



REPUBLIC OF KENYA



Onyango & another (Both suing as legal representatives of the Estate of Grace Okumu Onyango) v Otoy & 17 others (Environment & Land Case E44 of 2021) [2024] KEELC 6935 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E44 OF 2021
AY KOROSS, J
OCTOBER 24, 2024**

BETWEEN

**MARY GORRETY AKINYI ONYANGO & MILLICENT ATIENO HEMSER
(BOTH SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF GRACE
OKUMU ONYANGO) PLAINTIFF**

AND

**JAMES ONIYAGO OTOYI 1ST DEFENDANT
PETER ONYANGO ODUNDO 2ND DEFENDANT
PRISCAH ANYANGO OMONDI 3RD DEFENDANT
JENNIFER N OMWANDA 4TH DEFENDANT
WILKISTER ADHIAMBO OGAMBI 5TH DEFENDANT
PAUL ANYIGO ONYUOGO 6TH DEFENDANT
WALTER OWUOR NYAMOLO 7TH DEFENDANT
CHARLES OGARA AUNGO 8TH DEFENDANT
PATRICIA AWUOR OKOTH 9TH DEFENDANT
SAMSON AULO OORO 10TH DEFENDANT
JOSEPH AGWINGI ONYANGO 11TH DEFENDANT
EDWARD ODHIAMBO WERE OLOO 12TH DEFENDANT
MICHAEL OTIENO OLANGO 13TH DEFENDANT
GEORGE NDONGA SIRRO 14TH DEFENDANT
STEPHEN JACOB OTUKA 15TH DEFENDANT**



ALICE OKUMU RAWAGO 16TH DEFENDANT
NOMIYA CHURCH BONDO – JERUSALEM DIOCESE 17TH DEFENDANT
BONDO SUB-COUNTY REGISTRAR OF LANDS 18TH DEFENDANT

JUDGMENT

Background of the case

1. The land parcels registered in or occupied by the defendants can be traced to land parcel no. North Sakwa Nyawita 223 (223) which was registered in the name Petro Onyango Umaya (Petro) who was the plaintiff's husband.
2. The plaintiff died on 28/08/1996 and Petro, who was polygamous, predeceased her. The administrators of the plaintiff's estate (administrators) are the plaintiff's and Petro's children.
3. Mary Gorrety Akinyi Onyango who was one of the administrators, died in the course of these proceedings and she was struck out as a party. The surviving representative Millicent Atieno Hemser shall hereafter be referred to as "administrator".
4. From the record, Petro subdivided 223 to create 2 subdivisions- North Sakwa/Nyawita 949 (949) and 950 (950) but of interest to this suit is 949 of which a portion was compulsorily acquired by the government in 1982. The government's acquisition thereof is not the subject of dispute.
5. Upon Petro's demise, 949 was transferred to Gaudencia Akala Onyango (Gaudencia) who was described as one of his wives. This transfer took place on 13/11/1989. Later on, on 30/12/1991, she divided it into 3 portions- North Sakwa /Nyawita 1366, 1367 and 1368. This 1368 was transferred to Samuel Opondo on 30/12/1991- there is no dispute over this parcel.
6. As for 1366 and 1367, their respective green cards were never placed before this court. Nonetheless, from evidence, it appears one of them was subsequently subdivided by Gaudencia to create North Sakwa/Nyawita 1947 (1947) which was afterward transferred to the plaintiff on 5/04/1995.
7. Upon transfer and just as her predecessors, the plaintiff fragmented 1947 to create North Sakwa Nyawita/1709 (mother parcel) and 1710. 1710 is not in dispute.
8. The mother parcel was on 8/9/1998 subdivided into several parcels that were initially registered in the plaintiff's name before some of them were registered in some of the defendants' names or occupied by them. These subdivisions ranged from North Sakwa/ Nyawita 1967 to 1981.
9. From the green cards, official searches, and copies of title documents, the subdivisions of the mother parcel were registered as follows: 1967- in the plaintiff's name on 8/09/1998; 1968 and 1972- 2nd defendant on 18/9/1999; 1969-15th defendant on 8/12/1998; 1970- 4th defendant on 8/12/1998; 1971- 5th defendant on 8/12/1998; 1973- the particulars of this property were never produced; 1974- 6th defendant on 8/12/1998; 1975- 8th defendant on 10/09/1999; 1976- 7th defendant on 12/4/2007; 1977- subdivided on 15/2/2005 to create 2492 to 2497. The owners of 2492, 2493, and 2494 were not disclosed but 2495 was transferred to the 12th defendant on 15/7/2011, 2496 to the 13th defendant on 18/5/2005 and 2497 to the 10th defendant on 18/11/2014; 1978- 12th defendant on 30/06/2000.
10. This 1978 was subsequently subdivided on 26/6/2006 to create 2637 to 2641. The owners of 2638, 2640, and 2641 were not disclosed but 2637 was registered in the 12th defendant's name and 2639



was transferred by the 12th defendant to the 2nd defendant on 13/7/2011; 1979- 9th defendant on 23/5/2008; 1980-changed hands severally and registered in 10th defendant's name on 9/11/2015 and lastly 1981 - 8th defendant on 8/12/1998. All these subdivisions except those whose particulars of ownership were not disclosed shall cumulatively be described as "disputed parcels".

11. It is noteworthy that some of the disputed parcels' registration or occupancy by the defendants were allegedly attributed to purchases either made from Petro, the plaintiff, or their son Fredrick Jakino (Jakino) all of whom are deceased.
12. It must be mentioned in a ruling rendered on 2/06/2022, this court directed the plaintiff to file all registers of the properties in question including all subdivisions but the plaintiff only filed some of them. Having laid the background, shortly, I will highlight the parties' cases and their respective pieces of evidence.

