



Wambua & 6 others (Suing on their own behalf and on behalf of the squatters/residents of Land Registration Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975 also known as Deep Sea Settlement Scheme) v Sheraton Apartments Ltd & 5 others (Environmental and Land Originating Summons 385 of 2019) [2023] KEELC 17680 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 385 OF 2019**

EK WABWOTO, J

MAY 25, 2023

BETWEEN

**BENSON MBITHI WAMBUA 1ST APPLICANT
FRASHIA NYAMBURA MAINA 2ND APPLICANT
TEXAS NJENGA WAMBUI 3RD APPLICANT
CHARLES MWANIKI MUCHUNGU 4TH APPLICANT
PATRICK MOI 5TH APPLICANT
HELLEN KHAMEDE 6TH APPLICANT
MARY WAIRIMU MURAYA 7TH APPLICANT**

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE SQUATTERS/
RESIDENTS OF LAND REGISTRATION NUMBERS 209/9945, 209/9946,
209/9947, 209/9948, 209/9949 AND 209/11975 ALSO KNOWN AS DEEP SEA
SETTLEMENT SCHEME**

AND

**SHERATON APARTMENTS LTD 1ST RESPONDENT
ELDAMA RAVINE VIEW POINT ESTATE LTD 2ND RESPONDENT
ZAHIR ABDUL MANJI 3RD RESPONDENT
MANSUKHLAL JUTHALA SHAH 4TH RESPONDENT
MARY JACINTA NJERI 5TH RESPONDENT
MEHMOOD REHMAT KHAN 6TH RESPONDENT**



JUDGMENT

1. The Applicants filed this suit by way of an Originating summons dated November 28, 2019 seeking the following orders:
 - a. That a permanent injunction do issue restraining the Respondents whether by themselves, assigns, agents, servants, employees, persons claiming under their authority from interfering with the Applicant's ownership, quiet possession, enjoyment and or user of Land Registration Numbers 209/9945, 209/9947, 209/9946, 209/9948, 209/9949 and 209/11975.
 - b. That a declaration that the Applicants have become entitled by way of adverse possession to ownership of all those parcels of land comprised in Land Registration Numbers 209/9945, 209/9947, 209/9946, 209/9948, 209/9949 and 209/11975.
 - c. That a declaration that the titles to the Land Registration Numbers 209/9945 – 9949 and 209/11975 have been extinguished in favour of the Applicants under Section 37 and 38 of the Limitation of Actions Act.
 - d. That an order to issue requiring and directing the Registrar of Lands to register the Applicants as Lessees for the residue of the terms of all those parcels of Land compromised in Land Registration Numbers 209/9945 – 49 and 209/11975.
 - e. That such, other or further orders as my meet the ends of justice in this case.
 - f. Those costs of this application be provided for.
2. The Originating summons was supported by affidavits sworn by Benson Mbithi Wambua, Mary Wambui Njoroge, Frashia Nyambura Maina, Mwinzi Syanda, Texas Njenga Wambui, Charles Mwaniki Muchungu, Patrick Moi, Hellen Khamede and Mary Wairimu Muraya. The application was also premised on the following grounds: -
 - i. The Applicants herein are absolute beneficial owners and occupants of Land Registration Numbers 209/9945, 209/9947, 209/9948, 209/9949 and 209/11975 commonly known as Deep Sea Settlement Scheme.
 - ii. The Applicants entered into occupation of the said portion of land from as early as 1947 to 1970 and have continued in open, continuous, exclusive uninterrupted and adverse occupation of and use of Land Registration Numbers 209/9945, 209/9947, 209/9946, 209/9948, 209/9949 and 209/11975 over 12 years.
 - iii. The Respondents titles have become extinguished by virtue of the fact that the Applicants have been resident on the parcels of land for a period exceeding 12 years.
3. The Originating Summons was opposed by the Respondents. The 1st, 2nd, 3rd, 4th and 5th Respondents filed a Replying Affidavit sworn on 14th February 2020 by Manmohan Sign Chawla a Director of the 2nd Respondent herein. The 6th Respondent equally opposed the same and filed a replying affidavit sworn on 28th March 2021.
4. Pursuant to the directions issued by the Court, the originating summons proceed by way of viva voce evidence and all parties presented their respective witnesses who testified in the suit.



The Applicants case.

