**Toroitich v Bullut & another (Environment & Land Case 22 of 2016)**
**[2024] KEELC 6268 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6268 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE 22 OF 2016**

**EO OBAGA, J**

**SEPTEMBER 30, 2024**

**BETWEEN**

**TITUS KIPKORIR TOROITICH ..... PLAINTIFF**

**AND**

**PAUL K. BULLUT ..... 1ST DEFENDANT**

**ISAIAH K MUTAI ..... 2ND DEFENDANT**

## JUDGMENT

1. This suit was commenced by way of Originating Summons dated 2nd February, 2016 where the Plaintiff asked the court to grant him the following orders:

    a. That Titus Kipkorir Toroitich be registered as owner of the entire parcel of land L.R. No. Uasin Gishu/Elgeyo Border Settlement Scheme/226 measuring 8.6 Ha having acquired ownership and/or proprietary rights through adverse possession and the title of the Defendants to the parcel of land measuring 8.6 Ha to be declared as having been extinguished.

    b. That summons herein be served upon Paul K. Bullut and Isaiah K. Mutai.

    c. That during the pendency of this suit the said suit land L.R. No. Uasin Gishu/Elgeyo Border Settlement Scheme/226 be preserved.

    d. That the Defendants be condemned to pay costs of this Originating Summons.

2. The Plaintiff swore an Affidavit in support of the Summons. The Plaintiff deponed that Land Parcel No. Uasin Gishu/ Elgeyo Border Settlement Scheme/226 measuring 8.6 Ha (the suit property herein) was registered on 25th March, 1994 in the names of the Defendants as proprietors in common in equal shares. He deponed that he has been in uninterrupted, actual, physical possession and occupation of the suit property since 2001, has developed it and is living thereon with his family. He stated that his father and two brothers were interred on the suit property. He averred that his rights and occupation

over the suit property have been adverse to the title held by the Defendants. That he has therefore acquired the entire suit property comprising 8.6 Ha by way of adverse possession having lived thereon uninterruptedly, openly and peacefully since 2001. He asked to be registered as the sole proprietor of the land in place of the Defendants. He added that the Defendants have never utilised or taken possession of the suit land at any time. He prayed that his Summons be allowed.

3. A very lengthy Replying Affidavit sworn by Paul Bullut, the 1st Defendant herein on 29th June, 2020, was filed in response to the Summons. Mr. Bullut stated that he had authority to swear the Affidavit on behalf of the 2nd Defendant, and that he knew the Plaintiff as one of the sons of late Chemwolo Toroitich, (the Deceased). He admitted that the property known as Uasin Gishu/ Elgeyo Border Settlement Scheme/226 measuring 27.27 Acres is registered in the names of the Defendants. He deponed that the Defendants are in possession of the suit property. He explained that the suit property initially belonged to the Deceased who used it as security for a charge with the now defunct Continental Credit Finance Ltd (the Creditor) and defaulted in repayment of the loan. That the Creditor through its official receiver exercised its power of sale following due process and the Defendants herein purchased the property at the advertised public auction. He deponed that the official receiver thereafter executed the conveyance documents and the Defendants were registered as owners to the suit property, with no challenge from the Deceased to the advertisement and registration.

4. The 1st Defendant deponed that they issued a demand letter to the Deceased to vacate the land but he did not, so they instituted Eldoret HCCC No. 84 of 1994. That interlocutory judgment was issued against the Deceased, whereupon the matter proceeded for formal proof and the judgment confirmed. The Deceased filed an application to set aside the judgment but the same was dismissed. He deponed that the Deceased then lodged an appeal, being Eldoret Civil Appeal No. 72 of 2007, which was also dismissed for lack of merit and eviction orders issued to the Deceased and his family to vacate the property or face eviction by the Defendants. An attempt to review the eviction orders in HCCC No. 84 of 1994 failed and the Deceased and his family were successfully evicted in 2015. The 1st Defendant stated that the current case is an attempt to re-canvass a matter that has already been determined with finality up to the court of Appeal, and urged that litigation must come to an end. That this suit is frivolous and a dismissal thereof would promote equity, justice and good conscience.

5. Mr. Bullut deponed that there are orders of the court from HCCC No. 84 of 1994, which have not been varied or discharged, yet in total disregard thereto, the Plaintiff herein buried the Deceased on the suit property. That there is a matter pending before the Environment & Land Court seeking to have the Deceased's remains exhumed from the suit property. He further deponed that on 13th July, 2015 the Plaintiff and his brother, Sylvester Toroitich, invaded the suit property with his agents/employees, all armed, and torched down houses which matter was reported as OB No. 08/13/07/2015. That the Plaintiff has a place to live being Uasin Gishu/ Elgeyo Border Settlement Scheme/39 which was also owned by his late father. He averred that the party with the lawful court order is the one entitled to evict a forcible detainer. That for the alleged offences by the Defendants, the Plaintiff also ought to have pursued criminal prosecution if he believes himself aggrieved. He deponed that the Plaintiff seeks to perpetrate an infringement of the Defendant's rights over the property.

6. The 1st Defendant stated that there was a Criminal Case No. 2110 of 2016 against the Plaintiff and his brother Sylvester Toroitich for the acts of forcible detainer contrary to Section 91 of the Kenyan Penal Code. He deponed that the Plaintiff is guilty of material non-disclosure and misrepresentation, and having acted in bad faith is thus not entitled to the orders sought. Further, that the Plaintiff had failed to meet the threshold for issuance of orders of adverse possession. He urged that under the *Land Act* and *Land Registration Act*, a judgment not appealed against with regards to immovable property is a

transfer of right to enjoy such property. Lastly, he deponed that due to the above reasons, the suit is rendered dead on arrival and it is in the interest of justice that it be dismissed with costs.

