



Mangi & another v Naaman (Enviromental and Land Originating Summons E019 of 2022) [2025] KEELC 1493 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1493 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2022
LL NAIKUNI, J
MARCH 21, 2025

BETWEEN

SAFARI MWERI MANGI 1ST PLAINTIFF

KADZO NDORO NYIRO 2ND PLAINTIFF

AND

ABDUL NASSIR SALIM NAAMAN DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court emanates from a Civil Suit before it. It was instituted by Safari Mweri Mangi and Kadzo Nodoro Nyiro the Plaintiffs/Applicants herein against Abdul Nassir Salim Naaman, the Defendant/Respondent herein by way of Originating Summons on the 23rd February, 2022 filed on 24th February, 2022. The suit was premised under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 Laws of Kenya, Order 5 Rule 17, Order 51 of the Civil Procedure Rules, 2010, Sections 28(h) and 101 of the *Land Registration Act*, No. 3 of 2012; Order 37 Rule 7 of the Civil Procedure Rules, 2010 Laws of Kenya, Section 150 of the *Land Act* No. 3 of 2012 Laws of Kenya and Sections 13 and 26 of the *Environment and Land Court Act*, No. 19 of 2011, Sections 7, 13, 17, 37 and 38 of The *Limitation of Actions Act* Chapter 22, Laws of Kenya and all other relevant enabling provisions of the Law.
2. Upon filling of the Originating Summons the Defendant/ Respondent entered appearance through a Memorandum of Appearance responded through the Statement of Defence and Counter - Claim dated 24th April, 2023.
3. It is instructive to note that by the consensus of the parties, on 19th July, 2024 the Honourable Court did conduct a site visit (“Locus in Quo”) of the suit property. Thereafter, a report was prepared and shared with the parties. The same is attached in this Judgement for ease of reference.



II. Court directions before the hearing

4. On 5th February, 2024, after confirming that all parties had complied with Order 11 of the Civil Procedure Rules 2010, directions were taken pursuant to the provision of Order 37 Rules, 13, 16 and 18 of the Civil Procedure Rules, 2010. The Honourable Court set a date through “Viva Voce” on 22nd April, 2024. The Plaintiffs/Applicants called PW - 1, on the same day and closed their case thereafter. The Defendant/ Respondent called their witnesses DW - 1 on 18th July, 2024 after which he closed his case.

III. The Plaintiffs/Applicants’ case

5. The Plaintiffs/Applicants claimed entitlement of the suit property by virtue of adverse possession and therefore seek the following orders:-
 - a. That the Originating Summons herein be served on the Respondent herein in person.
 - b. That the Respondents interests in parcel of land situated in Mtwapa, Mombasa County, known as Plot Subdivision No.4098 (Original No.3241/53/III/MN be and hereby extinguished accordingly.
 - c. That survey be done for the portions of land occupied by the Plaintiffs/Applicants herein and subdivision done for them to be registered forthwith as the owners jointly severally of the portions they occupy from the main suit property known as Plot Subdivision No.4098 (Original No.3241/53/III/MN in place of the Respondent by reason of the fact that the Plaintiffs/Applicant have become entitled to the said portions of parcel of land by adverse possession.
 - d. That the land Registrar Mombasa do hereby proceed to issue Title Documents for the portions of parcel of land occupied by the applicants from the main title known as Plot Subdivision No.4098 (Original No.3241/53/III/MN in the names of the Plaintiffs.
 - e. That the Orders referred to in paragraphs 2, 3 & 4 above be registered against the Title to property known as Plot Sub - Division No.4098 (original No.3241/53/III/MN in terms of Section 38(2) of The Limitation Actions Act, Chapter 22, Laws of Kenya.
 - f. That the costs of this Originating Summons be provided for.
6. The Original Summons was based on the following grounds on the face of it and those of the 21 paragraphed supporting affidavit sworn by Safari Mweri Mangi, the 1st Plaintiff/ Applicant sworn on the same day with the Originating summons where she averred:-
 - a. The Suit property known as Plot Sub - Division no. 4098 (original no.3241/53/III/MN was registered in the name of the Defendant in whose possession the original Title documents were annexed in the affidavit and marked as “SMM – 2” was a copy of official search.
 - b. The applicants had been in physical occupation and possession of a portion of land known Plot Sub – Division No. 4098 (Original NO. 3241/53/III/MN Situate at Mtwapa.
 - c. The 1st Applicant entered the suit land in the year 1996 which was more than 26 years whilst the 2nd Applicant was born on the suit land in the year 1935 which was more than 87 years.
 - d. In the applicants’ stay and occupation no one had ever come to claim the land from them.



- e. The applicants had stayed in harmony together with their neighbors and brought up their families knowing it as their home.
- f. The applicants had lived on the suit property peacefully and developed it openly by building their homes without hindrance and interruption for more than 26 years and 87 years respectively. Annexed in the affidavit and marked as “SMM – 3” were photographs showing their homesteads.
- g. The Applicants only came to know about the Respondent in the year 2018 or thereabout when he came to the area and promised them that he would compensate them their houses and give them money to leave and those interested were told they could buy their portions and that they allow him to build a perimeter wall.
- h. Even after completion of the Respondent’s construction of the wall and gate, the applicants still lived peacefully and had access to the land while negotiations for compensation continued and those interested in buying their portions started contributing towards buying.
- i. It was until recently when the Respondent started demolishing houses including their neighbors and were been given a 10 days’ notice to vacate or their houses would be demolished. Annexed in the affidavit and marked “SMM – 4” were photographs showing the demolished houses.
- j. The Respondent had gone further to put a Maasai guard at the gate locking it and trying to deny them access to their homes. Annexed and marked as “SMM – 5” were photographs showing Maasai Guard.
- k. The Applicants were now in danger of being evicted and their houses demolished and they would be rendered homeless as they had no any other home other than the suit land.
- l. The Applicants had reported the incidences to Mtwapa Police Station vide O.B No.54/13/02/22 and got some assistance but the OCS informed them that they needed Court’s Order to restrict the Respondent from locking them out. Annexed and marked as “SMM – 6” was a copy of the O.B.
- m. Unless the Respondent was stopped by this Honorable Court from demolishing their houses as they would be homeless and their suit rendered nugatory.
- n. The Respondent was only trying to evict the Applicants forcefully in an attempt to defeat our suit and render it nugatory.
- o. The Applicants now had acquired overriding interest over the defendant as the owner had been absent and that they had been in actual and active possession and occupation of the said property for over the required 12 years.
- p. The Applicants be highly prejudiced if orders sought were not granted as they will be locked out and their homes demolished and rendered homeless.
- q. The Applicants in possession and use of the suit land where their homestead were and would be rendered homeless.
- r. It was in the interest of justice that the Orders sought herein were granted as prayed.
- s. The Respondent would not suffer any prejudice if this Application was allowed as prayed.



