



**Kiplagat v Krelkut (Miscellaneous Application 330 of 2017)
[2024] KEELC 4245 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4245 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS APPLICATION 330 OF 2017**

EO OBAGA, J

MAY 17, 2024

BETWEEN

CATHY ALUCIA JEBOR KIPLAGAT PLAINTIFF

AND

VINCENT KOMEN KRELKUT DEFENDANT

JUDGMENT

Introduction

1. By Originating Summons dated 28th September, 2017 the Plaintiff has sued the Defendant seeking the following orders:
 - a. That the Applicants Cathy Alucia Jebor Kiplagat has obtained title by adverse possession over Five (5) Acres comprised in the suit parcel of land known as L.R. No.Moibeki/Moibeki/Block 1(Moiben)/66 having been in uninterrupted possession and use of the same since February, 2005.
 - b. That the Respondent's title over the aforesaid portion has been extinguished by dint of adverse possession as provided by the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
 - c. That the Applicant is the bonafide purchaser for value of Five (5) Acres comprised in the suit parcel of land known as L.R. No.Moibeki/Moibeki/Block 1(MOIBEN)/66 having purchased the same for value from the Defendant/Respondent in February, 2005.
 - d. That the Five (5) Acres aforesaid belonging to the Applicant be transferred to her forthwith.
 - e. That a vesting order do issue vesting the Five (5) Acres comprised in the suit parcel of land in the Applicant.



- f. That the Defendant/Respondent be ordered to sign the requisite transfer documents in favour of the Applicant for the Five (5) Acres comprised in L.R. No.Moibeki/Moibeki/Block 1(MOIBEN)/66 and/or in the alternative the Deputy Registrar be allowed to sign the said documents on his behalf.
- g. That the Respondents be condemned to pay the costs of the Originating Summons.

Plaintiff's contention;

2. The Originating Summons (O.S.) is anchored on the Supporting Affidavit of even date sworn by the Plaintiff. She deponed that she is the bonafide purchaser for value of Five (5) Acres comprised in L.R. No.Moibeki/Moibeki/Block 1(MOIBEN)/66 (the suit property) having purchased the same from the Defendant vide a mutual oral agreement. She deponed that the Defendant was introduced to her as owner of the suit property by her brother Lazarus Cheptoo. It is her case that the agreed purchase price was KShs. 45,000/- per Acre making a total of KShs. 225,000/- for the entire Five (5) Acres which was paid in cash through her brother. That she has been in possession thereof since February, 2005 with no interruption from him or anyone else.
3. The Plaintiff averred that the Defendant refused to sign the requisite forms to enable her obtain the Land Control Board (LCB) Consent and all efforts through the local administration to compel him to execute them were in vain. She deponed that the Defendant relocated and left the suit property to her in the year 2005 after he was paid without disclosing his new residence and his whereabouts remain unknown. That consequently, the sale agreement became void due to failure to obtain the said consent as stipulated by the law. As a result, the Defendant remains the registered owner of the suit property as no transfer was effected in the Plaintiff's favour. She deponed that the suit property has been her home for more than 12 years and she, together with her family, will be rendered destitute should the Defendant make good his threats of evicting them therefrom and transferring it to a third party.
4. It is the Plaintiff's case that the Defendant's refusal to execute the relevant transfers/completion forms in the Plaintiff's favour have rendered this suit necessary, and further that his whereabouts remain unknown. She urged that the Defendant be compelled to sign the Transfer documents in her favour or in the alternative, that the Deputy Registrar does the same on his behalf. She deponed that the Defendant surrendered the original Title Deed over the suit property to her for purposes of the transfer. That she believed herself to be the legal owner of the suit property having occupied it for more than 16 years, and that she has the legal right to enjoy peaceful and quiet possession thereof. She called on the Court to exercise its unfettered discretion to grant the orders sought, pointing out that the originating summons was brought promptly and in the interest of justice and fairness.

Defendant's Replying Affidavit;

5. The Defendant replied to the originating summons through a Replying Affidavit filed on 18th January, 2021 stating that the Plaintiff has not met the minimum threshold required to deserve being awarded the title by virtue of adverse possession. He deponed that around 2004 - 2005, he sold 23 Acres being the suit land, at KShs. 45,000/- per Acre to Isaac Sugut and Phillip Cheptoo Kendagor, and after signing the Agreement for Sale he assigned the land to Isaac Sugut who had bought 13 Acres. That Phillip had purchased 10 Acres and had made local arrangements to give 5 Acres thereof to the Plaintiff but she defaulted in paying the entire sum for the 5 Acres. He averred that the Plaintiff paid the Defendant KShs. 200,000/- and then alleged that the balance would be paid by Phillip Cheptoo. He averred that the amount paid translates to 4.4 Acres and he authorised them to share the land in the ratio of the consideration paid. That consequently, the Plaintiff moved to the land in 2007.



