**Kiptanui v Kotut (Civil Suit 28 of 2019)**
**[2024] KEELC 6329 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6329 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**CIVIL SUIT 28 OF 2019**

**EO OBAGA, J**

**SEPTEMBER 30, 2024**

**BETWEEN**

**SAMWEL KIPLAGAT KIPTANUI ..... PLAINTIFF**

**AND**

**JANE JEPKEMBOI KOTUT ..... DEFENDANT**

## JUDGMENT

1. The Plaintiff approached this court by way of Originating Summons dated 25th February, 2019 seeking the following declarations and orders:

    a. That the interest of Jane Jepkemboi Kotut in the 3 Acres in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912 has been extinguished by lapse of time.

    b. That the Plaintiff has acquired title by adverse possession of 3 Acres of land comprised in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912

    c. That the land register relating to the suit property be rectified to reflect the Plaintiff as the owner of the said 3 Acres and any title document issued be delivered to court for cancellation.

    d. That the Defendant do effect transfer of the said 3 Acres comprised in the suit land in favour of the Plaintiff.

    e. That a permanent injunction do issue restraining the Defendant his agents permanently from interfering with the Plaintiff's use, and occupation of 3 Acres in L.R. No. Uasin Gishu/ Kipkabus Settlement Scheme/912

    f. That the costs of this suit be borne by the Defendant.

2. In his Supporting Affidavit to the Summons sworn on the same date, the Plaintiff claims that he lives on L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912 (the suit property) having purchased 3

Acres of land comprised therein on 23rd December, 2003. He deponed that he paid the full purchase price and the Defendant acknowledged receipt upon which he moved and settled on the land. He stated that he put up a temporary structure, and has lived thereon continuously and uninterrupted since 2003 until 2018 when the Defendant instructed her son to destroy part of his fence. He claims to have had open, free and uninterrupted possession of the 3 Acres for over 12 years and is thus entitled to the same by way of adverse possession and/or purchase. That his exclusive use and occupation of the land for over 12 years has extinguished any right, interest or claim by the Defendant herein and he should be declared the owner of the 3 Acres by adverse possession.

3. The Defendant filed a Replying Affidavit on 25th April, 2013 and later on 8th December, 2020 filed a Statement of Defence and Counterclaim in essence denying that the Plaintiff had been in adverse occupation of the 3 Acres. It is her case that the Agreement for Sale dated 23rd December, 2003 was rendered illegal, null and void as well as invalid by Section 8(1) of the *Land Control Act*. That in fact she donated 1 Acre of her land to the Plaintiff. Further, that the Plaintiff later purchased the 1-Acre piece of land but never paid the balance of the purchase price within 3 months as agreed, thus they never approached that Land Control Board within 6 months as required by the law. She also averred that the Plaintiff never occupied the 3 Acres peacefully, continuously or adversely as she is in the control the land together with her children.

4. The Defendant averred that the Plaintiff only purchased 1 Acre under the Sale Agreement and is only entitled to a refund, if any, for the 1 Acre comprised in the suit property. She asserted that the land was never surveyed and seeking a survey of the suit property meant that the Plaintiff could not ascertain the portion of land he claims, save for the 1-Acre portion he occupies. The Defendant averred that one cannot occupy land in a vacuum, and since the initial agreement had become illegal and void, the Plaintiff cannot claim under adverse possession.

5. In the counterclaim, the Defendant averred that the Plaintiff had trespassed and continued to occupy 3 Acres of L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912, he had failed to pay the balance on the 1 Acre he purchased. That since the Agreement for Sale had become illegal, null and void, the Defendant dispossessed part of the land and devolved it to her children and thus the only remedy that the Plaintiff was entitled to is a refund. For these reasons, the Defendant prayed for judgment in the following terms:-

    a. That the Plaintiff's Originating Summons is bad in law and should be dismissed with costs.

    b. A declaration that the 1 Acre comprised in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912 that the Plaintiff purchased but failed to clear the balance of the Purchase Price has been extinguished by lapse of time as the contract was frustrated.

    c. A declaration that the Defendant and her children are entitled to the entire parcel of land comprised in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912 measuring 5 Acres.

    d. A permanent Injunction do issue restraining the Plaintiff, his agents, servants and/or assigns permanently interfering or trespassing into the Defendant's use and peaceful occupation of all that parcel of land comprised in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912 measuring 5 Acres.

    e. Any other relief that the court deems fit and convenient taking all the circumstances of this case into account.

    f. Costs of the suit.

