



Ndoro & 11 others (Representing over three hundred residents residing on land parcel No.2717/V/MN,2718/V/MN and 2719/V/MN) v Kenya Filters Limited (Civil Suit 224 of 2020) [2023] KEELC 18806 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18806 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 224 OF 2020

LL NAIKUNI, J

JUNE 14, 2023

IN THE MATTER OF: LAND PARCEL TITLE NO.2717/V/MN(CR 67154), 2718/V/MN(CR 68116) AND 2719/V/MN (CR 67153)

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED OWNERSHIP OF THE ABOVE SAID PARCEL OF LAND BY WAY OF ADVERSE POSSESSION

AND

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22 OF LAWS OF KENYA

BETWEEN

NYAWA MALAU NDORO 1ST PLAINTIFF
AZIMIO MWANJIRA ZUMA 2ND PLAINTIFF
SAHA MWERE SAHA 3RD PLAINTIFF
NGALAA CHUPI DOLO 4TH PLAINTIFF
MTORO MWERE SAHA 5TH PLAINTIFF
TSAMA MAZURI MUMBO 6TH PLAINTIFF
ALI CHANGI BEKANGA 7TH PLAINTIFF
MWABAYA BAYA SAID 8TH PLAINTIFF
AMINA OMAR JUMA 9TH PLAINTIFF
LINNET GATWIRI NJOKA 10TH PLAINTIFF
ROBERT MWAHUHI WANJE 11TH PLAINTIFF



SALIM NGUTA 12TH PLAINTIFF
REPRESENTING OVER THREE HUNDRED RESIDENTS RESIDING ON
LAND PARCEL NO.2717/V/MN,2718/V/MN AND 2719/V/MN

AND

KENYA FILTERS LIMITED DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement in this case relates to the suit instituted by the Plaintiffs herein against the Defendant. It was by way of Certificate of Urgency, Notice of Motion and Originating Summons on the 8th December, 2020 premised under Section 37 and 38 of the *Limitation of Actions Act* Cap. 22 of the Laws of Kenya, Order XXXVI (Sic) Rule 3D of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. The Originating summons are based on the grounds on the face of it and those of the 12th Paragraphed Affidavit of NYAWA MALAU NDORO and the 22nd paragraphed affidavit of SAHA MWERE SAHA where Nyawa Malau Ndoro averred that:
 - i. He moved onto the land parcel no. 2718/V/MN on or about 1997 and have ben occupying and utilizing a portion measuring 15 acres wherein he had erected his permanent house and rare livestock and other farming activities.
 - ii. The suit property is registered in the name of the Defendant. All reasonable attempts to conduct a search on the suit property have proven futile since the physical file cannot be traced at the Lands registry in Mombasa.
 - iii. He was gifted a portion of land measuring 15 acres by the village elders who welcomed him.
 - iv. He had peacefully coexisted with the other Plaintiffs on the subject parcel of land without any interference for a continuous period of over twelve years.
 - v. The suit property was his home and he did not know any other place to call home.
 - vi. He was fully convinced that he had acquired an interest by way of adverse possession over the suit property.
 - vii. He applied to the Honourable Court for an order that the entries in the land registry, Mombasa showing the Defendant or any other person for that matter as the proprietor of the suit property be deleted and or expunged forthwith and the Plaintiffs be registered as the joint proprietors of the suit properties.
 - viii. He had proved his case on a balance of probability.
3. Saha Mwere Saha in his affidavit dated the same day as the originating summons averred that:
 - a. He was born on land parcel number 2717/V/MN and his parents were called Mwere Saha Mwere(deceased) and Buche Mwere Saha.



