



**Plapan (Suing as the Legal Administrator of the Estate of Maua Chesoker
- Deceased) v Nguriareng & 2 others (Environment & Land Case
26 of 2020) [2023] KEELC 15701 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 26 OF 2020
FO NYAGAKA, J
FEBRUARY 22, 2023**

BETWEEN

**LILIAN JANICE PLAPAN (SUING AS THE LEGAL ADMINISTRATOR OF THE
ESTATE OF MAUA CHESOKER - DECEASED) PLAINTIFF**

AND

LORENG NGURIARENG 1ST DEFENDANT

POLOKOU NGURIARENG 2ND DEFENDANT

CHARITO NGURIARENG 3RD DEFENDANT

JUDGMENT

1. The plaintiff approached this court by way of an originating summons filed on the April 27, 2020 against the first two defendants herein. The summons were later, on November 28, 2022, amended to include the 3rd defendant.
2. She brought the summons under order 37 rule 6(1) and 7(1) of the Civil Procedure rules and sections 7, 13, 17 and 21 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. She sought the determination of a number of questions which are summarized as, whether she was the legal administrator of the Estate of Maua Chesoker; whether the two (now three) respondents were the registered owners of land parcel number West Pokot/Kanyarkwat “B”/26; whether the late Maua Chesoker and her family had been in open and notorious occupation of a portion measuring approximately 33 Ha of the said parcel of land; whether the late Maua Chesoker and her family, having, been in occupation of the said portion since the time prior to 1984, have acquired it by way of adverse possession; whether the county surveyor of West Pokot should be ordered to survey the portion of the land in issue and ascertain if there existed a river on the parcel of land and if so, its name, who was in occupation of the portion of the land in question and if there were any physical structures thereon, and



the actual acreage of the land West Pokot/Kanyarkwat “B”/21 together with the said portion of land in question all the way to River Murkong; whether the portion of the land between River Murkong and land parcel No West Pokot/Kanyarkwat “B”/21 should be hived off and registered in the name of Maua Chesoker; and who to pay costs of the suit.

3. In the originating summons, the plaintiff sought the following orders:-
 - a) A declaration that the deceased herein has obtained the portion of land after river Murkong which forms part of Title Deed No West Pokot/Kanyarkwat “B”/26 by way of adverse possession.
 - b) A declaration that the portion of Land after River Murkong forming part of Title deed No West Pokot/Kanyarkwat “B”/26 and its acreage ascertained by the county surveyor West Pokot county be curved from the said Title and transferred into the deceased’s name herein.
 - c) A permanent injunction restraining the respondents, their agents and or those claiming under them from trespassing onto the portion of land after River Murkong after being curved into the name of the deceased.
 - d) Costs of this suit.
 - e) Any other relief that this court may deem fit to grant for the best interest of justice.
4. She supported the originating summons by an affidavit she swore on April 27, 2020. To it she annexed a number of documents. She also swore a further affidavit sworn on the November 18, 2020 in furtherance of the facts asserted in the summons.
5. Only the 1st defendant filed a replying affidavit sworn on the June 4, 2020. He denied the plaintiff’s claim. To the affidavit were annexed a number of documents.
6. Subsequent to the filing of the summons and reply thereto and further affidavit, this court gave directions by which the suit was deemed as having been commenced by way of plaint, and the originating summons, the supporting affidavit and its annexures, and the further affidavit treated as the plaint and reply to defence while the replying affidavit and annexures were deemed as the defendants’ defence. Thereafter the hearing proceeded, and the plaintiff testified, calling a total of six (6) witnesses while the defence called a total of five (5) witnesses.

Plaintiff’s Evidence

7. PW1 was the plaintiff herself, one Lilian Janice Planpan. She adopted in evidence in-chief both her supporting affidavit to the originating summons and the further affidavit sworn on November 18, 2020 and filed on November 19, 2020. Her evidence was that she was the legal administrator of the estate of late Maua Chesoker who was her mother. She produced as P Exhibit 1 a copy of the grant of letters of administration.
8. In the supporting affidavit she deponed that the Land Parcel Numbers West Pokot/Kanyarkwat ‘B’/21 and ‘B’/26 were registered in the names of her late mother, Maua Chesoker and the respondents respectively. Further, that the parcels of land were adjacent to each other. That she had been born and raised on Land Parcel Number West Pokot/Kanyarkwat ‘B’/21 which extended all the way to River Murkong which formed the boundary between it and the neighboring parcel. Further, that the respondents’ occupation and use of their parcel had never crossed the river and that on her part she and the family of the deceased had been in notorious occupation and use of the land to the river for more than 70 years. She deponed further that she had been carrying out farming activities including cattle rearing on the land which measured approximately 33 Ha and on the land were her houses and



- indigenous trees. That after the demise of her mother on 8/12/2017 the respondents began trespassing onto the land across the River Murkong and cut trees down there and burning charcoal and claiming that the land was theirs. She wondered why the respondents never claimed the land during the lifetime of her mother.
9. She deponed that she went to the survey office to obtain a registry index map of the area only to find that it did not indicate the river Murkong as the boundary between the two parcels of land and that error on the map gave reason to the respondents to claim that the land beyond the river was theirs. She stated that the claim by the respondents over their land was an afterthought. She produced copies of the green card for the two parcels of land of which for parcel No 'B'/26 it was issued in 1984. She then deponed that the respondents cannot claim that land as theirs because their rights had since been extinguished by way and reason of adverse possession by her family. She prayed that the land her family occupied be curved off from 'B'/26 and be registered in the estate of the deceased Maua Chesoker.
 10. In the further affidavit she deponed that there was a dispute over the land in 2008 and when it was handled by the area chief in on February 8, 2008 the chief and the elders found in favour of the plaintiff's mother, particularly, that she was in occupation of the land and that one Loreng Todolima was not. She annexed to the affidavit and marked LJP 5 (b) a copy of the chief's verdict signed by all parties present including Loreng Todolima who thump-printed it as participant No 8. She deponed that the boundary being claimed by the respondents was put secretly by them without the knowledge of the deceased mother yet the river was the boundary. She then deponed that the survey the respondents referred to was the one confirming the secretly erected boundary. She said the river Murkong was mischievously and intentionally left out of the RIM by the respondents and her agents when it was being made. She maintained that she had been in quiet occupation for over twelve (12) years and that on February 12, 2017 the group ranch committee held the verdict that the applicant's land stretched all the way to the group ranch boundary, as per the minutes she annexed to the affidavit.
 11. Her further testimony was that the mother died on 08/12/2017, at the age of 94 years. Her late mother was the widow of her later father Polit Loliwale who died in 1975. PW1 testified that was the only child of the two deceased parents and was born on May 3, 1949.
 12. She stated further that the suit land lay between two rivers, namely, Kanyarkwat and Murkong and stretched all through to the boundary of the Kanyarkwat group ranch and all the way to the confluence of the two rivers.
 13. She stated that she and her parents had used all of the land uninterrupted, all the years since her birth. She testified that her family had erected some huts for workers who included her nephew who take care of the land and tend animals thereon on her behalf. She produced as P Exhibit 5 (a) and (b) photographs of the houses she referred to as huts.
 14. Her further testimony was that around March 2018 the defendants called her to go to a part of her parents' land and participate in a survey exercise thereof. That was when she knew that they were laying claim over a portion of it. She said, the people never claimed the land when her mother was alive. She attended the meeting with the surveyors in July 2018. It was then that she discovered that the surveyors were extending the boundary into her mother's land and she decided to raise a complaint with the county surveyor, one Mr. H. M. Lumwayi. When both she and the surveyor looked at the registry index map (RIM) the surveyor used then it showed the river Murkong was not shown on the map. It was upon that complaint that the Surveyor wrote, on January 24, 2020, that there was an error thereon. He indicated that for that reason there was a need to resurvey the land. She produced the letter as P Exhibit 6.



