Kiptanui & another v Ruto (Environment & Land Case 356 of 2016) [2024] KEELC 3867 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3867 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 356 OF 2016

EO OBAGA, J

MAY 16, 2024

BETWEEN

MARY JERUTO KIPTANUI ..... 1ST PLAINTIFF

PATRICK KIPLAGAT KIPTANUI (BOTH SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE ABRAHAM KIPTANUI) ..... 2ND PLAINTIFF

AND

JENIFFER CHEPKEMBOI RUTO ..... DEFENDANT

JUDGMENT

Introduction

1. The Late Abraham Kiptanui (hereinafter referred to as "Kiptanui") commenced this suit in his own name by way of Plaint dated 17th October, 2016. He passed on before the matter was fully heard and his wife, Mary Jeruto Kiptanui and Patrick Kiplagat Kiptanui, the administrators of his Estate applied to be substituted in his stead. This was done vide the Further Amended plaint through which the Plaintiffs seek for the following orders;

    a. A permanent injunction restraining the Defendant whether by her agents, servants, nominees or otherwise howsoever from encroaching upon, remaining or continuing in encroachment and/or trespass upon Uasin Gishu/Kipkabus Settlement Scheme/457 measuring 20 Acres;

    b. An order for mandatory injunction requiring the Defendant to remove forthwith in any event within fourteen (14) days all that part of the fence encroaching upon or erected on Uasin Gishu/Kipkabus Settlement Scheme/457 measuring 20 Acres;

    c. An injunction restraining the Defendant, whether by her servants, agents or nominees or any of them or otherwise from with the Plaintiffs quiet and peaceful enjoyment of Uasin Gishu/ Kipkabus Settlement Scheme/457 measuring 20 Acres;

d. General damages for trespass;

e. In the alternative;

i. The Plaintiff be declared to have become entitled by adverse possession of over twenty-seven (27) years to all that land known as Uasin Gishu/Kipkabus Settlement Scheme/457 measuring 20 Acres;

ii. A vesting order do issue vesting the aforesaid land unto the Plaintiff free from all charges and encumbrances.

f. Costs of the suit and interest thereon.

2. The Defendant filed a defence and raised a counter-claim in which she sought the following reliefs: -

a. A permanent injunction restraining the plaintiff either by himself or through his agents, servants and anyone claiming through or under the plaintiff from trespassing upon or entering into or interfering with the plaintiff's quiet possession of the suit property.

b. Mesne profits for a period of nine consecutive years to be assessed by an expert or be agreed upon plus interest at commercial rates from the date of the said illegal invasion until payment thereof in full.

c. General damages for loss of appreciation of the suit property due to obstruction and curtailment of development by reason of the plaintiff's unlawful occupation of the suit property for the said period of nine years.

d. Interest on b and ca above at commercial rates from the date of the illegal invasion and occupation until payment thereof is full.

3. The Plaintiff pleaded that he is the owner of all that land known as Uasin Gishu/Kipkabus Settlement Scheme/457 measuring 20 Acres (the suit property) which he had purchased from the then Allottee Mr. Austin E. M. Wawaka in 1990 and took possession thereafter and started farming. It was alleged that he later permitted one John Bongen to occupy the land and farm thereon while looking after his livestock. John Bongen was later joined by other individuals and in 2015 the Defendant invaded the suit property, destroyed houses and fenced the land without any colour of right thereby trespassing on the suit property. The Plaintiff avers that vide a letter dated 11th May, 2016 the Defendant issued notice to vacate the suit property within fourteen (14) days. The Plaintiffs claim that the Defendant's encroachment and trespass has deprived them of the full use and enjoyment of the suit property and if not stopped, they would lose their interest in the land.

4. In the alternative, the Plaintiffs claimed adverse possession on grounds that they have been in actual possession and use of the suit land since 1990 to date. That after purchase, Abraham Kipanui requested the Director of Land Adjudication and Settlement in Nakuru to facilitate registration of the land in his favour but the same was never done. That if indeed there exists a title in favour of Phillip Kiptoo (deceased) then the same should be extinguished and the Plaintiff be registered as owner of the suit property by virtue of adverse possession.

5. In response, the Defendant through her Amended Defence dated 21st September, 2017 denied the contents of the further Amended Plaint in its entirety and instead averred that the suit is misconceived, poorly pleaded, ambiguous, materially insufficient, unclear and otherwise fatally defective. The Defendant averred that the claim for adverse possession as presented or at all is null and void and ought to be dismissed. She further denied both the prayer that the Plaintiff was entitled to adverse possession

of the suit property and the attendant prayer for a vesting order and asked that the suit be dismissed with and/or struck out with costs to the Defendant.

6. The Plaintiff filed a Reply to Amended Statement of Defence joining issue with the Defendant on her Amended Defence and reiterating the contents of the Amended Plaint. They denied all the averments in the Amended Statement of Defence and prayed that the Amended Defence be struck out with costs and judgement be entered in their favour as prayed in the Further Amended Plaint.

Hearing and Evidence:

Plaintiff's Case;

7. The Plaintiffs called Joseph Birgen as PW1, he was sworn and adopted his witness statement filed on 6th February, 2017. In the said statement, he stated that in 1987 he was employed as a caretaker/farm manager by Kiptanui to assist his mother in managing his farm at Kaberu in Burnt Forest. That he knew Kiptanui as owner of the suit property having purchased it from Austin Wawaka around 1988, and that in 1991 he was transferred from Kaberu to Kipkabus to continue his work as caretaker/farm manager. That during his tenure, their stay on the land was peaceful without any form of interference or interruption from any individual.

8. On cross-examination, PW1 testified that he was not present when Kiptanui was buying the land, does not know how he bought the land and also does not know whether he has title. He testified that he left another person taking care of the land and that Kiptoo never ploughed the land. When re-examined, he stated that he had never seen Phillip Kiptoo on the land.

