



REPUBLIC OF KENYA



**Kivuva v Kivuva & 2 others (Environment & Land Case 35A of 2022)
[2025] KEELC 779 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 35A OF 2022
TW MURIGI, J
FEBRUARY 19, 2025**

BETWEEN

JOSEPH MUIA KIVUVA PLAINTIFF

AND

BERNARD KIMILU KIVUVA 1ST DEFENDANT

MAKUENI DISTRICT 2ND DEFENDANT

THE COMMISSIONER OF LANDS 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 2nd October, 2008, seeking the following orders: -
 - i) The Plaintiff be declared the legal owner of Plot No. Okia/Nzuuni/1225 and the 1st Defendant be ordered to vacate.
 - ii) The 1st Defendant do pay the Plaintiff damages for trespass.
 - iii) The 1st Defendant by himself, his agents or his servants be permanently and are hereby restrained from trespassing into the suit land and/or entering and remaining there.
 - iv) The 1st Defendant do dismantle all the illegal structures and restore the suit property into its original form.
 - v) There be such further or other relief as the court deems fit and just in the circumstances of the case.
 - vi) Interest accrued.
 - vii) Costs.



2. The 1st Defendant filed a Defence and an amended Defence dated 17th July, 2017 in which he denied the Plaintiff's claim. He urged the court to dismiss the Plaintiff's suit with costs.
3. The 2nd Defendant denied the Plaintiff's claim vided a Statement of Defence filed on 29th March, 2018. The 2nd Defendant urged the court to dismiss the Plaintiff's suit with costs. The 3rd Defendant did not enter appearance nor file a defence.
4. The Plaintiff filed a reply to the 1st Defendant and 2nd Defendant statement of Defence on 24th June, 2010 and on 12th June, 2018 respectively in which he reiterated the contents of the Plaintiff.
5. The 1st Defendant took out an Originating Summons dated 29th September 2009, seeking the following orders:-
 1. Declaration that Bernard Kimilu Kivuva the Plaintiff had become entitled by adverse possession for over twelve years to land parcel No. Okia/Nzuuni/1225 registered under the Land Registration Act (Cap 300) Laws of Kenya and situated at Okia Division of Makueni District.
 2. That Bernard Kimilu Kivuva be registered as the proprietor of the said land parcel No. Okia/Nzuuni/1225 since he has been in continuous occupation of the above land uninterrupted for a period of over 14 years.
 3. That the costs of this suit do abide the result thereof.
6. The Originating Summons is supported by the affidavit of Bernard Kimilu Kivuva sworn on even date. The Plaintiff filed a replying affidavit sworn on 12th October 2009 in opposition to the Originating summons.
7. On 23rd March 2012, this suit was consolidated with O.S No. 290 of 2009. The Court directed that the instant suit be the lead file.

The Plaintiff's Case

8. The Plaintiff Joseph Muia Kivuva testified as PW1 and called 3 witnesses in support of his case.
9. He adopted his witness statement dated 20/4/2011 as his evidence in chief. He also produced the documents in his list dated 17th November, 2011 as PEX 1 – 14.
10. The Plaintiff informed this court that his grandfather had two wives namely Nthanga Kieleko and Syokonyo Kieleko. That Syokonyo Kieleko had one child namely Musani Kieleko who died in the year 1981 without a wife or child, while Nthanga Kieleko had three children namely; Koso Kieleko, Kivuva Kieleko and Kingoi Kieleko. It was his testimony that he was informed that his late uncle's liabilities devolved upon his father.
11. That after the death of Musani Kieleko, his father Kivuva Kieleko together with his uncles Koso, and Kingoi agreed to sell the suit property to him.

He testified that on 5th October 1997 he was instructed to pay 4 cows being the purchase price for the suit property. That in addition, he paid 3 goats and Kshs. 6000/=being the costs incurred in a suit relating to the suit property. It was his testimony that he paid the purchase price for the suit property to his father Kivuva Kieleko in the presence of Munayo Masika, Ngenda Kivuva, Kyalo Kimilu and Joseph Kiio.



