



**Kipkwambok v Maiyo & 2 others (Environment & Land Case  
131 of 2019 & Environmental and Land Originating Summons 43 of 2019  
(Consolidated)) [2024] KEELC 7252 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7252 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 131 OF 2019 & ENVIRONMENTAL  
AND LAND ORIGINATING SUMMONS 43 OF 2019 (CONSOLIDATED)**

**JM ONYANGO, J**

**OCTOBER 30, 2024**

**BETWEEN**

**WILBERT KIPKWAMBOK ..... PLAINTIFF**

**AND**

**GABRIEL KIMUTAI MAIYO ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY LAND REGISTRAR UASIN GISHU ..... 2<sup>ND</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 26<sup>th</sup> April, 2016 the Plaintiff filed suit against the Defendants seeking the following orders:-
  - a. A declaration that the Plaintiff is the legal owner of all that parcel of land known as Uasin Gishu/Kahungura Scheme/496.
  - b. An eviction order evicting the 1<sup>st</sup> Defendants, his Agents, servants and employees from land parcel Uasin Gishu/Kahungura Scheme/496.
  - c. A permanent injunction restraining the 1<sup>st</sup> Defendant, his servants, agents and or employees from trespassing into land parcel Uasin Gishu/Kahungura Scheme/496.
  - d. An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to remove the caution and or restriction placed on the suit land Uasin Gishu/Kahungura Scheme/496.
  - e. Costs and interest of the suit.
  - f. Any other or further relief that this Honourable Court may deem fit to grant.



2. According to the Plaintiff, he received a Letter of Offer for Plot No. 496 within Kahungura Settlement Scheme on 22<sup>nd</sup> November, 1993. He accepted the offer by paying KShs.6,600/- development Loan/ Conveyancing fees and he was issued with a Certificate of Outright Purchase by the District Settlement Officer Uasin Gishu on 18<sup>th</sup> April, 1994. On 6<sup>th</sup> July, 2001 he became registered as the absolute proprietor of the land which was now known as Uasin Gishu/ Kahungura Scheme/496 (the suit property herein). He averred that due to the nature of his work, he has been deployed to work in various areas of this country, but he had someone take care of the land right from the time of its acquisition. However, the 1<sup>st</sup> Defendant encroached into the land in 2005. The Plaintiff then conducted a search at the Uasin Gishu County Lands Office and discovered that a caution/restriction had been placed on the land without any justification or legal basis. The Plaintiff seeks a declaration that the 1<sup>st</sup> Defendant is a trespasser on the land.
3. The 1<sup>st</sup> Defendant filed an Amended Defence and Counterclaim denying the Plaintiff's claim. The 1<sup>st</sup> Defendant alleged that the suit land was not available for allocation to the Plaintiff or any other person since it had already been allotted to him before 22<sup>nd</sup> November, 1993. Any payment by the Plaintiff was thus meaningless as he had already paid the Government fees thereon, and any certificate issued to the Plaintiff is null and void. He averred that he is the legally recognised proprietor of the suit land having been allocated the same in 1983. He alleges that he took possession in the same year, fenced the land and started using it in the year 1999 to date. He has since put up bee hives, planted indigenous and cypress trees some of which have already matured, and constructed a house on the property. He averred that he lodged the caution on the land when he discovered that the land had been registered in the Plaintiff's name. He is of the view that the said registration is null and void as the allocation of the land to the 1<sup>st</sup> Defendant in 1983 had not been cancelled/revoked hence the Caution he filed has a legal basis and is thus justified. He averred that the suit discloses no cause of action against him and should be struck out or dismissed with costs because the Plaintiff is not deserving of the orders sought.
4. In his counterclaim, the 1<sup>st</sup> Defendant reiterated the facts laid out in his Defence, and sought a declaration that the Plaintiff is holding the suit property in trust for him and he set out the particulars of trust. He also asked that the Plaintiff's suit be dismissed with costs and judgment be entered in his favour against the Plaintiff and he specifically seeks the following orders:-
  - a. An order of declaration that the 1<sup>st</sup> Defendant is the legal owner of that parcel of land comprised in Title No.Uasin Gishu/Kahungura Scheme/496 by virtue of the *Limitation of Actions Act*.
  - b. An order of declaration that the plaintiff is holding parcel No. Uasin Gishu/ Kahungura Scheme/496 in trust for the 1<sup>st</sup> Defendant.
  - c. An order of declaration terminating the said trust and an order compelling the plaintiff to transfer Title No.Uasin Gishu/Kahungura Scheme/496 to the 1<sup>st</sup> Defendant's name within a specified period of time failure to which the Deputy Registrar of this Honourable Court and or any other relevant Officer to execute the necessary instruments of transfer in favour of the 1<sup>st</sup> Defendant.
  - d. An order of permanent injunction restraining the plaintiff, his agents, servants and or employees from entering into, remaining on or developing or in any way dealing with and or interfering with Title No.Uasin Gishu/Kahungura Scheme/496.