5. During trial, six witnesses testified on behalf of the Applicants. Benson Mbithi Wambua testified as PW1. He relied on his affidavit sworn on November 28, 2019 in his evidence in chief. He stated that he has been staying at Deep Sea Settlement Scheme (which for the purposes of these proceedings shall be referred to as 'Deep Sea') since 1968 when his father moved to that place and at that time he was only 19 years of age. He also stated that the area has about 14,000 residents.
6. He further stated that nobody claimed ownership to the said land and according to him he knew it to be initially government Land. Though in 2005 some people had tried to evict them.
7. On cross-examination by Counsel for 1st to 5th Respondents, he stated that the list of residents that he had provided to the court had the names, Identity card numbers and signatures but did not indicate the date of birth and place of residence.
8. He also stated that the name 'Deep Sea' was given by Residents of the area and that in 1980, they did a search of the land and found that it was registered in the name of the government.
9. On further cross-examination, he stated that they do not pay any rates in respect to the property. He also denied ever attending any court proceedings and further stated that the 2005 case was not against his members.
10. When asked about the features of the property, he stated that the total area is about 4.2 acres and that there exists Mathari River which flows through the property. He also stated that there was a public road that was constructed along the property and about 585 people were evicted at that time to pave way for its construction. He also stated that there are no rental houses in the property since all houses are owned by the residents and that their houses are not connected to any sewerage services.
11. Upon cross-examination by Counsel for the 6th Respondent, he stated that he was born in Machakos and that he still has some relatives residing there. He also stated that they initially constructed 'carton houses' before replaced them with 'Mabati' Houses. He further stated that he had not brought any photos of the area and neither did he know who owns the property.
12. He stated that he knew about the 2005 case when some people came to demolish their houses.
13. When asked about his National Identity Card and birth certificates of his children, he stated that he did not have his Identity Card in court and that the birth certificates were never issued save for only one child.
14. On re-examination, he stated that he never knew of the ELC case filed in 2005 until when it was heard and determined and that the then District Commissioner had called him in 2019 when referring him to a court order issued in 2018.
15. Hellen Khamede testified as PW2. She adopted her affidavit dated 28th November 2019 as her evidence in chief. She told the court that she was born in Deep Sea in 1962 since her parents used to reside at that place. She also stated that she has 6 children and that her first child was born in 1993 at Deep Sea while the rest were born at Pumwani Hospital. She further stated that she has stayed at Deep Sea for a long time and the area has about 14,000 residents who do not have any alternative home and she requested the court to grant the reliefs sought in their application.
16. During cross examination by Counsel for the 1st to 5th Respondents, she stated that her parents came from Vihiga before moving to Deep Sea. When asked about the case that was filed in the year 2005, she started that she was not involved in that case neither did she know the persons who were sued as



- Defendants though an order was issued stopping their intended eviction. She also added that Deep Sea does not have tenants but persons who have their own houses.
17. Upon cross examination by Counsel for the 6th Respondent, she stated that her National Identify card showed that she had been born at a different place from Deep Sea and that the same was an error which she had sought to have it corrected since according to her she knew that she had been born at Deep Sea. She also stated that she could not tell exactly on which Respondent's property had her house. She also added that the area has over 600 houses.
 18. She also stated that the area had schools which belonged to various churches even though the churches were not made parties to this suit.
 19. On reexamination, she clarified that her parents are the one who had indicated her place of birth as Vihiga even though she was born at Deep Sea.
 20. Frashia Nyambura Maina testified as PW3. During trial, she adopted her affidavit sworn on 28th November 2018 as her evidence in chief.
 21. When cross examined by Counsel for the 1st to 5th Defendants, she stated that was born in 1965 at Deep Sea in Nairobi even though her National Identity card stated that she was born in Muranga. She also stated that they have four houses at Deep Sea and they have not been rented out to anyone. She also stated that she does not know of any other home apart from Deep Sea. She further stated that she has five children of whom only one was born at the hospital and the others were born at at Deep Sea area. When asked about the 2005 case, she stated that she was not aware of any court order seeking for their eviction.
 22. When cross examined by Counsel for the 6th Respondent she stated that she did not confirm her place of birth when applying for her National Identity card. She also stated that she doesn't not know specifically where her house is located among the 6 properties belonging to the Respondents.
 23. Mwinzi Syanda testified as PW4 in the suit. He also adopted his affidavit dated 28th November 2019 as evidence in chief during trial. He also added that he has been in Deep Sea since 1965. When asked about the 2005 case, he stated that there was no eviction which occurred and he requested the court to grant the applicants the reliefs sought.
 24. On further cross examination he stated that the current National Identity card had erroneously indicated that he was born in Kitui.
 25. When re-examined, he reiterated that he stays at Deep Sea and applied for his National Identity Card in Nairobi.
 26. Patrick Moi was the fifth Applicants witness. He also adopted his affidavit sworn on 28th November 2019 as his evidence in Chief.
 27. Mary Wairimu Muranga was the last of the Applicants' witness during trial and she testified as PW6. During trial, she relied on her affidavit filed in support of the suit. When cross examined she stated that she came to Deep Sea in 1965 and she has been staying there ever since. She also stated they have never been evicted for the property and they have no alternative home. She also stated that the Respondents titles were issued when they were already residing at Deep Sea.

