



Shing'ore & another v Mutambi & 2 others (Environment & Land Case 709 of 2012 & 260 of 2013 (Consolidated)) [2023] KEELC 167 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 167 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 709 OF 2012 & 260 OF 2013 (CONSOLIDATED)
SM KIBUNJA, J
JANUARY 25, 2023

BETWEEN

ISAAC CYPRIANO SHING'ORE PLAINTIFF

AND

NAHASHON OSIAKO MUTAMBI DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 260 OF 2013

BETWEEN

NAHASHON OSIAKO MUTAMBI PLAINTIFF

AND

ISAAC CYPRIANO SHING'ORE 1ST DEFENDANT

CLEMENT OOKO ODHIAMBO 2ND DEFENDANT

JUDGMENT

1. This suit was commenced by way of a plaint dated 8th April, 2011 as HCCC No. 70 of 2011 which was later transferred to the Environment and Land Court as ELC No. 709 of 2012. The plaintiff seeks for the following prayers against the defendant-
 - a. An order directing the defendant to remove the structure on Soy/Soy/Block 10[Navillus]1869, the suit land;
 - b. A permanent injunction to restrain the defendant, his servants and or agents from trespassing, constructing or in any other manner from dealing and or interfering with the said land;



- c. Costs and interests; and
- d. Any other or further relief this Honourable Court may deem fit to grant in the circumstances.

The plaintiff averred that he is the registered owner of all that parcel of land known as Soy/Soy/Block 10 (Navillus)/1869, the suit land, having bought it in 1998 from Eshieywe Self Help Group. He further averred that Nashon Osiako, the defendant, has trespassed on the said piece of land and has put up a structure on it. He denied ever selling, leasing, or otherwise allowing the defendant into possession of the suit parcel of land.

- 2. The claim is opposed by the defendant through his filed statement of defence dated 3rd June, 2011. He denied that the plaintiff is the owner of the suit parcel of land and averred that he has been living on and occupying the suit parcel of land for more than 12 years, and has erected a semi-permanent house where he has lived openly, freely and uninterrupted. He further averred that the plaintiff was secretly, illegally and fraudulently registered himself as the owner. That the plaintiff's title stood extinguished on 2nd January, 2008 and he has been holding the alleged title in trust for the defendant. He stated that he is a member of Ishiywe Self Help Group where he had paid for shares which culminated into his allocation of the suit parcel of land. He contended that the plaintiff's allegations are unfounded and his alleged acquisition of title is fraudulent. He denied being a trespasser on the plot, and averred that the plaintiff's suit is statute barred under section 7 of the Limitation of Actions Act, and prayed for the plaintiff's suit to be dismissed with costs.
- 3. The record shows that the defendant filed an application dated 20th November, 2012 seeking to strike out the plaintiff's suit for being time barred. However, on 10th June, 2013 when the said application came up for hearing, the Court noted that the suit had raised very substantive issues regarding possession of the suit parcel of land which can only be determined after a full hearing. The defendant then filed ELC No. 260 of 2013(OS) against Isaac Cypriano Shingore [plaintiff], and Clement Osiako Odhiambo, the 1st and 2nd respondents respectively, dated the 10th January 2013, on the 18th April, 2013, that was amended on 2nd November, 2018, and further amended on 13th December, 2018, through which he sought for the following prayers against the plaintiff-
 - a. That the applicant [defendant] has obtained title over land parcel No. Soy/Soy/Block 10(NAVILLUS)/1869 by way of adverse possession for having occupied the said parcel of land since 26th June 1998;
 - b. That the applicant [defendant] be registered as the sole, absolute and indefeasible proprietor of land parcel No. Soy/Soy/Block 10(NAVILLUS)/1869;
 - c. The District Land Registrar, Uasin Gishu, do enter the name of the defendant herein as the proprietor of the suit parcel of land in lieu of the 1st respondent's [plaintiff's] name; and
 - d. The plaintiff to pay the defendant the costs of the suit and interest thereon at Court rates.

The defendant deposed in the supporting affidavit that he is a member of Ishieywe Self Help Group since the year 1996 and he has paid the relevant fees and charges required of every member. He and other members balloted for plots at Ishieywe area and he was allocated plot No. 8, 9 and 10, each measuring 0.12 acres, and after paying the full purchase price he was issued with a share certificate No. 024 dated 24th July, 1999. That he moved onto his plot No. 8, 9 and 10, each measuring 0.12 acres on the 26th June 1998 where he has lived and resided to date. He contended that the suit parcel of land was part of block title No. Soy/Soy/Block 10(NAVILLUS)/62 where all other registered shareholders were allocated their parcels of land. In addition, he has extensively developed the suit parcel of land by planting trees, banana, fencing and built his home on it. That his children have grown up and



been nurtured there and it is the only place they know as home. That he has also lived there openly, continuously, freely and uninterrupted for the last 15 years. The defendant deposed that the Lands Control Board did not sanction the sale of the suit property to the plaintiff, herein thus the said sale is void ab initio, and in any case the plaintiff's title over the suit parcel of land has been extinguished by virtue of section 7 of the *Limitation of Actions Act*.