- e. In the alternative and without prejudice to the foregoing, an order of declaration that the suit land was not available for alienation since it had been allocated/allotted to the 1<sup>st</sup> Defendant well before 22<sup>nd</sup> November, 1993.
  - f. An order cancelling the title deed in respect of Title No. Uasin Gishu/Kahungura Scheme/496 registered in the name of the plaintiff and directing that the suit land be registered in the name of the 1<sup>st</sup> Defendant.
  - g. Any further or other relief this court may deem just to grant.
5. In response, the Plaintiff filed a Reply to Defence and Defence to Counterclaim denying the averments therein in toto. He denied the allegation that the land was not available for allotment having already been allotted to the 1<sup>st</sup> Defendant, or that his payments for the land were meaningless. He denied that the 1<sup>st</sup> Defendant was the legally recognised proprietor or that the caution had a legal basis or was justified. He pointed out that contrary to the allegations in the Defence, there was another suit being ELC Case No. 43 of 2019 (OS). In his Defence to the Counterclaim, the Plaintiff denied the averments therein, stating that the 1<sup>st</sup> Defendant is not entitled to the reliefs sought in the Counterclaim. He prayed that the defence be struck out as it contained mere general denials and that the Counterclaim be dismissed with costs.
  6. In his Reply to Defence to Counterclaim filed on 19<sup>th</sup> July, 2022, the 1<sup>st</sup> Defendant reiterated the statements in his Defence and Counterclaim. He prayed that the Plaintiff's suit be dismissed or struck out with costs and for judgment to be entered in his favour.
  7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants opposed the suit by filing a joint Defence on 22<sup>nd</sup> August, 2022 denying the Plaintiff's averments. They however admitted the allegation that the Plaintiff acquired the suit property after complying with the procedures and he was issued with a title on 6<sup>th</sup> July, 2001. They averred that the Land Registrar is only the custodian of public documents and could not have utilised or wasted the suit land in any way. It was explained that the registration of the land in the name of the Plaintiff was done in good faith after certifying the completion documents were in order and after complying with the requisite procedural requirements. It was also averred that the Land Registrar is statutorily mandated to place a caution/restriction over land upon presentation of the requisite documents, and any caution/restriction placed on the suit property was done in good faith. They alleged that the suit is incurably defective, vexatious and bad in law as it discloses no cause of action against them.
  8. In his Reply to this Defence, the Plaintiff joined issue with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Defence save where the same consisted of admissions. The Plaintiff also reiterated all the averments in his Plaint, and denied the Land Registrar placed the caution/restriction on the suit property in good faith. He averred that the Defence contains mere general denials and prayed that it be struck out.
- The suit was transferred to the Chief Magistrate's Court and assigned the number CMCE & L No.295 of 2018
9. On 29<sup>th</sup> March, 2019 the 1<sup>st</sup> Defendant (Gabriel Kimutai Maiyo) filed Originating Summons against the Plaintiffs vide ELC. Case No. 43 of 2019 (OS) seeking a determination of the following questions:-
    - a. Whether or not the Applicant, Gabriel Kimutai Maiyo, has acquired title and ownership of the whole of land reference number Uasin Gishu/Kahungura Scheme/496 containing by measurement 2.2 hectares or thereabout having been in exclusive, open, peaceful, continuous and uninterrupted possession and occupation and use of the whole of the said land reference number Uasin Gishu/Kahungura Scheme/496 for a period of over 12 years.



- b. Whether or not the Respondent's, Wilbert Kipkwambok's, title in the said land reference number Uasin Gishu/Kahungura Scheme/496 has been extinguished by dint of adverse possession by the Applicant, Gabriel Kimutai Maiyo.
  - c. Consequent upon the foregoing, that the Respondent's, Wilbert Kipkwambok's, title in and/or over the said land reference number Uasin Gishu/Kahungura Scheme/496 has been extinguished by operation of law and the whole of the said land ought to be transferred into the name of the Applicant, Gabriel Kimutai Maiyo.
  - d. A vesting order do accordingly issue, vesting the whole of the said land reference number Uasin Gishu/Kahungura Scheme/496 to the Applicant, Gabriel Kimutai Maiyo.
  - e. Consequent upon prayers 1, 2, 3 and 4 being granted, the Respondent, Wilbert Kipkwambok be ordered to execute a transfer to the Applicant, Gabriel Kimutai Maiyo, of land reference number Uasin Gishu/Kahungura Scheme/496 which Gabriel Kimutai Maiyo has acquired under adverse possession failing which the Deputy Registrar of the Environment and Land Court shall execute transfer documents and that Land Registrar Uasin Gishu County do issue a fresh title deed in the name of the Applicant, Gabriel Kimutai Maiyo.
  - f. The Respondent be permanently shut out of the suit land and he be condemned to pay the Applicant's costs.
10. The Applicant swore a Supporting Affidavit on 25<sup>th</sup> March, 2019 setting out the grounds on which the Summons was premised. His case is that he applied for land from the District Land Officer in 1983 and was allocated the suit property and his name is on the list and/or register of Kahungura Settlement Scheme members. He took possession of the suit property in 1983 and asked a neighbour to look after the land until 1999 when he fenced it and started grazing his livestock thereon. He put up beehives in 2000, planted cypress trees along the boundary in 2001, which have matured and are ready for harvesting. In 2002 started planting maize and has done so to date. He constructed a house for his son who has occupied it since completion in 2015.
  11. He averred that the Ministry of Land and Physical Planning and the administration office recognise him as the owner, and he attached letters from the Chief and the said Ministry to that effect. He further averred that the purported transfer of the suit property to the Respondent was therefore irregular, unlawful, fraudulent and illegal, therefore null and void. He alleged that he has been in exclusive, open, peaceful, continuous and uninterrupted possession of the suit property since 1983 to date and has acquired title/ownership by operation of law. The land ought therefore to be transferred into his name and a title issued to him since the Respondent has lost the right thereto under the Limitation of Actions Act. He prayed for orders as per the Originating Summons.
  12. After the Originating Summons was filed CMC E&L Case No.295 of 2018 was transferred to the Environment and Land Court and assigned the number ELC Case No.131 of 2019.
  13. By an application dated 7<sup>th</sup> March, 2020 the Applicant sought to have ELC.No.131 of 2019 consolidated with ELC Case No.43 of 2019(O.S) and the application was allowed on 28<sup>th</sup> June, 2021. ELC Case No. 131 of 2019 was designated as the lead file for purposes of recording the proceedings and hearing. This judgment is therefore in respect of the two consolidated suits.

