Kimayi v Kemei & 3 others (Environment and Land Case Civil Suit 126 of 2014) [2024] KEELC 4246 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4246 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE CIVIL SUIT 126 OF 2014

EO OBAGA, J

MAY 16, 2024

IN THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NUMBER UASIN/GISHU/KIMUMU 4261 AND 4262

BETWEEN

ELIZABETH CHEBUNGEI KIMAYI ..... PLAINTIFF

AND

ROSELINA JEPKETER KEMEI ..... 1ST DEFENDANT

KIPSIROR SITIENEI KOMEN ..... 2ND DEFENDANT

EMILY CHELAGAT SITIENEI ..... 3RD DEFENDANT

JACKSON KIPRUTO NGETICH ..... 4TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of Originating Summons dated 23rd April, 2014 and filed in court on the same date, where he sought for orders:

    a. That the Plaintiff/Applicant be declared to have become the legal owner entitled by adverse possession of over Twelve (12) years since 1982 over All That parcel of land comprised in Land Parcel Number Uasin Gishu/kimumu/4261 And Land Parcel Number Uasin Gishu/ kimumu/4262 situated in Kimumu Uasin Gishu County hereinafter referred to as the "suit properties".

    b. That the said Applicant be registered as the sole proprietor of the said properties in place of the above named Respondents in whose favour the parcels of land are currently registered and/or about to be registered.

c. That the last original indentures in respect of the suit properties which are with the Respondents possession be dispensed with.

d. That upon grant of the foregoing, a permanent injunction be and is hereby issued restraining the Respondents by themselves, their servants, agents and/or employees from interfering with the Plaintiff/Applicant lawful enjoyment and quiet possession of the suit properties herein.

e. Costs of this Application be provided for.

2. The Summons is supported by the Affidavit of Elizabeth Chebungei Kimaiyo, the Plaintiff/Applicant herein. She swore that the Defendants/Respondents are the beneficiaries of the Estate of the late John Kimeli Kebenei (hereinafter referred to as "the Deceased") who was the registered proprietor of Land Parcel No. Uasin Gishu/Kimumu/123, which was subdivided without the Plaintiff's knowledge, giving rise to the suit properties herein. The suit properties were then distributed among the heirs of the Deceased. The Plaintiff deponed that she and her mother had purchased One (1) Acre and Two (2) Acres from the Deceased, which formed part of Land Parcel No. Uasin Gishu/Kimumu/123 in 1982 and 1985 respectively. Their Agreements were consolidated into one Agreement of 2nd December, 1985. The Plaintiff deponed that they paid in full and on 13th February, 2013 she paid KShs. 50,000/- to the 3rd Defendant to have the land transferred to her name.

3. It is the Plaintiff's case that she took possession of the suit properties in 1982, fenced it and built her home on the suit properties. That she has developed and maintained the suit properties and has been living thereon with her family and that her mother, upon her demise in 1985, was buried thereon. She claims to have enjoyed the use of the suit properties to the exclusion of all others enjoying uninterrupted, continued possession as well as paying utility bills to date. She deponed that in April, 2014, the Defendants started to survey the suit properties, commenced subdivision process and fencing it with the intention of evicting her from the suit properties and they have even threatened her with physical harm if she stops them from carrying out their unlawful acts.

4. The Plaintiff is apprehensive that the suit properties are in danger of being sold, at her peril, despite the fact that she has lived on the properties openly and with the Defendant's knowledge in a manner adverse to their interests and they never interfered. The Plaintiff urged the court to declare her the legal owner of the suit properties by adverse possession, her right of ownership having accrued adversely from her uninterrupted, continued exclusive possession for more than 12 years. She concluded that it is only fair, just, expedient and in the interest of justice that the Summons be allowed.

5. The Defendants entered Appearance on and the 1st Defendant, Roselina Jepketer Kemei, swore a Replying Affidavit which was filed in court on 4th July, 2014. She deponed that she pleaded on behalf of all the Defendants in her position as the Administrator of the Estate of John Kimeli (the Deceased). She deponed that she had been in actual, undisturbed and peaceful use and occupation of Land Parcel No. Uasin Gishu/Kimumu/123, for over 20 years. That the said property remained Government Land under the Settlement Fund Trust until 5th September, 2006 when it was transferred to the Deceased. She also deponed that their Advocates wrote to the Plaintiff notifying her to avoid any acts of trespass as the property could only be appropriated after the Grant was obtained. She further deponed that any entrance into the land by the Plaintiff in 1982 must have been done on licence as it was still Government Land and did not belong to the Deceased.

6. Dismissing the alleged Sale Agreements, she deponed that allotment was made on 29th March, 1983 whereas the Sale was in 1982, a year before the Grant by the Settlement Fund Trustees and it excluded sale, lease or subdivision without their consent. She further stated that a search conducted on 1st September, 2005 indicated that the land was registered charged to the Settlement Fund Trustees

(hereinafter "the SFT") for KShs. 6,100/- whereas an earlier one of 19th July, 2001 states otherwise. She averred that the land was encumbered until 5th September, 2006 when it was discharged by the Settlement fund Trust, thus she purported that the Search of 19th July, 2001 was deliberately forged to mislead the Court.

7. The 1st Defendant stated that the Area Chief wrote to Eldoret Police Station complaining of Acts of cruelty associated with the occupation of the land as well as the death of the Deceased's nephew from assault associated with the Plaintiff. She alleged that the Defendants Advocate on 10th January, 2012 and on 21st February, 2014 again wrote to the Plaintiff complaining of her trespass and acts that were inconsistent with peaceful occupation and as a result of these letters, one David Kirwa, the Plaintiff's Cousin vacated the land. The 1st Defendant averred that the purported transactions are clothed in mystery, incapable of self-explanation and muddled in substance and time running up to 2013. She indicated that when they filed the probate and administration suit, the Plaintiff's claim was not enjoined as a creditor of the Estate of the Deceased.