9. PW2 is John Bongen who also testified under oath and adopted his witness statement as his evidence-in-chief. His testimony is that he is the caretaker of the Plaintiffs' land being the suit property herein, a pastor at AIC Kipkabus and a chaplain at Kipakbus Secondary School. He testified that he has been a caretaker/farm manager on the suit property, having taken over from Joseph Birgen since November, 2003 assisted by Juma Arap Owino and he knew Kiptanui as proprietor thereof. That he found several structures on the land including 5 semi-permanent houses, 2 storage structures, 12 beehives, a fish pond and 2 pit latrines. That since 2003 when he took over he has managed the farm peacefully without any form of interruption from anyone including the Defendant, until 12 years later when they received the Defendant's letter dated 11th May, 2016 asking them to vacate the land.

10. PW2 testified that between May and June, 2016 the Defendant without lawful authority ploughed around 3 Acres of the suit property. That on 3rd August, 2016 the Defendant attacked the suit property in the company of rowdy youths and goons chasing cattle, slashed crops. Destroyed the fence and denied them physical access to the suit property and PW2 reported the matter to Kipkabus Police Post. That the Defendant and her goons attacked again on 30th October, 2016 and on report to the local police was summoned for questioning. That as a consequence of the Defendant's actions, the Plaintiff has been denied peaceful enjoyment, quiet and full use of the suit property

11. He was cross-examined by Mr. Songok upon which he testified that he met the Defendant in 2015 when she came to the land, showed them a title in Kiptoo's name and started ploughing it. He testified that Kiptoo has never ploughed the land. PW2 stated that Kiptanui, who was his employer, said he owned the land and is the one who tills it, but he had not seen the title neither had he seen Kiptanui's Letter of Allotment. He stated on re-examination that the Defendant entered the land by force in 2015, before then he had last seen her in 2003.

12. The third witness is Philemon Mwaisaka Wawaka who testified as PW3 and also adopted his witness statement dated 15th March, 2017 as his evidence-in-chief. He testified in court that he knew Kiptanui

from his days in public service. He stated that he had never seen the land but it was allocated to his brother, Austin M. Wawaka between 1987 and 1988 upon application. PW3 stated that he introduced Kiptanui to his brother. His brother then sold his interest in the land to Kiptanui as it was far from his home. PW3 witnessed the transaction and he signed a letter dated 21st July, 1990 in regard to the sale of the land, which letter was produced as PEX1. He continued in evidence that he does not know and has never met the Defendant. He also produced PEX2 which is his letter dated 12th April, 2015 and testified that he addressed it to the Provincial Director of Land and Adjudication appealing to him to visit his records and confirm that the land was allocated to his brother, but he received no response.

13. Cross-examined, he stated that he had not brought the letter of allotment but the Sale Agreement was handed over to Kiptanui's Advocate, Justice Tuiyot. That he saw the agreement and he had never used his position to influence a public officer. He confirmed that his brother had no title, only a Letter of Allotment. That he did not know the Defendant and did not know of the title.

14. The Plaintiffs also called PW4, Mary Jeruto Kiptanui, who testified on oath on behalf of her husband Abraham Kiptanui, who is incapacitated. She adopted her witness statement dated 14th January, 2017 as her evidence in chief. She produced a copy of a letter dated 21st July, 1990 from Austin Wawaka to the Provincial Settlement Officer, and clarified that the original was with Mr. Francis Tuiyot who acted as their advocate in the transaction. She also produced a letter dated 7th October, 2016 from Kiptanui's Advocate to the Defendant's Advocate, the two were marked PEX 2 and PEX3 respectively.

15. In summary, PW4's statement is that her husband purchased the suit property from Austin E.M. Wawaka in 1990 in a transaction witnessed by Philemon Mwaisaka then Senior District Commissioner, Baringo. That Kiptanui then allowed his mother to farm the land with assistance of Jackson, Joseph Birgen and Arap Owino while PW4 oversaw the running and management of the suit property. That John Bongen was later allowed on the land followed by various other individuals in 2004. That in 2015, the Defendant, without any permission or proprietary or possessory rights trespassed onto the land.

16. PW4 explained that the late Phillip Kiptoo had claimed to be proprietor of the suit property and that it had been allocated to him. She stated that she and her husband took their Agreement to Nyaundi Tuiyot & Co. Advocates, the Defendant's Advocates and handed it to Mr. Francis Tuiyot. Phillip Kiptoo was informed that the allocation of the land to him was illegal/irregular as the land had already been allocated to Mr. Austin Wawaka. She testified that Kiptanui knew Phillip Kiptoo, they were friends and he helped Phillip Kiptoo to get a job as the Town Clerk at the Eldoret Municipality. That Phillip Kiptoo also sought assistance from Kptanui to be allocated the Eldoret Municipal Council house he was living in and the two never had any disagreements over the suit property.

17. PW4 testified that the Defendant has since 2015 engaged in continuous acts of trespass and through her letter dated 11th May, 2016 issued a notice to the occupants of the suit property to vacate within fourteen (14) days or face forceful eviction. That on 30th October, 2016 the Defendant sent rowdy people and goons to the suit property to destroy property denying Kiptanui peaceful enjoyment, quiet and full use of thereof. Further, that the agricultural produce, crops, structures and assets on the suit property are in real and imminent danger of being dissipated and wasted due to the Defendant's actions and the Plaintiff stands to suffer irreparable loss and injury that cannot be compensated in damages. In addition, PW4 testified that the title documents presented by the Defendant were fraudulently, irregularly and/or illegally obtained as the land was not available for allocation since the land had already been allocated to Austin Wawaka.

18. She was cross-examined and stated that PEX2 was one of the documents that show they own the land as she had no Agreement, and that the land was farmland in Kipkabus Settlement Scheme. She testified that they did not get Land Control Board Consent and that she did not have the allocation letter.

Further that the letter written in April, 2015 by Mr. Mwaisaka was addressed to the Provincial Director Land and Settlement asking him to assist Kiptanui get a title. She admitted knowing the Defendant as the late Phillip Kiptoo's wife. She also acknowledged that the letter dated 20th January, 1994 allocated Kipkabus Settlement Scheme No. 457, the suit property herein, to Philip Kiprop Kiptoo.