12. That on 15/7/1981 he received a letter from Kimondiu Mbindyo demanding repayment of a debt of 31 goats and one cow owed to him by his late uncle. That he repaid the debt on 15/11/1996 as part payment for the suit property in the presence of Jackson Kingoo, Kimondiu, Kivuva Kieleko and Joseph Kiio. He added that on 25/1/1997, he paid Kivuva Kieleko the expenses that he had incurred in a case relating to the suit property in the presence of elders. That after he repaid the debts, his uncle Koso Kieleko being the eldest in the family caused the suit property to be registered in his name.
13. That between the year 1979 and 1980 a dispute arose between his father and Mangeli Keli over the suit property which was eventually decided in his father's favour. That later in the year 1982, Mangeli Keli instituted a case at the survey office over the suit property and his father who represented him won the case.
14. That on 4/5/1987 he relocated to Nairobi with his entire family after his child fell ill and upon return in the year 1988, he found the 1st Defendant having constructed a house on the suit property without his permission. He went on to state that the 1st Defendant filed an objection claiming that the suit property belongs to their father and that it should be sub divided between his three wives. He further stated that the objection was decided in favour of the 1st Defendant. That being aggrieved, he appealed against the decision to the Minister who determined the Appeal in his favour.
15. That on 4/4/1997 the Kieleko family went to the chief's office and recorded an agreement that the instant suit should await the outcome of the Minister's court.
16. He further testified that on 5/10/1998, the Chief Ukia Location gave him a letter requiring the 1st Defendant to vacate the suit property. That later on 17/06/2003 he was issued with the title for the suit property. He asserted that the 1st Defendant has refused to vacate the suit property despite demand notices having issued. He urged the court to grant the orders sought in the Plaintiff.
17. In cross-examination, he testified that the 1st Defendant is his step-brother. He testified that he took possession of the suit property after the death of his uncle in the year 1981. He further testified that the family agreement dated 4th April, 1997 was made at the Chief's Office in the presence of their father, the 1st Defendant and other family members. He further testified that his father and his two uncles sold the suit property after to him after the death of his uncle.
18. He further testified that he was not aware that the 1st Defendant had purchased the suit property as he only saw documents which indicated that the suit property had been distributed amongst the family members. He further testified that the 1st Defendant is in occupation of the suit property and that he did not know when he occupied the same.
19. In re-examination, he testified that he made the payments for the suit property between the year 1981-1997.
20. He further testified that in the year 2016, the Defendant put up an iron sheet house despite there being an order from the court. He told the court that the formal agreement was done in the year 1997 and that he was issued with a title deed for the suit property in June, 2003.
21. PW2, Jackson King'oo Mbindyo, adopted his witness statement dated 20/4/2011 as his evidence in chief. He testified that he is the son of Kimondiu Mbindyo and a neighbour to both the Plaintiff and 1st Defendant. It was his testimony that the Plaintiff settled a debt of 31 goats and one cow owed by Musani Kieleko to his father. He confirmed that he witnessed and signed the repayment of the debt on behalf of his father. He asserted that the suit property belongs to the Plaintiff and added that the 1st Defendant is a trespasser on the suit property.