#### **Plaintiff's Case**

14. At the hearing, the Plaintiff testified as PW1 and adopted his witness statement dated 1<sup>st</sup> October, 2016. A summary of his testimony is that he applied for land from the Settlement Scheme in 1993



and was allocated the suit property that year. He asked his neighbour, Arap Kengir, to take care of it while he was working in Garissa. When he visited in 2005 he found the 1<sup>st</sup> Defendant on the land and on inquiry, the 1<sup>st</sup> Defendant told him that he was only grazing his cattle. PW1 testified that when he went back in 2015, the suit property had been fenced and there was a semi-permanent structure, which the 1<sup>st</sup> Defendant told him was for taking shelter during the rainy season. He admitted that he has never stayed on the suit property because he stays on a different piece of land. PW1 produced a letter dated 17<sup>th</sup> November, 1993 which was marked as PMFI1, a letter dated 22<sup>nd</sup> November, 1993 as PEX2, the Certificate of Outright Purchase as PEX3, a receipt dated 24<sup>th</sup> March, 1994 as PEX4, a rates demand notice dated 8<sup>th</sup> April, 2004 as PW5, a certificate of official search for the suit property dated 13<sup>th</sup> September, 2016 as PEX6 and the Original title deed as PEX7. He prayed that the 1<sup>st</sup> Defendant be evicted from the land.

15. PW1 was cross-examined by Mr. Wafula for the 1<sup>st</sup> Defendant and he testified that he is a retired Administration Police Officer who worked under the late Provincial Commissioner Mr. Chelang'a. DW1 testified that he did not know the other names of his neighbour Kengin, neither did he know his plot number, but that Kengin died a while back, by which time the said neighbour had moved from the neighbouring plot having been chased by the 1<sup>st</sup> Defendant. When shown the copy of the Extract of the Register, PW1 confirmed that the first entry is the Settlement Fund Trustee, and the second one is him. He confirmed that DMFI2 is a letter by the 1<sup>st</sup> Defendant applying for allocation of land, and that DMFI5 shows photographs of trees and beehives. He was also shown a letter from the Chief indicating that the land was allocated to the 1<sup>st</sup> Defendant. PW1 testified that he knew Dan Kalamba, the settlement Officer who wrote a letter (DMFI6) stating that the suit property was allocated to the 1<sup>st</sup> Defendant. He identified DMFI7 as a receipt dated 18 July, 1988 in the 1<sup>st</sup> Defendant's name for KShs.685/-. He further stated that the letter dated 21<sup>st</sup> September, 2018 addressed to the Land Registrar Uasin Gishu stated that the land was allocated to the 1<sup>st</sup> Defendant.
16. PW1 told the court that when he applied for the land he did not know it had been allocated to the 1<sup>st</sup> Defendant. That later, the 1<sup>st</sup> Defendant told him that he had left the suit property and moved to his land in Kanyarkuat in West Pokot. He told the court that he had told the 1<sup>st</sup> Defendant to vacate the land. That the 1<sup>st</sup> Defendant is a trespasser. He testified that a plot can be re-allocated if the owner fails to meet the obligations in the letter of allotment. He testified that the 1<sup>st</sup> Defendant constructed on his land by force and that he was not ready to relinquish the land.
17. PW1 was also cross-examined by Mr. Kwame for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and he testified that he was not aware that the Land Registrar made a mistake when he issued him with a title. He testified that he had not written to the Land Registrar to remove the caution placed by the 1<sup>st</sup> Defendant on the land. He admitted that he did not issue notice to the Land Registrar before he filed suit, but that he had sued the Registrar because they issued him with the title yet the land was allocated to someone else.

### **Defendants' Case**

18. The 1<sup>st</sup> Defendant testified as DW1 adopting his two witness statements dated 19<sup>th</sup> June, 2023 and 18<sup>th</sup> June, 2019 as well as his Supporting Affidavit to the OS sworn on 25<sup>th</sup> March, 2019 as his evidence in chief. He also produced the documents annexed to his said affidavits as the Defendant's Exhibits 1-10. He told the court that he had the Green Card for the suit property which shows that it is registered in the Plaintiff's name. That he also has the original letter of allotment for Kahungura Scheme Plot No. 496 which he produced as DEXB11.
19. On cross-examination by Mr. Matekwa, DW1 reiterated that the land was registered in the Plaintiff's name and admitted that he has no title. He testified that the register of members he produced was not