19. PW4 testified that the title deed (DMFI 5) was issued on 25th January, 1994 in the name of Phillip Kiprop Kiptoo. That the name of Austin E.M. Wawaka does not appear anywhere in the entries, neither does that of Abraham Kiptanui. PW4 added that the purchase was finalised on 21st July, 1990 and Philemon Mwaisaka was a witness thereto. She testified that both her husband and Kiptanui were busy and could not follow up with registration so they gave the file to Mr. Tuiyot to do the work. She was re-examined, upon which she stated that the documents of sale, consent and original copy of the letter were in the file that was given to the advocate, which is why she did not have it with her. That the sale commenced in the years 1988/1989 and was finalised in 1990.

20. PW5 is Dan Mbuvi Ndonye Kalamba a Land Adjudication and Settlement Officer in Uasin Gishu. His testimony is that from their records, the suit property was allotted to Austin Mugendi Wawaka, and there is a form dated 26th March, 1990 but which was presented for registration but was never registered. He produced the extract of the register as PEX5 and a copy of the Transfer as PEX6. He testified that the letter of allotment were being issued by the Provincial Commissioner and the one dated 20th January, 1994 was procedurally issued. That the transfer to Phillip Kiptoo was registered. That the name of Phillip Kiptoo does not appear on the register.

21. PW5 testified that it is possible for a title to be issued the one week after the Letter of Allotment is given. He stated that the suit property was given to Phillip Kiptoo. PW5 informed that court that Phillip Kiptoo also had Plot No. 1101 and acknowledged that land in settlement schemes is to be given to landless people, thus it was not fair for one person to have 2 plots in the same settlement scheme. He also informed the court that the file reflects that Plot No. 457 is still government property and that Kipkabus Settlement Scheme is yet to be degazetted. He produced the entire file as PEX7.

22. On cross-examination, he testified that the suit property was initially allocated to Austin Wawaka. That he did not have a copy of the letter of Allotment for Mr. Wawaka but that the procedure in allocating him the land was not completed, whereas the transfer to Mr. Kiptoo was registered. He reiterated that the letter of allotment came from the provincial administration, as was the procedure then. He clarified that Plot 459 was in the name of one Micheal Rotich but Plot 1101 also belonged to Phillip Kiptoo. PW5 explained that he had no record of any plot belonging to Abraham Kiptanui. He testified that it was possible for one to get two plots in the same settlement scheme. That the green card for the suit property was opened in 1990 and the first entry is the Government of Kenya and the second is Phillip Kiptoo.

23. When re-examined by Mr. Mayende, he testified that the green card does not match the name on the register. That it is the registrar who did not complete the registration process. He reiterated that since plots in settlement schemes is given to landless people, it was unfair for one individual to be allotted 2 plots in one scheme.

Defendant's Case

24. The Defence commenced its case on 19th January, 2023 by calling Justice Francis Tuiyot as its first witness. Upon being sworn, DW1 testified that he represented Kiptanui and Phillip Kiptoo in relation to the suit property. That the two went to his chambers and Mr. Kiptoo deposited the title to the suit property on instructions that Kiptanui was to avail an alternative plot to be swapped with the suit property. That from his records, the title to the suit property was received but there is no date given, so

he could not be sure if the title in court is the one that was received by his firm. He stated that he had no details of the property that was to be swapped and their agreement was not recorded in writing, he also was not aware if Kiptanui ever took the title to the firm as he left in 2012.

25. DW1 testified that he knew Phillip Kiptoo as his firm was on the panel of both Eldoret Municipal Council and ELDOWAS where Kiptoo worked and they sometimes interacted in that capacity. That he did not know if Kiptanui had taken possession of the land but upon Mr. Kiptoo's death he was informed that he had taken possession of the suit property. That he could not recall Mr. Kiptoo handing over the suit property to Kiptanui, and Mr. Kiptoo never told him that he had done so.

26. DW1 was cross-examined by Mr. Mayende and he testified that he did not remember if Kiptanui came with a file in respect of the suit property, or whether he had a letter of allotment. He also did not recall whether Kiptanui had received the suit property from Mr. Austin Wawaka. He testified that the Notice to vacate dated 11th May, 2016 was drawn by Nyaundi Tuiyot & Co. Advocates, his former firm. On re-examination, he testified that the only document deposited in his office is a title deed and that he did not recall if a letter of allotment was brought alongside the title. That he is aware of the dispute between Kiptanui and Mr. Kiptoo's family.

27. DW2 was Emma Sitienei a Land Registrar in Uasin Gishu County. She testified under oath that entry No. 1 in the abstract of the register was made on 26th March, 1990 in the name of the Government and the second one on 25th January, 1994 in the name of Phillip Kiptoo. Entry No. 4 is a re-issue of the title deed but she did not know the circumstances under which it was re-issued. She explained that ordinarily, a re-issue is done where the title is lost or destroyed.

28. When cross-examined, DW2 testified that she had not brought the file relating to the suit property as the summons were received late. Reiterating her testimony on the circumstances of re-issue of title, she testified that where the proprietor is deceased, a title is re-issued to the administrator, she could not however confirm if the registrar was aware that Kiptoo was dead at the time of re-issue. DW2 testified that ordinarily any letter must bear the letter head, and if it did not then it could not have emanated from the purported office. That they did not insist on a letter of allotment but were more concerned with the transfer and discharge of charge, both of which she did not have. Further, that she was not sure whether it was proper for the former DC to issue a letter of allotment. She testified that the parcel file was not available. On re-examination, she testified that the green card is the final authority on ownership.

29. Jennifer Chepkemboi Ruto, the Defendant, testified under oath as DW3. She testified that she was married to Phillip Kiptoo (hereinafter referred to as "Kiptoo") who died in 2007 and produced his death certificate as DE1 and her marriage certificate as DEX2. She obtained a grant issued on 18th June, 2019. She adopted her witness statement dated 8th December, 2016 and Replying Affidavit of the same date as her evidence-in-chief. She went on to state that the suit property was allocated to Kiptoo vide letter of allotment dated 20 January, 1990 (DEX4) and a title issued on 25th January, 1994 (DEX5). She testified that her husband took possession immediately upon allocation, fenced it, planted trees and started farming and rearing animals. That after her husband's death, Kiptanui who was a close friend of her husband, told her that he had purchased the land from her late husband and she relinquished the land to him even though she had been in possession until 2007.