15. Her evidence was that on December 15, 2017 a meeting of the elders and other people had resolved that the land belonged to her family. She produced as P Exhibit 7 (a) and (b) the proceedings of the meetings that made the resolution. To her, it was upon that illegal entry that she sued the defendants and laid a claim to it by way of adverse possession because she had been using the land since time immemorial. She added that all her youthful memories lay on or were in the land and they should not be taken away by giving away the land. She urged the court to declare that the river Murkong was the proper boundary of the family land.
16. Upon cross-examination, she stated that she could not tell if by the time her father died the defendants were on the land. Her emphasis was that her family occupied the suit land and that the defendants only resided as neighbours bordering it. Her further evidence was that the defendants occupied the land on the other side of or beyond river Murkong while the plaintiff's family land stretched all the way to that river. She agreed with the learned defence counsel that she had not carried out a survey to show the size of the disputed land but stated that she knew it and it stretched all the way to the boundary of the group ranch.
17. She admitted that title deeds were issued in respect of parcels of land in the area in 1984. She stated that demarcation was done in 1975 and that by that time her mother did not have capacity to raise a complaint on anything wrong on their land. Her further testimony in cross-examination was that her family got their title deed in 1985 but she did not know where land parcel No 26 which measured approximately 69.0 Hectares stretched to except that it was bordered by the two rivers and the Ranch.
18. When PW1 was shown the RIM which she produced as P Exhibit 2, she stated that it did not show the continuation of the river Murkong as the position is on the ground. She admitted that there was no "brace" (a mark usually indicated on land maps to show that if the same parcel of land is crossed by a road it is connected) to show that their land stretched all the way to the river. She discounted the argument that, in terms of P Exhibit 6 which was the report by the surveyor, boundaries were confirmed as they were.
19. The plaintiff stated that the surveyor advised that whoever was not satisfied with his finding on that day he/she was free to seek justice since the RIM did not indicate the correct position on the ground. Regarding the developments on the land, she stated that the photographs, P Exhibit 7(a) and (b) showed clearly that they were on the plaintiff's land and the permanent house on them was on the upper part of her land.
20. Her further evidence in cross-examination was that Loreng (the 1st defendant) had never been on the land across river Murkong from his childhood and that he only moved there later after his father bought the land from then original owner. Asked about a dispute that ensued in the year 2008, PW1 stated that the issue then was that her father and Mr. Loreng's mother had committed adultery, and the elders resolved that if such an issue was truly confirmed, then according to Pokot culture, compensation was made by way of payment or a fine in terms of cattle and not ceding land. Her evidence was that after that issue was resolved that way, the said defendant did not pursue it any longer but waited until her mother died only for him to start laying claim over their (plaintiff's) land.
21. Upon being shown DMFI-1, a report by a surveyor in 2008, she stated that on 15/02/2008, the surveyor visited that land, made a report and erected a sisal boundary thereon but not posts as the report showed.
22. Lastly, in cross-examination, she stated that a meeting called by the area chief in 2019 to resolve the dispute ended in a shouting match. She admitted though that the report resulting from the said meeting of March 25, 2019, indicated that boundaries were put between the parcels of land by



- ancestors. She stated that she neither lost the case nor was she given the report. She reiterated that she protested what the participants in the meeting were purporting to convince her to agree to.
23. In re-examination PW1 stated that her family was never involved in settling boundary issues with the defendants'. She repeated her earlier evidence about the family huts being on their land and that when the defendants cut down trees on her land she considered it an encroachment and when she confronted him he ran away and instead put up a claim of adultery. He did not claim at the time that the plaintiff's land was the defendants'.
 24. PW2, one Chidon Lotunale gave evidence on how he got to know both the plaintiff and her late parents, Mr. Chesoker and mama Maua Chesoker. He stated that they were his neighbours, whose parcels of land were separated by a river (stream) known as Kanyarkwat Mongorion. He stated that the plaintiff's father owned the parcel of land in question. It stretched all the way from Kanyarkwat centre to Kamkai and to the Kanyarkwat group ranch. He stated that the land was not separated by anyone between it and the group ranch and that the plaintiff, Lillian Janice, used all of it. About the occupancy of the defendants in the area, he testified that the defendants occupied land from beyond the Murkong river. He stated that they did not occupy the land claimed by PW1. He said that the defendants' land did not cross the river Murkong to where the plaintiff's parcel was situate.
 25. Upon cross-examination he stated that he did not know whether both the plaintiff and defendants had title to the parcels of land they claimed. He admitted that one's registration of title was evidence of ownership. He then stated that he never had any dispute between the plaintiff's late father and mother and Mr. Loreng Nguriareng. He stated further that he was not present when the surveyor visited the parcels of land in question. He then stated that the defendants had since then moved onto and occupied the plaintiff's parcel of land, across the river (herein understood by court as river Murkong).
 26. PW3, one Jonia Karonei Kirwa, stated that he completed school in 1973. His evidence was that from 1974 to the date of giving testimony he was a resident of Kanyarkwat area. He adopted his witness statement dated November 17, 2020 as his evidence in-chief.
 27. In his written statement he stated that he was a resident of Kapkoi in Trans Nzoia West after moving from Kanyarkwat. In 1973 he was in that area. He used to work in the adjudication office in Kanyarkwat and he was among the people responsible for showing boundaries in 1974. He was among those who confirmed the plaintiff's father's land boundaries. He stated that it stretched all the way into Kanyarkwat group ranch. It was between two rivers, Murkong and Kanyarkwat. Further, there was no break of the land between where it starts to the ranch: there was no person between the plaintiff's father's land and the group ranch.
 28. Upon cross-examination, he stated that he used to work as a subordinate staff in the lands office in the area. At the time, he used to go for fieldwork with surveyors of West Pokot now West Pokot county. He testified that he was present when the demarcation of the parcels of land in issue was being done for purposes of adjudication. He stated that the survey office drew P Exhibit 2 which was correct map. He stated that he actually drew the map and he also did draw the defendant's land. After doing the demarcation, people were given 45 days to raise a complaint, if any, and none raised it. His testimony was that if no one appealed the adjudication committee's findings, it meant he agreed with its decision.
 29. On re-examination, he said his work was to "hold the rope" for the surveyors and they used to draw the sketches on a plain table. He stated that P Exhibit 3 was a tracing of a map but it was not the drawing he and the surveyors made of the parcels of land. He repeated that the plaintiff's father's land stretched from the top of the hill all the way to the bottom of two rivers Murkong and Kanyarkwat at their confluence and it formed a triangular shape.