7. The Plaintiff then swore and filed what is titled "Replying Affidavit" dated 4th May, 2018 in response to the Defendants' Reply. The Plaintiff deponed that the Eviction order was obtained by fraud because the Notice to Show Cause was never served, and further that the process server who allegedly served it was not licensed to practice in the year 2015. He deponed that the High Court had no jurisdiction to issue the Eviction Order. That the Defendants did not obtain leave of court to execute a 15-year-old judgment that was time barred. For these reasons, he was of the opinion that the eviction order was null and void, and that the judgements of the High Court and Court of Appeal had been rendered nugatory, hence title to the land should pass to him by adverse possession. The Plaintiff further challenged the eviction order as being incurably and fatally defective and any actions undertaken pursuant to it are a nullity as this court has no power to cure the said defects. He deponed that the Defendants were attempting to defraud the court into legitimising irregularities and illegalities to deny him the remedies sought in the suit.

8. The Plaintiff added that there are only 3 ways through which the Defendant could legally re-obtain the suit property. The first was by waiver of the Plaintiff's rights, which he had no intention to do. The second was by amendment to the law, which in any event would not apply retrogressively to favour the Defendants; and thirdly, by purchasing the land on a willing buyer willing seller basis with their own money. He averred that the Defendants were to blame for their predicament in the loss of their title and for compensation for damages suffered by the Plaintiff and his family members resulting from the fraudulent and illegal execution of the defective eviction order, including theft/robbery of personal property worth millions and possible lengthy periods in prison. He deponed that the Defendants could either voluntarily relinquish possession to the Plaintiff and his family members, or in the alternative this court has power to extinguish their title in favour of the Plaintiff under Section 17 of the *Limitation of Actions Act* and issue eviction orders against them as well as costs. He deponed that the Defendants had approached the court with dirty hands. Further, that the Plaintiff's prayers ought to be granted on a priority basis as a matter of urgency and not to allow the Defendants abuse the court process.

**Hearing and Evidence:**

9. The hearing of the suit commenced on 12th October, 2021 when the Plaintiff called 3 witnesses. The Plaintiff testified under oath as PW1 adopting his witness statement dated 2nd February, 2016. He deponed that he has lived on the suit property since he was born in 1978. He testified that he was not a party to the suit between his father and the Defendants regarding ownership of the suit property. He testified that his father died in 2015 and was buried on the suit property. PW1 testified that he put up a house in his father's compound but it was demolished by the Defendants. That the Defendants also razed his store and cut down his trees, which were carted away to Paul Bullut's home. PW1 testified that he had never seen an eviction order against him. That on 17th March, 2015 when the Police came to destroy his property, one Eliud Tanui Kipkemoi served him a court order signed on 25th March, 2015 and he produced it as PEX1 and an Affidavit by Eliud Kipkemoi as PEX2. He testified that he confirmed from the secretary of Process Servers Committee that the said Eliud Kiptanui was not authorised to practice for the year 2015. He presented a letter from the Secretary of Process Servers which was marked as MFI1 and an extract of the register of Process Servers which he marked MFI2.

10. PW1 testified that the destruction to his property was valued at KShs. 37,950,000/- and he presented a Valuation Report marked as MFI3. He conceded that he was ejected from the suit property by the police in March, 2015. He testified that the 5 Acres of maize he planted were harvested by the 1st Defendant, which together with the cutting of tress, was done over period of time. He added that

two of his brothers were interred on the suit property. He admitted that there is indeed a criminal case initiated by the Defendants that is still ongoing. That he knew of no civil suit against him. PW1 testified that he wished for the suit property to be transferred to him because he has been living thereon peacefully. He also asked that the Defendants be asked to meet the costs of his destroyed property as well as costs of this suit.

11. PW1 was cross-examined by Ms. Chesoo and he admitted that he was the son of late Chemwolo Toroitich and was born on the land as his son. When shown the eviction order, he denied that he was a family member of the said Chemwolo Toroitich. He admitted that he had averred to being on the land since 2001, and that he had indicated in his witness statement that his father had been evicted from the suit property in 2000. He was referred to proceedings on HCCC No. 84 of 1994 and he testified that there was a stay on the ruling of 8th November, 2011 which was granted to his father. He testified that the Judgement of the Court of Appeal was delivered on 19th September, 2012 and he confirmed that his father and the Defendants were in court between 1994 and 2012. PW1 testified the letter relating the re-issue of the eviction notice was written after dismissal of the appeal.

12. PW1 acknowledged that there was an application for exhumation of his father's remains from the suit property. He admitted that from the witness statement of one James Chemjor, he was utilising only 4 Acres of the land. He testified that the instructions to prepare the valuation report were issued by Sylvester Toroitich, that the report did not value the land. That it was prepared on 11th February, 2020 yet the destruction to his property was in 2015. He testified that he was not in possession of the suit property, yet the letter from the chief of Tembeho Location dated 3rd November, 2015 said that he was in possession. PW1 informed the court that he was aware the Chief wrote another letter in 2020 stating that the Defendants were in possession. PW1 testified that the complaint in the Charge sheet was related to his interference with the suit property. He admitted that he had not fulfilled the elements of adverse possession.

13. PW1 was then re-examined by Mr. Bitok and he testified that he has not been sued in any civil suit. That he has been living on the suit property independent of his father since 2001 when he was 23 years old, and that his father's houses were destroyed in 2000. PW1 testified that he constructed his own houses in 2001. PW1 insisted that the judgment of the Court of Appeal did not include him as a person, neither did the Notice to Show Cause nor the Eviction Order. He indicated that his brother Sylvester Toroitich has a separate suit against the Defendants and they were both using the same Valuation Report. He testified that the Criminal Case was an afterthought meant to stifle him. He reiterated that he was currently not on the suit property.