4. The defendant's claim is opposed by the plaintiff [1st respondent] through his filed replying affidavit sworn on the 11th January, 2019. The plaintiff deposed that he was allocated plots No. A8, A9 and A10, after he paid Kshs. 36,000/=. That the three plots were registered as Soy/Soy/Block 10 [Navillus]1869, after excision from Soy/Soy Block 10 [Navillus]/62. Thereafter, he obtained Land Control Board Consent on 17th May, 2007, paid stamp duty on 3rd August, 2007 and a title deed for the suit parcel of was subsequently registered and issued in his name on 10th August, 2007. That the defendant's claim is frivolous and an abuse of the court process because at the time the defendant claimed to have paid for his registration on 27th December, 1996 to Ishiywe Self Help Group in respect of land title No. Soy/Soy/Block 10 (NAVILLUS)/62, the land did not belong to the group as the title still belonged to Lonho Agribusiness (East Africa) Limited. That Lonrho sold the said land to the group later in 1997. The plaintiff denied that the defendant has been in occupation of the suit parcel of land since 1996, insisting that he only trespassed on it in 2010 after he learnt that the title had been issued to him. He deposed that his title over the suit parcel of land is indefeasible.
5. On the 7th November, 2013 the Court directed that ELC No. 709 of 2012, and ELC No. 260 of 2013(OS) be consolidated for hearing and determination, with the former being the lead file since the issues in the two suits were related. The Court further directed that the OS will be incorporated in the defence and also be considered a counter-claim while the replying affidavit to the OS will be treated as the reply to and defence to counter-claim.
6. The plaintiff testified as PW1, he called Cecilia Martha Njoki the then secretary of Esheywe Self Help Group who testified as PW2, CPL Silvanus Mandikwa of DCI Eldoret who testified as PW3, and Clement Ooko Odhiambo the then chairman of Esheywe Self Help Group, and the 2nd respondent in E LC No. 260 of 2013(OS), who testified as PW4. The plaintiff testified that the suit parcel of land belonged to him and he produced a copy of the title deed for all that parcel of land known as Soy/Soy/Block 10(NAVILLUS)/1869 as exhibit 1. He told the Court how he paid for stamp duty and how he obtained consent from the Land Control Board, before he was registered as owner. He produced a customer transaction voucher as exhibit 2, a stamp duty declaration form as exhibit 3, and a letter of consent dated 17th May, 2007 as exhibit 4. He testified that prior to purchasing the suit property, he carried out a search, and he produced a copy of a certificate of search and official receipt as exhibit 5(a) & (b) respectively. The plaintiff also produced the Self-Help Group membership for Eshieywe as exhibit 6, a bundle of eight receipts for payments made as exhibit 7, and a bundle of three ballot papers for the three plots that he got, A8 to A10, which he testified became the suit parcel of land as exhibit 8. He produced a further copy of official search dated 14th May, 2018 and a receipt as exhibit 9(a) & (b) respectively, a copy of green card issued on 23rd October, 2018 and its receipt as exhibit 10(a) & (b) respectively. It was the plaintiff's testimony that a member got to know the plot they had been given only after balloting. That the defendant had not fully paid for the membership of the self-help group and could not have participated in the balloting. He further testified that the DCI investigated the defendant's documents, which he proceeded to have marked MF1 (11) and the forensic document report that indicted that they were forgeries. The plaintiff testified that the Self Help Group acquired the land in question on 14th August, 1997, and he produced a certified copy of an agreement for sale as exhibit 12. He added therefore that, the defendant's claim that he moved into the suit parcel of land in June, 1996 has no basis as the land did not belong to the group then. He then produced a certified copy



of allocation list for parcel Soy/Soy Block 10 [Navillus]/62 as exhibit 13 and testified that it shows how the plots were allocated after balloting, and pointed out that his name was written next to plots No. A8 to A10, which consist of the suit parcel of land. The plaintiff asserted that the defendant's parcel of land was from block 64 and he was allocated plots No. 112 and 113 and he produced a certified copy of allocation list for parcel 64 as exhibit 14. He contended that he paid a total of Kshs. 36,000/= between May and June 1998 for his plots whereas the defendant paid only Kshs. 6,000/=. The other exhibit produced by the plaintiff was in form of a letter served upon the defendant which was produced as exhibit 15. In cross-examination, he testified that the defendant entered into the suit parcel of land in the year 2007, the same year he was issued with a title deed to the suit parcel of land. He stated that he does not live in the suit land as the defendant had forcefully taken it. He added that when he got the suit parcel of land after balloting, it had trees.

