



Maritim & another v Kibaru & another (Land Case 126 of 2012 & Environment & Land Case 60 of 2013 (Consolidated)) [2023] KEELC 79 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 79 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 126 OF 2012 & ENVIRONMENT & LAND CASE 60 OF 2013 (CONSOLIDATED)
FM NJOROGE, J
JANUARY 19, 2023

BETWEEN

SIMON TOWETT MARITIM PLAINTIFF

AND

JOTHAM MUIRURI KIBARU DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 60 OF 2013

BETWEEN

JOTHAM MUIRURI KIBARU PLAINTIFF

AND

JOSEPH RONO (SUED OF THE ESTATE OF KIPRONO BEIBEI NYANGUSI – DECEASED) DEFENDANT

JUDGMENT

Introduction

1. This is a judgment in a dispute in which two persons, Simon Towett Maritim and Jotham Muiruri Kibaru exchanged land for the sake of their personal safety due to the sprouting of hostilities between different communities in the then so called Rift Valley Province which bore the brunt the infamous ethnic clashes that occurred in the early 1990s in our nation. As the two litigants were tussling over the land, a third party, Kiprono Beibei Nyangusi, emerged and claimed registered rights to the same land.
2. Two separate cases were filed by the parties. These were Nakuru HCCC 272/2005 which later became Nakuru ELC 60 of 2013 and Nakuru HCCC 125/2011 which later became ELC No. 126 of 2012.



They were later consolidated by way of a consent order adopted by the court on 15/4/2013 with ELC 126/2012 being the lead file.

3. To avert any confusion in the consolidated suits, the term “plaintiff” will refer to the plaintiff in ELC 126 of 2012 and the term “defendant” will be used in reference to the defendant in ELC 126 of 2012. Also, for ease, the estate of the defendant in ELC 60 of 2013 will be referred to by his name, “Kiprono Biebei Nyangusi” or simply as “Kiprono.”

Pleadings

Pleadings in ELC No. 126 of 2012*

4. In ELC No. 126 of 2012, the plaintiff Simon Towett Maritim sued Jotham Muiruri Kibaru stating as follows: that he bought the suit land measuring 4 ½ acres from Kiprono Biebei Nyangusi in 1989; following the rise of ethnic clashes in 1992 he feared for his life and exchanged the said plot of land with the defendant’s parcel known as Kericho/Chesinende/S.S./97 (hereinafter also “the Kericho land”) which the defendant could not also occupy due to the existing hostilities; following that exchange, the plaintiff took over the Kericho land and developed it and the defendant took over the plaintiff’s land known as Dundori/Muguathi Block 2/20, (hereinafter “Dundori land” or alternately “the suit land”) and occupied the plaintiff’s former house. Later in 2005, the defendant sued the plaintiff for eviction in Nakuru HCCC 253/1996 and subsequently evicted the plaintiff and took back the Kericho land together with all the developments thereof but still retained the plaintiff’s Dundori land which he had gotten through the exchange; the plaintiff avers that he has on several occasions demanded that the defendant vacates the Dundori land but in vain and the plaintiff has since been rendered landless. Consequently, the plaintiff prays for a declaration that he is the owner of Dundori/Muguathi Block 2/20, an order of eviction of the defendant from Dundori/Muguathi Block 2/20, general damages for inconvenience and suffering from the date of eviction to date and the costs of the suit.
5. In a defence filed on 24/8/2011, the defendant denied that the plaintiff owned the Dundori land or that he bought it from Kiprono Biebei Nyangusi; he averred that the issue of the Kericho land is re judicata Nakuru HCC 353/1996 and that he had acquired the Dundori land by way of adverse possession; he cited Nakuru ELC No. 60 of 2013 (now part of this consolidated suit) as the case vide which he was seeking a declaration that he is entitled to be registered as owner of the Dundori land by way of adverse possession. The plaintiff filed his reply to defence dated 30/8/2011 reiterating the matters contained in the plaint and added that he has been unable to transfer the title for the Dundori land into his name because the plaintiff had lodged a caution claiming adverse possession and the case for adverse possession has not been concluded.