6. The Defendant deponed that there was never any demarcations on the boundaries until 2018 when the Plaintiff obtained an ex parte judgment and extended her boundaries beyond what she had bought. The Defendant averred that he has never refused to sign completion documents or procure consent of the Land Control Board. That he had in fact handed over copies of the Land Transfer Forms, Original Title Deed, Application for Consent, Passport Photos as well as copies of his PIN and National ID Card to Philip Cheptoo and Isaac Sugut. He indicated that he is aware that the Plaintiff stays on the land as she was there on his express invitation to stay on the 4.4 Acres that was bought for her. That however, the Plaintiff went ahead and obtained ex parte judgment through misrepresentation, particulars of which he set out in the Replying Affidavit. He averred that his consent to the Plaintiff's stay on the land disqualifies her from pursuing a claim in adverse possession as time begins to run after leave or license is determined.
7. In addition, the Defendant averred that he had already sold the land to Phillip Cheptoo and Isaac Sugut prior to institution of this suit. That as the Plaintiff has acknowledged, survey work was done in 2011 meaning that the period of 12 years has not lapsed. That the Plaintiff had another suit pending in the ELC Court against him, which was later withdrawn. He averred that he would suffer loss and damage if the Originating summons is allowed due to the other individuals who purchased the land.

Plaintiff's Further Affidavit

8. On 6th April, 2021 the Plaintiff filed a Further Affidavit in response, where she alleged that the Defendant's Replying Affidavit constituted falsehoods and contradictions and that it ought to be dismissed. She averred that she had satisfied the conditions for adverse possession as her occupation has been actual, open, continuous, exclusive and uninterrupted as well as inconsistent with the interests of the Defendant since February, 2005. She deponed that since the Defendant relocated, he cannot be certain when exactly the Plaintiff took possession or when and where the individuals he sold to sold to other people such as herself. She averred that the Defendant had admitted to selling the land and thus he had no legal claim thereto. She deponed that at Paragraph 6(a) of the Replying Affidavit the Defendant had admitted that she is indeed entitled to Five (5) Acres of the land. Further, that the Defendant is not privy to the local arrangement between her and her brother Philip Cheptoo hence the allegation that she did not pay the full purchase price is premised on hearsay. She added that the said arrangement with Philip Cheptoo, having been entered in the year 2005, had itself become null and void.
9. The Plaintiff asserted that the main factor is not what was paid or not paid but that the Agreement for Sale is null and void by operation of the law and she has been in occupation of the suit property for over 12 years. That the Defendant has not disputed that no consent of the Land Control Board was obtained and that even the sale to the other two purchasers had become null and void by law. She deponed that the demarcation done in 2011 was with the full knowledge of the Defendant and that the plaintiff did not move the boundary as insinuated as the same was identified by the said survey. The Plaintiff averred that she was not party to the transaction between the Defendant, Isaac Sugut and Phillip Cheptoo. She reiterated the Defendant indeed refused to sign the consent form and she sought assistance from the local administration in vain. She thus denied the alleged misrepresentation and the particulars thereof as set out by the Defendant in his reply.
10. The Plaintiff went on to depone that the Defendant never gave her permission to occupy the suit property, but that aside, he was aware of her occupation thereof and did nothing to evict her. That in any event, since the Defendant had already sold the suit property she did not need his consent to reside on the land. She indicated that her brother has been in occupation of the portion he purchased whereas she has also taken possession of and has utilised her portion since February, 2005. She denied that her said occupation was with the leave or license of the Defendant, and deponed that the fact that the survey



was done in 2011 does not mean that she was not in occupation, since the same was only to confirm the boundaries for the persons in occupation like herself. The Plaintiff was of the view that the initial suit against the Defendant was not a question before this court and the same should be disregarded. She also denied that allowing the originating summons would cause prejudice to the Defendant as the other purchasers' portions have clearly been identified on the ground as confirmed by the mutation map. She urged that the Replying Affidavit consists of mere denials and should be disregarded.

