



**Letoluo & 2 others (Suing as the Legal Representatives of the Estate of Leshan ole Letoluo - Deceased) v Haba Haba Investment Limited & 4 others (Environment & Land Case 3 of 2020) [2025] KEELC 698 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 698 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 3 OF 2020  
CG MBOGO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**SALOME NAANYU LESHAN LETOLUO ..... 1<sup>ST</sup> PLAINTIFF  
JOY NAMUNYAK LESHAN ..... 2<sup>ND</sup> PLAINTIFF  
LESHAN KUNTAI ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF LESHAN  
OLE LETOLUO - DECEASED**

**AND**

**HABA HABA INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT  
JAMES OCHEGO ONDUSO ..... 2<sup>ND</sup> DEFENDANT  
SERAH NJOKI MUNGE ..... 3<sup>RD</sup> DEFENDANT  
SANKALE OLE OTUNI ..... 4<sup>TH</sup> DEFENDANT  
LAND REGISTRAR NAROK ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The late Leshan Ole Letoluo filed the plaint dated 20<sup>th</sup> September, 2017, and prayed for judgment against the defendants jointly and severally for: -
  - a. A declaration that parcels no. Nrk/ Cis-Mara/ Ilmashariani-Morijo/ 1189 and 1190 belong to the plaintiff by way of adverse possession.
  - b. A declaration that all the documents giving rise to allocation and registration of parcel number Nrk/ Cis-Mara/ Ilmashariani-Morijo/ 1189 to the 1<sup>st</sup> defendant are invalid.



- c. A mandatory order compelling the land registrar to cancel the purported registration of parcel of land known as Nrk/ Cis-Mara/ Ilmashariani-morijo/1189 in the name of the 1<sup>st</sup> defendant and registration of the plaintiff's as owner of the said property.
  - d. An order restraining the 4<sup>th</sup> defendant from selling the remaining part of parcel number Nrk/ Cis-Mara/ Ilmashariani-morijo/ 1190 as this would render the 2<sup>nd</sup> plaintiff who is a spouse to the 4<sup>th</sup> defendant landless.
  - e. Compensation for the damages occasioned by malicious breaking of the building that stood upon land subject matter herein.
  - f. Costs of this suit.
  - g. Any other or further relief(s) that the honourable court may deem fit and just to grant.
2. In the plaint, the late plaintiff averred that prior and at the time of filing the suit, he had acquired an interest in parcel no. Nrk/ Cis-Mara/ Ilmashariani-Morijo/1189 and 1190 (the suit properties) by virtue of adverse possession, as he has been in open and continuous occupation of the suit properties for a period exceeding 12 years. He stated that he has an unregistered but overriding interest over the two parcels of land.
  3. The late plaintiff further pleaded that on 7<sup>th</sup> August, 2017, the 5<sup>th</sup> defendant purported to execute a transfer of his properties to a fictitious person in the name of the 1<sup>st</sup> defendant, and that on 10<sup>th</sup> September, 16 years after he took open possession, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants laid claim on his land alleging that he was in rent arrears of Kshs. 27,000/-.
  4. The late plaintiff further pleaded that the defendants in collaboration with the administration police caused malicious damage to property, and that he reported the matter to Narok Police Station but the police refused to record his statement. He pleaded that the defendants are trying to forcefully evict him and take possession of his land in violation of his constitutional right to own property provided under Article 40 and his right to a fair hearing provided under Article 50(1) of *the Constitution*.
  5. From the memorandum of appearance filed by the firm of Githui & Co. Advocates, it appears that the said law firm entered appearance on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants which further informed the statement of defence dated 3<sup>rd</sup> October, 2017 filed by the said parties. The statement of defence dated 3<sup>rd</sup> October, 2017 would thus be construed to be on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as opposed to 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their statement of defence dated 3<sup>rd</sup> October, 2017. The aforementioned defendants denied that the late plaintiff had acquired the suit properties by way of adverse possession as he had not demonstrated that such a declaration has ever been made. They averred that a claim for adverse possession proceeds first from the admission that the parcel of land in dispute is the property of the registered owner which the late plaintiff has not done.
  6. The 1<sup>st</sup> defendant contended that it was offered the parcel of land for purchase on a private treaty from Family Bank since the registered owner had a loan which it was unable to service. Further, that it accepted the offer and entered into a sale agreement and paid the entire purchase price, and had the land registered in its name. Further, that when they took ownership of the entire parcel of land, there was a shop which was being operated at the instance of the late plaintiff, and that he refused to vacate or pay rent upon which the 1<sup>st</sup> defendant was compelled to levy distress for rent. The said shop was a temporary structure and the only item that was found was chang'aa. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants pleaded that being illicit brew, the late plaintiff cannot lay claim to the value of the property since he cannot benefit from possession of illegal items.