30. DW3 testified that in 2014, she chanced upon a copy of the title deed of the suit property among her late husband's documents and no agreement to show that it had been sold. On the advice of her lawyer, she conducted a search and the land was still in Kiptoo's name. That she was advised to apply for a replacement title that was re-issued on 13th May, 2015 produced as DEX6. That she went back in 2015 to take back the land she had surrendered to Kiptanui. That he found the Plaintiff's caretaker on the

land farming, making bricks and burning charcoal, and that he had felled all the mature trees planted by her late husband. That she reported to the area chief who summoned all parties concerned to appear before him with their documents. That Kiptanui did not attend but his caretakers did and said they had no documents whereas she had her letter of allotment and copy of title thus the chief asked the caretakers to vacate the land and they did.

31. It is DW3's testimony that she went back to the land and started rearing livestock and was putting up a house but in 2016 she got a court order restraining her from interfering with the suit property. The Police were also involved in evicting her and she complied because her life and those of her children were in danger. That she was not allowed to harvest her maize or take away her iron sheets and she lost the animals that were on the land. That her husband never informed her that he had sold the suit property to Kiptanui, neither was she aware of any exchange agreement between the two. That there is no entry in the green card (DEX7) showing the land was transferred to Kiptanui. That the land belongs to her husband and prayed to be allowed to go back, and also asked for compensation for the destroyed property and costs of this suit.

32. When cross-examined, DW3 confirmed that by the time the title was re-issued, Phillip Kiptoo had died and the re-issued title was collected by her lawyer after she had issued instruction to apply for the re-issue. She testified that it is only the administrator of a deceased person's estate that can be re-issued with a title, yet she was not the Administrator of Kiptoo's estate when it was re-issued. She acknowledged that the letter of allotment dated 20th January, 1994 from the PC was not on a letterhead. She denied knowledge of the fact that the said letter of allotment was not in the file produced by the settlement officer. She also admitted that the name appearing on the hand-written register as the person allocated the suit property is Austin Mghendi Wawaka who she had never met so she was not aware he is the one who sold to Kiptanui. That she was not aware her husband had any other land apart from the suit property. In contrast, she also testified that she was aware that her husband had another plot in Kipkabus but she could not remember the parcel number.

33. DW3 further stated that it is her husband who showed her the title; that they took possession of the property in 1994 and it is her late husband who put markers on the land. She testified that she knew Kiptanui took possession of the suit property through his mother. She admitted that when her husband and his uncle, one Sammy Barsulai, visited the suit property they found an old lady who was herding sheep. DW3 testified that she found Kiptanui's caretaker John Bongen, when she went to the property. That she did not know if Birgen entered the land in 1991. She acknowledged that Kiptanui and her husband were good friends but she did not know that Kiptanui assisted him to get a municipal council house.

34. She was re-examined by Mr. Lilan and she testified that she took possession in 1994 until 2007 when she vacated the land for Kiptanui. That she was removed from the land in 2016 although she was not shown any court order authorising her removal, and that the title was re-issued in her husband's name.

35. The Defendant also called William Kimatui Murgor as DW4 who testified under oath and adopted his witness statement as his evidence-in-chief. He stated that he is a resident and senior chief of Kapyemit location. DW4 testified that he recalls showing Kiptoo who had a letter of allotment where the land was in 1994/1995 as per procedure. That he took possession immediately, fenced it and there were animals and structures on the land. That Kiptoo was housing his employees on the land and was in possession of the land until he died in 2007. That there was no dispute between Kiptoo and anyone until 2015 when the Defendant reported people occupying the land. That DW4 summoned the parties and asked Koptanui's workers to vacate because they had no supporting documents and they complied. The Defendant took possession of the property but later informed him of a court order requiring her to

vacate the land pursuant to which she was forcefully evicted. That DW4 did not know Kiptanui as he never went to be shown his land, and Kiptoo never complained about anyone planning to take his land.

36. He was cross-examined by Mr. Mayende and he testified that he became a chief in 2008 and was previously a teacher but being a scheme committee member Kipkabus Settlement Scheme, he was the one who showed people their land after the scheme started in the 80's. He admitted that the letter of allotment had no letter head. He testified that the register was the primary document in allocating land and confirmed that both the handwritten and typed register showed the suit property was allocated to Austin Mghendi Wawaka. Further, that he knew John Bongen as the person who was occupying the suit property, but he was not aware that Kiptanui had been occupying the land since 1989. DW4 testified that the Defendant showed him a letter of allotment, search and title in favour of Phillip Kiptoo but he did not conduct due diligence over the documents presented to him.

37. On re-examination, DW4 testified that Kiptoo's land was next to a dam and there was nobody on Kiptoo's land when he showed it to him. That at the meeting he convened, he confirmed that the Defendant had genuine documents and asked the occupiers to vacate.

38. DW5, the last witness to testify for the Defendant was Emmanuel Kimutai Kiptoo, he testified under oath and adopted his witness statement dated 29th August, 2022 as his evidence-in-chief. DW5 is the Defendant Kiptoo's son and he testified that the suit property is registered in his father's name. That he used to visit the land in 2002 in the company of his father who was rearing cattle thereon and plant crops. That they are currently not in occupation of the suit property as they were evicted in 2015 pursuant to court orders obtained by Kiptanui. That Kiptanui informed his mother in 2007 that the suit property belonged to him. He told this court that he could not recall when his mother went back to the land.

39. Under cross-examination by Mr. Mayende he testified that he was not aware of the two title deeds produced by the Defendant relating to the suit property. He testified that a title deed can be re-issued if a title is lost or if there are errors. That the Defendant was re-issued with a new title in her husband's name after the original was lost. She was not an administrator of his estate when this was done. He denied that the original title was illegally given. He told this court that he was not aware that the letter of allotment to his father was not among the documents produced by the Settlement Trustee's official, and he confirmed that from the handwritten register, the suit property was allotted to Austin Mghendi Wawaka. He also testified that he was not aware of Kiptanui purchasing the land from Mr. Wawaka. He confirmed that Kiptanui's family is in possession of the property through John Bongen but he did not know when he took possession; and that when he visited the land with his father in 2002, they did not see Bongen. When he was re-examined, DW5 testified that there was no irregularity in the issuance of the new title.

