Case Number:	Civil Case 4994 of 1993
Date Delivered:	19 May 2006
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Jackton Boma Ojwang
Citation:	Kenya Tea Development Authority v Jackson Gichuhi Karanja & another [2006] eKLR
Advocates:	For the Plaintiff/Applicant: Mr. Njenga, instructed by M/s J.M. Njenga & Co. Advocates For the Defendants/Respondents: Mr. Wandai, instructed by M/s Karuga Wandai & Co. Advocates.
Case Summary:	Land law – adverse possession – claim to ownership of land by virtue of twelve years of peaceful, open and continuous possession – whether because the plaintiff, subsequent to filing the suit, been dissolved by law and replaced by a different entity, and because the plaintiff had purchased the land from persons who were since deceased, the land subdivided and part of it occupied by a third party, the plaintiff could maintain the suit – whether it was proper for the defendant to raise such important preliminary issues during submissions – whether the plaintiff could assert rights against successors in title to the deceased vendors – whether the land could not be the subject of a claim for adverse possession on account of recent sub-division and the assignment of a new land register number – whether the plaintiff had satisfied the conditions for a claim to land by adverse possession
Court Division:	Civil
History Magistrates:	-
County:	Nairobi

Docket Number:	-
History Docket Number:	-
Case Outcome:	Allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 4994 OF 1993

KENYA TEA DEVELOPMENTAUTHORITY.....…PLAINTIFFF/APPLICANT

-VERSUS-

JACKSON GICHUHI KARANJA)

EUTYCHUS MWANGI KARANJA)…….DEFENDANTS/RESPONDENTS

IN THE MATTER OF THE ESTATE OF KARANJA CHEGE [DECEASED)

-AND-

IN THE MATTER OF THE REGISTERED LAND ACT

(CAP. 300, LAWS OF KENYA)

-AND-

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

(CAP. 22, LAWS OF KENYA)

JUDGMENT

I. WE HAVE OCCUPIED SUIT LAND FOR TWELVE YEARS PEACEFULLY, OPENLY, CONTINUOUSLY – PLAINTIFF'S PLEADINGS

The suit by Originating Summons was originally dated 15th September, 1993 and filed on 7th October, 1993. It was amended on 11th April, 1994 and further amended on ***14th May, 2004.***

The Kenya Tea Development Authority (plaintiff) has made acclaim for land by adverse possession, pleading as follows: that, the plaintiff/applicant has been in occupation of the parcel of land known as LOC. 2/MAKOMBOKI/1300 (the suit land) recently excised from LOC 2/MAKOMBOKI/154 peacefully, openly, continuously and without interruption for a period exceeding twelve years; that, the plaintiff/applicant be declared as the absolute owner of the suit land by virtue of adverse possession; that, the defendants/respondents be declared as holding title to the suit land in trust for, and for the benefit of the plaintiff/applicant; that, the defendants/respondents be ordered to execute documents of transfer in respect of the suit land in favour of the plaintiff/applicant failing which the High Court's Deputy Registrar be empowered to sign the said documents of transfer in favour of the plaintiff/applicant, in place of the defendants/respondents; that the costs of this suit be provided for.

II.DEPOSITIONS IN SUPPORT OF THE PLAINTIFF'S CASE

Wahu Maina, advocate and company secretary of the plaintiff, swore a supporting affidavit on 14th May,

2004.

The deponent avers that there has been a series of other Court cases in respect of the suit land and this has delayed by years the conclusion of the grievance herein. The deponent believes to be true the information received from the plaintiff's advocates, that such other Court cases have now been concluded.

It is deponed that investigations conducted since the conclusion of the other cases, have revealed that early in 2004 the respondents subdivided the larger property carrying the suit land, into five portions namely –

(i) LOC. 2/MAKOMBOKI/1297 measuring 2.06 hectares – now registered in the name of ***Eutychus Mwangi Karanja;***

(ii) LOC. 2/MAKOMBOKI/1298 measuring 7.4 hectares – registered in the name of ***James Kamau;***

(iii) LOC. 2/MAKOMBOKI/1299 measuring 1.66 hectares – registered in the name of ***Michigu Mwangi;***

(iv) LOC. 2/MAKOMBOKI/1300 measuring 8.02 hectares – registered in favour of ***David Muigai Mwangi, James Kamau Kinuthia, Eutychus Mwangi Karanja,*** **and** ***Michigu Mwangi;***

(v) LOC. 2/MAKOMBOKI/1301 measuring 2.06 hectares – registered in favour of ***David Muigai Mwangi.***

The deponent avers that the plaintiff has been in occupation of and has developed approximately 19.8 hectares ["] out of the original (larger) parcel of land known as LOC. 2/MAKOMBOKI/154, with the full knowledge, consent and acquiescence of the registered owner since 1980; and the area so occupied by the plaintiff has been well defined, though not formally excised. It is deponed that pursuant to the subdivision process effected by the defendants in the course of 2004, the portion which has always been occupied by the plaintiff (the suit land), measuring approximately 19.8 acres, has now been registered in favour of several persons (named above).

It is averred that the suit land should now be declared as belonging to the plaintiff, on the basis of the doctrine of adverse possession.

III.ISSUES FOR RESOLUTION

The advocates for the plaintiff had on 20th February, 1995 filed their version of agreed issues. Although these were not countersigned by the advocates for the defendants, I will regard them as the crucial issues in the determination of this case, since no other draft of issues was filed. I take it that the defendants do not apprehend any prejudice to themselves if the case is resolved on the basis of the issues duly filed.

