



**Kimetto v Kimetto & another (Environmental and Land Originating Summons  
1 of 2020) [2024] KEELC 6018 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6018 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2020  
MC OUNDO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**JOSEPH KIMUTAI KIMETTO ..... PLAINTIFF**

**AND**

**RICHARD KIPNGETICH KIMETTO ..... 1<sup>ST</sup> DEFENDANT**

**JOHN KIPKEMOI KIMETTO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide an Originating Summons dated 3<sup>rd</sup> January, 2020 brought pursuant to the provisions of Sections 38 of the *Limitation of Actions Act*, Cap 22 laws of Kenya and Order 37 Rule 7 of the Civil Procedure Rules, the Plaintiff herein sought for the following orders:
  - i. That the plaintiff is entitled by adverse possession to 2 acres of land comprised in the land parcel known as L.R No. Kericho/Boito/173 situated in Bomet County.
  - ii. That the Plaintiff be registered as the proprietor of the said piece of land measuring 2 acres comprised in that parcel of land known as L.R No. Kericho/Boito/173 situated in Bomet County.
  - iii. That the Deputy Registrar of the court does execute all the necessary documents to facilitate registration of the Plaintiff as the absolute proprietor of the 2 acres piece of land comprised in that parcel of land known as L.R No. Kericho/Boito/173 situated in Bomet County.
  - iv. That the Applicant is entitled to an order of permanent injunction restraining the Respondent, his agents, employees from entering, cultivating, occupying, trespassing, alienating, transferring and/or in any other manner adversely dealing with the Applicant's aforesaid portion measuring 2 acres.
  - v. That the cost of the Application be provided for.



2. The Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting Affidavit of Joseph Kimutai Kimetto, the Plaintiff herein sworn on 3<sup>rd</sup> January, 2020.
3. Simultaneously with the Originating Summons, the Plaintiff had filed a Notice of Motion dated the 3<sup>rd</sup> January 2020 where he had sought for injunctive orders restraining the Defendants from interfering with his right of use and occupation of the property title number Kericho/Boito/173 and an order of inhibition against any dealings on the said land parcel for which interim injunctive and inhibitive orders had been granted vide a ruling of 26<sup>th</sup> February, 2021.
4. In their Replying Affidavit dated 24<sup>th</sup> May, 2022 and filed on the 26<sup>th</sup> May, 2022, the Defendants opposed the Originating Summons for being frivolous, vexatious, ambiguous and an abuse of the court process the same having been overtaken by events. They refuted the allegations made by the Plaintiff to the effect that he had bought 2 acres comprised in L.R No. Kericho/Boito/173 (suit land) stating that the photo annexed and marked as 'JKK-2' had been a falsification of the position on the ground given that the Plaintiff had never constructed any structure or houses within the suit land.
5. The refuted the claim that their deceased father had sought consent from the Land Control Board for the subdivision and transfer of the alleged 2 acres portion of the suit land to the Plaintiff or that the Plaintiff had been in occupation of the suit land since the year 1975. That they had placed a caution on the suit land on 19<sup>th</sup> July, 2004 upon realizing that the Plaintiff was in the process of fraudulently transferring part of the same to himself. That the Plaintiff had trespassed into the suit property with the intention to prevent them from enjoying their lawful inheritance of their deceased father's estate whose succession proceedings had already been concluded and the Defendants were in the process of distributing it.
6. After complying with directions on how to proceed with the hearing of the Originating Summons, the matter proceeded for hearing by way of viva voce evidence wherein the Plaintiff, Joseph Kimutai Kimetto testified as PW1 to the effect that he was a farmer living in Litein Kabiangek. That he had sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein who were the legal representatives of the deceased's Sabastiano Mochi Masae as per the confirmation of Grant in Kericho H.C. Succession case No. 47/2011 which he produced as Pf exhibit 1.
7. He testified that the deceased Sabastiano Mochi Masae was the proprietor of the suit land being parcel No. Kericho/Boito/173 and produced a copy of the Certificate of Official Search dated 6<sup>th</sup> July, 2004 as Pf exh 2. That the deceased Sabastiano had sold to him 2 acres, to be excised from the said land, in the year 1975 at a purchase price of Kshs. 4400/= wherein upon completion of payment in the said year, he had taken possession and occupation and had built a temporary house in which he had lived therein for about 5 years. That he had also planted tea bushes, trees and even dug a bore-hole on the suit land where he had even buried his children.
8. He produced a photograph showing the said house and his children as Pf exh 3 before proceeding to testify that after his children died, he had decided to use the suit land as agricultural land wherein he had planted tea bushes and sold the tea leaves at the K.T.D.A. He produced Photographs of the tea bushes and receipt issued at KTDA as Pf exh 4(a – c) and receipts for February 1987 and October 2019 as Pf exh 5 (a – b) and added that he also kept cattle and planted maize plant on the other part of the suit land.
9. His evidence was that he had fenced the land with a live fence, planted the trees on the suit land in the year 1980's which trees were still on the ground, as per a Photograph he produced as Pf exh 6. He also produced the photographs showing the bore-hole and 2 of his children's graves as Pf exh 7 and 8 respectively.