Plaintiff's case and evidence

13. In an undated amended plaint filed on 16/02/2022, it was asserted North Sakwa/ Nyawita 1967 (suit property) was registered on 8/09/ 1998 which was 2 years after the plaintiff died. It was also contended that the suit property was illegally derived as a subdivision of the mother parcel.
14. It was averred that in 2017, the administrator discovered the defendants had without consent, illegally encroached onto the suit property thus denying her quiet enjoyment which she attributed to the actions of Jakino and 3rd parties who unlawfully sold the land.
15. It was further stated that even after Jakino's demise, the 'parcel' was further unlawfully registered in the names of unknown persons and this was notwithstanding the plaintiff's estate had not been administered. These 3rd parties were described as 'encroachers and intermeddlers.'
16. It was asserted the 3rd parties had failed to disclose how they came into occupation of some of the disputed parcels or how they acquired titles thereto. It was stated the registrar of lands who was described as either the 18th defendant or interested party (IP) had declined to allow the administrators to scrutinize registers of various parcels of land which emanated from the suit property or mother parcel.
17. It was stated the administrator had requested the defendants to vacate the suit property to no avail and she pleaded and particularised illegalities and fraud against the 1st to 17th defendants thus: -
 - a. Unlawfully entering, remaining on, or constructing upon the suit property without the plaintiff's consent, authority, or permission.
 - b. Trespassing onto the suit property.
 - c. Refusing to heed the request to vacate the suit property.
 - d. Unlawfully denying the rightful owners peaceful and quiet enjoyment of the suit property.
 - e. At the expense of the plaintiff, illegally earning profits from her land.
18. In addition, fraud and illegalities were pleaded and particularised against the unknown 3rd parties whom the plaintiffs described as 'intended 4th to 17th defendants' in the following manner: -
 - a. Intermeddling with the property of a deceased person.
 - b. Fraudulently causing the registration of illegal changes on the plaintiff's boundary without consent or justification.



- c. Procuring and effecting illegal and fraudulent amendments to the various map sheets.
19. Lastly, the plaintiff pleaded and particularized fraud and illegalities against the 18th defendant thus: -
- a. Sanctioning a resurvey of the deceased person's land without the plaintiff's presence and express written or oral consent.
 - b. Registering the 3rd parties' fraudulent transactions on the map sheet as depicted in various map editions.
 - c. Illegally registering the suit property in the plaintiff's name 2 years after her demise yet it arose from an illegal subdivision of her land.
 - d. Illegally concealing the fraud and illegal transactions over the suit property by not informing the plaintiff.
 - e. Causing the suit property and parcel 1709 to be published as an inset in various maps to conceal and camouflage the fraud.
 - f. Illegally closing parcel 1709's register without justification for purposes of sanitizing the illegal title and parcels derived from it.
20. Upon seeking mesne profits against the 1st- 3rd defendants and craving leave to join the 3rd parties to the proceedings, the plaintiff accordingly sought the following reliefs from this court: -
- a. Reinstatement of the mother parcel to the plaintiff's name.
 - b. Revocation of all titles fraudulently excised from the mother parcel.
 - c. Upon issuance of orders (a) and (b) above, eviction orders be issued against the defendants and 3rd parties from the mother parcel and suit property.
 - d. The boundaries be restored to the position they were in before the plaintiff's demise.
 - e. Permanent injunction against the defendants or their agents or servants from interfering with the mother parcel and suit property.
 - f. General damages for trespass, mesne profits, and costs of the suit.
21. The administrator testified as PW1 and she relied on her statements and bundles of documents that were contained in her lists of documents. Her evidence was led by Maria Ngesa Winga and George Eka Ogonya who respectively testified as PW2 and PW3 and they adopted their witness statements as their evidence in chief.
22. She testified that upon the plaintiff's demise, Jakino continued living on the suit property. It was her testimony she only became aware of the encroachers in 2017 as she had resided in Germany since 1994. She averred that even when she came to Kenya in 2005, she did not find anyone on the disputed parcels.
23. She was categorical that she was not aware how long some of the defendants had lived on the disputed parcels but the 15th defendant was her cousin. It was her position she was uncertain whether the suit property was derived from the mother parcel or if the suit property was divided during the plaintiff's lifetime. She stated she was not aware the disputed parcels had been sold.
24. It was her evidence she did not attend the plaintiff's burial but some of her siblings who lived in Kenya at the time namely Hellen Ogola (DW1), Rispah, and Anyango did attend. She testified that Jakino who died in 2001, was the one who illegally sold the disputed parcels to various persons.



25. When questioned about the mutation form dated 12/08/1996 that subdivided the mother parcel, she asserted it was dated during the plaintiff's life who died on 31/10/1996 but stated the title deeds were issued long after the plaintiff's demise.
26. According to her, notwithstanding the mutation form demonstrated the plaintiff was the one who gave instructions to the surveyor, he subdivided the mother parcel without the plaintiff's consent.
27. It was her testimony she could not ascertain if the plaintiff did not sign the mutation form by appending her thumbprint and that she had not bothered to conduct a forensic analysis on this thumbprint.
28. She averred the mutation form was registered on 28/8/1998 which was after the plaintiff had died. According to her, it was around this time that some of the defendants acquired title to the disputed parcels. She stated the plaintiff was always at liberty to sell the mother parcel.
29. PW2 testified she saw the defendants entering the mother parcel in 1998 and Jakino occupied other portions of it. However, it had been 2-3 years since she was on the mother parcel. She testified she was not in a position to verify if the plaintiff sold the disputed parcels.
30. On further questioning, she stated she did not know how long some of the defendants had resided on the disputed parcels.
31. PW3 stated she visited the mother parcel during the burials of the plaintiff and Jakino. However, in the latter's burial which was in 2021, she did not see any occupiers save for Jakino. She later changed her mind and testified that she indeed found houses in the mother parcel. She asserted she was uncertain if the defendants had permission to occupy the suit property.
32. She stated she only became privy to the encroachment through Jakino's wife and she was unfamiliar with the size of the suit property or the parcel no. Uncompromisingly, she asserted that she never recorded in her statement that the defendants were encroachers.

Defences and evidence

I. Defence and evidence of those whose purchases were allegedly derived from Petro-7th defendant

33. Upon pleadings allegedly filed by the firm of M/s. Suyianka Lempaa & Co. Advocates being struck out, the 7th defendant proceeded to instruct the firm of M/s. Nyamweya Mamboleo Advocates.
34. In a defence dated 28/02/2023, the 7th defendant denied the plaintiff's claim and contended the root of his title was derived from a purchase between Petro and Mathews Ogolla Ongallo (Mathews) that took place in 1985.
35. It was further averred in 1993, Mathews sold his unregistered interest to Silvanus Nyamolo Obala (Silvanus)- the 7th defendant's father, and at that juncture, trust subsisted between Silvanus and Petro or his successors in title.
36. It was contended the mother parcel whose roots could be traced to North Sakwa/Nyawita/1366 (1366), was lawfully subdivided for purposes of giving effect to Silvanus's interests which were recognised as lying in 1976 which had since been transmitted to the 7th defendant.
37. It was stated the 7th defendant was not an encroacher as he had registered interests in 1976 whose occupancy commenced in 1994 as a consequence of the sale between Mathews and Silvanus. It was averred the plaintiff's claim was superfluous and intended to enrich her administrators, brought in bad faith and should be struck out.



