



**Mainko (Suing for and on behalf of the Jeremiah Mainko Kidiyenye - Deceased) v Njoroge & 2 others (Environment & Land Case 64 of 2020) [2024] KEELC 13235 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13235 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 64 OF 2020  
LC KOMINGOI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**ESTHER N MAINKO ..... PLAINTIFF  
SUING FOR AND ON BEHALF OF THE JEREMIAH MAINKO KIDIENYE -  
DECEASED**

**AND**

**EDWARD NJOROGE ..... 1<sup>ST</sup> DEFENDANT  
INSPECTOR GENERAL ..... 2<sup>ND</sup> DEFENDANT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By the Complaint dated 14<sup>th</sup> September 2020, Amended on 2<sup>nd</sup> September 2021 and Further Amended on 16<sup>th</sup> June 2023, the Plaintiff claims that property Kajiado/Kitengela/19745 belonged to her late husband Jeremiah Mainko Kidiyenye following the registration in 2008 and upon his demise, the property devolved to the Plaintiff and her children. The said property was bequeathed to the late Jeremiah by his father Ibrahim Lei Ole Sondai. Upon acquisition of the property by her husband, the 1<sup>st</sup> Defendant started claiming ownership and forcefully occupied it alongside other parcels Kajiado/Kitengela/19746 and Kajiado/Kitengela/19747 and had since declined to vacate. Prior to her husband’s demise, he tried to have the 1<sup>st</sup> Defendant vacate by involving the local administration but the 1<sup>st</sup> Defendant declined. After the demise of her husband, she continued to follow up on this however on or about 2<sup>nd</sup> July 2019, the 2<sup>nd</sup> Defendant’s agents, the Director of Criminal Investigation, Ongata Rongai Police Station registered a restriction against the suit property on grounds that they were carrying out investigations. In the same year, another person not known to the Plaintiff also put a caution against the same title.



2. The Plaintiff further stated that in the year 2018 the 1<sup>st</sup> Defendant was ordered by court to vacate properties Kajiado/Kitengela/19747 and Kajiado/Kitengela/19746 when the registered owners moved this court vide Kajiado ELC No. 76 of 2017 (formerly Machakos ELC No. 183 of 2011). She contested the allegation that her late husband sold the property to the 1<sup>st</sup> Defendant on grounds that there was no evidence of the sale and stating that the property was gifted to her late husband by his father and it had never been disposed of in any manner. The Plaintiff and her children are thus entitled to enjoy the suit property and therefore seek:
  - a. A declaration that land parcel Kajiado/Kitengela/19745 forms part of the Estate of the late Jeremiah Mainko Kidiyenye (Deceased).
  - b. An order do issue directing the 1<sup>st</sup> Defendant, his agents, employees, servants and/or whomsoever is acting under him to immediately and unconditionally give vacant possession of parcel No. Kajiado/Kitengela/19745.
  - c. An order do issue directing the Land registrar, Kajiado to remove the restriction filed by the 2<sup>nd</sup> Defendant's agents and a restriction filed by unknown person against the suit property.
  - d. An order directing the Land Registrar Kajiado to de-register the caution and restriction entered against the suit property.
  - e. An order do issue directing the OCS Kitengela Police Station to supervise a peaceful handover of the suit property from the 1<sup>st</sup> Defendant, his agents, employees and/or servants from land parcel No. Kajiado/Kitengela/19745.
  - f. An order to issue dismissing the 1<sup>st</sup> Defendant's counterclaim as contained in his Amended Defence dated 13<sup>th</sup> December 2022.
  - g. Costs of the suit.
  - h. Costs of the counterclaim.
  - i. Any other and further orders the Hon. Court may deem just to grant.
3. The 1<sup>st</sup> Defendant in his Amended Statement of Defence and Counter Claim dated 13<sup>th</sup> December 2022 contested the Plaintiffs allegation stating that the suit property was part of the 10 acres that he acquired from Ibrahim Lei Ole Sondai in the year 1996 before the same was subdivided. He indicated that the said Ibrahim showed him his portion of his 10 acres, he paid the surveyor's fees, placed beacons thereon and allowed him to take possession. Ibrahim gave him a mutation form for parcel Kajiado/Kitengela/19377 and informed him that the mutation was for his portion of land. He then moved to the property in the year 1996 and has since developed it. Therefore, the allegation that he was a trespasser was false because by the year 2008 when the late Jeremiah allegedly gained ownership, he had been in occupation of the property for over 12 years and his prayers were thus untenable. As such, the acquisition of title deed for Kajiado/Kitengela/19745 was done fraudulently because the said Ibrahim was well aware of the 1<sup>st</sup> Defendant's interest in the suit property but went ahead to subdivide it and register it in other people's names in an aim to defeat his interest in parcel Kajiado/Kitengela/19377. Accordingly, the transfer undertaken in 2008 was subject to the overriding interests under Section 28(e) and (h) of the [Land Registration Act](#). And he was entitled to the suit property by way of adverse possession.
4. He therefore sought that:
  - i. The Plaintiff's suit be dismissed with costs;