10. It was his evidence that after he purchased the suit land, he had asked Sabastiano to transfer the same to him wherein they had attended the Land Control Board (LCB) around the year 1980 and had obtained the LCB consent dated 11<sup>th</sup> November, 1980 which he produced as Pf exh 9. He also produced the Application for LCB consent to transfer dated 8<sup>th</sup> September, 1980 as Pf exh 10.
11. That Sabastiano had then asked him to get a surveyor whom he contacted and paid, as per the receipt dated 19<sup>th</sup> November, 1980 herein produced as Pf exh 11, however, when the said surveyor visited the suit land for purposes of surveying and sub-dividing the same, Sabastiano's family had chased him away claiming that they needed time to discuss the issue as a family. That having waited for their communication to no avail, he had continued developing the suit land. That subsequently there had been a meeting with the elders who confirmed that indeed, he had bought the suit land. That Sabastiano's family never communicated to him until Sabastiano died in July 2005 after which they had started disturbing him asking that he leaves the suit land.
12. That subsequently, he had filed the instant suit in the year 2020. His application to the probate Court to have the Certificate of Grant in Succession Cause No. 47/2011 revoked was dismissed in a Ruling dated 9<sup>th</sup> December 2019 which he produced as Pf exh 12.
13. That whilst still in occupation of the suit land, the Defendants had assaulted him and had proceeded to cut down the trees therein where he had reported them to the police. He produced the photographs of the trees that were felled down as Pf exh 13 stating that he had never left the suit land to date. He sought for orders that the Defendants be directed to give him the title to the suit land and desist from disturbing him therein. He also sought for the costs of the suit.
14. On being cross-examined, the Plaintiff had confirmed that he bought the suit land in the year 1975. That whereas he had witnesses to the sale transaction, the Agreement got lost. That nevertheless, the purchase price had been Kshs. 4,400/= and whereas he could not remember the exact months of payment, he had paid an initial deposit of Kshs. 2,200/= and later paid the balance of Kshs. 2,200 within the same year of the purchase.
15. He confirmed the names of the witnesses to the said Agreement to have been Matias Kiprono Cheruiyot, Edward Chetiyony, Simeon Koskei. Others who were now deceased had included the secretary who had written the Agreement, one George Cheptiyony who was Edward's younger brother. That the Agreement had been made at Sabastiano's home in the presence of his children namely Richard Kimetto, the 1<sup>st</sup> Plaintiff herein and one Christopher all who had witnessed him pay the money but were now renegading the transaction. He confirmed that the purchase price had been in cash.
16. He also confirmed that in the 1980's, he had been accompanied by the deceased Sabastiano to the Land Control Board wherein the said Sabastiano had signed the application for consent for which the transfer should have been effected in the year 1981 but Sabastiano's family had refused. That he and Sabastiano had a good relation and he had sold him the suit land because they were neighbors. That it was only after Sabastiano's children had told him not to sell the suit land that he had refused to transfer the same to the Plaintiff. He maintained that in the presence of the area Chief, the surveyors had been turned away and told not to survey the suit land.
17. He confirmed that he had been on the suit land to date and that they did not have any dispute over the suit land with Sabastiano who had died in the year 2005. He denied ever getting any Notice from the Counsel or the chief but testified that the elders in the village had made a decision that he had bought the suit land. That in the 1980s the District Officer (D.O) had instructed the chief to hold the said meeting for which Sabastiano did not attend because he had been locked in the compound and told not to attend the same.



