



**Wafula & 4 others v Board of Management St Anthony School of Deaf & 4 others (Environment & Land Case 10 of 2017) [2024] KEELC 13934 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13934 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 10 OF 2017  
EC CHERONO, J  
DECEMBER 17, 2024**

**BETWEEN**

**AGNES WAFULA ..... 1<sup>ST</sup> PLAINTIFF  
JORAM WAFULA MUKWEYI ..... 2<sup>ND</sup> PLAINTIFF  
PATRICK BARASA MUKWEYI ..... 3<sup>RD</sup> PLAINTIFF  
HENRY MANYONGE MUKWEYI ..... 4<sup>TH</sup> PLAINTIFF  
GODFRIDA MUNIKA MAYAMA ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**THE BOARD OF MANAGEMENT ST ANTHONY SCHOOL OF  
DEAF ..... 1<sup>ST</sup> DEFENDANT  
COUNTY GOVERNMENT OF BUNGOMA ..... 2<sup>ND</sup> DEFENDANT  
PERMANENT SECRETARY MINISTRY OF LANDS ..... 3<sup>RD</sup> DEFENDANT  
DIRECTOR OF SURVEYS ..... 4<sup>TH</sup> DEFENDANT  
HON ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs herein commenced this suit by way of a plaint dated 14<sup>th</sup> January, 2017 seeking the following orders;
  - a. Injunction as prayed in paragraph 12 of the plaint.
  - b. A declaratory order as pleaded in paragraph 13 of the plaint.
  - c. Costs and interests.



2. The 2<sup>nd</sup> Defendant entered appearance and filed defence on 1<sup>st</sup> September 2017 denying the plaintiffs' claim. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants also entered appearance and filed their joint statement of defence dated 3<sup>rd</sup> October, 2022.
3. During pre-trial conference, the parties confirmed compliance with pre-trial directions under Order 11 CPR and that the case was ripe for hearing. The parties thereafter agreed to have this case heard by way of viva voce evidence.
4. During the hearing, the plaintiffs called two witnesses and the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants called two (2) while the 2<sup>nd</sup> Defendant called one witness.

### **Plaintiffs's Summay Of Facts-**

5. Joram Wafula Mukweyi testified as PW1 and referred to his witness statement dated 7<sup>th</sup> October, 2020 which he adopted as his testimony-in-chief. He stated that he acquired land parcel No. Ndivisi/muchi/1339 measuring approximately 3.6 Ha.as inheritance from his father during land consolidation in 1969. He stated that his father was registered in his own land parcel No. Ndivisi/muchi/1242 the same year and was acquired by the Government through compulsory acquisition. He stated that in 2007, he sold parts of his land to the following people;
  1. Agnes Wafula-----Ndivisi/muchi/6661
  2. Godfrida Munika Mayama-Ndivisi/muchi/6660
  3. Joram Wafula Mukweyi----Ndivisi/muchi/6658
6. He stated that they lived peacefully until late 2016 when the principal of St. Anthony School For The Deaf (1<sup>st</sup> Defendant) hired goons and students who invaded and fenced off the portion of land which was not theirs. He further stated that every time he tried to plough, he was chased away including the purchasers.
7. On cross-examination, the witness stated that he was not aware that his title deed was surrendered to the Government. He stated that his title deed got lost. He stated that was given the suit land during land Adjudication in 1969 and that ST. Anthony School for the Deaf encroached into his land and admitted that he did not report to any law enforcement officers.
8. Godfrida Munika Mayama testified as PW2. She referred to their joint witness statement dated 7<sup>th</sup> October, 2020 and stated that that Joram Wafula Mukweyi (1<sup>st</sup> plaintiff) sold her land parcel No. Ndivisi/muchi/6660 in the year 2007. She stated that before purchasing the land, she conducted an official search and later attended the land control Board where they were issued with a consent. Subsequently, She was issued with a title deed.
9. On cross-examination, the witness stated that ST. Anthony School for the Deaf encroached on her land. She said that she was not present when the surveyor was doing the survey but she visited the land after the survey had been done. She stated that she sent someone when the survey exercise was being done but that person is not a witness in this case. She said that she has not conducted an official search of her land since she bought it in the year 2007. She said that she was not given the mutation forms when the original land parcel No. Ndivisi/muchi/1339 was being subdivided by Joram Wafula Mukweyi. She said that she did not report the encroachment of her land by St. Anthony School for the Deaf. She admitted that since she bought the suit land in the year 2007, she has not lived on the land nor constructed any structures thereon.