7. The aforementioned defendants averred that possession alone does not create property rights whatsoever, and that the alleged violence, if any, was created by the late plaintiff who has been threatening every person that he will not vacate from private property. They pleaded that there cannot be constitutional rights available to a trespasser unless and until such rights crystallize into a prescriptive right by way of adverse possession. Further, that the alleged constitutional rights have not accrued and the late plaintiff's case is based on an inchoate idea that his right has accrued by way of adverse possession.
8. In conclusion, the aforementioned defendants stated that the late plaintiff has demonstrated that he is a frivolous litigant as he has already filed another suit in addition to this suit.
9. The 4<sup>th</sup> defendant filed his statement of defence dated 16<sup>th</sup> July, 2018. The 4<sup>th</sup> defendant pleaded that he is the lawful owner of the suit properties originally known as CisMara/Ilmashariani-Morijo/333, and that the late plaintiff has never been in occupation or possession of the said parcels of land. Further, that he has been enjoying quiet and peaceful possession of the same until the year 2010 when the late plaintiff encroached with the intent to dispossess him of the same.
10. The 4<sup>th</sup> defendant pleaded that by the year 2010, the late plaintiff unlawfully encroached into his properties using intimidation as a Major General in the army, and that his occupation has always been repelled and thwarted by the 4<sup>th</sup> defendant. He stated that he has been in possession and has since subdivided parcel no. 1190 into other portions. Further, that he entered into a sale agreement with the 1<sup>st</sup> defendant as the legitimate owner of the land. He pleaded that the late plaintiff has not acquired proprietary rights over the suit properties and he is being deceitful to this court.
11. The 5<sup>th</sup> defendant filed its statement of defence dated 22<sup>nd</sup> November, 2018. The 5<sup>th</sup> defendant denied all the contents of the plaint and invited strict proof.
12. This matter proceeded for hearing on 17<sup>th</sup> February, 2021. Leshan Nick Ole Letoluo(PW1) who is now deceased, in his introduction stated that he grew up in Siyiapei, and that he worked as a flight cadet and retired as Lt General and vice CGS. He testified that in July, 2001, he was approached by a lady called Zipporah at his office to buy 6.8Ha being parcel of land known as Cis Mara/Ilmashariani/Morijo/1189. It was his testimony that he asked Zipporah how she acquired the land and she gave him her papers which he perused, and was convinced about her credibility to sell the land to him. PW1 testified that Zipporah gave him documents which included a title in the name of Sankale Ole Otuni (4<sup>th</sup> defendant) who was the owner of land parcel No. Cis Mara/Ilmashariani/Morijo/333, and in the said documents it indicated that the land was sub divided into 3 parcels, and one of the parcels was given to Zipporah as a gift, as she was the mother in law of the 4<sup>th</sup> defendant.
13. PW1 further stated that on 20<sup>th</sup> March, 2001, the 4<sup>th</sup> defendant sought the authority of the Land Control Board to have the land sub divided and that consent was granted and surveyors carried out the sub division where parcel No.1180, 1189, 1190 and the 4<sup>th</sup> defendant accepted to have the land and later wrote to the Land Control Board to transfer the land to Zipporah which is parcel no. 1159 (sic) which is the land Zipporah sold to him. He stated that they had an agreement of sale which is in his list of documents.
14. On 15<sup>th</sup> March, 2021, PW1 proceeded with his evidence in chief. He testified that they were waiting for title No. 333 which the 4<sup>th</sup> defendant was to process as separate titles, and what they had was a mutation. Further, that Zipporah agreed to sell to him parcel no.1189, and together, they entered into a sale agreement dated 21<sup>st</sup> July, 2001, produced as P. Ex. 1 but he did not get the title for this parcel of land. Further, that there was a second agreement in respect of parcel No. 1190 measuring 5 acres, which was sold to him by the 4<sup>th</sup> defendant and his wife Mary Jerobon. The sale agreement is dated 30<sup>th</sup>