The issues are as follows:

(a) whether the plaintiff/applicant is in occupation of the suit land, comprising 19.8 acres, since 1980, and if so, then, whether the plaintiff is entitled to claim adverse possession;

(b) whether the parties herein did execute a sale agreement dated 29th August, 1980;

(c) by virtue of the said sale agreement of 29th August, 1980 are the defendants holding the suit land in

trust for the plaintiff"

(d) whether the defendants/respondents have refused to execute documents of transfer in respect of the suit land, in favour of the plaintiffs/applicants and have thus contravened the sale agreement of 29th August, 1980.

IV.PRE-TRIAL MATTERS

When this matter came up before my brother ***Justice Kubo*** on 12th May, 2005 hearing was deferred, for the reason, as recorded: "There are on-going negotiations for settlement". It came to me for mention on 15th June, 2005 when ***Mr. Nyaga*** for the plaintiff stated that consent had not been reached, "negotiations have broken down; parties wish to have the matter proceed to full hearing". Both ***Mr. Nyaga*** and ***Mr. Ongicho*** (holding brief for ***Mr. Wandai,*** for the defendants) were now seeking a hearing date. And on 21st September, 2005 ***Kubo, J*** gave directions that the matter would proceed by ***viva voce*** evidence.

The matter came up for hearing before me, on 7th November, 2005 when ***Mr. Njenga*** represented the plaintiff, while ***Mr. Wandai*** represented the defendants.

V. TESTIMONIES

1. The Plaintiff's Case

P.W.1, *Francis Gathagu Maina* was sworn on 7th November, 2005 and testified as follows. He lives at Makomboki Tea Factory in Maragua District. He is the factory's chief clerk, and in that capacity keeps records relating to: accounting; factory assets; others. He is employed by the Kenya Tea Development Authority (plaintiff), ***which manages Makomboki Tea Factory.*** P.W. 1 was ***transferred*** to Makomboki Tea Factory in January, 1996. The factory commenced operations in ***1981,*** and the Kenya Tea Development Authority (KTDA) are managing agents at the factory. The land occupied by the factory was purchased by KTDA in the 1980s, on the basis of an agreement. It was purchased from ***Eutychus Mwangi Karanja***, ***Jackson Gichuhi Karanja*** and ***Mwangi Karanja.*** The land so purchased comprised approximately 19 acres, and was part of a large parcel, namely LOC. 2/MAKOMBOKI/154.

P.W. 1 testified that the agreement between the four land-owners and KTDA was not followed up with a ***transfer*** to the purchaser, because "there were some problems; there was need for sub-division; and to-date transfer has not taken place". This problem arose, the witness testified, because the vendors were still waiting for sub-division, which sub-division was, on paper, only done on ***29th January, 2004***. The effect of the sub-division was to separate the factory's fenced land from the wider parcel of land. The plaintiff's expectation had been that the said sub-division would lead to an ***excision*** of the factory's 19 acres and its ***transfer*** to the plaintiff; but this did not happen. In the words of the witness, "We just heard that sub-division had been done"; and in the process and without inviting the plaintiff to participate, the larger parcel, LOC. 2/MAKOMBOKI/154 which comprised ***60.6 acres***, was now sub-divided into ***five*** separate portions each with a title deed in the name of somebody. The factory's land was in the process, kept separate and ***registered*** as LOC.2/MAKOMBOKI/1300 comprising the original 8.02 hectares. This portion (the suit land) was not registered in the name of the plaintiff herein; instead, it was registered in the names of four persons: ***David Muigai Mwangi, James Kamau Kinuthia, Eutychus Mwangi Karanja,*** **and** ***Michigu Mwangi.***

P.W.1 testified that Makomboki Tea Factory sits on 8.02 hectares of land (c. 19 acres) ***secured by a continuous boundary fence*** which has been in place from the very beginning, in 1980. The vendors of the suit land occupied the neighbouring lands outside the fenced portion of 8.02 hectares. There ***has***

not been any boundary dispute touching on the suit land; and ***major developments*** have been effected on the suit land which carries factory buildings, staff houses, machinery and vehicles.

The witness produced several exhibits to demonstrate the state of development of the suit land: (i) Exhibit 1A – a photograph showing the main factory building, and the Unit Manager's house; (ii) Exhibit 1B – a photograph showing the Labour Line – with houses for factory workers; (iii) Exhibit 1C – a photograph showing factory buildings; (iv) Exhibit 1D – a photograph showing factory buildings.

P.W.1 testified that Makomboki Tea Factory has some 300 employees, and the value of the factory as shown in audited accounts, is Kshs.300,000,000/=.

On cross-examination by learned counsel ***Mr. Wandai***, P.W.1 further testified that as he had come to work at Makomboki Tea Factory only in 1996, he did not know who had fenced the suit land; and for matters transpiring before that date, he had been speaking from office records. He testified that the agreement between the parties herein had made reference to LOC.2/MAKOMBOKI/154 but that since then the suit land had taken its own land-reference identity as LOC. 2/MAKOMBOKI/1300. P.W.1 testified that the persons holding title over the land in question, following the sub-division and creation of new titles, are either the same, or descendants of the same vendors who had sold to the plaintiff in 1980. The witness identified ***Eutychus Mwangi Karanja*** as the constant name in the vendor-list and in the title-holding following sub-division.