- ii. A declaration that the 1<sup>st</sup> Defendant is the rightful owner of land parcel No. Kajiado/Kitengela/19745 and/or is entitled to be registered as the owner of the said parcel by adverse possession;
  - iii. An order of cancellation of title purportedly held by the Plaintiff over number Kajiado/Kitengela/19745;
  - iv. An order directing the Land Registrar Kajiado to rectify the register and issue the 1<sup>st</sup> Defendant with a certificate of title over number Kajiado/Kitengela/19745.
  - v. Costs of the suit and of the counterclaim.
  - vi. Any other relief the court deems fit to grant.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their Statement of Defence dated 10<sup>th</sup> July 2023 contested that the Amended Plaintiff had no cause of action against them and should be dismissed with costs.

### **Evidence of the Plaintiff**

6. PW1, Esther Mainko, the plaintiff adopted her witness statement as her evidence in chief and produced her bundle of documents which was marked as P. Exhibit 1 to 11 as evidence. She testified that the suit property was part of the larger parcel Kajiado/Kitengela/13577 measuring approximately 600 acres belonging to one Ibrahim Lei Ole Sondai (her father in law). He then gifted a portion of it to her late husband Jeremiah Kidienye. Upon subdivision in 2008, the portion given to her late husband was registered in her husband's name as parcel Kajiado/Kitengela/13745. Although the mutation form was filled in the year 2004. She stated that she knew the 1<sup>st</sup> Defendant who started residing on the suit property in the year 1996 without permission. She stated that as early as the year 2002, efforts were made to evict him from the property as shown by the Chief's letter dated 24<sup>th</sup> July 2002 but he refused to leave. They approached the Disputes Tribunal to resolve the matter but he also declined to attend and on 17<sup>th</sup> July 2008 summons were issued for his attendance. Following his continued stay and refusal to leave, this suit was then filed.
7. She stated that she had sued the 2<sup>nd</sup> Defendant because his agents caused a caution to be registered against the suit property and she wanted the caution removed.
8. On Cross examination she confirmed that the 1<sup>st</sup> Defendant entered the suit property in the year 1996 and had constructed permanent houses on the property although her father in law had severally asked him to vacate. She confirmed that there was a letter from the area Chief in the year 2002 in this regard as well as summons from the Land Disputes Tribunal in the year 2008. Although the 1<sup>st</sup> Defendant failed to appear for the hearing, the Tribunal ordered him to leave which he once again refused to. She confirmed that the mutation and registration of the suit property was undertaken when the 1<sup>st</sup> Defendant was still on the land. She confirmed that the 1<sup>st</sup> Defendant never had permission to be on the land. She made reference to Kibera Law Courts Criminal Case No. 5137 of 2010 where the 1<sup>st</sup> Defendant is the complainant and her father in law, was the accused person. When asked why she sued the 2<sup>nd</sup> Defendant, she stated that the caution was placed by the 1<sup>st</sup> Defendant's son who is a Police Officer. She desired the same lifted.
9. On re-examination she reiterated her evidence in chief.
10. PW2 Ibrahim Lei Sondai, the Plaintiff's father in law adopted his witness statement dated 16<sup>th</sup> June 2023 as his evidence in chief. He stated that he neither sold the suit property to the 1<sup>st</sup> Defendant, receive money for it, showed him the property, nor allowed him to reside on it. He stated that the 1<sup>st</sup>