14. PW2 is Wilfred Malakwen Chepkiyeng who was also sworn and adopted his witness statement dated 29th March, 2021. He testified that he knew the Plaintiff because he is his neighbour at home and he went to school with him. He testified that the suit property was at Tembeho Area. PW2 testified that in 2004 he was asked by the Plaintiff to build a two-roomed house made of bricks and stones with an iron sheet roof as well as a store on the suit property. PW2 testified that the Plaintiff was evicted in 2016 and the house and store have since been destroyed. In cross-examination, PW2 testified that the Plaintiff's photographs contained the house and store that he built in 2004. PW2 testified that the Plaintiff is the son of the late Chemwolo. He was not re-examined.

15. The Plaintiff then called PW3, Richard Kimutai Kigen, a registered Valuer who testified that he was given instructions by the Plaintiff in early 2016, who was by then in Kimumu. That he visited the suit property in February, 2016 and prepared the Valuation Report. He testified that in 2018, the Plaintiff's brother Sylvester Toroitich asked him to keep the report until they required it. That he printed the Valuation Report in 2020. PW3 testified that there were mature trees on the property and evidence

that some houses had been on the suit property as well as an irrigation system that had been vandalised. PW3 testified that the trees had been cut but a few remained. He testified that going by what he saw, he assigned a total value of KShs. 37,950,000/-. He produced the Valuation Report as PEX4, a gazette Notice No. 2823 dated 3rd April, 2020 showing the status of the Valuer in 2020 as PEX5A and another being No. 1225 dated 12th February, 2021 as PEX5B.

16. On cross-examination, he testified that the Valuation Report was done in 2016 but he does not have a certificate to show his status in 2016. He testified that he received instructions from Sylvester Toroitich. He testified that he knew the Forest Act gives direction on valuation of trees, but he was not aware there was subsidiary legislation on the same enacted in 2016. He testified that he did not find any houses on the suit property as they were completely demolished and he did not indicate the specific number of indigenous tress that were on the land. He admitted that he did not conduct a structural survey. He indicated that the justification for his figures is to be found in his notes. PW3 explained that the items listed as others covers small items that cannot be enumerated in the report. He testified that the Plaintiff was not present when he visited the suit property.

17. Upon being re-examined, he testified that valuation is for determination of value of a property and they do not concern themselves with compensation. He testified that he arrived at the value of the house by reconstructing the materials which were on the ground and the foundation that was still existing. He explained that nothing much had changed in the period of four years. He stated that he was paid by the Plaintiff.

18. The Plaintiff's last witness PW4 was James Malakwen Chemjor who testified that he lives on Uasin Gishu/Elgeyo Marakwet Border Settlement Scheme/395. He explained that he was in court to testify on behalf of Toroitich Chemitei who died around 2015/2017. That he knew the Deceased since 1963 and they were friends living in the same settlement scheme, did business together and he used to visit his home. PW4 testified that Toroitich had his own house and his son Titus Toroitich had one as well. The son, who had his family on the land, was cultivating it and reared cows. He added that when Chemitei died he was buried on the suit property and that his son Titus continued to stay there. He told the court that one day in 2015, he saw smoke coming from the suit property and there were police officers. That on inquiry, he was informed that people claiming to have bought the land had come to take possession. That Titus's house was burning while blue gum and cypress trees had been cut down. He testified that Titus is no longer on the land and it is occupied by those who claimed ownership and took possession.

19. When cross-examined, PW4 testified that what is contained in his statement of 29th March, 2021 is what he knew. That Chemwolo Toroitich was staying on the land with his family and Titus came to occupy the land through his father. PW4 testified that he does not know the portion Titus was occupying, however, he was not occupying the entire suit property. He testified that he was aware that Mr. Chemwolo's farm was sold in a public auction in 1993 to Paul Bullut and Isaiah Mutai. He informed the court that he did not know that Mr. Chemwolo went up to the Court of Appeal to reclaim his land. PW4 was re-examined and he testified that Titus remained on the land even after his father was evicted. That Titus was evicted in 2015 after his house was razed down. That before his or his father's eviction, Titus was never taken before any court.

20. Only one witness testified on behalf of the two Defendants as DW1. This was Paul Kibet Bullut, the 1st Defendant who gave a sworn testimony and adopted his witness statement dated 6th November, 2020 as his evidence-in-chief. He produced the documents listed in his bundle of documents of the same date as DEX1-16. He testified that the suit property being Uasin Gishu/Elgeyo Border Settlement Scheme/226 measuring 8.6 Ha, is registered under his and Isaiah Mutai's names and they are in possession. DW1 testified that the Plaintiff is the son of the late Chemwolo. That the case ended in

2000 and the Appeal determined in 2012. He testified that the eviction order was given on 17th March, 2000 but they evicted the Deceased and his family in 2015.

21. DW1 testified that he did not evict Chemwolo Toroitich in 2000 because he lodged an appeal and there was a stay of execution granted. DW1 stated that there was an application for review of the eviction order but it was also dismissed vide ruling delivered on 3rd December, 2015. DW1 stated that the Deceased died in January, 2015 and was secretly buried on the suit property at night and he has since filed Case No. 48 of 2016 to have the body exhumed. It was his testimony that the Plaintiff tried to come back into the land after eviction in 2015 but they repulsed him and he was charged for trespass, the case is pending in court. DW1 denied the assertion that when the late Chemwolo was evicted, the Plaintiff remained on the land. He testified that they removed all the houses that were on the suit property. He stated that the Plaintiff now lives in Kimumu. He asked that the suit be dismissed with costs.

