Lomormoi v Lubusi (Environment and Land Appeal 1 of 2021)
[2023] KEELC 778 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 778 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 1 OF 2021

FO NYAGAKA, J

FEBRUARY 15, 2023

BETWEEN

KAMECHWA LONGURA LOMORMOI ..... APPELLANT

AND

LUBUSI LUVUBI ALIAS STEPHEN LUBUSI AMBAKO ..... RESPONDENT

(Being an Appeal from the judgment of the Senior Principal Magistrate (S.K. Mutai) in Kapenguria SPMC Land Case No. 23 of 2019 delivered on 12/01/2021)

JUDGMENT

The Background

1. The Appellant being dissatisfied with the judgment of the trial court delivered on January 21, 2021 in Kapenguria SPMC Land Case No 23 of 2019, preferred this appeal against it. The brief background of the suit is that on August 2, 2019, the Plaintiff in the suit, who is now the Appellant, filed the case against the Defendant. He did so by a Plaint dated July 29, 2019. By it, he sought eviction orders against the Defendant, his agents and/or servants from all that parcel of land known as West Pokot/Keringet 'A'/1413 (herein referred to as the suit land, and the removal of a caution allegedly unlawfully registered on the suit land, the costs of the suit and interest thereon and any other relief this Court would deem fit and just to grant. The land parcel in question is situate in West Pokot County. The suit was based on the allegations that the plaintiff was the registered proprietor of the suit land and that in or about January, 2017 the defendant trespassed onto his land and hurriedly began to erect informal structures thereon, and the plaintiff tried to stop him in vain.

2. Upon being served with Summons to Enter Appearance the Defendant filed an Appearance and Defence and Counterclaim dated August 22, 2019 and September 6, 2019 on August 23, 2019 and September 9, 2019 respectively. In the Defence he denied each of the allegations and particularly that the Plaintiff was the rightful owner of the suit land and that he (the Defendant) was illegally in

occupation thereof and went on to aver that he entered the suit land after lawfully purchasing it from the late Cosmas Pkerkor Oreno and he had extensively developed it. He prayed for the dismissal of the suit. In the Counterclaim he repeated the allegations that he had bought the parcel of land from one Cosmas Pkerkor Oreno (now deceased) in 1988 and resided thereon and developed it extensively. He claimed he was the bona fide purchaser for value and therefore the rightful owner. He sought the reliefs, '(a) that the Defendant is the rightful owner of land parcel No West Pokot/Keringet 'A'/1413, (b) Cancellation of the name of the Plaintiff i.e Kamechwa Longuria Lomormoi and in place the Defendant's name, i.e Stephen Lubusi Ambogo, be substituted in respect to land parcel No West Pokot/Keringet 'A'/1413, (c) Costs of the suit and Counterclaim be provided for.'

3. The suit proceeded for hearing on September 1, 2020 for both the Plaintiff's and Defendant's cases. In the end, the learned trial Magistrate found, on the one hand, that the Plaintiff's suit lacked in merit and dismissed it, and on the hand, that the Defendant had proved his Counterclaim on a balance of probabilities and entered judgment for him in terms of the reliefs sought in it. Upon appealing, the Plaintiff did not extract a decree.

The Appeal

4. The Plaintiff was dissatisfied with the Judgment. He brought the instant appeal through a Memorandum of Appeal filed on January 28, 2021. He also filed the Record of Appeal dated February 19, 2021 on February 26, 2021. It contained the Certificate of the Record, the Statement of Address of Service and the Index all of the same date, besides copies of the proceedings, exhibits and judgment.

5. In the Memorandum of Appeal the Appellant raised six (6) grounds. They were that:

   (1) The learned trial magistrate erred in law and fact by failing to consider that the Appellant is the registered owner with valid title pursuant to section 24, 25 and 26 of the *Land Registration Act* No 3 of 2012.

   (2) The learned magistrate erred in law and fact by failing to take judicial notice that LR 7 and LR 19 conferred registration of the Title Deed to the Appellant by transmission.