Learned counsel sought to know from P.W.1 ***what price KTDA had paid*** to the vendors, for the suit land in 1980. The witness did not know what sum of money had been paid by the plaintiff.

The sub-division of 2004, the witness averred, had not changed the boundaries of the 19-acre suit land; and no survey lines had been introduced which excluded factory buildings from the perimeters of the suit land.

P.W.1 testified that he was aware that since the 1980s the plaintiff, the Kenya Tea Development Authority, has been re-named Kenya Tea Development Agency. He also testified that he knew that the formal description of the tea factory occupying the suit land was Makomboki Tea Factory Limited – and that it was a limited - liability company; but he went on to testify that Makomboki Tea Factory Limited ***was*** under the umbrella of KTDA. KTDA is the managing agent for the tea factory and KTDA is responsible for all decision-making at the factory. The witness testified that the physical constructions in place at the factory had been funded from the Makomboki Tea Factory account, and they were the properties of Makomboki Tea factory.

P.W.1 testified that the plaintiff had no tenant-landlord relationship with the vendors, and no rents were paid to them. Operations at the factory were financially accounted for in annual accounts which were prepared by KTDA.

On re-examination by learned counsel ***Mr. Njenga***, P.W.1 gave further testimony as follows. What is new about the suit land is that it has a ***separate title***, which has been in existence for about one-year-and-a-half: "the land itself has not changed". Three names in the original list of vendors are now missing; they have died; "the persons sued are alive, they are the sons and the administrators of the deceased persons". In the aftermath of the sub-division of the suit land, P.W. 1 testified, "nobody has told us that any of our buildings is [now located] in the wrong place"; and "no respondent has demanded that any part of the factory be demolished". The witness said he did not know whether, as at 1980 when the suit land was purchased, Makomboki Tea Factory had been registered as a corporate entity. The purchase agreement of 1980 had been made between ***KTDA*** (plaintiff) and the respondents; but at the

moment Makomboki Tea Factory is occupying the suit land. P.W.1 testified hat in his perception Kenya Tea Development ***Authority*** and Kenya Tea Development ***Agency*** were one and the same thing.

P.W.2, ***Juliet Gachihi Kinyua***, was sworn and gave her testimony on 8th November, 2005. She lives at Dagoretti in Nairobi, and is employed by KTDA at their head office. She has worked with KTDA for over twenty years and is the property co-ordinator, with responsibility to ensure the safeguarding of the plaintiff's properties. Many of these properties are situated in Nairobi, Mombasa and all over the country. She handles land matters, working in liaison with KTDA's officers in the field.

P.W.2 testified that the plaintiff had purchased the suit property in 1980, on the basis of an agreement signed on ***29th August, 1980.*** Negotiations were conducted with ***Mr. Karanja,*** but he died, and his sons, ***Jackson Gichuhi Karanja, Mwangi Karanja, Eutychus Mwangi Karanja*** **and** ***Joseph Mwangi Karanja*** became the vendors. The entire land held by the vendors, L.R. No. LOC. 2/MAKOMBOKI/154 comprised 60.6 acres, and ***19.8 acres*** out of the larger parcel was sold to the plaintiff. The understanding reached was that the vendors were to ***effect a sub-division,*** and then ***transfer to the plaintiff*** the said portion of 19.8 acres. But first, the vendors had to deal with ***succession*** issues consequent upon the death of their father. They had to agree on administrators, and on mode of inheritance. At the time of the sale, succession proceedings were in progress, in H.C.S.C. 3610 of 1979. The agreed sale price was Kshs.20,000/= per acre; and a total of ***Kshs.396,000/=*** was paid by the purchaser to the vendors, through their advocates M/s Karuga Wandai & Company Advocates. The advocates were to ***hold the payment as a deposit,*** until finalisation of the succession process; and to this effect there was correspondence between the respective advocates for the parties (plaintiff's exhibit No. 3 and 4). Although the plaintiff was not involved in the succession, they were kept briefed on the proceedings through M/s Karuga Wandai & Company advocates.

P.W. 2 testified that KTDA had taken possession of the suit land immediately after the agreement, in 1980. The plaintiff was purchasing the land ***for the construction of a tea factory*** – known as ***Makomboki Tea Factory***. The vendors clearly indicated to the purchaser the boundaries of the 19.8 acres which form the suit land. At that stage, Makomboki Tea Factory was not in existence; but KTDA had ***the mandate to construct tea factories*** – and so it proceeded to ***erect Makomboki Tea Factory*** which is in existence to-date, and bearing a current value of Kshs.300,000,000/=.

The plaintiff learned that the ***succession process*** within the families of the vendors was concluded in 2003; and thereafter the larger parcel of land was ***sub-divided*** into: L.R. LOC.2/MAKOMBOKI/1297; L.R. LOC.2/MAKOMBOKI/1298; L.R. LOC.2/MAKOMBOKI/1299; ***L.R. LOC.2/MAKOMBOKI/1300;*** and L.R. LOC.2/MAKOMBOKI/1301. All these titles were ***registered in the names of individuals or groups within the family of the vendors.*** The plaintiffs had not been shown the sub-division plans; but a search was conducted which showed that LOC.2/MAKOMBOKI/1300 was the registered title for the suit land and that it was issued in the joint names of four vendor-family members: ***David Muigai Mwangi, James Kamau Kinuthia Eutychus Mwangi Karanja,*** and ***Michigu Mwangi***. Out of these four persons, only one, ***Eutychus Mwangi Karanja***, had been a party to the sale agreement. The other three in the new joint-ownership are sons of deceased vendors.