10. Felix Oduor Maura testified as DW1 and identified himself as the Land Registrar, Bungoma County. He stated that from their records, Land parcels NO Ndivisi/muchi/6658, 6659, 66660 and 6661 are resultant subdivision of land parcel No. Ndivisi/muchi/1339. He stated that from the green card, the subdivision was done on 06/08/2007 and that the resultant subdivisions are registered in the names of Joram Wafula Mukweyi. He further stated that the Land Registrar entered a restriction on land parcel No. Ndivisi/muchi/6658 with the remarks that the particular title was cancelled because the property was a Government land. He stated that there is a reference made to PDP Reference NO. W/63/85/2 of 13/08/85. He stated that the cancellation was applicable to all the four subdivisions which he produced as D-Exhibit 1, 2, 3 and 4 respectively. The witness also stated that in their records, there is a letter sent to the registered proprietors of the four affected parcels dated 5/2/2008 which was produced as P-Exhibit 5. The witness also referred to another letter addressed to Agnes Wafula, Godfrida Munika Mayama and Joram Wafula Mukweyi dated 7/5/2008 produced as D-Exhibit 6.
11. On cross-examination, the witness stated that before the subdivision, there was PDP. He stated that he has not checked the mother title. He stated that if the Government acquires land through compulsory acquisition and the person is compensated on a particular property, that person has no right to the property, let alone subdividing or transferring the property to himself or any other persons.
12. Bonventure Wanyama was called as DW2 who identified himself as a resident of Kibabii location. He was referred to his witness statement dated 17/10/2022 which he adopted as his testimony-in-chief. He was also referred to his list of documents containing 5 items dated 3/10/2022 and filed in court on 12/10/2022 and produced as D-Exhibit 1,2, 3, 4, 5, 6, 7, 8, 9 and 10 respectively. He stated that he is the chairman of St. Anthony School for the Deaf from the year 2000 and that the plaintiffs do not live in the school land and that the school occupies its land which is beacons and have not encroached the plaintiffs' land.
13. On cross-examination, the witness stated that the Government allocated unsurveyed land measuring 9.92 parcel No. Ndivisi/muchi/1339 to St. Anthony School for the Deaf on 26/7/1994. He stated that if the said land was owned by someone, the person would not have allowed the school to be developed to the state where it has reached. He stated that when he joined the school in the year 2000, they continued to construct more structures and classrooms. He stated that he saw a copy of compensation list showing that the original owner of land parcel No. Ndivisi/muchi/1339 was compensated.

#### DIVISION - 2 DEFENDANT'S CASE-

14. The 2<sup>nd</sup> Defendant called one Cleophus Wanyonyi Waswa (dw1) who identified himself as a Senior Surveyor of the County Government of Bungoma. He referred to his witness statement recorded on 10/03/2021 which he adopted as his testimony-in-chief. He also referred to the 2<sup>nd</sup> Defendants list of documents dated 1<sup>st</sup> September and a further list of documents dated 18/2/2022 containing 4 and 2 items each and produced as D-Exhibit 1, 2, 3, 4, 5 and 6 respectively. He also referred to a green card for land parcel No. Ndivisi/muchi/1242 which was also produced as D-Exhibit 7. He said that the issue in contention is land parcel No. Ndivisi/muchi/1339. He stated that he has not seen an extract containing the same. He stated that he has a list of people who were compensated after the Government acquired their parcels of land including land parcel No. Ndivisi/muchi/1339. He stated that the owner of that land was compensated KSHS 8,823.50. He also stated that the details of the land is land parcel No. Ndivisi/muchi/1339 which is measuring 8.64 Acres and the amount paid for the land was KSHS. 4,320/ and the developments thereon was KSHS.4503.50 making a total of KSHS. 8,823.50. He stated that land parcel No. Ndivisi/muchi/1242 belonged to Mukweyi Andrea and it measured 12.68 Acres. He stated that the price for the land was KSHS. 6,340/ and the developments thereon was KSHS. 22,808/50 making a total of KSHS.29,138/50. He stated that the owner of land parcel No. Ndivisi/



muchi/1339 was Joram Wafula Mukweyi and that the said parcel of land was subsequently subdivided into several portions which are the subject of this case. He stated that after receiving compensation, the owners need not have sold it again as that is tantamount to unfair enrichment.