   (3) The learned magistrate erred in law and fact by failing to consider the Appellant facts and evidence placed before him.

   (4) The learned magistrate erred in law and fact misdirecting himself by relying the evidence adduced by the Respondent and yet they were doubtful and unreliable.

   (5) The learned magistrate erred in law and fact by finding in favour of the Respondent in his counter-claim when clearly there was no evidence on record in support thereof.

   (6) The learned magistrate erred in law and fact by not considering relevant issues hence arriving at a wrong conclusion.

6. The Appellant prayed that the appeal be allowed with costs to him both in the Appeal and in the lower Court (sic). After directions were taken on the Appeal and it was admitted for hearing, this Court directed that it be disposed of by way of written submissions. The parties filed their respective submissions which I summarize below.

Appellant's Submissions

7. On November 9, 2022, after summarizing the background of the suit which I need not to repeat, the Appellant submitted on each of the six grounds of appeal. Regarding the first ground, that the learned trial magistrate erred in law and fact by failing to consider that the Appellant was the registered owner

with a valid title pursuant to Section 24, 25 and 26 of the *Land Registration Act* No 3 of 2012, it was the Appellant's argument that he was the bona fide and legal owner of the suit property known as West Pokot/Keringet 'A'/1413. His argument was that having produced in evidence a copy of the Title Deed as P Exhibit 2 registered in his name and the Certificate of Official Search marked as P Exhibit 3 to that effect, together with the green card marked as DMFI (2) (but it is worth of note that document DMFI(2) was not his intended to be his evidence or produced by him in evidence) he had proved that his case on that issue yet the trial Magistrates failed to find that as much. He argued that his registration as owner of the suit property was by way of transmission as a result of the succession proceedings in Succession Cause No 6 of 2011 in respect to the estate of Cosmas Pkerkor Oreno. However, he did not produce the Grant of Letters of Administration in the Cause or even adduce evidence on which court issued the said Grant of Letters of Administration or its contents.

8. He relied on Sections 24, 25 and 26 of the *Land Registration Act* No 3 of 2012 to buttress his argument that he had proved that he was the legal owner of the parcel of land. He then submitted that in terms of Section 26(1)(a) of the Act, there was no fraud or misrepresentation proven against him by way of preferring criminal charges against him to discredit the legitimacy of the title deed issued to him. He relied on the case of *Peter Lavatsa Kabwoya Vs Nicholas G Karira & Another [2021] eKLR* which is basically on point that a party alleging fraud must specifically plead the particulars thereof and lead evidence specifically to prove the allegations of fraud. He also relied on the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2013] eKLR* which speaks to the same point of law about fraud. He then summed it that absent of fraud or misrepresentation being levelled against the good title, this Court should hold that he was the registered proprietor of the suit land and that he was the absolute owner of the suit land.

9. In regard to the second ground which was that the learned Magistrate erred in law and fact by failing to take judicial notice that forms RL 7 and RL 19 conferred registration of the title deed to the Appellant by transmission, the Appellant submitted that the Court ought to have taken judicial notice that upon the death of registered proprietor of the land, an administrator acquires proprietary rights after succession process is complete and the he executes the requisite forms RL 7 (currently form RL 42) and RL 19 (currently form RL 39) for registration by way of transmission. He then submitted that those details were captured in entry numbers 2 and 3 in the green card (which was marked as DMFI(2). He then stated that since the succession proceedings were never challenged by the Respondent when he lodged a caution on the suit land claiming a beneficiary interest or any other person, that evidence stood that the Appellant was the registered proprietor of the suit land by transmission.

10. About the third ground of appeal that the learned magistrate erred in law and fact by failing to consider the facts and evidence the Appellant placed before him. He then submitted that being the registered owner of the suit land he had indefeasible and absolute rights over the property. He referred to the documents he produced in support of that claim, which were P-Exhibit 1, P-Exhibit 2, P-Exhibit 3 and D. Exhibit 2, all of which pointed to the fact of his ownership of the parcel of land in question, and that the alleged trespass took place in the year 2017 or thereabouts.