The Case of the Respondents.

28. Manmohar Singh Chawla swore a Replying Affidavit dated February 14, 2020 which set out the case of the Respondents herein.



29. It was the Respondents case that the Applicants have not been in occupation of the suit properties for over 12 years of any other period since there has been interruptions on their continued occupation.
30. It was averred that the Respondents had filed a suit and obtained judgment against the Applicants which judgment has not been appealed from, varied and or overturned.
31. The Respondents averred that the said suit filed in 2005 had in effect interrupted the Applicants continued possession since the Respondents successfully evicted the Applicants only for them to return to the suit properties and resumed their acts of trespass.
32. At the trial, Margaret Wairimu Magugu testified as PW1. She stated that she was testifying as one of the administrators of Mary Jacinta Njeri who had been sued as the 5th Respondent herein. She adopted her witness statement dated 2.02.2022 and bundle of documents dated February 14, 2022 as her evidence in chief.
33. On cross-examination by Counsel for the Applicants, she stated that Mary Njeri died about 3 years ago though in her statement it was about 6 years ago. She also stated that the 5th Respondent acquired the land after she was allocated by the government and that the deceased had never physically occupied the property.
34. On further cross-examination, she stated that after the deceased passed away she has not made any payments as land rent.
35. On re-examination, she stated that her sister was allocated the land on 1st February 1981 and that the trespassers came in 1988. She further stated that the trespassers were removed pursuant to an eviction order issued by the court.
36. Nazir Manji a director of 1st Respondent testified as DW2. Reliance was made to the witness statement dated February 22, 2022 and list of documents dated 14th February 2022 as his evidence in chief.
37. Upon cross-examination by Counsel for the Applicants, he stated that he bought the property from one of the Directors of Sheraton Apartments Limited and that he also bought the company which owned the land. He stated that the purchase price was about Kshs 7 to 8 million and the property was bought in 1995. He also stated that people moved into the property at around the year 2000. They removed the fence but the issue was reported to the area chief though he had no evidence of the said report.
38. On further cross-examination, he also stated that the Applicants were not parties to the case which had been filed in the year 2005. He also stated that he took possession of the land but never fenced it.
39. On re-examination, he reiterated that he acquired the property on 20.12.1995. He also stated that the orders issued in respect to the 2005 case were to be applied against anyone claiming interest on the land. He also stated that he pays land rates and rent annually and that he also tried to evict the applicants though unsuccessfully.
40. Zahir Abdul Manji testified as the DW3 in the suit. He relied on the witness statement dated February 2, 2022 and bundle of documents of even date as evidence in chief.
41. On cross-examination, he stated that he has never lived on the suit property even though he purchased it in the year 1991. When asked about the amount of money he paid as purchase price, he stated that he could not remember exactly how much was paid.