Hearing and Evidence:

The Plaintiff's Case;

11. Hearing of the suit was on 14th November, 2022 when the Plaintiff, having been sworn, testified as PW1 and adopted her witness statement dated 28th September, 2017 as part of her evidence-in-chief. She testified that the Defendant sold them land now known as L.R. No. MOIBEKI/ MOIBEKI/ BLOCK 1(MOIBEN)/71. She testified that she bought the land together with her two brothers. PW1 explained that the land was going for KShs. 45,000/- per Acre and she bought 5 Acres for a total of KShs. 225,000/-. She testified that she has 3 deposit slips to show for this; one dated 28th February, 2005 for KShs. 50,000/-, another dated 1st March, 2005 for KShs. 100,000/- and the third dated 4th August, 2005 for KShs. 50,000/- and she produced them as PEX1(a), (b) and (c) respectively.
12. PW1 went on to state that she gave her brother Philip Cheptoo the remaining KShs. 25,000/- to deposit in the Defendant's Account. That they agreed to have the Agreement drawn in Philip Cheptoo's name and the Plaintiff would get 5 Acres, Philip 5 Acres and Gilbert 3 Acres. PW1 testified that the deposits were made at Standard Chartered Bank. That she took possession of her 5 Acres in 2005 when the Defendant refused to give her Title. PW1 testified that she sought the intervention of the Assistant Chief who issued summons to Isaac and Philip which she produced as PEX2(a) and (b) because they are the ones who had been given the title for purposes of subdivision. PW1 stated that she had signed an Application for Land Control Board Consent and that the Defendant did not sign. This Application was produced as PEX3. PW1 added that the Defendant signed the Mutation form, which she produced as PEX4 alongside a Certificate of Official Search produced as PEX5. PW1 asked the court to allow her claim.
13. On Cross-examination by Ms. Bosibori, PW1 testified that she has been in occupation of the suit property, and that she works at Iten but goes to the property on weekends. PW1 testified that she has never physically met the Defendant and was not present when the sale agreement was made having entrusted her brother to purchase it on their behalf. PW1 testified that the suit property was going for KShs. 225,000/- and she was shown the suit property by her brother, even though she had not completed payment at the time she was shown. PW1 testified that she had signed an application for consent of the Land Control Board dated 28th February, 2005. She admitted that she did not know the concept of adverse possession. PW1 further testified that she gave money to her brother to deposit in the Defendant's account and denied the claim that her brother did not deposit the cash even though by her words, her brother did not give her a receipt for the said amount. She testified that she now has a title for the 5 Acres she purchased. That she constructed her house in 2005 and it is not true that she instituted the suit 6 years after she had taken possession of the suit property.
14. Upon being re-examined, PW1 testified that she cleared payment in 2005 and fenced the property, and the Defendant has never asked her to move out of the suit property. She testified that she sells bananas in Iten but goes back to Moiben. She testified that Philip and Isaac were summoned by the village elder. She further testified that the Surveyor's report was done accurately and that she would not have been given title if she had not paid the full purchase price.



15. The Plaintiff then called PW2, Lazarus Kipkoech, who also testified under oath and adopted his witness statement of 28th September, 2017 as part of his evidence. He testified that he does not know the Defendant but knows his brother called Kamitot who told him the Defendant was selling 23 Acres. PW2 stated that he then told his sister who said she could only afford 5 Acres, so he spoke to his brothers Gilbert and Philip who agreed to buy 3 Acres and 5 Acres respectively. PW2 testified that his sister gave him KShs. 100,000/- which he deposited in the Defendant's Account, and later he also paid KShs. 50,000/-. PW2 testified that his brother Philip paid KShs. 75,000/- to the Defendant pursuant to which the Plaintiff took possession of the land in 2005. It is his testimony that the Defendant has never tried to evict the Plaintiff from her 5 Acres.
16. On cross-examination, he testified that he does not have a good relationship with his brother Philip now, but he is the one who introduced his brother and sister to the Defendant. PW2 confirmed that he was the one who paid part of the purchase price on behalf of his sister. He denied conspiring with the Plaintiff to bring this suit. PW2 testified that he was not a witness to the agreement between the Defendant and Philip, but that his relationship with Philip was good during the purchase of the land. PW2 testified that his sister took possession of the land in 2005. He testified that it is not the Defendant who showed the Plaintiff the land. He also denied the allegation that his sister does not stay on the land.
17. Ms. Isiaho re-examined the witness and he testified that he deposited KShs. 100,000/- on 1st March, 2005 and KShs. 50,000/- on 4th August, 2005 which amounts came from the plaintiff, while the rest of the purchase price was paid by Philip Cheptoo. PW2 testified that Mr. Kamitot never told him that his brother was claiming any money from his sister.