Defendant started residing on the property in the year 2002. He asked him to vacate but he declined. He reported the matter to the Chief and later to the Land Disputes Tribunal. He made reference to the Chief's letter dated 24<sup>th</sup> July 2002. He indicated that he did not conspire with his late son to defraud the 1<sup>st</sup> Defendant because he (1<sup>st</sup> Defendant) was not entitled to the land. He also testified that at some point the 1<sup>st</sup> Defendant accused him in Criminal Case 5137 of 2010 at Kibera Law Courts but he was acquitted of the charges. He denied the allegation that he sold the land to the 1<sup>st</sup> Defendant contesting the sale agreement dated 14<sup>th</sup> June 1996 and the allegation that he received a payment of Kshs. 200,000 from the 1<sup>st</sup> Defendant.

11. On cross examination, PW2 admitted that the 1<sup>st</sup> Defendant entered on the suit property in 2002 and he reported the matter to the chief in the same year and then to the Land Disputes Tribunal in the year 2008 although he did not avail any record of the proceedings at the Land Disputes Tribunal. He also did not avail the Award. He confirmed that the 1<sup>st</sup> Defendant had put up permanent structures on the suit property. He stated that he was acquitted of the Criminal charges at Kibera Law Courts. He said the court found that the signature on the sale agreement was not his.
12. On re-examination he confirmed that the signature on the witness statement was his.

### **Evidence of the Defendants**

13. DW1 Edward Peter Njoroge, the 1<sup>st</sup> Defendant adopted his witness statement as his evidence in chief and his bundle of documents which was marked as D. Exhibit 1. He stated that he purchased the suit property from PW2 in the year 1996 for Kshs. 200,000 which was equivalent to Kshs. 20,000 per acre. He stated that by 2002, he was already on the suit property having moved there in the year 1996 and had constructed permanent structures where he resides with his family. He confirmed that PW2 reported him to the Land Disputes Tribunal in the year 2008 but not to the area Chief. On the Criminal Case number 5137 of 2010 at Kibera Law courts, he stated that the court found that the accused (PW 2) had breached the contract. He then filed Machakos CMCC No. 583 of 2012 against PW2 seeking an order of specific performance which was granted but he (PW2) refused to transfer the land to him. He stated that as per the certificate of official search, the late Jeremiah Mainko was registered as the owner of the suit property in the year 2008 and by that time DW1 had been on the suit property for over 12 years. He also testified that the caution was placed against the title through the Director of Criminal Investigations Ongata Rongai to restrict any transfer of the suit property to third parties pending investigations. He also confirmed that he registered a caution against the title. He sought to be registered as the owner of the suit property.
14. On cross examination he confirmed that the sale agreement dated 12<sup>th</sup> February 1996 made reference to parcel Kajiado/Kitengela/3036 and that there was another sale agreement dated 14<sup>th</sup> June 1996. He stated that he paid the entire purchase price and sought consent from the Land Control Board although he did not have evidence of the application. He stated that PW2 had been unwell for a while and could not attend the Land Control Board meeting and upon recovery, he still refused to attend the Land Control Board meeting. He confirmed that the signature on the sale agreement was PW2's. He also confirmed that the signing of the agreement was witnessed by two witnesses but one had since passed away. He stated that at the time of the purchase, the land had not been subdivided although he paid for the surveyor's fees. The surveyor visited the land, put up beacons on his parcel of land and that is where he had been residing since the year 1996. He stated that the mutation form referred to the suit property he was residing on and he confirmed that his documents showed that the parcel is Kajiado/Kitengela/7609. He also confirmed that he was summoned by the Chief in the year 2002 as well as at the Land Disputes Tribunal, but upon production of his documents, no orders were issued. It is his case that, he is entitled to be registered as the owner of the property.