11. In regard to the fourth ground, that the learned magistrate erred in law and fact misdirecting himself by relying the evidence adduced by the Respondent and yet they were doubtful and unreliable, he submitted that the trial magistrate relied doubtful and unreliable evidence adduced by the Respondent. He discounted the evidence of the Respondent that he purchased the suit land from the original registered owner one Cosmas Oreno (deceased) in the year 1988 and the agreement in support of that which was produced as D Exhibit 1. He also cast doubt on the Respondent's evidence of the bundle of receipts to support his claim that he begun to occupy the land parcel in 1988 and constructed a house in 1990 and later left for Sudan. He argued that there having been no evidence that the Respondent

went to Sudan and left a caretaker known as Ouma on the suit land but did not call him or any other witness during the trial to support those facts that evidence was shaky. He submitted further that the agreement marked as D Exhibit 1 was not genuine since parcel number West Pokot/Keringet 'A'/1413 was not in existence in 1988. He went on to state further that the Green Card marked as D Exhibit 2 of the suit land showed that the register was opened on August 8, 1989 about a year later after the agreement was allegedly entered into. He submitted that the agreement was a manufactured document by the Respondent to justify his illegal occupation of the suit property.

12. The Appellant submitted further that the trial magistrate failed to note that the documents relied by the Respondent purported it was for payment of the transfer of land were undated hence their authenticity was in issue. His further submission was that claim by the Respondent that he had extensively developed the suit land while the photographs produced in evidence showed a semi-permanent house was itself an untruth. Moreover, his contention was that the photographs did not show when they were taken hence falsified.

13. On the fifth ground that the learned magistrate erred in law and fact by finding in favour of the Respondent in his counter-claim when clearly there was no evidence on record in support thereof, it was the Appellant's submission that the Respondent counter-claimed both a purchaser's interest and as an adverse possessor. He then contended that the documents in support of the purchaser's interest were doubtful. On adverse possession, he submitted on Sections 7, 13 and 38 (1) and (2) of the *Limitation of Actions Act*. His argument was that there was no evidence adduced by the Respondent to show that his possession of the suit land was continuous, adequate, in publicity and with the permission of the Appellant (sic). He submitted that he was registered as proprietor of the suit land on July 13, 2016 and the title deed was issued on the same date hence the 12 years' period for adverse possession to firm up started running against him on July 13, 2016 hence a claim of adverse possession could only have become ripe on July 13, 2028.

14. Regarding the sixth ground that the learned magistrate erred in law and fact by not considering relevant issues hence arriving at a wrong conclusion, he submitted that the trial court failed to recognize him as the registered proprietor of the suit land with indefeasible and absolute rights and the absence of fraud or misrepresentation levelled against the Appellant. He submitted that the Appeal be allowed as prayed.

The Respondent's Submissions

15. The Respondent submitted that the appeal was baseless and unmeritorious as it sought to abuse due process and cause a gross miscarriage of justice. Further, that there was nothing to fault the judgment of the lower court about. He then summarized the issues the Court should consider, being whether the Honorable Trial Judge (sic) failed to exercise his discretion properly in refusing to up hold the appellant's claim; and whether the appellant was entitled to any reliefs based on the prima facie level case on a balance of convenience?

16. On whether the appellant had a prima facie level case, he submitted that this Court was obligated to make a decision on the merits of the Appeal by considering the grounds raised while reviewing the evidence presented in the lower court. He relied on the Court of Appeal case of *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*. He submitted that proof of the suit required the court to exercise discretion in favor of the plaintiff but took a different turn, but that the Court did not exercise discretion injudiciously or on wrong principle. He relied on the case of *Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR* in which the Court of Appeal pronounced itself on where an appellate Court can interfere with the exercise of discretion of a trial Court and that is only in circumstances where it was put forth improperly. He also

cited the holding in Mbogo and Another v Shah [1968] EA 93 on interference by an appellate court in discretion of a trial Court.