Hearing and Evidence:

The Plaintiff's case;

8. On 17th February, 2015 the court directed that the OS would be treated as a Plaint and the Replying Affidavit be a Defence. Parties were directed to file witness statements. Thereafter the matter proceeded for hearing by way of viva voce evidence. Hearing commenced on 27th January, 2020 and the Plaintiff testified under oath as PW1 and adopted her written statement dated 23rd April, 2014 as evidence with amendments at paragraph *1*, *2* and *3* on acreage.

9. The sum total of PW1's oral and written statement of 23rd April, 2014 is that the Defendants are the beneficiaries of the Deceased who was registered as proprietor of Land Parcel No. Uasin Gishu/Kimumu/123. She testified that she and her mother each bought 1-Acre plots out of the said land from the Deceased, making two Acres being the suit properties herein. She produced two Agreements for Sale dated 2nd December, 1985 and 17th February, 1985 which were marked as PEX 1(a) & (b) as well as a search dated 19th July, 2001 marked as PEX 2. She testified that she has been in occupation of the suit properties and has built a house thereon as shown by the photographs she produced in court dated 18th April, 2014 marked PMFI 3a-g.

10. PW1 testified that they filed a succession suit and obtained a grant after which the land was distributed and the parcels she now occupies are Plot Nos. 4261 and 4262 on which she has lived for 38 years. That the land was discharged from the SFT loan in 1989. In Addition, PW1 also produced two searches dated 5th November 2014 marked as PEX 4 and 5. PW1 testified that the Administrators of the Estate of the Deceased have threatened to evict her and her family's detriment. That the Defendants actions and their intention to sell the suit properties have caused her untold suffering and agony and unless restrained the Defendants are likely to cause a breach of peace. She thus filed this suit seeking inter alia a declaration that she is entitled the two acres of land being Uasin Gishu/Kimumu/4261 and 4262.

11. When she was cross-examined by Mr. Angu, PW1 testified that the land was bought by John Kimeli Kebenei and Rael Sogome Kimaiyo, both deceased, and that John Kimeli paid the whole purchase price. A grant was issued in respect of John Kimeli vide Succession Cause No. 28 of 2001, however there has been no succession proceedings in respect of Rael Kimaiyo's estate. PW1 clarified that at the time the second Agreement was made in 1985, Rael Kimaiyo was already dead but that she was added 1 acre in the agreement. She stated that when she bought the land it was still in the name of the SFT and did not have a discharge of charge. It is her testimony that she paid one Emily Jelagat KShs. 50,000/-

but she refused to take the balance of KShs. 50,000/-. She stated that they had not had peace since the parcel numbers were changed.

12. On re-examination, PW1 testified that the Agreement with Emily Sitienei was for further payment. In addition, that she has been staying on the suit land for over 13 years and reiterated her prayers to court.

13. The Plaintiff then called her second witness, Jackson Kibiwot Rutto (PW2), a village elder who also adopted his written statement dated 29th January, 2019 as his evidence. His testimony is that he knew that the Plaintiff as the owner of the suit properties having bought the land from the Deceased. PW2 testified that the Plaintiff's mother bought 1 Acre in 1982 and took possession of it in the same year. He testified that later in 1985, the Plaintiff purchased an extra 1 Acre. He testified that ever since the Plaintiff and her mother purchased the suit properties, the Plaintiff has been in occupation and has made developments thereon. It was PW2's testimony that the Plaintiff has been using the suit properties and cultivates part of the land. That she has been in peaceful occupation since then, and now the Administrators have threatened to evict her. PW2 stated that he knew for a fact that the Plaintiff and her mother purchased the suit properties from the Deceased which were part of Uasin Gishu/Kimumu/123 in 1982 and 1985 and they belong to the Plaintiff thus the court should grant her prayers as contained in the Plaint.

14. PW2 was cross-examined by Mr. Angu for the Defendant upon which he stated that he is a village elder of Kambi Nairobi since 2019 and he was 23 years old in 1985. He testified that the mother of the Plaintiff is deceased and no succession cause was filed. That the Administrators of John Kimeli have threatened to evict the Plaintiff. On re-examination by Mr. Kandie, he reiterated that the Plaintiff has been using the land since 1982.

15. PW3, one Joseph Mulima Jonah, also gave a sworn testimony and further adopted his written statement dated 10th June, 2015 as his evidence. He testified that he comes from Kimumu Settlement Scheme and has been a village elder there for 40 years. He informed the court that he has known the Plaintiff since she was a child and knew her mother too. That Land Parcel No. Uasin Gishu/Kimumu/123 was owned by the Deceased and the Plaintiff's mother bought 1 Acre from him. Later, in a bid to solve fees problems for his family, John Kimeli approached the Plaintiff to purchase 1 Acre and she did. When the Plaintiff's mother died, she was buried on the suit properties. He testified that the purchase was in 1982 and the Plaintiff and her mother have been on the land since then. PW3 testified that the Plaintiff's mother's house still stood on the suit properties and the Plaintiff still lives on the suit properties.

16. On cross-examination, PW3 stated that it is the Plaintiff's mother, who first bought 1 Acre. That he did not know whether the Plaintiff took out letters of administration in respect of her mother's estate. PW3 testified that the total purchase price was KShs. 8,500/-. He stated that the land belonged to the SFT who then transferred it to the late John Kimeli Kibenei, and that the Defendants had obtained letters of administration for his estate. This witness was not re-examined.