15. On re-examination he confirmed that he purchased 10 acres of the un-subdivided parcel 3036. It was then subdivided to parcel 7609 which gave rise to parcel 19377 measuring 10 acres but he was occupying parcel 19745. He stated that neither the Chief nor the Land Disputes Tribunal asked him to vacate the property. He confirmed that following frustration in attempts to get title to the property from PW2, he registered a caution against it and the caution was still in force.
16. At the close of the oral testimonies parties tendered final written submissions.

### **The Plaintiff's submissions**

17. In the Plaintiff's submissions dated 5<sup>th</sup> June 2024, counsel for the Plaintiff submitted on the following issues for determination as summarised here under.
18. On whether the 1<sup>st</sup> Defendant has proprietary rights over parcel no. Kajiado/Kitengela/19745 measuring approximately 2.84 hectares, counsel submitted that the sale agreements dated 12<sup>th</sup> February and 14<sup>th</sup> June 1996 produced by the 1<sup>st</sup> Defendant should be rejected because PW2 refuted ever selling the suit property to the 1<sup>st</sup> Defendant. Additionally, the agreements indicate that the purchased property was Kajiado/Kitengela/3036 and the property before court was Kajiado/Kitengela/19745 which was not excised from parcel 3036 indicated on the 1<sup>st</sup> Defendant's sale agreements. Counsel submitted that the 1<sup>st</sup> Defendant did not file evidence of the alleged property 3036 and there was thus no evidence of existence of such parcel of land. Counsel submitted that the Plaintiff was a stranger to the 1<sup>st</sup> Defendant's claim and if he claims that parcel 3036 was part of parcel 19745, then he should have joined PW2 as a party to the suit and as such cannot claim to recover property from the Plaintiff. Counsel went on to submit that the 1<sup>st</sup> Defendant's witness statement made reference to parcel Kajiado/Kitengela/13577 whereas that was neither the property in the sale agreement nor parcel 19745 claimed by the Plaintiff. Counsel added that the mutation form produced by the 1<sup>st</sup> Defendant, parcel 13577 was parcel B excised from parcel 7609 and not from parcel 3036 referred to in the sale agreement. Therefore, with these glaring discrepancies, the 1<sup>st</sup> Defendant had not proved his proprietary rights over the suit property as espoused by Section 107 of the [Evidence Act](#) and held in *Muriungi Kanoru Jeremiah vs Stephen Ungu M'Mwarabua* [2015] eKLR.
19. On whether property Kajiado/Kitengela/19745 should transmit to the 1<sup>st</sup> Defendant by way of adverse possession, counsel submitted that the Defendant had not met the threshold for grant of orders of adverse possession as was articulated in the cases of: *Mtana Lewa vs Kahindi Ngala Mwangandi* (2005) eKLR and *Ngonje vs Njawa & 2 others* [2023] KEELC 22037 (KLR). This is because there is evidence that the Defendant's occupation of the suit property was never peaceful following the letter from the Chief in the year 2002 and the Tribunal's summons in the year 2008. Additionally, the Defendant was claiming 10 acres from PW2 who was not party to the suit while the Plaintiff's land measured 7 acres. Counsel submitted that there were several court cases against the 1<sup>st</sup> Defendant such as *Kajiado CM ELC No. 38 of 2020* in which PW2's son was seeking to have the 1<sup>st</sup> Defendant evicted from his suit property; *Kajiado HC ELC No. 76 of 2017* where the 1<sup>st</sup> Defendant was ordered to vacate parcels 19746 and 19747 which border the parcel of land 19745 being sought by the Plaintiff. This thus shows that the 1<sup>st</sup> Defendant has not been in peaceful possession of the suit property and is a trespasser.
20. On whether the Plaintiff is entitled to the orders sought, counsel submitted that the Plaintiff was entitled to orders sought since her ownership was protected by Section 24 and 26 of the [Land Registration Act](#) and Article 40 of the [Constitution](#) also citing *Ahmed Ibrahim Suleiman vs Noor Khamisi Surur* (2013) eKLR. As such, the 1<sup>st</sup> Defendant's counterclaim should be dismissed with costs of the counterclaim and the main suit to the Plaintiff.