17. About the evidence by the Appellant, he submitted that he relied on three documents being a demand letter, a copy of title deed and certificate of official search to prove ownership but he did not look at the case of the Counter-claim. The documents seemed to have been in order to prove that he, the Appellant, was in fact the registered absolute proprietor of the suit land. He then listed the seven documents that he, the Respondent, produced in evidence to support his Counter-claim and that by virtue of Section 107 of the *Evidence Act* he discharged the burden that was on him to prove his Counterclaim. He then submitted that evidence of ownership by way of title was not conclusive since that could be discounted by proof of fraud. He went on to argue that the allegation of a Succession Cause that led to the Appellant being a registered owner of the land in issue was not proved. He submitted on Section 26 of the *Land Registration Act*, 2012 which provides on proof of indefeasibility of title except on proof of fraud, misrepresentation or illegality, un-procedural conduct or through a corrupt scheme.

18. On whether the appellant was entitled to any reliefs based on the prima facie level case on a balance of convenience, he submitted that cases of prima facie nature are cases which no other evidence is produced in the particular instance hence the court would no doubt make a decision in favor of the person alleging without needing to cross-check anything else. He argued that the Appellant should be bound by his own evidence and not make this Court to 'go on an academic exercise as if this is a lecture.' He then submitted that the appellant colluded with officials at the land registry to deny him his constitutionally protected rights under Article 40 of the *Constitution* of Kenya, 2010 using fraud or a fraudulent scheme by registering the Appellant as owner by transmission. His view was that the appellant did not prove his case to the required standard of proof hence the Appeal be dismissed with costs to him. He relied on the case of *Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*, where it held that an appeal to a higher Court at first instance from a trial by the High Court is by way of retrial hence the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. He then summed it that the appeal was unmeritorious, prejudicial and an abuse of due process of the Court and be dismissed.

Analysis, Issues and Determination

19. This court notes that the Respondent's submissions did not help this court much in the determination of the appeal. I say so because they were fairly misdirected: except the last section of the submissions where he argued that the hearing of an appeal is basically as a retrial, and also on the fact of the three documents relied on by the appellant to support his case and those he produced to support his Counter-claim, the rest of the submissions were more on an application for injunction and on an appeal that challenges the discretion by a trial Court than on an appeal from a judgment of the Court. He did not address each or any of the grounds of appeal as did the Appellant.

20. Be that as it may, this Court shall determine the appeal on its merits by considering the grounds raised in the Memorandum of Appeal. This is the first appeal after the trial Court pronounced itself on the merits or otherwise of the Appellant's and Respondent's cases in the court below. Bearing in mind that this is a first appeal, this Court also notes that the appeal was against a judgment of the trial Court arrived at after the Court heard and weighed the evidence of the Court. It was not on the exercise of the discretion of the Court but a matter of judicial reason and consideration of the parties' cases presented before it.

21. It is trite that where the Appeal would have been against a judgment (on the merit or otherwise of the evidence of parties) the role of the appellate Court of first point of call is circumscribed. The Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR held that:-

> ' An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.'

22. Similarly, in Peters v Sunday Post Ltd [1958] EA 424, as quoted in the case of *Jackson Kaio Kivuva v Penina Wanjiru Muchene [2019] eKLR* the Court held:-

> ' Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.'

23. Additionally, in Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] e KLR, the court held that:

> ' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

24. That said, I now consider the merits or otherwise of the appeal by analyzing each of the grounds separately. Regarding the first ground of Appeal, the Appellant argued that learned trial magistrate made an error of both law and fact by failing to consider that the Appellant was the registered owner of the suit land, with valid title pursuant to Section 24, 25 and 26 of the *Land Registration Act* No 3 of 2012. He reproduced the three Sections and explained how they provided for ownership of land. Section 24 is on the interest that the registration of a person confers on him, which may be either absolute or leasehold. Section 25 is on the rights a proprietor of a first or subsequent registration acquires, which shall not be defeated except as the Act provides. Section 26 is on the point that a certificate of title is conclusive evidence of proprietorship subject to the exceptions given therein, such as involvement of fraud, misrepresentation, illegality, or by acquisition unprocedurally or through corruption scheme.