P.W.2 testified that the plaintiff had not been kept informed of the sub-division affecting the suit land which took place in early 2004. However, the sub-division had not disturbed the boundaries of the suit land; and KTDA believes the suit land can now be transferred to it, following the completion of sub-division. KTDA does not know ***why*** transfer to it of the suit land was not effected following the conclusion of the succession proceedings, and subsequent to the sub-division of the larger parcel of land.

P.W.2 averred that the title deed for the suit land, L.R. LOC.2/MAKOMBOKI/1300 was in the hands of four people instead of the hands of the plaintiff. She testified that KTDA (Plaintiff) through Makomboki Tea Factory, has been in occupation and possession of the suit land for over 12 years. She testified that "there was never any dispute between KTDA and the family of the deceased proprietor". P.W.2 testified that the ***boundaries of Makomboki Tea Factory are well defined;*** it stands on 19.8 acres of land; its land is secured by fencing – in the form of concrete posts overlapped and connected with wire mesh running all round, a situation prevailing ever since the factory was constructed.

Upon cross-examination by learned counsel ***Mr. Wandai***, P.W.2 further testified as follows. When the plaintiff paid the purchase price for the suit land to M/s. Karuga Wandai & Company Advocates, it was to the intent that that firm of advocates should hold the money until subdivision of the land had been effected and title to the suit land had been transferred to the plaintiff. With the consent of the purchaser, the said monies would be released to the vendors. The witness testified that the money-deposit has in the past been released instalmentally to the vendors. On the first occasion the sum of Kshs.20,000/= was released to the vendors who then made another request, but the plaintiff herein raised an objection. The witness did not know of any monies being released to the vendors, apart from the sum of Kshs.20,000/= in the first release.

P.W. 2 testified that the plaintiff's official name, Kenya Tea Development Authority, had been changed by statute to Kenya Tea Development Agency, and it was specified in a gazettement that Kenya Tea Development Agency had ***inherited all the assets and liabilities of its predecessor***. Kenya Tea Development Agency is registered under the

Companies Act (Cap. 486), and it now has a Memorandum and Articles of Association. Makomboki Tea Factory is also a limited liability company registered under the Companies Act (Cap. 486). The witness testified that Makomboki Tea Factory Limited is not a party to the instant suit, just as it is not a party to the sale and purchase agreement of 1980. The witness testified: "We bought the land so as to construct that company [Makomboki Tea Factory Limited]. It is that company which is in actual occupation." There is a board of directors for Makomboki Tea Factory Limited; but management is done by KTDA. It also has a chairman. [The company performs] day-to-day matters; but KTDA manages operations."

P.W.2 testified that M/s Karuga Wandai & Co. Advocates had had the obligation to keep the plaintiff informed of the succession matters being pursued by the vendors, and affecting the suit land, because at the beginning they were "common advocates for both sides"; but later on the plaintiff retained other advocates, M/s. J.K. Kibicho & Company Advocates.

P.W.2 testified that the plaintiff had been able to wait for the succession proceedings to be concluded and for the subdivision of the parcel of land to be effected because "there was never any dispute about KTDA's ownership"' and only in 1984 were different advocates appointed to take care of the plaintiff's interests. It was in the course of an official search in the Lands Office, that the plaintiff learned that a separate title for the suit land had been issued, in the names of four persons who were either the vendors or successors in title of the vendors.

P.W. 2 testified that even before the transfer of the suit land to the plaintiff, the vendors had sought to ***re-negotiate the sale,*** in ***1989***. They were considering revocation of the sale agreement.

On re-examination by learned counsel ***Mr. Njenga***, P.W.2 testified that Makomboki Tea Factory had not been in existence when the transaction for the sale of the suit land was undertaken – and this is the reason the factory is not a party to this suit. KTDA had the competence in law to construct a tea factory,

and to manage the same.

P.W.2 testified that the plaintiff could not undertake a new process of negotiations with the vendors of the suit land, in 1989, because already there was an agreement in place carrying contractual rights and obligations for the parties, and already the plaintiff had performed its part under the agreement. There is, in the circumstances, no reason in perception of the plaintiff, for the defendants' failure to transfer the suit land to KTDA.

2. The Defendant's Case

D.W.1, ***Michugu Mwangi***, was sworn and embarked upon his testimony on 28th March, 2006. He testified that he was a farmer in the larger parcel of land where the suit land is situated. He testified that the original owner of that composite parcel of land was his late grandfather, ***Karanja Chege***, and that he (D.W.1) along with other descendants of ***Karanja Chege***, subdivided the land as soon as the succession proceedings were concluded. The composite parcel of land was subdivided into ***five*** portions, the one occupied by KTDA being registered as LOC.2/MAKOMBOKI/1300. On this smaller parcel, D.W.1 testified, there is a tea factory, and of this factory he averred: "Makomboki Tea Factory – I do not know it. I only know KTDA". He then said: "The tea factory belongs to tea growers. I am a shareholder of Makomboki Tea Factory." D.W. 1 went on to give evidence equally remarkable: "Makomboki Tea Factory has been there since 1975. ***Mr. Kamithi Ng'ang'a*** was Chief Technical Manage and ***Mr.Gikunju*** Factory Manager. The two came to Makomboki Factory and called me with others. We were being asked to pay more. It was not clear who owned the farm…. Up to now we have not sat to agreed on the fate of that land. The land is in the name of four persons: ***David Muigai Mwangi, James Kamau Karuthui, Eutycus Mwangi Karanja,*** and ***Michugu Mwangi*** (myself)."