22. Upon cross-examination, DW1 reiterated that the stay of execution granted when the Deceased lodged his appeal is the reason they did not evict him in 2000. He reiterated that they managed to evict the Deceased's family in 2015. DW1 stated that they never sued the Plaintiff in the 1994 case. He testified that the eviction order included the Deceased's family. He testified that they served the eviction order through Eliud Kipkemboi. He testified that he knew the deceased was buried on the suit property. He clarified that he did not sue the Plaintiff in the exhumation proceedings. DW1 testified that they did not apply for an eviction order from the Environment and Land court. DW1 was not re-examined and the Defence case was closed.

**Submissions:**

**Plaintiff's Submission;**

23. Pursuant to directions of this court issued on 27th November, 2023 the Plaintiff filed his submissions dated 19th December, 2023. Counsel submitted that Section 4(4) of the *Limitation of Actions Act* stipulates the period within which a judgment of court is to be enforced. Counsel submitted that under Section 17 of the Act a judgment debtor acquires possessory title by possession, which can be enforced in appropriate proceedings. He relied on M'ikiara M'irikenya & Another vs Gilbert Kabere M'mbijiwe, Nbi Civil Appeal No. 124 of 2004. Counsel submitted that service of the alleged eviction order was disputed. Further, that the Court with jurisdiction to proceed with the matter had been established in 2012.

24. Counsel argued that the Plaintiff was claiming an interest arising from occupation for over 12 years, thus his time is computed from the failed eviction in 2000. He submitted that the Plaintiff remained on the land in actual, open, uninterrupted and peaceful occupation of the land until 2015 when he was wrongly evicted. In addition, that he had demonstrated his intention to disposes the Defendants even after his father's demise. Counsel submitted that it is no defence that the Plaintiff is a relative of Chemwolo Toroitich. He submitted that Section 28 of the *Land Registration Act* recognises the right to acquire land by virtue of any written law including the *Limitation of Actions Act*, and it is not an infringement of Article 40 of *the Constitution*. He cited Article 64 of *the Constitution* claiming that the Plaintiff is entitled to acquire the suit property. He also cited the case of Mtana Lewa vs Kahindi Ngala Mwagandi CA 46 of 2014 where the court explained the reasoning behind adverse possession.

25. Counsel argued that the Plaintiff's occupation of the land was non-permissible, and that he had occupied the land openly by constructing houses thereon and planting trees. He relied on Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Rahambi Katana & 15 Others (2018) eKLR and Kisumu Civil Appeal No. 27 of 2013, Samwel Kilamba vs Mary Mbaisi (2015) eKLR. Counsel argued that the Defendants did not produce anything to exhibit their assertion of claim

over the suit land (Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees (2016) eKLR and Amos Weru Murigi vs Marata Wangari Kambi & Another.

26. Counsel further submitted that the Plaintiff clearly identified the suit property (Stephen Wanaga Gatunge vs Edwin Onesmus Wanjau OS 7 of 2021 (2020) eKLR). Counsel argued that the Defendants re-entry into the land did not distinguish the Plaintiff's rights as time had already lapsed and the Plaintiff immediately asserted his rights by filing the suit herein. He pointed out that even if the land was to change hands, the plaintiff would still maintain an action against the registered owner. He based his opinion on James Obande Wasui vs Jeremiah Ochwada Musumba (2002) eKLR where it was held that adverse possession runs with the land irrespective of change in proprietorship. In what appears to be a typographical error, Counsel asked that the suit be dismissed in its entirety with costs to the Plaintiff.

**Defendant's Submissions;**

27. The Defendants filed submissions in response dated 20th December, 2023 arguing that the Plaintiff must ensure that his pleadings marry with the ingredients of adverse possession outlined in Mugerwa Katana Fundi & Others vs Ali Swaleh Ali & Another (2018) eKLR and Mbira vs Gachuhi (2002) IEALR 137. On openness of possession alleged by the Plaintiff, the Defendant submitted that under the *Evidence Act*, he who alleges must prove. He opined that the Plaintiff had failed to tender evidence that he had been in open occupation of the suit property. Counsel pointed out that DW1's assertion of being in open occupation of the land was buttressed by the Area Chief's letter dated 11th April, 2020 (DEX2), contrary to the Plaintiff's allegation that he has been in occupation since 2001. Counsel submitted that due to the ongoing dispute between the years 1994-2015, and the stay of execution granted to the Deceased, the claim that the plaintiff occupied the suit property from 2001 is false.

28. With regards to peaceful and continuous occupation, Counsel cited Isaiah Mutea M'Itunga vs Francis Kairethea Ibere & Another (2018) eKLR, where the court dismissed the suit on grounds that the Plaintiff's occupation was not continuous as there were constant disputes with the Defendants. Counsel submitted that the Plaintiff's stay on the land was not continuous, pointing Eldoret CMCR No. 2110 of 2016 R vs Titus Kipkorir Toroitich, Eldoret HCCC No. 84 of 1994 and Civil Appeal No. 72 of 2007. Counsel opined that even if the Plaintiff has been in occupation of the land, which was denied, the said occupation was interrupted by the above instances upon which the period must start to run all over again. Counsel supported this argument by relying on Elija Ikaha Ikanjo vs Joseph Ngairo Asutsa (2006) eKLR.