22. On cross-examination, he testified that his father had informed him about the debt long before the Plaintiff repaid the same.
23. PW3, Joseph Kiio Nzuki, adopted his witness statement dated 20/4/2011 as his evidence in chief. He testified that he is a neighbour to the Kieleko family and that his land borders the suit property. He further testified that he was the Vice-Chairperson of the survey team and added that he participated in the survey exercise conducted on the suit property in August 1980.
24. He went on to state that after the death of Musani Kieleko, the family of Kieleko Nzola agreed that the Plaintiff should inherit the suit property and be regarded as his son. That pursuant to the said agreement, the Plaintiff was ordered to repay his uncle's debts/ liabilities in order to acquire ownership of the suit property. He went on to state that the Plaintiff repaid a debt of 31 goats and 1 cow owed to Kimondi Mbindyo by his late uncle. He further stated that the family also agreed that the suit property should be registered in the Plaintiff's name.
25. That after the Plaintiff repaid his uncle's debts, his family demanded for 4 cows in order to bless the suit property which the Plaintiff paid. That after the Plaintiff repaid his uncles debts and paid 4 cows to bless the suit property, the family proceeded to the Chief's Office in Ukia and reduced the agreement into writing. It was his testimony that the family did not oppose the Plaintiff taking ownership of the suit property and being regarded as the son of the late late Musani Kieleko.
26. He further testified that the family agreement was witnessed by;
 - i. Mrs. Munini Koso Kieleko
 - ii. Nzola Koso Kieleko
 - iii. Bernard Kimilu Kivuva
 - iv. Kivuva KielekoWho represented the families of :-
 - i. Koso Kieleko family
 - ii. Kivuva Kieleko family
 - iii. Kingui Kieleko family.
27. According to PW3, the 1st Defendant is a trespasser on the suit property because the land belongs to the Plaintiff. He explained that the 1st Defendant has put up illegal structures on the suit property and added that he destroyed the fence and cut down the trees thereon.
28. On cross-examination, he testified that in a family sitting held in the year 1997, the Plaintiff was the only son of Kivuva Kieleko who accepted to repay his uncle's debts. He confirmed that he was present when the Plaintiff purchased the suit property and added that he was not aware that the 1st Defendant was also claiming the suit property.

The 1st Defendant's Case

29. The 1st Defendant Bernard Kimilu Kivuva testified as the sole witness in support of his case. He adopted his witness statement dated 22nd June, 2017 as his evidence in chief. He also produced the documents in his list of even date as DEX 1 – 5 and his supplementary list dated 11/6/2018 in support of his case. He testified that the Plaintiff is his step-brother. It was his testimony that he purchased the suit property from his uncle Musani Kieleko vide a sale agreement dated 3/3/1980.



30. He further testified that the land adjudication process had not commenced in Nzuuni area as at the time when he was purchasing the suit property. He went on to state that his uncle showed him where to build his home on the suit property so that he could continue taking care of him while he was ageing. That when the land adjudication process commenced in Nzuuni Sub Location in the year 1982, the Plaintiff's identification card was used to register the suit property because his father and uncle Musani Kieleko did not have any. He testified that the Plaintiff was registered as the proprietor of the suit property in trust for the family so as to prevent the land from being taken away by other people.
31. It was his testimony that he had paid his late uncle Kshs. 1,800/= out of the purchase price of Kshs. 3000/= and added that he paid the outstanding balance of Kshs. 1,200/= to Koso Kieleko, Kivuva Kieleko and King'oi Kieleko in the presence of the Clan Chairman, Vice-Chairman and other clan members.
32. It was his further testimony that their clan addressed the dispute herein and resolved that he was entitled to the suit property because he had purchased the same and had constructed thereon. He informed the court that there had been litigation over the suit property through the land adjudication dispute resolution mechanism and that the latest decision was made on 17/7/1997.
33. He asserted that he is entitled to the suit property by way of adverse possession even if he had purchased the same because he has been in continuous and uninterrupted possession for the last 29 years.
34. According to the 1st Defendant, the Plaintiff's suit is time barred and ought to be dismissed with costs. Concluding his evidence, he urged the court to grant the orders sought in the Originating Summons.
35. On cross-examination, he reiterated that he has been residing in the suit property since the year 1980. He admitted that the Plaintiff is the registered proprietor of the suit property. He further admitted that the suit property was awarded to the Plaintiff after the dispute was heard and determined by the Minister. He stated that he was not aware whether the Plaintiff had purchased the suit property or whether the Plaintiff had repaid a debt owed to Kimondiu Mbindyo. He denied having been served with a notice to vacate the suit property in the year 2005.
36. In re-examination, he testified that he was awarded the suit property earlier than the Plaintiff and had made improvements since the year 1980.
37. The 2nd Defendant did not call any witness in support of their case.
38. After the close of the close of the hearing, the parties agreed to file and exchange their written submissions.