30. PW4, one George Bartany, also testified, adopting his statement dated November 17, 2020 as his evidence in-chief. In the statement he stated that he was a resident of Kanyarkwat and knew the family of the plaintiff. Further, that the plaintiff was a daughter of the former area chief, one Porit Loliwale. He said the defendants were neighbours of the plaintiff but they lived beyond the river Murkong from as early as 1960s. He stated further that from as early as the 1960s the applicant's family had been using the land between the rivers Murkong and Kanyarkwat. Lastly, he stated that the defendants were children of the late Nguriareng who bought land from a Nandi person.
31. When he was cross-examined by learned counsel for the defendants, he stated that his home was about 3 kilometers from the land owned by Loreng Nguriareng, the 1st defendant. He too stated that he knew the plaintiff's parents from 1963 but for the defendant he did so from 1973. He admitted he knew both parties had title deeds to the respective parcels of land. He stated that about two years prior to the time of giving evidence he knew that there was a complaint that the defendants' land stretched into Chesoker's land. That was when the dispute arose but the parties had lived peacefully as neighbours all along.
32. PW5, one Lokoluga Lotunale who testified that his home was about two villages away from that of the defendants and stated that he knew them well. He adopted his witness statement dated November 17, 2020 in which he wrote that the defendants were his neighbours on the lower end of the river Murkong. The 1st defendant was his agemate. His written testimony was that the defendants stayed on the land bought by their late father. He stated further that the defendants had never occupied the land across river Murkong. He then ended the statement by saying that the land beyond the river Murkong which the defendants were now claiming to be theirs had been under use and occupation of the applicant's family.
33. He stated further that their land and that of the plaintiff was separated by river Murkong. His further evidence was that the plaintiff's land stretched from Kanyarkwat centre all the way to the confluence of the rivers Murkong and Kanyarkwat. He also testified that the plaintiff, Lillian Janice, had been using the entire land peacefully ever since he, as an individual, was born.
34. Upon cross-examination, PW5 stated that the plaintiff inherited the land from her later father. He, however, did not know its size. His further evidence was that the 1st defendant and family bought their land, by way of exchange of cows, from a resident who was of Nandi descent. His name was Arap Koskei. But he stated that he was not present when the sale took place. He too stated that he knew the parties had title deeds to the respective parcels.
35. His further evidence was that when demarcation took place he did not hear of anyone raising a complaint about their parcels and that since then the two families knew their parcels were separated by the existing rivers. He repeated that Lillian Janice, occupied the land now claimed by the two defendants and her workers resided on it, using it all the way to the river. He stated further that he knew she reared cattle on it. His evidence was that the late mother to the plaintiff at one time complained that the defendants had crossed the river onto her land and planted sisal on it. He then stated that he was not present when the land surveyor visited the land. Upon re-examination he stated that the plaintiff had built houses on the part of the parcel of land being claimed by the defendants and her animals grazed on it.
36. PW6, A. Aboth Lokoyer, adopted his witness statement dated and signed on November 17, 2020. In it he stated that he knew the Applicant's family and he used to stay with them since 1967. He used to tend the plaintiff's father's cattle on the disputed portion of land. The land in dispute was for Porit Loliwale, a former area chief. It lay between the rivers Murkong and Kanyarkwat. His further statement



- was the defendants had never crossed the river Murkong or used the disputed land. He stated further that he worked with the plaintiff's family until 1975 when the plaintiff's father died.
37. Orally, he stated that he had known the plaintiff's family since 1967 when he started herding cattle in the area. He stated that the animals he herded belonged to the plaintiff's father, the late Polit Loliwale, who was a former area chief. He too testified that the late Porit's land lay between the rivers Murkong and Kanyarkwat and stretched from their confluence all the way to the Kanyarkwat centre.
 38. He stated that the Loreng's (the defendant's) family never occupied the suit land and at no time did they do so. He repeated that it was Lillian's family that used the part of the land claimed by the defendants. Cross-examination of PW6 yielded no further evidence than that he used to work for the late Porit as a herder worker since 1967. He denied giving evidence due to his relationship with the late Porit's family.
 39. PW7, one Abraham Lotunale, also adopted his witness statement dated November 17, 2020. He wrote that he was a resident of Kanyarkwat sublocation of Kanyarkwat Location of West Pokot. Further, the plaintiff's land was adjacent to their family land. He stated that the defendant were neighbours to the plaintiff along the river Murkong. They never occupied or used the land beyond the river Murkong. It was the plaintiff's family that had been in occupation of the land after river Murkong which acted as a natural boundary between them and the respondents (defendants). He stated that he even used to graze his cows on the applicant's land after river Murkong which acted as a boundary with the defendant's land. Lastly, he stated that the defendants' claim over the plaintiff's land was an afterthought and false.
 40. He stated in oral testimony that he knew the plaintiff's father, the late Porit Chesoker, since his (PW7) childhood. He also knew the defendants and their families. His testimony was that the family of the plaintiff lived on the parcel of land separated by river Murkong while that of Loreng Nguriareng, the 1st defendant and his counterpart lived on the land across or on the other side of the river, and that that had been for a long time. His evidence was that the Chesoker family used the land all the way to the Murkong river for a long time and they had built on it. He also stated that the said family reared cattle on the land. He denied the claim of the Loreng family using the portion of the land they were now claiming from the recent past.
 41. On cross-examination, he stated that the boundary between the parcels of land was the river and that demarcation was done in 1974. He admitted that both parties in the suit had title to the land. His evidence was that there had never been a challenge regarding the map or titles. He stated how he learnt in that recent past the claim that the Loreng Nguriareng family was claiming the portion it now lay claim to, and it was shocking to him. He admitted that he had never heard anyone challenging the RIM and even the acreage of the parcels of land.
 42. On re-examination he stated that the plaintiff's and the defendants' families' parcels of land bordered each other. He reiterated the fact of the defendants' family having bought their land from a person of Nandi descent while the plaintiff's late father had his land demarcated and given to him during adjudication and that the former bought land way after adjudication. He also repeated the fact of the plaintiff's family using exclusively the disputed land. With that, the plaintiff closed her case.

defendants' Evidence

43. Thereafter, the defendants tendered their evidence, with the 1st defendant starting with his evidence as DW1. He adopted the facts he deponed in the Affidavit he swore on June 4, 2020. In it he did not dispute that the plaintiff was the legal administrator of the estate of the late Maua Chesoker who died on December 8, 2017. He deponed that he was the legal owner of land parcel No West Pokot/Kanyarkwat 'B'/26 whose official search he annexed to the Affidavit and marked as LN1. He stated that



he did not have any boundary dispute with the plaintiff's parents until after their death on December 9, 2017 when it erupted.