IV. The Plaintiffs' responses to the Counter - Claim

7. The Plaintiffs responded to the Counter - Claim through a reply to Counter - Claim dated 3rd October, 2023 where they deponed that:-
 - a. The Defendant (Plaintiff in the Counter - Claim) reiterated the contents of the Counter - Claim in its entirety.
 - b. In response to Paragraph 15 of the Plaintiff's Reply to Defence and Defence to Counter - Claim, the Defendant (Plaintiff in the Counter - Claim) reiterated the contents of Paragraphs 21 and 22 of the Counter - Claim.
 - c. In response to Paragraph 16 of the Plaintiff's Reply to Defence and Defence to Counter - Claim, the Defendant (Plaintiff in the Counter - Claim) reiterated the contents of Paragraphs 23 and 22 of the Counter - Claim.
8. The Plaintiff/Applicant called PW - 1 on 22nd April, 2024 and he testified as follows:-

A. Examination in chief of PW - 1 by Mr. Ondieki Advocate.

9. PW - 1 was sworn and testified in Swahili language. He identified himself as Safari Mweri Mangi, a citizen of Kenya with all the particulars indicated in his national card as shown to court. He stated that he was born in in the year 1948 and resided at Mtwapa where the suit land was situated. He recorded his witness statement – dated 23rd February, 2022 and a list of five documents. He got into the land in the year 1996. He was a business man dealing with fish mongering. Before coming the suit land, he had come from a place called Banbini. By that time, there were no people at that place and hence there was low business. The suit land bordered a business premises known as Luxury. When he moved from Banbini, he left behind his family – 1st wife. He was now living on the suit land with his 2nd wife. The witness told the court that he knew M/s. Kadzo Ngoro Nyiro, the 2nd Plaintiff herein. She also resided on the suit property.
10. PW - 1 refuted that he was a professional squatter. He had never gotten land for the purposes of speculation nor for selling purposes. He was aware of the Court case at Kilifi. He had paid their advocate but the Advocate consumed their money and hence never informed them of the outcome of the said case. The Plaintiffs were claiming the land at Banbini. There was another case at Mombasa. It was for the claim of land at Banbini. He was not literate – he realized that the land had been sub divided into smaller plots. The Defendant had claimed that they trespassed in the year 2018 which he refuted as he knew they got there in the year 1996. When he got there then, he found Kadzo Ngoro Nyiro already settled there. They neither broke the gate nor trespassed into the land.
11. PW - 1 told the court that there was a perimeter wall, a gate and guards. The construction was done while they were already in occupation of the land. Their structures – semi permanent – cement and mud together were never demolished. They neither requested nor persuaded the Defendant to let them stay there for a while. They never had any agreement with the Defendant. He knew Mr. Kassim Bona as a neighbor. His structure was demolished. After that, he moved to be living outside the perimeter wall. He was not aware about the case at Malindi. PW - 1 was never involved. PW - 1 he did not know about Kanze Safari Ndungo. What the witness knew was his structure was demolished and he moved out. He urged the Court to allow his prayers as sought from the Plaintiff.



B. Cross examination of PW - 1 by Mr. Oluga Advocate.

12. According to the PW - 1 he was not literate. He had never attended school at all. When referred to his witness statement he stated that on top of the place shown as deponent he had put his name. Although illiterate but at least he knew how to write his name. i.e. he spelt SAFARI. He only knew how to write his name but not anymore. With reference to the typed names – he only knew the name Safari. His advocate read for him the affidavit before he signed it and he fully understood the contents of the affidavit.
13. On being referred to the contents of Paragraph 6 of his witness statement, PW - 1 further told the court that they had stayed in harmony together with their neighbors and brought up their families knowing the property as theirs. He had two families one at Banbini and another at Luxury, Mtwapa. At Paragraph 6 he had not mentioned this fact. He had resided on the two parcels of land – his neighbours were Kadzo Ngoro Nyiro and Mwarogo were living. However, there before the demolition took place there were many people occupying the 2 ½ acres. They were only occupying a small portion.
14. The witness told the court that the Defendant and the 1st and 2nd Plaintiffs got into an agreement. It was agreed that he could not demolish their structures and that they would be compensated. However after the construction of the perimeter wall he seemed to change his mind. He decided to evict them from the land. PW – 1 knew the suit land belonged to someone but he did not know the person. The witness got into the land for the purposes of selling of fish in the year 1996. That used to be the only activity that pre-occupied him.
15. The witness told the court that he left his family at Banbini. He moved to Luxury, Mtwapa with his 2nd wife called Sidi. His first wife - Kadzo who was still at Banbini. At Luxury he had a semi -permanent structure. It was built by an artisan. Before it was made of mud. However, at the moment it was made of stones, mud and cement from the year 1996. The Kilifi case was for the land in Banbini. He was claiming two parcels of land which were his right while filing this case; he never disclosed the existence of the two cases. The cases were still pending before Court i.e. referred to replying to the Defence - (ELC No. 68 of 2020) and “Peter Mweri and Others – Versus – Hamisi Mwinyifaki and 8 others”. The witness knew about it.
16. PW - 1 told the court that they had not withdrawn this case as yet though it was stated that they had done so under Paragraph 3 of the Defence. In that case the supporting affidavit was signed by the witness. Paragraph No. 2 he had said they resided in Bandini land for long without interruption. He found Kadzo Ngoro on the land. He was referred to paragraph 4 of his statement which he indicated that he personally entered the suit land in the year 1996 which was more than 26 years. Whilst the 2nd Applicant was born on the suit land in the year 1936 which was more than 87 years.
17. The only fact he had was that he found M/s. Kadzo there. He was not sure about the year and the place of his birth.

C. Re - examination of PW - 1 by Mr. Ondieki Advocate.

18. PW - 1 confirmed that in this case, his claim was of the land at Luxury. The owner was Mr. Abdul Nassir Salim Naaman. The suit land and the one at Bandini had no connection at all. These were two (2) distinct parcels of land. They were not connected at all. They were sparsely apart. At Luxury, before the demolition took place, there were over 100 houses there. He moved from Bandini due to poor/ economic value of selling fish there. He would be selling fish and staying there with his wife. It was the land at Bandini that he had a title deed and they discovered that it was sub – divided into smaller parcels.



19. PW - 1 told the court that he was not a professional squatter – his family occupied two places – Bandini and Luxury. This case was to do with the suit land belonging to Abdul Nassir Salim Naaman (i.e. Luxury). He reiterated that the two parcels were distinct. He never disclosed the existence of the other cases. He got at Bandini in the year 1986 and at Luxury in the year 1996. He gave the evidence on his own behalf and not that of the 2nd Plaintiff. He was not representing the 2nd Plaintiff. But he had her authority to represent her. On the issue of the date of birth he had no information.
20. On 22nd April, 2024 the Plaintiffs through their legal counsel Mr. Ondieki marked the close of their case.

V. The Defendant/Respondent’s case

21. The Defendant/Respondent responded through a 23 Paragraphed Statement of Defence and Counter - Claim dated 24th April, 2023 where the Defendant averred that:-
 - a. The Plaintiffs’ allegation that they had been physical occupation and possession of the suit property it was NOT true and was vehemently denied by the Defendant. The Plaintiffs were put to strict proof of the said allegation.
 - b. Indeed the Plaintiffs filed another case, to wit, “Mombasa ELC No.68 of 2020 (OS): Safari Mweri Mangi & 2 Others – Versus - Estate of Hamisi Mwinyilai Ramadhan & 7 Others” in which the Plaintiffs claimed a different property known as C.R No. 4314/1/MN by way of adverse possession and claimed that they had been in continuous and peaceful occupation of the said property known as C.R No. 4314/1/MN for more than 34 years. There was no way the Plaintiffs could be in occupation of C.R No. 4314/1/MN and at the same time they were in occupation of the suit property herein.
 - c. Therefore, the Defendant strongly and vehemently denied the Plaintiffs’ allegation that the 1st Plaintiff entered the suit land in the year 1996 while the 2nd Applicant was born on the suit land in the year 1935.
 - d. The Plaintiffs invaded, trespassed on and illegally entered into the suit property in or about the year 2018 and constructed illegal structures thereon.
 - e. The Defendants confronted the Plaintiffs and demanded that they immediately vacate the suit property. The Plaintiffs pleaded with the Defendant to let them stay there for a while.
 - f. The Defendants confronted the Plaintiffs and demanded that they immediately vacate the suit property. The Plaintiffs pleaded with the suit property despite having agreed to voluntarily vacate prompting the Defendant to make efforts to protect his property by putting an askari to guard the same from the Plaintiffs and other invaders but the Plaintiffs have proved difficult.
 - g. Previously, the suit property was invaded by a squatter called KASSIM MAONA and not any of the Plaintiffs. The Defendant successfully sued the said KASSIM MAONA in “Malindi ELC No. 51 of 2009: Abdul Nassir Salim Naaman – Versus - Kassim Maona” in which Justice Angote entered judgment in favour of the Defendant herein (the Plaintiff in the said Malindi case) on 31st October 2014 and issued an eviction order against the said KASSIM MAONA.
 - h. While Malindi ELC No. 51 of 2009 was still pending and KASSIM MAONA sensed defeat in the case, he invited about ten (10) other squatters who joined hands with him by illegally invading the suit property so as to defeat the looming decree and the possible execution that would accrue and ensue therefrom.