The Plaintiff's Submissions

39. The Plaintiff filed his submissions dated 29th April, 2024.

On his behalf, Counsel submitted that the Plaintiff has discharged the burden of proof in accordance with Section 107 of the *Evidence Act*. Counsel further submitted that the Plaintiff's evidence on how he had purchased the suit property was corroborated by two witnesses. Counsel further submitted that the Plaintiff was declared the lawful owner of the suit property after a lengthy adjudication dispute and added that no appeal was filed against the decision of the Minister.
40. Counsel further submitted that the Plaintiff is the registered proprietor of the suit property. Counsel submitted that no evidence was adduced to show that the Plaintiff fraudulently acquired the suit property. Counsel further submitted that the 1st Defendant did not substantiate his claim to a genuine title over the suit property.



41. Counsel contended that the doctrine of adverse possession is inapplicable in the present matter as the 1st Defendant has not been in peaceful, exclusive and continuous occupation of the suit property. Counsel submitted that the Plaintiff had filed numerous cases seeking to protect his rights to the suit property and that he has always notified the 1st Defendant to cease trespassing thereon.
42. Concluding his submissions, Counsel urged the court to grant the orders sought in the Plaintiff.
43. To buttress his submissions, Counsel relied on the list of authorities annexed to the submissions.

The 1st Defendant's Submissions

44. The 1st Defendant filed his submissions dated 31st May, 2024.
On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the Plaintiff is the lawfully registered proprietor of the suit property?
 - ii. Whether the 1st Defendant is in unlawful occupation of the suit property and therefore a trespasser?
 - iii. What reliefs and/or orders should the court grant?
45. On the first issue, Counsel submitted that the Plaintiff fraudulently acquired the title for the suit property as he intentionally purchased Musanii Kieleko's property from persons who had no title and/or capacity to pass title. Counsel submitted that the 1st Defendant pleaded fraud in paragraph 8 of his defence and that the Plaintiff did not demonstrate that he entered into a valid contract with the lawful owner of the suit property. Counsel further submitted that the Plaintiff's alleged agreement does not comply with the provisions of Section 38 (1) of the *Land Act*, 2012. Counsel further submitted that the Plaintiff did not adduce evidence of a valid sale agreement between him and Musani Kieleko.
46. Counsel argued that the registration of the Plaintiff as the proprietor of the suit property was effected contrary to the provisions of Sections 24, 25 and 26 of the *Land Registration Act*.
47. Counsel submitted that the 1st Defendant has always been in exclusive occupation of the suit property since the year 1980 when he purchased the same and constructed a permanent home where he resides. Counsel argued that the suit herein was instituted in the year 2008 despite registration of the Plaintiff's title in the year 2002. Counsel asserted that the 1st Defendant's right to the suit property by way of adverse possession had already accrued. Counsel urged the court to dismiss the Plaintiff's suit with costs and allow the Originating Summons as prayed.
48. To buttress his submissions, Counsel relied on the following authorities: -
 - i. Lidzanga v Liseche [2023] KEELC 17659 (KLR)
 - ii. David O. Orango Mongare v Abdi Isaak & 2 others [2022] eKLR
49. As at the time of writing this judgment, the 2nd Defendant had not filed its submissions as directed.

Analysis and Determination

50. Having considered the pleadings, the evidence on record and the submissions by the respective parties, the following issues fall for determinations:-
 - i. Whether the Plaintiff's suit is statute barred.
 - ii. Whether the Plaintiff is the lawful proprietor of the suit property;



- iii. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
 - iv. Whether the 1st Defendant is entitled to the orders sought in the Originating Summons.
51. Whether the Plaintiff's suit is statute barred

The 1st Defendant contended that the Plaintiff's suit is statute barred and ought to be dismissed with costs. He contended that the Plaintiff was issued with a title for the suit property in the year 2003 while the suit herein was filed 12 years thereafter.

Section 4 of the *Limitation of Actions Act* cap 22 law of Kenya prescribes the limitation period for the institution of suits in regard to various causes of actions.