6. At the hearing of the suit, the Plaintiff testified under oath as PW1 and stated that he purchased 1 Acre from the Defendant on 23rd December, 2003 at KShs. 60,000/- (agreement produced as PEX1) which was part of the suit property herein. PW1 testified that on 16th March, 2006 he purchased 1.5 Acres from the Defendant and produced this Agreement as PEX2. He testified that on 26th March, 2006 the Defendant offered more land he gave her a cow and Kshs. 20,000/- for more land and he produced a photograph of the cow as PEX3. PW1 testified that the Defendant injured her arm and approached him for KShs. 10,000/- in exchange of which he was given 0.5 Acres of land. That he now claims 3 Acres of the land, which he has been in possession of since 2003. He testified that he built a house, store, dug a borehole and also planted trees. PW1 produced the photographs showing the developments on the land as PEX4 (a) (b), (c) and (d), and a green card showing that the land is owned by the Defendant as PEX5. He testified that he had been on the land for the last 13 years and prayed to be given the 3 Acres. PW1 further chose to rely on his witness statement dated 25th February, 2018 as his evidence.

7. On cross-examination, PW1 testified that he had entered the land with the permission of the Defendant and that he had not gone before the Land Control Board (LCB). He told this court that he was not aware the agreement became null and void after the lapse of 6 months. He testified that under Clause 5 of the Agreement for Sale of 23rd December, 2003 the Vendor was at liberty to refund the purchase price in case the land was not registered in the Plaintiff's name. He admitted that he did not have an agreement of 3 Acres but that he gave a cow in the presence of the Defendant's son thus he is claiming 3 Acres. When re-examined, PW1 testified that his money has never been refunded.

8. PW2, John Kisormoi Serem, testified under oath and opted to rely on his witness statement of 4th June, 2019. The sum total of his oral and written testimony is that the Plaintiff purchased 3 Acres of the suit property from the Defendant in the year 2003. PW2 testified that he accompanied the Plaintiff to the firm of Yano & Co. Advocates and was a witness to and signed the sale agreement dated 16th March, 2006 for the purchase of 1.5 Acres.

9. Upon cross-examination, PW2 testified that the Plaintiff paid KShs. 90,000/-. He testified that he was a witness to the Defendant who paid him KShs. 500/- for transport. That he witnessed the Plaintiff purchase 1.5 Acres. He conceded that the Defendant's son died and was buried on the remainder of the suit property. PW2 testified that there is a house on the suit property built by the Defendant's son. That the children till the land but do not live there. On re-examination, he testified that he was a witness to the agreement of 26th March, 2006.

10. The Plaintiff called a third witness, Benjamin K. Cheserem, who also testified under oath, adopting his witness statement dated 4th June, 2019 as his evidence-in-chief. He testified that the Plaintiff is his neighbour who has been on the land since 2003 when he purchased 3 Acres of the suit property from the Defendant. That in 2018, the Defendant's son one Kelvin Kibiwot Kotut, came and destroyed the Plaintiff's fence and started claiming the said parcel of land.

11. Cross-examined, PW3 testified that he is aware that the Defendant's son, Kiptoo, died and was buried on the suit property. PW3 testified that it is the Defendant's son who cultivates on the suit property. He then testified that he did not witness the agreement in 2003 and 2016 and it is the Plaintiff who told him that he purchased 3 Acres. He testified that the children of the Defendant grow maize and beans. Counsel for the Plaintiff opted not to re-examine PW3.