7. The testimony of PW2 was that she was employed as a secretary by Eshieywe Self Help group as can be seen from her letter of appointment dated 8th January, 1997 which she produced as exhibit 16. She told the Court that both the plaintiff and the defendant were members of the self-help group since both of them had paid a membership fee of Kshs. 100/= which entitled them to pay for shares. She confirmed the plaintiff's testimony and testified that allocation of plots to the members of the self-help group was done from June to August, 1998 and by that time the plaintiff had paid Kshs. 36,000/=:, while the defendant had paid Kshs. 6,000/=:. PW2 told the Court that the defendant paid for the share certificate in the year 2000, as it could not have been issued before payment. In addition, she stated that they were not indicating the plot numbers on the receipts for payments, which fact was later confirmed by PW4. She further testified that they never issued a single ballot paper for three plots, as each ballot paper was for one plot. She asserted that one of their shareholders by the name of Josephine was allocated plot No. 110 in parcel 64. In cross examination she stated that the defendant entered into the suit land in the year 2006 and not 1996 and he is occupying it to date.
8. PW3 testified that they received a complaint letter from the plaintiff's advocate dated 15th August, 2016 on forgery relating to Clement Odhiambo, chairman of the Self Help group. He and a chief inspector who has since retired commenced investigations, but the defendant's advocate declined to avail the original documents despite their request for the same. They forwarded the availed documents for a forensic audit examination and the examiner forwarded a report dated 5th September, 2019 which showed most of the documents were forgeries. The said report was produced as exhibit 11. In cross examination he contended that only the examiner who prepared the report can tell the details of the signature and their differences. That only one receipt among the other documents had been issued in the name of the defendant. He averred that the report shows that the signature in all the documents availed for examination, which included documents for the chairman and other deceased officials, was scanned from a different document and pasted on them.
9. It was PW4's testimony that he was the chairman of the self-help group. He went on to confirm the plaintiff's testimony, and that the DCI investigated complaints of group records being forged and a report was made. That the documents relied on by the defendant were found to have been forged. In cross-examination, he testified that the DCI found only one document from among those belonging to the defendant to be a forgery. PW4 stated that the management of the group had split into rival camps, but pointed out that the members did not belong to any camp. PW4 was referred to a share certificate receipt dated 24th July, 1999 for plot A9 marked as MFI 4 and he stated that the signatory is not any one of the officials. PW4 asserted that each plot measured approximately one eighth of an acre costing Kshs. 12,000/=:, thus plot No. A8-10 would cost a total of Kshs. 36,000/=:. He further stated that after calculation of what the defendant had paid as per the receipts he was referred to, the defendant paid a total of Kshs. 41,000. It was PW4's testimony that the share certificate issued to the defendant dated 24th July, 1999 for plot No. A9 was done in error as by that date the defendant had only



paid Kshs. 28,000/=. That all the documents given to the defendant in respect to Plot No. A8-10 were issued in error as the said plots belonged to the plaintiff. In re-examination he stated that the receipt dated 3rd January, 1997 and the two dated 29th October, 1999 but bearing different serial numbers in the defendants list of documents are photocopies. He stated that the suit parcel of land was allocated in 1998, while payment by the defendant was done between 1999 and 2020. That the defendant got to know the error in the documents issued to him through the committee findings that was appointed by the District Commissioner, and through the plaintiff's advocate. He further stated that the ballot paper signed by himself was the only original proof of allocation.