The limitation period in regard to an action to recover land under Section 7 of the *Limitation of Actions Act* is 12 years.

It provides that:-

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

The Plaintiff instituted this suit against the Defendants in the year 2008. The Defendant produced the title for the suit property (DEX-1). The title was issued to the Plaintiff on 17th June 2003. From the foregoing, I find that the suit herein was filed within the timelines and is not statute barred.

Whether the Plaintiff is the Lawful Registered Proprietor of the Suit Property

52. The dispute between the parties herein revolves around ownership of the suit property.
53. The Plaintiff testified that after the death of Musani Kieleko, his father Kivuva together with his uncles Koso and Kingoi sold the suit property to him. That he repaid a debt of 31 goats and 1 cow owed by his uncle to Kimondi Mbindyo, paid the expenses incurred by his father with regards to a case involving the suit property and also paid 4 cows to have the suit property blessed.
54. In this regard, the Plaintiff produced the family agreement dated 4/4/1997 (PEX-5). The agreement shows that the late Musani Kieleko died without a wife or child. That after his death, his family took over his land. That during his lifetime Kivuva Kieleko catered for the expenses with regards to the suit between him and Mangeli Keli since Koso and Kingoi refused to cater for the same. That Koso Kieleko and Kingoi Kieleko relinquished their claim to the suit property and in return the land would belong to Kivuva Kieleko who was to repay the late Musani Kieleko's debts.
55. It was the Plaintiff's testimony that he paid to his father 4 cows and 1 goat being the purchase price for the suit property. That later on he paid 3 goats plus Kshs. 6,000/= as expenses incurred in various cases handled by his father on his behalf.
56. The 1st Defendant testified that he purchased the suit property from Musani Kieleko vide a sale agreement dated 3/3/1980 (DEX-1) The sale agreement between him and Musani Kieleko, was a parcel of land in Kyangooa and the purchase price was Kshs 3000/=. The sale agreement shows that the purchase price was paid in instalments on various dates.
57. The 1st Defendant testified that out of the purchase price of Kshs. 3000/=: that he paid Kshs 1800/= to his uncle prior to his death. That he paid the outstanding balance of Kshs. 1200/= to his uncles in the presence of clan. In this regard, he produced the judgment by Ethanga Mbaathi Clan



- dated 28/12/1996(DEX-3). The 1st Defendant testified that in a meeting held on 27/6/1993, the clan resolved that the 4 cows and Kshs 70/= paid by the Plaintiff be refunded back and the suit property be shared amongst Kivuva Kieleko's three wives. In this regard he produced the clan resolution (DEX-2).
58. It is not in dispute that the suit property situated within Nzuuni Adjudication Section initially belonged to the late Musani Kieleko. It is also not in dispute that the land adjudication process in Nzuuni area commenced sometime in the year 1980. The Plaintiff testified that after he repaid his late uncle debts, his uncle Koso Kieleko being the first borne caused the suit property to be surveyed and recorded in his name. PW3 testified that after the Plaintiff repaid his uncles debts, the family was in agreement that he should be registered as the owner of the suit property.
59. The 1st Defendant contended that the Plaintiff was registered as the proprietor of the suit property because their father and uncle did not have an identification card. He asserted that the Plaintiff was holding the suit property in trust for the family.
60. It is not in dispute that the suit property initially belonged to Musani Kieleko but was not registered in his name. It is also not in dispute that the suit property was demarcated and recorded in the name of the Plaintiff. The 1st Defendant testified that there had been litigation over the suit property through the land adjudication dispute resolution mechanism. He produced the proceedings and findings in Objection Nos. 548, 461, 462, 463, 506 and 507 (DEX-7). In objection proceedings No. 506, the 1st Defendant objected against the registration of the Plaintiff in P/NO 1225 on the grounds that the suit property belonged to their father and it should be sub divided amongst his three wives. In response, the Plaintiff claimed ownership of the suit property on the grounds that he had repaid his uncle's debts. In his judgment dated 24/9/1992, the Land Adjudication Officer allowed the Objection and ordered for the addition of the names of Benard Kivuva and Kavuli Kivuva in P/No. 1225 to own it in common undivided share.
61. Being aggrieved, the Plaintiff appealed against the decision in Minister Appeal Case No. 527 of 1997 where he sought to have the names of Benard Kimilu and Kavuli Kivuva struck out from the register of P/No.1225. In his findings, the Minister stated that parcel No. 1225 was demarcated to the Appellant and that the 1st Defendant did not file a case before the Committee and the Arbitration Board in accordance with the [Land Adjudication Act](#). The Minister further noted that despite being alive at the time, the 1st Defendant did not call their father Kivuva Kieleko as a witness in support of his case.
62. In his judgment, the Minister allowed the Appeal and ordered for the names of Bernard Kimuli and Kavuli Kivuva to be struck out from the register of P/No. 1225 and the same to remain in the name of Joseph Muia Kivuva alone.
63. The preamble of the [Land Adjudication Act](#) provides that it is an Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto.
64. Section 29(1) of the [Land Adjudication Act](#) provides that the decision of the Minister shall be final. It is not in dispute that the 1st Defendant did not challenge the decision of the Minister by way of judicial review proceedings as required by the law.
65. At paragraph 8 of the Amended Defence, the 1st Defendant alleged that the Plaintiff was fraudulently registered as owner of the suit property as Koso Kieleko did not have any title to pass to the Plaintiff.
66. It is trite law that allegations of fraud must be specifically pleaded and proved.



67. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others* [2000] eKLR (Civil Appeal No 106 of 2000) Tunoi JA stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

68. Similarly, in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the Court of Appeal held that:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

69. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities

70. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the [Evidence Act](#) provides that:-

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- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

71. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.

72. The Plaintiff testified that his father and uncles sold to him the suit property after he repaid his uncle's debts. PW3 testified that the family held a meeting where it was agreed that the Plaintiff would acquire ownership of the suit property after he repays his uncle's debts. In his findings in Appeal Case No. 527 of 1997(PEX-4) the Minister stated as follows in part:-

“That when the clan convened a meeting and allocated the dispute P/No.1225 to the Appellant as compensation for the 30 goats he paid on behalf of the family It is evident that the sons of the two homes never assisted the appellant. That is why subdivided P/No. 1225 to the three wives and set aside P/No 1225 for the appellant and at no time did the two houses object to this arrangement to the higher levels of the clan since this took place before adjudication started. I have no doubt that the demarcation officer implemented the clan decision but leaving room to any one not satisfied with the same to file a case before the adjudication Committee.”



73. The Plaintiff produced a demand letter dated 15th July 1984 by Kimondiu Mbindiyo demanding repayment of a debt comprised of 31 goats and 1 cow. PW2 confirmed having witnessed the repayment of the debt on behalf of his father. PW3 stated that out of Kivuva Kieleko's sons, the Plaintiff was the only one who accepted to repay his uncle's debt. He also produced agreements dated 5/10/1997 (PEX-6) and 5/11/1997 in which Kivuva Kieleko admitted that he had received the purchase price in full. In the agreement dated 5/10/1997 Kivuva Kieleko confirmed that he was moving out from the suit property and that the land belongs to the Plaintiff.

74. The record shows that Musani Kieleko died before the commencement of the land adjudication process within the locus in quo and as such, the suit property was not registered in his name. Section 23 (2) of the [Land Adjudication Act](#) provides that:-

In preparing the adjudication record, the recording officer, if he is satisfied that—

- a. any person has, under recognized customary law, exercised rights in or over land which should be recognized as ownership, shall determine that person to be owner of that land.

75. It is only after adjudication that the rights of specific individuals can be registered after the hearing and determination of disputes in accordance with the [Land Adjudication Act](#).

76. Section 29 of the [Land Adjudication Act](#) provides that the decision of the Minister shall be final. Since the 1st Defendant did not challenge the decision of the Minister through judicial review proceedings, his fate over ownership of the suit property was sealed.