12. The Defendant called two witnesses and testified under oath as DW1 herself adopting her witness statement dated 8th December, 2020 as well as Replying Affidavits dated 26th April, 2019 and 21st October, 2022 as her evidence. She testified that she is the bonafide and legitimate owner of the suit property herein. That in a bid to save the Plaintiff from eviction, she allowed him put up a temporary

structure on her land. DW1 testified that she later agreed to sell him 1 Acre out of her 5-Acre parcel of land before Advocate Yano for KShs. 60,000/- vide the Agreement dated 23rd December, 2003. That her son died and she buried him on the land. DW1 testified that the advocate never presented the Transfer documents to them and the title still reads her name. DW1 testified that all this time, the Plaintiff was allowed to stay on and utilise the entire 5 Acres of land despite only purchasing 1 Acre. That she continuously reminded him to have the title document transferred to him, but the Plaintiff seemed disinterested.

13. When cross-examined, DW1 testified that she sold 1 Acre to the Plaintiff who was to take the documents to the LCB. She testified that she had not taken or paid a surveyor to excise the 1 Acre belonging to the Plaintiff but that it was the Plaintiff and her lawyer who were supposed to process the subdivision. She admitted that the Plaintiff was staying on the 1 Acre. DW1 testified that John Serem witnessed the execution of the Agreement as the Plaintiff's witness not hers, and further that she could not recall the advocates who were present at the said execution. She testified that John Serem lives a distance from the suit property.

14. On re-examination, DW1 reiterated that it is the Plaintiff who was supposed to undertake subdivision of the land. She reiterated that she sold only 1 Acre and was protecting the encroachment on her 4 Acres. She testified that Mr. Serem was a village elder where the land is situated. DW1 testified that the Plaintiff did not protest when she buried her son on the land. She testified that she has been planting maize and beans on the land.

15. The Defendant's second witness, Joseph Kiplagat Chegenu (DW2) testified under oath and adopted her witness statement dated 12th December, 2020 as his evidence-in-chief. He testified that he is the former Assistant Chief of Kabiemit Sub-location and knows both the Plaintiff and the Defendant. To his knowledge, the suit property was in his sub-location and it belonged to the Defendant. He testified that he was aware of all the transactions in his sub-location but he did not know of any dealings between them and only saw the Plaintiff constructing a house on the suit property. DW2 testified that the Plaintiff's son died and was buried on the suit property.

16. Upon cross-examination, he testified that the Defendant did not inform him when she sold the land to the Plaintiff and he only saw the Plaintiff build in one corner of the land. He conceded that there was no requirement that one had to inform the assistant chief when selling land. DW2 also admitted that he did not attend the funeral of the Defendant's son and that he was not aware that the Defendant had her 2 Acres out of the 5 Acres. DW2 testified that John Serem is a respected village elder who was present when the agreement was signed.

17. Mr. Ondieki for the Defendant re-examined DW2 who then testified that the Defendant's children were grazing animals on the land. That he heard the Defendant's son was buried on the suit property. He testified that John Serem was not a village elder but he was consulted whenever there was a dispute. He testified that the assistant chief has a role to play when it comes to subdivision. DW2 also testified that the area occupied by the Plaintiff was smaller than that of the Defendant.

**Submissions:**

**Plaintiff's Submissions;**

18. On the close of the Defendant's Case Court directed parties to file written submissions. The Plaintiff complied and filed his submissions on 26th January, 2024 where counsel pointed out that the Agreement of 23rd December, 2003 was not disputed. He submitted that no transfer has been made in favour of the Plaintiff due to the Defendant's refusal to effect one and her failure to obtain the (LCB)

Consent. Counsel submitted that although the agreement of 26th March, 2006 is disputed, it was duly executed before an Advocate and in the presence of a witness, John Serem. Further, in exchange of his cow for 0.5 Acres, he now claims 3 Acres of the land.