#### **PLAINTIFFS' SUBMISSIONS-**

15. The plaintiffs through the Firm of J.w Sichangi & Company Advocates submitted on the following six issues;
  - a. Whether or not the land parcel No. Ndivisi/muchi/1339 was compulsorily acquired by the Government in 1970
  - b. Whether the suit is statute barred
  - c. Whether the Government allocated any portion of the suit land Ndivisi/muchi/1339 to the 1<sup>st</sup> defendant as alleged
  - d. Whether the cancellation of the plaintiffs' titles in 2016 after subdivision was legal or valid.
  - e. Whether the resurvey of both processes is necessary.
  - f. Who should bear the Costs.
16. On the first issue, the plaintiffs submitted that all the witnesses including the Land Registrar who is the immediate custodian of the lands documents did not produce such documents and that the green cards produced with cancellation by hand only demonstrated that the plaintiff subdivided his original title Ndivisi/muchi/1339 into various titles to wit; Ndivisi/muchi/6658, 6659, 6660 and 6661. They submitted that the plaintiffs original title to the suit land was then closed upon subdivision and obviously destroyed on 27.9.2007 and the initial registration was on 5.3.1969.
17. The plaintiff further submitted that the defendants are custodians of governments documents and cannot find refuge in saying documents are not available and the burden to prove their allegations lay on their shoulders. They submitted that for any part of land to be compulsorily acquired by the Government, courts have laid down clear requirements such as Gazette notice, the use for which the land has been acquired, and the acreage so acquired to be specifically stated. They relied in the case of the B.O.M Tambach Teachers Training College V Francis Cheplaiti, Environment And Land Court At Iten, Elc No. 6 Of 2022 (2023) Keelc 20481 (klr
18. As to whether the suit is statute barred, the plaintiffs submitted that that point could have been taken up as a preliminary point but nobody raised the same and the suit proceeded to full hearing and that the defendants may as well have abandoned the same. They submitted that the 2<sup>nd</sup> plaintiff got registered in 1969 and lived and continue to live on his land to date and even sold some portions to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs after subdividing the original title in 2007. They submitted that the interference that led to the suit land and the land Registrar without even a court order cancelled the entries in the register by hand.
19. On whether the purported cancellation of the resulting titles on subdivision has any legal relevance and whether the land was allocated to the 1<sup>st</sup> defendant, the plaintiffs submitted that there was no legal implications in the alleged cancellation. They submitted that there was no court order or authority for such enormous action to be taken. They submitted that the defendants did not prove in the first place compulsory acquisition and that land if at all was compulsorily acquired cannot later be re-allocated without being preceded by a change of user notice in the Kenya gazette
20. On the issue of costs, the plaintiffs submitted that judgment be entered in their favour with costs.



21. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant through the Hon. Attorney General submitted on the following six (6) issues;
- a. Whether the Government of Kenya compulsorily acquired land parcel No. Ndivisi/muchi/1339?
  - b. Whether the 1<sup>st</sup> defendant was allocated part of the acquired land parcel No. Ndivisi/muchi/1339?
  - c. Whether the subdivision of land of land parcel No. Ndivisi/muchi/1339 into land parcels No. Ndivisi/muchi/6658, 6659, 6660 and 6661 by the 1<sup>st</sup> plaintiff was procedural and whether the cancellation of the aforesaid titles by the Land Registrar was within the law?
  - d. Whether the 1<sup>st</sup> Defendant have encroached on the plaintiffs' parcel of land
  - e. Whether the plaintiffs are entitled to the orders sought?
22. On the first issue, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that from the documents produced and the testimonies of DW1 and DW2, Land parcel No. Ndivisi/muchi/1339 being claimed by the 1<sup>st</sup> plaintiff was compulsorily acquired by the Government in the year 1973 and the same is evidenced from the list of payment produced by the 1<sup>st</sup> defendant which indicates the name of the 1<sup>st</sup> plaintiff JORAM WAFULA MUKWEYI (Exhibit no.4 in the 1<sup>st</sup> defendant's list of documents dated 3<sup>rd</sup> October, 2022) which shows the 1<sup>st</sup> plaintiff was paid a sum of Kshs. 8,823/= for land parcel No. Ndivisi/muchi/1339.
23. On whether the 1<sup>st</sup> defendant was allocated part of land parcel No. Ndivisi/muchi/1339, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted in the affirmative and were issued with a letter of allotment dated 26<sup>th</sup> July, 1994 and that the 1<sup>st</sup> Defendant has been utilizing the said land as an educational institutional to date. They further submitted that after being allocated the land, the 1<sup>st</sup> Defendant was also issued with a beacon certificate in the name of the school chairman BONVENTURE WANYAMA and was produced as Exhibit NO.5 in the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' list of documents dated 3/10/2022
24. On whether the subdivision of land parcel No. Ndivisi/muchi/1339N into land parcels No. Ndivisi/muchi/6658, 6659, 6660 and 6661 by the 1<sup>st</sup> plaintiff was procedural and whether the cancellation by the land Registrar was within the law, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the purported subdivision was illegal and unlawful since the 1<sup>st</sup> plaintiff took advantage of the fact that the Government after acquiring the land in 1973 did not restrict the same and the plaintiff knowing very well that the Government had acquired the said land and compensated him went ahead and subdivided the same and transferred them into the names of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs.
25. They submitted that the above argument is supported by the letter dated 24/03/2010 and 29/3/2010 in which the then Land Registrar Bungoma was explaining the circumstances under which the said Land parcel No. Ndivisi/muchi/1339 was illegally subdivided by the 1<sup>st</sup> plaintiff. They further submitted that after a complaint was made by the 1<sup>st</sup> Defendant, the Land Registrar did cancel all the subdivisions arising out of land parcel No. Ndivisi/muchi/1339 as evidence from the land register produced by DW1 –the Land Registrar as contained in the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants list of documents dated 7<sup>th</sup> October, 2022 which shows the said titles had been cancelled.
26. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the said cancellation was lawful and the Land Registrar acted within his powers under the law and even summoned the registered owners as provided for under Section 8(a) and(b) of the Registered Land Act, CAP 300 Laws of Kenya vide his letter dated



5<sup>th</sup> February, 2008 and a follow up letter dated 7<sup>th</sup> May, 2008. They submitted that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs who are the registered of the resultant subdivisions did indeed surrender their title deeds and the same were cancelled but the 1<sup>st</sup> Plaintiff did not surrender his title for cancellation. They further submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were given notice by the Land Registrar before their illegally acquired titles arising out of illegal subdivision by the 1<sup>st</sup> plaintiff of LR No. Ndivisi/muchi/1339 were cancelled.

27. On the 4<sup>th</sup> issue whether the 1<sup>st</sup> Defendant has encroached on the plaintiffs' parcel of land, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants submitted that other than alleging in their pleadings that the 1<sup>st</sup> Defendant encroached on their parcels of land, the plaintiffs did not lead any evidence to prove the aforesaid allegations. They submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were unable to tell how the 1<sup>st</sup> Defendant had encroached on their parcels of land nor did they produce any documentary proof to show that the 1<sup>st</sup> Defendant had encroached on their parcels of land.
28. On the Last issue whether the plaintiffs are entitled to the reliefs sought, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant answered in the negative and argued that they have failed to prove their case on a balance of probabilities and that the titles under which thy claim ownership have already been cancelled. They submitted that the plaintiffs did not seek to amend their pleadings to seek for prayers to have the cancellation of their titles declared a nullity and therefore as it stands, their title deeds remain cancelled.