18. When re-examined, he confirmed that after the surveyor had been sent away, he had reported the matter to the District Officer after which the meeting had been held by the Chief. That there had been no other meeting held.
19. Edward Cheptiyony testified as PW2 to the effect that he came from Kabiangek village and was a farmer. That he both the Plaintiff and the Defendants as they were all his neighbors. He confirmed that the Plaintiff bought the suit land from Arap Masae in the year 1975 and thereafter planted tea bushes and built a house and started living therein. That after the death of the Plaintiff's children, the Plaintiff had moved to a land bordering the suit land but had continued cultivating his tea bushes and ploughing the same.
20. He confirmed that the Plaintiff's deceased children had been buried on the suit land. That whereas Sabastiano's children wanted the Plaintiff out of the suit land, their father had had no issue with the Plaintiff during his lifetime. He thus sought that the Court allows the Plaintiff to stay on the suit land.
21. In cross-examination, he maintained that the Plaintiff had purchased the suit land. That whereas he was not there during the meeting with the Chief, he had heard about the same. He maintained that there had been no dispute between the Plaintiff and Sabastiano and that only Sabastiano's children had issues with the Plaintiff over the suit land which dispute began in the year 2019.
22. PW3, one Matthew Kiprono Cheruiyot also confirmed that he lived in Kabiangek and that the Plaintiff had bought a portion of 2 acres of the suit land in the year 1975 after which he had planted tea bushes, built a house and dug a bore hole therein. He asked that the court issues the Plaintiff the title deed to the suit land since he was still on the said land where he was harvesting his tea. He also confirmed that the Defendants were the administrators of their father's property.
23. When he was examined by the court he confirmed that he knew the Defendants as sons of Arap Masae Sabastiano and that they all lived together in their home.
24. On cross examination he confirmed that the Plaintiff who was a retired teacher, bought the suit land, built a house, planted trees and dug a bore hole therein. That the dispute over the suit land started between the years 1975 – 1978. That whereas the Plaintiff had been sent away by Sabastiano's children, wherein he had let but returned and was still there to date and that the parties herein had not resolved the dispute.
25. In re-examination he testified that whereas he was not sure of the year in which the Plaintiff had bought the suit land, yet there had not been any dispute between the Plaintiff and Sabastiano and that the instant dispute had been between the Plaintiff and Sabastiano's children. That the Plaintiff took possession of the suit land after he bought it. that he had subsequently left the land but now used it to plant trees.

The Plaintiffs thus closed their case.

26. The Defence opened its case with the testimony of John Kipkemoi Kimetto, the 2<sup>nd</sup> Defendant herein who testified as DW1 to the effect that he lived in Kabiangek village Bomet County and was a farmer. He confirmed that the Plaintiff was his neighbour and that land parcel No. Kericho/Boito/173 (suit land) which had been registered to their father, one Mr. Sabastiano Mochi Masae (Deceased) was now registered in their names by virtue of High Court at Kericho Succession Cause No. 47 of 2011.
27. His evidence was that the Plaintiff had leased the suit land from their father in the year 1976 for 5 years but started denying them access therein and despite the lease having been for the purposes of planting maize only, he had proceeded to plant tea bushes therein without their deceased father's permission.