Pleadings in ELC No. 60 of 2013

6. In ELC No. 60 of 2013, the plaintiff filed an originating summons seeking to be entitled to registered as proprietor of the suit land, Dundori/Muguathi Block 2/20 by way of prescription and that the respondent be restrained from interfering with the suit land. The defendant in that suit filed a replying affidavit stating that he is the registered proprietor of the suit land which he “gave” to his daughter who is married to Simon Maritim the plaintiff in ELC No. 126 of 2012; he stated that Simon had been utilising the land and that he had leased part of it to the plaintiff; he denied the claim that he had sold his land to Towett that he has never executed any sale agreement with Towett.



Evidence of the Parties in the Consolidated Suit

Evidence of The Plaintiff

7. Hearing of the consolidated cases commenced on 18/1/2021. PW1, Jotham Muiruri Kibaru testified and adopted his witness statement as part of his evidence-in-chief. He stated that owner of the suit land is Kiprono Biebei and produced a copy of the register as PExh.1. He stated that he still lives on the suit land, having taken possession thereof in 1992; before that he was living on parcel number Kericho/Chesinende/S.S./97 which belonged to his mother who acquired it from Settlement Fund Trustees in 1971 by way of allotment and who lived thereon till her demise on 4/6/1981 upon which she was survived by 10 children. In 1992, when ethnic conflicts occurred in Chesinende, the family had to move to a safer place. In April 1992, 5 people came from Nakuru where they had been displaced by tribal clashes and they were looking for persons with whom they could exchange land and among them was Simon Towett Maritim the plaintiff in ELC No. 126 of 2012; they did not know anybody in Chesinende and they enquired at the Chief's office whether anybody affected by clashes would like to leave Chesinende, the chief called the defendant and interviewed the newcomers in his presence as to the land which they had; Simon had 4 ½ acres at Dundori while the defendant had 12 acres at Chesinende. Simon and others viewed the land at Chesinende and later the defendant viewed the land at Dundori which Simon claimed to be his land. He showed the defendant a sale agreement dated 16/4/1989 with Kiprono Biebei Nyangusi (PExh.2). Then the parties agreed that they would not exchange the two parcels but they would move in for the safety of their lives and anything else could be done later; Simon then transported his goods to Chesinende where he occupied the defendant's 4-bedroom permanent house and the defendant did the same and occupied the temporary 2-bedroom house in June 1992 where he has been living since. In 2005, Kiprono Biebei Nyangusi tried to sell the Dundori land the defendant lodged a caution. At first Mr. Biebei wanted to sell 1 ½ acres and the defendant did not have money readily available to buy the land; the land was surveyed and subdivided into 3 parts and the defendant then filed ELC No. 60/2013 for adverse possession. The purported sale failed and the purchase price was refunded. In respect of the Kericho land, Simon Towett Maritim was charged for fraudulently obtaining a title in his name in Kericho PM Criminal Case No. 1338/1993 but he was acquitted. Another case, Nakuru HCC 253/1996 was filed by Jotham against Simon regarding Simon's fraudulent transfer of the land from Jotham's mother's name to himself and the court ordered him to vacate the land; the judgment in that case was produced as PExh.3. According to PW1 he learnt that the plaintiff was not the owner of the Dundori land and he later got to know the real owner. He admits that he was granted possession by Simon Maritim and that he has developed the Dundori land by building a residential house while Simon never carried out any developments on the Kericho land; instead, he had demolished some structures that had been standing thereon. PW1 stated that he took over possession of the Dundori land from the Simon and his family who had been in occupation and his claim is premised on that permission. He stated that the Kericho land was not his and he only allowed Simon to go and utilise it on the understanding that he had a piece of land in Dundori which the defendant could occupy. Under re-examination he stated that he took Kiprono to Kericho in 1993, that being the year that he learned that Kiprono was the owner of the Dundori land. With that, the plaintiff's case was marked closed.

Evidence of Estate of Kiprono Biebei Nyangusi

8. DW1, Joseph Rono, testified on the same day as PW1. His evidence is that he is son to Kiprono Biebei Nyangusi (deceased) and administrator to his estate. He stated that Simon's wife is his aunt; that his father never sold the Dundori land to Simon; that there was no thumbprint on the agreement dated 16/4/1989; that they were not informed as a family that the land was intended to be sold; that his father



denied having sold the land or even appearing before an advocate for the execution of the agreement; that it was Simon's wife, DW1's aunt, who had requested for a place to stay and she was given the land; that the house thereon was built by Kiprono; that Kiprono allowed Simon to occupy the Dundori land and consequently allowed the exchange, and the defendant took up the land believing that it belonged to the plaintiff; that when the defendant met DW1's family, they informed him that the land did not belong to Simon; that the land is still registered in Kiprono's name.