10. The defendant testified as DW1, and called Justus Maina the then assistant secretary of the self-help group as DW2, and John Lumadede, the caretaker of Ishieywe group, as DW3. He told the Court that he is the owner of the suit parcel of land. He produced the documents annexed to his list of documents filed in ELC No. 260 of 2013 as exhibit No. 1 to 9 and the documents annexed to his list of documents filed in ELC No. 709 of 2012 as exhibit 10 to 37. He averred that he has been in the suit land since the year 1990 and relied on exhibit 4, which is a photograph showing his old house which he built in the year 1998, and the trees thereon that he had planted. DW1 denied that any of the receipts he is relying on were forged. It was his testimony that he lives on the suit parcel of land with his wife, children and grandchildren. That the share certificate dated 24th July, 1999 issued to him was freely signed by Odhiambo [PW4] and the receipts he is relying on were signed by the group officials who were elected into office at different times. In cross examination he stated that one would only be given a share certificate after fully paying for the land. That in 2020 he had fully paid for Plot No. A8 -10 and was then issued with a share certificate, but that the share certificate that he has in Court dated 24th July, 1999 was issued after he paid for plot No. A9. That since a member could only take possession of the land after paying the full price, he settled in A9 in 1998 and in A8 and 10 in 2000. It was DW1's testimony that he paid for plot No. A8 in 1999, A9 in 1998 and A10 in 2000. He confirmed that after payment of the full purchase price, members were balloting. That he balloted for A8 in 1999 and A9 in 1998. That in respect of A10, the committee gave him the plot without him having to ballot. DW1 testified that as at 1998, he had not paid for the three plots that form the suit parcel of land fully. DW1 testified that he was issued a receipt dated 29th October, 1999 for plot A7, but was later given a letter indicating that the said plot has been given to somebody else. He asserted that indeed plot No. 112 in Block 64 was given to him, but he has since sold it to the church. In re-examination, he stated that he paid for plot No. A8 in 1998 but got the certificate in 1999. That he paid for plot Nos. A9 on 29th October, 1999 and A10 on 18th October, 1999. In addition, he stated that some suit papers initially indicated that he took possession in 1996 which was an error that was later amended to read 1998.
11. DW2 testified that the defendant had balloted for plot No. A9. That later, the people who owned plot No. A8 and A10 surrendered them to the office after they flooded and they were given other alternative plots elsewhere. Thereafter, the management asked the defendant to add shares so that he can get the said two plots and he did so. He averred that the defendant has fully paid for the three plots. That the receipt dated 21st February, 2010 was signed by Simiyu King'ori, who was one of the groups officials. In cross-examination, he testified that a member of the group could only take possession of the plot upon paying for the shares and the allocation being done. That a member could only ballot for a plot after finishing paying for it, and thereafter be issued with a share certificate that will capture the allocated plot. That the defendant's share certificate for plot No. A9 is dated 24th July, 1999 even though he has receipts for 3rd July, 2000, 5th June, 2000, and 29th October, 1999 in respect of payments for share certificate. DW2 stated that the shareholders were also paying for survey expenses thus the receipt dated 13th February, 1999 is for survey expenses. He contended that the defendant made payments even after the receipt dated 21st February, 2020, and that the receipt produced as exhibit 21 is for plot No. A7.



- That the defendant wanted to purchase the said plot but he failed to fully pay for it and his money was returned to him.
12. DW3 testified that the defendant got plot No. A9 and settled on it in 1998, and plot No. A8 and 10, which were surrendered by George and Simiyu respectively following their flooding during the EL-nino rains of 1998. He asserted that exhibit 4 shows the defendant, his wife, grandson, and the defendant's house on plot No. A10. That the said grandson died in 2003 and was buried on the said parcel of land. In cross-examination, he indicated that he has differences with the plaintiff, and had a Court case against the him and his brother who were charged with assaulting him. That he has not testified in the criminal case and he is not aware that those charged were released over the said charge. He also confirmed that there is a pending case, being Eldoret CMCC No. 969 of 2018 where the plaintiff and his brother are the plaintiffs, while he is one of the defendants. He averred that the balloting of plot Nos. A8, A9 and A10 were done on 16th March, 1998 and the defendant only balloted for plot No. A9. Thereafter, members took possession of the plots on 26th June, 1998. That one would get a share certificate after completing the payment for the share, balloted and taken possession of the plot. He added that the survey was done just before balloting, occupation and paying of survey fees. That the plaintiff had been allocated plots No. 11 and 12 but he never took possession and were occupied by other people. He told the Court that all the photos relied on by the defendant show his house at plot No. A10. In re-examination DW3 stated that the share certificate dated 16th May, 1998 which was issued to the defendant was only for plot No. A9. He contended that the other cases he has with the plaintiff have not made him testify against him.
 13. The learned counsel for the plaintiff filed their written submissions dated the 1st July, 2022 on the 24th October, 2022 while that for the defendant filed theirs dated the 7th November, 2022 on the 8th November, 2022.
 14. Learned Counsel for the plaintiff relied on the case of Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR and submitted that the plaintiff has proved his case on a balance of probability bearing in mind that the burden of proof in civil cases is on a balance of probability. He further submitted that the plaintiff has produced documents in support of his case and has called witnesses who corroborated his evidence by giving consistent and believable testimonies unlike the defendant who offered a disjointed defence. He invoked section 24(a) & 26(1) of the *Land Registration Act* and submitted that the defendant has not brought any evidence to show that the plaintiff's title deed was acquired fraudulently. That the plaintiff has proved that he paid for the said three plots and he followed the due process to get the title deed. Counsel contended that the defendant confirmed that he did not ballot for the three plots, and he did not prove that he paid for them. That some of documents defendants had relied on were found to be forgeries by the DCI, which findings he has not challenged. He relied on the case of Kinyanjui Kamau v George Kamau [2015] eKLR where the Court of Appeal held that any allegation of fraud must be specifically pleaded and strictly proved in cases where fraud is alleged, as it is not enough to infer from the facts. Counsel also relied on the Court of Appeal decision in Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR where it was held that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner and there is no guarantee of the title if it is acquired by fraud, misrepresentation or where it has been acquired illegally, unprocedurally or through a corrupt scheme. Learned Counsel for the plaintiff referred to the provisions of section 7 and 13 of the *Limitation of Actions Act*, and submitted that the plaintiff obtained his title deed in the year 2007 and the claim for adverse possession was filed in the year 2013. He also relied on Court of Appeal decision in Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR where it was held that a person seeking to acquire title to land by adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land



in question for an uninterrupted period of 12 years. He submitted that the defendant trespassed into the suit parcel of land in the year 2010, and immediately thereafter the plaintiff issued a demand letter and filed a suit in the year 2011, and therefore, the defendant has not discharged the burden of proof in a claim for adverse possession. Counsel urged this Court to allow the plaintiff's suit with costs and dismiss the Defendant's OS with costs.