The Defendant's Case;

18. On the same day, the Plaintiff closed her case and the Defendant opened his, testifying under oath as DW1 and opted to rely on his Replying Affidavit as his evidence-in-chief. He testified that he is a retired civil servant who now resides in Kilifi Town. He produced the sale agreement between him and Philip Cheptoo as DEX1 and the one with Isaac Rugut as DEX2. DW1 also produced a bundle of cash deposit slips as DEX3, a bundle of completion documents as DEX4 and the Replying Affidavit dated 28th January, 2020 as DEX5. He then informed this court that he never sold land to the Plaintiff, he only sold to Philip and Isaac.
19. When cross-examined, DW1 testified that he sold his entire land to Isaac and Philip and has never gone back to the land he sold. He admitted that he never attended the Land Control Board. He testified that he is not aware that Isaac and Philip sold land to any other person. DW1 testified that he has never filed any case against the Plaintiff and did not know if she was Philip Kiptoo's sister. He also testified that he was not aware that the Plaintiff paid KShs. 200,000/- to his bank account as he only received money from Philip and Isaac. DW1 denied knowledge of the Plaintiff's stay on the suit property since 2005. He testified that he is not owed any money from Philip or Isaac and that he has never done a search on the suit property. DW1 informed the court that he had an account at Standard Chartered Bank. He testified that he has no agreement with the Plaintiff and cannot know if the money which he received came from her. DW1 denied allowing the Plaintiff to occupy the 4.4 Acres which was bought for her. DW1 was not re-examined and this marked the close of the Defendant's case. The parties were directed to file written submissions.

Submissions:

20. In the Plaintiff's Submissions dated 19th February, 2024 it was argued that no evidence had been adduced to challenge the Plaintiff's testimony that she had been in possession of 5 Acres of the land



from 2005. For this reason, Counsel for the Plaintiff submitted that the question whether the Plaintiff had been in peaceful, open, uninterrupted possession and use of the suit property is answered in the affirmative. Counsel also submitted that even in the absence of an agreement for sale, the deposit slips produced are evidence that payments were made into the Defendant's account from February, 2005 towards the agreed consideration. He then submitted that contracts are voluntary arrangements enforceable by law. However, under Section 4 of the Limitation of Actions Act, the contract herein having been made in the year 2005, had lapsed as at February, 2005 by operation of law.

21. On adverse possession, Counsel submitted that the Plaintiff had been in occupation, possession and/or use of the suit parcel of land for a period of 12 years seven months as at the time of the institution of this suit. That this confirms her legal title as envisaged under Section 7 of Cap 22, which embodies the doctrine of adverse possession. Counsel submitted that the doctrine of adverse possession allows a person to acquire land in accordance with the law, and Article 64 of the Constitution defines private land to include land acquired by adverse possession. Further, that Section 7(i) of the Land Act and Section 28 of the Land Registration Act recognise that land may be acquired through any manner prescribed by law. Consequently, that a person such as the Plaintiff, who acquires land under adverse possession is entitled to equal protection of the law over land so acquired.

Defendant's Submissions;

22. The Defendant's Submissions are dated 5th April, 2024. Counsel submitted that the Plaintiff had herself averred that she was on the land by consent of the current and previous registered owner. He submitted that the Plaintiff cannot sustain a claim for adverse possession due the fact that the Plaintiff's stay on the land was consented to. He submitted that where such consent is terminated, and the person does not leave but instead continues their stay on the land and the owner takes not steps to evict them for 12 years, then in that case the claimant would be entitled to claim adverse possession. Counsel submitted that time in this case started running in favour of the Plaintiff on 29th September, 2017 when the suit was filed, thus the claim is premature. He relied on *Wilson Kazungu Katana & 101 Others vs Salim Abdalla Bakshwein & Another* (2015) eKLR and *John Ndungu Kipsoi vs Samuel Chepkulu & Another* (2018) eKLR.
23. The rest of the Defendant's submissions seemed to be talking about a 2nd Respondent, an injunction and loans, matters that never arose in this suit and the court is convinced they were not in respect of the instant case.

Analysis and Determination:

24. Having considered the Originating Summons herein and Affidavits filed in support, the Affidavit in Reply, the witness testimonies and evidence adduced as well as the rival submissions of counsel and authorities relied on, I find that the following issues lend themselves for determination by this court:-
 - a. Whether there was a valid sale agreement with respect to the suit property
 - b. Whether the Plaintiff is entitled to her 5-Acre Portion under the doctrine of adverse possession
 - c. Who should bear the costs of the suit?
25. A brief background of this matter is necessary to put things into perspective. The suit was commenced by originating summons dated 28th September, 2017. Service was effected on the Defendant and he failed to enter appearance and defend the claim, thus the court proceeded to enter judgement in favour of the Plaintiff on 12th July, 2018. Consequently, the Plaintiff went ahead to have the land surveyed and excised her portion therefrom. Vide a Notice of Motion dated 19th October, 2018 she sought and obtained orders to have the Deputy Registrar execute all completion documents on behalf of the