9. Upon cross-examination by Mr Akango, DW 1 admitted that a certain advocate by the name Kipkenei represented his father at one point; that he was not aware whether his father signed any statement upon visiting Kipkenei's office; that he did accompany his father once or twice to the advocate's office; that Simon used to give his father some money; that his father never informed him how much he had received from Simon, that he does not know if the money was refunded and that his father used to execute documents by way of thumbprint.
10. Upon cross-examination by Mr Mutonyi he stated that his father did not live on the Dundori land but on other land in Rongai; that he gave Simon the Dundori land to farm on; that he did not allow the defendant to enter the Dundori land; that the defendant entered into possession of the suit land in 1992 and is still in possession of the entire parcel and his father was aware of that occupation; that his father also knew that Simon and his family had gone to Kericho and the defendant had taken possession of the land; that when he and his father visited the Dundori land on an unspecified date they found the defendant in possession.
11. Upon re-examination by Mr Opar he stated that his father sanctioned the land exchange between the plaintiff and the defendant and that he never sold it; in the same breath he stated that money was refunded by Simon. With that the defence of the defendant in the adverse possession claim came to a close.

Evidence of the Defendant

12. DW2, Joshua Kipkemoi Mutai testified on 27/1/2022 and adopted his witness statement filed on 9/11/2021. He stated that he is an advocate practising as Mutai Kipkemoi Advocates; that earlier his firm was known as Chelule & Co Advocates; that his senior Stephen Chelule, now retired, executed the subject agreement between DW1's father and Simon, which he produced as D. Exh 4.
13. Upon cross-examination by Mr Mutonyi on 8/2/2022 DW2 stated as follows: that he did not witness the agreement dated 16/4/1989; that he does not know the document the seller Kiprono went to the advocate with for the preparation of the agreement; that he is not aware of why the consent of the directors of Kalenjin Enterprises Ltd was required by the agreement.
14. When cross-examined by Mr Opar, DW2 stated as follows: that he became an associate in the law firm in 2012; that Mr Chelule is quite old and when he presented summons to him he issued him with verbal instructions on the matter. The copy of agreement he holds has no attached document evidencing ownership; it is for sale of a plot known as plot no 20; he is not aware if any transfer of land form was executed in respect of the transaction as none is in his records; there is also no evidence of issuance consent of Kalenjin Enterprises Ltd in the firm's file record; he is unaware of the purpose of such a consent. He stated that certificate in the agreement is proof that Kiprono appeared before Mr Chelule at its execution.
15. Upon re-examination by Mr Akango DW2 stated that the original agreement is in their records, that he discussed the matter with Mr Chelule when the summons were served and that he informed him that the parties to the agreement had appeared before him; that the vendor had a duty to secure a



consent and effect transfer. According to DW2, Kiprono Biebei and his son Rono have never lodged any complaints about the transaction at his office.