## The 1<sup>st</sup> Defendant's submissions

21. Counsel for the 1<sup>st</sup> Defendant in his submissions dated 23<sup>rd</sup> July 2024 and supplementary submissions outlined the history of the suit property stating that the initial parcel of land was known as Kajiado/Kitengela/3036 which was more than 50 acres. Parcel Kajiado/Kitengel/13577 measuring approximately 10 acres was excised therefrom. Parcel 13577 was then closed on subdivision and gave rise to parcels 19746, 19747 and 19745 (which is the suit property measuring 7 acres). Counsel submitted that the 1<sup>st</sup> Defendant entered into the suit property following purchase of the same in the year 1996 as evidenced by the sale agreement dated 12<sup>th</sup> February 1996 and a further sale agreement which showed acknowledgment of the purchase price paid. The 1<sup>st</sup> Defendant also paid surveyor's fees and beacons were put up for his 10 acre piece of land which he entered and fenced sometime in June 1996. However, the land was never transferred to the 1<sup>st</sup> defendant because the seller Ibrahim refused to execute the transfer documents but the 1<sup>st</sup> Defendant continued residing on it for all this while. Sometime in the year 2001, in an aim to defeat the 1<sup>st</sup> Defendant's rights over the suit property, the owner of the property one Ibrahim subdivided the property and registered it in other person's names including the Plaintiff's husband in 2008. Counsel submitted that upon this discovery, the 1<sup>st</sup> Defendant filed a complaint against Ibrahim and he was charged with obtaining by false pretence in Kibera Criminal Case No. 5137 of 2010. A ruling was delivered on 18<sup>th</sup> July 2012 where the Court held that evidence showed that the accused had breached his part of the contract and the issues could be best resolved through a civil suit. The 1<sup>st</sup> Defendant would then file Machakos CMCC No. 583 of 2012 between him and Ibrahim Lei and in the Judgement delivered on 25<sup>th</sup> September 2013, the Court issued orders for Specific performance against Ibrahim Lei Elesondai. This decision was neither appealed against nor set aside, but the said Ibrahim declined to comply.
22. Therefore, the Plaintiff did not have any legitimate proprietary or legal rights over the suit property because the purported transfer was illegal, unlawful and fraudulent as articulated under Section 26 of the [Land Registration Act](#). By 2008, the 1<sup>st</sup> Defendant had been on the suit property for over 12 years. Additionally, the alleged transfer was subject to overriding interest as elucidated by Section 28(h) of the [Land Registration Act](#).
23. On whether the 1<sup>st</sup> Defendant had acquired rights over the suit property by way of adverse possession, counsel submitted that the Plaintiff testifying as PW1 had acknowledged that the 1<sup>st</sup> Defendant had been on the suit property from the year 1996 and had constructed permanent houses where he cultivates and resides to date. PW2 also acknowledged the fact that the 1<sup>st</sup> Defendant had been on the suit property openly although he claimed that it was from the year 2002. Which either way was more than 12 years and they had not taken any steps to evict him. Reference was made to the Court of Appeal's case of Public Trustee vs Wanduru Ndegwa [1984] eKLR where the Court held that the owner of the suit property ceased possession on the day the purchase price was paid in full and time started running. The 1<sup>st</sup> Defendant having not received any eviction notice means that time started running when this suit was filed on 23<sup>rd</sup> September 2020 which was 24 years since he entered the property citing Presbetyrian Church of East Africa (Uthiru Church) & another vs Kihoro & 3 others [2022] eKLR. He was therefore entitled to the property by way of adverse possession as per Section 7 of the [Limitation of Actions Act](#). Counsel also submitted that the notice to attend the Land Disputes Tribunal reveals that it had been altered to indicate the year as 2008 instead of 2019. It was also noteworthy that PW1 and PW2 did not produce any other evidence of the said dispute. Additionally, mere correspondence such as the purported chief's letter could also not equate to assertion of rights that would stop time from running citing Benson Mukuwa Wachira vs Assumption of Sisters of Nairobi Registered Trustees [2016] eKLR and Gulam Miriam Noordin v Julius Charo Karisa Civil



Appeal No. 26 of 2015. Therefore, having proved his counterclaim, the 1<sup>st</sup> Defendant was entitled to be issued with title over property Kajiado/Kitengela/19745.