On cross-examination by learned Counsel ***Mr. Njenga***, D.W.1 testified that it was his understanding that KTDA ***had*** paid a purchase-price ***deposit*** for the suit land: "The agreement was made in 1980, but I never saw it." D.W.1 testified that only ***Eutycus Mwangi Karanja***, of the four persons who made an agreement with KTDA, was still alive but was ailing. He testified that he himself was the son of the late ***Joseph Mwangi Karanja***, one of the four vendors, and that he was 47 years old in 1980 when the sale agreement was made. D.W.1 has no knowledge whether his late father was ever paid for the suit land. He testified: "Kshs.396,000/= is shown in the [agreement] as having been paid; but I do not know if it was paid".

D.W.1 testified that in 1980 there was only one large parcel of land, LOC. 2/MAKOMBOKI/154 comprising 60.6 acres. He expressed ignorance as to whether 19 acres out of the composite parcel had been sold to KTDA; but he then made the puzzling statement: "KTDA purchased only a small portion of the land." He testified that the question of inheritance in respect of the large portion "was still undecided" – and "so KTDA had to await the succession case before seeking title to their portion". He went on to say that KTDA purchased land in 1980, but had entered the same in ***1975*** – and it is then that KTDA started building a factory. D.W.1 testified: "[KTDA] obtained authority to build in 1975 – though they had not title. The deceased old men gave them authority". He went on to testify: "KTDA got in in 1975, before agreement. KTDA paid a deposit and entered the land." Later he changed his mind and said: "I will agree that they [KTDA] got [into the suit land] after ***1980***, after [the making of the] agreement." Of the plaintiff's exhibits 1A, 1B, 1C, and 1D the witness testified: "These are factories already built [on the suit land] by KTDA". He testified that ***the suit land had clear boundaries***, "marked by concrete posts and wires", and they were erected "when [KTDA] ***entered [the suit land]."***

D.W. 1 testified that the succession cause relating to the larger parcel of land where the suit land is situate, had taken place in the Magistrate's Court, being Succession Cause No. 10 of 1975, and it had

been concluded in ***1997.*** On the strength of the Succession Cause decision, the defendants had proceeded to partition the larger parcel of land into five portions, on ***February 13, 2004.*** This process was accompanied by surveying; and "KTDA refused to come. I never saw them". D.W.1 testified that the Magistrate's Court hearing the succession cause had allowed sub-division into ***five portions*** – at ***D.W.1's request***. In the conduct of the subdivision, he testified, "***We did not draw lines across the factory [land], because it is Government property".***

D.W.1 testified repeatedly that during the subdivision of the composite parcel of land KTDA was not represented:

"We called KTDA. They refused to come. We called them to ***come and talk about price*** … We put LOC. 2/MAKOMBOKI/1300 together with our lands – ***so that if [KTDA] came we would agree on price***. There is no letter which shows our invitation to KTDA. [But] if they [had come] ***we would have sought a [new] price agreement***. We did not know KTDA had paid anything [for the suit land]. We would not be surprised if it turned out that KTDA paid our lawyer in 1980. …[Kshs.] 396,000/- I hear it was ***only a deposit***. So ***we would demand further payment.*** We wanted, them to pay Kshs.1,000,000/= per acre. We hear they are buying land elsewhere. So ***we wanted them to pay more."***

As the witness gave his evidence on cross-examination I had occasion to record evidence of demeanour, in the following terms:

"*Witness rather hot-tempered and automatic, or repulsive in his answering*".

To counsel's question as to why KTDA has never been given title to the suit property, D.W.1 testified: "We have never given KTDA title, because those who sub-divided the land had no agreement with KTDA."

On re-examination by learned counsel ***Mr. Wandai***, D.W.1 testified that the succession cause in the Magistrate's Court had been commenced in 1977, and judgment was delivered in 1997 apportioning specific acreages of the larger parcel of land, LOC. 2/MAKOMBOKI/154 to four individuals, ***Jackson Gichuhi Karanja*** (9.3 acres); ***Mwangi Karanja*** (20.5 acres); ***Eutycus Mwangi Karanja*** (19.5 acres); and ***Joseph Mwangi Karanja*** (8.3. acres). (Both counsel noted that the matter went further to the High Court, as HCCC No. 3610 of 1979; but the decision of the Magistrate's Court was not disturbed).

D.W. 1 testified that he and the other persons registered as owners of the various units of the composite parcel of land, "are ***asking for a new price***" for the suit land. He stated his justification thus: "I was not there [at the time of the 1980 agreement]. So we want a new agreement."

VI. PLAINTIFF'S CASE SHOULD SUCCEED WHETHER ON THE BASIS OF ADVERSE POSSESION OR AGREEMENT: SUBMISSIONS FOR THE PLAINTIFF

1. Submissions on Evidence

Learned counsel ***Mr. Njenga*** submitted that the four vendors had been selling 19.8 acres of land to the plaintiff in their capacity as the sons and legal representatives/administrators of the deceased registered owner. The ***sale price was agreed*** at Kshs.396,000/=, and the same had been ***paid*** to the defendants' advocates to hold as stakeholder ***until subdivision*** of the portion of 19.8 acres for the plaintiff. Counsel urged, I believe correctly, that there is no dispute that the agreed purchase price ***was duly paid out.***

Counsel remarked the evidence on record, which shows that in 1980 the plaintiff ***moved*** into the suit

premises after the ***identification*** of its 19.8 acres which it proceeded to ***fence*** with mesh-wire supported by concrete poles. About the same time the plaintiff ***constructed a factory***, ***now*** known as Makomboki Tea Factory Limited. Counsel noted from the evidence that the vendors had been unable to perform their part of the bargain – and this required ***subdividing and transferring*** to the plaintiff 19.8 acres of land. All through up to 1993 the defendants had not subdivided and transferred the suit land to the plaintiff; and so the plaintiff sought to have the transfer process given effect on the basis of the doctrine of ***adverse possession*** – as the plaintiff had enjoyed uninterrupted possession continuously since 1980.