17. The last witness to testify on behalf of the Plaintiff was Pius Sandro Vodoti (PW4), a cameraman and resident of Kimumu, who testified under oath and also adopted his written statement dated 1st February, 2022 as part of his evidence-in-chief. He testified that he worked as a photographer from the year 1986 until 2018 when he retired. He testified that the Plaintiff is his neighbour and he has known her since 1986. That the Plaintiff called her to go and take photographs of her home at Kambi-Nairobi (Kimumu) which he did on 18th April, 2014 which he did and produced the photographs as PEX 3a-g respectively.

18. On cross-examination by Mr. Angu, PW4 testified that he never went to any school of photography but that he knew the Plaintiff's home and he took digital photographs. He further testified that he did not have a certificate to confirm how he took the photographs and the gadgets that he used. PW4 was not re-examined and the Plaintiff closed her case.

The Defendants' Case;

19. DW1 was Roselina Jepketer Kimeli, the 1st Defendant herein, she testified under oath and adopted her written statement as her evidence-in-chief. She also produced the documents in the Defendants' List of Documents as her Exhibits save for No. 8, 9 and 12 which were marked as DMFI 8, 9 and 12. In her statement, DW1 stated that she is the widow of the late John Kimeli, and one of the Administrators of his Estate. The Deceased died on 27th July, 1991 with no privity of contract between him and the Plaintiff. That the Deceased was registered owner of Land Parcel No. Uasin Gishu/Kimumu/123, which by virtue of a Certificate of Confirmation of Grant obtained in Succession Cause No. 28 of 2000 was subdivided into Uasin Gishu/Kimumu/4259, 4260, 4261 and 4262. The suit properties herein are registered in the names of Kipsiror Sitienei Komen and Emily Chelagat Sitienei.

20. DW1 testified she was not aware that her late husband did sell any part of the land to the Plaintiff and no statutory notice had issued from the Plaintiff upon the demise of her husband. That consequently, the alleged agreement is non-existent and fraudulently obtained. She stated that no objection was raised with respect to the Succession cause during the period it was gazetted for 30 days. Further, that the Plaintiff has no right to disturb the peace of the Deceased's estate with her claim that she purchased 2 acres and that on 1st April, 2015 the Plaintiff trespassed on the land and began surveying and ploughing thereon without due process of the law, and in addition has threatened her and her family. She testified that the Plaintiff acquired the land through a dubious process and urged the court to dismiss the Plaintiff's claim.

21. On cross-examination, DW1 testified that she lived in Kimumu with her late husband and children and that the Plaintiff and her mother, Rael Kimaiyo, were allowed to stay with them on the suit property as they looked for their own land. They were allowed onto the land before her husband's demise even though the Plaintiff was not tilling the land. She clarified that the Plaintiff stayed peacefully on the land as they differed and that at one point she wanted to chase the Plaintiff. She confirmed that this was about 40 years ago, but the Plaintiff started having troubles after the death of John Kimeli. She denied that the Plaintiff's stay on the land was without permission but acknowledged that the Plaintiff does not pay her rent. That the Plaintiff occupies less than three acres and that although she does not know where Rael Kimaiyo was buried, she is not buried on the portion the Plaintiff occupies. She also confirmed that the Plaintiff is still staying on the suit property.

22. Jackson Kipruto Ngetich testified as DW2, giving a sworn testimony and adopted his witness statement dated 28th April, 2015. The summary of both his oral and written testimony is that he advanced monies to the 1st Defendant after her husband's demise to pay school fees for her children in 1998. That consequently, the 1st Defendant and her children unanimously agreed to allocate him 0.4 acres of the land in consideration of the monies advanced. He testified that his name was included in the succession proceedings of the Deceased estate as shown in the Certificate of Confirmation of Grant dated 12th July, 2000. That subdivision was carried out in accordance thereto and he got a title to his parcel. He testified that he was informed that the Plaintiff was residing on the suit property.

23. He was cross-examined and stated that the money advanced was to be repaid in kind but he had produced no agreement to the effect because he had none. He testified that he visited the 1st Defendant's home Plot 123 in 1997 and he confirmed that the Plaintiff was staying on part of the suit property. He

saw a structure that was put up by the 1st Defendant and he was informed that the 1st Defendant and the Plaintiff were living harmoniously. DW2 stated that his parcel is 4260. He told the court that the Plaintiff brought goons to destroy the fence they had put and in the process a young man died, but he never reported the destruction to the police. He acknowledged that although the Plaintiff was on the suit property when he went there, he has never filed a suit against her, but the Plaintiff filed this suit after the succession.

24. On re-examination, DW2 clarified that it is the Plaintiff who hired goons to destroy the fence. That his parcel was also affected as it forms part of the larger plot no. 123, and further that the relationship between the Plaintiff and the Defendants is not rosy.

25. Finally, the Defendants called their third witness, Samuel Kipkemboi Mare (DW3), a Lands and Settlement Officer at Uasin Gishu. He produced a Charge and Discharge of Charge which were marked DEX 9(a) & (b) respectively. His testimony is that Uasin Gishu/Kimumu/123 was discharged in 1999 after which the file was returned to the Lands office. That he noted there was a sale agreement dated 19th February, 1988 in which one David Kirwa Ruto had purchased 2 Acres. There was also another agreement dated 20th May, 1982 with Elizabeth Chebungei Kimaiyo as well as a Death Certificate of John Kimeli Kibenei who was the original allottee of Plot 123 Kimumu.

26. DW3 testified that there was also a Grant of Letters of Administration dated 16th December, 2000 and a Certificate of Confirmation of Grant dated 12th July, 2001. The beneficiaries of the Estate are Roselina jepketer Kemei (3 Acres), Kipsiror Sitienei Komen (1 Acre), Emily Chelagat Sitienei (1 Acre) and Jackson Kipruto Ngetich (0.4 Acres). DW3 states that there was also a letter dated 12th February, 2002 addressed to the area Assistant Chief where their office was asking him to confirm whether there were buyers on the ground. He explained that the Settlement office had received reports there were in fact buyers on the ground, but they received no reply from the Assistant Chief. DW3 produced and marked the file as DEX10.