#### DIVISION - 2 - {^ - Nd- } - Defendant's Submissions-

29. The 2<sup>nd</sup> defendant did not file their submissions within the agreed timelines.

#### DIVISION - Legal analysis and determination -

30. I have considered the pleadings by the parties, their testimonies and that of their witnesses, the documents produced in evidence, their rival submissions and the applicable law. Having considered the materials referred to hereinabove, I find the following issues distil for determination;
  1. Whether the suit property LR No. Ndivisi/muchi/1339 was acquired compulsorily by the Government of Kenya?
  2. Whether St. Anthony School For The Deaf, the 1<sup>st</sup> Defendant herein was allocated the acquired land parcel No. Ndivisi/muchi/1339 and LR. NO Ndivisi/muchi/1242?
  3. Whether in the alternative the 1<sup>st</sup> Defendant herein (St. Anthony School For The Deaf) acquired the suit land parcels No. Ndivisi/muchi/1339 and Ndivisi/muchi/1242 by operation of law (adverse possession)?
  4. Whether the subdivision of land parcel No. Ndivisi/muchi/1339 into land parcels No. Ndivisi/muchi/6658, 6659, 6660 and 6661 by the 1<sup>st</sup> Plaintiff was procedural and whether the cancellation of the aforesaid titles by the Land Registrar was lawful and within the law?
  5. Whether the 1<sup>st</sup> Defendant has encroached on the plaintiffs' parcels of land?
  6. Whether the Plaintiffs are entitled to the reliefs sought?
  7. Who will bear the costs of this suit?

#### **Whether the suit property lr no. ndivisi/muchi/1339 was acquired compulsorily by the government of Kenya?**

31. The 2<sup>nd</sup> defendant through its Senior Land Surveyor Mr. Cleophas Wanyonyi Waswa testified on oath that Land parcels No. Ndivisi/muchi/1339 and Land parcel No. Ndivisi/muchi/1242 were



acquired compulsorily by the Government of Kenya in 1970 and the two titles were consolidated and allocated to St. Anthony School For The Deaf through an allotment number 933373/iv of 26<sup>th</sup> July 1994. The witness also stated that after the Government of Kenya acquired the two parcels of land compulsorily, the owners were promptly compensated and produced into evidence an inventory dated 22<sup>nd</sup> November, 1973. The said inventory contains names, plots and the amount paid as compensation after the Government of Kenya compulsory acquired the subject properties. The witness stated that the 2<sup>nd</sup> plaintiff Joram W. Mukweyi owner of land parcel No. Ndivisi/muchi/1339 was paid KSHS 4,320/= being the amount for the land and KSHS. 5,503/50 for development thereon making a total of KSHS. 8,823/50.

32. The witness also stated that Land parcel No. Ndivisi/muchi/1242 Measuring approximately 12.68 Acres and owned by one Mukweyi Sikolia was paid compensation of KSHS.6,340 for the land and Kshs. 22, 138/50 for the developments thereon making a total of KSHS. 29,138/50.
33. The 1<sup>st</sup> Defendant called Bonventure Wanyama adopted his witness statement dated 17/10/2022 and stated he is the current chairperson of the Board of Management St. Anthony School For The Deaf. He further stated that the school occupies Land parcel No. Ndivisi/muchi/1339 after it was acquired by the Government of Kenya compulsorily and allocated to them in 1973. An allotment letter dated 26/07/1994 was also produced into evidence. Those averments given on oath were not controverted. I find the testimony by the defence witnesses reliable and more probable than that of the plaintiffs. The inventory produced of the land owners and the compensation paid after they were acquired has not been controverted or any suggestion made that the Government of Kenya did not pay them. Of more than 100 persons whose land was acquired compulsorily by the Government of Kenya, only the 2<sup>nd</sup> plaintiff has come back more than 50 years to reclaim the same. The 2<sup>nd</sup> plaintiff had been compensated over the land after the Government of Kenya acquired the same compulsorily and paid the owner in 1973.

**Whether st. anthony school for the deaf, the 1<sup>st</sup> defendant herein was allocated by the government of kenya land parcel no. ndivisi/muchi/1339 and land parcel no. ndivisi/muchi/1242?**

34. It was the 1<sup>st</sup> Defendant's case that they were allocated land parcel No. Ndivisi/muchi/1339 Measuring Approximately 8.64 Acres and Land parcel No. Ndivisi/muchi/1242 Measuring 12.68 Acres making a total of Approximately 9.92 Ha (21.68 Acres) as reflected in a letter Allotment dated 26/7/1994 and produced by the defence as an Exhibit. The two parcel of land had been acquired by the Government of Kenya by compulsory acquisition after compensating the owners on 22/11/1973. After allocating the above mentioned parcels of land, the 1<sup>st</sup> Defendant immediately took possession and has been in quiet possession and occupation of the same as an institution of learning for person with special needs until they saw some people hoovering on the suit land purporting to subdivide the suit land. They complained at the lands office Bungoma who summoned Joram Wafula Mukweyi, the 2<sup>nd</sup> Plaintiff herein together with the persons he had transferred the resultant subdivisions and were ordered to surrender their titles. They stated that all surrendered except Joram Wafula Mukweyi (2<sup>nd</sup> plaintiff) who promised to surrender but failed. Again I find the evidence by the defendants reliable and more probable than not. I therefore find that ST. ANTHONY SCHOOL FOR THE DEAF was indeed allocated Land parcels No. Ndivisi/muchi/1339 and Ndivisi/muchi/1242 and have been in quiet, open, continuous and uninterrupted possession and occupation of the same from 1994 (more than 30year) to date.