38. The 7th defendant testified as DW8 and he relied on his statement and documents that were contained in his list of documents. His evidence was led by Daniel Odundo Okelo, Siprose Awino Odipo and Edward Akun Ngado who respectively testified as DW9, 10 and 11.
39. He testified his registration process commenced in 1994 which was when he handed over documents to the surveyor. He asserted that nevertheless, he received the title document in 2007 which was after the plaintiff had died. According to him, the process commenced when the plaintiff executed the mutation form by appending her thumbprint to it.
40. DW9 testified he witnessed the agreements executed on 19/1/1985 and 1993 whereby in the former, the vendor was Petro who sold it to Mathews. He stated Mathews subsequently sold it to Silvanus. He averred that since Petro was unwell, his sons sold the land on his behalf.
41. DW10 stated her husband Mathews who had since died, bought the disputed parcel from Petro who then sold it to Silvanus.
42. DW11 who was a retired chief testified he was familiar with 1976 and stated that after Petro visited his office together with Mathews, he proceeded to author the letter dated 18/03/1985. He stated the thumbprint contained in the letter was appended by Petro who had at the time, promised to transfer the disputed parcel to Mathews. Nonetheless, he did not know how the transfer materialised.

II. Defence, counterclaims and evidence of those whose purchases were allegedly derived from the plaintiff- 2nd, 6th, 8th, 10th 15th and 17th defendants

a. 2nd 10th and 17th defendants

43. By the firm of M/s Ooro Awana & Co. Advocates, the 2nd, 10th and 17th defendants filed a joint defence together with the 17th defendant's counterclaim. They were both dated 24/07/2022. They denied the averments contained in the plaint and put the plaintiff to proof.
44. They averred that various parcels were bought by them and or occupied by them as of right- the 2nd defendant purchased 2639 from Edward Odhiambo Were Oloo (Edward) in 2011, the 10th defendant purchased 1980 from Joseph Oriaro Okumu (Okumu) and 2497 from the plaintiff. Whereas the 17th defendant occupied land donated to it by the deceased Hezrone Angina Ooro (Hezrone) who had bought it from the plaintiff.
45. It was asserted the 2nd defendant legally acquired his title for valuable consideration whilst the 17th defendant contended he did not have a title.
46. In the counterclaim, the 17th defendant asserted that though the plaintiff entered into a verbal agreement for the sale of 0.12 Ha in 2492 in 2000, the plaintiff did not effect the transfer. The 17th defendant stated having been in occupation for 20 years, it had met the threshold of adverse possession.
47. The 17th defendant sought reliefs for it to be declared that it had acquired prescriptive rights over 0.12 Ha in 2492, the administrator be directed to sign instruments of transfer and in default, the registrar of the court to so do, permanent injunction over 0.12 Ha in 2492 and costs of the suit.
48. The 2nd defendant testified as DW4 and he relied on his witness statement and documents he produced in support of his case. It was his testimony the plaint did not refer to land parcels nos. 1968 and 1972. He stated he purchased 1968 from the plaintiff and had lived on it. He also averred that he did not know all his neighbours.



49. He asserted that though he bought 1972 in 1993, he did not have an agreement for sale to prove so. It was his evidence title was issued to him by the plaintiff's surveyor after her demise. However, in 1993, he executed the transfer instruments. Although he was initially uncertain if the plaintiff also executed the instruments, he later clarified that she did sign and that the registration process was conducted by her surveyor.
50. Additionally, he testified he was the ad hoc chairman of the 17th defendant but did not have an agreement for sale to demonstrate how the 17th defendant acquired the land it occupied but as far as he knew it, Hezrone acquired it.
51. The 10th defendant testified as DW10 and he relied on his witness statement and documents he produced in support of his case. He stated he executed the agreement for sale for 2497 and he handed over the relevant documents to the plaintiff's surveyor in 1995.
52. As for the other parcels that were in his name, he stated he bought them from other persons who could have derived ownership from the plaintiff.
53. He stated in these other parcels, his advocate handled the transactions and he was unfamiliar with the process of how the advocate was able to register the parcels to his name nonetheless, he collected the title documents from the plaintiff's surveyor. The 17th defendant did not testify and its case was closed.

b. 6th defendant

54. By the firm of M/s Mulinge Ochieng & Co. Advocates, the 6th defendant filed a defence and counterclaim dated 21/07/2022 in which he denied the averments contained in the plaint and put the plaintiff to proof.
55. The 6th defendant asserted that 2 properties which were registered in his name namely 1973 and 1974 were derived from the plaintiff.
56. It was his position the former was derived from a purchase he made from Joseph Abiero Adhiek (Adhiek) in 2009 and the latter from a purchase made from the plaintiff. The 6th defendant averred that since these properties were lawfully acquired by him, he had been in lawful and peaceful occupation for over 26 years.
57. He counterclaimed that the suit was time-barred and urged the court to find that the plaintiff lacked locus standi. He averred he had acquired prescriptive rights over some of the disputed parcels and that the suit was frivolous, vexatious and an abuse of court process and prayed for dismissal of the suit with costs.
58. The 6th defendant testified as DW7 and he relied on his witness statement and documents he produced in support of his case. It was his evidence his parcels of land were not mentioned in the plaint.
59. He stated that he bought one of his parcels from the plaintiff on 2/1/1996 and she appended her signature to the documents but the title to his land was obtained in 1998 which was after her demise. He asserted the plaintiff executed the instrument of transfer and assured the various purchasers that the registration process was ongoing.

c. 8th defendant

60. The 8th defendant who was self-represented filed a defence dated 6/06/2023 and he denied the averments contained in the plaint and put the plaintiff to proof.