16. DW3, Simon Towett Maritim testified on 27/1/22 and adopted his witness statement dated 8/2/2011. His evidence is that he purchased the Dundori land from Kiprono on 16/4/1989 for Kshs 270,000/=; that Chelule & Co Advocates of Kericho drew the agreement and Mr Chelule received the consideration from DW3 which he passed on to Kiprono and both parties signed the agreement; that he took possession of the land and planted trees thereon; that in 1989, title had not issued; that title issued in the name of Kiprono in 1993; that he has built on the land; that in 1992 he and two other persons went to Chesinende in Kericho to seek a safe place to live in and the chief introduced the defendant to them; that the defendant showed them the land and stated that it belonged to Waithira Githinji his mother; that the two parties conducted their own informal valuation and agreed to exchange the lands mentioned herein and they effected that exchange agreement; that they even used the same lorry to ferry their goods across the distance between the plots; that later on DW2 went to the lands office and was told that there was no file and that the Kericho land belonged to the government and he at the advice of some officers paid a loan attached to the title and obtained title in his name, that soon thereafter the defendant caused him to be arrested and charged in a criminal case at Kericho of which he was acquitted; thereafter the defendant filed a suit and got back the Kericho land; when DW3 told the defendant that he wanted the Dundori land back, the latter refused to comply and lodged a caution on that title. DW3 stated that he is the person who permitted the defendant to enter the Dundori land on the strength of the sale agreement he had entered into with Kiprono; he stated that he and Kiprono had executed a land control board consent application form and Kiprono had surrendered the title to Kipkeni advocate but transfer was not effected as there was a caution against the title; Kiprono had sold 1.5 Acres of the land to one Donald Momanyi but the plaintiff refunded Donald his money when he learned of it.
17. Upon cross-examination by Mr Mutonyi DW3 stated that from 1989 to his death Kiprono lived in Rongai; that he knew that DW3 had shifted to Chesinende and that the defendant had taken possession of the Dundori land; that by the time the defendant entered the land Kiprono was the registered owner; that the exchange agreement was not reduced into writing but was merely verbal; that by then the defendant was not the registered owner of the Kericho land; that both parcels are of agricultural use; that LCB consent could not be sought as the proper documents were not available; that he and Kiprono never attended the land control board over the 1989 sale agreement.
18. Upon cross-examination by Mr Opar, DW3 stated that when he and Kiprono went to the Kalenjin Enterprises Ltd office they found that it had been closed; that it was him and not Kiprono who built a house on the Dundori land which was still there while the defendant was taking possession.
19. Upon re-examination by Mr Akango DW3 stated that Kiprono had admitted to selling him the land in his statement dated 8/2/2011.

Submissions

20. The defendant filed his submissions on 24/5/2022. The submissions of the plaintiff were filed on 23/6/2022 and the submissions of Joseph Rono, the defendant in ELC No 60 Of 2013 are also in the file. I have read and considered those submissions while writing this judgment.

Determination

21. It is common ground in the present suit that:
 - a. The suit land is registered in the name of Kiprono Biebei Nyangusi;



- b. The plaintiff and the defendant exchanged the two parcels with full knowledge that none of them was the registered proprietor at the time of exchange and the exchange agreement was not reduced into writing;
- c. Each of the exchanging parties settled on the land obtained through the exchange and the defendant has been in possession for more than 12 years from the date of his entry into the Dundori land;
- d. The plaintiff obtained title to the Kericho land without involving the defendant and was successfully sued for eviction and that land repossessed by the estate of the defendant's mother;
- e. Kiprono Biebei Nyangusi was aware of the exchange and the taking up of possession by the defendant.
- f. Kiprono attempted to sell the land or a part thereof in 2005 but the plaintiff remained in possession of the entire parcel.

Issues for determination

22. The issues that remain for determination in the present suit are as follows:
- a. Did the plaintiff obtain any rights or interests in the suit land by way of purchase from Kiprono in 1989 and are those rights and interests still in existence?
 - b. Is the defendant entitled to be registered as the proprietor of the suit land by virtue of the doctrine of adverse possession?
 - c. Who ought to bear the costs of the present litigation?
23. Regarding the first issue the sale agreement D. Exh 4 dated 16/4/1989 comes into sharp focus. The original agreement was not produced in court by the defendant. However, DW2 an advocate from the firm that is claimed to have drawn the agreement identified the sale agreement. It states that Kiprono Biebei Nyangusi is vendor and one Simion Towett Maritim is purchaser of plot number 20 measuring 4.5 acres situate at Lanet in Nakuru. Consideration is Kshs 270,000/= which was allegedly paid in full on the date of execution. The transfer was to be immediate, but subject to consent issued by Kalenjin Enterprises. However, no transfer was effected. No consent was shown to have been issued by Kalenjin enterprises for the transaction. Of interest in the alleged sale is the replying affidavit of Kiprono sworn on 11/11/2005 in HCCC 272 of 2005 (now ELC No 60 of 2013). Kiprono stated therein that he acquired the land from Kalenjin Enterprises Ltd by virtue of his shareholding there and was subsequently issued with a title deed. The share certificate he produced bears the name "Yebei Kiprono". He stated further that he never lived on the plot and so he gave it to his daughter who is the plaintiff's wife; that he is aware that the plaintiff had been utilising the land and leasing part of it to the defendant; that the plaintiff therefore never bought the land from him and the agreement herein before analysed is a forgery. He denied having ever appeared before the attesting advocate for the agreement's execution. In his witness statement filed on 30/11/2011 in ELC No 60 of 2013 the defendant stated that when the plaintiff approached him for the land exchange, he came with a copy of sale agreement stating he had purchased the suit land from Kiprono, and that it was only in 2005 that Kiprono emerged, claiming he had title to the land contrary to the defendant's belief that the plaintiff owned it.
24. The evidence of the defendant that the plaintiff came along with an agreement dated 16/4/1989 (PEXH2, which is a replica of DEXH4) showing purchase from Kiprono was corroborated by DW2 an advocate from the firm that made an agreement on behalf of the parties in 1989. This is significant