77. The Plaintiff testified that he is the registered proprietor of the suit property. He produced a copy of title deed (PEX-2) which shows that it was issued on 17/06/2003. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides as follows;

Subject to this Act;

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

78. Section 25 of the [Land Registration Act](#) provides for the rights of a proprietor. It provides as follows:

- I. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;...

Section 26 of the Act provides that:-...

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

79. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the right can be taken away. The 1st Defendant was a party to the family agreement dated 04/04/1997 where the issue of ownership of the suit property was discussed at length. No evidence was adduced to show that the Plaintiff fraudulently acquired the suit property. From the foregoing, I that the Plaintiff has demonstrated to the satisfaction of this court that he is the lawful registered owner of the suit property.

Whether the Plaintiff is entitled to the orders sought

80. The Plaintiff is seeking for damages for trespass on the suit property. The court is called upon to determine whether the 1st Defendant trespassed into the suit property.

81. Black’s Law Dictionary 10th Edition defines trespass to land as follows;

“ A person’s unlawful entry on another’s land that is visibly enclosed.”

82. In the case of Municipal Council of Eldoret Vs Titus Gatitu Njau (2020) eKLR the Court of Appeal cited the case of M’Mukanya Vs M’Mbijiwe (1984) KLR 761 where the ingredients of tort of trespass were stated as follows;

“trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership see Thomson Vs Ward (1953) 2 QB 153.”

83. To establish trespass, the Plaintiff had to prove that he was either lawfully in possession of the property or was the owner thereof and that the 1st Defendant entered the property without any justifiable cause.

84. In the case of Gitwany Investments Limited vs Tajmal Limited & 3 Others [2006] eKLR, the Court held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass.

85. The Plaintiff testified that in the year 1988, the 1st Defendant constructed a house on the suit property without his permission. He further testified that 1st Defendant has refused to vacate from the suit property despite having been issued with several demand notices. The Plaintiff produced demand letters dated 30th March 2000(PEX-11) and 15th February 2005 directing the 1st Defendant to vacate the suit property. The 1st Defendant admitted that he has been residing on the suit property for the last 29 years. Having found that the Plaintiff is the registered proprietor of the suit property, it goes without saying that the 1st Defendant is a trespasser thereon.

86. Having found that the 1st Defendant is a trespasser on the suit property, this court is called upon to determine whether the Plaintiff is entitled to damages for trespass. In the case of Park Towers Ltd vs John Mithamo Njika & 7 others (2014) eKLR the court held that:-

“I agree with the learned judges that where trespass is proved a party need not prove that he has suffered any specific damage or loss to be awarded damages. The court in such



circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.

87. Though the Plaintiff has proved that the 1st Defendant trespassed into the suit property, he did not adduce any evidence to enable this court to determine the actual damage that he has suffered. Considering the circumstances of this case I will award the Plaintiff minimal damages for trespass on the suit property.
88. The Plaintiff sought for a permanent injunction restraining the 1st Defendant from trespassing or interfering with the suit property. Having demonstrated that he is the registered owner of the suit property, I find that the Plaintiff has established a prima facie case that warrants the grant of the orders sought.

Whether the 1st Defendant Is Entitled to the Orders Sought in the Originating Summons

89. The 1st Defendant is seeking a declaration that he is entitled to the suit property by way of adverse possession. He also sought to be registered as the proprietor of the suit property.
90. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which stipulates that:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person.”

91. Further Section 13 provides that: -
1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession), and, where under Section 9, 10, 11 and 12 of this act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.
92. Section 38 gives guidelines on the procedure to be followed by a person claiming adverse possession.
93. The ingredients of the doctrine of adverse possession were discussed in the case of *Wambugu Vs Njuguna (1983) KLR 173* where the Court of Appeal held that: -

“Adverse possession contemplates two concepts; Possession and discontinuance of possession. It further held that the proper way of assessing proof of Adverse possession would be whether or not the title holder has been dispossessed or has discontinued his



possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

94. the ingredients were recently discussed by the Court of Appeal in the case of *Mtana Lewa Vs Kahindi Ngala Mwangandi* (2005) eKLR where it was held that: -

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya of 12 years. The process springs into action essentially by default or inaction by the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under 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.”