44. He then called for a survey which was done on July 12, 2018 and a sketch map of the two parcels of land, namely No 'B'/26 and 'B'/21 was drawn and it showed that there was no boundary issue between the parties. He annexed a copy of a letter inviting all parties to the survey and a copy of the list of people who attended the survey as LN 2(a) and (b) respectively. He said the plaintiff resided on parcel No 'B'/21 and had developed it. Specifically, at paragraph 14 he deponed that the issue of the boundary had been fixed on July 12, 2018 when the surveyor visited the land and carried out his exercise, confirming it as it was set by the forefathers, hence the prayer was overtaken by events. He stated that he had been on the land for a long time until 2017 when the dispute arose. He deponed that the applicant has instituted succession cause no 8 of 2018 in Kapenguria law courts which he successfully defended. He denied the fact of river Murkong being the boundary between their parcels of land, and that the complaint about the boundary between them was heard by land registrar and was determined. He also swore that the plaintiff's claim for adverse possession could not succeed as she had parcel No 'B'/21 registered in her name.
45. He produced as D. Exhibit 3 a letter dated April 15, 2020 addressed to him by the assistant county commissioner forbidding him to sell or build on land parcel No West Pokot/Kanyarkwat 'B'/26 (herein referred to as 'B'/26). He also produced as D. Exhibit 4 a certificate of official search of the parcel of land. Both documents showed that he was the registered owner of the land together with the other two defendants. He stated that its approximate size was 69.0 Hectares, and it was registered in 1974 but title thereto was issued in 1984. He also produced as D. Exhibit 5 a copy of a certificate of official search for parcel number West Pokot/Kanyarkwat 'B'/21 (herein referred to as 'B'/21). He gave evidence that when the issue was presented before the area chief his verdict was that Parcel No 'B'/26 belonged to him and that the chief stated in a letter he marked as DMFI-2 that the boundaries remain as their parents had fixed.
46. His further evidence was that when the Surveyor visited the ground he stated that the land was his. He produced the surveyor's report as D. Exhibit 1 and a letter dated January 24, 2020 written by the surveyor as D. Exhibit 6. The letter indicated that since the river (which the court came to know by way of parties' evidence as Murkong) was not shown the RIM was to be redrawn. He stated that even if that was to be done the land would remain his and that the river should not be used as the boundary. His evidence was that the boundary was erected in 1971 using sisal plants and not the river.
47. When he was asked about the map produced as P Exhibit 2, DW1 stated that the same showed the proper drawings and boundaries of the parcels of land in issue. He denied the fact of the plaintiff using the disputed parcel of land. He stated that he resided on it and ploughed part thereof. He then stated that PW2 misled the court. He admitted the evidence of PW4 that both his parents and those of the plaintiff had a boundary dispute before but denied PW5's testimony that the river (Murkong) should form the boundary of the two parcels of land. He discounted the evidence of PW7 since he was not an immediate neighbour to them. He admitted that the Map would show the truth rather than oral evidence and then prayed for the dismissal of the plaintiff's case.
48. Upon cross-examination, he stated that his and the plaintiff's parents erected the boundaries in 1971 and land parcel No 24 bordered the suit land. He gave the plaintiff's correct names and added that the parcels of land were demarcated as shown on P Exhibit 2 (the RIM). He denied the plaintiff's mother's land stretching to the Kanyarkwat group ranch. He stated, however, that he did not know if the plaintiff's father owned land in the Group Ranch.



49. He testified that he farmed on the land and had taken photographs of houses he had erected on it. On being asked about the photographs produced by the plaintiff as P Exhibit 5 (a) and (b), he stated that they were on Chesoker's (meaning plaintiff's father's) land. He then stated that the houses used by the workers of the plaintiff were (built) on the plaintiff's portion of land and not his. He stated further that in 2018 he called a surveyor who visited the land to dispel the claim by the plaintiff that her land stretched onto his. His evidence was that the plaintiff began claiming the portion of land as hers after her (the plaintiff's) mother died. His version of the facts was that his land stretched all the way to the group ranch land and it was initially owned by his late father.
50. DW1's evidence was that his father never bought land from anyone. He admitted, however, that whenever the plaintiff went to the group ranch he knew she passed through the land. He denied, however, her use of the land.
51. On re-examination he agreed that he did not know the activities that took place at the group ranch. But he denied knowledge of the fact of the plaintiff's family owning land in the Ranch.
52. The defendant called DW2, one Lonyalio Lotunale Luitaruko, who adopted his witness statement which was dated July 7, 2022. In his written statement he stated that he had resident at Kanyarkwat since 1956 and he knew both parties as the daughter of Maua Cheseker and the sons of Nguriyang Kaptulwo respectively. He wrote that he knew that the 1st respondent/defendant owned the parcel of land West Pokot/Kanyarkwat 'B'/26, measuring 69.0 Ha. He stated further that he was a member of the elders' committee whose duty was to establish boundaries of the individual in the area. That in 1971 they established boundary of the 1st defendant/respondent's Land, using sisal plants. He participated in the establishment of boundary of the land belonging to the deceased, Maua Chesoker. He also stated that he knew that the defendant had been using the suit land since 1971.
53. Further, he wrote that the boundaries of the suit land were confirmed by the land survey, West Pokot, in 1972 in presence of all owners. That was after the Chief then, issued notices that the land be surveyed and the boundaries be confirmed. At the time the elders' committee was formed and he was one of the members. The committee established the boundaries of the lands of all individual staying at Kanyarkwat. He said that the surveyors used as a guide the boundaries established by the elders. Lastly, he stated that since then people had stayed peacefully until recently is when he was surprised that the plaintiff was complaining about the boundaries and also claiming for adverse possession and yet she had not been in possession of the suit land nor utilized the same.
54. On cross-examination, he stated that he knew the plaintiff and her father, the late Chesoker, and her late mother whose name he could not recall. Although on his part he was allocated his land in 1974, he did not recall its parcel number. He stated that he was part of the team that demarcated the parcels of land in 1971 and had been a resident of the area from an earlier time than 1956 as indicated on his national identity card. His evidence was that the year 1956 indicated on the identity card was not correct: he was older but just indicated that way.
55. His stated that the plaintiff's late father was present when the land was demarcated. He also stated that there were persons who owned land both in the group ranch and outside. To him, neither the plaintiff's late father nor the 1st defendant owned land in the ranch. He stated further that he went round the plaintiff's father's parcel of land with the plaintiff's father when his land was being demarcated and boundaries were fixed in 1971. He was part of the elders who showed boundaries then. He said he was not an immediate neighbour to both parties. But he stated that there was no river that passed through the defendants' parcel of land. He repeated that he had never seen a river passing through Nguriang's