25. In support of this ground the Plaintiff submitted that he tendered P. Exhibits 1, 2 and 3 and that was enough proof. In the judgement, the trial Magistrate held as follows, 'from the evidence on record there is no dispute that the Plaintiff herein is registered as the proprietor of land parcel No West Pokot/ Keringet 'A'/1413.' Thus, in my view, contrary to the argument by the Plaintiff that the trial magistrate erred, the learned judicial officer correctly found that the Appellant was the registered proprietor. This ground fails.

26. But before I move to the next ground it is worth noting that in support of the ground above, the Appellant sought to rely on the copy of the green card which was filed together with the Defendant's List and marked as DMFI (2) the prove his proprietorship of the suit land. In my humble view, to the extent that the document that he seeks to rely on was marked for identification, in that state it was not

evidence that the Court could rely on. The Appellant was mistaken on how documents form part of the evidence which can be relied on by Courts to prove facts. In *Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2022] eKLR* this Court gave four steps in regard to proof of documents in a trial. It stated as follows:

> ' In summary it stated that first, the document is filed in court (according to the rules or legal requirements. Second, if the document is not the original, the party wanting to produce it will lay the basis for the production of the copy and not the original. Once the Court is satisfied with that basis, then third, the party will lay a further basis for production of the document. Fourth, the party will then prove the contents, state or physical appearance of the document.'

27. The parties are also encouraged to refer to a detailed exegesis of the issue of production of documentary evidence in Lwangu v Ndote (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) (Ruling). Thus, to the extent that the document had not been produced in evidence after being filed or even being marked for identification, its evidentiary value is nil. But I have looked at the proceedings and noted that the document was eventually produced as D Exhibit 2 when the Defendant testified.

28. Similarly, after the trial Court finding rightly that the suit land was registered in the name of the Plaintiff, now Appellant, it went on to make a finding that apart from relying on the mere indications of RL 19 and RL 7 in the green card it did not confer ownership of the said land to the Plaintiff. He ought to have tabled the succession documents in cause No 6 of 2011 to show how the land transmitted from the original owner. The trial Magistrate did not explain why he made such a binding that appeared to place the burden on the Plaintiff to disprove the allegations of fraud leveled against him by the Plaintiff. What was before the Court to be proved on the part of the Plaintiff was whether or not he was the proprietor of the land. This he proved and the trial magistrate was correct in so finding. That is the basis for adverse possession holding. Be that as it may, the slight error on the part of the trial magistrate did not affect the final finding he made on ownership and as such was not prejudicial to the Appellant as to affect the judgment.

29. The second ground was that the learned Magistrate erred in law and fact by failing to take judicial notice that RL 7 and RL 19 conferred registration of the Title Deed to the Appellant by transmission. On this the Appellant submitted that forms RL 7 and RL 19 which were referred to in the green card marked as DMFI(2) and captured in entry numbers 2 and 3 of the document conferred registration of the title deed to the Appellant by transmission and the Court ought to have taken judicial notice of that fact.

30. This Court has made a finding above on the import of a document, such as DMFI(2), not produced and proved in evidence. It is trite law, under Section 107 of the *Evidence Act* that he who alleges a fact proves it, unless the law lays the burden on such other person other than him as it may provide. In the instant case, it was obligatory on the Appellant that such forms existed and were used to confer on him ownership of the suit land, and that indeed the succession proceedings took place, that the Respondent was aware of them so as to challenge or apply to be enjoined in them as contended by the Appellant. The trial Magistrate did not doubt the ownership of the land but was beholden of the process, which, in the opinion of this Court lent credence to the Defendant's averment that there was a possibility of fraud involved.