- October, 2001, and it is produced as P. Ex. 2. He further informed the court that Zipporah had been given the plot as a gift after the 4<sup>th</sup> defendant's plot in Majengo was sold, and she provided him with a letter which was an application from the Land Control Board which was to ascertain the transaction and mutation forms, survey map, and a transfer form between the 4<sup>th</sup> defendant and Zipporah.
15. PW1 further testified that the parcel-1190 was later transferred to him after entering into the sale agreement. However, the titles were never brought to him even though the same were issued. He stated that he occupied the suit properties and made developments thereon. Further, that on 9<sup>th</sup> September, 2017, he was called by his caretaker who informed him that the home was attacked by people who broke down the gate, latrine and vandalized structures. Further, that these people were accompanied by the administration police. It was his testimony that he immediately went to the police station and explained to the OCS who brushed him off, and after that, he went to the OC crime who recorded his complaint as OBS/9/9/2017, but they never followed up on the matter.
  16. On cross-examination, PW1 testified that he had filed an amended plaint on 18<sup>th</sup> October, 2017, and that there was agreement he entered with Zipporah dated 21<sup>st</sup> July, 2001, in respect of parcel no. 1189 which he paid Kshs.430,000/-. He stated that he did not give any money, and that there was a term that if he did not get the land then the vendor was to refund the purchase prize. He stated that the completion date was within 30 days of execution of the agreement, and that there was no role to be played by the 4<sup>th</sup> defendant as per the sale agreement, as it was Zipporah who was to facilitate the acquisition of the consent. He testified that the transfer P. Ex no. 10 is dated 20<sup>th</sup> July, 2001 and the sale agreement is dated 21<sup>st</sup> July, 2001. He agreed that he had a sale agreement when he had signed the transfer form and they had not established vendor/purchaser relations prior to signing of transfer. PW1 further testified that there was no consideration that was paid, and the transfer did not happen before the date of agreement.
  17. He agreed that there was no title deed for parcel no. 1189. Further, that there was no one with title in respect of the land parcel 333 including the 4<sup>th</sup> defendant, and he did not know that the title deed for parcel no. 333 was issued on 6<sup>th</sup> February, 2013 and the title for parcel no. 1189 was issued on 21<sup>st</sup> March, 2013. He reiterated that the land was sold to him by Zipporah but he did not sue her, and that there was no reason to pressure her for the refund of the money. With regard to the 2<sup>nd</sup> sale agreement of 30<sup>th</sup> October, 2001, PW1 testified that there was no title deed in the joint names of 4<sup>th</sup> defendant and Mary Jerobon. He also did not know that land parcel no. 1189 has since been transferred to the 1<sup>st</sup> defendant. He also did not know whether parcel no. 1190 no longer existed. He stated that he has never used his position to bar the 4<sup>th</sup> defendant from accessing his land under use and to cultivate the land. Further, that he was not introduced in the negotiations between Zipporah and the 4<sup>th</sup> defendant as it is Zipporah who told him so. Further, that the mutation was not a mere expression of interest, as it was marked to give his mother in law.
  18. On further cross-examination, PW1 testified that he sued the 5<sup>th</sup> to 7<sup>th</sup> defendants because all the issues he has raised would not have happened. He testified that he has not presented the transfer documents to the Ministry of Lands. Further, that he had filed a suit in Nakuru but the 5<sup>th</sup> to 7<sup>th</sup> defendants were never party to the same, and that he has never appealed against the decision of the magistrate's court.
  19. On re-examination, PW1 testified that there was a declaration that was given by court when it issued for adverse possession and there were damages that he had suffered from the breaches. He testified that the transfer between him and Zipporah is dated 20<sup>th</sup> July, 2001 and the sale agreement is dated 21<sup>st</sup> July 2017. Further, that these documents were prepared by Omariba advocates and he does not know who inserted the date. He stated that he had paid the vendor on 21/7/2001 while the transfer was executed, and that it is the first time he had seen the title documents that he was shown. Further, that he relied on