27. On cross-examination, he confirmed that Plot No. 123 was in the name of the Deceased and he was aware that a title deed was issued as it follows the issuance of the Discharge of Charge. He stated that Plot no. 123 Kimumu measured 5 Acres and although he was not part of the proceedings in the succession case, he had since found out that the property has been sub-divided. That he has never visited the suit property and was not aware of who was in occupation of Plot No. 123 Kimumu before the sub-division. He also could not confirm if the four listed beneficiaries were the only beneficiaries and neither was he aware whether the estate of the deceased had debts. There was no re-examination and the Defence closed its case.

Submissions;

Plaintiff's Submissions

28. The Plaintiff's submissions are dated 19th March, 2024. In his submissions, Counsel for the Plaintiff argued that the Plaintiff bought, took possession of and has been in occupation of the suit property since 1982 and buried her mother thereon without any objections from the Defendants. Counsel cited *Regina Wanjiru Mwago & Another vs Lucy Wairimu Gichuhi & 2 Others* (2019) eKLR, where it was held that the 12 year period for adverse possession for a purchaser in possession is calculated from the date of payment of the purchase price because it is from this date that the owner is dispossessed. This was further supported by *Hosea vs Njiru & Others* (1974) EA 526 which cited Bridges vs Mees (1972) 2 All ER 577. Counsel pointed out that in the Agreement dated 2nd December, 1985 the Deceased confirmed that he had received the total amount of KShs. 8,600/- for the 2 Acres.

29. Counsel also referred to DW1's testimony that the Plaintiff has been living on the suit property since the time her husband was alive. In the alternative, that if indeed there was no agreement for sale as the Defendants alleged, then the Plaintiff's had taken forceful occupation of the land to the knowledge of the Defendants and without interruption for all those years. Counsel submitted that DW1 also confirmed that the Plaintiff never paid rent and she had never filed evictions proceedings against her, and the Defendants confirmed that the Plaintiff is still on the land to date. This, in conjunction with the testimonies of the other Plaintiff's witnesses, which counsel opined was never challenged by the Defendants shows that the Plaintiff has been in constant, continuous, peaceful and uninterrupted occupation of the suit property for 38 years (Mwangi & Another vs Mwangi (1986) KLR 328).

30. Counsel also pointed out that by the year 2012, when the Defendants started laying claim over the 2 acres that the Plaintiff was utilising, it had been several years after the lapse of the 12 year statutory period thus the Defendants were time barred. He submitted that an application for letters of administration in respect of a deceased's land did not interrupt adverse possession as it did not interrupt the Plaintiff's occupation of the suit properties because the title had already been extinguished. Counsel further urged that the Plaintiff had proved her case and should thus be declared as having adversely possessed Uasin Gishu/Kimumu/4261 and 4262 and the OS allowed. He relied on Samwel Nyakenogo vs Samwel Orucho Onyaru (2010) eKLR, Regina Wanjiru Mwago & Another (Supra), Wambugu vs Njuguna (1983) KLR 172 and John Omuse vs Sifirosa Akumu Oburon (being the Administratrix of the Estate of Obarasa Matiengi) (2021) eKLR. On the issue of costs, Counsel submitted that the Plaintiff is entitled to and should be compensated by way of costs.

Defendant's Submissions;

31. The Defendant's Submissions are dated 24th march, 2024 and Counsel submitted that Parcel No. Uasin Gishu/Kimumu/123 was allotted by the SFT vide letter of allotment dated 29th March, 1983 whose conditions were that "it shall not be subdivided, charged, let, leased or transferred without the prior consent in writing of the SFT. Counsel submitted that the Agreements produced constitute partial payments with no completion date and they did not state when occupation was to be effected. That there was no explanation why LCB Consent was not sought as required under section 6 & 7 of the *Land Control Act*, nor why the sale agreement was made before the land was allotted to the deceased. Further, that the Plaintiff never objected in the succession court as a creditor.

32. Counsel submitted that the Agreements mentioned Rael Sakome Kimaiyo, claimed to be her mother yet she had not Grant of Letters of administration to constituted competence to plead her case. Counsel also argued that there was no survey or part development plan delineating the area purchased by the Plaintiff. He also pointed out that there was no certificate to authenticate the workability of the digital device used to take the photos filed in court. It was Counsel's submission that the Plaintiff had no valid contract with the deceased as envisioned under Section 3(3) of the Contract Act which requires a contract for sale of land to be in writing and signed by both parties. Aside from the requirement to writing, Counsel submitted that the Defendant denied signing the Agreements for Sale and the Plaintiff failed to prove the validity of these agreements contrary to Sections 70, 71 and 72 of the *Evidence Act*.

33. Counsel also submitted that Section 41 of the *Limitation of Actions Act*, excludes public land from application of the Act thus it cannot be acquired by way of adverse possession. He relied on Ann Itumbi Kiseli vs James Muriuki Muriithi (2013) eKLR where it was held that the SFT is a public enterprise, and asserted the suit property as it was owned by the Government in 1982. Relying on Section 7, 13 and 38 of the *Limitation of Actions Act*, Counsel submitted that a claim for adverse possession could not accrue unless the land is in the possession of one in whose favour time can run, and

that the statute only operates where the true owner is not in possession of the land. To this end, Counsel submitted that the Plaintiff's claim is premature as it was instituted before expiry of the statutory period of 12 years. Counsel relied on Wambugu vs Njuguna (1983) KLR 172, Mtana Lewa vs Kahindi Ngala Mwagandi (2015) eKLR and Mbira vs Gachuhi (2002)1 EALR 137.