31. Regarding judicial notice, Section 60(1)(a) of the *Evidence Act* provides for matters which the Court can take judicial notice of. But judicial notice is a device or tool by which the Court considers as proven facts which would otherwise require proof because they are so common or notorious that no reasonable person, include the Court for that matter, can question their existence. It is defined in

Garner, B (2019) *Black's Law Dictionary Eleventh Edition, Thompson Reuters, St Paul, MN*, at page 1012 as follows:-

> ' A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact the trial court took judicial notice of the fact water freezes at 32 degree.'

32. The Appellant attempted, by his argument, to shift his burden of proof of transmission of the title from the deceased Cosmas Pkerkor Oreno's estate to him by use of forms RL 7 and RL 19. In my view, these were issues that called for evidence to prove them: they are not as notorious as the Appellant may want all to believe. Thus, I find that the second ground is not merited and therefore fails.

33. The third ground of appeal was that the learned Magistrate erred in law and fact by failing to consider the Appellant facts and evidence placed before him. In support of this ground the Appellant submitted that he produced in evidence P Exhibit 1, P Exhibit 2, P Exhibit 3 and D Exhibit 2 all of which were indicative of the fact of his ownership of the suit land, and that the alleged trespass took place in the year 2017 or thereabouts.

34. This Court has examined the record and indeed finds that the documents referred to were tendered and proven in evidence. When the trial Magistrate retired to write his judgment he held as follows, 'from the evidence on record it is not in dispute that the Plaintiff herein is the registered proprietor of land parcel number' He then gave the number of the suit land. This was the parcel of land referred to in the Plaintiff's P Exhibit 1, 2 and 3. It is this Court's finding that as much as the trial Magistrate did not specifically mention the documents listed above, he considered them and arrived at the finding that indeed the Appellant was the proprietor of the parcel of land. Thus, the ground fails.

35. The appellant submitted much on the fourth ground of appeal which was that the learned Magistrate erred in law and fact misdirecting himself by relying on the evidence adduced by the Respondent and yet they were doubtful and unreliable. He went out to point out that the evidence by the Respondent, then Defendant, was shaky and should not have been relied on by the trial Court. This Court poses to ask the question that guides its reasoning on this ground of appeal: of what use was the Defendant's evidence? Was it to disprove the Plaintiff's case or it was to prove the Defendant's Counterclaim? The answer to both questions lies in Section 107 of the *Evidence Act*. The provision is to the effect that if anyone 'desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.' Thus, whoever of the rival parties alleged the existence of a fact leading to the establishment of his claim, he had the burden of discharging it and not vice versa. At not time would the burden shift to the rival party.

36. Before the Court were two claims: The Plaintiff's and the Defendant's Counterclaim. It was incumbent on each of the parties to prove their case. The Plaintiff had to adduce evidence on a balance of probabilities that he was entitled to the relief of the order of eviction of the Defendant. To do that he had to prove that he was the lawful owner of the suit land to the exclusion of the Defendant. On the other hand, if the Defendant established his claim for adverse possession of the same land, then even if the Plaintiff was the registered owner of the land he would lose his title thereto and disentitle the Plaintiff to the order of eviction.

37. What then was the relevance of the Defendant's evidence impugned in the Appeal? It was two-fold. First, it was to show that he bought the land from the late Cosmas Pkerkor Okeno and that by virtue of that he was entitled to the ownership thereof hence the Plaintiff's claim inheriting the land from the deceased was fraudulent and a misrepresentation of the facts and was dislodged. Secondly, and

more important was, that even though his Counterclaim of being an adverse possessor of the suit land though registered in the Plaintiff's name was established.