- certified. Further, that he had only produced the excerpt of the register where his name appears but asserted that he knew that the Plaintiff's name does not appear therein. DW1 acknowledged that he had indicated in his witness statement of 19<sup>th</sup> June, 2023 that the land was registered in the Plaintiff's name in 2001. DW1 also acknowledged that DEXB8 indicates that he had paid 100% deposit vide receipt No. AY 412683 whereas DEXB9 indicates that he paid 10% deposit vide the same receipt No. AY 412683. He added that he has lived on the land since 1983, but when he went to collect his title, he discovered that the land was registered in the Plaintiff's name, so he placed the caution to prevent the Plaintiff from selling it.
20. Ms. Tigo for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cross-examined DW1 and he testified that he was never given a notice that his allotment letter was cancelled. That he did not lodge the caution in bad faith, but only to prevent the Plaintiff from selling the land. He stated that the Land Registrar did not make any mistake. Upon re-examination, DW1 testified that he took possession of the suit property in 1983 and has been in peaceful possession since 1999. He reiterated that he has planted trees and constructed a house thereon.
  21. James Malakwen Kipsaina of ID No. 3313907, testified as DW2. He adopted his witness statement dated 19<sup>th</sup> June, 2023. In his said statement, he recalled that William Kigen used to take care of the 1<sup>st</sup> Defendant's parcel which he stated was Parcel No. Uasin Gishu/Kahungura Scheme/496. He stated that he did not know the Plaintiff, and only heard his name when the 1<sup>st</sup> Defendant informed him that the Plaintiff alleged that he had asked him to take care of the suit land. He denied that he had at any time taken care of the suit land or any other parcel for the Plaintiff. He denied the allegation that the 1<sup>st</sup> defendant had chased him from the land, clarifying that he relocated from Kahungura Scheme in 2005 having sold his plot to a 3<sup>rd</sup> Party and left of his own volition. He refuted the allegation that he had died in 2005 as claimed. He asserted that the suit property had been in the 1<sup>st</sup> Defendant's possession for over 20 years.
  22. Thomas Koech Chelimo testified as DW3. He adopted his witness statement in ELC 43 of 2019 dated 18<sup>th</sup> June, 2019 and the statement of even date in ELC 295 of 2018 as his evidence-in-chief. The summary of his statements is that he came to know the Defendant in 1987 as the owner of Plot No. 496-Kahungura Scheme. At the time, he and his family used to occupy Plot No. 177, which borders Plot No. 496, before being relocated. He said that the land was given to Mr. William Kigen who occupies it to date. To his knowledge, Mr. Kengir took care of the 1<sup>st</sup> Defendant's land. When the 1<sup>st</sup> Defendant came to occupy the land in 1999, there was a house on the plot. That the 1<sup>st</sup> Defendant fenced the land, planted cypress trees along the boundary and put up bee hives. He added that the 1<sup>st</sup> Defendant started planting maize and wheat around the year 2002. He also harvests small stones which he sells to Chesogor Secondary School. He stated that besides the 1<sup>st</sup> Defendant, he has never known any other owner of the suit land.
  23. Upon being cross-examined by Mr. Matekwa, he acknowledged that the Land Registrar is the one who can confirm ownership of land. DW3 testified that he knew the 1<sup>st</sup> Defendant and he is the owner of the suit land. He however acknowledged that not everyone who tills or occupies land necessarily owns it. He testified that since the 1<sup>st</sup> Defendant owns the land; he should have a title deed. He clarified that in 2001, he resided in Kaoni Village in Uasin Gishu.
  24. The Defence then called William Kiprotich Kigen as DW4. He adopted his two witness statements filed in ELC 43 of 2019 and ELC 295 of 2019 both dated 18<sup>th</sup> June, 2019 as his evidence-in-chief. The summary of his statement is that he is the owner of Plot No. 177 while the 1<sup>st</sup> Defendant whom he has known since 1983 is the owner of Plot No. 496. He stated that he and the 1<sup>st</sup> Defendant both took possession of their land in 1983, however, the 1<sup>st</sup> Defendant used to live and work in Eldoret Town.



The 1<sup>st</sup> Defendant thus allowed DW4 to graze on the land between 1984 to 1999 when he came back, fenced the land and started grazing his animals thereon. That the 1<sup>st</sup> Defendant planted cypress trees in 2000 which are now mature, and put up bee hives that he requested DW4 to care for. He stated that the 1<sup>st</sup> Defendant started cultivating the land around that time, and in 2015, constructed a house for his son, Mr. Kiplimo, who is in occupation thereof to date. He stated that the 1<sup>st</sup> Defendant has been in exclusive, open, peaceful, continuous and uninterrupted possession and occupation of the land from 1983 to date. He explained that he did not know the Plaintiff and that he has never seen anyone else but the 1<sup>st</sup> Defendant and his family on the land.

25. When Mr. Matekwa cross-examined DW4, he testified that his land is known as Uasin Gishu/Kahungura Scheme/177, and he knew the 1<sup>st</sup> Defendant whose land was Parcel No. 496. He testified that the 1<sup>st</sup> Defendant allowed him to graze his cattle on the suit property. He stated that he was able to tell the owner of a neighbouring plot of land. He admitted that he had not produced any documents showing that the 1<sup>st</sup> Defendant owned the suit property, but asserted that the 1<sup>st</sup> Defendant should be having the title deed. In re-examination, DW4 testified that he took care of the 1<sup>st</sup> Defendant's land. That the 1<sup>st</sup> Defendant took possession in 1983 and nobody chased him from the land. He confirmed that the 1<sup>st</sup> Defendant has planted cypress trees on his land. This marked the close of the 1<sup>st</sup> Defendant's case.
26. The 2<sup>nd</sup> Defendant chose not to call any witness, but produced the Green card for parcel number Uasin Gishu/Kahungura Scheme/496 as the 2<sup>nd</sup> Defendant's Exhibit 1. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's case was closed and the court directed that parties file their written submissions.