- i. The Plaintiffs herein were not among the ten (10) squatters who were invited into the suit property by KASSIM MAONA and the Plaintiffs herein had never occupied the suit property which was then invaded by KASSIM MAONA and his ten (10) squatters.
- j. The invitation of ten (10) squatters by KASSIM MAONA prompted the Defendant to report the invasion of the suit property to the local administration who held several meetings with the invaders and advised them to vacate.
- k. On 26th October 2019, the ten (10) squatters agreed in writing to vacate the suit property after the Defendant had given them a grace period of two weeks to vacate therefrom.
- l. The said KASSIM MAONA and the ten (10) squatters did not honour their written undertaking to vacate the suit property hence the Defendant evicted therefrom in the year 2017.
- m. Sometimes in the year 2019, one of the ten (10) squatters, KANZE SAFARI NDUNGO and some three other persons sued the Defendant in ELC case No. 200 of 2019 (OS) in which they purported to have been in occupation of the suit Property for a long time and sought to be awarded the suit property by way of land adverse possession.
- n. It was subsequent to the eviction of KASSIM MAONA and the ten (10) squatters that the Plaintiffs herein attempted to take advantage of the situation and invaded the suit property.
- o. It was therefore not true as alleged by the Plaintiffs that the 1st Plaintiff entered the suit land in year 1996 while the 2nd Applicant was born on the suit land in year 1935 because:
 - i. The only person who invaded and occupied the suit property in or about the year 1998 was KASSIM MAONA whom the Defendant successfully sued in Malindi ELC No. 51 of 2009 and the ten (10) squatters who invaded the suit property after the Defendant had filed the Malindi case in 2009. The said KASSIM MAONA and the ten (10) squatters were successfully evicted from the suit property.
 - ii. The Plaintiffs had been in occupation of a different property identified as CR. 4314/I/MN as they rightfully pleaded in ELC No. 68 of 2020 (OS) and they could not claim to have been simultaneously in occupation of the suit property.
- p. The Plaintiff had not met the threshold for granting of the adverse possession order because:
 - i. The Plaintiffs had not been in occupation of the suit property for a period of 12 years.
 - ii. By the Plaintiffs' own pleading, the 1st Plaintiff allegedly entered the suit property in the year 1996 while the 2nd Plaintiff flip-flopped between being born on the suit property in the year 1935 or entering the same in the year 1935. The Defendant's title was issued on 18th May 2004 meaning that the Plaintiffs' alleged entry into the suit property which took place in the years 1996 and 1935 respectively could not have been adverse to the Defendant's title which was non-existent in the stated years.
 - iii. The Plaintiffs pleaded that they only got to know about the Defendant in the year 2018 meaning that they could not have entered the suit property in the years 1996 and 1935 with a view to adversely possess the Defendant of the suit property as they did not know of the Defendant.
 - iv. The Plaintiffs never annexed a certified extract of the title to the suit property as required by Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010.



- q. The Defendant averred that the Plaintiffs were perennial and professional squatters who had perfected the art of claiming other peoples' properties by way of land adverse possession even where they had not been in occupation of the same for the requisite period of 12 years.
22. The Defendant also filed a Counter - Claim where he averred that:-
- a. The Plaintiff in the Counter - Claim was the registered owner of the property known as Sub - division Number 4098 (Original Number 3241/53) Section III Mainland North (hereinafter "the suit property").
 - b. The Defendants had without any colour of right claimed the suit property, invaded it and trespassed upon the same.
 - c. The Defendants' claim over the suit property was illegal.
 - d. The Plaintiff in Counter - Claim relied on the following particulars of illegality and trespass by the Defendants:-
 - i. Illegally gaining access to the suit property.
 - ii. Putting up temporary and illegal structures on the suit property.
 - iii. Claiming ownership of the suit property.
 - iv. Interfering with the Plaintiff's guard posted in the suit property
 - e. The Defendants had interfered with the Plaintiff's right to own and quietly.
23. For these reasons whereof, the Plaintiff in the Counter - Claim prayed for Judgment against the Defendants in the Counter – Claim jointly and severally for:-
- a. An eviction order be and is hereby issued against the Defendants herein, Safari Mweri Mangi and Kadzo Ngoro Nyiro, their family members, relatives, agents, employees, tenants or any other person authorized by them and/or claiming through them or acting on their instructions from accessing, entering, trespassing on, occupying, developing, building on, cultivating, undertaking any agricultural activities or in any manner whatsoever interfering with the property known as Subdivision Number 4098 (Original Number 3241/53)Section III Mainland North.
 - b. An order of permanent injunction be and is hereby issued restraining the Defendants herein, Safari Mweri Mangi and Kadzo Ngoro Nyiro, their family members, relatives, agents, employees, tenants or any other person authorized by them and/or claiming through them or acting on their instructions from accessing, entering, trespassing on, occupying, developing, building on, cultivating, undertaking any agricultural activities or in any manner whatsoever interfering with the property known as Subdivision Number 4098 (Original Number 3241/53) Section III Mainland North.
 - c. The Officer Commanding Station (OCS), Mtwapa Police Station or any other nearer police station to ensure compliance with this court's orders and that peace is maintained at all times.
 - d. Damages for trespass.
 - e. Mesne profits.
 - f. Costs of this suit and of the Counterclaim.



- g. Any other and further relief this court may deem just to grant.
24. The Defendant/Respondent called DW - 1 on 18th July, 2024 who testified that:-

A. Examination in chief of DW - 1 by Mr. Oluga Advocate.

25. DW - 1 was sworn and he testified in Swahili language. He identified himself as Abdul Nassir Salim Naaman, a citizen of Kenya with all the particulars as shown in his national identity card. He recorded a witness statement on 3rd October, 2023 and filed a list of seven (7) documents dated 3rd October, 2023 with number 7 missing. The witness produced six (6) exhibits as Defendant Exhibit Numbers 1 to 6. He went further to tell the court that the 1st Plaintiff's claim to have entered the suit land in the year 1996 was not true. He was never on the land. He was on the land from 2018. The 2nd Plaintiff claimed to have been born there which aversions were not true. She moved to the property in the year 2018.
26. According to the witness it was Mr. Kassam Maauna who was the one on the land. He was removed out of the land by a court order. It was from there that the 1st and 2nd Plaintiffs got to the land as per Paragraph 12 of the witness statement. With reference to Paragraph 13; it was the case number ELC No. 51 of 2009. The witness was aware that the 1st Plaintiff had another land at a different place and where he used to carry out fish mongering business. He settled at the suit land and got another wife. He wanted him out but he refused. The Plaintiffs wanted them to have a tenancy agreement but he refused.