Defendant. This was done and she was issued with a title deed for her portion, which is now known as MOIBEKI/MOIBEKI BLOCK 1(MOIBEN)/71 in her name on 25th March, 2019.

a. Whether there was a valid sale agreement with respect to the suit property

26. From June, 2003 the amendment to Section 3(3) of the [Law of Contract Act](#) came into force. The new law provided that:-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless:

(a) the contract upon which the suit is founded:-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

27. Under this issue, the court is to determine whether there was a valid and enforceable contract for sale of land with respect to the suit property. Both the parties are in agreement that the Defendant sold all his interest in L.R. No.Moibeki/Moibeki/Block 1(MOIBEN)/66 to Philip Cheptoo and Isaac Sugut as evidenced by the two Agreements for Sale produced as DEX 1 and 2 respectively. The Plaintiff however purports to have entered a separate arrangement with her brother Philip Cheptoo for the purchase of 5 Acres of the said property. The Plaintiff purports that they entered into an oral agreement that she was to pay for the said portion at the rate of KShs. 45,000/- per Acre bringing a total of KShs. 225,000/- for the 5 Acres. There is no record of any such sale as between the Plaintiff and the Defendant who was then registered as owner of the suit property. From the evidence that was presented in this court, there is no written, signed/executed and attested agreement between the Plaintiff and the Defendant or between her and her said brother relating to the suit property, none whatsoever.

28. The Defendant denied receiving money from the Plaintiff for purchase of the property, and further testified that he did not sell any land to the Plaintiff. The Plaintiff produced 3 cash deposit slips (PEX1(a), (b) and (c) purported to be for payment of the purchase price for the suit property at the bank, and although they indicate that the money was being paid to the Defendant, none of them identified or made reference to L.R. No.Moibeki/Moibeki/Block 1(MOIBEN)/ 66. In addition, none of them made any reference to any specific acreage of the property that was being sold.

29. The totality of the evidence on record is that there is no valid contract for disposition of an interest in land in favour of the Plaintiff herein as required under Section 3(3) of the [Law of Contract Act](#). In the absence of a valid contract, the issue of Land Control Board Consent does not arise, and neither can an invalid contract become null and void under Section 4 of the [Limitation of Actions Act](#) as it does not exist in the first place.



b. Whether the Plaintiff is entitled to her 5-Acre Portion under the doctrine of adverse possession

30. The Black's Law Dictionary, 11th Edition defines the term "adverse possession" thus:

- “ 1. The enjoyment of real property with a claim of right when the enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.
2. The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specific period of time.”

31. The definition of adverse possession has been given in numerous cases. One such definition was given by the court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where Makhandia, JA stated as follows:

“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 of stealth nor 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.”

32. In Kenya, a claim for adverse possession is founded under the *Limitation of Actions Act*, Cap. 22 Laws of Kenya, which at Section 7 and Section 13. The procedure for claiming land by adverse possession is given under Section 38 of the Act, which allows a claimant to apply to Court for orders that they have become entitled to the land by adverse possession. provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

33. The ingredients required to prove the doctrine of adverse possession have also been repeated in many cases, but this court will find guidance in the *Celina Muthoni Kithinji vs Safiya Bwinti Swaleh & 8 Others* [2018] eKLR, where the Court stated:-

- “ 12. It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was nec vi, nec clam, nec precario” that it peaceful open and continuous. The possession should not have been through force nor in secrecy and without the authority of or permission of the owner.
13. This being a claim for adverse possession the plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.”



34. See also the case of *Moraa Ndege vs Moenga Moenga* [2015] eKLR, where the Court of Appeal relied on the case of *Kimani Ruchire & Another vs swift Rutherfords Co. Ltd* [1980] KLR 10 in which Kneller J (as he then was) observed thus:-

“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 persuasion) 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. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration...”

35. Having considered the above authorities as well as numerous others, what is clear is that the ingredients for adverse possession have been settled as follows;

- i. One must have been in continuous and uninterrupted possession of the land for at least 12 years
- ii. Such possession has been open and notorious to the knowledge of the owner
- iii. Such possession is without the permission of the owner; and
- iv. That the plaintiff has asserted a hostile title to the owner of the property.