- parcel of land. He stated further in cross-examination that the plaintiff's family lived on their parcel of land and not the defendants'.
56. In re-examination he stated that when fixing the boundary, they did not use the stream to mark the two parcels of land.
 57. DW3, Kachapin Longura, adopted as his evidence in-chief the witness statement he wrote on July 7, 2021. He stated that he resided in Kanyarkwat since 1956. In his witness statement he stated that in it he stated that he was a resident of Kanyarkwat since 1956 and knew the parties as residents of Kanyarkwat. He knew the defendant as his neighbour and a son of Ngoriayang Kaptulwo. He wrote that the plaintiff stayed at the upper side while the defendant stayed on the lower side and that their parcels of land were separated by a boundary at the lower side. He stated that the defendant has stayed on the suit land since he was grazing cattle on the suit land. Further, that he witnessed when the elders established boundaries of the lands belonging to the parties in 1971 and nobody complained about the boundaries.
 58. He stated that even in 1972, he was present when the land surveyor visited Kanyarkwat area to confirm the boundaries and nobody complained about them. Since then they had been staying peacefully until recently when the plaintiff raised a complaint over the boundary of the suit land and that the land had been in use by defendant for farming and cattle grazing. He prayed for the dismissal of the claim for adverse possession by the plaintiff. He stated further that the plaintiff had never stayed at Kanyarkwat area, until the recent period after the death of her mother that she inherited the land and started appearing in the area.
 59. In cross-examination he stated that he was a neighbour to the defendants. His parcel of land was 'B'/22. The defendants inherited their land from their father who was the initial settler thereon. His further evidence was that by 1956 he was old enough to know what was taking place, boundaries were marked in 1971, he saw that take place between the plaintiff's father and the defendants', and he used to herd cattle then. Although he was not one of the elders then, he went round the parcels of land as the boundaries were pointed out.
 60. He too stated in cross-examination that there was no stream that passed through Nguriareng's parcel of land. He stated that there was a stream known as Mungorion, passing through the land. He stated that other people such as Lokuko were given land in the group ranch but the late Porit was not. His evidence was that the 1st defendant grazed cattle and planted maize on the disputed parcel of land and that he had built on it. In re-examination he stated that there was a seasonal stream that passed through Nguriareng's parcel of and only the 1st defendant used the disputed portion but not the plaintiff.
 61. DW4, Limangor Ngiruye, born in 1963 and he too a resident of Kanyarkwat, adopted his witness statement as evidence in-chief. He stated he knew the defendants' parcel of land well and he identified it on the RIM, P Exhibit 2. He stated that there was a small seasonal stream that passed through the land. In his witness statement, after giving his postal address, he stated that he was the son of Lokuko Limangor, resident of Kanyarkwat and a neighbor to Loreng Nguriayang, the 1st defendant. He stated that the insult (sic) land belong to Loreng Nguriayang and its boundaries had been fenced by the sisal.
 62. He denied the claim that the suit land belonged to Lilian Janice Plapan. He give the specific location of Loreng Nguriayang's land as lying between the boundary of Limangor Ngiruye.
 63. His written statement was that the suit land was claimed by Lilian but later the boundaries were confirmed by the land survey, West Pokot, in 2018.



64. His further statement was that before the elders and the land survey came to establish the boundaries, individual used to own land but then a meeting was held by the chief's and elders. It was resolved that land be surveyed and boundaries be confirmed. Surveyor came to confirm the boundaries and all individuals were present then. Since then they had stayed peaceful until recent is when he was surprised that the plaintiff was complaining about the land and yet she has not been in the possession of it.
65. On cross-examination, he admitted that at the bottom end of the two parcels of land was the group ranch. On the left side of the land belonging to the defendants (Nguriareng's) was river Mongorion as one viewed it from the group ranch. On his part he had land in the group ranch while the defendants' father was given land in the rural area and not in the ranch. His evidence was that the 1st defendant had erected a fence on the land, grazed thereon and had built a house. He stated that the plaintiff never used the disputed portion of the parcel of land. He was old enough in 1971 when boundaries were fixed. But the court doubted whether at 9 years he was old enough to tell what was happening then.
66. On re-examination he stated that in 1971 when the boundaries were fixed he was herding cattle.
67. At the end of the witness' testimony, both learned counsel agreed to produce the document marked as DMFI-2, the report by the office of the chief, Kanyarkwat Location, dated 25/03/2019, on the land dispute between the plaintiff and 1st defendant, as D. Exhibit 2. It marked the close of the defence case. The parties submitted on their respective cases and let the court to retire to write the judgment herein. During the preparation of the judgment it turned out that from P Exhibit 3, the plaintiff had sued only two persons yet the extract of title, the green card showed three names.
68. Due to that the parties agreed to reopen the cases, the plaintiff to amend the originating summons and serve the missing proprietor and once he was added, he could adduce evidence if he so wished and cross-examine any parties and witnesses he so wished. The amendment and service were done. After that the 3rd defendant entered appearance dated January 9, 2023 on January 11, 2023 through the other defendant's advocate. He did not file any other document thereafter.
69. But on January 18, 2023, learned counsel for him informed the court that he relied entirely on the defences and evidence of the other defendants and did not wish to cross-examine the parties. He prayed that the cases of the parties be closed. Learned counsel for the plaintiff too prayed that the cases be close.
70. By virtue of sections 13(1) and 19(1) of the *Environment and Land Act* which provide for rules of evidence and procedure not to be necessarily followed word for word in handling the disputes of land, this court once more closed the two cases. Then the parties relied on the submissions they had filed earlier.

plaintiff's Written Submissions

71. The plaintiff summarized her submissions through learned counsel. She stated in summary that her evidence was that she brought the suit on behalf of her late mother, one, Maua Chesokor who died on December 8, 2017. Her late mother had been married to her later father Polit Loliwale who passed away in 1975. By the time of his death he was the area chief of Kanyarkwat Location wherein he owned the suit land which measured approximately 47 Hectares, which was registered in the name of her late mother. She produced as P Exhibit 1 the grant of letters of administration to the estate of her deceased mother. She reiterated that she had adopted as her evidence the contents of two affidavits she swore on April 27, 2020 and November 28, 2020.
72. She produced as P Exhibit 2 the Registry Index Map (RIM) in respect of which the parcel of land was referenced. She also produced P Exhibit 3-7 to support her case. She then stated fact of having occupied the portion of the parcel of land in question since the 1970's but more so from 1984 when



the defendants got registered as proprietors of the land. She submitted further that her late mother's and the family's occupation of the portion of the land had been quiet and uninterrupted, leading to the acquisition of the same by adverse possession as prescribed by law.