29. Counsel advanced the argument that the Plaintiff, never having been in unlawful possession of the suit property, cannot lay claim over it, as he has never been in sole occupation since 2001 as claimed. That the evidence adduced by the Plaintiff does not meet all the requirements for adverse possession. Counsel urged the court to be persuaded by the cases of Maragret Wangui Njugi & 2 Others vs George Kimani & Another (2019) eKLR, Karuntimi Raiji vs M'makinya (2013) eKLR and the authorities cited therein. Counsel submitted that the Defendants have been in possession of the suit property since the Plaintiff's family was evicted in 2015. Counsel also challenged the Originating Summons for failure to annex a copy of the title as required under law (Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui (2017) eKLR). Counsel submitted that the Defendants' title is regular in terms of Sections 25 & 26 of the *Land Registration Act* and thus indefeasible. That the Defendants' rights are protected under Section 24 of the *Land Registration Act* that the suit ought to be dismissed in the interest of justice.

30. Counsel argued that the plea of res judicata is predicated on the public interest principle that litigation must come to an end and prevent abuse of the court process. Counsel submitted that Eldoret HCCC

No. 84 of 1994 and Civil Appeal No. 72 of 2007 were instituted before the current suit over the suit property herein. That the two were heard to conclusion and determined on merit. Counsel further submitted that consequently the doctrine of res judicata applies to the Originating Summons herein and urged the court uphold the doctrine of res judicata and dismiss the suit. On this front, Counsel relied on numerous authorities including Pangaea Holdings LLC & Another vs Hacienda Development Ltd & 2 Others (2020) eKLR, Kamunye & Others vs Pioneer General Assurance Society Ltd (1971) EA 263 at 265 and Willie vs Muchuki & 2 Others. Counsel argued that costs follow the events as provided under Section 27 of the *Civil Procedure Act* and Section 13(7)(i) of the Environmental & Land Court Act.

**Analysis and Determination:**

31. Having considered the respective parties' pleadings, witness testimonies, the evidence adduced and submissions in the instant suit, this Court is of the considered view that the issues arising for determination are;

    a. Whether the suit herein is res judicata

    b. Whether the Plaintiff has satisfied all the ingredients to be entitled to orders for adverse possession

    c. Whether the Plaintiff is entitled for compensation on the destruction of property

    d. Who should bear the costs of this suit?

**a. Whether the suit herein is res judicata**

32. The Defendants have averred as well as submitted that the suit herein is res judicata Eldoret HCCC No. 84 of 1994 as well as the resultant appeal being Eldoret Civil Appeal No. 72 of 2007. That the suit property herein was subject of the two earlier suits, which were between the same parties and where the issues therein fully determined. It is necessary that the court determine this issue first, becaue the outcome of it might have implications on the jurisdiction of the court to proceed on the determination of the remaining issues.

33. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

34. The Court of Appeal held in The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others (2017) eKLR, that:

> " For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

35. In order therefore for a court to decide whether this case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain:

i. What issues were really determined in the previous case;

ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

36. There Defendants provided copies of the pleadings filed in HCCC No. 84 of 1994. From the Plaint, the Defendants herein who were the Plaintiffs in that suit sought the following orders from the court:

i. Declaratory orders of court per paragraph 13 above (which asked that the Defendant, Mr. Chemwolo, be declared a trespasser on the suit property and continues being in lawful possession thereof);

ii. Eviction orders of court per paragraph 14 (which asked that the Defendant be directed to leave the suit property within a reasonable time);

iii. Mesne profits as per paragraph 15A above (they sought mesne profits from the date they purchased the property to the date of the Defendant's vacation from the suit land);

iv. ..."

37. Although the suit property herein was the subject of the earlier suit, HCCC No. 84 of 1994 was mainly concerned with ownership of the suit property. The instant suit was brought to determine whether the Plaintiff herein had become entitled to the suit property by way of adverse possession. The considerations in the current suit are different from the considerations in the earlier suit. The Deceased never lay claim to the land by adverse possession. It cannot be said therefore that the issues in the previous suit are the same as in this subsequent suit. Having failed to prove that the issues in this suit were the same issues deliberated in the earlier suit, even without considering the other limbs, it is clear that the claim that the suit property is res judicata cannot thus succeed.

38. I feel that it is important to address the question on whether the high court had jurisdiction to hear and determine the land matter, it is common knowledge that at the time the suit was filed in 1994, the High Court had jurisdiction to hear and determine matters relating to land and the environment. On establishment of the Environment and Land Court in 2012, the Chief Justice gave directions on the hearing of environment and land matters. The Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of,

and Title to Land and Proceedings in Other Courts given under Gazette Notice No. 5178 of 25th November, 2014 read in part as follows:

> "2. All proceedings relating to the environment and the use and occupation of, and title to land pending before the Court of Appeal shall continue to be heard and determined by the same court.
>
> 3. All pending judgments and rulings relating to the environment and the use and occupation of, and title to land pending before the High court shall be delivered by the same court.
>
> 4. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.
>
> 5. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge."

39. The said suit though on environment and land had already been filed in the high court and thus continued to be heard and was eventually determined in that court. The court thus had jurisdiction to hear the said matter to its conclusion. In any event, if the Plaintiff therein had any issued with the forum before which the suit was being handled, he should have raised it at that time. No challenge was raised to the jurisdiction of the court at the time or during the Appeal filed thereafter. Therefore, none can be raised in this instant suit, which is a separate/distinct suit from HCCC No. 84 of 1994.

**b. Whether the Plaintiff has satisfied all the ingredients to be entitled to orders for adverse possession**

40. That being settled, the court now turns to determine the Plaintiff's claim of adverse possession. Article 40 of *the Constitution* of Kenya read together with article 64 allows citizens to acquire and own property, including real property, throughout the country. The doctrine of adverse possession is one of the ways through which individuals can acquire land. Under this doctrine, a land owner who abandons their land for a specific number of years to the mercy of squatters or trespassers stands at risk of losing their property to them. The doctrine finds life in the Limitations of Actions Act Cap 22, which at Section 7 thereof reads:

> "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."