in that through the evidence of 3 persons, it has clearly been shown that by 1992 the sale agreement (DExh4) did exist.

25. I am satisfied therefore that there was a sale agreement between Kiprono and the plaintiff for the sale of the land to the latter by the time the land exchange took place. However, many years passed after the agreement was made without the land being transferred to the plaintiff. It remained in the name of the original owner Kiprono who not only registered himself as proprietor but subsequently denied having sold the land to the plaintiff in his defence in the adverse possession claim filed by the defendant against him.
26. By the time Kiprono died he had not abrogated his denial of the transaction. It is also significant that his obtainance of title to the Dundori land in his name on 24/9/1992 so soon after the exchange of land between the plaintiff and the defendant was contrary to the terms of the agreement D. Exh 4. In this court's view, his registration as owner was a total renunciation of the terms of the agreement whose terms were that the vendor undertook to transfer the land immediately to the purchaser. Unless the plaintiff himself was a part of a scheme hatched jointly together with Kiprono, the latter's registration as proprietor was a total repudiation of contract by conduct; it left the plaintiff nothing to salvage save through a suit for specific performance or damages which he has never filed to this day. It is clear that the land therefore remained Kiprono's property all through, and the plaintiff's rights under the agreement dated 16/4/1989 were extinguished by Kiprono's title and the plaintiff's failure to assert himself as owner.
27. The next question is whether the plaintiff deserves to be registered as proprietor of the land by virtue of adverse possession. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR it was observed as follows by the Court of Appeal:

“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 or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act*, which is in these terms: -

“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.”

28. In the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR the Court of Appeal held as follows:

“16. A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an interrupted period of not less than 12 years.”

29. *Halbury's Laws of England*, 4th Edition Volume 28, paragraph 768 provides that: -

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of



fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

30. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR the court held as follows:

“(7) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. What is a significant interruption depends upon the nature of the land.”

31. For the defendant to establish that he is entitled to be registered as proprietor by way of adverse possession he must therefore prove that he has been in continuous, uninterrupted, unbroken possession which is adverse to the title, for the necessary statutory period of 12 years and with the knowledge of the paper title owner; also, the possession of the adverse possessor must be neither by force or stealth or under the license of the owner.

32. In the present dispute the defendant took possession by way of an unwritten exchange agreement with the plaintiff the exact nature and extent of which is still unclear as both parties differ regarding its terms. One thing that is clear is that the agreement between them was not a lease as no rents were to be paid. The alleged temporary or permanent nature of the exchange agreement as posited by the defendant and the plaintiff respectively removes the agreement from the realm of a licence into an amorphous transaction defying description. The sort of interest however permanent or transitory which was supposed to pass between the plaintiff and the defendant and the success of the exchange whatever the terms thereof was however predicated on the exclusive ownership of the suit land by the plaintiff. Both the plaintiff's and the defendant's rights to possession of the suit land or to entitle them to their strange species of exchange therefore hung upon the rather precarious thread of enforceability of the agreement dated 16/4/1989. The proverbial slip betwixt the cup and the lip occurred barely three months after the exchange when Kiprono's obtainance of paper title to the land on 24/9/1992 evinced a fundamental breach, a complete volte face in his desire to complete the sale agreement with the plaintiff. The plaintiff appears to have acquiesced, failed or neglected to claim for specific performance or other remedy against the Kiprono which is quite curious as he is said to have paid full consideration. The time within which an action for specific performance or breach of contract could have been lodged by the plaintiff against Kiprono lapsed on 23/9/1995. However, the claim of adverse possession is by the defendant not against the plaintiff but against Kiprono. Consequently, I find that the computation of time for purposes of the application of the doctrine must commence from the date the defendant became a trespasser as against Kiprono's title.