61. He asserted that he was the registered owner of 1975 and 1981 having lawfully purchased them from the plaintiff on diverse dates of 30/03/1996 and 20/01/1996 and had since 2000, constructed upon them in a contiguous manner. He asserted that since he was the registered owner of these parcels of land, the suit against him should be dismissed.
62. The 8th defendant testified as DW12 and he relied on his witness statement and documents he produced in support of his case. His case was led by Paul Abonyo Adagi and Caroline Achieng Ogara who respectively testified as DW13 and 14. It was his testimony that when he bought his parcels, the plaintiff duly executed the relevant documents.
63. He testified that though the plaintiff could not read, Jakino interpreted the agreement for her before she appended her thumbprint whereupon she called her surveyor to show him his portion. It was his evidence the surveyor collected all the completion documents. Thereafter, the title documents were issued to him which was after the plaintiff's demise. According to him, the completion process started before the plaintiff's demise.
64. DW13 who adopted his witness statement as evidence testified that as a land agent, he was the one who introduced the 8th defendant to the plaintiff and even witnessed the agreement for sale that was between them and saw the consideration being paid. He clarified that though the plaintiff had a surveyor who handled her transactions, he was not privy to the subdivisions.
65. DW14 who was the 8th defendant's wife adopted her witness statement and corroborated his evidence. She testified the 17th defendant's structure had existed in one of the disputed parcels for over 20 years and the titles were issued to the 8th defendant by the Ministry of Lands. She testified that though her ID read she was born in 1986, her year of birth was 1977.

d. 15th defendant

66. In a defence and counterclaim filed by the law firm of M/s. Lilian Amere Machio & Co. Advocates dated 22/04/2022, the 15th defendant denied the averments contained in the plaint and put the plaintiff to proof.
67. It was contended he purchased 1969 from the plaintiff on 4/08/1994 in the presence of her daughter Hellen Akinyi Rarondo (DW1). It was stated the subdivision of the mother parcel was lawful and was conducted with the consent and knowledge of the plaintiff before her death.
68. It was asserted that the registration of 1969 was a matter of formality and the plaintiff had executed the mutation form before her demise. It was contended the 15th defendant was not an encroacher as he was registered as the owner of 1969 which he had since developed.
69. In his counterclaim, the 15th defendant asserted that having lawfully acquired 1969, he should be declared its legal and bona fide owner and an order of permanent injunction should be issued against the plaintiff and her agents.
70. At the behest of the 15th defendant, DW1 was summoned to appear before the court and testify as an independent witness. She testified the 15th defendant was her cousin and that on 4/08/1994, the plaintiff called her to witness an agreement between herself and the 15th defendant.
71. According to her, the agreement was duly executed, with an initial deposit of kshs.20,000/- being made and the final balance thereof paid 2 weeks thereafter. All these transactions took place in her presence.



72. It was her testimony the plaintiff called her surveyor who hived off the portion purchased by the 15th defendant and that a portion of land was gifted to her by the plaintiff. It was her evidence the plaintiff handed over the mother parcel's title deed to the Surveyor.
73. It was her testimony the Surveyor stayed with the title deed for a long time and when she (DW1) would enquire from him, he would assert that it was at the Ministry of Land's office.
74. Even so, eventually, Ogolla who was the 15th defendant's brother, gave her title deeds which were registered in her name and that of the plaintiff. According to her, the plaintiff's title deed was with the administrator.
75. It was her position that the plaintiff signed all documents of the subdivision of the mother parcel including the mutation form and during that period, the administrator was away.
76. She stated that apart from the 15th defendant who acquired his land legally, she did not know if the plaintiff sold land to the other defendants but other people constructed on the mother parcel several years ago with others being constructed after Jakino's demise.
77. She stated the 2nd defendant had even constructed on the plaintiff's homestead and had lived there even before the plaintiff died but that the 16th defendant's structure was constructed after the plaintiff's demise.
78. She asserted she did not know how the 2nd defendant acquired his land. It was her testimony that Jakino had a right to inheritance nevertheless, she did not know if he sold land. She averred that Petro also sold land to other people including Patrick Onyango Ochang who sold it to another person.
79. The 15th defendant testified as DW16 and he relied on his pleadings, witness statement and documents he produced in support of his case. He corroborated DW1's evidence.
80. It was his case that after he purchased the suit property in 1994, the plaintiff gave instructions to the surveyor to subdivide the land, the mutation form was duly filled and executed and completion documents were handed over to the surveyor.
81. He later asserted that the transfer was signed after the plaintiff had died but clarified in re-exam that it was done during the plaintiff's subsistence and that the surveyor was the one who handed over to him his title document.

III. Defence of those who allegedly bought land from Jakino

a. 1st defendant

82. His defence and counterclaim dated 1/02/2023 were filed by Ms. M.A. Ochanji & Co. Advocates. The assertions made therein were composed of denials and put the plaintiff to proof and asserted the plaintiff had never occupied a portion of the suit property.
83. In the counterclaim, the 1st defendant asserted his father John Otoy Audi (John) purchased a portion of the suit property measuring 20 by 12 footsteps (1st defendant's disputed portion) on 19/11/1998 from Jakino. He averred John had since constructed houses upon it which were currently utilised by the 1st defendant.
84. It was the 1st defendant's counterclaim that he and his family had cumulatively occupied the portion for over 22 years with full knowledge of the administrator. He asserted he had met the threshold of adverse possession.



85. He sought a declaration that he had acquired the suit property by adverse possession, and prayed for the 18th defendant to register the 1st defendant's disputed portion in his name and costs of the suit and counterclaim.
86. The 1st defendant testified as DW2 and he relied on his witness statement and documents he produced in support of his case. It was his case that though he was James Ocholla Audi, the plaint had erroneously referred to his name as James Onyango Otoy.
87. It was his evidence that his residence bordered that of Jakino. He stated that he and his family started living on the disputed portion in 1998. It was his position the consideration for the agreement for sale between Jakino and his father John Otoy Audi (Otoy) was ksh. 15,000/-. He stated it was fully settled with the last instalment of kshs. 4,800 being made on either 19/11/1998 or 22/1/1999.
88. DW3 who was DW2's mother adopted her statement as her evidence and testified that she witnessed the execution of the agreement for sale and also corroborated DW3's evidence.

b. 16th defendant

89. The 16th and 7th defendants were represented by the same law firm on record and the 16th defendant's defence dated 28/02/2023 was of similar tenor as that of the 7th defendant and I need not rehash the defence.
90. Nevertheless, there were a few divergences between the 2 defences as shall be seen shortly. The 16th defendant asserted she purchased 2641 from Jakino on 6/12/2001 who at that time was the legitimate owner of the suit property.
91. She contended she had been in occupation since 2001 and her occupancy was acknowledged by the administrator. She urged the court to dismiss the plaintiff's claim.
92. The 16th defendant testified as DW17 and she relied on her witness statement and documents she produced in support of her case.
93. It was her case that by an agreement for sale, she bought a portion of 1978 from Jakino in 2001 and she paid the purchase price. According to her, she perceived Jakino as the plaintiff's rightful heir.
94. She stated that after purchasing, Jakino introduced her to the surveyor to whom she handed over documents including a transfer form that Jakino had signed. She averred that when she acquired the title to her land in 2007, both the plaintiff and Jakino were deceased.