19. Citing Sections 7, 13 and 38 of the *Limitation of Actions Act*, Counsel argued that in respect of the 1st and 2nd Agreements the Plaintiff had been on the suit property for 15 and 13 years respectively since time started to run 6 months after the failure to obtain LCB Consent in all three agreements. Counsel urged that a claimant in adverse possession must prove exclusive possession of the land, openly as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner's own volition. Counsel relied on Mbira vs Gachuhi (2000) EA 1, Mate Jane Jawe Muga (2007) eKLR and Nathaniel Kibet Chepkener vs Francis Chepkurui & Another (2022) eKLR. Counsel argued that by 4th October, 2018 the limitation period had run its full cause for all three agreements and any registered interest the Defendant had in the 3 Acres had been extinguished. He asked that the defendant be restrained from interfering with the use, possession and occupation of the 3 Acres and that she should pay the costs of this suit.

**Defendant's Submissions;**

20. The Defendant also complied and her submissions were filed on 30th January, 2024. Counsel cited Article 40 of Constitution of Kenya on the right to property, Article 10(1)(2) on the right to legitimate expectation, as well as Article 27(1) on equal protection of the law. Counsel submitted that the Defendant has a legitimate expectation that the law will protect her against unlawful intrusion. Counsel also submitted that under Section 107 of the Registered *Land Act*, the Defendant's title is absolute and cannot be defeated except for fraud, mistake and illegality none of which were argued by the Plaintiff. Counsel relied on Nbi ELC Case No. E103 of 2021 (O.S) Abdirashid Adan Hassan vs The Estate of WHE Edgley that adverse possession cannot succeed if one is in possession with the permission of the owner or under the provisions of a sale agreement. Counsel also relied on Joseph Macharia Kairu vs Kenneth Kimani Muiruri (2021) eKLR for the contention that the burden of proof is higher in adverse possession, and it is on the Applicant to prove that he has met the requirements for grant of an order of adverse possession. Counsel urged the court to dismiss the suit with costs.

**Analysis and Determination:**

21. The Court has carefully read and considered the pleadings, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;

    a. Whether the Applicant has met the threshold for grant of orders for adverse possession

    b. Whether the Plaintiff is entitled to a permanent injunction

    c. Whether the Defendant's Counterclaim is merited

**a. Whether the Plaintiff has met the threshold for grant of orders for adverse possession;**

22. The Black's Law Dictionary, 11th Edition defines the term "adverse possession" as 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. It goes on to explain that adverse possession is the doctrine by which title to real property is acquired as a result of such use or enjoyment over a

specific period of time. The court of Appeal in Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR further defined it 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 not 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."

23. The law relating to adverse possession is 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. Time and again, courts have discussed the ingredients required to prove the doctrine of adverse possession. In Kimani Ruchire & Another vs swift Rutherfords Co. Ltd (1980) KLR 10 the Court of Appeal observed that:-

> " 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..."

24. The statutory time limit for adverse possession is found at Section 7 of the Limitations of Actions Act, which provides that:-

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

25. To determine whether the Plaintiff has been in possession for the requisite number of years, this court needs to establish when the Plaintiff entered the suit property. It is not in dispute that the Plaintiff initially entered the land with the permission of the Defendant. The Defendant testified that she allowed the Plaintiff occupation and use of the entire suit property and later agreed to sell to him 1 Acre. The Agreement for Sale dated 23rd December, 2003 drawn by the firm of Yano & Company Advocates was for the sale of a 1 Acre piece of land at the price of KShs. 60,000/-. This amount was to be paid upon execution and the vendor acknowledged receipt thereof. Of note is that the Plaintiff entered the land prior to 2003, however he became entitled to the 1-Acre portion in the year 2003 when he paid for it in full under the Agreement.