- the mutation to purchase the land. He stated that none of them is currently on the land, and further clarified that there are two parcels in contention.
20. On 1<sup>st</sup> July, 2024, Stephen Onchiri (PW2) adopted his witness statement dated 4<sup>th</sup> April, 2019 as his evidence in chief. He testified that he has worked for PW1 for 17 years and that PW1 purchased the suit properties in his presence in a year that he could not remember. According to him, PW1 instructed him to build a 4 roomed timber houses, and that one day, police officers came to the land at 6.30a.m. and ordered him to vacate the house, and began demolishing the houses. He testified that he alerted PW1, and also reported the matter to the police.
  21. On cross-examination, PW2 testified that PW1 purchased the suit properties in the year 2014, from one Zipporah who showed him the boundaries. Further, that it was at this time when he went to live in the said properties. He did not know the parcel numbers where he resided, but according to him, there were houses which were demolished. He maintained that PW1 purchased the land in the year 2014 and not the year 2000, and that he entered into the land after PW1 had purchased the same. PW2 did not see the sale agreement between the two, and neither did he see the title deed. He also did not know if parcel number 1189 was transferred to the 1<sup>st</sup> defendant in the year 2017. He testified that he had lived on the land for 3 years before it was invaded, but that he did not record when the invasion occurred.
  22. On further cross-examination, PW2 testified that PW1 had been on the suit land for 12 years, and that he had purchased land from Zipporah. Whereas he reported the matter to the police, he did not know what action was taken against the 5<sup>th</sup> defendant as he was not charged with a criminal offence.
  23. On re-examination, PW2 stated that PW1 purchased land which he entered into and remained for 17 years. With the evidence of PW2, the plaintiff closed his case.
  24. On 1<sup>st</sup> October, 2024, Sankale Ole Otuni (DW1), and the 4<sup>th</sup> defendant in this matter adopted his witness statement dated 10<sup>th</sup> September, 2018 as his evidence in chief. He stated that the late plaintiff claims parcels 1189 and 1190 (the suit properties) which are a subdivision from parcel number 333 in the form of adverse possession. It was his evidence that parcel number 333 was allocated to him by the Group Ranch, and he was issued with the title deed on 6<sup>th</sup> February, 2013 produced as D. Ex. No. 1. DW1 further stated that he was a member of Ilmashariani Group Ranch, and that prior to the year 2013, he did not own any parcel of land. That after the land was allocated to him, he sold a portion of it to the 1<sup>st</sup> defendant being parcel no. 1189, and subdivided the other land to his children and brothers.
  25. DW1 further testified that the 1<sup>st</sup> defendant was registered on 7<sup>th</sup> August, 2017, and he produced a copy of the search which he carried out to confirm the status of the land dated 24<sup>th</sup> August, 2017 as D. Ex. No. 2. Further, he testified that parcel number 333 was subdivided into 3 portions being 1188, 1189 and 1190, and that he further subdivided parcel 1190 into 6 portions which are owned by people who are not parties to this suit. He produced a copy of the mutation form for parcel number 1190 as D. Ex No.3. It was his testimony that he was allocated the land in the year 2013 while this suit was filed in the year 2017 which is 4 years after he became the registered owner. Further, that the late plaintiff trespassed into his parcel of land in the year 2010, and used his position as an army officer, and that he did not take any action against him because he had not been registered as the owner.
  26. On cross-examination, DW1 testified that Mary Jerobon is his wife, and they live together on his land. It was his testimony that Mary Jerobon started residing on the land since the year 2000, and that they have children. Further, that the land then belonged to the Group Ranch, and he agreed that it is the same land he used to reside in. While showing his ID card number 7117001, he stated that it was not true that together with his wife, they entered into a sale agreement with the deceased plaintiff and his (PW1) wife Salome Naanyu Leshan in October, 2001. According to him, it was not true that they were