Submissions:

Plaintiffs' Submissions;

40. On 16th January, 2024 when the Defence closed its case, court directed parties to file written submissions. The Plaintiffs' submissions were filed on 18th March, 2024, where Counsel for the Plaintiffs started by rehashing the facts and evidence of the case. Counsel then submitted that Phillip Kiptoo acquired title to the land irregularly, fraudulently and illegally. Counsel acknowledged the Supreme Court's finding in Torino Enterprises Limited vs Attorney General (2023) KESC 79 (KLR) that a letter of allotment cannot confer ownership rights over property, but sought to distinguish its applicability in the suit herein arguing that the facts and circumstances in the present case are different from the supreme court case. He cited mysterious circumstances under which the Transfer Form to

Austine Wawaka was not registered, he then urged that a first title can be challenged if it is established that it was obtained without following due procedure, fraudulently, irregularly and was against public interest.

41. Counsel pointed to the fact that Phillip Kiptoo's name was not in the primary register used to establish availability of land for allotment and the lack of explanation as to why two transfer forms would be issued for the same parcel of land. Counsel relied on the case of Dina Management Limited vs County Government of Mombasa & 5 Others (KESC) 30 (KLR) (21 April 2023) (judgment) where it was held that a title or lease is the end product of a process. That if the process did not comply with the law, then the title cannot be held indefeasible. Counsel urged the court not to sanction irregularities and illegalities. Counsel pointed to the fact that Kiptoo was allotted two parcels in the same settlement scheme yet schemes are meant to assist squatters, landless and needy people. He relied on John Mwangi Ngania vs Mary Mukiru (2017) eKLR which case was referred to in Solly Mbogo vs John Mugeni Gitau (2022) eKLR.

42. It was submitted that Article 40(6) limits constitutional protection on the right to property to those properties that are lawfully acquired, thus the doctrine of first in time does not apply in this case. Further, the alleged letter of allotment dated 20th January, 1994 was not a valid letter of allotment as it did not bear the official letter head of the office it emanated from as is the norm. Counsel submitted that it is not clear how Kiptoo obtained an allotment yet he was not in the hand-written or typed registers, and it was missing in the file from the Settlement Fund Trustee. Counsel relied on Munyu Maina vs Hiram Gathiha Maina (2013) eKLR, where it was held that a party needs to establish how a title was acquired to prove it was free from encumbrances.

43. He argued that the first allotment issued to Austin Wawaka must prevail (Gitwany Investments Limited vs Tajmal Limited & 2 Others (2006) eKLR). Counsel added that the Defendant admitted to applying for re-issuance of a title deed at a time when she was not yet appointed an administrator of the estate of Phillip Kiptoo. That in Veronica Njoki Wakagoto (Deceased) (2013) eKLR, the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by law, therefore the title so re-issued on 13th May, 2015 was obtained illegally, un-procedurally and irregularly issued to the Defendant.

44. With regards to the alternative claim for adverse possession, Counsel submitted that Abraham Kiptanui has been in possession of the suit land since 1990. By 2015 when the Defendant trespassed and lay claim to the suit property, he had been there for 27 years and thus the claim for adverse possession succeeds. He relied on Mtana Lewa vs Kahindi Ngala Mwagandi (2015) eKLR. In addition, Counsel submitted that the Defendant, and without permission or legal right, invaded the land in 2015, destroyed houses and fenced the land. That to this end, the Defendant trespassed upon the suit land and the Plaintiffs are entitled to damages for trespass.

Defendant's Submissions;

45. The Defendant filed submissions in reply on 29th March, 2024. In those submissions, Counsel started by arguing that the suit was instituted in 2016 against the Defendant who by then had not obtained a grant of Letters of Administration with respect to the Estate of Phillip Kiptoo the registered owner. That pursuant to Section 45 of the *law of Succession Act* the Defendant therefore had no locus standi. Reliance was placed on Daniel Njuguna Mbugua vs Peter Kiarie Njuguna (2021) eKLR, Julian Adoyo Ongunga vs Francis Kiberenge Abano, Migori Civil Appeal No. 119 of 2015 and Veronica Njoki Wakagoto (Deceased) (2013) eKLR. Counsel submitted that as a consequence, the suit is null and void and ought to be dismissed.

46. On adverse possession, Counsel submitted that Section 38 of the Limitations of Actions Act as read with Order 37 Rule (71) requires a claim for adverse possession to be brought in the form of an Originating Summons. He cited Kanda vs Kanda (2008)1 EA where the court held that this is a mandatory provision thus a breach thereof means the claim cannot succeed. Counsel argued that as a result of this breach of procedure, the suit herein must fail. In addition, Counsel opined that from the evidence, the Defendant re-entered the land in 2015 after Kiptanui had possessed it for only 8 years thus his claim on adverse possession was without basis. Further, that Kptanui regained entry into the land upon filing of this suit and using the injunctive orders obtained herein to evict her. Counsel submitted that the ingredients of adverse possession were never met and asked that the suit be struck out. He relied on the Mtana Lewa Case (Supra) and Kweyu vs Omutut (1990) KLR 709.

47. With regards to the claim for trespass, quoting Section 26 of the *Land Registration Act*, Counsel submitted that it was totally unfounded because the Defendant is the legal wife to the late Phillip Kiptoo the registered owner of the suit property. Counsel urged that the court dismiss this suit for being incurably hopeless.

Analysis and Determination

48. I have carefully considered the pleadings, the testimonies of the witnesses called herein and their respective exhibits as well as the rival submissions filed and it is this court's considered view that the following issues arise for determination: -

    i. Whether an allotment letter can pass good title?

    ii. Whether the claim for adverse possession has been proved?

    iii. Whether a claim for adverse possession brought by way of Plaint is defective?

    iv. Whether there was trespass by the Defendants and if an Order of Permanent Injunction should Issue

Whether an allotment letter can pass good title?