15. The learned Counsel for the defendant identified four issues for determination as follows;
- a. Whether Nahashon Osiako Mutambi, has acquired land parcel No. Soy/Soy Block 10(Navillus)/1869 by way of adverse possession;
 - b. Whether the plaintiff balloted and was allocated land parcels No. Soy/Soy Block 10 (Navillus)/1869;
 - c. Whether the plaintiff is entitled to the reliefs sought; and
 - d. Who is to bear the costs of the suit.

Counsel submitted that the defendant took possession of the suit land in the year 1998 after it was allocated to him and has been in peaceful, uninterrupted possession of the said plot to date, which is equivalent to 24 years, and thus a period of more than 12 years. He further submitted that the plaintiff fraudulently registered the said land in his name. He invoked the provisions of section 38(1) of the Limitations of Actions Act Cap 22, and stated that the defendant gained the right to be the registered proprietor of the suit parcel of land after the lapse of 12 years. That therefore, the plaintiff is holding the title in trust for the defendant. To this end, Counsel relied on the case of *Kynoch Limited v Rowlands* [1912] 1CH 527 534, *Lindsey MR in Littledale v Wambugu v Kamau Njuguna* [1983] eKLR where the Court stated that-

“in order to acquire by the statute of limitation title to land which has a known owner, the owner must have lost his rights to either by being disposed of it or by having discontinued his possession of the dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intends to use it.”

Learned Counsel cited the case of *Hosea v Njiru* [1974] EA 526 eKLR and contended that the defendant, being a registered member of *Ishieywe* self-help group, and having paid all the relevant fees and charges required of each member, and thereafter having been allocated the suit property and issued with a share certificate after completing all the payments, the time for adverse possession started running upon completion of the relevant payments and the defendant's occupation, which has never been terminated. The counsel submitted that the defendant has not been disposed from the suit parcel of land, while the plaintiff has been disposed since 1998, and a period of over 24 years lapsed. That the defendant's occupation has been continuous and has never been suspended despite the fact that the plaintiff had knowledge of the said occupation. The counsel referred to the case of *Kynoch Limited v Rowlands* (supra), and the Court of Appeal decision in *Mtana Lewa v Kahindi Ngata Mwangandi* [2005] eKLR where the ingredients of adverse possession were discussed as a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of over 12 years. On whether the plaintiff is entitled to the reliefs sought, Counsel submitted that the plaintiff's suit is statute barred since the defendant has been in occupation for an uninterrupted period of over 24 years. He cited the case of *Kithinji Kivagu v Tabitha Mugo* [2018] eKLR and submitted that at the time the plaintiff became a registered owner of the suit property in 2007, the defendant was in the process of acquiring land by way of prescription. On whether the plaintiff balloted for the suit land, Counsel submitted that the plaintiff has not produced any evidence in support of this allegation. He further submitted that the defendant



testified that he was allocated the suit parcel of land after balloting for the same and produced receipts and a ballot paper which was issued to him upon payment. The counsel for the defendant relied on the provisions of section 107(1) of the *Evidence Act* and stated that the plaintiff has failed to prove that he balloted for the suit parcel of land, and is therefore not entitled to the suit property. He concluded by praying that the plaintiff's suit should be dismissed and the Defendant's OS be allowed with costs.

16. The following are the issues for the court's determinations;
 - a. Whether the land parcel Soy/Soy Block 10[Navillus]/1869, the suit land, was allocated to the plaintiff or the defendant.
 - b. When the defendant took possession of the said land, and whether his occupation was adverse, and if so, from when.
 - c. Whether the plaintiff registration as proprietor of the suit land was lawfully and procedurally acquired.
 - d. Who pays the cost of the main suit and counterclaim.