**Whether in the alternative, the 1<sup>st</sup> defendant herein (st. anthony school for the deaf) acquired the suit properties land parcels no. ndivisi/muchi/1339 and ndivisi/muchi/1242 by operation of law (adverse possession)?**

35. The 1<sup>st</sup> defendant stated in their evidence that they were allocated the suit properties parcels No. Ndivisi/muchi/1339 and Ndivisi/muchi/1242 Measuring Approximately 9.92 Ha. (Approximately 24.5 Acres) where they have developed and have been in quiet possession and uninterrupted occupation as an institution of learning for persons with special needs (SCHOOL FOR THE DEAF). These averments under oath have not been controverted. I therefore find that 1<sup>st</sup> defendant has been in possession and occupation of the suit properties being Land parcels No. Ndivisi/muchi/1339 and Ndivisi/muchi/1242 openly and quietly without interruption from 26<sup>th</sup> July, 1994 which is more than 30 years. The elements of adverse were summarized in the case of Kasuve V Mwaani Investments Ltd & 4 Others (2004 1KLR 184 where it was held;

“and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his volition, Wanja v Sakwa NO. 2 (1984) KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”

36. Again in the case of Chevron (K) Limited v Harrison Charo Wa Shutu (2016) KLR, it was held, inter alia that;

“At the expiration of twelve years period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High court for an order that he be registered as the proprietor of the land. Therefore, the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See Littledale v Liverpool college (1900)1Ch. 19,21.”

37. I agree with the findings of the court in the above decision which are similar to the facts of this case. The 1<sup>st</sup> Defendant has stated on oath that they have been in possession and occupation and have developed the properties without permission from the 2<sup>nd</sup> plaintiff and thereby dispossessed or discontinued his possession of the suit land. The 1<sup>st</sup> Defendant also stated that they have been utilizing the suit property as an institution of learning for persons with special needs (school For The Deaf). These averments which are uncontroverted in my view are acts which are inconsistent with the owner’s enjoyment of the soil for which he intended to use it. In my view, the 1<sup>st</sup> Defendant has acquired title to the suit properties by operation of the law through adverse possession.

38. It is also important to note that the 2<sup>nd</sup> plaintiff was registered as proprietor of the original Title No. Ndivisi/muchi/1339 on 5/3/1969. The 1<sup>st</sup> Defendant has averred that they were allocated the suit land which comprises the plaintiff’s land and LR. NO Ndivisi/muchi/1242 vide an allotment letter dated 26<sup>th</sup> July, 1994. The 1<sup>st</sup> Defendant also stated that since they were allocated the suit land, they have been in open, notorious, quiet, peaceful and uninterrupted possession and occupation of the property for more that 12 years. It is trite that Section 7 of the Limitations of Actions Act places a bar on actions



to recover land after 12 years from the date on which the right accrued. From the evidence on record, the 1<sup>st</sup> Defendant took possession and occupation of the suit land on 26/07/1994 which in my view is when time started to run. In the year 2007 when the plaintiff purported to subdivide the land into land parcels No. Ndivisi/muchi/6658, 6659, 6660 and 6661, the 1<sup>st</sup> defendant had been in possession and occupation of the land openly and peacefully for 30 years which was beyond six years and also beyond twelve years period within which an action may be brought for the recovery of land. In the case of *Salim Mohamed Salim Tweshe v Khalid Salim Naaman & 5 Others* (2020) KLR, Justice C.K Yano held as follows;