34. Counsel argued that since the land was owned by the government through the SFT until 18th November, 1988 when the title was issued to the Deceased, the transactions the Plaintiff relies on were made at a time when there was no land for sale. Counsel debated that the Plaintiff's entry into the land was permissive under the Sale and time could only start to run at the end of the period of permissive occupation. He cited Mombasa Teachers Cooperative Savings & Credit Society Limited vs Robert Muhambi katana & 15 Others (2018) eKLR, Samuel Miki Waweru vs Jane Njeri Richu, Civil Appeal No. 122 of 2001 (UR) and Jandu Kipral & Another (1975) EA 225.

35. In his submissions, Counsel argued that the Plaintiff had not pointed out a specific parcel or size of land that she was claiming (Wilson Kazungu Katana & 101 Others vs Salim Abdalla Bakshwein & Another (2015) eKLR, Mount Elgon Beach Properties Limited vs Kalume Mwanongo Mwangaro & Another (2019) eKLR, Kasuve vs Mwaani Investments Limited & 4 Others (2004)1 KLR among others). Further, and relying on Eliakim Masale vs Ilale Mohamed & 4 Others, Mombasa Civil Appeal 135 of 2019, Counsel submitted that photographs have limited evidentiary and probative value as regards the facts of duration of occupation and the continuous occupation which are the subject of a claim of adverse possession.

36. Counsel also submitted that the Plaintiff's case falls short of establishing that she had exclusive possession of the property for the entire period as explained in Gabriel Mbui vs Mukindia Maranya (1993) eKLR. For these reasons, counsel argued that the Plaintiff had not satisfied the requirements to be declared in adverse possession of the land. On Costs, Counsel submitted that pursuant to Section 27 of the *Civil procedure Act*, courts have discretion to award costs, although it is trite that they follow the events and the successful party is always awarded costs. He urged this court to disallow the Plaintiff's originating Summons.

Analysis and Determination;

37. Having carefully considered the parties' pleadings, the witness testimonies, evidence on record as well as the submissions filed herein, I am of the view that the main issue for determination herein is:-Whether there was a valid Agreement for SaleWhether the Plaintiff has proved that she is entitled to a declaration that she has acquired the suit property through adverse possession.

38. To give a brief background of this case, the Plaintiff claims that sometime in 1982 she first purchased a 1 Acre plot from John Kimeli Kebenei. Her late mother, Rael Sokome Kimaiyo purchased another 1 Acre from the same individual on 17th February, 1985. These two Agreements were consolidated on 2nd December, 1985 and the Deceased agreed to add her mother's 1 Acre to the Plaintiff's 1 Acre, thus giving her a 2 Acre portion which is what she is now claiming. These two Acres were to be excised from Plot No. Uasin Gishu/Kimumu/123 registered in the name of the late John Kimeli Kibenei. The late John Kimeli Kebenei died in 1991 and his Widow and other beneficiaries obtained a grant of Letters of Administration in the year 2000, which was confirmed on 12th July, 2001.

39. It is not disputed that the Plaintiff did not object to the succession cause and thus was not included as a beneficiary or creditor of the estate. Pursuant to the Certificate of Confirmation of Grant, the said Plot No. 123 was subdivided into 4 portions; Uasin Gishu/Kimumu/4259, 4260, 4261 and 4262. The Plaintiff claims to have moved onto the land since 1982 when she bought it and upon subdivision, she claims that her 2 Acre portion stands on what is now known as Uasin Gishu/Kimumu/4261 and 4262,

the suit properties herein. It is the Plaintiff's case that she has lived thereon peaceful, continuously, without interruption and with the full knowledge of the Defendants to date. That her stay has been adverse to the interests of the registered owner, whose title has since been extinguished. The Plaintiff brought this motion seeking to be declared the owner of the suit properties having acquired them through the doctrine of adverse possession.

a. Whether there was a valid Agreement for Sale;

40. The Plaintiff pleaded and led evidence to show that the she and her mother separately entered into agreements with the Deceased for the purchase of the 1 Acre plots each from his above-mentioned property. These two Agreements culminated in the Agreement dated 2nd December, 1985, which the Plaintiff affirmed in her oral testimony was made after the demise of her mother. The Defendants on the other hand allege that there was no valid agreement between the Plaintiff and the Deceased. It is not lost on the court that at the same time the Defendants also want to purport that the Plaintiff's entry was permissive and by virtue of the agreement for sale whose existence they deny. They cannot in good conscience seek to rely on both arguments.

41. The starting point therefore is to determine whether there was a valid agreement for the sale of land. This being a transaction involving land, it has to comply with section 3 (3) of the *Law of Contract Act* (Cap 23) which, before the amendment of 1990, provided that:

> "No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:
>
> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –
>
> (i) has in part performance of the contract taken possession of the property or any part thereof; or
>
> (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

42. It appears that there were three separate Agreements in this transaction subject matter of this suit. There is an Agreement dated 17th February, 1985 between the Plaintiff's mother and the Deceased for sale of 1 Acre of land and this one is marked as PEXB 1(a). There is also the agreement dated 2nd December, 1985 between the Plaintiff herself and the deceased produced in Court and marked as PEXB 1(b), which makes reference to an earlier one of March, 1982 also for sale of 1 Acre. In PEXB 1(b), the Deceased acknowledged that he had now sold 2 Acres from his property to the Plaintiff, including the one he had sold to the Plaintiff's mother. It is on the basis of this Agreement that the Plaintiff now claims 2 Acres from the larger Plot No. Uasin Gishu/Kimumu/123.

43. This fulfils the requirement for writing under Section 3(3) of the *Law of Contract Act* as it existed at the time. Any allegation that the said was not valid needed to be proved through evidence. Although the Defendants alleged that the Agreements were fraudulently obtained, they failed to tender evidence to prove this fraud as required under Section 107 of the *Evidence Act*. As already set out above, the Agreements for Sale were produced as PEX 1(a) and (b). The Defendants submission that these documents were not produced is false. For the sake of clarity, what the Plaintiff marked as PMFI 3(a)

to (g) are photographs showing her house on the suit property, these were later produced into evidence by the photographer who took them.