- to sell 5 acres from parcel number 1190, but that they agreed on the sum of Kshs.125,000= . He denied defrauding the late plaintiff and his wife in the year 2001.
27. DW1 said that he also knew Zipporah Jebichii as a woman from Nandi, and stated that she is not related to his wife, and neither is she the mother to his wife. It was his testimony that parcels no. 1189 and 1190 came into being or were created in the year 2013. Further, that he sold the land to the 1<sup>st</sup> defendant in the year 2017, but he did not see the need to produce the green card for the search, and that the 1<sup>st</sup> defendant was the one that brought the certificate of search. He reiterated that he has resided in Ilmashariani together with his wife Jeroboni since the year 1992. He admitted that he had the land even though it belonged to the Group Ranch. He further reiterated that the late PW1 used his position in the military to enter into his land, and that he was evicted from the land after he sold it to the 1<sup>st</sup> defendant. It was his testimony that he sold the land after he acquired a title deed, and that there were people on the parcel of land in question but no one claimed ownership. He stated that he never received any rent from the late plaintiff and that the 1<sup>st</sup> defendant lied if they said that the late plaintiff had a debt of Kshs.27,000/-. Further, that it was not true that together with 1<sup>st</sup> defendant, they used trickery to evict the late plaintiff from his land that he had occupied since the year 2001.
28. On further cross-examination, DW1 testified that he knew the late plaintiff, and that he did not sell any parcel of land to him, and that he (PW1) did not pay him any money. He said that he knew that PW1 wanted to be registered as proprietor of the suit properties, as they claimed to have been in occupation of the land since the year 2000. He stated that the parcels of land are occupied by other persons, and that the late plaintiff forcefully occupied his land for 4 years since he acquired a title deed, and that he had no power to evict him. Further, that the late plaintiff fenced the two parcels of land and erected semi-permanent structures, but he did not take any document to the land registrar regarding the suit properties concerning the late plaintiff.
29. On re-examination, DW1 testified that with regard to the sale agreement dated 21<sup>st</sup> July, 2001 between Jebichi and the late plaintiff for parcel number 1189, Zipporah Jebichi has never owned the parcel of land in question, and he was not involved in the sale of land. Further, that in the year 2001, the suit properties were not in existence. Further, that he has not been shown any documents to show existence of the suit properties in the year 2001. DW1 testified that the suit concerns adverse possession, and that he was allocated parcel number 333 by the Group Ranch in February, 2013. Further, that he had no power to evict any one from the land before 2013. He maintained that Jebichi is not the mother of his wife, and that together with the late plaintiff, they used to reside on the land as members of the Group Ranch. He informed the court that he sold parcel no. 1189 to the 1<sup>st</sup> defendant who was obliged to carry out a search before purchasing the land. Further, that the late plaintiff did not develop the suit properties, and that he was not involved in evicting him from the same.
30. Ms. Mwalizi, the learned counsel for the 5<sup>th</sup> defendant stated that the issue is about adverse possession, and that they did not intend to call any witness. She rested the 5<sup>th</sup> defendant's case.
31. The plaintiffs filed their written submissions dated 29<sup>th</sup> October, 2024. They narrated the events leading to the filing of the suit and the weight of the evidence in favour of the late plaintiff. Further, it was submitted that the sale agreement between the late plaintiff, the 4<sup>th</sup> defendant and Ziporah Jebichii Kurui became void in the year 2002, and that by the end of the year 2014, the late plaintiff had acquired an interest in land by way of adverse possession, and he filed a suit for adverse possession in the year 2016. While relying on the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001 and High Court Meru Civil Case No. 238 of 1990 Gabriel Mbui v Mukindia Maranya, the plaintiffs submitted that the 4<sup>th</sup> defendant admitted in court that he had no tenant landlord