42. He also stated that his property was encroached in 1998 when trespassers came in and he evicted them with the help of the police. He also stated that he did not fence the property after evicting them. He also stated that the current applicants were not parties to the previous suit filed in 2005.
43. On re-examination, he stated that he was registered as the owner of the property on 05.03.1991 and nobody has ever disputed his ownership. He also stated that he regularly pays land rent and rates.
44. Manmohan Singh Chawla a Director of 2nd Respondent testified as DW4. He relied on his witness statement dated 11. 02.2022 and bundle of documents filed to support the respondents' case as his evidence in chief.
45. Upon cross-examination by Counsel for the applicants, he stated that he purchased the property in 1998 even though he did not have any evidence of the sale agreement. He also stated that he was involved in the case that was filed in the year 2005 and that they had unsuccessfully tried to evict the people who were on the suit properties. He also stated that he does not know how many people are currently staying on the property.
46. On re-examination, he stated that nobody has ever claimed ownership of the property and that the applicants do not pay any rates nor rent.
47. Mansukhabh Juthala Shah, the 4th Respondent testified as DW5. During trial, he adopted his statement and bundle of documents dated February 17, 2023 as his evidence in chief.
48. Mehmod Rahmat Khan the 6th Respondent herein testified as DW6. He equally adopted his witness statement dated 27.01.2022 and bundle of documents of the even date as his evidence in chief.
49. When cross-examined by the Counsel for the Respondent, he stated that he bought his land in 1993 but did not have any sale agreement in court. He also stated that the land was allocated to him and he accepted the said allotment. He further stated that he took possession in 1993 and that his property was first invaded in the year 2007. He also stated that he had unsuccessfully tried to evict the people who stay in his property.
50. On re-examination, he stated that the decree in respect to the 2005 case was issued on 24.11. 2019 and that there has been no appeal in respect of the same. He also reiterated that there is no dispute in respect to his property.

The Applicants submissions

51. The Applicants filed Submissions dated December 13, 2022 through M/S khayega Chivai & Company Advocates. The Applicants submitted that they had met the criteria for acquisition of the suit properties by way of adverse possession and urged the court to grant them the prayers sought.
52. In terms of ownership of the suit properties by the Respondents, it was submitted that LR No. 209/9945 measuring 0.2915 hectares had its initial proprietor being Motichand Bhagwanji Shah whose title was issued on 9.9.1987 and transferred to Hali Developers who sold it to the 1st Respondent Sheraton Apartments Ltd on 20.12.1995. LR No. 209/9947 measuring approximately 0.2474 hectares was registered for the first time on 18.09.1985 in the name of John Kiereini who transferred it to Time Developers Limited on 23.10.1990 and later sold to the 2nd Respondent on 28.01.1998. In respect to LR No. 209/9946 measuring approximately 0.3019 hectares, it had the 3rd Respondent Zahir Abdul Manji registered as its proprietor on 5.3.1991 having acquired it from Andrew Ogendi Nyabutio who had been its proprietor from 9.05.1984. It was also submitted that LR No. 209/9948 measuring approximately 0.2259 hectares was allocated and registered in the names of the 4th Respondent



Mansuhlal Juthala Shah on 22.08.1988 while LR No. 209/11975 measuring approximately 0.2277 hectares was allocated and registered in the names of Mary Jacinta Njeri on 27.11.1987, while LR No. 209/9949 measuring approximately 0.04900 hectares was allocated and registered in the names of the 6th Respondent Mehmood Rehmat Khan on 27.09.1993.

53. It was further submitted that the Applicants had during trial established that they had stayed on the land for an uninterrupted period of 12 years and the allegations made by the Respondents that they had evicted the applicants was not backed by the evidence that was available. Reliance was made to the following Court of Appeal decisions in support of the Applicants case; Peter Thuo Kairu vs Kuria Gacheru (1988) 2 KLR 111, Kasuve vs Mwaani Investments Limited & 4 Others 1 KLR 184, Joseph Gabumi Kiriru vs Lawrence Munyambu Kabura CA No. 20 of 1993 and Ernest Orwa Mwai vs Abdul S. Hasid & Another Civil Appeal No. 39 of 1995.