26. The second Agreement dated 26th March, 2006 was also done by Yano and Company Advocates for sale of 1.5 Acres. Although the Defendant has protested selling more than 1 Acre of land to the Plaintiff, she did not disown the signature on this second Agreement dated 26th March, 2006 and neither has she alleged that the said signature was forged. Under Clause 1, the purchase price is indicated as KShs. 90,000/- which would be paid on execution and the Vendor also acknowledged receipt of the said amount upon execution thereof. The Defendant became entitled to this portion as from the year 2006 when he purchased it and paid for it in full.

27. Although the Defendant denies that the Plaintiff has been in occupation and use of 3 Acres of the suit property, at paragraph *10* on the defence and Counterclaim, it was averred that "the Plaintiff has trespassed and continued to unlawfully occupy 3 Acres" of the suit property. However, aside from the claim that he gave KShs. 10,000/- and a cow, no evidence was tendered of when this transaction occurred or when exactly the Plaintiff became entitled to the 0.5 Acres. There is no proof of the 3rd Agreement whatsoever and notably, none of the witnesses including the Plaintiff's witnesses spoke to this third transaction that involved a cow and some KShs. 10,000/- allegedly given to the Defendant by the Plaintiff in exchange for 0.5 Acres. It is not possible to determine when the date of entry into this portion thus, it would be difficult to determine whether the Plaintiff's stay on the said portion meets the required 12-year limit.

28. Consequently, what can be deduced from the evidence placed on the record is that the Plaintiff first purchased 1 Acre from the Defendant for a consideration of KShs. 60,000/- on 23rd December, 2003. On 26th March, 2006 the Plaintiff again bought 1.5 Acres from the Defendant for the agreed consideration of KShs. 90,000/-. It is this Agreement that Mr. John Kisormoi Serem of Kipkabus witnessed. This court therefore finds that the portion of the suit property currently possessed by the Plaintiff is 2.5 Acres and not 3 Acres as claimed by the Plaintiff.

29. It is the Defendant's contention that she donated 1 Acre to the Plaintiff as a gift, and while that might have been the case prior to 2003, the status of the land changed when the she sold 1 Acre and then 1.5 Acres to the Plaintiff in 2003 and later in 2006. As was submitted on behalf of the Defendant, a claim for adverse possession cannot succeed if the person is in possession with the permission of the registered owner. In the instant suit, up until the point of purchase, the Plaintiff was in possession of the said portion with the permission of the registered owner and thus time could not run. For time to start running where an one is in possession with the permission of the registered owner, it must be shown that the permission was withdrawn. Failure to establish that the permissive possession came to an end means that the claimant's possession cannot be deemed adverse to the rights and/or interests of the owner. In the case of Kweyu vs Omuto (1990) KLR 709 the Court, on the issue of permissive possession held that:-

> " Adverse possession and possession with permission cannot co-exist. Adverse possession does not start until the date of possession with permission (which usually follows a sale of land) expires."

30. In cases where one is in possession pursuant to a sale agreement, the permission granted under the sale ends once the purchaser in possession pays the purchase price in full, at which point their continued stay on the land becomes adverse to that of the registered owner. In Public Trustee vs Wanduru (1984) KLR 314, the court of Appeal held that adverse possession commences in favour of a purchaser in possession on the date he completes payment of the purchase price. Madan JA at page 319 stated:-

> " In this court the appellant's first ground of Appeal is that the learned judge correctly found that the second appellant was in continuous, open, exclusive and undisturbed possession of the suit land since March 16, 1967 and that the full purchase price for the land having been paid on the same day, viz March 16, 1967 the learned judge ought to have held that the second appellant had completed adverse possession of the suit land for over twelve years before the institution of the suit on April 2, 1979.
>
> Of course, calculated from the date of payment of the purchase price on March, 16 1967 and on the basis of it, the full span of 12 years' adverse possession and more had already run when the suit was filed April 2, 1979. The true owner ceased to be in possession on

March 16, 1967. His possession was discontinued that day. Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive (as the learned judge found it to be so in this case) 28 Halsbury 4th Edition paragraph 769."