- That after the 5 years, the Plaintiff had refused to leave the suit land hence the beginning of the dispute concerning the same in the year 1980.
28. That he had neither heard that the suit land had been sold to the Plaintiff nor had he seen any Sale Agreement. That further, they did not know whom the Plaintiff had attended the Land Control Board with. That whenever his deceased father had asked the Plaintiff to leave the suit land, the Plaintiff had always asked him to wait until he had harvested the maize. His father's plea to leave the suit land had been in vain.
  29. That subsequently, together with his brother, they had placed a caution on the suit land. He produced the Certificate of Search dated 19<sup>th</sup> July, 2004 as Defence Exhibit 1. He also produced a letter dated 4<sup>th</sup> September, 2004 which their deceased father and his sons had written to the District Investigating Officer (DC1) as Df exh 2. That the said letter, which had been duly executed by their father's thumb print and their respective signatures had been to the effect that they had not sold the suit land. That together with their deceased father, they had subsequently lodged a complaint with the Anti-corruption Commission wherein vide a letter dated 21<sup>st</sup> April 2005, which he produced as Df exh 3, they had been advised to lodge their grievance with the Provincial Commissioner (PC).
  30. That together with their deceased father, they had also consulted T. Koske Advocate who had written a complaint letter dated 2<sup>nd</sup> December 2004, herein produced as Df exh 4, to the District Commissioner (DC). That unfortunately, their father had passed away in the year 2005 before the Plaintiff had vacated the suit land. That currently, there were only tea bushes in the suit land and nothing else. That whereas he could not tell how many trees were on the suit land, the same had been planted by their father. That although no barbed wire had been used as a fence, there was a wall. That whilst the Plaintiff had informed the court that he was living on the 2 acres portion of the suit land, there was neither a house or a pit latrine therein but only a borehole and trees.
  31. That there were no buildings constructed on the suit land, there had been no burial permit produced showing that the Plaintiff had buried his children on the suit land. That further, if indeed the said children had been buried on the suit land, according to their culture, there would have been evidence of a fence around the graves. He contended that the Plaintiff had not been in peaceful possession of the suit land and maintained that the suit land belonged to his deceased father, Sabastiano Mochi Masae.
  32. On cross examination, he testified that the portion of land that had brought them to court measured 2 acres. That the Plaintiffs' land neighboured theirs with a road between the two parcels. That Plaintiff was living on his parcel of land while they were living on their own portion of land.
  33. That whereas he did not know the Plaintiff's family, he came to know him as their neighbour after he had filed a suit against them. He confirmed that the suit land had tea bushes and that whereas he did not remember when the same had been planted, he confirmed that they were planted by the Plaintiff, and could have been around the year 1983. He confirmed that they had dug the borehole on the suit land in the year 1985, and that the Plaintiff had leased the suit land from their deceased father in the year 1976. He maintained that although he had not seen any written agreement, yet he had only heard from his father that the suit land had been leased to the Plaintiff.
  34. He confirmed that whereas the Plaintiff had planted the tea bushes on the suit land between the years 1980 and 1983 despite protests from his (Defendants') deceased father, there was nothing else that he (Plaintiff) had done on the suit land. That further whilst the Plaintiff used to harvest the tea bushes, they also harvested the same so that the Plaintiff could leave. That the Plaintiff had even reported him at the Konoin Police station for harvesting his tea wherein he had been jailed for 3 years.



35. That they had never seen any burial ceremony conducted on the suit land but had only heard that the Plaintiff's mother had died and was buried at their home. That they have never attended his children's funeral. He confirmed that they transferred the suit land to their names in the year 2015 but before then, the same had been registered in the name of their deceased father, Mr. Sabastiano Mochi Masae.
36. When he was referred to Df exh 4, he explained that apart from the Advocate's letter, they had also filed a case against the Plaintiff after he cut the trees on the suit land, which case did not proceed and he did not understand what had transpired there.
37. When he was re-examined, he reiterated that the Plaintiff did not plant tea bushes on the entire suit land for after the Succession Cause in the year 2016, they had also planted the tea bushes on the disputed 2-acre portion of the suit land.
38. DW2, Calisto Langat testified that he lived in Kabiangek division in Bomet County and was a preacher in Africa Inland Church Kusumek District at a place called Kipkosir. That he knew the parties herein as well as the deceased Sabastiano Mochi Masae who had been their neighbour. He stated that the suit land herein, title No. Kericho/Boito/173 belonged to Sabastiano but was now registered in the name of his children. That he had heard of the dispute between the Plaintiff and the deceased's children and whereas the Plaintiff was in occupation of Sabastiano's land, he had not heard of any sell or lease of the suit land. That whilst the Plaintiff had been trespassing on the suit land for a long time which was more than 12 years, he had not bought the same. That before the demise of Sabastiano, they used to hear that there was a dispute between the Plaintiff and the said Sabastiano.
39. On being cross-examined, he confirmed that the Plaintiff was currently on the disputed portion of the suit land although he did not know when had taken possession of the same. He confirmed that the disputed portion of the suit land had tea bushes which were more than 10 years old and which had been planted by the Plaintiff.
40. Caroli Kipngetich Arap Chumo testified as DW3 to the effect that he lived in Chemelot location within Bomet County and was a farmer. That he knew the parties herein and that Sabastiano Mochi Masae was now deceased. That the Plaintiff was his neighbour while the 2<sup>nd</sup> Defendant who was Sabastiano's son lived slightly away from their land. That whereas he did not know why the parties herein were fighting, the suit land had belonged to Sabastiano and he did not know when the Plaintiff got into the said land. That he had just heard that the Plaintiff had bought the same although he was not sure of the information.
41. That the Plaintiff lived in his own portion of land which was separated from the disputed portion by a road. That he had not heard of any burial on the suit land because he lived slightly far from it but he was aware that the Plaintiff had ploughed Sabastiano's parcel of land sometime back.
42. When he was cross-examined, he confirmed he was a neighbour to the Plaintiff. That there were tea bushes growing on the land which used to belong to Sabastiano and which tea bushes, the Plaintiff was harvesting.
43. Upon the closure of the Defendant's case, parties filed their respective submissions wherein the Plaintiff summarized the factual background of the matter as well as the evidence adduced in court before framing two issues for determination as follows:
  - i. Whether the Plaintiff has acquired ownership by way of Adverse Possession.
  - ii. Whether the Plaintiff is entitled to the prayers sought in the originating summons.