The Respondents submissions

54. The 1st, 2nd, 3rd, 4th and 5th Respondents filed written submissions dated March 6, 2023 through M/S A.G.N Kamau Advocates. They submitted on the following three issues;
- i. Whether the applicants claim as a representative action against the Respondents is competent and sustainable?
 - ii. Whether the applicants claim as is *res judicata*?
 - iii. Whether the applicants have proven their claim on the basis of adverse possession?
55. On their first issue it was submitted that the consent to sue on behalf of the residents of deep sea settlement dated 28.12.2019 as provided by the applicants falls far below the requirement of a proper authority given to persons who intend to be represented in the present proceedings since the consent does not amount to the proper authority for the persons named therein, the list appears to have fake and fictitious names since no actual copies of the national identity cards were provided. The case of Shadrack Mwamuu Nzioka & 2 Others (Suing on their behalf as official of Crescent Self-Help Group) vs Tropical Blooms Limited [2020] eKLR was cited in support.
56. On whether the suit was *res judicata*, the 1st to 5th Respondents referred to the judgment delivered in Nairobi ELC Number 620 of 2005 Sheraton Apartments Ltd & 5 others vs Miriam Wanjiru & 4 others and stated that the current suit is *res judicata* owing to the following;
- a. The issue in these proceedings being the issue of eviction and the current issue of seeking a permanent injunction to bar the Respondents from evicting the Applicants are directly and substantially in issue in the former suit.
 - b. As has been argued earlier the decree issued herein against the Defendants was directed at themselves, their agents, servants, employees and or otherwise and it is the current applicants are parties who laid the claim under the original defendants.
 - c. Both the Applicants and Respondents are litigating under the same title.
 - d. The judgment is clear evidence that the issue of eviction was heard and finally determined in the former suit.
 - e. This court is competent to try the current suit and was competent as it was in trying the original suit.
57. It was further submitted that there is a nexus between this suit and the former suit and hence the current suit is *res judicata*.



58. On whether or not the applicants have proved their claim on the basis of adverse possession, it was submitted that the Applicants' claim to have entered into occupation of the Respondents parcels of land being L.R. Number 209/9945 measuring 0.2915 ha registered in favour of the 1st Respondent on 20th December 1995, LR Number 209/9947 measuring 0.2474 ha registered in the name of the 2nd Respondent on the 28th January 1998, LR Number 209/9946 measuring 0.3019 ha or thereabout registered in the name of the 3rd Respondent on the 5th March 1991, LR Number 209/9948 measuring 0.2259 ha or thereabout to the 4th Respondent on the 27th October 1988 and LR Number 209/9949 measuring 0.2277 ha registered in favour of 5th Respondent on the 27th November 1987 in accordance with their grounds in support of their claim as early as 1947 to 1970 and claim to have continued in open continuous exclusive and uninterrupted and adverse occupation of the above parcels of land for a period of 12 years.
59. It is also submitted that it is trite that adverse possession cannot lie in respect to public land as expressed in sections 37 of the Limitations of Actions Act.
60. Reliance was made to the following cases in support of the Respondents case; Court of Appeal Kisumu Civil Appeal No. 110 of 2016 *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR, *Wilson Njoroge Kamau vs Nganga Muceru Kamau* [2020] eKLR and Nairobi ELC Number 365 of 2014 *Ravji Karsan Sanghani vs Peter Gakuru*.
61. The 6th Defendant filed written submissions dated January 18, 2022 through M/S Otieno Okeyo Advocates and submitted that the Applicants have failed to prove their case, that they have failed to prove by any tangible and independently corroborated evidence the beginning of their alleged occupation of the 6th Respondent's property. It was also contended that the 6th Respondent has by clear and crystal and unchallenged evidence demonstrated to this court that his parcel of land was invaded in the year 2005 and the same evidence stands unchallenged in ELC No 620 of 2005 and in the Judgment of the Hon. Eboso J. of the 4th December 2008 as evidenced at paragraph 5 of that Judgment.
62. The 6th Respondent also submitted that in ELC No. 620 of 2005 the Applicants were sued in a representative capacity and the existence of the suit was duly advertised. Upon ex parte orders being obtained against the said defendants they applied for a review of the same on their behalf and on behalf of 400 other dwellers of the Deep-Sea Settlement Scheme who were affected by the said orders. The application was allowed and leave given to them and the other 400 dwellers of the scheme to defend the suit. They filed their defence as representative of the dwellers of the scheme and the matter proceeded to judgment.
63. It was also submitted that the Applicants had acknowledged that their representatives represented them in the said suit and they lost and never preferred any appeal against the same.
64. It was also submitted that in as much as it is admitted that there is sporadic invasion of squatters on the Respondents properties, the Applicants herein have failed to demonstrate and prove that they are the ones squatting on the Respondents properties. They have failed to show which parcel(s) they are individually squatting upon, the actual portions thereupon and the individual proof of the actual nature of their squatting. This would have been achieved by either subdivision plan and actual pictures.
65. It was argued that the Applicants who gave evidence gave very contradicting evidence on where they came, when they allegedly settled on the unidentified portion of the six properties sued on and where they were born. Their National Identity Cards, which were their only corroborating evidence, contradicted their pleadings and evidence. Apart from the evidence adduced by the witnesses that appeared on behalf of the Applicants, the rest of the applicants neither swore any affidavits nor



provided any other evidence in support of their claims making the same untenable. Proof of adverse possession is strict and cannot be by proxy.