24. In the Supplementary submissions, counsel responded by submitting that the Plaintiff's submissions impugning the 1<sup>st</sup> Defendant's mutation form were incorrect because parcel 13577 was excised from parcel 3036 and not 7609 as alleged by Counsel for the Plaintiff. That 7609 was the subdivision number and not the parcel number. Counsel also submitted that it was not in contention that the suit property measured 7 acres which had been excised from the initial 10 acres and the other 3 acres were subject to an active court case Kajiado ELC No. 76 of 2017 at the lower court and therefore not subject to this suit.
25. Counsel thus sought for dismissal of the Plaintiff's suit with costs.
26. It appears the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file any written submissions.

### **Analysis and Determination**

27. I have considered the pleadings, the evidence on record, the rival submissions and the authorities cited and find that the issues for determination are:
  - i. Who is rightful owner of land known as Kajiado/Kitengela/19745;
  - ii. Whether the Plaintiff is entitled to the prayers sought;
  - iii. Whether the 1<sup>st</sup> Defendant has proved his case and is entitled to his prayers in the Counter Claim;
  - iv. Who should bear costs of the suit?
28. It is the Plaintiff's case that known as Kajiado/Kitengela/19745, which the Plaintiff claims, was gifted to her late husband in the year 2008 by his father Ibrahim Lei Elesundai who testified as PW2. PW2 in his witness statement indicated that parcel Kajiado/Kitengela/19377 belonged to him and had gifted it to his son Newton Mwaura Sundai sometime in 2008. It reads, "...I am the original registered owner of land parcel no. Kjd/Kitengela/19377, the subject of this suit. The Plaintiff therein is my son. In 2008 or thereabout, I shared out my assets among all my children to enable them start their lives. To my son Newton Mwaura Sundai, I gifted Kajiado/Kitengela/19377..." At this juncture, let me point out the glaring discrepancy regarding the ownership. The Plaintiff claims that property Kajiado/Kitengela/19745 is the property that was given to her late husband Jeremiah Mainko Kidienye by his father PW2. However, PW2's witness statement indicates that it was property 19377 was gifted to Newton Mwaura Sundai. PW2 did not inform the court the history and subdivision of property 19377 gifted to Newton and how it ended up as property 19745 given and registered in Jeremiah Kidienye's name. I also notice that, what was produced as evidence was a mutation form dated 19<sup>th</sup> May 2004 for parcel Kajiado/Kitengela/19376 in the name Ibrahim Lei Elesundai which was subdivided to parcels 19745, 19746 and 19747. Once again, the parcel that resulted to the suit property was parcel Kajiado/Kitengela/19376 and not parcel Kajiado/Kitengela/19377 as per the witness statement.
29. In support of her case the Plaintiff produced the following documents; A mutation form for property Ngong/Ngong/62347 in Jeremiah Mainko Kidienye's name dated 22<sup>nd</sup> May 2014; a restriction against land Kajiado/Kitengela/23995 dated 31<sup>st</sup> January 2020 by put up by Ibrahim Lei Elesondai and a certificate of official search for property Kajiado/Kitengela/3936 issued on 21<sup>st</sup> January 2023 belonging to Paul Taiyo. I note that the land mentioned in these documents is different from the suit property.