73. She relied on the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR wherein the Court of Appeal set down the criteria for a successful claim of adverse possession and the case of *Mate Gitabi v Jane Kaburu Muga & 3 others* [2017] eKLR, which repeats the same principles. They also cited the Court of Appeal case of Civil Appeal No 42 of 1987 between Peter Thuo Kairu (appellant) and Kuria Gacheru (respondent) from the judgment of the High Court of Kenya at Nairobi (shields J) dated December 11, 1986. The plaintiff prayed for the reliefs she set out in the originating summons.

Defendants' written submissions

74. The defendants filed submissions dated July 15, 2022 on the same date. They summarized the pleadings, the reliefs sought, their answer to the pleadings and their prayers. They then summarized the evidence of both the plaintiff and theirs. In their summary, they stated that the plaintiff testified that she sued the 1st defendant because he had sought to realign the boundary between her mother's land and his and in so doing she asserted that her land stretched all the way to the River Murkong while his land actually was correctly marked by the boundary shown on the RIM, P Exhibit 6. They then challenged the plaintiff's move to claim adverse possession of the portion in issue after her mother's death in 2018 and read sinister motive in it.
75. They restated that for the reason that the plaintiff's testimony in cross-examination was that she was not aware of the existence of the title deeds her evidence should be rejected. They also relied on the evidence of PW3 who stated that during the adjudication process, the RIM was drawn as it was and no one ever complained about or went on appeal. They also stated that PW4 gave evidence that there was no dispute between the parties' parents from 1963 when he knew them as neighbours to the time of the instant suit. On that score the defendants submitted that the plaintiff had failed to prove her case for adverse possession.
76. They then summed up the defence case and evidence. They restated that the defendants and the plaintiff's mother or parents did not have a dispute over the portion of the land until December 12, 2017 when they request for survey and the officers confirmed the boundary as it was on the RIM. Further, they stated that the fact that the 1st defendant testified that the plaintiff resided on Parcel No 'B'/21 and not 'B'/26 and that he had been using the latter portion showed that the plaintiff had not proved her case. They stated that the defence evidence showed that the defendants are the ones who used the entire Parcel 'B'/26.
77. They reiterated the evidence of DW2 whom they said that he testified that the boundary between the adverse parties lay at the point shown on the P Exhibit 6 and not the river Murkong. They also relied on the evidence of DW3 whom they stated that he testified that the 1st defendant's animals grazed on the entire Parcel Number 'B'/26. They also relied on DW4's evidence to support that fact. Furthermore, they relied on the case of *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR as cited in Civil Appeal No 164 of 2011, *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR and Nairobi Civil No 283 of 1990, *Gabriel Mbui v Mukinda Maranay* [1993] eKLR. They urged the court to reject the plaintiff's claim and dismiss it with costs to the them.

Issues, analysis and determination

78. I have given due consideration of the pleadings herein together with the evidence of the parties and their submissions. I have also taken into account and applied both statutory and statute law on the



matter before me. The parties did not formulate issues herein. I am of the learned opinion that the issues in this matter, once identified, are simple and straightforward, subject to the analysis of the law and application of the evidence thereon. Therefore, the issues that I have to determine are:-

- (a) Whether the plaintiff proved her claim for adverse possession of the portion of land in issue.
- (b) What order to issue and who to bear the costs of the suit.

79. Regarding the first issue, that is to say, whether the plaintiff proved her claim for adverse possession of the portion of land in issue, the burden lay on her adduce evidence to satisfy this court on whether or not she had established the claim. The burden rested entirely on the plaintiff to do so. This is by virtue of section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. At no point in time has the law on adverse possession shifted that burden to the defendants to disprove the claim. The defendants need not adduce evidence as long as the plaintiff has not discharged that burden. The court would still dismiss the case if the plaintiff's evidence were not sufficient in the circumstances. But her obligation regarding the proof is not as high as that in criminal cases: it is only on a balance of probabilities.
80. The law regarding adverse possession, though always frowned upon, regarding its basis and application, by reason of commencing on illegal or unauthorized occupation of one's land and thereby acquiring ownership thereof, is still good law in Kenya. It is encompassed in our (Kenya's) statutes and hallowed in our courts and practice. After all, since it has a good foundational basis in the property origins of antiquity, it is applicable in Kenya today as it was when it was introduced.
81. In England, the latest position on adverse possession may be summarized, as given under sections 96-98 of the *Land Registration Act*, 2002 (<https://www.legislation.gov.uk/ukpga/2002/9/data.pdf>) and schedule 6 of the *Act*, that the claimant of adverse possession, should give notice to the owner, after being on the registered land for at least ten (10) years, that he/she intends to exercise his right at the end of the twelve (12) year period. Then the owner shall have the opportunity to object to the land being taken by the adverse possessor and the objection is basically as good as successful unless the prospective adverse possessor brings himself within the conditions stated in the schedule.
82. Before I proceed further, I must say two things here. First, my view is that though the position of the law in England has since tended to mitigate the pain and agony caused by the process of acquisition of land by adverse possession, it does not cleanse the tainted genesis of such a claim which is that the prospective adverse possessor began the journey thereof from a point of a manner other than what this court may term as the lawful ways of gaining title to land. After all, if not so, why then would criminal law punish a party for forcible detainer? It should as well leave occupation of land, whether illegally or otherwise, to the realm of civil law only!
83. Second, the position in England as contained in the change of law since 2002 is not applicable in Kenya and I will not by any stretch of imagination apply it. The position in Kenya is clear, no notice is required to be given to the owner of the land about the intention of the adverse possessor to own his land by virtue of being on it. Without stating that the position in England is good, since it was informed by a lot of history and discussion, it may be appropriate for the legislature in Kenya to rethink our (country's) position and give better parameters to ameliorate the problems occasioned by such a process. It is time it did so. Until then, this court shall rely on the law as it is and apply facts thereto appropriately as I do hereunder.
84. Thus, the law on adverse possession in Kenya is laid down in various statutory provisions in both the *Limitation of Actions Act* and the *Land Registration Act*. These include sections 7, 13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and section 28 (h) of the *Land Registration Act*.