17. The court has carefully considered the pleadings filed in the two consolidated suits, evidence tendered by both sides, submissions by both counsel, the superior courts decisions cited thereon, and come to the following determinations;
 - a. It is the plaintiff's case that he acquired good title over the suit parcel of land having paid the full purchase price of Kshs. 36,000/= to Ishieywe self-help group, balloted for plot Nos. A8, A9, and A10. That he thereafter complied with the due process to get the plots registered as Soy/Soy Block 10[Navillus]/1869 and title deed to the suit property eventually issued to him on the 10th August, 2007. On the other hand, the defendant has also pleaded that he acquired the suit parcel of land after having complied with the rules and regulations set down by the same self-help group so as to enable a member to acquire and/or own a parcel of land. During the hearing the plaintiff produced documentary evidence that details the steps he undertook in acquiring the suit parcel of land. The process begun with the plaintiff paying for membership with Ishieywe self-help group in 1998 and purchasing three (3) shares, namely plot No. A8, A9, and A10, at kshs. 12,000/- totalling kshs. 36,000/-. That the plots now form the new title No. Soy/Soy Block 10 (Navillus) 1869. It was the plaintiff's testimony that he was allocated the suit parcel of land legally after a transparent balloting had been done. That he took possession of the suit parcel of land and started utilizing it. It was the plaintiff's evidence that he obtained the title deed over the suit parcel of land having followed the laid down procedure. That he obtained the land Control Board Consent on 17th May, 2007, then paid for stamp duty on 3rd August, 2007 and was subsequently issued with a title deed on 10th August, 2007. The plaintiff further testified that sometime in the year 2006, the defendant trespassed onto the suit parcel of land without any colour of right and forcefully erected a semi-permanent house on it. That the defendant refused to vacate despite being informed by the plaintiff that the suit parcel of land belongs to him and being served with a demand/eviction notice by the plaintiff's advocates on record. The plaintiff contended that he does not use the suit parcel of land as the defendant forcefully took it. The defendant also claimed ownership of the suit parcel of land. It was the defendant's evidence that he is also a member of Ishieywe self-help group where he paid for shares and balloted for the suit parcel of land, which he has been in possession of from the year 1998 to date. The defendant contended that he has since built a semi-permanent house on part of the suit parcel of land where he lives with his wife, children and grandchildren, and he cultivates the remainder of it.



- b. It is trite law that a Certificate of title is prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner as provided for under section 26(1) of the *Land Registration Act* reproduced hereunder-
1. 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...

It is not disputed that the plaintiff is currently the registered proprietor of the suit land, and has the title deed that was issued on 10th August, 2007. However, the defendant contends that the plaintiff obtained the said title deed illegally and/or fraudulently. Upon perusal of the evidence that was tendered before me, it is evident that the plaintiff and the defendant, together with all their witnesses agree on the process to be followed by members of the self-help group in order to acquire and/or own a parcel of land. That first a person who had paid the membership fee had to buy a share(s), each going for Kshs. 12,000/-. That a fully paid share entitled one to ballot for a plot, which is equivalent to a parcel of land measuring approximately an eighth of an acre. That upon payment of the full purchase price, members would participate in the balloting exercise at which point they would be shown and/or identify their respective parcel(s) of land. Thereafter, the member would be at liberty to take possession of his/her parcel of land, and the self-help group would issue that particular member with a share certificate for their parcel(s) of land. The evidence before this court confirms that the plaintiff was a member of Ishieywe self-help group. In his testimony, the plaintiff produced a certified copy of receipts totalling to Kshs. 36,000/= as exhibit 7 as proof for payments made towards purchase of the suit parcel of land. He also produced certified copies of three ballot papers for the three plots No. A8, A9, and A10 that he got after balloting, which became the suit parcel of land as exhibit 8. The plaintiff told the Court that he obtained a consent from the Land Control Board on 17th May, 2007 thereafter, he paid for stamp duty as can be seen from the customer transaction voucher, and a stamp duty declaration form produced as exhibit 2 and 3 respectively. That on the analysis of the foregoing, one can conclude that the plaintiff followed the due process to get registered and be issued with the title deed to the suit parcel of land.

- c. Looking at the defendant's evidence, and in as much as he claims to be the legal owner of the suit land, the process that has described leading to his acquisition of the of land is filled with a lot of mystery, leaving many questions unanswered. The defendant contended that he fully paid for the suit land before he took possession of the same. A perusal of the bundle of receipts



produced by the defendant reveals that he only made one payment for shares on 15th March, 1998 when he paid Kshs. 5,000/=. Therefore, by the time the balloting exercise was taking place sometime in the year, 1998, the defendant had not completed payment for even one plot, and there is no way he could have participated in the balloting exercise as full payment of the purchase price was a pre-requisite to balloting. The defendant's witnesses confirmed that the defendant was making payments even up to the year 2000, but had by then taken possession of the suit land, which if true was irregular. It is noteworthy that the defendant did not produce any ballots to show that he balloted for any of the plots which form the suit land. He also did not produce ballots for the people who allegedly surrendered plot No. A8 and A10 before they were allocated to him. Therefore, he failed to produce vital documents in support of his claim for ownership for the suit parcel of land. Accordingly, the court comes to the finding that the defendant never followed the steps and/or procedure that members of the self-help group were required to follow in the acquisition of plots. On his part the plaintiff took the court through the steps that he took in the acquisition of the suit land, and produced as exhibits documentary evidence in support thereof.