### **Plaintiff's Submissions**

27. The Plaintiff's written Submissions are dated 6<sup>th</sup> August, 2024. Counsel for the Plaintiff cited Sections 24 of the [Land Registration Act](#), on the rights and privileges of registration, and Section 26(1) thereof which provides that a certificate of title is prima facie proof of ownership (Ali Wanje Ziro vs Abdulbasit Abeid Said & Another (2022) eKLR). He submitted that no proof had been tendered to show the Plaintiff was culpable of fraud, corruption or illegal dealing with reference to the land. He pointed out that the 1<sup>st</sup> Defendant claimed to have paid KShs.685/- on the land but had produced no receipt in respect thereof (William Lagat vs Dickson Kebut (2023) eKLR).
28. Counsel submitted that the Plaintiff's letter of allotment was issued 10 years after the 1<sup>st</sup> Defendant's, but going by the letter dated 17<sup>th</sup> November, 1993 addressed to the Director of Land Adjudication, the suit land had in between been allocated to one Francis Busienei before being re-allocated to the Plaintiff. Counsel pointed out the possibility that the 1<sup>st</sup> Defendant may have failed to comply with the procedures after allotment of the land and never paid the requisite fees hence it was re-allocated to Mr. Busienei.
29. Counsel submitted that the discrepancies in the amount paid by the 1<sup>st</sup> Defendant in the letter dated 21<sup>st</sup> March, 2017 (100% deposit) as against the letter dated 21<sup>st</sup> September, 2018 (10% deposit) cannot be allowed to stand. Counsel argued that the 1<sup>st</sup> Defendant is asking the court to hold that a letter of allotment is superior to a title deed, which argument cannot hold water. He relied on Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others, cited in the William Lagat Case (Supra). Counsel submitted that on the above cited sections of the [Land Registration Act](#), the Plaintiff is the proprietor of the suit property and he prayed for judgment in favour of the Plaintiff as prayed in the Plaintiff's Prayer.



### **1<sup>st</sup> Defendant's Submissions**

30. The 1<sup>st</sup> Defendant filed his submissions on 7<sup>th</sup> October, 2024. In those submissions, Counsel for the 1<sup>st</sup> Defendant argued that in a claim for adverse possession, the Claimant must satisfy the requirements set out by the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR and *Grace Jesoimo Tarus & Another vs Sarah Rop & 2 Others* (2018) eKLR. Counsel submitted that the 1<sup>st</sup> Defendant had satisfied the essential prerequisites to deserve the judgment of this court. He explained that the 1<sup>st</sup> Defendant had presented the Extract of the Register to show that the Plaintiff was the registered owner of the suit property. Furthermore, he had shown that he had been in exclusive, open, peaceful, continuous and uninterrupted possession, occupation and use of the suit property for over 12 years.
31. Counsel submitted that the photographs produced by the 1<sup>st</sup> Defendant are further proof of the 1<sup>st</sup> Defendant's claims. Counsel cited *Eldoret E&LC Case No. 52 of 2018*; *Nathaniel Kibet Chepkener vs Francis Kiprop Chepkurui & Kiprop Birir (UR)* in support of the 1<sup>st</sup> Defendant's case. Counsel concluded by urging that it is in the interest of justice that judgment be entered in favour of the 1<sup>st</sup> Defendant with costs.

### **2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Submissions**

32. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' submissions were filed on 4<sup>th</sup> October, 2024. Counsel submitted that every action undertaken by the office of the 2<sup>nd</sup> Defendant was in good faith, in compliance with its statutory mandate and thus in accordance with the law. Counsel submitted that no particular claim or allegation was directed at the 2<sup>nd</sup> or 3<sup>rd</sup> Defendants nor were any particulars of illegality specifically proved against them. Counsel argued that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had been dragged into the suit without any lawful cause. Counsel further argued that if the Plaintiff wanted the caution removed, he should have invoked the procedure in Section 73 and 78(1) of the [Land Registration Act](#) and made the requisite application to the Land Registrar. In addition, Counsel submitted that the Plaintiff had not proved any illegality against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as alleged in the Plaint hence the suit herein is speculative and must be dismissed with costs.

### **Analysis and Determination**

33. I have considered the various pleadings filed herein, the testimonies of the witnesses, the evidence adduced and the rival submissions filed. The issues that lend themselves for determination are:-
- a. Whether the Plaintiff lawfully obtained the suit property
  - b. Whether the 1<sup>st</sup> Defendant has acquired title to the suit property by way of adverse possession.
  - c. What orders should the court issue?
  - d. Who should bear the costs of this suit?