44. On the first issue for determination, the Plaintiff submitted that from the pleadings in the Originating Summons, it had been clear that he had been in occupation and quiet enjoyment of the said Parcel of Land L.R No. Kericho/Boito/173 since the year 1975 and that the Defendants deceased father had never taken and/or repossessed the suit land until his demise.
45. He placed reliance in a combination of decisions in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR and *James Maina Kinya v Gerald Kwandaka* [2018] eKLR where the court cited the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430, to submit that he had met the threshold of the principles set to be granted the orders of adverse possession because he had been in possession of 2 acres portion of land comprised in land parcel L.R No. Kericho/Boito/173, the possession had been public and that during the time that the Plaintiff had acquired the said possession, the deceased had lived for close to 30 years before his demise during which time the Plaintiff had been utilizing the said parcel of land without interruption.
46. On the second issue for determination as to whether he was entitled to the prayers sought in the Originating Summons, the Plaintiff's submission was that it was clear from the onset that the right to Adverse Possession accrued and vested in him as at 1975 so much so that by the year 2019 when the Defendants were obtaining the Grant, the title had already been extinguished in his favour. That further, there had not been evidence that the deceased ever took possession of the suit land or that he had ousted the Plaintiff from possession of the same up to his demise.
47. The Plaintiff placed reliance in the decided case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR to submit that it was not in dispute that he had developed the suit land by planting trees around the said parcel and also planting and tea bushes which he had been tending up to date. That indeed his occupation had been open and uninterrupted ever since he took possession of the suit land with the Defendants' knowledge.
48. He thus submitted that since the title by way of Adverse Possession had accrued and vested in his favour, the court should allow the prayers sought in the Originating Summons as the same was merited.
49. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other hand vide their submissions dated 6<sup>th</sup> May, 2024 summarized the factual background of the matter and framed their issues for determination as follows:
- i. Whether the Plaintiff purchased 2 acres of the suit property from the deceased.
  - ii. Whether the Plaintiff can claim beneficial interest under the doctrine of adverse possession.
  - iii. Who should pay the cost of the suit?
50. On the first issue for determination, the Defendants submitted that whereas it was trite that he who alleges must prove, the Plaintiff had claimed to have purchased the suit land but failed to prove the existence of a valid sale agreement between himself and the then owner of the suit land. They placed reliance on the provisions of Section 3(3) of the *Law of Contract Act*.
51. That Plaintiff's exhibits 9 and 10 being a Letter of Consent and an Application for the Land Board consent were dated 8<sup>th</sup> September, 1980 yet the Plaintiff did not satisfactorily explain why he had not proceeded to have the suit property transferred to his name even after obtaining both the documents, nor why in all those years he had not filed a suit claiming the 2 acres portion of the suit land as a purchaser.
52. On the second issue for determination, reliance was placed on the decided case of *Mate Gitabi v Jane Kabubu Muga & others, Nyeri Civil Appeal No. 43 of 2015* (unreported) to submit that whereas the Plaintiff had by his own admission stated that he had purchased the suit land from the deceased



Sabastiano, while their defence had that been that he had been a lessee on the said disputed portion, his occupation of the same had therefore been with the permission of the owner. Reliance was placed in a combination of decisions in the case of *Mbira v Gachuhi* (2002) 1EALR 137 and *Mwinyi Hamisi Ali vs the Attorney General & Another* [1997] eKLR