- d. In the case of *Daudi Kiptugen v Commissioner of Lands, Nairobi & 5 others* [2016] eKLR the Court of Appeal held that-

“In order to determine the question of whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. ”

In the absence of a letter recalling and/or cancelling the plaintiff's ballots for plot Nos. A8, A9 and A10, it is my finding that any subsequent allocation of the said plots to the defendant and/or any other third party whatsoever was void and could not supersede the plaintiff's rights over the said parcels of land, as the plaintiff had complied with all the requisite procedures.

- e. Though the defendant alleged that the plaintiff obtained a title deed to the suit parcel of land fraudulently, he did not lead any evidence in support of this allegation. The Court of Appeal in *Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others* [2019] eKLR held that-

“In *Ndolo v Ndolo* [2008] 1 KLR (G & F) 742 it was stated that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In this matter, the appellant has invited us to infer fraud from the fact that the 1st respondent was working at the land office. Allegations of fraud cannot be proved by inference. There is no evidence on record showing a fraudulent act of omission



or commission on the part of the respondents. Specific evidence proving fraud must be distinctly alleged, tendered and proved in court. We find that the trial court did not err in finding that the allegations on fraud were not proved.”

In view of the foregoing, it is my finding that the plaintiff is the rightful registered owner of the suit property, and any subsequent allocation of the suit parcel of land to the defendant and/or any other third parties was irregular, invalid and of no legal effect.

- f. On the defendant’s claim based on adverse possession over the suit land, his case is that he has been in continuous, uninterrupted occupation and possession of the suit parcel of land since 1998, which is equivalent to 24 years, thus a period in excess of 12 years. To succeed, the defendant has the burden of proving this fact beyond reasonable doubt. The court in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, held that-

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

The principle of adverse possession is well settled under *Limitation of Actions Act* Cap 22 Laws of Kenya. Section 7 of the said Act, underpin the doctrine and provides that-

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

Further Section 13 provides that;

1. “A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.



3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

It is trite that for one to succeed in a claim of adverse possession, he must satisfy the following criteria set out in the case of *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR where the Court of Appeal held that-

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. (Emphasis added) In law, possession is a matter of fact depending on all circumstances”.

Accordingly, in order for the defendant herein to prove and/or to establish a claim of adverse possession of the suit land against the plaintiff, he has to demonstrate that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the title of the registered owner.

- g. In the case of *Samuel Miki Waweru vs. Jane Njeru Richu*, Civil Appeal No. 122 of 2001, which was cited with authority in *James Maina Kinya v Gerald Kwendaka* [2018] eKLR, the Court of Appeal delivered the following dictum:

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

The defendant contends that he took possession of the suit parcel of land in 1998 and has been living there with his family and has also been cultivating the said parcel of land to date. Therefore, he has been in the suit parcel of land for 24 years, which period is more than 12 years prescribed, and hence the plaintiff holds the title to the suit parcel of land in trust for him.

- h. As seen herein above, other than the being peaceful, uninterrupted possession of the suit parcel of land for more than 12 years, the defendant also has to prove that the possession and/or occupation was adverse to the title of the registered owner. It is not in dispute that the plaintiff herein was issued with a title deed to the suit property on 10th August, 2007 and that he filed the suit in the year 2012, seeking for among others, an order directing the defendant to remove the structure on the suit land. Accordingly, only a period of approximately 4 years had lapsed from the date when the plaintiff was registered as proprietor and was issued with a title deed to the suit land, to the date when he filed a suit against the defendant over the suit property. The copy of the title deed of the suit land produced by the plaintiff, shows the register was first opened on



the 31st January 2007 and transferred to Isaac Cypriano Shingore, the plaintiff, on the 10th August 2007, which is about seven months later. The suit land was agreed to have been a subdivision from Soy/Soy Block 10[Navillus]/62, the parent title. The copy of the green card produced as exhibit shows that its register was opened on 4th August 1999 and the first registered owner was the Government of Kenya. It was then transferred to Lonrho Agribusiness [E.A] Limited on the 26th May 2000, and on the same date transferred to Clement Ooko Odhiambo, Enock Khani Shirebera and Francis Juma Taabu, who the court takes to be the then officials of Isheywe Self Help Group. The green card shows at entry number 5 of the 28th July 2006, that the title was closed on subdivision to numbers 1636 to 1876. That while considering the defendant's claim on adverse possession against the plaintiff, the court has to remind itself of the defendant's evidence that he took possession of the suit land being his entitlement as a paid up member of Ishieywe Self Help group. That possession would obviously be taken to have been with permission or licence of the then registered proprietor or legal owner. The possession only became adverse when the permission of the legal owner was withdrawn or became apparent to any reasonable person that it had been rescinded. Though none of the parties addressed the court on this aspect specifically, it must have become apparent to the defendant that the group's permission or licence for him to occupy or possess the land was no more after the said land was transferred to the name of the plaintiff in 2007. By the time the plaintiff filed this suit in 2012, the defendant could only have been in adverse possession of the suit land for only about four (4) years, and that period falls short of the statutorily prescribed period of twelve (12) years, to kick in the prescriptive doctrine in favour of the defendant.