33. Kiprono's knowledge of the exchange agreement between the plaintiff and the defendant and his lack of disapproval of the same must be deemed to be a form of a licence or permission extended to the defendant through the agreement dated 16/4/1989. Ordinarily, permission or licence does not entitle the occupier in adverse possession and time can not be deemed to run in his favour until that permission or licence is expressly or impliedly terminated. Perchance it is deemed that the defendant took possession with consent of the plaintiff, then the plaintiff obtained authority to consent through the sale agreement of 16/4/1989 while it was still valid and the consent of Kiprono was then not needed; with the repudiation of the sale agreement, the consent from the plaintiff to the defendant was extinguished on 24/9/1992. As stated earlier Kiprono's consent was not needed while the sale agreement was still in force as he had sold the land. It has been admitted by all the three sides in this case that Kiprono was well aware of the taking up of possession of the suit land by the defendant



and the migration of the plaintiff's family to Kericho even as those events took place. However, Kiprono repudiated the sale agreement by conduct and became the registered owner of the suit land. Kiprono's newly registered interest in the land being totally adverse to the exchange agreement, the latter agreement must be deemed utterly frustrated; it therefore ought to have occurred to Kiprono that the new occupant of the land had then been rendered a trespasser by his registration as proprietor and he ought to have evicted him but he did not do so.

34. In the case of *Samuel Katana Nzunga & 102 others v Salim Abdalla Bakshwein & another* [2013] eKLR the Court stated as follows:

“Reiterating the holding in the case of *Samuel Miki Waweru v Jane Njeri Richu* CA No. 122 of 2001 (UR) the court said: -

“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 vs Kilipal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of *Sisto Wambugu vs Kamau Njuguna* [1982 — 8811 KLR (172)...seems to be that a purchaser of land under a contract of sale in possession of the land with the permission of the vendor (can lay a claim for possession of such land) only after the period of the validity of the contract unless and until the contract has been repudiated...adverse possession starts from the date of the termination of the contract.” (Emphasis mine.)

35. Consequently, this court concludes that the defendant did not enter into possession of the suit land by stealth or by force. Indeed, no evidence of secrecy or force was adduced by the registered title holder. Therefore, consequence of Kiprono's obtainance of paper title to the land on 24/9/1992 was the immediate repudiation of the agreement dated 16/4/1989, the extinction of the plaintiff's rights under the agreement and the immediate revocation of any permission or licence granted to the defendant expressly or impliedly by either the plaintiff or by Kiprono or by their joint conduct, and the defendant was converted into a trespasser on the suit land in relation to Kiprono. Kiprono should have moved to evict the defendant forthwith upon his registration but did not hence the defendant's present adverse possession claim.
36. As to whether the defendant has been quiet, continuous, uninterrupted, unbroken possession which is adverse to the title, for the necessary statutory period of 12 years, this court finds from the evidence adduced by all sides that he lived on the suit land since the exchange in June 1992 till 3/11/2005 when he filed the present originating summons and is still in possession to date. That is a period in excess of 12 years. I do not find any evidence from the plaintiff or from Kiprono that that possession was not quiet, or that it was ever interrupted after the agreement of 16/4/1989 was repudiated. In the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR the Court observed that:

“The Plaintiff led evidence that he has been in exclusive control of the suit land and demonstrated his animus possidendi in developing the suit land through planting and tending tea bushes, growing trees and practicing subsistence farming on the suit land as though it was as of right. That he has done this since 1971 to date openly and without interruption by anyone, least of all, the Defendant, is not under challenge. Evidence was led that the Defendant had knowledge of the Plaintiff's occupation of the suit land.”