31. The two Agreements are clear that the Vendor acknowledged receipt of the full purchase price upon execution thereof. The Defendant has produced no evidence that there remains a balance on the purchase price yet to be paid, not even a letter demanding payment of the balance. The claim that there is money owing from the Plaintiff to the Defendant is thus unfounded. This leads me to believe that the Plaintiff paid the entire purchase price upon execution of the two Agreements. Consequently, for the 1-Acre portion of land, the Plaintiff's possession became adverse on 23rd December, 2003 therefore the registered owner ceased to be in possession on the same date. Twelve years counted from this date ended on 23rd December, 2015. With regards to the 1.5 Acre portion, the Plaintiff's possession became adverse on 26th March, 2006 when the purchase price was paid in full. The statutory time limit counted from the said date thus ended on 26th March, 2018.

32. Adverse possession must also be open, notorious and to the knowledge of the owner. From the responses by the Defendant, it is clear that she is well aware that the Plaintiff is in occupation of the land. The Defendant's knowledge of the Plaintiff's occupation can also be deduced from both her oral and written testimony. DW2 also testified that he saw the Plaintiff constructing a house on the suit property. There is no doubt therefore that the Plaintiff lives openly on the suit property and with the express knowledge of the registered owner.

33. At the time of entry, the Defendant herein was and is still the registered owner. Although the Defendant denied that the Plaintiff was in peaceful occupation of the land, the only incident that shows any opposition or challenge of the Plaintiff's stay on the land is the invasion by the Defendant's son in 2018. By this time, the Plaintiff had already become entitled to the land by adverse possession because the 12 years had already lapsed. In any event, it appears that even the 2018 invasion by the Defendant's son was successful in dislodging the Plaintiff from the suit property. As a result, neither the Defendant nor her son acting under her succeeded in dispossessing the Plaintiff of the land and he is still on the suit property.

34. Also at the heart of the concept of adverse possession is hostile occupation and use of land in a manner inconsistent with the rights of the registered owner. In a claim for adverse possession, a claimant must also show that their possession of the land is hostile which is what amounts to dispossession of the owner. The element of hostile possession can be inferred from non-permissive possession. In Gabriel Mbui vs Mukindia Maranya (1993) eKLR, 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)."

35. 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. He built his house on the land and has been living on the suit property since 2003 without permission, actions which are hostile to the rights and interests of the registered owner.

36. Accordingly, this court is satisfied that the Plaintiff has been in continuous, open and uninterrupted possession of a portion of the suit property measuring 2.5 Acres. He is therefore entitled to be declared owner thereof by way of adverse possession.

**b. Whether the Plaintiff is entitled to a permanent injunction**

37. Aside from adverse possession, the Plaintiff also seeks a permanent injunction against the Defendant, restraining her and her agents permanently from interfering with the Plaintiff's use, and occupation of his portion of the suit property. A permanent injunction is ordinarily granted upon the hearing of the suit. It is granted after the Court has weighed the evidence in support of and against a claim and has weighed the merits of the case. It is also known as a perpetual injunction because unlike a temporary injunction which is meant to be in force for a specified time or until the issuance of further orders from the court, it perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. See Kenya Power & Lighting Co. Ltd vs Sheriff Molana Habib (2018) eKLR.

38. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code. The principles on granting injunctions are well known and were established in the celebrated case of Giella vs Cassman Brown & Co. Ltd (1973) EA 358. Having found that the Plaintiff has established his claim over a 2.5 Acre portion of the suit property, I hold that the Plaintiff has indeed established a prima facie case and proved his case to the required threshold to warrant the grant of permanent injunctive orders sought over the said portion. Consequently, I will proceed to find that the Defendant either by herself, agents, servants and/or anyone claiming under her should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the 2.5 Acre portion of the suit property found to belong to the Plaintiff.