36. Concerning the period of possession, the Plaintiff claims that she went into the land in February, 2005. This claim is supported by PW2, her brother, who also testified that the Plaintiff took possession of the land in 2005. The Defendant on the other hand claims that to his knowledge the Plaintiff entered the land in 2007. The Defendant at paragraph 6(a) of his Replying Affidavit to the originating summons deponed that he sold the land around 2004-2005. The Agreement for Sale between the Defendant and Philip Cheptoo provided that the Purchase Price was to be paid in two instalments. The first instalment of KShs. 400,000/- was paid on 21st February, 2005 and the Defendant acknowledged receipt thereof at Clause 3(a) of the Agreement for Sale. The second instalment was to be paid on 30th June, 2005. DEX3 is a bundle of Cash Deposit Slips all dated various months in the year 2005.

37. In addition, in his oral testimony, the Defendant testified that there is no money owing to him from Philip Cheptoo and Isaac Sugut to whom he had sold the land. This coupled with the fact that there has been no allegation of default or delay in the payment of the purchase price leads me to believe that both Isaac Sugut and Philip Cheptoo paid the entire purchase price within the year 2005. In *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, the court explained that:-

“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by instalments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in *Wanyoike v Kahiri* [1979] Kenya L R 236 at 239; also see among others, *Simpson J* (as he then was), in *Hosea v Njiru and others* [1974] E A 526 at 529, 530).”

38. Both Agreements for Sale at Clause 7 provide that “quiet, peaceful, vacant, uninterrupted and actual possession” of the land would pass to the purchasers on the signing thereof. The land was fully paid for in 2005 and the Defendant gave the land as well as the original title deed and other completion documents to the purchasers Philip Cheptoo and Isaac Sugut as per their Agreements for Sale. The



Defendant testified that he has never gone back to the land since he sold it. Their possession of the suit property became adverse to that of the Defendant in the year 2005. The Court of Appeal has had various opportunities to deliberate the issue of adverse possession arising from a sale agreement. One such case is *Wambugu vs Njuguna* (1983) KLR 173 where the court held inter alia that:-

“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 instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

39. That being the case, the interests of the Philip Cheptoo and Isaac Sugut became adverse to the Defendant’s interests from the year 2005. As a result, the Plaintiff is allowed to also start counting her period of possession from the time Philip Cheptoo took possession of the suit property, which is the year 2005 in what is referred to as tacking. Tacking is a process where an individual is in adverse possession of real property and adds to their period of possession the period of an adverse possessor who was on the land before them. The case of *Gabriel Mbui v Mukindia Maranya* (supra) explained the principle of tacking as follows:

“One interesting question within the subject of continuity is tacking, that is to say, the adding together of periods of possession that are continuous but by different persons. Tacking is allowed, provided there is a sufficient nexus, often called “privity”, between successors. The nexus will be sufficient if the earlier possessor gives the next one a colourable title document or if the next one is his heir, and there is no interruption. There are four possible situations under the doctrine of tacking (or more commonly described in terms of successive possessors). First, where the adverse possessor dies or transfers his interest to another person before the lapse of the statutory period, the time during which he has possessed is available to his successor in title, and, therefore, a purchaser or devisee who immediately follows him into possession and holds for the remainder of the statutory time acquires as good a right to the land as if he himself had been in possession for the whole period (*Asher v Whitlock*, (1865) L R 1 Q B1). Understand that since possession is prima facie evidence of seisin in fee, an adverse possessor holds a transmissible interest in the land that is why he can dispose of it. Accordingly, any person taking a squatter’s interest can add the squatter’s period of possession to his own.”

40. As a result, since Philip Cheptoo took the suit property in the year 2005 after purchase and his possession was adverse to that of the registered owner, time with regards to the Plaintiff’s period of possession will be calculated from when Philip Cheptoo’s possession of the land began, that is 2005. Moreover, since the Defendant admitted that he has never visited the land since he sold, I find I agree with the Plaintiff that he is not in a position to testify as to when the Plaintiff entered the land. Indeed, the Defendant in his oral testimony told this court that he is not aware that the Plaintiff has been staying on the land since 2005. It remains therefore that no evidence has been adduced to contradict the Plaintiff’s claim that she entered the land in 2005. In fact, Lazarus Cheptoo who testified as PW2 also confirmed that the Plaintiff entered the land in 2005 after the arrangement with Philip Kiptoo.

41. The Plaintiff testified that the survey done in 2011 in the presence of the Defendant, who on his part seems to believe that undertaking the survey at that point means that time started to run in 2011, which is incorrect. The Plaintiff had already taken possession of the suit property at the time and time was already running. The survey exercise did not cut short the Plaintiff occupation of the land as time stops



to run only when the owner takes steps to re-assert his rights over the land. Conducting the survey did not have the effect of removing the Plaintiff from the land, if anything, the survey had the opposite effect, seeing it was meant to carve out the portion of land purchased by the Plaintiff. It was actually done in support of the Plaintiff's proprietary interest in the land. As long as the Defendant's actions did not result in him getting the land back, time continued to run.