#### **a. Whether the Plaintiff lawfully obtained the suit property**

34. In a nutshell, the Plaintiff's case is that he applied for and was allotted the suit property by the Department of Land Adjudication and Settlement in 1993. The Plaintiff followed due process thereafter and obtained the Title Deed to the suit land. The 1<sup>st</sup> Defendant's position, however, is that he applied for and was allocated the land in 1983, 10 years before allocation to the Plaintiff. He admits he has no title but has alleged that the Plaintiff obtained his title unlawfully through fraud and



illegality. The core issue here is whether the Plaintiff, being the title holder acquired his title lawfully and procedurally.

35. Indeed, Section 26 of the *Land Registration Act*, provides that:-

26. The certificate of title issued by the Registrar upon registration, or to a  
(1) purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

36. From the above cited provision, although a Certificate of Title is to be taken as prima facie proof of ownership by the person named therein, a title can be challenged on grounds that it was acquired by way of fraud or misrepresentation to which a person is proved to be a party. It can also be challenged if it was acquired illegally, unprocedurally or through a corrupt scheme. It is for this reason that where the root of the title is challenged, a title holder must explain or exhibit the process through which he acquired the title to demonstrate that it was acquired legally, lawfully after following the correct procedure. The requirement that a title holder ought to demonstrate that their title was obtained procedurally was explained in *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme Court of Kenya held that:-

“As held by the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* Civil Appeal No 239 of 2009 (2013) eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

37. I have perused the documents that the Plaintiff produced in support of his case. The Plaintiff did not produce the application letter he alleges to have submitted while requesting for allocation of land. However, in the letter dated 17<sup>th</sup> November, 1983 (PEXB1) addressed to the District Land Adjudication and Settlement Department, and brought to the attention of one Mr. Tommo, the name of one Mr. Francis Busienei, who had initially been allotted the suit land was to be substituted with that of the Plaintiff. The Plaintiff was then issued with a letter of offer for the land dated 22<sup>nd</sup> November, 1983 (PEXB2). The Plaintiff was required to pay a 10% deposit for the land within 90 days. He paid the entire sum required vide Official Receipt No. 507117 issued on 24<sup>th</sup> March, 1994. He was subsequently given a Certificate of Outright Purchase dated 18<sup>th</sup> April, 1994.



38. The court has not seen a copy of the Discharge of Charge or Transfers signed in favour of the Plaintiff but filed together with the Plaintiff were 2 receipts from the Department of Lands both dated 6<sup>th</sup> July, 2001; one is No. E668014 for Discharge of Charge and another is No. 668013 for the Transfer. The Plaintiff was issued with a Title Deed, also dated 6<sup>th</sup> July, 2001 stating that he was the registered owner of the suit property. While I am surprised at the possibility of the payment of the Discharge of Charge and Transfer fees and issuance of the Title Deed all happening on the same day, being alive to the vagaries that come with transacting at the land registries in this country, nevertheless, that alone cannot be taken as proof of fraud or illegality.

39. The 1<sup>st</sup> Defendant has argued that the suit property having been allocated to him in the year 1983 was not available for allocation to the Plaintiff. However, that contention can only arise where the terms of allocation have been fulfilled. In *John Muchiri Mbuthia vs Rebecca Were Mutanda & another* (2015) eKLR, the court cited the case of *Rukaya Ali Mohamed vs David Gikonyo Nambacha & Another* Kisumu HCCA No. 9 of 2004, Warsame J. [as he then was] and stated as follows:-

“...once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was outrightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

40. It is clear that the land was initially issued to the 1<sup>st</sup> Defendant. Despite the fact that the Registrar was sued as a party herein, they did not provide a reasonable explanation as to why the same was registered in the name of the Plaintiff instead of the 1<sup>st</sup> Defendant. It appears however from PEXB1 that between allocation to the 1<sup>st</sup> Defendant and the Plaintiff's allocation, the land had been allocated to one Francis Busienei. There is no explanation why this was done. The Plaintiff has raised the possibility that the 1<sup>st</sup> Defendant may have failed to fulfil all the requirements laid out in his letter of allotment.

41. The consequences of failure to comply with terms of allotment were discussed in *Lagat vs Kebut* (Environment and Land Appeal E021 of 2022) [2023] KEELC 18432 (KLR), where the court held that:-

“The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others* C.A.60/1997 where the Court of Appeal held as follows:

‘It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.

In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period.”



42. In the instant suit, I have seen the Letter of Allotment issued to the 1<sup>st</sup> Defendant on 28<sup>th</sup> April, 1983 which indicates that the 1<sup>st</sup> Defendant was to get in touch with Provincial Settlement Controller, Nakuru, to be shown the plot and be given the necessary instructions. There is no indication what those instructions were as no record thereto has been exhibited in this court. I have however noted the discrepancies pointed out by the Plaintiff in DEXB8 which indicates that he had paid 100% deposit vide receipt No. AJ 412683, as against DEXB9, which indicates that he paid 10% deposit vide the same receipt No. AJ 412683.
43. These letters, it must be noted, both originated from the Ministry of Lands and Physical Planning and were both signed by one Dan Kalamba. Contrary to the Plaintiff's submissions, the said Receipt No. AJ412683 was produced in this court as DEXB7. The said receipt is dated 18<sup>th</sup> July, 1988 and it shows that the 1<sup>st</sup> Defendant paid KShs.685/- which was said to be "10% Land Deposit and Conveyancing fee - 496 Kahungura". There is no evidence tabled to show that the 1<sup>st</sup> Defendant completed payment of the outstanding balance. I am therefore inclined to believe the information conveyed in DEXB9 and supported by the receipt produced as DEXb7 that the 1<sup>st</sup> Defendant only paid 10% Deposit on the land.
44. In the absence of evidence to the contrary, this court is convinced on a balance of probability that the 1<sup>st</sup> Defendant failed to fulfil the terms of the allotment, thus the allocation was cancelled/revoked and the land was then allocated to other parties and eventually the Plaintiff herein. That, combined with the failure to prove fraud and/or illegality in obtaining the Title Deed points to the fact that the Plaintiff lawfully acquired his title to the suit property. The Plaintiff is therefore the legal owner of the suit property herein.