49. The Plaintiffs base the claim by the late Abraham Kiptanui on an alleged purchase of the suit property from one Austine Mghendi Wawaka, who sold as an allottee of the property. The only document Kiptanui had as proof of ownership is an alleged letter of allotment, which document or even a copy thereof was never adduced in court. Although the practice is common, it trite that a letter of allotment is not a document that can confer title or ownership of or interest in land to another. The Allottee only becomes entitled to the land once the letter of allotment is perfected by fulfilling the conditions attached to the allotment, and the allottee legally registered as the owner of the land. There are many authorities from our courts on this issue, one such case is that of Lilian Wanjeri Njatha vs Sabina Wanjiru Kuguru & another [2022] eKLR, where it was held that:

> " 52. It is trite that a letter of allotment is not capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. This was affirmed by the Court of Appeal in Joseph N.K. Arap Ng'ok vs Moijo Ole Keiwua & 4 others [1997] eKLR
>
> > "It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of

title document pursuant to provisions in the Act under which the property is held."

53. In the absence of any evidence confirming that all the conditions in the letter of allotment were met, the allotment letter produced by the Plaintiff remains an intention on the part of the City Commission, which the commission could rescind."

50. The Kenyan Supreme Court has recently also lent its voice to this issue. See Torino Enterprises Limited vs Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where it was held that:-

" 58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others CA 60/1997 [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

"It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all' [Emphasis added]."

51. In as much as the Plaintiffs' Advocate sought to distinguish the above case and argue that it does not apply herein, I respectfully disagree. The facts of this case might be different from the Torino Case (Supra), but it remains clear that in both cases, a party claimed to have purchased interest in land through a letter of allotment. For that reason, that authority perfectly applies in this case. The court went further to explain that:-

" 60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In Peter Wariire Kanyiri vs Chrispus Washumbe & 2 others, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:

"[15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [Emphasis added].

61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the

allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed."

52. Further, if it is to be believed that the suit property was indeed first allotted to Austin Mghendi Wawaka in the year 1990, it begs the question why neither the alleged original allottee nor the late Abraham Kiptanui never followed up on being issued with a title. There is a difference of 4 years from 1990 to 1994 when title was first issued to Kiptoo. The letter dated 21st July, 1990 is not an Agreement for Sale, it was just a notification of the purported sale. Neither the late Abraham Kiptanui nor his wife followed up on whether the transfer of the alleged "interest" was done as per Austin Wawaka's request in the said letter. Abraham Kiptanui then went to sleep and it appears nothing else was done until 12th April, 2015 when Austin Mghendi Wawaka's brother Philemon Mwaisaka wrote to the Provincial Director of Land and Settlement, Rift Valley, asking him to assist Kiptanui to obtain ownership documents. A copy of this letter that was copied to the Late Abraham Kiptanui is what was produced in this court. Again, there was no further follow-up and neither is there any indication that the same was received by the intended office, Mr. Mwaisaka testified that he never received a response to his letter.

53. In contrast, in Phillip Kiptoo's instance, this court has seen a letter from the then Provincial Commissioner, I.K.J. Chelang'a, allocating him the suit property herein. The Settlement Officer PW5 testified that the procedure at the time was that letters of allotment emanated from the provincial administration. Therefore, the settlement office did not perceive this as odd. DW4, William Kimatui Murgor, testified that he was a scheme committee member of Kipkabus Settlement Scheme. He stated that he was the one who showed people their land after the scheme started in the 80's and that he was the one who showed Kiptoo the suit property after it was allotted to him. He is currently the area chief where the property is situated, and as a government official on the ground, his words carry weight and the court presumes that he is aware what is going on in his locality.

54. As much as the Plaintiff's Advocate belaboured the lack of the allotment letter to Phillip Kiptoo in the settlement file, it must be noted that there was none in favour of Austin Mghendi Wawaka as well in that same file. In fact, as already pointed out, none was produced in court, not even a copy, to show that the land was indeed allotted to him. Not even the Letter by Austine Wawaka dated 21st July, 1990 or the one by Philemon Mwaisaka of 12th April, 2015 make reference to it or forwarded a copy of the same. The transfer to Austine Wawaka, as seen by this court, was only signed by the SFT whereas the alleged allottee never signed it and it is no wonder the same was not registered. This court is further guided by the case of Peter Wariire Kanyiri vs Chrispus Washumbe & 2 others [2022] eKLR which was cited by the Supreme Court in the Torino Case (Supra), where the court explained itself as follows:-

> "[15]. In the case at hand, in the absence of any title registered in the name of the Plaintiff, the Court is unable to hold that the Plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences. The transfer form relied upon by the Plaintiff, in the absence of registration is incapable of conferring any interest in the land. The truth of the matter is that the Plaintiff had no interest to convey to the Defendants in 2000 by way of lease nor in 2006 by way of a sale. It is also true that the Plaintiff neither acquired any interest estate or right

in the suit land in 2012 by way of the unregistered draft transfer form from Benson Njuguna Nganga. [16]. In the absence of any demonstrable right or interest in the suit land by the Plaintiff, there is no cause of action to warrant enforcement by this Court against the Defendants."

55. On the other hand, the Transfer to Phillip Kiptoo dated 21st January, 1994 is properly executed by both the SFT and the allottee. It is from this transfer that the title deed to the late Phillip Kiptoo emanated. Article 40 of *the Constitution* of Kenya 2010 as well as Section 24, 25 and 26 of the *Land Registration Act* offers protection to property that is registered. Since no registration ever came from the purported letter of allotment relied by the Plaintiffs, Abraham Kiptanui was not registered as proprietor under any Act. His purported interests do not therefore qualify for protection either under constitution or the Act. To this end, the title held by the Defendant's husband, Phillip Kiptoo, over the suit property is superior to any claim by the late Kiptanui or anyone claiming under him. The fact that the new title was re-issued to the Defendant before she obtained a Grant of Letters of Administration for her husband's estate cannot nullify the initial title earlier issued to the late Phillip Kiptoo. If anything, the dealings with that property without a grant is a matter for the Family Division of the High Court, for which this court has no jurisdiction.

56. The outcome is that a letter of allotment is an intention on the part of the Settlement Office and not proof of ownership. A letter of allotment cannot therefore pass any title. The purported sale, if any, to the late Abraham Kiptanui is thus void.

Whether a claim for adverse possession brought by way of Plaint is defective?