66. The 6th Respondent also submitted that when it came to identifying the properties they sought to take away from the Respondents, they all told the court that they don't know the Respondents and that the land they're suing on is the Government's.
67. This court was urged to dismiss the applicants claim in its totality and with costs by to the Respondents.

Issues for determination

68. I have considered the parties pleadings, evidence tendered and written submissions filed herein. In my view, the following are the key issues falling for determination in this suit.
- i. Whether the Applicants claim as a representative action against the Respondents is competent and sustainable.
 - ii. Whether the current suit is *res judicata*.
 - iii. Whether the Applicants have proven their case for adverse possession.
 - iv. What are the appropriate orders that this court can issue.

Analysis and Determination

Issue No. 1

69. The applicants herein have expressed their suit to have been filed on their own behalf and in representation of 'squatters/residents of Land Registration Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975 also known as Deep Sea Settlement Scheme.
70. They also filed witness statements and attached a list of the persons on whose behalf the suit was filed.
71. However, the 1st - 5th Respondents filed a Replying Affidavit dated 14th February 2020 and submissions dated 6th March 2023 and contended that the "consent to sue on behalf of all Residents of Deep Sea Settlement" dated 28th December 2019 falls far below the requirement of a proper authority given by persons who intend to be represented in the present proceeding. It was submitted that the purported consent and list had signatures which appear to have been made by the same hand and no copies of the National Identification cards of all the persons listed therein had been annexed.
72. Order 1 Rule 8 of the *Civil Procedure Rules* provides as follows:
1. Where numerous persons have the same interested in any proceedings, the proceedings may be commenced and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing, all except one or more of them.
 2. The parties shall in such case give notice of the suit to all such persons either by personal service or where from the number of persons or any other cause which service is not reasonably practicable by Public advertisement as the court in each case may direct.
 3. Any person on whose behalf or for whose behalf a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.
73. Order 1 rule 13 of the *Civil Procedure Rules* provides as follows:



1. Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 2. The authority shall be in writing signed by the party giving it and shall be filed in the case.
74. The Respondents argued that the consent to sue that was provided was not supported by any copies of the national identification cards annexed to the same and that the signatures appearing in the said documents appeared to have been made by the same hand. However, during hearing, the Respondents did not adduce or led any evidence to confirm that indeed the said signatures were forgeries.
75. I am persuaded that the Applicants suit is a representative suit. The suit was filed on behalf of the residents of Deep Sea Settlement. In this era of post 2010 Constitution, Courts should be hesitant to strike out cases on procedural technicalities unless what is omitted goes to the root of the case. I therefore find no merit in the Respondents contention that the suit falls short of proper requirement of a representative suit.

Issue No II

Whether the Applicants claim is *res judicata*.

76. The Respondents also pleaded and argued that the Applicants claim was *res judicata* in view of ELC Number 620 of 2005 – *Sheraton Apartments Ltd & 5 others –vs- Miriam Wanjiru and 4 others*.
77. On this issue, the Applicants argued that in ELC 620 of 2005, the Respondents had sued 5 Defendants, Miriam Wanjiru, Cecilia Wahu, Evans Enekea, Joseph Mwema and Virginia Njeri who were not parties to the current case and that the Judgment was a judgment in personam and not a Judgment in rem.
78. The doctrine of *res judicata*, is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
79. A close reading of Section 7, reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that: -
- i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
80. The decree issued in respect to ELC Case No. 620 of 2005 provided as follows: -
1. That an order is hereby issued declaring that the 1st, 2nd, 3rd, 4th and 5th Defendants are in wrongful and unlawful possession of the 1st, 2nd, 3rd, 4th, 5th and 6th Plaintiffs parcel of Land (known as Land Reference Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975 respectively) without any colour of right whatsoever.