IV. 18th Defendant's defence

95. The 18th defendant's defence dated 23/09/2022 was filed by the office of the Attorney General and the assertions therein were composed of denials and put the plaintiff to proof.
96. It was asserted the 18th defendant was a stranger to some of the statements and that any registration as alleged by the plaintiff was anchored on documents presented to its offices which it believed were genuine and consequently, proceeded to register them.
97. Although the 18th defendant did not call a witness and their case was closed, this court on its own motion, issued witness summons against the 18th defendant whose witness Diana Nasimiyu Wanyama testified as Common Witness 1 (CW1).



98. During her testimony, the court allowed all the parties who were present in court to cross-examine her. It was her testimony that in 2012, the official records were relocated from the Siaya lands registry to the Bondo lands registry.
99. She gave a history of the creation of the mother parcel and the subdivision thereof. She stated that the mutation form that created the mother parcel was in her custody. She also stated the mother parcel was subdivided and the mutation form thereof was similarly in her custody.
100. As to other records of subdivisions, she averred she only had the green cards and instruments of transfer of 1980 that transferred it to the 10th defendant. She was categorical that she was unable to trace several documents since they could have been misplaced during the movement from Siaya land's registry to Bondo.
101. She asserted that the plaintiff's thumbprint on the mutation form that subdivided the mother parcel was conclusive proof she (plaintiff) executed it. She testified that the document was proper and even if she did not have evidence of transfers, a mutation form and transfers could be registered simultaneously and the 18th defendant's role was limited to registration.
102. It was her testimony that the process for subdivision commences when the Land Control Board (LCB) gives consent to subdivide, thereafter the mutation and consent are lodged with the land survey office which issues Registry Index Maps (RIMS) with new nos. Afterwards, if one wants to transfer, a visit is made to the LCB which issues the consent to transfer.
103. She testified that notwithstanding the plaintiff's demise, the mutation form could be registered as she had already presented it for registration and the transfers could similarly be registered. According to her, the registration was conducted procedurally.
104. She testified that the transfer process is elaborate and includes several documents such as an LCB consent, ID, KRA pin, transfer instruments, stamp duty payment records and valuation by a land valuer however, due to relocation, her office was missing various records.
105. According to her, the mutation form was presented on 13/08/1996, when the boundaries were surveyed as per the plaintiff's instructions. She stated the district land surveyor signed it on 13/08/1996 and registration was carried out on 8/09/1998.
106. It was her position that upon subdivision, a closure of a parcel file takes place and the owner is first registered as the proprietor and thereafter, the transfers are conducted. However, as of 1980, she was emphatic the plaintiff could not have signed the documents as the transfer took place on 15/03/2001 which was long after the plaintiff's demise.

V. Defendants who did not file a defence- 3rd, 4th, 5th, 9th, 11th, 12th, 13th and 14th defendants.

107. By the firm of Ms. Ogola Okello & Co. Advocates, the 3rd defendant entered an appearance on 5/11/2020 but did not file a defence whilst the 4th, 5th, 9th, 11th, 12th, 13th and 14th defendants neither entered an appearance nor filed defences.
108. Notwithstanding not filing a defence, the 3rd defendant testified as DW6 and adopted her witness statement and her evidence was led by Alfred Onyango Owiti who testified as DW5.
109. She stated Jakino sold 1967 to her husband Joseph Omondi (Omondi) in 2002. According to her, Jakino was authorised by the plaintiff to sell the land.



110. DW5 adopted his witness statement and he corroborated DW6's testimony. However, he clarified that during Omondi's purchase, he was a minor and did not execute any document.

Reply to 1st, 6th, 15th and 17th defendants' defences and counterclaim

111. These replies were all dated 10/03/2023 and the plaintiff respectively denied the assertions made in the respective defences and asserted she was a stranger therein. Remarkably, the plaintiff did not file any defences to the various counterclaims.

Parties' written submissions

112. Upon conclusion of the hearing and closing parties' cases, some of the parties filed written submissions and the provisions of law and judicial precedents they relied upon shall be taken into account by this court in its analysis and determination.

Issues for determination

113. Upon carefully considering pleadings, adduced evidence, rival submissions and issues that have been filed, the following issues commend themselves for determination: -

- a. Whether the suit against the 17th defendant and its counterclaim are competent.
- b. Whether fraud was specifically pleaded and proved.
- c. Whether the 1st and 17th defendants proved adverse possession to the required standards.
- d. Whether the 3rd defendant's evidence and that of her witness should be expunged from the record.
- e. What orders should this court issue including an order as to costs?

Analysis and Determination

114. The issues that were earlier identified for determination shall be dispensed with in a seriatim manner.

a. Whether the suit against the 17th defendant and its counterclaim are competent

115. This issue was never addressed by the parties. It was undisputed evidence the 17th defendant was a church. Ordinarily, churches are usually registered under the auspices of the Societies Act.

116. By Section 9 of the Act, the officials include a chair, treasurer, and secretary who are deputized by known officials. It is noteworthy that by Section 17 of the same Act, the officials can be changed. The import of this is that the particulars of every office bearer of a registered society are known.

117. In the pleadings, and without making disclosures on the 17th defendant's officials, the 17th defendant is described as Nomiya Church Bondo- Jerusalem Diocese.

118. The absence of the official's names and descriptions may explain the circumstances by which the 17th defendant was constrained from calling a witness to testify on its behalf and the testimony of the 2nd defendant who asserted that he was merely an ad-hoc chair could not hold as there was no evidence, he was an official duly recognized as such under the Act.



119. A society is an unincorporated entity and therefore it has no legal personality with the capacity to sue or be sued in its name. I agree with the persuasive decision of John Ottenyo Amwayi & 2 others vs. Rev. George Abura & 2 others, Nairobi H.C.C.C No. 6339 of 1990 where Bosire J held that the legislature did not intend that suits be brought by or against societies in their own names.
120. I also adopt the Court of Appeal decision of Ephuntus Kihara Guchu v Grace Gathoni Matu, Mary Muthoni Mbugua, Leah Wambui Kimani, Josephine Muthoni Wamwea & Deas Wanjira Njoki (Officials of Multipurpose Women Group) [2020] KECA 814 (KLR) which stated thus in paragraph 32 of its judgment: -
- “...it has consistently been held that registered societies do not have legal personalities capable of suing and being sued in their own names but through their officials or trustees in accordance with their respective constitutions.”
121. Lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of these proceedings and it is my considered view that it is not curable by Article 159 of the Constitution.
122. Therefore, I must conclude and find the suit by the plaintiff against the 17th defendant incompetent while its defence and counterclaim are equally incompetent. Consequently, the claim against the 17th defendant and its defence and counterclaim are hereby struck out.

b. Whether fraud was specifically pleaded and proved.