B. Cross examination of DW - 1 by Mr. Ondieki Advocate.

27. DW - 1 confirmed that from his witness statement he had indicated that the 1st and 2nd Plaintiffs were professional squatters. He had referred to other cases to do with these Plaintiffs (referred to paragraph 7 of the witness statement) i.e. ELC No. 68 of 2020 [O.S.]. The witness told the court that he was the Defendant in that case and what he knew was that he had won that case. He was the one who dictated to his advocate the contents of the witness statement. On being referred to Defendant Exhibit No. 2 (at page 8) the witness told the court that from the names there; he was not mentioned. He also never appeared in Court.
28. On being referred to Defendant Exhibit number 3 (Page 20) Paragraph 1 (line 1 to 4) being a Ruling in ELC No. 68 of 2020 where the Court held that:- "Mr. Matata, the Learned Counsel for the 1st to 4th Respondents submitted that the 3rd Applicant is a complete stranger who has never been in possession of the land. He stated that he knows that he masquerades as an Advocate. This submission has not been contested in any way by the 3rd Applicant.....". In this case the 3rd Applicant was one Mr. Cornel L. Shisanya – whom was claimed to be masquerading as an Advocate of High Court of Kenya. DW – 1 stated that Plot No. CR. 43 OF 2014 was his land. It was the parcel mentioned in ELC NO. 68 OF 2020. He did not fully understand how the procedure was done at the land registry.
29. With reference to paragraph 4 the witness told the court that he knew how CR. NO. LR. NO. 43 was given. He knew there was a difference between the CR. No. and LR. No. They maybe differed but referring to the same parcel of land. It was after that he disclosed the existence of ELC No. 68 of 2020 to Court that the plaintiffs disclosed to withdrawing the said case. With reference to the original pleadings by the Plaintiff; it was filed on 24th February, 2022. With reference to the Replying affidavit, the Defence were field on 15th March, 2022. He did not remember when the 1st and 2nd Plaintiff withdrew the ELC No. 68 of 2020.
30. It was not his disclosure of the existence of ELC No. 68 of 2020 that caused the Plaintiffs to withdraw the case – ELC No. 68 of 2020. They were still in occupation of the suit land. When he swore the Affidavit; he had not known them. He knew them in 2018. He swore the Affidavit in 2022. His land



had perimeter wall around it; he constructed it in 2018. With reference to paragraph 20 the witness stated that he evicted them in 2017. When he constructed the perimeter wall there was one lady and a gentleman. From a court order, they were asked to all vacate and not to go back.

31. According to the witness what they were claiming was not correct nor was it true. The witness admitted that the houses of the Plaintiffs were permanent. He claimed to have constructed the perimeter wall after they had already constructed the permanent houses inside the land. But they kept on demolishing the houses on the land. In the process they would leave the land voluntarily but they refused. They got onto the land during the time of Kassim Maana. They got onto the land in year 2018.
32. The witness told the court that he did not have any evidence that the Plaintiffs got into the land in year 2018. He did not have any proof of this agreement. It was in year 2019. It was with four (4) – when he won the case in ELC No. 200 of 2019. The Judgment was delivered on 18th January, 2022. It was after that that the 1st and 2nd Plaintiffs decided to file this suit. They had discussed earlier. Among the four (4) – Kanze Safari Ndunyo, Jenifa Doo Mang’abwa, Benard Kalama and Priscilla Mshanga Ngala; none of the 1st or 2nd Plaintiffs were amongst them.
33. DW 1 told the court that he filed a case against Kassim Maona in ELC No. 51 of 2009. With reference to paragraph 14 of the statement, the witness told the court that it was only him and his family whom he sued as they were the ones in occupation of the land. He had not brought Mr. Maona to court. He confirmed that the 1st and 2nd Plaintiffs were still in occupation. They had permanent houses. He reiterated that the Plaintiffs got on the land in year 2018.

B. Re - examination of DW - 1 by Mr. Oluga Advocate.

34. DW - 1 reiterated that the 1st and 2nd Plaintiffs got on the land in the year 2018 and not 1996 as alleged. By that time, he had already evicted Mr. Kassim Maona – by that time that had been in the land. He evicted Kassim in 2017. But the Plaintiffs requested that they continued to be on the land.
35. On 18th July, 2024 the Defendant closed his case through his Learned Counsel Mr. Oluga Advocate.

VI. Submissions

36. On 18th July, 2024, immediately after the closure of the Plaintiffs/ Applicants’ and the Defendant/ Respondent, the Honorable Court directed the parties to canvass the originating summons dated 23rd February, 2022 through written submissions. Thereafter, on the 19th July, 2024 parties having fully complied, the Honorable Court reserved a date for delivery of Judgement on 21st March, 2025 accordingly.

A. The Written Submissions by the 1st & 2nd Plaintiffs.

37. The 1st and 2nd Plaintiffs through the Law firm of Messrs. Marende, Necheza and Company Advocates filed their written submission dated 14th November, 2024. Mr. Ondieki Advocate commenced his submissions by stating that what was before the Honourable Court for its determination was the Plaintiff’s Originating Summons dated 23rd February 2022 and filed in Court on 4th February 2022. It was against the Defendant herein jointly and severally. The Plaintiff sought for Prayers 2, 3, 4 and 5 as provided under the Originating Summons plus costs and any other relevant order the Court may deem fit in the circumstances.
38. The Learned Counsel averred that at all material times of this suit the Plaintiffs were living and were still living on the suit property. They enjoyed physical occupation of the suit property. Further, during the continued stay, no one had interrupted them. They had enjoyed the property for more than



twenty six years (26) in respect to the 1st Plaintiff and eighty seven years (87) in respect to the 2nd Plaintiff. Therefore, they sought for a declaration that they had been in possession peacefully, openly and continuously without interruption.

39. In his submissions, the Learned Counsel relied on the following issues for the determination by Court. These were:-
- a) Whether or not the Plaintiffs had acquired rights over the suit property.
 - b) Whether the Defendants' rights jointly and severally over the suit property have been extinguished.
 - c) Whether the Plaintiffs had any other remedies available to them or not
40. With regard to the first issue. The Learned Counsel held that, the Plaintiffs had been in occupation of the suit property for more than twenty six years (26) in respect to the 1st Plaintiff and eighty seven years (87) in respect to the 2nd Plaintiff. That they did enter the land without consent of the Defendant and stayed on the suit property openly, freely and continuously. They caused developments thereon, including temporary and permanent buildings and other amenities.
41. On 19th July 2024 the Honourable Court conducted a site visit and prepared its report. From it, the Court confirmed what the Plaintiffs had pleaded and proved in their pleadings that to wit:-
- a) They were in physical occupation of the suit property.
 - b) The houses were relatively old houses even the 1st Plaintiff's iron sheets had already rusted.
 - c) The fish business was being conducted on the suit property-and that was what the 1st Plaintiff stated that caused him to move from the other place to current suit property due to customers.
 - d) The 2nd Plaintiff lived on the suit property together with her family (Children and grandchildren) with them having other semi-permanent houses on the suit property
 - e) That the 2nd Plaintiff was born on the suit property and her parents having been buried on the suit property with their graves present and her siblings too.
42. The Learned Counsel submitted that the Plaintiffs had acquired rights over the suit property. To buttress on his case, he referred Court to the case of:- "Teresa Wachuka Gachira -Versus - Joseph Mwangi Wachira Civil Appeal No. 325 of 2003" where the Court emphasized the importance of following the prescribed procedure in adverse possession claims. Such claim was based on the fact that the suit property belonged to a registered owner. In the instant case, the Plaintiffs had provided proof that the Defendant was the registered owner of the suit property vide the search dated 14th February 2022. It was produced in evidence as Plaintiffs' exhibit number 1.
43. Further, the Learned Counsel referred Court to the of "Kimani Ruchine – Versus - Swift Rutherford & Co Limited (1980) KLR," where it stated that the Plaintiff had to prove that they had been in occupation and use, the possession had to be continuous and not broken by any temporary purpose or endeavours. The Court also in the case of:- "Teresa Wachuka Gachira (supra) stated the proof of exclusive continuous and uninterrupted use of the suit property was a must. Periodic use of the suit property did not amount to use that was inconsistent with the enjoyment of the land by the proprietor. The Plaintiffs gave evidence in support of their claim and to showed that they had developed the suit property by making permanent and semi - permanent constructions of their houses on the suit land and this was exhibited by the Photostat of the developments on the suit property.