38. The Appellant submitted that the agreement produced as D Exhibit 1, was made in 1988 yet the register of the parcel No West Pokot/Keringet 'A'/1413 was not in existence until August 8, 1989. I have looked at the two documents sought to be compared in evidence. It is indeed true that the register of the parcel number in question is shown on D Exhibit 2 as having been opened on that date and that the agreement was entered into on December 7, 1988. That means that the agreement predated the opening of the register by about eight (8) months. That may as well case doubt on the authenticity of the agreement. But one important fact the Plaintiff failed to show was when the Mutation that gave rise to the parcel of land was prepared and registered since the mutation form usually bears the resultant numbers of the parcels of land arising out of a subdivision.

39. But even if the validity of the agreement was doubtful, even more for reason that the documents used for the transfer of land, that is to say, D Exhibit 4 were undated hence their authenticity being in question, as argued by the Appellant, it is clear from D Exhibit 2 which was a Letter of Consent dated January 19, 1990 for transfer of the land from the late Cosmas Pkerkor Ekeno to Stephen Lubusi Ambako was issued by the Land Control Board of West Pokot in a meeting held on November 23, 1989 following an application which was made on October 11, 1989. The authenticity of the Consent of the Board was not at all challenged by the Appellant, not even in cross-examination. It therefore means that as early as October 11, 1989, the late Cosmas Pkerkor Ekeno had legally transferred the parcel of land in question to the Respondent.

40. And comparing this piece of evidence with his written statement dated July 29, 2019 which was adopted in evidence, in which he stated that fact of the Land Control Board Consent being given to him and he starting to reside on the land from 1988 and staying on it to date uninterrupted even when he left for Sudan having left a caretaker by name Mr Ouma to take care of it, and having shown there he indeed planted trees and built thereon, this Court is of the view that the fact of open continuous and uninterrupted occupation of the land from 1988 to the date of the suit and evidence was sufficiently proved by him. Apart from the Plaintiff claiming verbally that the trespass began in 2017 and that by the demand letter produced as P Exhibit 1 it showed as much, there was no other evidence to support the fact that indeed the Defendant left the land at any time and came back in 2017 or thereabouts as alleged since the said caretaker was not shown to have moved or the Respondent's house and trees removed from the land at any time of the intervening period. In any event, in cross-examination the Plaintiff confirmed that there was a house, latrine and trees on the land. Apart from testifying that the house was built in 2017, he failed to discount the Plaintiff's evidence that he planted trees on the land since 1988 when he bought the land. For that reason, it was clear that the Defendant was in occupation and use of the land continuously since 1988 as he pleaded and testified hence was over the land for more than 12 years continuously.

41. For the reasons above, even if the documentary evidence may have been shaky as to when the agreement was made hence not sufficient to prove ownership by way of purchase of the land, the evidence on adverse possession was water-tight and therefore entitled the Court to hold that the Defendant's Counterclaim had been established. Again, having established that the Respondent was on the land since 1988, I find that even if the Plaintiff was indeed found to be the registered owner of the land, his claim for recovery of the same had been extinguished by virtue of Sections 7 and 17 of the *Limitation of Actions Act* since the Defendant was on it for more than 12 years.

42. Further, on the claim of adverse possession by the Respondent, the Appellant argued that the same had not crystallized for the reason that he became registered as owner of the suit land on July 13, 2016 hence the period of twelve (12) years against his title started to run then and could have ended on July

13, 2028. For that reason, he contended that the Respondent's claim must and ought to fail hence the Appeal be allowed as prayed. In regard to the law on adverse possession, nothing can be further from the position than the Appellant's argument as explained below.

43. First, adverse possession runs against (a specific parcel of) land and not ownership. It does not matter how many times the title to the land changes hands. As long as the adverse possessor is in hostile uninterrupted possession as the law stipulates, all that the proprietor and his subsequent successors do in transfer or even subdivision is in vain.