“ The cause of action in this case is indicated to have arisen on 14<sup>th</sup> May, 1983. The suit was filed on 2<sup>nd</sup> October, 2018 which was far beyond the six years period within an action founded on contract may be brought and also beyond the twelve years within which an action may be brought for the recovery of land. From the above provisions of the law, it is evident that the plaintiff’s suit herein is statute barred. In this case, the plaintiff argues that the time the cause of action accrued is contested and therefore the objection before court is not a pure point of law. However, in my view the matters raised are purely on points and in particular the issue that the suit is caught up by limitation of time. From the pleadings and especially the plaint, it is clear that the plaintiff’s claim is grounded on a contract which arose in the year 1983. The court does not require any evidence to arrive at a finding that the suit is caught up by limitation of time. I am alive to the fact that at this stage, the court cannot investigate on some facts as to when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection ceases to be a preliminary objection. I am only beholden to look at the pleadings as I have done in the instant case.”

39. I agree with the above persuasive decision by my learned colleague. The upshot of my finding on this issue is that the plaintiff’s claim is caught up by *limitation of Actions Act*.

Whether The Subdivision Of Land Parcel No. Ndivisi/muchi/1339 Into Land Parcels No. Ndivisi/muchi/6658, 6659, 6660 And 6661 By The 1<sup>st</sup> Plaintiff Was Procedural And Whether The Cancellation By The Land Registrar Was Lawful And Within The Law?

40. I have found elsewhere in this judgment that the 1<sup>st</sup> defendant has acquired title to the suit land by operation of the law having been in quiet, open and continuous possession and uninterrupted occupation of the suit land for more than 12 years from 1994. For purposes of the operation of the doctrine of adverse possession, Time started to run from 26<sup>th</sup> July, 1994 when the 1<sup>st</sup> Defendant took possession and occupation of the suit land. Since then, the owner was dispossessed or discontinued his possession of the land which has given rise to the 1<sup>st</sup> Defendant as an adverse possessor doing acts that are inconsistent with the owner’s enjoyment of the soil for which he intended to use it. The 12 years period lapsed on 25/07/2006. When the 2<sup>nd</sup> plaintiff purported to subdivide the suit land parcel No. Ndivisi/muchi/1339 in the year 2007 to give rise to land parcels No. Ndivisi/muchi/6658, 6659, 6660 and 6661, the 2<sup>nd</sup> Plaintiff’s title had been extinguished. It is therefore my view that the subdivision of Land parcel No. Ndivisi/muchi/1339 into Land Parcels No. Ndivisi/muchi/6658, 6659, 6660 and 6661 by the 1<sup>st</sup> Plaintiff was not only unprocedural but unlawful and liable to be cancelled and the register rectified accordingly.

#### **Whether The 1<sup>st</sup> Defendant Has Encroached On The Plaintiffs’ Parcels Of Land?**

41. In reply to the above question, the Defendants answered in the negative. Having found that the 1<sup>st</sup> plaintiff’s title to the suit land parcel No. Ndivisi/muchi/1339 had been extinguished by operation



of the law and that the subsequent subdivision of the said land parcel No. Ndivisi/muchi/1339 into land parcels No. Ndivisi/muchi/6658, 6659, 6660 and 6661 was unprocedural and unlawful, there cannot be any land belonging to the 1<sup>st</sup> plaintiff capable of being encroached. From my analysis of the evidence and the testimony of the witnesses, I find that the 1<sup>st</sup> Defendant has not encroached on the plaintiffs' land.

**Whether the plaintiffs are entitled to the reliefs sought?**

42. From my analysis and finding on the issues above, I have found and held that the plaintiffs are not entitled to the orders sought since they have failed to prove their case on a balance of probabilities and the titles under which they claim ownership have either been cancelled or extinguished by operation of the law. In view of the foregoing, I find that the plaintiffs' claim is devoid of merit and out for dismissal.

**Who Will Bear The Costs Of This Suit - ?**

43. Costs ordinarily follow the event unless for exceptional reasons which the trial court must disclose. In this suit, this court has found that the plaintiffs have failed to prove their claim on a balance of probabilities. Consequently, the plaintiffs must bear the consequence of their failure to prove their case as required in law.

44. For the foregoing reasons, I this suit is hereby dismissed with costs to the defendants.

45. Orders accordingly.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024**

.....  
**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

Plaintiff/Advocate-absent.

Mr Tarus for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants.

Bett C/A.