44. In addition, the Court conducted the site visit and confirmed that the Plaintiffs lived on the said suit property with their houses and family members. That they used the land in a manner inconsistent with the rights of the registered proprietor (the Defendant herein). The Learned Counsel submitted that the Plaintiffs by their continuous occupation and use of the suit property in exclusion of the Defendant who was the registered owner for more than twenty six years (26) in respect to the 1st Plaintiff and eighty seven years (87) in respect to the 2nd Plaintiff make them acquire overriding interest over the suit property to the Defendant hence ought to be the registered owners.
45. On the second issue. The Learned Counsel asserted that indeed the Defendant's right over the suit property had been extinguished by the use and occupation of the Plaintiffs. The Defendant in his defence tried to raise two issues that the 1st Plaintiff was "a perennial and professional squatter" and brought about another case of ELC 68 of 2020 in which he was a Plaintiff. Secondly, that the Plaintiffs had not been in occupation for more than 12 years stating that they invaded his land in the year 2018. The Plaintiffs vehemently refuted the said allegation. In their evidence they confirmed the existence of ELC 68 of 2020 in which they were Plaintiffs, but confirmed that it was in respect to a different land and not the suit property. They argued that the facts of ELC 68 of 2020 and Kilifi SRMCC 304 of 2015 were non material to this case because the owners of the said property were not parties to this suit.
46. However, if that was what the Defendant was relying on to paint the Plaintiffs as perennial squatters, then it was evident during the hearing and through evidence given that the suit property referred to in both ELC No. 68 of 2020 and Kilifi SRMCC 304 of 2015 was the same and it was a short distance from the suit property. The 1st Plaintiff confirmed that he first settled on the other plot (suit property of ELC G8 of 2020) whereby being a fish vender the area then was bushy and with few customers then he moved to the suit property in the year 1996 and build his home and got a second wife there. That since then he had two homesteads the first land where he settled and the suit property and this was confirmed by the Court through the site visit which it visited both plots and found. Indeed, the 1st Plaintiff had two homes with two wives and the family members (children) living on both lands. That in the circumstances with the backup of evidence and confirmation of the Court through site visit, that indeed the Plaintiffs were not perennial squatters and were not claiming where they never lived. They were claiming where they were actually in occupation and in use.
47. On the third issue. The Learned Counsel vigorously refuted the allegation meted by the Defendant in his testimony and evidence that he evicted all the squatters in his land in the year 2017. Additionally, that he built a perimeter wall around his land and that the Plaintiffs only trespassed and built their homes in year 2018. It was his humble submission that logically that was impossible because with the permanent houses built how could one get the materials over the wall and build the houses from the foundation level to completion and move in without him knowing especially after putting his Masai askaris on the gate. It was their submission that the Court in its own observation of the houses at the site confirmed that the houses were relatively old and not newly constructed houses in the year 2018 as alleged by the Defendant. The Learned Counsel asserted that, on the contrary it was the Defendant who before building the perimeter wall who offered the Plaintiffs that he would compensate them. That they should not worry when if he constructed the wall. However, after that he wanted to evict them forcefully without compensating them which resulted to the institution of this suit.
48. The Defendant had referred to other cases in his defense but during testimony he confirmed that the Plaintiffs were not party to any of those cases. They urged this Honourable Court to find in favor of the Plaintiffs that they had proved their case. That they were the ones who had been in physical occupation for more than 12 years hence had acquired rights over the Defendant.



49. The Learned Counsel submitted in general legal terms as pertains the subject matter. He held that the provision of Article 40 of *the Constitution* of Kenya protects the right to property. The same Article is however silent on whether the right to ownership of property could be limited or not. This then, it can be inferred that Parliament may enact laws to limit ownership of land, provided such limitation is not arbitrary or discriminatory in terms of the grounds set out in Article 27. Article 24 (1) of *the Constitution* provides that the rights contained in the Bill of Rights shall not be limited, except by law and as long as such limitation is reasonable and justifiable in an open democratic society, taking into account all relevant factors including the purpose of the limitation. Article 60 (1) further provides that land is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable. The *Limitation of Actions Act* serves to limit the rights of land ownership in respect of adverse possession in this instance. In reference to Angote Judge in the case of “Kahindi Ngala Mwangandi – Versus - Mtana Lewa (2014) eKLR”, land was a scarce resource and should not be allowed to lie abandoned in perpetuity. It was to be held, used and managed in a manner that is equitable, efficient, productive and sustainable. The law on limitation in this regard is therefore to ensure that land is put in proper use at all times rather than lying abandoned.
50. The Learned Counsel opined that the Defendant had left the land unused and unmanned for more than 12 years, which period the Plaintiffs had been in occupation of the suit property. In terms of Sections 7,9,13,17,37 and 38 of the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya, and the case of “Titus Kigoro Munyi vs Peter Mburu Kimani Civil Appeal no 28 of 2014” the title of a registered owner of land would be extinguished and vested in a third party who proved he had been in occupation of the land continuously and uninterrupted for twelve years, such occupation had been open and notorious to the owner and without permission of the said owner, and that the said third party had asserted a hostile title and dispossessed the true owner. Therefore, it was their submission that the Plaintiff had acquired rights over the suit property and the Defendants' rights over the suit property had been extinguished.
51. Finally, whether the Plaintiffs had any other remedies available to them or not. The Learned Counsel reiterated that the property herein was registered in the names of the Defendant. There was no way the Plaintiffs could make any claim when in fact they were not the registered as owner. Given, they had been in occupation for over 12 years but could not legally deal with the property, and even risked eviction unless the suit property was registered in their names. They relied on “the nemo dat quod non habet’ doctrine, to assert that the Plaintiffs could not deal with the property.
52. In conclusion and from the foregoing, the Plaintiffs prayed that their suit be allowed in toto.

B. The Written Submissions by the Defendant

53. The Defendant through the Law firm of Messrs. Hezron Gekonde & Co. Advocates filed his written submissions dated 1st April, 2022 . Mr. Oluga Advocate submitted that the Defendant was the registered owner of the suit property; Plot no.4078, CR 294112/16 orig. no. 3241/52 section III MN. In the year 2009, the Plaintiffs sued one Kassim Maona in civil suit no. 51 of 2009 in Malindi High Court seeking orders of eviction, permanent injunction, general damages and interest. The main reason was because the Defendant in civil suit no. 51 of 2009 had illegally trespassed to the suit property in the year 1998 and put up temporary structures without the consent or authority of the Plaintiff. The Defendant filed his statement of Defence and Counter - Claim in which he claimed to be declared as the owner of the suit property.
54. The case proceeded for hearing and a Judgment was delivered by the court dated 31st October 2015 in which the Defendant's case was dismissed with costs and an order of eviction was issued. Consequently