44. In addition, the Plaintiff has further alleged that pursuant to the sale, she and her mother moved into the properties and she has been living thereon to date. This is corroborated by both DW1 and DW2 who testified that the Plaintiff is still in possession of the suit properties to date, thus even if the Agreement was not written. This fact speak to part performance of the Agreement by both parties thereto which together with the payment of the purchase price would under the said law validate the Agreement. Upon careful consideration, it is evident that there was an agreement for sale entered into between the Plaintiff and the Deceased for the purchase of the suit properties.

45. The Defendants argue that the lack of consent from the SFT invalidates the Agreement. However, DW3 a Settlement Officer produced the entire file from the Settlement Office. Inside that file is a copy of the Agreement dated 2nd December, 1985 meaning that they were well aware of the happenings on the ground. As to the Defendant's allegation/assertion that the signatures on the sale agreement were forged and that the agreements were obtained fraudulently, no evidence was tendered in support of this. Additionally, the Agreements bear both the purchasers' signatures and the Deceased's signature as well. There were no allegations in the Replying Affidavit that the signature of the Deceased on any of the Agreements did not belong to him. This issue was only raised in submissions, and it is well known that submissions are not pleadings. In any event, the Plaintiff's witnesses affirmed the sale by the Deceased to the Plaintiff by PW2 and PW3 who are village elders in Kimumu.

46. In any event, if this court were to hold the signatures were not proved as required under S. 70-72 of the *Evidence Act*, or that the lack of consent voided the sale, it would not take away the fact of the Plaintiff's adverse possession of the property. If the signatures are held to not belong to the Deceased then the element of permissive possession is not there, which means the Plaintiff's possession was adverse from the point of entry. Additionally, if indeed the Defendants want to rely on conditions in the letter of allotment dated 29th March, 1983 prohibiting the subdivision, charge, letting, leasing or transfer of the property without the prior consent in writing of the SFT, where is the consent obtained to sell the land to the 4th Defendant? All these allegations in my view are unfounded and appear to have been attempts to defeat the plaintiff's claim for adverse possession.

b. Whether the Plaintiff has proved that she is entitled to a declaration that she has acquired the suit property through adverse possession.

47. The doctrine of adverse possession in Kenya is embodied under several provisions of the *Limitation of Actions Act*. The first of these is Section 7, which provides that:-

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

48. Then there is Section 13 which provides that:

> "(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land."

49. The ingredients of adverse possession were discussed by the Court of Appeal in Mtana Lewa vs Kahindi Ngala Mwangandi (2016) eKLR where it was held that:-

> " Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in asserting of his title for a certain period, in Kenya 12 years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

50. The term licence here means permission, with the general rule being that there can be no adverse possession when entry is by consent of the registered proprietor. The Plaintiff acknowledges that she entered the suit property pursuant to a sale agreement as a bona fide purchaser for value. The entry was with permission of the Deceased who was the vendor. In such a case, the permission so granted ends once the purchaser in possession pays the purchase price in full, at which point their continued stay on the land becomes adverse to that of the registered owner. In Wambugu vs Njuguna (1983) KLR 173 the Court of Appeal interalia held thus:-

> " 8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment".

51. Likewise, in the case of Public Trustee vs Wanduru (1984) KLR 314, the court held that adverse possession commences in favour of a purchaser in possession on the date he completes payment of the purchase price. Madan JA at page 319 stated:-

> " ...that the full purchase price for the land having been paid on the same day, viz March 16, 1967 the learned judge ought to have held that the second appellant had completed adverse possession of the suit land for over twelve years before the institution of the suit on April 2, 1979".

52. The above case was cited in the case of Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, the Court of Appeal had further expounded that:

> " 32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case

> of Public Trustee – v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run."

53. There is no doubt that the Deceased, John Kimeli Kebenei was the registered proprietor of land parcel the land known as Plot No. 123 Kimumu which was later subdivided into 4 portions, two of which form the suit properties herein. It is clear from PEX1(b) that the full purchase price for the two acres was KShs. 8,600/- which was paid in full to the Deceased as evidently acknowledged in the said Agreement tendered in evidence. The Agreement reads in part in Kiswahili:- "Mimi John Kimeli Kebenei mwenye Plot No. 123 kuanzia leo tarehe 2/12/1985 nimepokea pesa yote na hakuna deni yeyote." This, roughly translated, means; "I John Kimeli Kebenei owner of Plot No. 123 have today 2/12/1985 received all the money and there is no balance".

54. He then allowed the Plaintiff entry into the property pending issuance of title and transfer of the land to her. There has since been a change of ownership as the said portions are now owned by the beneficiaries and heirs of his estate. However, it must be noted that the Deceased acknowledged that he had been paid the full purchase price on the two acres on 2nd December, 1985. Going by the above-cited authority, the Deceased became dispossessed on the said date upon payment of the purchase price in full. The permission initially granted ceased on that date and the Plaintiff's occupation of the suit properties became adverse to the Deceased's rights.

55. With regards to the period of possession, the Plaintiff has led evidence that she entered the suit property in 1982 and has remained thereon to date, this assertion is supported by PW2 and PW3. The Defendant has not tendered evidence to disprove the alleged year of occupation. However, they concede that the Plaintiff was allowed onto the land by the John Kimeli himself during his lifetime. John Kimeli died in 1991, which means that the Plaintiff was on the land prior to 1991. Even going by DW2's testimony that he visited the property in 1997 and found the Plaintiff already in occupation, that would still mean that as at 2014 the Plaintiff had been on the land for 17 years, way over the statutory time limit. However, at that time the Deceased had not yet been registered as the proprietor of the land. It still technically belonged to the Government and the Deceased was a beneficial owner.