85. section 38(1) of the [Limitations of Actions Act](#) provides for a case where a “person claiming to have become entitled by adverse possession to land registered under any of the acts may apply to the High Court for an order that he be registered as the proprietor, in place of the person then registered as proprietor of the land.”
86. Following the enactment of the Environment and Land Court (ELC) in Kenya, by virtue of article 162(2)(b) of the [Constitution of Kenya, 2010](#), this legislature thought it wise be clear on whether or not the [Civil Procedure rules, 2010](#) are application in the Court. The Court which is defined under section 2 of the [Environment and Land Court Act](#), Act No 19 of 2011 is established under section 4 thereof and its jurisdiction provided for under section 13. It is now no longer in dispute that following the establishment of the court, and by virtue of section 19(2) of the [Act](#), the [Civil Procedure rules, 2010](#) are applicable in the court hence they lay down the general procedure to be followed by the court.
87. order 37 rule 7 of the [Civil Procedure rules](#) provides for the procedure of making a claim for adverse possession. rule 1 stipulates that the Application which is to be made under section 38 of the [Limitation of Acts Act](#), Chapter 22 of the Laws of Kenya shall be by originating summons. Rule 2 is to the effect that the originating summons should be supported by an affidavit to which the applicant must annex an extract of the title in question.
88. Before examining the import of section 38 of the [Limitation of Actions Act](#) worth starting with is the import of section 7. It 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.”
89. The provision means that, in Kenya, the person intending to claim for adverse possession has to cross his fingers for a continuous period of twelve (12) years of being in possession of the land that is not his before he moves the court that he has firmed title that is adverse to that of the legal owner. Any other person who is not an owner thereof cannot be sued and even if he is on the land, a suit against that one cannot succeed in passing title by way of adverse possession to the claimant.
90. It would appear that at the end of that period, even if the adverse possessor has not moved the court for orders accordingly, the owner cannot now claim the land back. I say so because by use of the textual interpretation of the statute, section 17 of the [Act](#) provides as much. It stipulates that “Subject to section 18 of this Act, at the expiration of the period prescribed by this [Act](#) for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.” section 18 refers to recognition of equitable interests on the land. That being the case, the period specified under the Act for recovery of land is that which section 7 provides for, which is 12 years. In my view, and put differently, if the owner moves the court to recover his land after the expiry of the period prescribed, the doctrine of *estoppel* kicks in: he will be estopped by law from doing so, and the person in adverse possession can raise a defence of limitation of the action or put differently the person in possession adverse to the owner can raise the defence of ‘estoppel by law’.
91. I am aware that such a type defence is not in existence among the conventional types of estoppel and so it should not be taken to literary men so hence the quotes. What I mean is that the adverse possessor could stand with a shield against such a claim by the owner and tell him that the law stops you from claiming this land back.
92. The adverse possessor can sit pretty at the expiry of that period and do anything on the land as through he is the actual owner. But to the extent that he has not been declared owner, he may not be in a position



to do certain things on the title, not for reason of now being 'owner' but for lack of proper documents. He may for instance, not present the as security for a loan since he does not have title documents.

93. As this court stated in *Kangethu (Suing as the Personal Representative of the Late James Kangethu Njoroge) v Public Trustee as the Administrator of the Estate of Giovanni Theodore Sovic (Deceased) & 3 others* (Land Case 73 of 2017) [2022] KEELC 3985 (KLR) (29 July 2022) (Judgment);

“The totality of the import of the provisions is that a person claiming to have ownership of the land will lose it if another has adverse possession thereof, and that period prescribed is a minimum of 12 continuous years. And the owner loses the right to claim it if the period lapses because his interest is extinguished by facts firming the law.”

94. In *Gabriel Mbui v Mukindia Maranya* [1993]eKLR it was observed that the principles on adverse possession have now been settled. They are that (i) one must have been in continuous and uninterrupted possession of the land for at least 12 years (ii) the possession has been open and notorious to the knowledge of the owner (iii) the possession must be without the permission of the owner; and (iv) the plaintiff ought to have asserted a hostile title to the owner of the property. This is the same principle repeated in the Latin Maxim *nec vi nec clam nec precario* which means, not by force, not by stealth nor by the permission of the owner.

95. In *Abdulkhalil Mohamed Abdulkhalik Mazurui & 2 others v Josiah Kafuta J Mtila & another* [2021] eKLR, the Court of Appeal held that,

“The burden of proving adverse possession lay with the 1st respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1st and 2nd appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario* Or, as Lord Hoffmann put it in *R v Oxfordshire County Council ex p. Sunningwell Parish Council* [2000] 1AC 335 at 350, 'not by force, nor stealth, nor the licence of the owner'. See also *Kimani Ruchine v Swift Rutherford & CoLtd* [1980] KLR on this point.

A claim of adverse possession can only be maintained against a registered owner, as set out in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR, and time as envisioned under section 7 of the *Limitation of Actions Act*, can only run against a registered owner.”

96. In *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR the Court of Appeal stated that:-

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years.”

97. In *Public Trustees v Wandura* 1984 KLR 314 at 319 Madan J stated 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.”

98. In the instant case, it is not in dispute the that plaintiff is the legal administrator of the estate of the Later Maua Chesoker, who died on December 8, 2017. It has also been established in evidence that the



three defendants are the registered owners of land parcel No West Pokot/Kanyarokwat 'B'/26 which measures approximately 69.0 Ha. Further, there is no dispute that the suit land is that portion of land being part of the said parcel of land registered in the name of the defendants but lies between the boundary thereof as shown on the RIM, produced as P Exhibit 6 and the river known as Murkong, and stretching all the way to the confluence of the river and that known as River Kanyarkwat, which borders the Kanyarkwat group ranch.