123. This was the crux of the issue for determination. The legal framework on the legitimacy of title documents is governed by Sections 24 and 25 Land Registration ACT. Even so, a title document can be challenged on grounds set out in Section 26 of this Act.
124. Section 24 recognizes the registered owner as the absolute owner of land and this proviso of the law provides as follows: -
- “Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.’
125. While Section 26 of the Land Registration Act states as follows;
- “26 The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



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

126. By these statutory provisions, courts consider title documents as prima facie evidence of ownership of land. This proprietorship allows the registered owner to enjoy rights of possession, occupation, and quiet use of her land. Still, the registered owner’s proprietorship can only be challenged on grounds set out in Section 26.

17. In the circumstances of this case, the plaintiff has pleaded illegalities and fraud against the 1st to 18th defendants and persons described as “3rd parties now unknown to the plaintiff (now intended 4th and 17th defendants”).

128. Illegality has been defined by the Black’s Law Dictionary, 11th Edn, as follows: -

- “ 1. An act that is forbidden by law.
- 2. The state of not being legally authorized.”

129. Whereas fraud has been defined by the same dictionary at pg 802 in the following words: -

- “ 1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when conduct is willful) it maybe a crime.)- Also termed intentional fraud...
- 2. A reckless misrepresentation made without justified belief in its truth to induce another to act.
- 3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment. Additional elements in a claim of fraud may include reasonable reliance on the misrepresentation and damages resulting from this reliance.
- 4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties’ relative positions and resulting in an unconscionable bargain.”

130. When one pleads illegality or fraud, Order 2 Rule 10 (1) (a) of the Civil Procedure Rules (CPR) provides that such claims have to be particularised, and this proviso states: -

- “(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and”

131. It is settled law that fraud must procedurally be specifically pleaded and proved on parameters beyond a balance of probability but below that of beyond reasonable doubt. This principle of law was well



elucidated in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar* (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) (1 December 2000) (Judgment) when Court of Appeal held: -

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

132. Accordingly, having set down the law, I now turn to the pleadings and evidence and in consideration thereof, this court will delve into two crucial questions- were the claims properly pleaded? Were they proved to the required standards? In answering these questions, this court will consider the submissions of the parties.

133. I will proceed to address the 1st limb. As stated in the persuasive decision of *Westmont Power (Kenya) Limited Vs Westmont Power (Kenya) Limited* [2003] Kehc 584 (KLR) by R. Kuloba J (as he then was), a party’s pleadings are expected to be well structured and postulate her case. This decision had this to say;

“Setting up one’s case or defence is to compose, propound, posit, or begin to develop and show the structure of the case of defence. One is required to place in view the line of case or defence intended to be pursued.”

134. The Court of Appeal decision of *Bruce Joseph Bockle v Coquero Limited* (Civil Appeal 94 of 2016) [2017] KECA 265 (KLR) (21 September 2017) (Judgment) weighed in on this issue too and stated that a claimant must present a prima facie case of fraud and illegality and that a general claim cannot be sustained when it stated:

“Parties ought to know that they have an obligation to present a prima facie case of fraud or illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do.”

135. Since fraud and even illegality are serious allegations, a party’s case hinges on its proper particularization as this enables the opposing party to appreciate the case against her and also for the court to comprehend the nature of the case that is before it. In other words, there must be particularity in the plaintiff’s allegations of fraud and illegality.

136. While bearing in mind the provision of Section 26 of the Land Registration Act on challenging a registered owner’s title, I am afraid scrutiny of the amended plaint reveals the plaintiff’s claim fell far short as shall be demonstrated shortly - the claims of fraud and illegality were generalized, vague, not well particularised, and importantly, some of the persons against whom some of the claims were made against, were not disclosed and merely described as unknown 3rd parties.

137. Although the plaintiff did not argue that the claim was pleaded to the required standards, the 12th defendant submitted that irregularities in the transfer process of various parcels of land were never pleaded in the plaint. The 7th and 16th defendants also submitted that fraud was not particularized in the plaint.



138. As evident from paragraphs 5 and 6 of the plaint, the properties in contention are 1967 which has been described as the “suit land” and the mother parcel. It also alleges the mother title’s register was irregularly closed by an interested party (IP) yet this IP has not been disclosed.
139. The same applies to paragraphs 8, 9, 10, 11,12, and 18 of the plaint where particulars of illegality and fraud have been made against unknown 3rd parties whom the plaintiff intended to join to the proceedings as 4th to 17th defendants.
140. Accordingly, several questions arise, who are these persons? Are they the defendants? Why were they not joined? Although this court appreciates that the initial plaint was amended. In the changes, the then IP is now the 18th defendant and the 4th to 17th defendants were joined as new parties. In my view, the amended plaint should have properly intituled the parties.
141. Equally, paragraphs 8, 9, 10, 11, 12, and 13 of the plaint posits another set of challenges. Who are these 3rd parties together with whom Jakino illegally sold land to the defendants? Why are they and Jakino’s estate not joined to the proceedings? Is the claim a boundary dispute or a claim of trespass? If it is a boundary dispute, why is the matter before this court? If trespass, why are the dates of entry into 1967 not disclosed? Who are these 3rd party trespassers? Which parcels of land were subdivided after Jakino’s death and which ones emanated therefrom? Which parcel has been fragmented and which illegal titles have been created and which 3rd parties do they belong to?
142. The particularization of these acts of illegality and fraud in Paragraph 18 of the plaint against the 1st to 17th defendants are all acts of trespass over 1967 and do not meet the threshold of illegality or fraud as defined earlier in this judgment.
143. Further, although trespass is an act of illegal entry on land, it is a distinct cause of action from illegality since the former is a wrong against possession, while in my view and as drawn from Section 26 of the Land Registration Act, a claim of illegality over land challenges ownership of the title. In the book Law Made Simple by Barker, David L. A., Taylor & Francis Group, 2020, pg 364, the author stated thus on the claim of trespass.
- “ Trespass is essentially a wrong against possession, not against ownership.”
144. Consequently, it therefore follows that the acts of illegalities were not specifically particularized in the plaint. Furthermore, since trespass, is a tort, by Section 4 (2) of the Limitation of Actions Act it must be filed within 3 years from when the cause of action accrued. Additionally, a claim of trespass ordinarily discloses the date or dates the actions accrued.
145. Additionally, in paragraph 18 of the plaint, the plaintiff particularized fraud against the 18th defendant, and just as in the other paragraphs of the plaint, it had several deficiencies. Which particular land was resurveyed? Who were the 3rd parties? Which fraudulent transactions of the 3rd parties did it register in the map sheet? The illegal subdivision was on which land? Which is this parcel 1709? What land fraud was committed? Furthermore, by fraud’s definition, concealing fraud or illegality as particularized is not tantamount to fraud.
146. I must point out that under Order 4, Rule 3 of the CPR, the plaintiff was required in her particulars of fraud and illegality against the 18th defendant, to give a full description of the mother parcel that is sufficient to identify it and not to merely designate it as “1709”. Such a description unquestionably fails to identify the mother parcel.