- the Defendant prepared a decree which was signed by the court on 28th July 2015 together with warrant to the court bailiff to give vacant possession dated 31st August 2015. Execution proceedings commenced and a few of the trespassers made extra ordinary arrangements with the police against the plaintiff and they sought to be given 14 days to give vacant possession.
55. The Defendant constructed a wall round the suit property and kept his property safe. They referred to annexures marked as “ANSN-5” being a set of Photographs. Contrary to what the belief of the Plaintiffs that they were all trespassers having been evicted as per the court orders. In the year 2019 other application namely - Kanze Safari Ndungo and 3 others filed an originating summons against the Defendant and 2 more others claiming that they wanted to be declared as the sole owners of the suit property through adverse possession. He referred to the annexures marked as “ANSN – 3”. The case proceeded into full hearing. The Plaintiffs gave their evidences and gave their witnesses. The court delivered a judgment dated 18th January 2022. The Plaintiffs’ case was dismissed with costs. No appeal was made against the ruling hence warrants to the court bailiff were issued and the decree dated 16th February 2022.
56. The Plaintiffs had filed this suit by changing merely names in order to show that they are different from the ones who were in the other OS. They have not introduced anything new to warrant the court to continue holding the case. The 1st Plaintiff in OS no. 200 of 2019 Kanze Safari Ndungo had alleged that she was in the suit property for 26 years. This was the same claim made by the 1st Applicant in this suit Safari Mweri Mangi at paragraph 6 of the motion. The other claim that there was an old man in the photo accompanying the application to the supporting affidavit to the motion was hot air.
57. The Learned Counsel submitted that the issue of Land adverse possession could never arise in favour of the applicant for the reasons that at Paragraph 7 of the motion the applicant had clearly stated that they came to know the Respondent in the year 2018 or thereabout. An applicant for adverse possession must have known the registered owner of the suit property for not less than a period of 12 years and occupied the land for that period.
58. It was their submission that the Defendant was in full possession of the suit property. The issue of the applicant being in the suit property is not real. That the issues of eviction was done long time ago and it was maintained that it must continue. Any attempt by this honourable court to stop the demolition done legally would be tantamount to this court sitting on appeal on one’s brother and sister Judgment.
59. It was the Learned Counsel’s contention that the Plaintiffs’ supporting affidavit to the motion was full of contradictions. The contents of Paragraphs 5, 6 and 7 of the supporting affidavit never correlate well with the contents of Paragraphs 7, 8 and 9 of the notice of motion because the applicants themselves had shown that there was demolition and that they were negotiating for compensation therefore they could not say that nobody had ever come to remove them from the suit property.
60. The Learned Counsel averred that the Applicant's claim that they were allowed by the police to continue staying at the suit property as they remove their things had no substantive evidence at all. They urged the court to disregard it. It was their submission that the Applicants were the 3rd group of people who were claiming adverse possession of the suit property. This was bad in law. In each and every case the parties had been saying that the suit property was theirs. This one was saying that they wanted a surveyor to go the suit property to cover out what it believed to be his land. The law could not allow this as it was an exercise in vain.



VII. Analysis and Determination

61. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiffs and the relevant provisions of the law.
62. In this regard, there are four (4) key issues for the determination by this Honourable Court. These are:
 - a. Whether the Plaintiffs have made out their claim of the suit land by way of land Adverse possession?
 - b. Whether the Defendant has made out his claim in the Counter - Claim?
 - c. Whether the Parties herein are entitled to the prayers sought?
 - d. Who meets costs of the suit and counterclaim

Issue No. a). Whether the Plaintiffs have made out their claim of the suit land by way of land Adverse possession?

The Site Visit Report

63. Before proceeding with the analysis of the issue under this Sub – Title, I wish to share the site visit report as herein below.

Republic of Kenya

In the Environment and Land Court

At Mombasa

ELC. No. 19 of 2022

Site Visit (“Locus In Quo”) Report at Mtwapa Area Held on 19th July, 2024 at 11.45 A.M.

i. Introduction

The site property is situated at Mtwapa area of the County of Kilifi. It is approximately 3 Kilometres from the Mombasa – Malindi road and 25 Kilometres from the Main Mombasa township. It is on Hamisi bin Salim Road – Road from main road. The team assembled as per scheduled and the session was commenced by a word of prayer. The session was guided by the Judge. It is instructive to note that the Court visited two different sites (for ease of reference referred as “Site – A and B” respectively.

ii. Court:

1. Hon. Justice L.L. Naikuni, ELC No. 3.
2. Firdaus Mbula – Court Assistant.

iii. Plaintiffs

1. Mr. Ondieki Advocate.
2. Mr. Safari Mwero – The 1st Plaintiff.
3. Mrs. Kadzo – the 2nd Plaintiff.



Members of the public, well wishers & neighbours.

1. Mr. Hassan Kassim.
2. M/s. Jenifer.
3. Mr. Bernard Karama.
4. M/s. Rehema Charo.
5. Mr. Salim Kasim.
6. Mr. Gift Richard.
7. Mr. Mofat Masha.
8. Mr. Omar Kasim.
9. Mr. Salim Kasim.
10. Mr. Karisa Baya.

iv. The Defendants.

1. Mr. Oluga Advocate.
2. Mr. Abdul Naman Nasoor – the Defendant.
(Hereinafter referred to as “The Team”)

v. Security Operatives

1. The Officer In Charge (OCS) of Mtwapa Police Station - Michael Mugo.
2. Sgt. Elizabeth Pombe.
3. PC. George Ngure.
4. PC. Victor Shinga.
5. PC. Khamis Simon.

vi. The area administration office

1. The Area Chief - Madam Halima Hamadi.
2. The Village Elder – Mr. Mbwana Hamisi.

vii. The Purpose for the site Visit

6. The Court informed the team the purpose of the site visit (“Locus in Quo”). It indicated that this was pursuant to a Court made on 22nd April, 2024 in accordance with the provision of Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit: -



Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

While Order 40 Rule 10 (1) (a) provided to wit: -

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit: -

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.
7. By consensus of the parties, it was agreed that Site Visit be conducted led by the parties from both side and their Advocates. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities on the ground to enable the Court in making a fair, just and equitable decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.
 8. Hence, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
 9. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

iv. The Procedure

10. The procedure upon which the site visit was to be conducted was explained to the team present. It was mutually agreed that the team be guided by the two Land Surveyors present. At the same time, the team was guided by both the Plaintiff and the Defendants who were knowledgeable of the place by moving around within and without the suit land.

On Site “A” (Luxury – Mtwapa)

Observations

11. After some deliberations and moving around the site land, the team made the following observations.
 - a. The suit land was known as Plot Sub – division No. 4098 (Original NO.3241/53/III/MN). It measures approximately 2



acres or thereabouts It is well fenced using a permanent concrete a six (6) feet nine (9) metres high perimeter wall. It has one entrance metallic gate. The gate is on the Southern Part of the Plot

- b. Within the plot there has been constructed a few Semi-Permanent houses. These included Mr. Safari's 4 bedroomed house with a rusty iron sheet roofs. There was presence of solar electricity supply from the panels mounted on the rooftop.
- c. Mr. Kazungu showed us his one 1 roomed shelter.
- d. M/s. Kadzo whom we learnt was born Kadzo born in the year 1935 and a bearer of the Kenyan national identity card bearing numbers 22633767. She is a fairly frail with some withered skinned body (most likely due to nutritional and lack of adequate balanced diet reasons and poor health surroundings reasons) old lady but with a sharp memory. She lived in a 2 bedroomed permanent structure.
- e. Mr. Mwama Ndoro had a 2 roomed semi permanent
- f. Mr. Alphonse Karis has a 2 roomed house.
- g. Mr. Bernard Karama has a 2 roomed Semi permanent.
- h. The team noticed some plantations within the compound. They were of neem and some coconut trees.
- i. The team also saw the presence of a cowshed where it was informed it accommodated 12 herds of cattle. Indeed, from the fresh cow – dung, there was a possibility and being the ordinary practice that there were some of them which spend the night there but were taken away off the site land for green pastures and water during the day. Unfortunately the team never saw the livestock whatsoever.
- j. The team saw the presence of traditional and subsistence poultry keeping.
- k. It was shown a foundation and some structure debris which it learnt was a remain of a demolished foundation where a church once stood.
- l. The team observed some fish mongering and frying business. It was being conducted from a tiny coconut roofed but open sided makeshift kitchen.
- m. Within the compound and right in front of the house of M/s. Kadzo were five (5) unkempt graveyards of some ancestors. We learnt that was in accordance with the Giriama customary rites and traditions. We also saw some exterior makeshift bathroom and toilets.