56. I believe it is on the strength of this that the Defendants contend that time cannot have started to run because the property was at the time government land against who time cannot run for adverse Possession. The Defendants supported this argument by relying on Section 41 of the *Limitation of Actions act*, which exempts government land from the application of the Statute. It is true and I am in agreement with the Defendant's submission that government land is exempt from the doctrine of adverse possession. However, the property was only government land in the period before issuance of the Title Deed and the registration of the Deceased as owner thereof. This was however done on 18th November, 1988 when the land ceased being government land and became private property for which a claim for adverse possession could be brought.

57. While at it, this court deems it important to deal with the 1st Defendants averments at paragraph 11 of her Replying Affidavit, where she alleged that "a search conducted on 1st September, 2005 indicated that the land was registered charged to the Settlement Fund Trustees for KShs. 6,100/- whereas an earlier one of 19th July, 2001 states otherwise". This is however not a correct reading or interpretation of the two documents. I have had a look at both these documents, being the Search of 1st September,

2005 and that of 19th July, 2001 (produced as DEX 11 and PEX 2 respectively). They both show at the Proprietor section that the land was registered in the name of the Deceased and that a Title Deed had been issued on 18th November, 1988. On the encumbrances section, the two searches indicate that there was a notification of a Charge for KShs. 6,100/-.

58. Further, being charged to the SFT does not mean that the land belonged to the government. The charge was merely an encumbrance as against the Deceased's title, which was removed once the amount on the charge was fully paid. The two documents give the exact same information. The bottom line being that as at 18th November, 1988 the land known as Uasin Gishu/Kimumu/123 was not government land as alleged but the private property of the Deceased. Ideally, this is also the date from whence time started to run for purposes of adverse possession. However, this court has noted that the title to the suit property was issued on 18th November, 1988 and that is when the Deceased became the registered owner of Plot No. 123 Kimumu. For that reason, in this particular case, this is the date from which the 12 years are to be calculated. See Kenya Ihenya Company Limited v Ruth Nyambura Chuchu & 2 others; Jackton Osewe Agwet & I Saac Nyongoina & 146 others (Interested Parties); Urutagwo Mwiruti Women Group (Necessary Party) [2021] eKLR, where it was held that:-

> " 84. The title to the suit property was issued to the deceased on 10th June 1996. Time for purpose of limitation period must be computed from when the suit property was registered in the name of the proprietor. The Plaintiff has therefore been in possession for a period of eleven (11) years which is less than 12 years. Its claim for adverse possession may not succeed."

59. Thus by 18th November, 2000 the Plaintiff had been in possession of the property for 12 years. As at the time of filing of this suit in the year 2014, the Plaintiff had been on the suit properties for 26 years. At the lapse of the statutory period of 12 years, the Deceased's title to the property was extinguished by operation of Section 37 of the *Limitation of Actions Act*, which provides that:-

> "
>
> " 37. Application of Act to registered land
> This Act applies to land registered under the Government Lands Act (Repealed), the Registration of Titles Act (Repealed), the Land Titles Act (Repealed) or the Registered *Land Act* (Repealed), in the same manner and to the same extent as it applies to land not so registered, except that—
>
> (a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;
>
> (b) an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it."

60. The creation of a trust under said Section 37 was explained in the Peter Mbiri Michuki Case (Supra), where the court of Appeal held:

> " 35. The dicta in Mwangi & another –v- Mwangi, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In Public Trustee -v- Wanduru, (1984) KLR 314 at 324, it is stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the *Limitation of Actions Act*, has acquired title against the proprietor. In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land... 36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the *Limitation of Actions Act* applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff."

61. Aside from the aspect of time, for the claim to succeed, it must also be shown that the claimant's occupation of the subject property was continuous, open and uninterrupted for a period of not less than 12 years. The adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the registered owner. The Court of Appeal in the case of Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui (2017) eKLR while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision of Kamataka Board of Wakf vs Government of India & Others (2004) 10 SCC 779 where the court held thus: -

> " In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

62. It goes without saying that the Plaintiff's use and occupation of the land was open and within the knowledge of all the Defendants herein. DW1 testified that the Plaintiff stay on the land was peaceful. DW2 also testified that when he visited the land in 1997 he was told that the Plaintiff and the Defendants lived together harmoniously. Thus this court can safely presume that anyone who visited the property could see her on the land, and she has photographs to show that she is on the land and has developed it. There has been no evidence to the effect that her occupation of the land was at any point discontinued for any reason or at all.

63. Paragraph 6 of the Replying Affidavit dated 3rd July, 2014 the 1st Defendant states that their advocate, Birech, Ruto & Co. Advocates, wrote to the Plaintiff to notify her to stop acts of trespass. The letter

would not have been necessary if the Plaintiff was not on the land or at the very least claiming it. There are two letters from the said Advocates one dated 10th January, 2012 and another of 21st February, 2014 (produced as DEX 14 and DEX 15 respectively), which do not indicate when the Plaintiff is supposed to have come into the property, but both were asking the Plaintiff to vacate the it.

64. There is also a letter from the Area Chief dated 4th February, 1997 (produced as DEX 12) complaining of Acts of cruelty associated with the occupation of the land, an alleged report to Eldoret Police Station seeking removal of the Plaintiff, as well as the death of the Deceased's nephew from assault associated with the Plaintiff. The question then is whether the mere writing of these letters or the alleged police report, proof of which this court has not seen, resulted in the Plaintiff's removal from the land.