41. The court of Appeal in Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR, defined the doctrine of adverse possession and also gave essential ingredients that a claimant needs to establish to prove adverse possession. The court held that;

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

nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

42. From the above authorities, for one to be able to sustain a claim for adverse possession, they must establish that:

    i. They have been in continuous, exclusive possession/occupation of the suit property for the statutory time limit of 12 years;

    ii. Their stay on the land has been without force or secrecy

    iii. That the possession was without the permission of the owner

43. For the claim to succeed, one must prove the existence of these essential elements. It is only upon meeting all the statutory requirements for adverse possession, that they become entitled to the property under the doctrine. That being the case, this court then has to determine whether the Plaintiff herein established all the prerequisites for his claim in adverse possession.

44. To start off, the court will consider whether the Plaintiff has had continuous, exclusive possession of the suit property for 12 years as required by law. It is not in dispute that the suit property initially belonged to the late Chemwolo Toroitich the Plaintiff's father, and by virtue of being his son, the Plaintiff resided thereon for a period of time. It was then purchased by the Defendants at a public auction due to failure by the Deceased to redeem it after defaulting on a loan where the suit property had been used as security. The Deceased challenged the Defendants ownership of the suit property in Eldoret HCCC No. 84 of 1994 but he did not succeed. I have read the Judgment of the court in HCCC No. 84 of 1994. The orders of the court therein are very clear. The Court held that:

    "1. A declaration is here made and declared that the Defendant Chemwolo Toroititch is a trespasser on land parcel No. UASIN GISHU/ELGEYO BORDER SCHEME PLOT No. 226.

    2. That he (Defendant) Chemwolo Toroitich be and is hereby given three (3) months from the date of judgment to remove himself, his family members, agents and servants as well as all his properties from the suit land.

    3. That in the event that the Defendant Chemwolo Toroitich fails to comply with item 2 above the Plaintiffs shall be at liberty to evict him.

    4. The claim for the mesne profits is refused as it was based on estimates and no documentary proof was tendered in evidence.

    5. The Plaintiff will have costs of the suit."

45. I have seen no evidence that there existed any temporary injunctive orders in HCCC No. 84 of 1994 that barred the Defendants from evicting the Plaintiff's family from the suit property pending hearing and determination of the suit. However, it is imperative that during the pendency of the suit, the Defendants herein could not interfere with the status of the land. The Defendants could not have dealt with the suit property without the leave of the court, especially since any such dealings would affect the rights of the other party to that suit in the event that the court found that the land belonged to him. In any event, since the suit was filed by the Defendants herein as the registered owners to assert their rights over their newly acquired property, for the duration of the suit, time for adverse possession could not run.

46. The Deceased then moved to the Court of Appeal and lodged an Appeal No. 60 of 2006, which was dismissed on 20th September, 2006 owing to the fact that the Appeal had been filed out of time and without leave of court. The Deceased returned to the Court of Appeal vide Eldoret Civil Appeal No. 72 of 2007, where a stay of execution was granted through a ruling delivered on 8th November, 2002. The Defendants could not then evict the Deceased and his family, the Plaintiff herein included, from the land pending hearing and determination of the Appeal. In a judgement dated 19th September, 2012 the Deceased's appeal was dismissed. After the judgment of the Court of Appeal, the Defendants herein sought a re-issue of the Eviction Order from the High Court in the trial court file. A Notice to Show Cause why execution should not issue against the Deceased dated 12th March, 2015 was issued and the Deceased, although served, failed to appear as indicated in the letter from the Deputy Registrar dated 22nd September, 2016. The Eviction Order was issued and on 27th March, 2015.

47. The Plaintiff testified that his father had been evicted from the suit property in 2000, and in the Application for execution filed in the High Court on 12th March, 2015, it was indicated that the Judgment Debtor was evicted in 2000 but he returned to the land. DW1 however testified that they did not evict Chemwolo Toroitich in 2000 after determination of the High Court matter because of the appeal lodged by the Deceased. Whatever the case, it remains that the Deceased remained on the suit property post the 2000 judgment of the High Court. As stated above, the Judgement of the Court of Appeal was delivered on 19th September, 2012. Section 13(1) of the *Limitation of Actions Act* provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person whose favour the period of limitation can run. The Court in Gabriel Mbui vs Mukindia Maranya (1993) eKLR held:

> " Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant... The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable"

48. From the above outline of events, time could not run in favour of the Plaintiff or his family due to the litany of litigation that the suit property was subject of. The Plaintiff himself confirmed that his father and the Defendants were in court between 1994 and 2012. For this reason, time for the Plaintiff herein can only be computed from the date of delivery of the Judgment of the Court of Appeal, which was on 19th September, 2012. The Plaintiff's family was evicted from the suit property in 2015 pursuant to the Eviction order dated 27th March, 2015 meaning that the plaintiff had only been on the land for slightly over 2 years from the date on which time started to run in his favour.

49. The claim for adverse possession had therefore not matured. As a result, the Defendants' title had not been extinguished so as to entitle the Plaintiff the right to be registered as the sole proprietor of the suit property. As if that was not enough, the Plaintiff's family was evicted from the land in 2015 and the Defendants took possession thereof, thereby interrupting the period of possession. Despite averments by the Plaintiff that he was in possession at the time of filing the suit, evidence tendered shows that as of 2015, he ceased being on possession. Time then stopped running. Section 13(2) of the Limitations of Actions Act provides that:-

> " 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."