- n. Perimeter wall had evidence of demolition by people trying to illegally trespass into the suit land.
- o. Within the compound there were several debris and foundations of demolished structures. The debris were mainly on the Southern part of the suit land. The team learnt that these belonged to some inhabitants before they were lawfully evicted following a court order. The team was never shown the said orders whatsoever. Indeed, the team learnt that most of the well wishers present were the previous owners of these structures and had attended the site visit with hope of being reinstated to the suit land, They harboured very high hopes from their expression and facial demeanour. They really appeared disparate.
- p. Generally, all the suit land had over grown and unkempt bushy and wild vegetation with no care at all. The said plantation was neglected and appeared extremely untidy with very high possibility of some dangerous to human beings bearing poisonous venom reptiles such as snakes habiting there.

On Site “B” (Banbino)

Observation

- 12. There was very little to see on this land. Nonetheless, the team made the following observations.
 - a. The suit land was known as as Bindini. It measured approximately it bore approximately 1, 439 sub - divided of 80 plots The team learnt that the land belonged to one Mr. Karisa Baya who was shot in in the year 2019.
 - b. The distance between the two plots was barely 1 Kilometre or thereabout.
 - c. It had several Semi-permanent which apparently belonged to one family. Mr. Safari had 3 homesteads there.
 - d. There was no mush activities taking place on the land apart from some several plantations of pawpaw trees, coconut trees and bananas.
 - e. The team leant that the civil suit Kilifi & ELC. 68/20 was related to this land. Mr. Safari moved onto the land as a Caretaker. He was immediately after followed by Mr. Kibwana Athman, wife Halima Mwinyikai.
 - f. Before his demise, it was land owner who allowed Mr. Safari the responsibility to care for the land. Further, it was the owners who caused sub – division of the suit land.

Main road



viii. Conclusion.

13. Upon the conclusion of the site visit, the following were the directions.
- a. That the Honourable Court was to prepare and share the draft Site Visit Report among the parties in due course.
 - b. That the parties to feel free to make any further inputs to the report.
 - c. That the parties were given direction and leave on filing their written submissions accordingly based on the observations made from the Site Visit.
 - d. That the matter to be mentioned on 19th September, 2024 for further direction and the Honourable Court to deliver its Judgement on 24th October, 2024.

There being no further business, the site visit ended at 12.44 pm.

Site Visit Report Signed at Mombasa and Dated 31st Day of July 2024

.....

Hon. Mr. Justice L. L. Naikuni

Environment and Land Court at

Mombasa

64. Now turning to the analysis under this sub – heading, the Honourable Court has deciphered that the main issue is whether the Plaintiffs/Applicants were entitled to ownership of all that parcel of land known as Plot Sub – division No. 4098 (Original NO.3241/53/III/MN) was registered in the name of the Defendant by virtue of adverse possession. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as “the Burden of Proof” and is encapsulated for by Section 107 of the [Evidence Act](#) Cap. 80 laws of Kenya which provides as follows:-

“ 107. Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

65. Under the provision of Order 37 Rule 4 of the Civil Procedure Rules, 2010 pursuant to which the application was brought provides that:-

“ Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may



require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgage.”

66. It is trite law that Adverse possession is a doctrine of law wide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on the provision of Sections 7, 13 and 38 of the *Limitation of Actions Act*, cap. 22. Section 7 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.”

67. The provision of Section 13 of the *Limitation of Actions Act* provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

68. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the *Limitation of Actions Act*, Cap. 22 and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides;

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land
- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

69. And Order 37 Civil Procedure Rules provides:

- “(1) An Application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons
- (2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

70. Article 162 (2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 and Section 38 of the *Limitation of Actions Act*, Cap. 22 confers jurisdiction on this court to handle claims premised on land adverse possession.



71. In the present case, the Plaintiffs aver that they had been in physical occupation and possession of a portion of land known Plot Sub – division No. 4098 (Original No. 3241/53/III/MN Situate at Mtwapa. The 1st Applicant entered the suit land in the year 1996 which was more than 26 years whilst the 2nd Applicant, , aged close to 85 years old, was born on the suit land in year 1935 which was more than 87 years. In the applicants’ stay and occupation no one had ever come to claim the land from them. When the Court conducted the site visit it was able to see the permanent and semi permanent structures on the land belonging to the 1st and 2nd Plaintiffs. The 1st and 2nd Plaintiffs were living on it with their families. There were several debris an indication of mass demolition of structures having taken place there. The applicants had stayed in harmony together with their neighbors and brought up their families knowing it as their home. The applicants had lived on the suit property peacefully and developed it openly by building their homes without hindrance and interruption for more than 26 years and 87 years respectively. There was no evidence of the Defendant having carried out any development on the suit land. The only visible aspect of development was the eight feet concrete perimeter wall around the suit land with one common metal gate. Clearly, the Defendant never used, occupied nor lived on the suit land.
72. In the case of: “Kimani Ruchure – Versus - Swift Rutherfords & Co. Ltd (Supra) Kneller J held that:
- “ the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion).”
73. Further to this, in the case of “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” adverse possession was defined as
- “the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”
74. PW - 1’s evidence was born in the year 1948 and resided at Mtwapa; he recorded his statement – dated 23rd February, 2022 and a list of five documents. He got into the land in 1996 and was a business man dealing with fish mongering. Before then he had come from a place called Bambino but there were no people and hence low business. It bordered Luxury. Hence he moved to Bandini but left his family back – 1st wife. He was now living with his 2nd wife. The witness told the court that he knew Kadzo Ndoro Nyiro, 85 years old lady - the 2nd Plaintiff who also resided on the suit property. He had never gotten land for the purposes of speculation not for selling purposes. He was aware of the Court case at Kilifi; he had paid their advocate but the Advocate consumed their money and hence the witness did not know of the outcome. The Plaintiffs were claiming the land at Banbini. There was another case at Mombasa. It was for the claim of land at Banbini. He was not literate – he realized that the land had been sub divided into smaller plots. The Defendant had claimed that they trespassed in the year 2018 which he refuted as he knew they got there in 1996 and he found Kadzo Ndoro Nyiro there. They never broke the gate and trespassed into the land



75. In the case of “M’ikiara M’rinkanya & Another – Versus - Gilbert Kabeere M’mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR”, the Court held that:-

‘...From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher – Versus - Donovan [1948] 2 All ER 11, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession...

..as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in Lowsley – Versus - Forbes [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.’

76. Further, in the case of “Mbira – Versus - Gachuhi [2002] 1 EALR 137” the court stated as follows;

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

77. Similarly in the case of “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” Kuloba enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;

- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
- b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c. The occupation of land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupant.
- d. The non-permissive actual possession hostile to the current owner must be un equivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e. The possession by the person seeking to prove title by adviser possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.