57. The Defendant submitted that the suit was defective because the claim for adverse possession was raised through a Plaint. Before proceeding to deliberate on this issue, I must point out that the claim was raised 7 years ago through the Amended Plaint dated 12th April, 2017. The objection as to form has never been raised until this final stage through submissions. Be that as it may, this issue seems to arise from Order 37 Rule 7 of the Civil Procedure Rules, 2010 which provides that:-

> "7. Adverse possession [Order 37, rule 7]
>
> (1) An application under section 38 of the *Limitation of Actions Act* (Cap. 22) shall be made by originating summons.
>
> (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
>
> (3) The court shall direct on whom and in what manner the summons shall be served."

58. The argument is that the provision is couched in mandatory terms, and that the consequence of failure to comply with this provision is that the suit is rendered defective. Initially, this was the case, however, necessitated by the need to do substantive justice to the parties the jurisprudence in this area of law has changed. Backed by the oxygen principles enshrined in our Constitution and the *Civil Procedure Act* itself, courts have held otherwise with regards to the strict application of this procedural requirement. In Gulam Miriam Noordin vs Julius Charo Karisa [2015] eKLR, the Court of Appeal made the following finding:-

> "This brings us to the question whether the learned Judge fell in error by declaring that the appellant was barred by statute of limitation to evict the respondent on the basis of a plea

raised in the defence. The appellant contended that for the court to find for the respondent the claim ought to have been brought by way of originating summons. That contention is based on the provisions of Order 37 rule 7 of the Civil Procedure Rules. It has been held that although that is the procedural requirement, a party is not precluded from articulating his claim by way of a plaint. See Mariba vs Mariba Civil Appeal No. 188 of 2002. In Njuguna Ndatho vs Masai Itumo & 2 others Civil Appeal No.231 of 1999, this Court held that the respondent's counter-claim for adverse possession was misconceived because it ought to have been brought by originating summons... That position is no longer tenable. Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala vs Okumu [1997] LLR 609 (CAK), which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd vs Kosgey [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted."

59. To lend credence to this argument, it is clear that this suit as was initially instituted did not include a claim for adverse possession but relied heavily on trespass. The claim, as earlier indicated was raised through the amendment of 12th April, 2017. It is safe to presume that the amendment became necessary after the Defendant filed her Defence and it became clear that she had a title deed courtesy of her late husband, a fact that may not have been in Kiptanui's knowledge at the time of instituting the suit. Filing another suit to deal with the same subject matter between the same parties would only have resulted in a waste of the court's valuable time whereas the matter can be determined together with the matters raised in the suit as originally filed.

60. Guided by the Gulam Mariam Noordin Case (Supra) among others, the Court of Appeal in Malindi in its decision in the case of Chevron (k) Limited vs Harrison Charo Washulu 2016 eKLR held that a claim by adverse possession can be brought by a plaint. From the foregoing, the suit herein is not rendered defective by virtue of the fact that the claim on adverse possession was brought by way of plaint.

Whether the claim for adverse possession has been proved?

61. The Court of Appeal held in Teresa Wachuka Gachira vs Joseph Mwangi Gachira [2009] eKLR that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove they are entitled to it. This is why the court now turns to determine whether the Plaintiffs have shown that they are entitled to the suit property as claimed. The doctrine of adverse possession is provided for by statute in this country and it is ordinarily pleaded under Section 7 of the *Limitation of Actions Act*, Cap 22, which provides:

> " 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 its first accrued to some person through whom he claims, to that person."

62. In Kimani Ruchine vs Swift, Rutherford & Co. Ltd [1980] KLR 10, it was held that in a claim for adverse possession:

> " The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous.

63. More recently, in Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR, the Court of Appeal held:-

> " Adverse possession is essentially a situation where a person takes possession of land and asserts 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, is twelve (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."

64. In the instant suit, Kiptanui claimed to have been on the land through his mother and employees since 1990. Two of the witnesses who testified, Joseph Birgen and John Bongen, claimed that they were on the suit property by virtue of the fact that they were employees of Kiptanui. The Defendant does not deny that the late Abraham Kiptanui possessed the land for a certain period, however she denies that he was on the land for 12 years. This admission resolves the issue of openness of possession. What is in dispute therefore is the period of occupation and this court needs to determine whether the statutory time limit has been met.

65. On the one hand, the Plaintiffs' claim is that they have been in occupation since 1990. Joseph Birgen testified that he was transferred to work on the suit property in the year 1991, whereas John Bongen claimed he took over in the year 2003. He also testified that this is the last time he saw the Defendant prior to 2015, but did not say where or in what circumstances. The Defendant on the other hand claims she and her husband were in possession of the suit property until his death in 2007 when the Plaintiff came to her and informed her he had purchased the property. She was not shown any agreement but believed him because of his position in society and the friendship he had with her late husband. She however vacated the property and surrendered it to him.

66. In tracing the timeline of Phillip Kiptoo's entry into and possession of the suit property, we start with DW4 William Kimatui Murgor, who is the area chief and was also a member of the Committee of Kipkabus Settlement Scheme. He testified that he was the one showing people their parcels when the scheme was opened and that Phillip Kiptoo first went to the Chief's Office in 1990. That he then visited DW4 in 1994/1995 and DW4 showed Kiptoo the suit property and he testified that there was no one on the land when he showed it to him then. He further testified that Phillip Kiptoo took possession of the property immediately and started farming. He also informed this court that whenever he used to patrol the area, he would see Phillip Kiptoo's workers on the land, animals and a few structures and that Phillip Kiptoo was in possession of the suit property until his demise in 2007. He denied knowledge that Abraham Kiptanui occupied the land since 1989.

67. DW4 confirms the Defendant's return to the land in the year 2015 and the dispute he settled between her and Abraham Kiptanui's employees. He confirms that the said employee's left and the Defendant went into the land and started farming again, thereby re-asserting ownership and possession. DW4's testimony carries weight not only as a government official on the ground currently, but also a member

of the scheme that was responsible for pointing out parcels to the owners. He confirms there was no one on the land when he showed it to Kiptoo in 1994/1995.

68. DW3 is the Defendant, who testifies that together with her husband they occupied and used the suit property until 2007 when the she surrendered it to Abraham Kiptanui on the allegation of a purchase. Then there is DW5, Emmanuel Kiptoo, who is Phillip Kiptoo's son. He testified that as late as 2002 as an 11 year old boy, he remembers visiting the suit property with his deceased father during his lifetime. He knew then that the land belonged to them and it was not occupied by the Plaintiff. His testimony is proof by the year 2002, the late Phillip Kiptoo was still occupying the suit property.