- relationship with the late plaintiff, and that the use of claim of rent arrears by the 1<sup>st</sup> to 3<sup>rd</sup> defendants to evict him from his land was without justification.
32. The plaintiffs submitted that the 4<sup>th</sup> defendant had notice of occupation of 21 acres by the late plaintiff, and by the time the late plaintiff went to court in the year 2016, he had been in possession of the suit land for 15 years. Further, that the 4<sup>th</sup> defendant's title to the portion occupied by the deceased plaintiff was extinguished upon being in occupation of the land for 12 years. While urging the court to find in their favour, they placed reliance was placed in Civil Appeal No. 57 of 2017, Robert Ngande Kathathi v Francis Kivuva Kitonde.
33. The 1<sup>st</sup> to 4<sup>th</sup> defendants filed their written submissions dated 5<sup>th</sup> December, 2024 where they raised two issues for determination as listed below: -
1. Whether the threshold for adverse possession has been proved.
  2. Whether the adverse possession can be instituted by way of plaint.
34. On the first issue, the 1<sup>st</sup> to 4<sup>th</sup> defendants' submitted that the mother title was issued on 6<sup>th</sup> February, 2013, and the late plaintiff cannot claim that the title held by the 1<sup>st</sup> and 4<sup>th</sup> defendants became adverse in his favour. Further, that the suit was instituted in the year 2018 and the 12-year period provided for by law had not matured. To buttress on this submission, the 1<sup>st</sup> to 4<sup>th</sup> defendants relied on the cases of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, and *Tabitha Waitherero Kimani v Joshua Nganga* [2017] eKLR. Further, they submitted that the period of twelve years prescribed by statute has not been achieved and the late plaintiff had not produced photographs to show his occupation. They further submitted that parcel no. 1190 has further been subdivided, and the registered proprietors of these properties have not been made parties to these proceedings. While relying on the case of *Benjamin Kamau Murma & Others v Gladys Njeri*, Ca No. 213 of 1996, the 1<sup>st</sup> to 4<sup>th</sup> defendants submitted that the late plaintiff has not met the ingredients of adverse possession, and that the doctrine of adverse possession is inapplicable where the land is public land or trust land. Further, that a group ranch is trust land within the provisions of the old Constitution and the Trust *Land Act* such that the period before 2013 when title was issued to the 4<sup>th</sup> defendant cannot be considered.
35. On the second issue, the 1<sup>st</sup> to 4<sup>th</sup> defendants submitted that the provisions regarding how to institute such proceedings are found at Order 37 Rule 7 of the Civil Procedure Rules, and they relied on the case of *Njunguna Ndatho v Masai Itumu & 2 Others*, Civil Appeal No. 231 of 1999.
36. I have considered the pleadings, the testimonies of the witnesses and the evidence tendered, as well as the written submissions filed by the plaintiffs and the 1<sup>st</sup> to 4<sup>th</sup> defendants. I am of the view the issue for determination is whether the plaintiffs are entitled to the orders sought.
37. The 1<sup>st</sup> to 4<sup>th</sup> defendants argued that a claim of adverse possession could not be sustained first and foremost through a plaint, and secondly that the period for such a claim had not yet matured.
38. Order 37 Rule 7 of the Civil Procedure Rules provides:-
- “ An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.”
39. The courts have over the years adopted different approaches on claims of adverse possession where parties dispute the manner in which such claims should be brought. Order 37 Rule 7 is clear that a claim for adverse possession ought to be brought by way of originating summons. It would have been a different case if the defendants pleaded adverse possession as a ground for defence. In the case of



*Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015*, [2015] eKLR, the court stated that:-

“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 v 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 v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