65. The Court of Appeal in Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees (2016) eKLR cited with approval the case of Amos Weru Murigu vs Martha Wangari Kambi and Another (H.C.C.C. No. 33 of 2002 (O.S) (at Kakamega) in making the following finding:-

"But a careful perusal of the correspondence exchanged between the parties shows that while the appellant did not grant permission to the respondent to be or to continue to remain on the suit land, the respondent maintained trespass and refused to move out even when the appellant through his advocates' demand letters required the respondent to vacate. The appellant did not assert his title by ejecting the respondent. He merely demanded through his advocates that the respondent vacates. The High Court correctly stated in Amos Weru Murigu v. Marata Wangari Kambi & Another (supra)–

"...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time form running."

66. In the same vein, it follows that neither the demand letters from the Defendants Advocates nor the letter from the chief stopped time from running as they did not constitute repossession of the property or an assertion of rights by the owner. True to form, the Plaintiff is in fact still in possession despite the said letters or the alleged report to the police. An assertion of rights in the proper sense was explained in Peter Kamau Njau vs Emmanuel Charo Tinga (2016) eKLR where the Court of Appeal held that:

" In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land. See Njuguna Ndatho V Masai Itumu & 2 Others Civil Appeal No 231 of 1999. There was no evidence of effective entry. The only time the appellant asserted his right against the respondent's occupation of the suit property was when he instituted the action in 2013, by which time the statutory 12-year period had lapsed and his title, with regard to the 1 acre comprised in the suit property had, forever been extinguished. The appellant had lost his right to the property upon being dispossessed by the respondent who has over the period of occupation used the suit property nec vi, nec clam, nec precario, as though it was his. He put up several houses on the property and leased some to tenants for rent."

67. For a suit to stop time from running, it must be a suit asserting the rights of the registered owner. A succession cause for instance will not stop time from running. See Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) (2022) eKLR, where the court held that:

> " It is trite that the filing of a suit asserting rights over land stops time from running in adverse possession. A Succession Cause is initiated for the purpose of distributing the property of the dead owner, to the persons entitled. Adverse possession on the other hand is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. In the instant case, there was no evidence that the filing of the Succession Cause was for eviction of the Applicant from the suit property or was meant to assert rights over the land. Adverse possession accrues to land and not title and unless the Respondent took steps to evict the Applicant from the suit land, which he did not. The mere act of claiming ownership on does not stop time from running. In Isaac Cypriano Shingore v Kipketer Togom [2016] eKLR the Court held:
>
> "By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.
>
> As the Court held in Githu vs Ndeete [1984] KLR 776 "Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894").

68. The Plaintiff testified that she paid one Emily Jelagat, the 3rd Defendant, KShs. 50,000/- in 2013. This is not an acknowledgement of the Defendants' title over the land capable of re-asserting ownership. A copy of the Agreement between the Plaintiff and the said Emily Jelagat was filed with the O.S. and though termed "Sale of Land Agreement", it is actually an acknowledgment slip. The document clearly states clearly that the money received was for "transfer of land documents" and not as part of any purchase price. If anything, this act is proof that the Plaintiff deems the land as hers, and was working towards obtaining the transfers and title thereto. In receiving the money for transfer documents, the 3rd Defendant acknowledged the plaintiff's claim.

69. The Grant was obtained on 16th December, 2000 and the Certificate of Confirmation issued on 12th July, 2001. The 4th defendant however claims to have purchased his plot in 1998. Yet he was included in the succession proceedings whereas the Plaintiff herein was not. It is common knowledge that any sale done prior to issuance of the Certificate of Confirmation of Grant is by virtue of void, thus the sale to DW2 therefore is itself null void.

70. As to the allegation that the Plaintiff did not obtain Letters of Administration over her mother's estate and thus cannot claim her portion, it should be noted that in entry No. 5 of the Agreement dated 17th February, 1985 the Deceased acknowledged receiving full payment from Rael Kimaiyo. Although time had not started running due to the fact that the property had not yet been registered in the name of the

Deceased, at the time the Title Deed was issued, the Plaintiff was already on the land possessing the two acres subject matter of this suit. She does not therefore require letters of administration to claim the 1 Acre initially sold to her mother because even without that Agreement for Sale, she has been adversely occupying the suit properties openly and without interruption for over 12 years.

71. I agree with the Defendants Submissions as supported by the case of Eliakim Masale vs Ilale Mohamed & 4 Others, Mombasa Civil Appeal 135 of 2019, that photographs have limited evidentiary and probative value as regards the facts of duration of occupation and the continuous occupation, which are the subject of a claim of adverse possession. However, photographs can show proof of the Plaintiff's acts on the land and prove that these acts are hostile to the rights and interests of the real owner.

Disposition;

72. The Plaintiff has sufficiently proved that her possession of the suit land has been adverse and hostile to that of the true proprietor. Her occupation and use of the suit properties has been confirmed by the Defendants' witnesses. She has thus shown that she is entitled to the orders sought. In the circumstances, the court hereby grants the following prayers:

    a. That the Plaintiff be and is hereby declared to have become the legal owner entitled by adverse possession of over Twelve (12) years since 1982 over All That parcel of land comprised in Land Parcel Number Uasin Gishu/kimumu/4261 and Land Parcel Number Uasin Gishu/kimumu/4262 situated in Kimumu Uasin Gishu County.

    b. That the Plaintiff be registered as the sole proprietor of the said properties in place of the current registered owners.

    c. That the last original indentures in respect of the suit properties which are with the 2nd and 3rd Defendants' possession be dispensed with.

    d. That a permanent injunction be and is hereby issued restraining the Defendants by themselves, their servants, agents and/or employees from interfering with the Plaintiff's lawful enjoyment and quiet possession of the suit properties herein.

    e. The Defendants shall bear costs of this suit.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 16TH DAY OF MAY, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Otuma for Mr. Angu for defendants.

Mr. Osewe Atieno for plaintiff.

Court Assistant –Laban