- i. The defendant's claim on adverse possession can also be understood to have been against Ishieywe Self Help Group. He has claimed to have bought the suit parcel of land from Ishieywe self-help group who sold the suit parcel of land to the plaintiff, and who also owned the entire parcel of land being land parcel No. Soy/Soy Block 10 (Navillus) 62 which was subdivided and the suit parcel of land excised from it. It is noteworthy that if that was the case, the defendant's right over the suit parcel of land may be taken if proved to supersede that of the plaintiff. The defendant claimed to be the rightful owner of the suit parcel of land having fully paid the purchase price for plot No. A9, participated in the ballot, taken possession of it and was issued with a share certificate on 24th July, 1999. In addition, the defendant also claimed to be the rightful owner of plot No. A8 and 10, saying the said plots had been allocated to him after the original owners who had paid for them fully, balloted and taken possession, surrendered them back to the group as a result of the 1998 El nino rains. That thereafter, the management of the self-help group allocated the said plots to the defendant who later on refunded the said amount that had been paid by the original allottees. That approach of the claim can easily be taken to be one for a bona fide purchaser for value. The pleadings by the defendant has not joined the said group and or its officials as a party against whom any prayers are sought or may issue.



- j. It is trite that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease. In the case of *Public Trustee v Wanduru* [1984] eKLR Madan J A stated as follows-

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

It is therefore my considered opinion that once you have and /or demonstrated purchaser’s interest over a parcel of land, you cannot also lay a claim of adverse possession against the vendor until and unless full payment of the purchase price has been paid and twelve years have lapsed from the date the possession became adverse to the title of the vendor. In this case, the defendant testified that he completed making payments for plot No. A8 and 10 in the year 2000, whereas he was issued with a share certificate for plot No. A9 on 24th July, 1999. It therefore follows that time started running for purposes of limitation from the year 2000, and 1999 respectively. Notably a period of approximately 10 years has lapsed from the date of payment of the purchase price in full for plot No. A8 and 10, and a period of approximately 11 years has lapsed from the date when the defendant was issued with a share certificate for plot No. 9, to when the plaintiff issued the defendant with an eviction notice on allegations of trespass. That even looking at the defendant’s claim from the above lenses, and without making a finding of when his possession became adverse, the period of twelve years that are a prerequisite under the provisions of section 7 and 13 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, had not lapsed by the time the suit was filed and the defendant does not have a claim for adverse possession against the self-help group.

- k. In light of the foregoing, this Court finds that the plaintiff is entitled to the protection of his right to property guaranteed under Article 40 of *the Constitution* of Kenya, 2010. Accordingly, the plaintiff is entitled to an order of permanent injunction against the defendant as sought in the plaint.
- l. It is trite that costs largely follow the event, unless where for good cause the court directs differently as can be seen from the provisions of section 27 (1) of the *Civil Procedure Act*.

18. As explained hereinabove, this Court finds that the plaintiff has proved his claim against the defendant on a balance of probability, while the defendant has failed to prove his counter-claim and/or originating summons to the required standards of proof. Consequently, the court finds and orders as follows;

- a. That the plaintiff suit in Eldoret ELC 709 OF 2012 has been proved to the standard required of a balance of probabilities. The court therefore enter judgement in his favour and against the defendant in the following terms;



- i. That a declaration be and is hereby issued that Isaac Cypriano Shing'ore, the Plaintiff, is the rightful registered owner of plots No. A8, A9, and A10 which form all that parcel of land known as Soy/Soy/Block 10(NAVILLUS)/1869;
 - ii. An order be and is hereby issued directing the defendant Nahashon Osiako Mutambi, to give vacant possession of the suit land to the plaintiff, and remove all the structures thereon in ninety (90) days and in default eviction orders to issue;
 - iii. An order of permanent injunction be and is hereby issued restraining the defendant, his servants and/or agents from dealing and/or interfering with the said land after granting vacant possession and or being evicted;
 - iv. Costs of the suit shall be borne by the defendant.
- b. That the defendant's suit/counterclaim as contained in Eldoret ELC 260 of 2013 that was consolidated with this suit, be and is hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF JANUARY 2023.

S.M.Kibunja, J.

IN THE PRESENCE OF;

PLAINTIFF : Absent

DEFENDANT : Absent

COUNSEL : Absent

WILSON .. COURT ASSISTANT.

S.M.Kibunja, J.

ELC MOMBASA.