40. Whereas I would agree with the 1<sup>st</sup> to 4<sup>th</sup> defendants that a claim of adverse possession cannot be instituted by way of a plaintiff, I find the same not to be fatal to the suit for the reason that in a plaintiff, the parties stand a better chance at testing the evidence through trial as opposed to originating summons which may proceed through viva voce evidence. Besides, there are other orders sought in the instant plaintiff, and this court must consider the evidence tendered and make a conclusive determination based on its findings.
41. The late plaintiff filed the suit seeking a claim of adverse possession among other orders as against the defendants with regards to the suit properties. He contended that he acquired parcels no. 1189 through purchase from Zipporah and parcel no. 1190 through purchase from the 4<sup>th</sup> defendant and his wife. On the other hand, the 1<sup>st</sup> to 4<sup>th</sup> defendants denied the averments raised by the plaintiff and argued that the title to the suit properties were acquired in the year 2013, and that before then, the land did not exist. In his evidence, PW1 testified that he bought parcel no. 1189 from Zipporah, and stated that Zipporah approached him in his office with documents of ownership, and he was satisfied that indeed she was the owner of the parcel no. 1189. He produced a copy of the agreement of sale dated 21<sup>st</sup> July, 2001 for sale of approximately 6.475 hectares. On cross-examination, PW1 maintained that he paid the purchase price but he felt there was no need to pressure the said Zipporah for a refund. It was his testimony that Zipporah was the mother in law to the 4<sup>th</sup> defendant and that he had gifted the parcel of land to her making it possible for her to sell it. In his testimony, PW1 did not seem certain on the issue of payment of the purchase price which I presume he saw no need of pursuing a refund, and thus this evidence was not satisfactory. The plaintiff did not see it fit to call the said Zipporah to corroborate this evidence.
42. With regards to parcel no. 1190, PW1 testified that he bought this parcel of land from the 4<sup>th</sup> defendant and his wife vide the sale agreement dated 30<sup>th</sup> October, 2001. He produced a copy of the said sale agreement, transfer of parcel no. 333 from Ilmashariani Group Ranch dated 29<sup>th</sup> March, 2001, a copy of the application for consent of land control board, mutation form, receipts of payments for both parcels of land. Whereas the 4<sup>th</sup> defendant claims that these parcels of land never existed before the year 2013, the documents produced by the plaintiff document a contrary position. The mutation form dated 22<sup>nd</sup> March, 2001 bears the signature and stamp of the district surveyor as well as the stamp from the provincial survey records office. The date of registration reads 23<sup>rd</sup> April, 2001 and the same is accompanied by a receipt of even date. The same applies with the transfer of land from the group ranch to the 4<sup>th</sup> defendant whose date of registration reads 23<sup>rd</sup> April, 2001. As far as this agreement is



concerned, the 4<sup>th</sup> defendant merely denied ever having entered into a sale agreement with PW1. I did not hear the 4<sup>th</sup> defendant state that the agreement was a forgery or it was made under duress or undue influence. I am satisfied that the late plaintiff and the 4<sup>th</sup> defendant together with his wife entered into a valid sale agreement for parcel no. 1190.

43. The testimony of DW1 goes ahead to show that he owned the said parcel of land which he was capable of disposing, which he did, by his own testimony. He stated that he has lived in Ilmashariani since the year 1992 and also the year 2000, together with his wife and children. He stated that PW1 encroached into the suit properties in the year 2010. It was his testimony that PW1 had fenced off the suit properties, and constructed semi-permanent structures thereon. It also came out clearly that there was no tenant/landlord relationship between PW1 and the 1<sup>st</sup> defendant to warrant malicious damage of the property. Infact, the 4<sup>th</sup> defendant was categorical that the 1<sup>st</sup> defendant lied by stating that PW1 was in rent arrears of KShs. 27,000/-. The question that begs to be answered is, how was it possible for PW1 to fence his property and occupy the same for all these years without his intervention if at all the occupation was unlawful? The argument by the 4<sup>th</sup> defendant that PW1 used his position in the military is far- fetched and not persuasive. I am satisfied that indeed the occupation by PW1 of this parcel of land was lawful owing to the agreement of sale dated 30<sup>th</sup> October, 2001.
44. From the above, I am persuaded that on a balance of probabilities, the plaintiffs have a case against the defendants, only to the extent regarding parcel no. 1190. The plaint dated 20<sup>th</sup> September, 2017 partially succeeds, and I proceed to grant the following orders: -
- i. A declaration is hereby issued that the plaintiff is entitled to 5 acres out of the parcel of land known as no. Nrk/ Cis-Mara/ Ilmashariani-Morijo/1190.
  - ii. A mandatory order is hereby issued directing the 4<sup>th</sup> defendant to execute transfer documents of 5 acres out of Nrk/ Cis-Mara/ Ilmashariani-Morijo/ 1190 to the estate of the late Leshan Ole Letoluo within 30 days from the date hereof failure to which the Deputy Registrar is directed to execute the relevant transfer documents.
  - iii. In the alternative to order ii. above, the 4<sup>th</sup> defendant to pay the estate of the late Leshan Ole Letoluo a sum equivalent to 5 acres of land at Ilmashariani at the current market price within 60 days from the date hereof.
  - iv. Costs of this suit to be borne by the defendants jointly.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HON. MBOGO C.G.**

**JUDGE**

**20/02/2025.**