**b. Whether the Defendant's Counterclaim is merited**

39. At the time the two Agreements for sale were made, sale of agricultural land was subject to the provisions of the *land control Act*. For this reason, the Plaintiff contends that he is entitled to the land by way of adverse possession because despite entering the contract by virtue of an agreement for sale, the said agreement became null and void by operation of law for failure to obtain LCB Consent as required. Under the *Land Control Act*, LCB Consent was to be obtained within 6 months after the making of the Agreements for Sale, yet in this case, it was not obtained for both agreements.

40. The Defendant concedes that the sale was rendered illegal under the *Land Control Act*. However, her position is that the Agreement dated 23rd December, 2003 was frustrated because the Plaintiff failed to clear the balance of the purchase price on time. The Black's Law Dictionary defines frustration with regards to contract as: "The doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered

terminated". The term breach is therein defined as"a violation or infraction ... of obligation or agreement ... whether by neglect, refusal, resistance or inaction". A breach of contract is then defined as a violation of a contractual obligation by failing to perform one's own promise by repudiating it or interfering with another party's performance.

41. What the Defendant alleges is that the Plaintiff failed and/or neglected to pay the balance of the purchase price, which is therefore not frustration, but breach of the terms of the contract. Both Contracts are clear that the payments were to be made on the date of execution of the purchase price and the Vendor acknowledged these payments by executing the said Agreements. As already discussed, the court has seen no evidence of the alleged breach of the two contracts by refusal to complete payments.

42. What would amount to breach is the failure to effect transfer of the portions purchased by the Plaintiff. Clause 5 of the Agreement for Sale dated 23rd December, 2003 provides:

> " That the Vendor hereby covenants that he shall refund the whole of such consideration as shall have been paid by the Purchaser with interest in the event that he fails to effect the transfer of the said parcel to the Purchaser."

43. To my understanding, it is the Vendor that gave the undertaking to ensure that the plot sold would be transferred to the Purchaser, failure to which, she would refund the consideration paid by the Plaintiff. The Defendant did not however endeavour to obtain LCB Consent which was essential in having the land transferred to the Plaintiff as outlined in the said Agreement for sale. Another instance of breach is that to date, the Defendant has also never refunded the purchase price as agreed under the contract.

44. With regards to the Agreement for Sale dated 26th March, 2006, whereas Clause 5 placed the responsibility of payment of requisite stamp duty and transfer/registration fees on the Plaintiff, Clause 4 thereof reads:

> " That the parties further agree that the Vendor shall pay all land rates due in respect of the said parcel of the land upto the date of transfer and that the Vendor undertakes to appear before the relevant Land Control Board for purposes of finalising the transaction herein."

45. The Defendant is again in breach of this Agreement since he did not appear before the LCB as agreed and neither did he sign the conveyancing documents necessary to effect transfer of the land as provided under Clause 3 thereof. It is trite law that a party cannot rely on its own breach to avoid a contract. The above are all obligations which lay with the Defendant, it is ironic that the Defendant would seek to rely on her own breaches and omissions to invalidate the Agreements for sale. In P.N Gichoho Ngugi vs County Government of Laikipia & Another [2017] eKLR, the court held:-

> " Can the defendant seek to obtain benefit of its own default? The following cases show that a defaulting party cannot rely on its fault. ALGHUSSEIN ESTABLISHMENT v ELTON COLLEGE (1991) 1 All ER 267, it was held:-
>
> > "A party who seek to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations."

The House of Lords in the decision above, relied on a speech by Lord Diplock in Cheall vs Association or Professinal Executive Clerical And Computer Staff (1983) 1 ALL ER that:-

> "This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed on broad language as "A man cannot be permitted to take advantage of his own wrong."

46. The Defendant is reminded that he who comes to equity must come with clean hands. It is clear that the Defendant is seeking to benefit from her own breach, which conduct this court ought not and will not countenance. The prayer seeking a declaration that the contracts herein were frustrated is not therefore merited.