Learned counsel submitted that the defence case had not been founded on consistent evidence; and that the defendants acknowledged having sold 19.8 acres of land to the plaintiff, yet D.W.1 had no coherent answer as to why the defendants have not transferred the suit land to the plaintiff even after the completion of succession and the subdivision of L.R. LOC.2/MAKOMBOKI/154 into five portions in 2004.

Mr. Njenga noted from the evidence that "there has never been any dispute to-date on the identity/acreage of the land occupied by the plaintiff, that the plaintiff has been in occupation since 1980, and that the said occupation has been peaceful and uninterrupted".

2. Submissions on Law

Mr. Njenga submitted that the specific issues for resolution herein are reducible to a single proposition: ***Whether on the law and the evidence adduced, the plaintiff is entitled to the reliefs sought [in the terms of] the further amended Originating Summons dated 14th May, 2004 particularly the claim on adverse possession.***

Learned counsel cited as persuasive authority the decision of ***Chanan Singh, J***. in ***Jandu v. Kirpal*** [1975] E.A. 225 (at page 232):

"***To prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, excessive, hostile, open and notorious."***

The late ***Chanan Singh, J*** had drawn inspiration, in formulating his proposition, from a case decided by a High Court in India, ***Turubai v. Verkatrao*** (1920) 27 B.S.M. 43 which carried the following propositions (to qualify possession of land as "adverse possession"):

(i) there must be an adverse act [by the applicant] and nothing that would lead the owner [respondent] to suppose that his rights remain intact;

(ii) the assertion of possession must be open, peaceable, and as of right;

(iii) the party claiming to hold adversely must go to prove that his possession was in denial of the other's title, and that he excluded that other from enjoyment of the property;

(iv) the registered owner must have knowledge of his ouster by the adverse possessor.

On the circumstances in which the doctrine of adverse possession will operate, learned counsel invoked the Court of Appeal's decision in ***Ahmed Abdulkarim & Another v. Member for Lands and Mines & Another*** [1958] EA 436, in which the following requirements are set out:

(a) the *identity of the suit land* must be clear;

(b) the *identity of the claimant* must be clear;

(c) it must be demonstrated that the plaintiff has been in *open, exclusive, continuous* and uninterrupted possession/occupation.

All such ingredients, ***Mr. Njenga*** submitted, were fulfilled in the instant case: the ***identity of the land*** is not in dispute, for instance. In the words of counsel: "The mere fact that the land has been subdivided from the original LOC. 2/MAKOMBOKI/154 cannot defeat the plaintiff's claim … The adverse possession was not on a title but on a ***specific identifiable portion of land*** initially to be excised and now excised."

Learned counsel submitted that the ***identity of the plaintiff*** was also not in dispute. In the words of counsel: "The contention [of] the defendants' counsel … as to why ***Makomboki Tea Factory Limited*** itself is not a party does not create any doubt [as to] he plaintiff's identity/claim." The land sale agreement, it was urged, had been between the ***plaintiff*** (KTDA) (not Makomboki Tea Factory Limited) and the ***defendants;*** and indeed D.W.1 had admitted in his evidence that when the sale transaction took place and when the plaintiff took possession, Makomboki Tea Factory Limited was not in existence. Counsel submitted: "[The] issue as to why Makomboki Tea Factory Company Limited occupies the premises bought and built up by the plaintiff is an issue outside the ambit of the issues/claim herein." Counsel further submitted that in any event, that question "was not pleaded in any of the defendants' replies to the Originating Summons and [so] the defence on that line is untenable".

Has the plaintiff been in ***open, exclusive, continuous and uninterrupted possession/occupation"*** The answer, counsel submitted, was in the affirmative.

Learned counsel urged that there is a special relationship between KTDA (the plaintiff) and the many ***tea factories*** in the entire country and the nature of this is defined in the Tea Act (Cap. 343) – a subject not in issue in this case.

Mr. Njenga submitted that nothing appeared on the record to indicate that the suit land ***no longer*** belongs to the plaintiff, or that the plaintiff has ***compromised its rights*** over the property. In the words of counsel: "The fact that the plaintiff bought the land and put up a factory going by another name [distinct from the plaintiff's own name] does not alter the status [of the property] or defeat the plaintiff's claim." Counsel urged: "The Plaintiff is still the owner of the land and if a title is issued it is to be issued in the plaintiff's favour [and] not [in favour of] Makomboki Tea Factory." Counsel submitted that any accounting questions on this matter, as between KTDA (plaintiff) and Makomboki Tea Factory Limited "is outside the defendants' concern and [also] out of the confines of the issues [now before the Court]".