30. It is trite law that he who alleges must prove. Whereas there is a claim that the suit property Kajiado/Kitengela/19745 belongs to Jeremiah Kidiyenye and a title deed issued in the year 2008 produced as evidence, and that the property was previously owned by Ibrahim Lei Elesundai, this court was never provided with full proof evidence as proof of how the history of title changed hands from Ibrahim to Jeremiah. I have already outlined the discrepancies in this history.
31. Before I make a final pronouncement on this I will delve into the 1<sup>st</sup> Defendant's defence and counterclaim.
32. It is not in contention that the 1<sup>st</sup> Defendant has been on the suit property and is still on the suit property with full knowledge of the Plaintiff and PW2. Both the Plaintiff and the 1<sup>st</sup> Defendant confirm that he has been on the suit property from the year 1996, however PW2 stated that he began residing on the property in the year 2002. Whereas the 1<sup>st</sup> Defendant claims to have purchased the suit property from Ibrahim in the year 1996, after paying the consideration in full, the Plaintiff and PW2 contested this claim stating that his open occupation was unlawful and illegal.
33. The 1<sup>st</sup> Defendant produced a sale agreement dated 12<sup>th</sup> February 1996 which showed that he purchased ten (10) acres of land from Ibrahim Lei Elesundai. Another sale agreement dated 14<sup>th</sup> June 1996 confirmed that the 1<sup>st</sup> Defendant had paid the entire purchase price for property Kajiado/Kitengela/3036 and what was left was for the transfer of the said land to him. In yet another letter dated 17<sup>th</sup> June 1996, Ibrahim confirmed that the 1<sup>st</sup> Defendant had paid Kshs. 10,000 as survey fees and that once the title deed for the property was released by court, they would go to the land control board. In the meantime, the 1<sup>st</sup> Defendant was allowed to develop the property.
34. PW2 in his testimony contested the signatures on those letters but there was no evidence presented in court to invalidate them.
35. The 1<sup>st</sup> Defendant produced a certificate of search dated 22<sup>nd</sup> February 2023 for property Kajiado/Kitengela/19745 which shows it was registered to one Jeremiah Mainko Kidiyenye and had a caution placed against it in the year 2014. There was also a copy of the original green card dated 24<sup>th</sup> October 2022 which showed that parcel; Kajiado/Kitengela/13577 was registered in the year 2001 to Ibrahim Lei Elesundai measuring approximately 4.05 hectares was closed on subdivision in the year 2004 and new title numbers 19376 and 19377 issued. A mutation form dated 23<sup>rd</sup> May 2001 for property Kajiado/Kitengela/7609 which was subdivided to parcels 13576, 13577 and 13578 was also produced. This court is in agreement that the history of subdivision of parcel 3036 in the sale agreement to parcel 19745 in the instant suit is unclear.
36. The 1<sup>st</sup> Defendant in his counterclaim seeks to be registered as the owner of the suit property by dint of adverse possession.
37. The Plaintiff and her witness PW2 confirmed that the 1<sup>st</sup> Defendant had been on the suit property from the year 1996 and 2002 respectively although illegally and without permission. They confirmed that he had also constructed permanent houses and they had tried to evict him from the property from the year 2002.
38. Section 7 of the *Limitation of Actions Act* provides that an action to recover land cannot be brought after the lapse of 12 years. It states; "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."



39. The Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] KECA 532 (KLR) held that:

“...Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act...*”

40. If the 1st Defendant began residing on the suit property in 1996, the 12-year limitation period expired in 2008. The Plaintiff contends that in 2002, they reported the 1st Defendant’s occupation to the Chief, who summoned the Defendant. However, the mere issuance of a summons by the Chief does not constitute an effective assertion of ownership rights sufficient to stop time from running for purposes of adverse possession. The Court of Appeal in the case of *Kuria Kiarie, Njuguna Kuria & Kimani Kuria v Sammy Magera* [2018] KECA 467 (KLR) held as follows regarding the issue of stopping of time in matters adverse possession:

As this Court stated in *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura* [1996] eKLR:

Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him.

... He must therefore make a peaceable and effective entry, or sue for recovery of land.”

41. Save for this letter from the Chief, there is no evidence that the Plaintiff made an entry in the suit property to stop the time. Therefore, time continued running.