44. Therefore, in *Registered Trustee Catholic Diocese of Murang'a v Micere Njau & 3 Others [2022] eKLR* the Court stated:

> ' It has been held again and again for purposes of Limitation of Actions does not stop to run on account of change of ownership of the land. A claim for adverse possession runs with the land irrespective of the change of ownership. A mere change of ownership does not affect a claim for adverse possession. The taking out of succession proceedings by the defendants in HC Succession Cause No, 282/2006 (Embu) and the subsequent issuance of new titles to the resultant parcels was tantamount to nothing but an exercise in futility. The purported new titles were tiger papers which did not stop time from running for purposes of adverse possession.'

45. Also, in *Githu v Ndeete [1984] KLR 776* wherein it was held that:

> ' The mere Change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.'

46. The above position was almost similar in the holding in the case of *Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR*, where the court of Appeal held as follows;

> ' It is stated that any man who buys land without knowing who is in possession risks his title. Just as he does, if he fails to inspect his land for twelve years after having acquired it.' So, it should be to a man who receives by transmission any land held by an adverse possessor such as the instant Appellant.

47. Second, of adverse possession, the claimant must show that he has retained open quiet uninterrupted possession of the parcel of land to the exclusion of the owner for a period of not less than twelve (12) years without his permission or consent. Thus, the adverse possessor must have set in motion and maintained an occupation that is against the will or permission of the owner but to his knowledge hence open possession, for all, including the owner to see. Thus, in *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 Others [2018] eKLR*, the Court enumerated the required elements to prove adverse possession in the following manner:

> ' Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.'

48. The Respondent showed that indeed he was in open occupation of the suit land in an uninterrupted twelve-year period to the exclusion of the owner. Thus, the trial Court was correct in holding that the Respondent had proved his case to the required standard. For that reason, the order of eviction prayed for by the plaintiff could not issue hence he was right in dismissing the Plaintiff's claim.

49. Lastly, on the ground, the Appellant also cast doubt on the Respondent's evidence of the bundle of receipts on his claim that he begun to occupy the land parcel in 1988 and constructed a house in 1990 and later left for Sudan. It was a self-defeating argument by the Appellant that the Respondent did not produce evidence that he left for Sudan. In essence the Appellant was arguing that indeed the Respondent never moved from the land. The other argument was that the Respondent did not prove that he left on the land a caretaker known as Ouma and he did not call him or any other witness to support that fact. His further submission was that the Respondent's claim that he had extensively developed the suit land yet the photographs produced in the trial court showed a semi- permanent house was itself an untruth besides that the photographs did not showing when they were taken hence falsified.

50. On all the arguments in the previous paragraph, I find that the evidence of the Defendant on all of the facts was unshaken in cross-examination. It is worth of note that during the cross-examination of the Defendant by learned Counsel, Lowasikou, the Defendant stated that the agreement was entered into in 1988 for plot No 1413, the green card was opened on August 8, 1989, Ouma lives in my land. That was against the backdrop of the evidence of the receipts and photographs being tendered in Examination-in-Chief. Absent of any shaking of the same by cross-examination, it means the evidence was cogent. As to the admissibility and weight to be placed on the photographs produced in evidence, Section 65(5) and (6) of the *Evidence Act* come into play. It was not shown by the Appellant that the provisions were not complied with.

51. On the sixth ground of appeal which was that the learned Magistrate erred in law and fact by not considering relevant issues hence arriving at a wrong conclusion, the Appellant submitted that the trial court failed to recognize the Appellant as the registered proprietor of the suit land with indefeasible and absolute rights and the absence of fraud or misrepresentation levelled against him. I am of the view that the issues raised about this ground has been sufficiently addressed in the 1st, 2nd, 3rd and 4th grounds above discussed.

a) What orders to issue and to meet costs of the Appeal

52. The upshot is that the Appeal herein is wholly unmeritorious and must fail. The judgment of the lower Court in Kapenguria SPMC ELC No 23 of 2019 is upheld. The Appeal herein is therefore dismissed with costs to the Respondent.

53. The original Court file in Kapenguria SPMC ELC Case No 23 of 2019 to be returned to the said Court for further action.

54. Orders accordingly.

JUDGMENT, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 15TH DAY OF FEBRUARY, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.