On the question whether KTDA as Kenya Tea Development Authority could move the Court when its formal designation has changed to ***Kenya Tea Development Agency Limited*** – an issue introduced in the cross-examination by counsel for the defendants – ***Mr. Njenga*** submitted that this point be disregarded: for it has never been in issue; "the plaintiff's capacity has not been challenged in the pleadings filed by the defendants." By Legal Notice No. 44 of 1999 clauses 3(2), 7 the name Kenya Tea Development Authority was to be deemed to be a reference to Kenya Tea Development Agency Limited. There was no need in the circumstances, counsel urged (contrary to the defendants' position), that the plaintiff's pleadings should have been amended.

Mr. Njenga returned to D.W.1's testimony: that the reason the defendants have not transferred the suit

land to the plaintiff is that they ***wanted to engage the plaintiff in fresh negotiations on the purchase price.*** Counsel stated that the sum of Kshs.396,000/= paid to the defendants' advocates was the total purchase price and was not merely a down payment. In the words of counsel:

"The sale price was agreed upon and paid in full way back in 1980. The delay in subdivision and transfer of the 19.8 acres … [was] not occasioned by the plaintiff's acts … or omission [so] as to qualify the defendants to ask for a re-negotiated sale price."

Mr. Njenga submitted that the plaintiff was entitled to the suit land, on the basis of the doctrine of adverse possession as read with the sale agreement dated 29th August, 1980. He urged that the plaintiff be declared the absolute owner of the parcel of land known as LOC. 2/MAKOMBOKI/1300 being the 19.8 acres excised from land parcel No. LOC. 2/MAKOMBOKI/154.

VII.RECENTLY -REGISTERED OWNERS OF SUIT LAND DIFFERENT FROM DECEASED VENDORS; SUIT LAND BEARS NEW REGISTRATION IDENTITY; NO ADVERSE POSSESSION OVER SUCH NEW TITLE; IDENTITY OF PLAINTIFF QUESTIONABLE; CORPORATE BODY OCCUPYING SUIT LAND DID NOT SUE: SUBMISSIONS FOR THE DEFENDANTS

Learned counsel ***Mr. Wandai*** submitted that the Kenya Tea Development Authority had ceased to exist on ***1st January, 2000*** through a revocation order contained in Legal Notice No. 44 of 1999, the entity being replaced by Kenya Tea Development Agency, a limited liability company under the provisions of the Companies Act (Cap. 486). Counsel insisted that the instant action was incompetent, as the plaintiff's pleadings had not been amended to reflect the effect of legal Notice No. 44 of 1999. So, counsel urged: "if any judgment were to be made in favour of the plaintiff it [would] be made [*in favour*] of a [non-existent] body."

Counsel then submitted that the claim itself was for ***non-existent land***: because the agreement relied on by the plaintiff was in respect of L.R. LOC. 2/MAKOMBOKI/154, but that parcel of land ***ceased to exist*** in 2004 when it was subdivided into ***new title numbers***. The new title, LOC.2/MAKOMBOKI/1300 "has only existed for two years and [so] cannot be the subject of being acquired … by the doctrine of adverse possession; the new title was not created subject to any existing rights [of] the plaintiff". Counsel urged:

"… the new title is not [the]subject of any sale to the plaintiff; the subdivision is not fraudulent and … is a valid title which should only be [affected] by rights and obligations that [have] arisen after it was created. There is no way the rights in relation to parcel ***No. 154*** can be passed to parcel ***No. 1300."***

Such an ingenious technical argument, however, was not supported by any established ***principle of law***, or indeed by any concept evolved in the course of ***judicial practice***. This caused me concern because all rights asserted in litigation can only claim validity on the basis of ***law***; but in this case a claim of grave practical consequences was being urged, but without citing a supportive, trodden path of the law.

Mr. Wandai next urged that the current registered owners of the suit land could not be bound by a sale agreement executed between their predecessors in title, for the one part, and the plaintiff for the other, way back in 1980. Since the current proprietors of L.R. LOC. 2/MAKOMBOKI/1300 were for the most part not involved in the agreement of 1980, counsel urged, "they cannot … be bound by an agreement they were not parties to …"

Learned counsel contended that the occupant of the suit land, ***Makomboki Tea Factory Company***

Limited, was different from the Plaintiff, and the plaintiff has ***not been*** in occupation of the suit land. This contention, however, flies in the face of the evidence; for D.W.1 had testified: "I will agree that KTDA got into the suit land after 1980 …" He had also said, in the course of his somewhat ill-tempered delivery of testimony: "***Makomboki Tea Factory – I do not know it. I only know KTDA"***. In the light of the evidence, I will overlook counsel's contention in this respect – as counsel's proper role is only to appraise the fact and the law, and to ***submit*** analytical constructions thereof.

VIII. *ANALYSIS*

1. Preliminary

My inferences drawn from the evidence and from the submissions of counsel have, I believe, taken a certain direction already, from the earlier part of this judgment.

It is apparent that ***two main issues*** hold the key to a resolution of the dispute herein: (a) Can the plaintiff maintain this suit" (b) Are the conditions for acquisition of title by adverse possession satisfied"

2. Can the Plaintiff Maintain this Suit"

At the submissions stage the defendant has taken the position that the plaintiff cannot maintain this suit – because the Kenya Tea Development Authority which filed suit in 1993, was later dissolved by Legal Notice No. 44 of 1999 which established in its place the Kenya Tea Development Agency Limited; because KTDA in 1980 purchased land from persons now dead, and different persons have, in 2004, become the registered owners of the suit land, L.R. LOC.2/MAKOMBOKI/1300 which has only recently been subdivided from the original composite title, L.R. No. LOC. 2/MAKOMBOKI/154; because there is Makomboki Tea Factory Limited occupying the suit land, and so how can KTDA also claim occupancy of the same premises.