**b. Whether the 1<sup>st</sup> Defendant has acquired title to the suit property by way of adverse possession**

45. The 1<sup>st</sup> Defendant in his counterclaim sought a declaration that he had acquired title to the suit land through adverse possession. The Limitations of Action Act Cap 22 does not define adverse possession, however in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2005) eKLR, the Court of Appeal defined adverse possession as:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action of his title for a certain period, in Kenya 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 or 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.”

46. In Kenya, the doctrine of adverse possession is embodied at Section 7 of the *Limitation of Actions Act*, which states that:-

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

47. Time and again, it has been held that, for one to succeed in a claim for adverse possession he must prove that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to own the land. There must be an apparent dispossession of the land from the land owner and this possession must have been continuous for the requisite period of 12 years.



48. To start off, a party claiming adverse possession must show by clear and unequivocal evidence that his possession was not permissible. In *Samuel Miki Waweru vs Jane Njeru Richu, Civil Appeal No. 122 of 2001*, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.

49. The Plaintiff in his own testimony admitted that he has over the years asked the 1<sup>st</sup> Defendant to stop grazing his livestock on the land to no avail. Instead of vacating, the 1<sup>st</sup> Defendant went ahead to build a semi-permanent house for his son to live in. There can be no doubt therefore that the 1<sup>st</sup> Defendant’s possession and occupation of the suit property was without the permission of the Plaintiff who is the registered owner thereto.

50. It is also the Defendant’s case that he obtained possession of the land in 1983, but started using it in 1999 when he went to fence and started grazing his livestock thereon. That he has been in exclusive, peaceful, uninterrupted use and occupation of the property since then to date. The 1<sup>st</sup> Defendant’s claim is corroborated by the testimonies of DW2, 3 and 4 who are all in agreement that the Plaintiff has been on the land since 1999. They testified that he has been utilising the land exclusively, since 1999.

51. There is also the Chief’s letter dated 28<sup>th</sup> February, 2005 which states clearly that the 1<sup>st</sup> Defendant went to the land in the year 1999 and fenced it for grazing. The Plaintiff did not refute the information conveyed by the said letter. I note also that the said letter was written in the year 2005, way before the institution of the original suit in the year 2016 so there can be no claim that the said letter was doctored to fit the 1<sup>st</sup> Defendant’s narrative in this suit. Counting from the year 1999 to 2016 when the suit was originally filed in the ELC, a period of 17 years had passed, which is more than the requisite statutory period of 12 years. But even if this court were to compute time from 2001 it would mean that at the time of filing suit in 2016, approximately 15 years which is the requisite period for adverse possession had already accrued. There has been no claim that the 1<sup>st</sup> Defendant’s stay on the land was not continuous. For this reason, the requirement of continuous possession for a period of 12 years has been satisfied.

52. On occupation and possession of the suit property, the 1<sup>st</sup> Defendant has told this court that since he entered the suit land in the year 1999, he fenced it and started grazing his farm animals. Later, he started planting maize and wheat, planted cypress trees and started bee farming. It is his case that he has had peaceful occupation and use thereof up to the time of filing suit. In the photographs produced in court as DEXB5, it can clearly be seen that there are farm animals grazing on the land, there are both indigenous and cypress trees planted on the land, as well as the bee hives mentioned repeatedly in the testimonies of the witnesses. All the Defence witnesses testified that the 1<sup>st</sup> Defendant first went to the property in 1999, and he fenced it. This court has also been informed that the cypress trees run along the boundary of the property. The bee hives have allegedly been there since about 2002.

53. The court takes judicial notice that cypress trees take between 25-30 years before they mature. I find it interesting that the Plaintiff never once wondered who was carrying out all these activities on his land. That he never confirmed what was happening on this land from the gentleman he had allegedly asked to take care of the land for him. It is also telling that the said gentleman denied ever having received instructions to take care of the property. It is clear that the 1<sup>st</sup> Defendant’s use and occupation of the land has been open with no secrecy and with the full knowledge of the Plaintiff. If the 1<sup>st</sup> Defendant’s possession was shrouded in secrecy, the Plaintiff would not have informed this court that he found the



1<sup>st</sup> Defendant on his land and asked him to vacate. It is also on record that the neighbours who testified for him confirmed that he does indeed use the land and they only know him as the owner of the land.

54. Additionally, the Plaintiff never claimed that he lives on the suit property. He informed the court that he lives on a separate piece of land that is his ancestral land, which fact ties in with the 1<sup>st</sup> Defendant's claims that the Plaintiff has never occupied the suit land. It goes without saying that this limb has also been satisfied. I therefore find without a doubt that the 1<sup>st</sup> Defendant has proved his claim that he has acquired the suit property by operation of law through the doctrine of adverse possession.