147. The only particulars of fraud that were appropriately pleaded with specificity and met the threshold of Order 2 Rule 10 (1) (a) of the CPR is a portion of paragraph 18(o) of the plaint where she particularized that 1967 was published as an inset in the maps.
148. Except for a portion of paragraph 18(o) of the plaint, the plaintiff's claims of illegality and fraud were generalized, failed to explicitly outline the exact acts of fraud and illegality and were not capable of sufficiently construing liability on the 1st to 18th defendants or undisclosed 3rd parties. It is settled law that parties are bound by their pleadings. Consequently, I find the plaintiff's claim of illegality and fraud was not specifically pleaded apart from a portion of paragraph 18(o) of the plaint.
149. Thus, since part of paragraph 18(o) met the 1st hurdle as it made allegations against the 18th defendant for "causing the suit land and...to be published as an inset in various maps", in the 2nd limb, I will deal with this paragraph 18(o).
150. Remarkably, none of the parties' submissions dwelt on the issue of maps but addressed the court on issues of legality of the subdivision of 1967, the mother parcel, and or transfer of the subdivisions thereof but the 12th and 18th defendants were curious as to why the director of surveys or survey office was not joined as a party to the proceedings.
151. As rightfully submitted by the 15th defendant's counsel, the mandate of maintenance of cadastral maps and authentication of maps is done by government surveyors, and this power is drawn from Sections 32 of the Survey Act and 15 of the Land Registration Act and the latter provides: -
- “(1) The office or authority responsible for the survey of land shall prepare and thereafter maintain a map or series of maps, to be known as the cadastral map, for every registration unit.
- (2) The parcel boundaries on such maps shall be geo-referenced and surveyed to such standards as to ensure compatibility with other documents required under this Act or any other law.”
152. It is a principle of the law that the party who alleges must prove and Sections 109 and 112 of the Evidence Act provides that:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- ...
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
153. It follows that the onus was on the plaintiff to prove her allegations that the 18th defendant tampered with the maps by inputting 1967 in them. Manifestly, the authors and custodians of maps are government surveyors including the director of surveys yet such key persons were never joined to the proceedings to answer the allegations made in paragraph 18 (o) of the plaint.
154. The 18th defendant does not deal with the maintenance of maps but rather the registration of maps [See the definition of maps under the Survey Act and Section 14 (c) of the Land Registration Act]. Hence, the 18th defendant could not be called upon to answer for the transgressions of the government



surveyor as alluded to in paragraph 18 (o) of the plaint. Therefore, I find the plaintiff did not prove her claim of fraud to the required standards. Given these findings, I will not dwell on issue (d).

c. Whether the 1st and 17th defendants proved adverse possession to the required standards

155. The 17th defendant's claim was struck out, so its arguments on this issue will not be considered.
156. As captured by the 1st defendant submissions, the doctrine of adverse possession arises where a person in possession of land owned by a registered proprietor may by some colour of right acquire valid title to it, so long as certain common law requirements are met.
157. Section 7 of the Limitation of Actions Act states the definition of adverse possession as follows:
- “an action that may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”
158. Section 38 of the Limitation of Actions Act authorizes a person who claims to have been entitled to land by adverse possession to apply to the court for an order that he be registered as the proprietor in place of the registered proprietor.
159. Section 28 (h) of the Land Registration Act is also key. It states that land is subject to certain overriding interests such as rights acquired or in the process of being acquired by any written law relating to the limitation of actions or by prescription. This overriding interest subsists and affects the interests of proprietors even when it is not noted on the register.
160. As was held in *Kweyu v Omuto*, C A Civ Appeal 8 of 1990 that was cited with approval in the case *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the primary function of the court in dealing with adverse possession is to draw legal inferences from proved facts and such inferences are matters of law. In such claims, proof of all principles of adverse possession must co-exist and be strictly proved.
161. The decision of *Maliamu Ncurubi M'ibiri v Francis M'imanyara M'rimgera* [2011] eKLR was quoted with approval by the well-cited decision of *Mbira Vs. Gachuhi* [2002] 1 EA where adverse possession principles were summarized thus: -
- a) That there had been absence of possession by the true owner through abandonment.
 - b) That the adverse possessor had been in actual possession of the piece of land;
 - c) That the adverse possessor had no colour of right to be there other than his entry and occupation;
 - d) That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;
 - e) That there was a sufficient animus to dispossess and an animus (sic) possidendi;
 - f) That the statutory period, in this case twelve years, had elapsed.
 - g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and



h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result.”