There is the basic issue of procedural law, that if the defendants meant such issues as important propositions in the prosecution of their defence, would have raised them at the beginning, in the form of ***preliminary objection.*** They ***never did***, and after numerous appearances in Court, both sides being represented, directions for hearing were given, and the full trial duly took place – to the intent that the issues in dispute be determined on the merits. On the facts and the circumstances of this case, I would have held that the defendants are not entitled to raise such intrinsically ***preliminary*** issues during submissions.

It may be added that the claim that the Kenya Tea Development Authority could no longer maintain suit following the publication of Legal Notice No.44 of 1999, lacks validity because the successor entity, namely the Kenya Tea Development Agency Limited, succeeded to all rights, liabilities and ***choses*** in action then held by its predecessor.

Counsel for the defendants raised no legal principle to sustain his claim that the plaintiff could not assert rights-claims against successors-in-title to the deceased vendors who had sold the suit land to the plaintiff in 1980. I would assume that the deceased vendors passed on their contractual rights and liabilities to their successors-in-title.

The defendants' claim that the very well-defined and fenced suit land could not be the subject of adverse possession claims, merely because of a ***recent*** land-subdivision which assigned the suit land a new land-register numbering, is not in my view, a valid claim in law. I have had occasion to consider this point in a recent case, ***The Assumption Sisters of Nairobi Registered Trustees v. Benson Mukuwa***

Wachira, HCCC No.2658 of 1998 (O.S) and I thus held:

… the term "squatter" … is a term of art which signifies a person recognised as capable in law of acquiring legal title to land, simply by virtue of his having had possession of that land over a certain defined period of time. From that principle, it is clear to my mind that the essential act demanded of the squatter, is *sheer holding of and dominion over the suit land. I would hold that there is no basis for demanding that the squatter when he entered into possession, must have checked whether that land was described in the Lands Office records*, or whether it belonged to X or to Y, or indeed, whether it stretched across from X's land to Y's land to Z's land. The only business of the squatter is to squat, possess, enjoy and retain; and once the minimum duration is completed he can seek the formal indicia of ownership of the land which he has possessed for so long."

I would add that claims based on adverse possession are founded on the ***reality*** of the claimant having been ***in possession***, and not on the fact that the land in question was or was not the subject of an administrative identification or record-keeping.

I therefore do not accept the defendants' claim that the suit land was given a Lands Office numbering only two years ago, and so only from that date of numbering can the limitation period for adverse possession begin to run.

I have taken into account the relevant evidence and heard the submissions of counsel, with regard to the status of the land-sale contract of 1980, and with regard to the plaintiff's interests in respect of the suit property. The evidence shows that the plaintiff's predecessor-in-title did purchase the suit land, paying therefor the whole agreed purchase price of ***Kshs.396,000/=;*** so that the unfulfilled task was that of subdivision and transfer of the suit land by the purchasers to the plaintiff.

The question whether the suit land is occupied and possessed by Makomboki Tea Factory Ltd or by KTDA is in my view not in issue in these proceedings – since it had not been part of the pleadings. In any case, it has been abundantly shown in uncontroverted evidence, that the buildings in the suit land have been constructed by KTDA, and that KTDA, which was the purchaser of the suit land, is the manager of the operations of the Makomboki Tea Factory; and this, in my view, is to be regarded as ***possession*** of the suit premises on the part of KTDA. It is not for this Court, on the facts of this case, to inquire what tenancy arrangements exist at the suit premises.

3. *Adverse Possession*

It is clear from the evidence that KTDA purchased the suit land in 1980 and took possession immediately. This possession has been sustained since then; it has been enjoyed in an exclusive manner, without any risk of deprivation, without violence, peacefully and distinctly notoriously for all to see and acknowledge. This is ***adverse possession***, I would hold, such as will entitle the plaintiff to the right of legal ownership over the suit land.

IX. *DECREE*

On the basis of the evidence on record, and the submissions made by counsel on matters of law and fact, I have been able to determine the issues in dispute and I now render a decree as follows:

1. The plaintiff/applicant is hereby declared as the absolute owner of the suit land otherwise known as L.R. No. LOC.2/MAKOMBOKI/1300 excised in 2004 from the larger parcel of land L.R.

No. LOC.2/MAKOMBOKI/154 by virtue of adverse possession.

2. I hereby declare the defendants/respondents as holding title to the said suit land in trust for and for the benefit of the plaintiff/applicant.

3. I hereby order the defendants/respondents to execute, within 30 days of the date hereof, documents of transfer in respect of the parcel of land L.R. No. LOC.2/ MAKOMBOKI/1300 in favour of the plaintiff/applicant.

4. If the defendants/respondents be in default in complying with paragraph No. 3 hereinabove, the High Court's Deputy Registrar shall sign the said transfer documents, in respect of L.R. No. LOC.2/MAKOMBOKI/1300 in favour of the plaintiff/applicant.

5. The defendants/respondents shall pay the plaintiff's costs in this suit and the same shall bear interest at Court rate as from the date of filing suit.

DATED and DELIVERED at Nairobi this 19th day of May, 2006.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Njenga, instructed by M/s J.M. Njenga & Co. Advocates

For the Defendants/Respondents: Mr. Wandai, instructed byM/s Karuga Wandai & Co. Advocates.