42. It is trite that filing suit to reclaim one's land from an adverse possessor stops 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, 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 *Eldoret Civil Appeal No. 212 of 2012, Isaac Cypriano Shingore vs 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’.”

43. When the Plaintiff filed this suit, it was to lay claim on the land, therefore this suit at the time of filing did not stop time from running. The Court entered judgment in her favour on 12th July, 2018. The Defendant filed the Application to set aside the *ex parte* judgment on 6th December, 2019. Since he had now come on record to defend/assert his rights over the land, time stopped running at that point. By then, the Plaintiff had been on the suit property for nigh 14 years. Even if we were to count from 2007 as the year the Defendant admitted in his *Replying Affidavit* is the year the Plaintiff took possession, it still makes 12 years as at 2019 when she lay claim to the land through her actions in this suit, thus the Plaintiff's claim meets the statutory time limit.
44. Adverse possession must also be open and notorious to the knowledge of the owner. At the time of entry, the Defendant herein was the registered owner. Although in his oral testimony the Defendant



denied knowledge of the Plaintiff's occupation of the land, at paragraph 7 of his Replying Affidavit, he made the following statement: 'THAT all this time I was aware of the Plaintiff's stay at her portion...'. The Defendant reiterates this at paragraphs 8 and 9 thereof only adding that he had permitted the Plaintiff's stay. Even though the Defendant was living in Kilifi, the Plaintiff's occupation of the land was so open and notorious that he knew of it yet he lived several counties away.

45. I note from the record that Philip Cheptoo had initially applied to be joined to this suit as a Defendant, but unfortunately, even before any response could be filed to that application, it was withdrawn exactly 6 days after it had been filed. It would have been important to hear his side of the story. I have had a chance to read through the Affidavit sworn in support of his Application for joinder since it does in fact form part of the court's record in this matter. Philip deponed that he purchased the property in the year 2005. He also deponed that he was supposed to give the Plaintiff 5 Acres from the portion he purchased from the Defendant herein.
46. Philip Cheptoo, from whom the Plaintiff derives her interest, was therefore aware of the Plaintiff's stay on the land as was stated in the Affidavit filed in support of the withdrawn Application where he deponed at paragraph 9 that she is occupying 5.5 Acres of the land. Besides that, the Plaintiff also pleaded in her Further Affidavit that she had filed a defective suit against the Defendant, being Eldoret ELC No. 252 of 2017; Cathy Alucia Jebor Kiplagat vs Philip Kendagor Cheptoo, Isaac Sugut and Vincent Komen Krelkut. The Plaintiff later withdrew the suit for reason that it was defective. The Defendant through his Counsel in that suit, who for the record is the same advocate representing him in this suit, was aware of that suit which was also with regard to the suit property herein and even filed a Bill of Costs. Yet even after that suit was withdrawn, neither the Defendant nor Philip Kiptoo took steps to evict her from the suit property. This court is thus convinced that the Plaintiff's occupation of the land was not in secrecy but open and in plain sight of the people who owned the suit property.
47. The third element is that possession must be without the permission of the owner. In the case of Samuel Miki Waweru vs Jane Njeru Richu (2007) eKLR, the Court of Appeal made the following observation:
- “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.”
48. In Wambugu vs Njuguna (1983) KLR 172 the Court held;
- “Where the claimant is in exclusive possession of the land with leave and license of the appellants in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.
49. This requirement is necessary because adverse possession is hostile in nature. The Plaintiff in a claim for adverse possession therefore needs to demonstrate that their occupation of the land was not permitted or with leave/licence of the registered owner. The Plaintiff must show that they dispossessed the registered owner of the land with the intention of using for her own benefit. The adverse character of the possession must thus be established as a fact and cannot be assumed even if the mere possession



has been for the requisite period, and the Plaintiff has the burden of proving this fact to the Court. In *Gabriel Mbui vs Mukindia Maranya (1993)* eKLR, it was held that:-

“It is well-known in our law, that the adverse characters of the intruder’s possession of another’s land must be proved as a clear fact, and cannot be assumed as a matter of law from mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the Court is to draw legal inferences as to whether there was or there was no adverse possession. The inference one way or the other is a legal one. This means that the acts of possession are factual data from which a legal conclusion may or may not arise as to whether they amount to adverse possession. In the words of Gicheru, JA:

‘In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts’ *Kweyu v Omuto, CA Civ. Appeal 8 of 1990 (as yet unreported)*’.”