162. Having pleaded the claim of adverse possession by purchase, the onus was on the 1st defendant to strictly prove that his claim had met the threshold of adverse possession.
163. Suffice it to say, it is now settled in the circumstances of purchase, the limitation period will begin to run from the date of the payment of the purchase price in full or the last instalment of it as was held in the Court of Appeal decision *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
164. The plaintiff did not file a defence to the counterclaim. Yet, by filing a reply to defence, there was a joinder of issues as was held in the Court of Appeal decision *Joash M. Nyabicha v Kenya Tea Development Authority* KSM CA No. 302 of 2010 [2013] eKLR.
165. In the pleadings, the plaintiff disclosed that 1967 had been encroached on by the defendants and other 3rd parties and the 1st defendant confirmed that indeed, he was in occupation of 1967 measuring 12 footsteps by 20 footsteps, and had even constructed houses upon it.
166. 1967 was registered in the plaintiff's name on 8/09/1998 and that is still so to date. It follows the agreement for sale between John and Jakino did not have any legal basis as Jakino did not have legal capacity.
167. Even if, the agreement was entered on 19/11/1998 for kshs.15,000/- and an initial deposit of kshs. 10,200/- was paid on the instant date and the balance of ksh. 4800/- paid on 22/1/1999, the applicability of the legal principle of time starting to run from payment of the last instalment could not arise as the agreement was in itself illegal.
168. Therefore, this court has to fall back on *Kweyu* (Supra) and *Maliamu Ncurubi M'ibiri* (Supra) and draw legal inferences from proven facts in determining whether the threshold of adverse possession was met.
169. The 1st defendant's testimony that he and his family entered the suit property in 1998, his parents constructed housing units thereupon and that eventually his parents 'bequeathed' this portion to him and that he had even put up his own house therein was not controverted.
170. The 1st defendant testified that even if the agreement did not disclose details of the property, a portion of 1967 was what was sold to John by Jakino. DW3 corroborated his evidence.
171. The 1st defendant's and DW3's evidence was unshaken, generally consistent, and truthful and there is no doubt that the houses constructed therein by John and the 1st defendant exist and are being utilized by the 1st defendant.
172. From the analysis of the facts, it is undoubted the 1st defendant has been in exclusive, open, illegal, and uninterrupted possession of a portion of the 1967 from 1998 to date demonstrated sufficient *animus possipendi*.
173. As required in claims of adverse possession, the 1st defendant has made claims over an identifiable portion of an owner's land as was held in the decision of *Mwangi Githu v Livingstone Ndeete* [1980] eKLR.
174. Since the 1st defendant did not disclose the date and month of entry that took place in 1998, the court has taken the date of entry as the last date of the year which was 31/12/1998.



175. This date was about 22 years to the date of filing suit meaning the claim was ripe. I therefore find that the 1st defendant proved his claim of adverse possession to the required standards.

d. What orders should this court issue including an order as to costs?

176. The Court of Appeal's decision of Attorney General v Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment) clarified the definition, nature, and import of declaratory reliefs by stating: -

“A declaratory order means a ruling that is explanatory in purpose; it is designed to clarify what before was uncertain or doubtful. A declaratory order constitutes a declaration of rights between parties to a dispute and is binding as to both present and future rights. Declaratory judgments are typically sought as a means of preventing a dispute by removing ‘legal uncertainty’ as to the applicable law and the rights and obligations of the parties”

177. Declaratory reliefs have very limited power, they clarify the legal relationship by stating the court's position on it and do not require any of the parties to do anything.

178. Significantly, some of the declaratory reliefs sought by the 6th defendant in his counterclaim are untenable but the declaratory relief on entitlement to possession and occupation of North Sakwa/Nyawita 1973 and 1974 has legal basis in Section 152A of the Land Act.

179. Equally, the 15th defendant's declaratory relief as sought in the counterclaim is grounded in Sections 24 and 26 of the Land Registration act and there is no basis for denying him the reliefs sought over North Sakwa/Nyawita 1969.

180. Ultimately, for the reasons stated above, it is my finding the plaintiff did not prove her claim to the required standards. It is also my finding the 1st defendant proved his claim of adverse possession to the required standards.

181. It is also my finding the 6th and 15th defendants as registered proprietors of some of the disputed parcels, are entitled to some of the reliefs sought in the counterclaim as earlier highlighted in the judgment. Lastly, it is my finding the plaintiff's suit is incompetent against the 17th defendant, and likewise, its counterclaim is incompetent.

182. It is trite law costs follow the event and in the absence of special circumstances, the plaintiff shall bear the 1st, 2nd, 6th, 7th, 8th, 10th, 15th, 16th, and 18th defendants' costs. Being successful, the 1st, 6th and 15th defendants are entitled to costs on their counterclaims. The 17th defendant shall bear its costs of the suit and counterclaim whereas the 3rd, 4th, 5th, 9th, 11th, 12th, 13th, and 14th defendants are not awarded costs.

184. To this end, I hereby issue the following disposal orders: -

- a. The plaintiff's suit against the 17th defendant and the 17th defendant's counterclaim are hereby struck out with the 17th defendant bearing its costs.
- b. The plaintiff's suit against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 18th defendants is hereby dismissed with costs to the 1st, 2nd, 6th, 7th, 8th, 10th, 15th, 16th, and 18th defendants.
- c. A declaration be and is hereby made that the title for land parcel no. North Sakwa/Nyawita 1967 measuring 12 footsteps by 20 footsteps has been extinguished by the 1st defendant's



adverse possession thereof for a period of more than 12 years in terms of the Limitation of Actions Act.

- d. At the 1st defendant's cost, it is hereby ordered that within ninety (90) days from the date hereof, a subdivision and transfer be conducted by the Land Registrar, Bondo or such other officer as shall be delegated by the Land Registrar, Bondo to survey, ascertain and excise a portion measuring 12 footsteps by 20 footsteps within land parcel no. North Sakwa/Nyawita 1967 for purposes of registration in the 1st defendant's favour.
- e. In default of compliance with the orders, the deputy registrar or such authorized officer does execute all the necessary documents to confer a portion measuring 12 footsteps by 20 footsteps within land parcel no. North Sakwa/Nyawita 1967 to the 1st defendant's names.
- f. A declaration be and is hereby issued that the 6th defendant is the rightful owner of land parcel numbers North Sakwa/Nyawita 1973 and North Sakwa/Nyawita 1974 and is entitled to proprietary rights over them.
- g. A declaration be and is hereby issued that the 15th defendant is the rightful owner of land parcel number North Sakwa/Nyawita 1969 and is entitled to proprietary rights over it.
- h. A permanent injunction is hereby issued restraining the plaintiff, her agents, servants, or representatives from interfering with the 15th defendant's land parcel number North Sakwa/Nyawita 1969.
- i. The plaintiff shall bear the 1st, 6th and 15th defendants' costs of their respective counterclaims.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF OCTOBER 2024.

HON. A. Y. KOROSS

JUDGE

24/10/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Bosire for plaintiff

Mrs. Opondo for 1st Defendant

Mr. Ooro F. for 2nd, 10th and 17th defendants

N/A for 3rd defendant

N/A for 4th defendant

N/A for 5th defendant

Mr. Ochieng for 6th defendant

Mr. Nyamolo for 7th and 16th defendants

N/A for 8th defendant

N/A for 9th defendant

N/A for 11th defendant



Miss Nyambenge for 12th defendant

N/A for 13th defendant

N/A for 14th defendant

Mrs. Machio for 15th defendant

N/A for 18th defendant

Court assistant: Ishmael Orwa

<i>siaya elc case no. 44 of 2021 (judgment)</i>	0
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