2. That an order is hereby issued evicting the 1st, 2nd, 3rd, 4th and 5th Defendants by themselves, their agents, servant's belongings, employees and/or otherwise from the 1st, 2nd, 3rd, 4th, 5th and 6th Plaintiffs properties known as L.R. Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949, and 209/11975 respectively.
81. A perusal of the said decree and Judgment clearly shows that while the suit involved the current titles made reference to herein, it was determined as between different parties (Defendants) who are not parties to the current suit. No evidence was led to confirm that indeed the Defendants in ELC 620 of 2005 had been sued on behalf of the current applicants. In this suit, there is no evidence that a final decree of the court of competent jurisdiction over the same subject matter or issues between the same parties has been made on the subject of adverse possession, as a bar to the Applicants from re-opening an already concluded case or matter. In absence of the same, I find that the suit is not *res-judicata* and as such, it is the finding of this court that the doctrine of *res judicata* is not applicable to this case.

Issue No. III

Whether the Applicants have proven their case of adverse possession.

82. The Applicants claim proprietorship of the suit property by way of adverse possession.
83. It is a cardinal principle of law that he who alleges must prove. This position is succinctly captured in Sections 107, 109 and 112 of the [Evidence Act](#). The said Sections of the [Evidence Act](#) provides as follows:
- “(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.”

And Sections 109 and 112 of the same [Act](#) states as follows:

- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
84. The court will be so guided. The first point of determination is when the Applicants dispossessed the Respondents the suit properties. From the evidence that was tendered during trial, it was stated that the Applicants settled on the suit property between 1960s to 1970s and this was on the pretext that the same was government land. The Applicants also produced evidence to confirm that while initially the suit properties were government land, the same was allocated to the Respondents vide the following parcels which were extinguished on the following dates:



No	Parcel	Date of registration	End of 12 year limitation period
1	L.R.No 209/9945	9.9.1987	9.9.1999
2.	L.R.No. 209/9947	18.9.1985	18.9.1997
3.	L.R.No 209/9946	9.5.1984	9.5.1996
4.	L.R.No. 209/9948	22.08.1988	22.08.2000
5.	L.R.No. 209/9949	27.11.1987	27.11.1999
6.	L.R.No. 11975	27.9.1993	27.9.2005

85. Since adverse possession cannot lie in government land, the period upon which the applicants took possession for the suit property can only be applicable as between 9th May 1984 to 27th September 1993. The allocation of the suit properties to the Respondents was also not disputed by either party. Adverse possession claims can only lay on registered land and where an extract of the title to the land is attached.
86. It is trite law that by virtue of sections 7 and 38 of the *Limitation of Actions Act*, a claim for adverse possession can only lie once an individual has been on the property for the statutory period of 12 years.
87. The next issue to be addressed by the court is when did time begin to run for purposes of the Applicants claim of possession. The Court of Appeal in the case of *Solomon Muatbe Mitau & 787 others -vs - Nguni Group Ranch* (2017) eKLR stated,
- “As regard the period of possession, time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In respect of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and therefore entitled to take action against any intruder to the land.”
88. That being the case, the Respondents rights to the suit properties ought to have been extinguished in the year 2005. However, in 2005 the Respondents asserted their rights by filing ELC Case No. 620 of 2005 which sought to evict parties who had trespassed in their properties. While filing of suit asserting rights over land stops time from running in adverse possession, It is also worth noting that adverse possession on the other hand is about occupation of land belonging to another and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. Adverse possession occurs to land and not title unless the Respondents took active steps to evict the Applicants from the suit land which there was no evidence adduced to confirm that indeed they were evicted since they are still residing in the property. The mere act of claiming ownership by way of filing suit does not stop time from running. The Court of Appeal in Civil Appeal No. 212 of 2012, *Isaac Cypriano Shingore -Vs- Kipketer Togom* (2016) eKLR held;
- “By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant



over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

As the Court held in *Gitbu Vs. Ndeete* [1984] KLR 776 "Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894").

