit land in the year 1991, there was an ongoing case between the 1<sup>st</sup> defendant and the registered owner over the suit land which case was concluded in 2007. The 1<sup>st</sup> defendant also testified that after the Court of Appeal case was concluded, the registered owner at the time Nicholas Makhonu Chelongo attempted to enter the suit land and he attacked him. Considering the evidence adduced and the standard required



to prove adverse possession, it is clear that the elements of the doctrine of adverse possession had not crystallized.

62. The occupation of the defendants was neither peaceful nor was it uninterrupted. Time under the doctrine of adverse possession started running in the year 2007 while this case was filed in 2015 making it 8 years which is 4 years shy. It is inconsequential that the 1<sup>st</sup> defendant was not aware of the ongoing litigation since as a purchaser, they were under obligation to conduct due diligence to satisfy themselves of the 1<sup>st</sup> defendant's title. The 2<sup>nd</sup> defendant even in her evidence stated that she did not conduct a search over the property and she cannot therefore benefit from her indolence.
63. Turning to the plaintiff's case, they sought for a permanent injunction and eviction against the defendants. It is not in dispute that the plaintiffs are the registered owners of the suit plots. The plaintiffs were issued with titles in the year 2011 under the Registered Land Act which has since been repealed by the Land Registration Act, 2012. The said statute protected the holder of title under Section 27 which was drawn as follows;

27 Subject to this Act-

- (a) the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

64. In the case of *Willy Kipsongok Morogo v Albert K. Morogo* (2017) eKLR, the Court held as follows:

‘the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under the Act.’

65. I have demonstrated in my analysis above that the defendants failed to prove that the plaintiffs acquired their respective titles fraudulently. Further, they also failed to prove that they had any interests over the suit land worth being protected under the law. The defendants have no right whatsoever to be on the suit land without the permission of the plaintiff. They have been trespassers all along. As such, I find that the plaintiff has proved his case to the required standard and is therefore entitled to the orders sought in the plaint. In the case of *Josphat Kuria Gathoni v James Maina Njoroge & 3 Others* [2019] eKLR, where Munyao J. held as follows:

“Whichever way I look at it, I do not see how the plaintiff can fail in his suit. He is the title holder and the defendants have not demonstrated any right over the suit land...the defendants have no right to be on the land without the permission of the plaintiff. The plaintiff is otherwise entitled to the orders of eviction and permanent injunction as prayed against the defendants. I will give the defendants 30 days to vacate the land and if they do not do so, the plaintiff is at liberty to apply for their eviction.”

66. The upshot of the foregoing is that the plaintiff's amended plaint dated 7<sup>th</sup> February, 2022 is merited and the same is hereby allowed as follows;

a.



- (i) The defendants are ordered to give vacant possession of the suit property within thirty (30) days from today.
  - (ii) In default of (i) above, an order of eviction is hereby issued against the defendants, their agents, servants and or any person claiming through them from Land Parcel No. Bungoma/Kamakoiwa/5087, 5088,5089,5090,5091 and 5092.
- b. Once vacant possession is given under paragraph (a) above, an order of permanent injunction is hereby issued against the defendants, their agents, servants and or any person claiming through the defendants from interfering with the plaintiff's user of Land Parcel No. Bungoma/Kamakoiwa/5087, 5088,5089,5090,5091 and 5092.
- c. The plaintiff is entitled costs of this suit.

**DATED AND SIGNED AND DELIVERD AT BUNGOMA THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Mr. Anwar for the plaintiff
2. Mr. Otundo H/B Ms Masengeli for 1<sup>st</sup> defendant
3. Wamalwa R. for 2<sup>nd</sup>, 9<sup>th</sup> & 10<sup>th</sup> defendants
4. Bett C/A