50. That aside, to successfully acquire ownership rights under adverse possession, it is also a requirement that the Claimant must demonstrate that their possession was without force, in other words that it was peaceful. In Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another [2015] eKLR, the Court of Appeal held that:-

> " This suffices to demonstrate that the possession and occupation by the appellants as well as their forefathers was permissive upon payment of rent to the deceased which they faithfully did. On his demise however, the respondents using every means and avenue available to them, attempted albeit unsuccessfully to evict the appellants from the suit premises at times with disastrous consequences. All these happened because the respondents were in law asserting their title to the suit premises which action had the effect of stopping the time from running for purposes of adverse possession. In the premises, the appellants' possession or occupation of the suit premises between 1970 and the filing of the Mombasa O.S. cannot be said to have been peaceful and uninterrupted as all along there were attempts to evict the appellants from the suit premises. As stated by this Court in the case of *Francis Gacharu Kariri vs Peter Njoroge Mairu, Civil Appeal No. 293 of 2002* (UR): '...the possession must not be broken, or any endeavours to interrupt it'.
>
> The appellants in this case have continuously been subjected to forceful acts by the respondent with intention to evict them, some have been arrested and successfully prosecuted over disputes relating to their occupation, violent incidents have occurred from time to time leading to serious injuries and loss of life, while disputing over the suit premises including one where the respondents brother Said Abdalla Bakshwein was seriously injured and some workers and a squatter killed. In a nutshell, there was no evidence that the appellants' occupation of the suit premises was continuous and uninterrupted for a period in excess of twelve years."

51. Similarly, in this suit, the Plaintiff's possession or occupation of the suit premises cannot be said to have been peaceful. He has all along been subjected to incidents of interruption even prior to the eviction of 2015 that removed the Plaintiff and his family from the suit property. DW1 testified that the Plaintiff has since then tried to gain entry into the suit property but the Defendants have repulsed him. The Defendants cited one such instance that led to institution of criminal proceedings being CMCr Case No. 2110 of 2016, where the Plaintiff was charged with the offence of forcible detainer contrary to Section 91 of the Penal Code. There are other acts that the Plaintiff has continuously been subjected to since 2012 when the judgment of the Court of Appeal was delivered such as cutting down of his trees and harvesting of his maize.

52. All elements of adverse possession must be met at all times during the statutory period for a party to succeed in a claim for adverse possession. This is not the case in the instant suit, where although the Plaintiff did reside on the land, the period of his occupation was less than the statutory minimum of 12 years. In addition, there has been no peace in the Plaintiff's possession of the property. On adverse possession therefore, I find that the Plaintiff's claim does not meet all the ingredients for adverse possession and the same cannot succeed.

**c. Whether the Plaintiff is entitled for compensation on the destruction of property**

53. The Plaintiff herein also asked for compensation for losses suffered from his eviction from the suit property by the Defendants. The compensation for losses incurred on eviction is a special damage claim because it has been made in the nature of pecuniary losses. There is a long line of authorities to the effect that special damages must first be pleaded, and then strictly proved. See for instance the court

of Appeal decision in Richard Okuku Oloo v South Nyanza Sugar Co Ltd (2013) eKLR. The issue of compensation for losses incurred during the evictions was raised at paragraph 9 of the Plaintiff's Affidavit of 4th May, 2018, in support of which a Valuation Report dated 11th February, 2020 was produced by PW3 as PEX4.

54. PW3 testified that he was instructed by the Plaintiff herein but that his brother only visited him in the year 2018 regarding the report, yet the report indicates that the instructions were received from Sylvester K. Toroitich. The Plaintiff testified that his brother Sylvester also had his own suit and they were both using the same report. In my opinion, they ought to each have obtained a separate report for their individual losses, otherwise it appears to me that they want to reap twice from one incident of the alleged loss.

55. That is not my only issue with the report. The object of a valuation report is to establish the truth and validity of a claim of loss and damage, however, the Plaintiffs report is dated 11th February, 2020. The Plaintiff cannot in all honesty expect the court to rely on a report that was generated almost 5 years after the alleged loss. If indeed the instructions were issued early in the year 2016, where is the letter of instructions or even a receipt for the valuation service to prove that? PW3, the Valuer, alleged to have inspected the property on 3rd February, 2016 and prepared the report immediately He testified that it was in existence when the Plaintiff's brother went to see him about it in the year 2018. On a perusal of the report however, he included an Aerial photograph of the property downloaded from Google Earth from 2019. In addition, the photographs do not bear a date stamp to prove that indeed they were taken on the alleged date of inspection on 3rd February, 2016. I decline to rely on the said report as proof of any special damages allegedly suffered by the Plaintiff.

56. That aside, Appeal No. 72 of 2007 was dismissed on 19th September, 2012 thus reverting to the High Court Judgment delivered on 7th April, 2000. The Plaintiff and the rest of his father's family had had well over 2 years from the date of the dismissal of the Appeal to vacate the suit property. The Plaintiff however failed to vacate the property in line with the orders of the court. The Judgment of 7th April, 2000 allowed the Defendants herein to evict the Plaintiff's family if they failed to vacate the land within 3 months of the date of the judgment. The Defendants issued a Notice to Show Cause why eviction should not issue, no one appeared in court on the appointed date, even though as per the Deputy Registrar's letter dated 22nd September, 2016 the court record indicated that they were properly served. The eviction order was then issued, which as indicated earlier, has never been successfully challenged, thus it remains valid.