89. The court finds that there was nothing that stopped time from running as the Respondents never actually evicted the Applicants from the suit properties.
90. As to whether the Applicants possession of the suit property was "*nec vinec clam, nec pecaria*," that is peaceful, open and continuous and wit the necessary "*animus possidendi*" or desire to acquire the land as their own, there can be no doubt about that. The applicants adduced evidence of the developments and structures they had put up in the suit properties which of course were undertaken over time and openly which any diligent owner ought to have been aware of.
91. Title to land under the doctrine of adverse possession accrues to a specific adverse possessor upon proof of appropriate degree of physical control of the land for the prescribed limitation period. Secondly, where the adverse possessors are several, they must demonstrate that there was a single possession by them jointly but not severally. The Rt Hon Sir Robert Megarry and Sir William Wade in their book *The Law of Real Property*, Eighth Edition [Sweet & Maxwell], page 1465 – 1466 observe thus:
- "For a squatter to prove that he had factual possession he must show that;
- (i) he had an appropriate degree of physical control of the land;
 - (ii) his possession was a single possession: there can be a single possession by several squatters jointly, but not severally;
 - (iii) his possession was exclusive, a squatter cannot be in possession at the same time as the true owner; and
 - (iv) he dealt with the land in question as an occupying owner might have been expected to deal with it and no one else has done."
92. The Applicants claimed that they had been in adverse possession of the suit properties for the over 12 years and during trial they were able to led evidence that there was a joint single possession by specified adverse possessors for over 12 years.
93. It was also evident from the testimony that was tendered by the Applicants that over time they have built their livelihoods on the said properties and that they have never known of any alternative home apart from Deep Sea.
94. A registered proprietor of land is defined under section 3 (a) of the *Land Registration Act* as the person named in the register as the proprietor. In this suit, evidence was tendered that the suit parcels of land are either registered or do belong to the Respondents. The court has also observed that even though the Respondents claimed to have purchased and or acquired the suit properties, it was evident that the said acquisition and or purchase was made when the Applicants were already residing in the said suit properties. The Respondents could not have been aware of the existence of the Applicants on the



suit property during their acquisition and or purchase of the same. Clearly the Respondents knew that there were some people residing and occupying the land.

95. In *Chevron (K) Ltd v Harison Charo Wa Shutu* (2016) eKLR, the court held that whether the possession was adverse for 12 years was a burden imposed by law on the person claiming to prove not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession and that the adverse possessor had done acts inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use it.
96. During trial the Respondents were unable to adduced any evidence demonstrating whether they had ever taken possession nor occupation of the said suit properties for the entire duration. From the evaluation of the evidence that was tendered, it was also evident that by building structures on the land without the permission of the Respondents, the Applicants had manifested *animus possidendi*, a clear mind and intention of dealing with the suit land as if it was exclusively theirs and in a manner that was a clear conflict with the Respondents rights. This court is therefore satisfied that the Applicants are therefore entitled to ownership of the said properties without further reference to the title holders who are the Respondents herein since they have met the prescribed standards permitted by the law.
97. In view of the foregoing analysis, the court finds that the Applicants have been able to prove on a balance of probabilities their claim for adverse possession against the respondents and they are entitled to the reliefs sought.

Final orders.

98. In the end, the court makes the following final orders: -
 - i. A permanent injunction is hereby issued restraining the Respondents whether by themselves, assigns, agents, servants, employees, persons claiming under their authority from interfering with the Applicants ownership, quiet possession, enjoyment and or user of Land Registration Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975.
 - ii. A declaration is hereby made to the effect that the Applicants have become entitled by way of adverse possession to ownership of all those parcels of Land comprised in Land Registration Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975.
 - iii. A declaration is hereby made to that titles to the Land Registration Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975 have been extinguished in favour of the Applicants under section 37 and 38 of the Limitations of Actions Act.
 - iv. An order be and is hereby issued requiring and directing the Registrar of Lands to register the Applicants as Lessees for the residue of the terms of all those parcels of land comprised in Land Registration Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975.
 - v. Each party to bear own costs.
100. In conclusion, I also wish to express my sincere gratitude to each and every Counsel who appeared in this matter for their courtesy, decency and the manner in which they conducted themselves throughout the entire proceedings and equally for their industry and able presentation of their respective client's cases.

DATED, SIGNED AND DELIVERED IN NAIROBI IN OPEN COURT THIS 25TH DAY OF MAY 2023.

E.K. WABWOTO



JUDGE

In the presence of:

Ms. Ade h/b for Mr. Khayega for Applicants.

Ms. Mwaura h/b for Mr. Kamau A. G. N. for 1st – 5th Respondents and also h/b for Mr. Okeyo for the 6th Respondent.

Court Assistant – Caroline Nafuna.

E.K. WABWOTO

JUDGE