99. PW1 testified, and her evidence was supported by that of PW2, PW3, PW4, PW5, PW6 and PW7. She testified both through the affidavits adopted as evidence and her oral testimony that the portion of land in issue is a part or section of all that part of Land Parcel No West Pokot/Kanyarkwat 'B'/26 (once again, referred to herein as 'B'/26) which is registered in the names of the three defendants, as shown in the extract of title, produced as P Exhibit 4, since February 2, 1984. The evidence was that the portion of the land is that which lies between the boundary shown on P Exhibit 6 as between land parcel numbers 'B'/26 and 'B'/21 and the River Murkong. The evidence was that the said river was not shown on the map but which PW1 and DW1 together with their witnesses PW1-7 and DW1 confirmed exists on the ground. The registration is of 'B'/26 in the defendants' names is evidenced by P Exhibit 4 and D Exhibit 4 while 'B'/21 in the name of Maua Chesoker, the plaintiff's mother is evidenced by P Exhibit 3 and D Exhibit 5. The extract of title to 'B'/26 was the one produced in evidence as P Exhibit 4.
100. The question that the court asks is, are the principles in the Mtana Lewa (supra) case and the other cases cited on adverse possession satisfied in this case? First, I wish to state that the dispute herein is on an almost triangular part of land parcel number West Pokot/Kanyarkwat 'B'/26 all of which is in the names of the three defendants herein. It would appear, and it is common evidence that the dispute arose soon after the death of the plaintiff's mother on December 8, 2017. According to the plaintiff and her witnesses, it was soon after that that the defendants encroached her parcel of land and brought in surveyors to come and show where the boundary lay that she discovered that they wanted to take her land, being the disputed portion. According to the defendants, it was soon after the demise of her mother that the plaintiff started laying claim on their portion of land which is now the suit land. On the one hand, the plaintiff averred and testified that she had been on the portion of the land since time immemorial and that it was where her childhood memories lay. On the other hand, the defendants averred and testified that the plaintiff had never resided on the parcel of land and that instead the 1st defendant was using the land since 1970s by grazing on it and recently farmed on it.
101. With the above contending issues, it required the court to weigh carefully the evidence on record to find out who of the parties produced credible evidence to the required standard of proof. I have carefully weighed all the evidence of the parties, beginning with the plaintiff's own and that of her witnesses, and that of the defendants and their witnesses.
102. I find that the totality of the plaintiff's evidence is consistent and more believable than that of the defendants and makes this court to find that the plaintiff's claim succeeds for a number of reasons. First, all the plaintiff's witnesses were clear and consistent as to the extent of the parcel of land which the plaintiff claimed as her own and used all along. They stated that it stretched from the road all the way to the two rivers, Murkong and Kanyarkwat to the confluence of the two. Not only did they state that the plaintiff had been continuously using the land including the portion registered in the name of the defendants but lying beyond the River Murkong, but that she had even built on the land and has caretakers on it, and that the defendants had never occupied the land beyond the river or crossed the river Murkong.
103. Again, she proved that she had trees growing on the land and that these were some of the ones which were cut down by the 1st defendant and the plaintiff considered it an encroachment. The photographs produced by her as P Exhibit 5(a) and (b) showed structures or houses which she emphasized were



- built by her on the disputed portion of land and were in use by her caretakers. These were confirmed to be the position by PW6 who testified that he knew the family well and had tended their cattle on the disputed portion of land since 1967 to 1975 when the plaintiff's father died. The defendants did not at all claim to have or show any physical structure built by them on the disputed portion of land or even any trees planted by them on it. All they claimed was that they grazed animals on it. There was no further evidence than those oral statements.
104. Even the evidence by DW3 that the 1st defendant, besides claiming to graze on the land claimed by the plaintiff, had built on it was not supported by any evidence by the defendant apart from claiming so but without any documentary support. Besides, the letter about the surveyor visiting the ground in 2018, did not support any evidence of his house or houses being on the disputed land.
 105. Again, the evidence of DW4 which in his statement was to the effect that the suit land was claimed by Lilian but later the boundaries were confirmed by the land survey, West Pokot, in 2018, meant that as at 2018 the surveyor was the one who 'confirmed' the boundaries and it must have been contrary to the position as was on the ground as was claimed and stated by the plaintiff.
 106. Thus, all these facts analyzed above, when compared with those of the plaintiff's affidavits which were backed by other evidence to support them, did not convince the court as being truthful on the part of the defendant's evidence. Actually, that which the defendants and their witnesses did was merely to deny the plaintiff's claims and evidence. The defence evidence is not sufficiently convincing as to dislodge the prove the plaintiff has made of her claim on a balance of probabilities.
 107. Lastly, and again, if indeed the plaintiff was not rightly on the suit land, nothing could have been easier to pray for than that the plaintiff be evicted from their land. The 1st defendant stated that it was the plaintiff who claimed the land after the mother's death. But from the evidence, produced as D. Exhibit 2 being the letter from the Chief about the dispute in 2019, D. Exhibit 3 being the letter of warning to the 1st defendant from the assistant district commissioner, and D. Exhibit 1 being the county surveyor's report on boundary alignment, it is clear that the defendants had used the administration to try and align the boundary between them and the plaintiff.
 108. Moreover, in my humble view, if the physical use and occupation of the land parcel No 'B'/26 had all along before 2017 been according to and where the boundary is shown on the RIM (P Exhibit 6) then there was no need for the defendants to call on the surveyors to come and try to align the boundary. It goes without saying that the defendants must have realized that the RIM showed the boundary as being at a different position on the ground and called on the surveyor to come to the ground and align the boundary, and that was what was done in 2018 of thereabouts. In any event the RIM was incorrectly done as to not show the existence of the river Murkong. Again, the evidence of the defendants revolved around the fact that the boundary between the two parcels of land in question was fixed by the ancestors hence to be used for determining whose land was in issue yet the plaintiff's claim was that she and the deceased's family had occupied and used the parcel of land all the way to the river Murkong and to the Kanyarkwat group ranch for over 70 years to the exclusion of the defendants and their servants and or agents. These facts, the court finds that the plaintiff proved. Again, the evidence of the defendants and cross-examination of the plaintiff's witnesses by the defendants was more over ownership of land parcel No West Pokot/Kanyarkwat 'B'/26 rather than the dispute of adverse possession.
 109. Lastly I find that the plaintiff has proved on a balance of probabilities that she and her family have been in continuous, open and uninterrupted hostile occupation of the portion of land lying between the boundary line shown on the RIM as between West Pokot Kanyarkwat 'B'/26 and West Pokot/Kanyarkwat 'B'/21 and the natural feature known as river Murkong all the way to the confluence of



the said river with the one known as river Kanyarkwat for over a period of twelve (12) years, being from the 1960s and even after registration of the titles was done in 1984, and is thereby entitled to the reliefs sought.

(b) What orders to issue and who to bear the costs of the suit

110. The plaintiff's claim has succeeded. I therefore enter judgment for the plaintiff against the defendants jointly and severally as follows:-

- a. A declaration be and is hereby issued that the estate of the deceased herein has obtained by way of adverse possession the disputed portion of land lying between the boundary shown to be existing between land parcel No West Pokot/ Kanyarkwat 'B'/26 and West Pokot/Kanyarkwat 'B'/21 and the river Murkong and stretches to the Kanyarkwat group ranch, which portion forms part of West Pokot/Kanyarkwat 'B'/26.
- b. A declaration is hereby issued that the portion of land after river Murkong forming part of Land Parcel No West Pokot/Kanyarkwat 'B'/26 whose acreage is to be ascertained by way of survey by the county surveyor in charge of West Pokot county be curbed from the said title and transferred to the estate of Maua Chesoker (deceased).
- c. A permanent injunction be and is hereby issued forthwith restraining the respondents, their agents and/or those claiming under them from trespassing onto the suit land stretching from River Murkong to the boundary between the parcels of land, namely West Pokot/Kanyarkwat 'B'/26 and West Pokot/Kanyarkwat 'B'/21, all the way to the boundary of Kanyarkwat Group Ranch.
- d. Costs of the suit.

102. orders accordingly.

**JUDGMENT, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
22ND DAY OF FEBRUARY, 2023.**

HON. DR. //IURFRED NYAGAKA

JUDGE, ELC, KITALE.