69. I then turn to DW1, Hon. Justice Francis Tuiyot, who at the time acted as the advocate for Phillip Kiptoo and Abraham Kiptanui. DW1 testified that as recently as 2007 and a few weeks before his demise, Phillip Kiptoo went to see him regarding the verbal agreement to exchange the suit property with Abraham Kiptanui. DW1 confirmed to him that Abraham Kiptanui had not yet delivered the title for the land that he intended to swap with the suit property. Phillip Kiptoo died before this proposed swap and since it did not happen at the time, the land remained to be Phillip Kiptoo's property. DW1 further testified that he had no knowledge of Kiptanui taking over the property and that in fact, the first time he heard of Kiptanui taking possession of the property was after Kiptoo's demise, which was in 2007.

70. The evidence outlined above casts probable doubt on the testimony of the Plaintiffs and their witnesses. From the Chief's confirmation that there was no one on the land between the years 1990 and 1995 or thereabouts, to the testimony that Kiptoo was still farming the land in in the years 2002 and 2003. All the way to 2007 when the Parties' Advocate testified that Phillip Kiptoo was following up on the proposed swap as the land was still in his possession. This court can thus safely presume that the family of Phillip Kiptoo was in possession of the suit property until his demise in the year 2007. That being the case, as at 2015 when the Defendant took back possession of the land, Abraham Kiptanui had only been in possession for 8 years. Even if we were to count the term up to 12th April, 2017 when the claim for adverse possession was raised, that only comes to 10 years of possession.

71. In addition, the evidence also begs the question as to whether the Plaintiff's occupation was indeed adverse to the registered owner seeing as the land was handed over to the late Abraham Kipatanui in the belief that he was the owner by virtue of the alleged purchase. It also casts a cloud on the Plaintiffs' claim because the element of knowledge in adverse possession claims requires that the registered owner is aware of the adverse nature of the Claimants occupation of their land. In this instance, the Defendant only knew that the late Abraham Kiptanui was a purchaser and not an adverse possessor. Moreover, it is clear that his entry into the land was allowed by the family of the late Phillip Kiptoo on the assumption, now debunked, that he had purchased the property. It is trite that adverse possession cannot be by permission of the owner. In the case of Samuel Miki Waweru vs Jane Njeru Richu (2007) eKLR, the Court of Appeal delivered the following dictum:

> "It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in Jandu vs. Kilpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given."

72. In Wambugu vs Njuguna (1983) KLR 172 the Court held inter alia that possession becomes adverse and time begins to run at the time the license is determined. In the instant suit, permission was withdrawn in the year 2015 when the widow of the late Phillip Kiptoo returned to the suit property and laid claim to it. She did in fact manage to remove Abraham Kiptanui's people from the property.

73. There are other facts that this court has considered such as the averment in the Further Amended Plaint that after John Bongen was invited on the land, other people also joined him to stay on the land. These are the people to whom the Notice to Vacate was addressed to. Their names are Daniel Kiplimo, Edna Chelelgo and Pius Kosgei. The 1st Plaintiff in her witness statement also reiterated that over the years there have been other named individuals who came to stay on the land. There was no explanation given as to how or why these individuals gained entry into the land, which can only show that the late Abraham Kiptanui did not have full control of the suit property.

74. That aside, John Bongen alluded to semi-permanent houses as well as a fish farming among other things that are supposed to be on the land. However, from the photos annexed herein by both parties, there were no photos of a pond. In fact, apart from temporary structures, this court has not seen any evidence of long-term occupation of the land by the Plaintiffs. I note that DW3 admitted that when her husband and his uncle, one Sammy Barsulai, visited the suit property they found an old lady who was herding sheep. There is no concrete evidence that this was the late Abraham Kiptanui's mother, thus it cannot be used as proof of occupation.

75. All these considerations can only lead to one conclusion, that the claim for adverse possession and the vesting order as prayed is premature. For that reason, the claim must fail.

Whether there was trespass by the Defendants and if an Order of Permanent Injunction should Issue;

76. The Plaintiffs seek both a permanent, mandatory and prohibitory injunction restraining the Defendant from encroaching and/or trespassing into the suit property as well as general damages for trespass. In this instance, to prove that they are entitled to the injunctions, first they have to prove ownership so that they can show that the Defendant indeed trespassed onto their land. It goes without saying that trespass, in law, is the unauthorized entry upon another's land. Trespass is defined under Section 3(1) of the *Trespass Act* in the following words:-

> " 3. Trespass upon private land
>
> (1) Any person who without reasonable excuse enters, in or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

77. One can only claim trespass if they are the legal or beneficial owner of the property or can claim it by some colour of right. The Plaintiffs have failed to prove ownership of the suit property. Since the land belongs to Phillip Kiptoo, the beneficial owners thereto are his wife, the Defendant and her family. The Defendant has proved that Kiptanui entered the suit property unlawfully and ejected her therefrom. The Plaintiffs having unlawfully entered the suit property without the permission of the Defendant are trespassers on the suit property. Needless to say that the Plaintiffs are thus not entitled to the injunctions sought or the claim for general damages for trespass.

78. The Defendant filed a counter-claim on 8.12.2016 on the basis that she was the administrator of the estate of her husband Philip Kiptoo. The Plaintiff filed a defence to the counter-claim in which he averred that the counter-claim was incompetent as the Defendant had not obtained a grant in respect of her husband's estate.

79. When the Defendant filed her amended defence on 22.9.2017, she dropped her counter-claim and I think rightly so because as at the time she filed the counter-claim, she had not obtained grant of letters of administration in respect of her husband's estate. There was no evidence led on the counter-claim.

There were even no submissions made on the same as it had been dropped. This being the case, there can be no finding made on it.

Disposition

80. From the above analysis, neither the plaintiffs' main claim nor the alternative claim of adverse possession can succeed. The Plaintiffs' claim is dismissed with costs to the Defendant.

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;

Mr. Nyongesa for Mr. Mayende for Plaintiffs.

Mr. Kiptoo and Mr. Lilan for Defendant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

16TH MAY, 2024