47. Without the LCB Consent at the time, the suit being agricultural land could not be transferred and the transactions became null and void 6 months after they each were made. Since the Plaintiff was left in possession after the failure to obtain LCB Consent, it is true that this would also entitle him under adverse possessor. In Samuel Miki Waweru vs Jane Njeri Richu [2007] eKLR, the Court of Appeal pronounced itself on the issue of adverse possession on failure to obtain LCB Consent, holding that:-

> " It is not in contention in this case that the *Land Control Act* applied to the alleged lease or sale of the portion of land claimed by the respondent or that the consent of the Land Control Board was neither applied for within the stipulated period nor granted. It follows therefore, and Mr. Gitonga concedes, that, the alleged sale or lease became void for all purposes as provided by Section 6 (1) of the *Land Control Act* with the consequences stipulated in Section 22 of the *Land Control Act*. Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of possession by the respondent thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner.
>
> In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the *Land Control Act* for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void."

48. Thus, even if this court were to count the statutory time limit from the date the Agreements became void, it would still remain that 12 years have lapsed under each Agreement for sale. And since the Defendant took no steps to evict the Plaintiff or remove him from the land when the Agreements were voided by operation of the law, then he has been in adverse possession thereof for the requisite number of years. The requirement that a claimant must show non-permissive possession for not less than 12 years is thus fulfilled.

49. Under Section 37 of the *Limitation of Actions Act* provides:-

> " 37. This Act applies to land registered under the Government Lands Act, the Land Titles Act, or the Registered *land Act*, in the same manner and to the same extent as it applies to land not so registered, except that:-

(a) Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act."

50. It is evident that under the law and from the authorities cited herein that adverse possession extinguishes the title of the registered owner. The owner cannot sue the adverse possessor to recover the land but the adverse possessor's ownership is effective after determination of the claim and registration by virtue of the court order is issued in that regard. Consequently, at the time of filing of this suit, the Defendant's title had already been extinguished since the 12-year statutory time period had lapsed. For this reason, the Defendant had no title, claim or interest on the Plaintiff's portion of land capable of entitling her or anyone claiming under her, including but not limited to her children, to a declaration of entitlement or ownership of the suit property.

51. The Defendant also asked that a permanent injunction be issued to restrain the Plaintiff from permanently interfering or trespassing on the suit property. Trespass is defined in Section 3(1) of the *Trespass Act* (Cap 294) as an entry into the land of another without consent, approval, or lawful justification. For the Defendant to be entitled to this prayer, she first had established absolute ownership of the land. But, having already found that the Defendant's title over the 2.5 Acres was extinguished, it follows that the land no longer belongs to her but the Plaintiff and the Plaintiff has every right to occupy the said portion of the suit property. As a consequence, this prayer is thus not merited.

52. The upshot is that I find that the Plaintiff has proved his case against the Defendant that he has acquired 2.5 Acres of the land through adverse possession and the Defendant's counterclaim must fail. The Plaintiff's right to enjoy the 2.5 Acres herein found to belong to him by adverse possession is protected by the law. I therefore enter judgment in favour of the Plaintiff as follows:-

a. The interest of Jane Jepkemboi Kotut in the 2.5 Acres in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912 has been extinguished by lapse of time;

b. The Plaintiff has acquired title by adverse possession of 2.5 Acres of land comprised in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912;

c. The land register relating to the suit be rectified to reflect the Plaintiff as the owner of the said 2.5 Acres.

d. The Defendant do effect transfer the said 2.5 Acres comprised in the suit land to the Plaintiff;

e. A permanent injunction be and is hereby issued restraining the Defendant and her agents from interfering with the Plaintiff's use and occupation of 2.5 Acres in L.R. No. Uasin Gishu/Kipkabus Settlement Scheme/912;

f. That the costs of this suit shall be borne by the Defendant.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF SEPTEMBER, 2024.**

**E. O. OBAGA**

**JUDGE**

**In the virtual presence of;**

Dr. Chebii for plaintiff.

Mr. Ondieki for Defendant.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**30th SEPTEMBER, 2024**