42. The Plaintiff claims that in the year 2008 they filed a dispute with the Land Disputes Tribunal. The letter attached by the Plaintiff only summoned the 1<sup>st</sup> Defendant to attend a dispute hearing. No other evidence of this dispute was produced. Additionally, the 1<sup>st</sup> Defendant pointed out that the Land Disputes Tribunal’s notice of attendance produced by the Plaintiff had been altered from the year 2019 to year 2008. This court has also taken note of this change. While I am cognisant that mistakes do happen, I cannot help but marvel at how possible it is that the Land Disputes Tribunal would print notices in the year 2008 that showed the year being 2019. Even assuming the said notice to attend was valid, it only shows that Ibrahim Lei Ole Sondai filed a claim against the 1<sup>st</sup> Defendant and the dispute had been fixed for hearing before the Land Disputes Tribunal. This, once again was not an eviction notice. Therefore, time continued running. Even the alleged change of ownership in the year 2008 from Ibrahim to Jeremiah Mainko did not stop time.

43. It is only until 2<sup>nd</sup> September 2020, that an eviction notice was issued to the 1<sup>st</sup> Defendant which was a proper way of stopping time and a consequent suit filed on 23<sup>rd</sup> September 2020. By this time, whether the 1<sup>st</sup> Defendant gained entry in the year 1996 or 2002, the action to recover land was already time



barred. This was the holding of Court of Appeal's in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Ali Abdalla Bakshwein* [2015] KECA 728 (KLR) where it was stated;

“... Neither was there evidence or dispossession or discontinued possession of the suit premises by the respondents throughout the period leading to the filing of the Mombasa O.S. By the appellants' own admission the respondents reared a large herd of cattle which grazed freely on the suit premises at times even feeding on their crops. The respondents too had constructed a dip water tank and buildings and or structures for their use and that of their workers. From the foregoing, it is quite apparent that the appellants never had exclusive and peaceful possession of the suit premises. If anything, the respondents continued to exercise and enjoy proprietary rights over the suit premises...

It is therefore quite apparent that the appellants did not prove that the respondents ever lost their rights to the suit premises either by being dispossessed or by having discontinued possession of the suit premises for a continuous statutory period of twelve years to entitle them to title to the suit premises by way of adverse possession. The trial court was therefore right in rejecting their claim on that basis...”

44. It is on record that the Plaintiff and her family had been aware of the 1<sup>st</sup> Defendant's continued occupation of the suit property including cultivating, constructing permanent houses and openly residing thereon with his family without their consent for the period of time he has been there. And there is no evidence that his possession had ever been discontinued. Since “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” as Section 107 of the *Evidence Act* provides, I find that the 1<sup>st</sup> Defendant has proved his claim for adverse possession as sought in the Counter Claim.
45. Counsel for the Plaintiff submitted that if the 1<sup>st</sup> Defendant has any claim to make, it ought to be against PW2 and not the Plaintiff. I wish to state that, an action to recover land is against the registered owner. In this particular suit, the Plaintiff and PW2 both indicated that the registered owner of the suit property was the late Jeremiah Mianko Kidiyeye herein represented by his Administrator. Therefore, the 1<sup>st</sup> Defendant's claim against the Plaintiff is proper and valid.
46. The upshot of the matter is that the Plaintiff has failed to prove her case as against the Defendants in a balance of probabilities. The suit is hereby dismissed.
47. In essence the 1<sup>st</sup> Defendant's counter claim succeeds. Accordingly Judgement is entered in favour of the 1<sup>st</sup> Defendant as against the Plaintiff as follows;
  - a. That a declaration is hereby issued that the 1<sup>st</sup> Defendant is the rightful owner of land parcel number Kajiado/Kitengela/19745 and/or is entitled to be registered as the owner of the said parcel by adverse possession.
  - b. That the Land Registrar Kajiado is directed to cancel the title held by the Plaintiff over the suit property; that Kajiado/Kitengela/19745 within sixty (60) days from the date of this Judgement.
  - c. That an Order is hereby issued, directing the Land Registrar Kajiado to rectify the register by deleting the Plaintiff's name and issue the 1<sup>st</sup> Defendant with a certificate of title in respect of Kajiado/Kitengela 19745/within sixty (60) days from the date of this Judgement.
  - d. That the costs of this suit be borne by the Plaintiff



**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Moseti for the Plaintiff.

Mr. Isahi for the 1<sup>st</sup> Defendant.

Ms. Kirina for the 2<sup>nd</sup>, 3<sup>rd</sup>, Defendants.

Mutisya – Court Assistant.