53. Their submission was that whereas one also needed to have been in actual possession of another person's land, in the instant case, whereas the Plaintiff had claimed actual and exclusive possession, the Defendants and/or their family members had been using the suit property to graze animals and had continuously cultivated and planted their crops therein. That further, whilst the Plaintiff had claimed to have purchased the suit land from Sabastiano and obtained consent from the Land Control Board, there had not been any further evidence to show *animus possidendi* (to show his intention to have) the suit land.
54. The Defendants further submitted that as far back as the year 1980, the late Sabastiano Mochi Masae had raised issues against the Plaintiff and his occupation of the suit land wherein there had been numerous complaints made to various government offices since then. That subsequently the period of 12 years had been marred with disputes hence the Plaintiff's occupation of the suit land had not been peaceful as evidenced by Def exh 2, 3 and 4. They placed reliance in the decided case of *Kasuve v Mwaani Investments Limited & 4 Others* 1KLR 184 to submit that at no point had the deceased Sabastiano Mochi Masae dispossessed them of the suit land and neither had the Plaintiff proved dispossession.
55. On the issue on costs of the suit, reliance was placed on the provisions of Section 27 of the [Civil Procedure Act](#) to submit that the same followed the event and that they be granted the costs.

#### **Determination.**

56. This is a matter where the Plaintiff seeks for orders that he be registered as proprietor of 2 acres of land comprised in L.R No. Kericho/Boito/173 situated in Bomet County having acquired the title by virtue of the doctrine of Adverse Possession after having purchased the same and there having been no transfer of its title to himself by its proprietor who was now deceased.
57. The Plaintiff's suit was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who were categorical that there was no sale agreement entered between the Plaintiff and the deceased father one Sabastiano Mochi Masae but instead that the Plaintiff had leased the land from their deceased father for 5 years in the year 1976 for the purposes of planting maize only but had proceeded to plant tea bushes wherein he had then denied them access therein.
58. On analyzing the above evidence, it is the Plaintiff's case that the deceased Sabastiano had sold to him 2 acres, to be excised from the said land, in the year 1975 at a purchase price of Kshs. 4400/= wherein upon completion of payment in the said year, he had taken possession and occupation of the suit land wherein he had built a temporary house in which he had lived therein for about 5 years. That he had also planted tea bushes, trees and even dug a bore-hole on the suit land where he had even buried his children.
59. That after the purchase he had applied for consent to transfer the land on 8<sup>th</sup> September, 1980 and had obtained the Land Control Board consent dated 11<sup>th</sup> November, 1980 as per his exhibits which he produced as Pf exh 10 and Pf exh 9 respectively. That after the death of his children, he had converted the suit land into an agricultural land wherein he had proceeded with cultivating and harvesting the tea planted therein to date. His effort to subdivide the land was thwarted by the deceased's family, the Defendants herein included.



60. The court is mindful of the legal attribution to the doctrine of Adverse Possession in Kenya which is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:
61. Section 7 of the *Limitation of Actions Act* provides as follows:
- “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...”
62. Section 13 of the *Limitation of Actions Act* further provides that:
- A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
63. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court Order (read Environment and Land Court Order) vesting the land in him.
- “64. Section 37 of the *Limitation of Actions Act* provides that:
- Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
65. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by Adverse Possession to land, (s)he must apply to the High (Read Environment and Land) Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner.
66. As I have indicated herein, the rule in Adverse Possession is that the party claiming must have been in possession for over 12 years. To prove a claim under Adverse Possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.
67. According to the Evidence on record, it is not in contention that L.R No. Kericho/Boito/173 situated in Bomet County was registered to Sabastiano Mochi Masae who was the father to both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein and who passed away in the year 2005. It is also not in dispute that the Plaintiff took possession of the 2 acres of land in the year 1980 and planted tea bushes therein wherein he has continued to cultivate and harvest the same to date. It is further not in contention that in the life time of the Defendants father the deceased Sabastiano Mochi Masae, there had been complaints filed against the Plaintiff seeking that he leaves the disputed piece of land wherein he had remained put.
68. It is further not in dispute that the Defendants herein had filed Kericho Succession Cause No. 47 of 2011 wherein they had been appointed as Legal administrators to the estate of the deceased father. That subsequently a Certificate of confirmation of grant to the whole suit land had been issued on the 15<sup>th</sup> July 2015 wherein the deceased’s estate had been distributed equally among his heirs. That



the Plaintiffs effort to have the Certificate of Grant revoked had been dismissed in a Ruling dated 9<sup>th</sup> December 2019 produced as Pf exh 12, wherein the probate court had found that it had no jurisdiction to deal with land issues on title and or occupation.