37. In the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR, the Court of Appeal held as follows:

“22. In the instant appeal, the appellant was not a beneficial owner. He was the true owner and he had capacity not only to assert his right of ownership but also eject trespassers. He was aware that the suit land was occupied by trespassers whom he thought to be slum dwellers. The evidence shows that as long ago as 1980, he knew there were trespassers on the suit land. In our view, it did not matter that he did not know their identity, or whether they were slum dwellers or otherwise. Trespassers are trespassers. That is why the common law principle holds true that where one trespasser removes another trespasser who is in adverse possession to the title of the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own (see *Amos Weru Murigu v. Murata Wangari Kambi & Another* (supra)). It is important to point out that in adverse possession, it is the knowledge by the owner of the land that there is a trespasser on his land that counts. There does not have to be a meeting of the minds, that is to say, that the owner knows of the trespasser and the trespasser knows of the owner. As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in adverse possession will run. But knowledge that the owner knows of the trespasser on the land must be strictly proved. It is not enough for the trespasser to speculate that the owner must have known that he was on the land without showing clearly that the owner knew or could not in the circumstances of the case be ignorant about it. If there is evidence that the trespasser occupied and carried activities and/or developments on the land claimed which the world could see and it is shown, for instance, that the owner lives near the land claimed or visits the area where it is located, the owner cannot be allowed in law to feign ignorance that he does not know of the trespass.”

38. Kiprono is the plaintiff's father-in-law, the latter having married the former's daughter. The Kenyan social-cultural milieu has not reached the point of unbridled individualism that would entitle this court to the assumption that Kiprono would not know that his own son in law and biological daughter had fallen victim to the vagaries of inter-ethnic conflagration with the consequent need for their migration from the land he had sold or given, whatever the case, to the plaintiff's family. In fact, the evidence of the plaintiff upon cross-examination by Mr Mutonyi as well as that of DW1 was that that Kiprono knew that the plaintiff had shifted to Chesinende and that the defendant had taken possession of the Dundori land; indeed, perchance such evidence had not been called, as seen in the *Benson Mukuwa Wachira* case, (supra) Kiprono could not feign ignorance that the defendant had taken possession of the suit land. Evidence in the present suit and from the exhibited judgment issued on 7/7/2003 in Nakuru HCC 253/1996 also demonstrated that in 1993 the defendant learnt that Kiprono was the owner of the land. The only logical conclusion arising from the fact that both Kiprono and the defendant knew of each other's status with regard to the suit land; Kiprono also knew of the defendant's subsequent conduct of effecting developments on the suit land; I therefore find that the defendant has proved animus possidendi or an intention to dispossess the registered owner of his right and interest in the land and the registered owner did nothing about it.



39. Kiprono having become registered owner after 16/4/1989 and the plaintiff having failed to take steps to enforce their agreement of that date even in the present litigation by pleading against Kiprono or his estate, the prayers for a declaration that the plaintiff is the proprietor of the suit land and for an eviction order against the defendant and damages are quite misconceived. Had the defendant's claim failed, this court would still not have been inclined to award the orders the plaintiff sought for himself while he has filed no claim directly against Kiprono, the registered owner of the suit land.
40. The upshot of the foregoing analysis is that the plaintiff's claim to be registered as proprietor of the suit land must fail and the defendant's claim against Kiprono's estate must succeed. I therefore issue the following final orders:
- a. The plaintiff's entire claim in the plaint dated 8/2/2011 in Nakuru ELC 126 of 2012 is dismissed as it has not been proved on a balance of probabilities;
 - b. The defendant's claim of adverse possession against the estate of Kiprono Biebei Nyangusi in Nakuru ELC No 60 of 2013 (OS) is hereby allowed;
 - c. A declaration is hereby issued that the proprietary interest of the estate of Kiprono Biebei Nyangusi in land parcel LR No Dundori/Muguathi Block 2/20 has been extinguished by reason of the defendant's adverse possession thereof;
 - d. It is hereby declared that the Jotham Muiruri Kibaru has acquired title to LR No Dundori/Muguathi Block 2/20 by way of adverse possession;
 - e. An order of permanent injunction is hereby issued restraining the administrator of the estate of Kiprono Biebei Nyangusi or any person claiming under him from interfering in any manner whatsoever with Jotham Muiruri Kibaru's quiet possession of LR No Dundori/Muguathi Block 2/20;
 - f. The costs of the consolidated suit shall be borne jointly and severally by Simon Towett Maritim and the Administrator of the estate of Kiprono Biebei Nyangusi who are the plaintiff and the defendant in Nakuru ELC No 126 of 2012 and Nakuru ELC No 60 of 2013 (OS) respectively.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