50. It is therefore trite that for a Plaintiff to acquire title to land by way of adverse possession, they must first prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use of the land for the prescribed 12 years (or more) without interruption. This is because possession that is permissive cannot be held to be adverse to the rights of the registered owner. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018]* eKLR, the Court of Appeal sitting in Mombasa held that:-

“18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another (1975)* EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna [1983]* KLR 173.”

51. The Plaintiff herein has indicated that her entry into the suit property was by virtue of a sale agreement, which would ideally bring up the element of permissive possession. However, the purported contract has been invalidated for not being in writing, thus eliminating any aspect of permissive entry into land. That aside, in his response to the originating summons, the Defendant was adamant that he is the one who allowed the Plaintiff entry into the land. A claim that was repeated in his submissions, where it was argued that the Plaintiff could not sustain a suit for adverse possession since she possessed the suit property with his permission as registered owner. On the day of the hearing however, the Defendant in his oral testimony denied ever allowing the Plaintiff entry into the land, further solidifying the Plaintiff’s averment that although the Defendant was aware of her occupation of the suit property, but never permitted her entry into the land.

52. The same applies to Philip Cheptoo, who has watched the Plaintiff occupy the suit property without a valid Agreement for Sale in force, contrary to his title as purchaser and beneficial owner of the 10 Acres of the Defendant’s land. Even the Defendant agrees that the Plaintiff has been in occupation of a 5-Acre portion without his express permission. Therefore, the Plaintiff has been in adverse possession



of the portion measuring 5 Acres occupied, and not 4.4 Acres as the Defendant had wanted this court to believe.

53. The last ingredient to prove is the hostility of the Plaintiff's possession to the title or interests of the registered owner. In *Gabriel Mbui v Mukindia Maranya* (Supra), the Justice Kuloba (as he then was) explained the element of hostile possession in the following words:-

“The ingredient of unpermitted occupation is usually expressed as “hostile” possession, to emphasize that “hostility” is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (*Cobb v Lane* [1952] 1 All E R 1199; Denning, MR, in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd* [1974] 3 All ER 575 at p 580; *Chanan Singh, J, Jandu v Kirpal and another* (1975) EA 225 at pp 233, 234, 237; *Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi*, 1[1976] Kenya L R 253, at pp 257, 258).”

54. The Court went on to explain that “the non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people”. It is on record that the Plaintiff has been in continuous open and uninterrupted possession of the suit land. There is no evidence to suggest that the Defendant or anyone else claiming under him sought or retook possession of the suit property from the Plaintiff.
55. There is also no evidence that the Plaintiff relinquished possession to the Defendant or any other individual claiming under him. The Plaintiff has been left to openly publicly occupy the suit property uninterrupted with no interruptions from any quarters. The Plaintiff averred that the suit property is home to her and her family. She testified in court that she built her house on the suit property and put up a live fence around it. All these actions are a demonstration of animus possidendi, (intention to possess) to the exclusion of the Defendant and anyone else who may have a claim on the suit property. The Plaintiff's control, use and occupation of the suit land is hostile to the title the Defendant and all who may have a claim under him.

c. Who should bear the costs of the suit?

56. The law on costs is found at Section 27 of the *Civil Procedure Act* which provides:-

“27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

57. A careful reading of Section 27 above reveals that costs do follow the cause/event unless the court, for some good reasons, orders otherwise. Rtd. Justice Richard Kuloba in his book *Judicial Hints on*



Civil Procedure, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. Section 27 further provides that the award of costs is at the discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force.

58. The instant suit had proceeded *ex parte* and judgment delivered in favour of the Plaintiff. The Defendant then approached the court to have the judgment set aside in what is now clearly an unsuccessful bid to defend the claim. This misadventure occasioned the Plaintiff some expenses including but not limited to legal fees. The Plaintiff is the successful party in terms of the provision of Section 27. The court has seen no justifiable reason why it should deny the Plaintiff her costs.

Disposition:

59. The upshot is that the Plaintiff’s Originating Summons is merited and hereby succeeds. Having already noted that a title Deed was issued over the suit property, or what is now known as Moibeki/Moibeki Block 1(Moiben)/71, in the name of the Plaintiff after delivery of the *ex parte* judgment, the validity of the said title is upheld. The Defendant shall pay the costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF MAY, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Chepkwony for M/s Isiaho for plaintiff.

Court Assistant –Laban

E. O. OBAGA

JUDGE

17TH MAY, 2024

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