**c. What orders should the court issue?**

55. The Plaintiff, aside from seeking a declaration that he is the owner of the suit property, also seeks an eviction order and a permanent injunction against the 1<sup>st</sup> Defendant. The Plaintiff has also asked this court to issue an order removing the caution/restriction placed on the suit property by the 1<sup>st</sup> Defendant.
56. On the permanent injunction, it is trite that an order of permanent injunction is meant to perpetually restrain the commission of an act by one party, in this case the 1<sup>st</sup> Defendant, so as to protect the rights of another party, being the Plaintiff herein. An order of permanent injunction, is granted where the court feels that the rights of a party have been infringed, violated and/or threatened.
57. The leading case on grant of permanent injunctions is that of *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib* (2018) eKLR, where it was held inter alia as follows:-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

58. In the present case, the Plaintiff has sought a permanent injunction against the 1<sup>st</sup> Defendant, restraining him from trespassing onto the suit property. In order to warrant an order of injunction, the Plaintiff was required to satisfy the conditions set out in the now famous case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, where it was held that for an order of injunction to issue, a party must show the existence of:-
- i. A prima facie case with a probability of success;
  - ii. That he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and
  - iii. That if the court is in doubt, it will decide an application on the balance of convenience.
59. It is not in doubt that the Plaintiff is the registered owner of the suit property, and this court has held that his title was regularly acquired. The Court has seen a Title Deed to the suit property to that effect. The first prayer in the Plaint, which seeks a declaration that the Plaintiff is the legal owner of all that parcel of the suit property thus succeeds.



60. That being the case, the Plaintiff would in ordinary circumstances have been entitled to the prayer for an order of permanent injunction. However, although the 1<sup>st</sup> Defendant entered the suit property unlawfully, he has demonstrated that his rights as an adverse possessor have crystallised. Consequently, having failed to dispel the 1<sup>st</sup> Defendant's interest on the land as an adverse possessor the Plaintiff has failed to satisfy the requirement for a prima facie case or at all, and is thus not entitled to the order of permanent injunction against the 1<sup>st</sup> Defendant. In the same vein, the other prayers in the Plaintiff equally fail.
61. From the above analysis, it is my finding that despite the fact that the Plaintiff is the duly registered owner of the suit property, the 1<sup>st</sup> Defendant has proved that his continued stay on the land was open, actual peaceful, continuous and exclusive thereof for a period of over 12 years. The 1<sup>st</sup> Defendant has also demonstrated that his use and occupation/possession of the suit land was with the knowledge but without the consent or permission of the Plaintiff. In addition, that the filing of the suit in 2016 neither stopped time from running in favour of the 1<sup>st</sup> Defendant nor extinguished rights of adverse possession which had already accrued to the 1<sup>st</sup> Defendant at the time of instituting the suit. On that basis, I find that the 1<sup>st</sup> Defendant has proved his case on a balance of probabilities and he is therefore entitled to the prayers set out in his Counterclaim, and the Originating Summons in ELC 43 of 2019.

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

62. Under section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter, or issue shall follow the event. The successful party in any litigation is entitled to an award of costs. The 1<sup>st</sup> Defendant herein is the successful party and the Court finds no reasons why it should not exercise its discretion in his favour. Consequently, this court shall condemn the Plaintiff to bear the costs of this suit.

**Final Orders:-**

63. Having carefully considered the available evidence and the rival written submissions, this Court finds that the Plaintiff has only succeeded in proving that he is the current registered owner of all that parcel of land known as Uasin Gishu/Kahungura Scheme/496. However, he has failed to prove the other prayers in his Plaintiff. Consequently, the Plaintiff's suit is dismissed. On the other hand, the 1<sup>st</sup> Defendant's Counterclaim and Originating Summons have been proved on a balance of probabilities. I therefore enter judgment for the 1<sup>st</sup> Defendant in the following terms:-
- a. An order be and is hereby issued declaring that the 1<sup>st</sup> Defendant is the legal owner of that parcel of land comprised in Title No. Uasin Gishu/Kahungura Scheme/496 by virtue of the *Limitation of Actions Act*.
  - b. An order be and is hereby issued declaring that the plaintiff is holding parcel No. Uasin Gishu/Kahungura Scheme/496 in trust for the 1<sup>st</sup> Defendant.
  - c. An order be and is hereby issued terminating the said trust declared at (b) above.
  - d. An order be and is hereby issued compelling the plaintiff to transfer Title No. Uasin Gishu/Kahungura Scheme/496 to the 1<sup>st</sup> Defendant's name within Thirty (30) days from the date hereof, failure to which the Deputy Registrar of this Honourable Court and or any other relevant Officer shall execute the necessary instruments of transfer in favour of the 1<sup>st</sup> Defendant.



- e. An order of permanent injunction be and is hereby issued restraining the plaintiff, his agents, servants and or employees from entering into, remaining on or developing or in any way dealing with and or interfering with Title No.Uasin Gishu/Kahungura Scheme/496.
- f. An order be and is hereby issued cancelling the title deed in respect of Title No.Uasin Gishu/Kahungura Scheme/496 registered in the name of the plaintiff and directing that the suit land be registered in the name of the 1<sup>st</sup> Defendant.
- g. The Plaintiff shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 30<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of;**

- 1. Mr. Matekwa for the Plaintiff
- 2. Mr. R. M. Wafula for the Defendant

Court Assistant: Brian