57. The Plaintiff was adamant that the eviction order did not apply to him for reason that he was not named as a party in the suit in which it was issued, and that the order was not directed at him. He went as far as denying that he belonged to his Deceased's father's family and even denied his father in a bid to lay claim to the suit land. The Plaintiff in his examination-in-chief testified that he was born on the land. He admitted in cross-examination that he was the son of Chemwolo Toroitich and that he was born on the suit property as his father's son. The Plaintiff's witnesses also testified to the fact that the Plaintiff was the son of Chemwolo Toroitich and that he came into the property through his father. I need not cite law or authorities to show that the Plaintiff herein is a family member to the late Chemwolo Toroitich. He admitted to being Chemwolo Toroitich's son, and by virtue of that fact, he is a member of his family.

58. I have also seen the said eviction order and it reads:

> " Whereas Chemwolo Toroitich was a judgment of this court delivered on 7th April, 2000 and ordered by a decree of this court issued on 1st September, 2000 to vacate plot No. Uasin Gishu/Elgeyo Border Scheme/226 Forthwith in default to be forcefully evicted.
>
> And whereas Chemwolo Torotitich the said judgment debtor has deliberately and negligently refused to comply with this order.
>
> You are hereby authorized/ordered to remove the said Chemwolo Toroitich his family members, agents, servants, livestock and all their properties from the said suit land plot No. Uasin Gishu/Elgeyo Border Scheme/226 forthwith."

59. It is clear that the Plaintiff's submissions only produced part of this Eviction order alleging that it was not addressed to the Plaintiff and thus it did not apply to him. From the extract reproduced above, the eviction order clearly applied to the Deceased as well as all his family members, including the Plaintiff. Furthermore, the allegation that the Process Server was not licensed is just the Plaintiff grasping at straws. His late father had been a party to the suit and knew of the orders therein. The High Court in its judgment did not require the Defendants to further serve the Deceased with an eviction notice if he failed to vacate the suit property within the 3 months granted. After his demise he was substituted with his Administrators ad Litem who clearly also knew of the orders of the High Court and the Decree issued therein. The fact that the Process Server was not licensed to practice for that year therefore cannot be of assistance to the Plaintiff in this suit.

60. In any event, if the Plaintiff and/or his family had any issues with the order of eviction, or the alleged defective/lack of service, they ought to have taken it up with the court that issued it, and in fact they did. There was an Application dated 7th June, 2017 by Sylvester Toroitich who was substituted in place of their Deceased father in HCCC No. 84 of 1994. In the said Application, he contended that the Eviction Order issued on 27th March, 2015 was issued in error as it was over 12 years since the date of the judgement in respect of which the order was given. In a Ruling delivered on 3rd September, 2019 Justice Olga Sewe held that:

> " Granted that this is a matter that has already been fully decided both by the High Court and Court of Appeal, there is no question or issue remaining to be determined in the basis of the pleadings filed herein. Moreover, all indications are that the Applicant is no longer in possession of the suit property and that the eviction order may have already been executed. In the premises, it is my considered view that the application is misconceived and therefore an abuse of the process of the court; and that the parties ought to pursue their grievances, if any, before the Environment and Land Court before which they are already litigating..."

61. The validity of the eviction order was not thereafter challenged and it thus stands valid, as do all actions done under it. The Black's law Dictionary, 11th Edition defines "special damages" as: "Damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved." From this definition, special damages are for expenses or losses incurred due to injury caused by another's wrongs or negligence. The Plaintiffs claim would have been valid if the eviction was illegal and/or malicious. I have already held that the Plaintiff's eviction from the suit property was undertaken pursuant to a valid court order, and further that the report produced in evidence is not reliable as proof of the alleged damage. It is my finding therefore that the claim for compensation for loss of property is also not merited.

**d. Who should bear the costs of this suit?**

62. The law on costs is found at Section 27 of the *Civil Procedure Act* which at sub-section 1 provides that:-

> 27(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;
>
> provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

63. A careful reading of Section 27 indicates that costs follow the cause/event, unless the court, for some good reasons, orders otherwise. The book Judicial Hints on Civil Procedure, 2nd Edition, 2005 by Rtd. Justice Richard Kuloba has been quoted in many cases in the definition of what is meant by the words 'the event'. At page 95 thereof, he explains that the words "the event" refers to the result of all the proceedings incidental to the litigation. One must also bear in mind that the award of costs as provided for under Section 27 remains at the discretion of the court subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force. In Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review applicati*on no 6 of 2014* court held as follows: -

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

64. Costs are awarded to compensate the successful party for trouble taken in prosecuting or defending the case and not to penalize the losing party, where the term "trouble taken" refers to the various lawful and legitimate steps taken by the parties in the case in pursuit of a remedy. Such reasons that would justify departure from the general rule that costs follow the event will vary from case to case. The Supreme Court of Kenya in Jasbir Singh Rai & Others vs Tarlochan Rai & Others (2014) eKLR gave a few examples of such justifiable reasons that the court may consider:

> " (15) It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs... [18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by

ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."

65. The import is that a successful party is entitled to costs unless they are guilty of any misconduct or there exists some other good reasons and or cause for not awarding them costs of the litigation. This court notes that the Defendants were not at fault at all in the Plaintiff's decision to file a premature and unmeritorious suit for adverse possession. However, it is noteworthy that the Plaintiff's actions have occasioned Defendants quite a lot of expenses and legal fees in defending this suit. The Plaintiff will have to shoulder that blame on his own. There is no doubt that the Defendants have emerged the successful parties in terms of the provisions of Section 27 above. The court sees no justifiable reason why it should deny them their costs.

**Orders:**

66. Consequently, this court finds as follows:

    a. The Plaintiffs Originating Summons dated 2nd February, 2016 lacks merit and is thus dismissed.

    b. The Defendants shall have the costs of this suit.

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

**E. O. OBAGA**

**JUDGE**

**In the virtual presence of;**

M/s Chesoo for Defendants.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**30th SEPTEMBER, 2024**