69. That Defendants' testimony was that pursuant to the confirmation of grant to issued on the 15<sup>th</sup> July 2015 they had transferred the suit land into their names in the year 2015, however no title deed had been produced in evidence to confirm this bit of allegation.
70. What was in contention is whether the Plaintiff took possession and occupation of a portion of 2 acres comprised of the suit land as a purchaser or as a lessee there having been no documentary evidence adduced in support of either theory and secondly having taken possession of the said portion of land, whether he had now qualified to be granted the same as an adverse possessor.
71. It is therefore clear that from the year 1980's, the Plaintiff has been in open, exclusive and actual possession of 2 acres of the suit property comprised in LR No. Kericho/Boito/173 situated in Bomet County wherein he has planted tea bushes and continues to cultivate and harvest the same to date without any interruption from the Defendants which is a period of more than 20 years since he brought this suit, which period is more than the 12 years required under the law for him to acquire title against the Defendants by way of Adverse Possession.
72. It is against this background, that the issue that arises for my determination is whether or not the Plaintiff has acquired prescriptive rights over the suit land through Adverse Possession
73. I find that the Plaintiff's entry onto the 2 acre of land in 1980 either through an alleged sale agreement or an alleged lease became null and void after the expiry of the respective six months, for lack of consent of Land Control Board under the [Land Control Act](#).
74. Indeed the Court of Appeal in Samuel Miki Waweru v Jane Njeri Richu [2007] eKLR held as follows:

“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.”
75. Secondly the deceased's title to a portion of 2 acres comprised in LR No. Kericho/Boito/173 situated in Bomet County was extinguished in 1992, twelve (12) years after the Plaintiff took possession and occupation of the said portion of suit property as it is trite that for purposes of limitation of Actions, time does not stop to run on a claim for adverse possession. The alleged change of ownership and the taking out of the succession proceedings by the Defendants in Kericho Succession Cause No. 47 of 2011 was therefore tantamount to nothing but an exercise in futility as this did not stop time from running for purposes of adverse possession.
76. I say so because it is trite that the filing of a suit asserting rights over land stops time from running in adverse possession, however a Succession Cause is initiated for the purpose of distributing the property of the deceased owner, to the persons entitled. Adverse possession on the other hand is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. In the instant case, there had been no evidence that the filing of the Succession Cause was for eviction of the Plaintiff from the suit property or was meant to assert rights over the land. Indeed adverse possession accrues to land and not title and unless the Defendants took steps to evict the Plaintiff from the suit land, which they did not, the mere claim that



the deceased's property had been distributed albeit after 12 years of the Plaintiff's occupation of the deceased estate did not stop his claim for his adverse possession over the 2 acres of land of the said estate as there is no evidence of assertion of rights by the Defendants.

77. The Court of Appeal in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held that:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”

The onus is on the person or persons claiming Adverse Possession:

“.. 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 evasion). 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 purpose or by any endeavors to interrupt it or by any recurrent consideration”

78. The main the elements of Adverse Possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

79. I find that the Plaintiff has sufficiently demonstrated the elements herein above stated thereby sufficiently establishing a claim to 2 acres comprised in that parcel of land known as L.R No. Kericho/Boito/173 situated in Bomet County by Adverse Possession. The Plaintiff's Originating Summons dated the 3<sup>rd</sup> January, 2020 is herein allowed in its entirety as prayed to the effect that;

- i. The Plaintiff is herein entitled by adverse possession to 2 acres of land comprised in the land parcel known as L.R No. Kericho/Boito/173 situated in Bomet County.
- ii. The Plaintiff shall be registered as the proprietor of the said piece of land measuring 2 acres comprised in that parcel of land known as L.R No. Kericho/Boito/173 situated in Bomet County within 30 days of delivery this judgment.
- iii. The Deputy Registrar of the court shall execute all the necessary documents to facilitate registration of the Plaintiff as the absolute proprietor of the 2 acres piece of land comprised in that parcel of land known as L.R No. Kericho/Boito/173 situated in Bomet County within 30 days of delivery of this judgment.
- iv. The Defendants, their agents, employees are herein permanently restrained from entering, cultivating, occupying, trespassing, alienating, transferring and/or in any other manner adversely dealing with the Plaintiff's aforesaid portion measuring 2 acres.
- v. Each party shall bear its own costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**



**M.C. OUNDO**  
**ENVIRONMENT & LAND – JUDGE**