95. It is well settled that a party claiming adverse possession ought to prove that his possession was peaceful, open and continuous. The possession should not have been through force, not in secrecy and without the authority or permission of the owner.

96. For the 1st Defendant to be entitled to the suit property by way of adverse possession, he must demonstrate that he has been in continuous, uninterrupted occupation for a period of not less than 12 years.

97. In *Mombasa Teachers Co-operative Savings and Credit Society Limited Vs Robert Muhambi Katana & 15 Others* [2018] eKLR the Court of Appeal stated that: -

“Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non permissive or non-consensual, actual, open, notorious, exclusive and adverse use/ occupation of the land in question for an interrupted period of 12 years as espoused in the latin maxim *nec vi nec clam nec precario*.”

98. The 1st Defendant produced a copy of title (DEX-1) which shows that the Plaintiff is the registered proprietor of the suit property. He contended that he has been in continuous and uninterrupted occupation of the suit property for a period spanning over 12 years.

99. He testified that he has constructed his home on the suit property as shown in the photographs annexed to his affidavit in support of the Originating Summons.

100. As to the nature of occupation or possession, the 1st Defendant testified that he purchased the suit property in the year 1980 and took possession thereof. He further testified that the Clan resolved that he is the owner of the suit property since he had purchased the same and had constructed his home thereon.

101. The record shows that the dispute herein was adjudicated upon by New Ethanga Mbaa Nthi Clan and through the dispute resolution mechanism provided under the *Land Adjudication Act*. The 1st Defendant filed Objection proceedings against the Plaintiff in the year 1992 which culminated in the decision by the Minister in the year 1998. The proceedings herein were filed in Machakos in the year 2008 and the 1st Defendant subsequently filed the Originating Summons in the year 2009.

102. By the computation of the above sequence of events, the 1st Defendant has clearly never been in possession of the suit property for a continuous period of 12 years without interruption by the Plaintiff. The evidence adduced by both the Plaintiff and the 1st Defendant shows that the parties



herein have been asserting their claim of ownership of the suit property at various levels ranging from their clan, the Area Chief and the Lands Office up to the time when the suit herein was filed.

103. That notwithstanding, Section 37 of the *Limitation of Actions Act* provides that adverse possession can only apply where the land is registered. In my view adverse possession can only run against the title of a registered proprietor. In the case of Titus Kigoro Munyi Vs Peter Mburu Kimani (2015) eKLR the Court of Appeal held that the limitation period for purposes of adverse possession starts running after the registration of the land in the name of the Respondent. In the Originating Summons the 1st Defendant is seeking a declaration that he is entitled to the suit property registered under RLA CAP 300 by way of adverse possession. In the matter at hand, the time can be computed from June 2003 when the Plaintiff was issued with a title for the suit property.
104. From the foregoing, I find that the 1st Defendant has not met the threshold for the grant of the orders sought. I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities as required by the law. I also find the 1st Defendant has not proved his case against the Plaintiff as required by the law.
105. In the end, I enter judgment for the Plaintiff against the 1st Defendant in the following terms:-
- i) The Plaintiff be and is hereby declared as the legal owner of Plot No. OKIA/NZUUNI/1225 and the 1st Defendant is hereby ordered to vacate within 180 days from the date of this judgment.
 - ii) A permanent injunction be and is hereby issued restraining the 1st Defendant by himself, his agents or his servants from trespassing into the suit land and/or entering and remaining there.
 - iii) The 1st Defendant shall demolish all the illegal structures erected on the suit property within 180-days from the date hereof.
 - v) The Plaintiff is awarded Kshs. 50,000/= as damages for trespass
- Each party to bear its own costs. R/A

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF FEBRUARY, 2025.

In the Presence of:-

Ms Mutua for the 1st Defendant.

Court assistant - Ahmed