- g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession
78. Therefore, to determine whether the Applicants' rights accrued the Court will seek to answer the following
- i. How did the Applicant take possession of the suit property?
 - ii. When did he take possession and occupation of the suit property?
 - iii. What was the nature of his possession and occupation?
 - iv. How long has the Applicant been in possession?
79. On examination of the questions above, the Plaintiffs have contended that they had been in possession of the suit property from the years 1996 and 1935 respectively. It was the evidence of PW - 1 that by the time they moved there in order to continue prospering on his fish mongering business. There was more market potential here. He found the 2nd Applicant already living and occupying the land. The Plaintiffs have produced photographs and evidence and the court confirmed the position of the said land when it visited the suit property on 1996. During the site visit, the Court noted that there were both semi and permanent structures made what looked like coral rocks which looked old, poultry and livestock paddocks in form of cattle shed. The Honourable Court was also shown some few unkempt Giriama graveyards which they were held to belong to some ancestors. The persons living on the suit land had developed the area and the people knew each other right to the date of their settling on the suit land.
80. From the evidence produced by both the Plaintiffs and the Defendant; the Plaintiffs got to the land in from the years 1996 and 1935 respectfully. The suit was filed in year 2022 which makes it 26 and 87 years respectively, from the calculation of the time the Plaintiffs the number of years the Plaintiffs have been in possession of the suit property was more than 12 years.
81. The question is therefore was the possession uninterrupted for more than twelve years? The answer is of course to the affirmative because the Defendant himself in his testimony had averred that the houses were permanent and that at some point he asked the Plaintiffs to move when he promised them that he will compensate them their houses and give them money to leave and those interested were told they can buy their portions and that they allow him to build a perimeter wall in 2018. They had had uninterrupted occupancy of the suit property for more than 12 years.
82. In the foregoing, it is my finding from the above that the Plaintiffs did satisfy the requirements to be declared in adverse possession as they have demonstrated to have been in actual possession of the land for 12 years. Their claim therefore succeeds.

Issue No. b). Whether the Defendant has made out his claim in the Counter claim.

83. Under this sub title, the Honourable Court shall examine the Counter - Claim by the Defendant with a view of establishing it viability. The Defendant averred that:-
- a. The Plaintiff in the Counter - Claim was the registered owner of the property known as Sub - division Number 4098 (Original Number 3241/53) Section III Mainland North (hereinafter "the suit property").
 - b. The Defendants had without any colour of right claimed the suit property, invaded it and trespassed upon the same.
 - c. The Defendants' claim over the suit property was illegal.



- d. The Plaintiff in Counter - Claim relied on the following particulars of illegality and trespass by the Defendants:-
- i. Illegally gaining access to the suit property.
 - ii. Putting up temporary and illegal structures on the suit property.
 - iii. Claiming ownership of the suit property.
 - iv. Interfering with the Plaintiff's guard posted in the suit property
- e. The Defendants had interfered with the Plaintiff's right to own and quietly.
84. The Defendant claims that there has been numerous Court cases over the ownership of the suit property. At first it was against on Mr. Kassam Mbaona and whom after losing the court case, the 1st and 2nd Plaintiffs came into the land. The Defendant never produced any evidence indicating any connection between the Plaintiffs to those cases. In the real sense, it is evident that the Defendant slept on his rights over the suit land and the possession and occupation of the suit land by the Plaintiffs was for all purposes adverse to the Defendant's title. The Defendant's claim that he got the title in 18th May, 2004 does not diminish the fact that the Plaintiffs had been in possession of the suit land for more than 12 years even if the court was meant to count the limitation period from them to the point that the Defendant allegedly evicted the said persons who were living on the suit property in 2017 that would be 13 years. Be that as it may, apart from the construction of a perimeter wall, the Defendant has never been in use nor occupation of the land at all. Furthermore, the Plaintiffs would still be within the limitation prescribed by sections of the Limitations of Actions Act Cap 22 and the Registration of *Land Act* No 6 of 2012 that anchors Adverse Possession. Never the less the Plaintiffs took possession and remained there on all this while. The Defendants' claim is therefore caught up with the doctrine of latches.
85. Having found that the Defendant's title was extinguished by operation of the law owing to prolonged possession and occupation of the suit land by the Plaintiffs it follows that the Defendant's Counter - Claim and particularly the argument that the 1st Plaintiff already owned another land elsewhere, cannot stand, the Plaintiffs entered the suit land and possessed it for more than 12 years therefore they were no trespasser as Section 28 (h) of the *Land Registration Act*, No. 3 of 2012 recognizes overriding interest on land such of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the said Act prescription is one of the ways of acquisition of land. The claim of trespass is not founded after extinguishment of the Defendant's title in favour of the Plaintiff.

Issue No. c). Whether the parties are entitled to the prayers sought

86. The Plaintiffs sought for the ownership and entitlement of the suit property by virtue of adverse possession. Had the Plaintiffs proved the above? My answer is in the affirmative as there has been adequate possession in continuity, in publicity and that it was adverse to the registered owner. The Defendant/Plaintiff in the Counter - Claim was registered as owner of the suit land in the year 2004 assuming the Plaintiffs were in continuous occupation then it would meet the threshold of 12 years as it is 13 years and more by the day the Defendant took possession of the suit land in 2017 - 2018.
87. Besides, the Defendant never summoned any other witness such as relatives or neighbours or the local Chief or leaders or the Land Surveyors or the Land Registrar and so forth as persons whom would have supported his claim of the use, occupation or title over the suit land. The Honourable Court finds this situation rather strange and difficult to believe.



88. In the given circumstances, I strongly find that the Defendant has failed to prove his Counter - Claim and the same is dismissed with costs to the Plaintiffs.

Issue No. d). Who bears the costs of the suit and the Counter claim

89. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

90. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

91. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

92. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

93. By the event, it means the result or outcome of the legal action. In this case, as this Honourable Court has opined above, the Plaintiffs shall have the costs of the Originating Summons dated 23rd February, 2022 filed on 24th February, 2022 and the Counter - Claim dated 24th April, 2023.



VIII. Conclusion and Disposition

94. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiffs have not established their case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-
- a. That the suit by the 1st & 2nd Plaintiffs/Applicants as per the Originating Summons dated 23rd February, 2022 filed on 24th February, 2022 succeeds in its entirety and is hereby allowed with costs.
 - b. That the Statement of Defence and Counter - Claim dated 24th April, 2023 by the Defendant be and is hereby found to lack merit and the same is dismissed in its entirety with costs.
 - c. That an order do and is hereby issued that the Respondents interests in parcel of land situated in Mtwapa, Mombasa County, known as Plot Sub - Division No.4098 (original No.3241/53/III/MN be and hereby extinguished accordingly.
 - d. That an order do and is hereby issued instructing that a survey be done for the portions of land occupied by the 1st & 2nd Plaintiffs/Applicants herein and subdivision done for them to be registered forthwith as the owners jointly severally of the portions they occupy from the main suit property known as Plot Sub - Division No. 4098 (Original No.3241/53/III/MN in place of the Respondent by reason of the fact that the Plaintiffs/Applicant have become entitled to the said portions of parcel of land by adverse possession.
 - e. That an order do and is hereby issued instructing the land Registrar Mombasa do hereby proceed to issue Title Documents for the portions of parcel of land occupied by the applicants from the main title known as Plot Sub – Division No. 4098 (Original No.3241/53/III/MN in the names of the Plaintiffs.
 - f. That the Orders referred to in Paragraphs 2, 3 & 4 above be registered against the Title to property known as Plot Sub – Division No. 4098 (Original No.3241/53/III/MN in terms of Section 38 (2) of The Limitation Actions Act, Chapter 22, Laws of Kenya
 - g. That the costs of the Originating Summons dated 23rd February, 2022 filed on 24th February, 2022 and the Counter - Claim dated 24th April, 2023 to be awarded to the 1st & 2nd Plaintiffs and borne by the Defendant herein.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS
SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF MARCH 2025.**

.....
**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT MOMBASA**

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Ondieki Advocate for the 1st & 2nd Plaintiffs/Applicants.
- c. Mr. Kilonzo Advocate holding brief for Mr. Oluga Advocate for the Defendant/ Respondent.