- b. Their village was called Ziwani Mbuyu wa Chapa Gotani village because of the dam that is situated on one end of the land the bigger portion of land.
- c. Ziwani Mbuyu wa Chapa Gotani village cuts across land parcels numbers 2717/V/MN(CR 67154), 2718/V/MN(CR 68116) AND 2719/V/MN (CR 67153) (hereinafter referred to as the “suit properties”). The total acreage of the three parcels of land is 111 acres.
- d. The suit properties was occupied by the Plaintiffs who represent over three hundred people.
- e. Their people belonged to the Rabai tribe settled on the suit properties in the 18th century before the colonialist came to this country.
- f. Their grandparents were called Bechizi Chenze Saha and Joha Mbwiya from the Mwamchukuyu and Mwadzoha Dzuya clans respectively. The two grandfathers later invited mzee Mwanjira Chaka Mwanjira from the Wachanda clan in the year 1920’s.
- g. The three clans occupied the suit properties and harmoniously coexisted until when the colonialists came and occupied in the 1940’s the land and set up the Miritini Veterinary Livestock Holding ground which was used as a holding ground for livestock destined for export.
- h. As a result of this take over their people were pushed to one corner of the suit properties which they called Ziwani village.
- i. The colonialists left an area within the holding ground where they used as a burial ground to date. All our departed family members had been buried on this graveyard.
- j. After independence, the holding ground was taken over by the post-independence government but the project finally collapsed in the early 1980's during the reign of the late Daniel T. Moi.
- k. Upon the collapse of the project, we again occupied suit properties where they had been living to date and engage in agricultural activities.
- l. Sometimes in the early years of 1990’s the Government through the local administration informed them that it would surrender the land and issues they with title deeds but that was never forthcoming.
- m. Upon due diligence they came to establish that the GL land had been subdivided into three portions and all have been registered in the Defendant.
- n. They never knew what procedure was used to transfer the suit properties to the Defendant but having occupied the same for over 100 years they believed that they were entitled under the doctrine of adverse possession.
- o. The suit properties were their home and he did not know of any other place that the Plaintiffs can call home. He was convinced that the Plaintiffs had acquired an interest by way of adverse possession over the suit properties.
- ix. He applied to the Honourable Court for an order that the entries in the land registry, Mombasa showing the Defendant or any other person for that matter as the proprietor of the suit property be deleted and or expunged forthwith and the Plaintiffs be registered as the joint proprietors of the suit properties.
- x. The Plaintiffs had proved their case on a balance of probability.



4. The Plaintiffs sought to be declared owners by way of adverse possession for the determination of the following questions:-
 - a. The Defendant's title and ownership of the land parcel number land parcel No. 2717/V/MN, 2718/V/MN and 2719/V/MN has been extinguished by lapse of time.
 - b. The Plaintiffs have obtained title and ownership to by virtue of the doctrine of adverse possession.
 - c. Pursuant to (1) above the Chief Land Registrar to be ordered enter the Plaintiffs names in the said register as the proprietors of land parcel number NO.2717/V/MN(CR 67154), 2718/V/MN(CR 68116) AND 2718/V/MN (CR 67153) and a Title deed be issued in their names.
 - d. Whether a permanent order can be issued against the Defendant, its servants, agents or authorized independent contractors not to be evicted or demolish the Plaintiffs houses built on the suit property.
 - e. The applicant be awarded costs of this proceedings.
5. The Plaintiff prayed for the following orders:-
 - a. The Plaintiffs be registered as the proprietor in common of the property known as land parcel No. 2717/V/MN, 2718/V/MN and 2719/V/MN in the place of the Defendant.
 - b. The Defendant, its agents, servants and/or any other authorized independent contractor be restrained by permanent injunction from entering the suit land or demolishing the Plaintiffs' houses and/or properties, structures thereon and/or evicting the Plaintiffs, their families and/or tenants or in any other manner whatsoever interfering with the Plaintiffs' and their tenants' peaceful occupation of the suit land.
 - c. The Costs of this suit be provided for.

II. The Testimony by the Plaintiffs

6. The Plaintiffs herein filed a suit for adverse possession commenced by way of Originating Summons dated 8th December 2020. The Plaintiffs also filed a Notice of Motion application of even date seeking interim injunctive Order pending the hearing and determination of the application and suit. The same was placed before Hon. Yano J who issued interim injunctions vide an Order dated 9th December 2020. The same was served upon the Defendant and they did not enter appearance. The same proceeded for formal proof.
7. PW - 1 was sworn and testified in English. He stated that he is Nyawa Malau Nodoro. He was the holder of the national identity card bearing numbers 8435182. He stated that he had a Supporting affidavit dated 8th December, 2020 and filed on the same day, with his signature. The supporting affidavit is admitted as part of the evidence. He told the court that he is married with 3 children. He lived on the land. On paragraph 3 of the Supporting Affidavit the parcel No. 2717/V/MN and not 2718/V/MN.
8. He told the court that in 1997, he got the land he was from Kwale, on the land there are about 200 people, they were mainly RABAI and DURUMA and they are Mijikenda. He was welcomed by the



- Elders and he got there with his family and settled there. He cultivated and constructed a Swahili – Makuti and clay house but later on he constructed a permanent 6-bedroom house where his 3 children live. He occupied approximately 20 acres of land. He cultivated subsistence crops, maize plantation, Green grams, vegetables, coconut and so on.
9. He testified that he had been in the land without any interruptions and continuously, they had buried his child Rehema in 2000 and his uncle Hussein in the year 2005. The authorities were aware of what brought him to Court before the year 2018, they were confronted by people claiming to have been from a company called Kenya Filter Ltd, who started planting beacons. They asked them and the company claimed that the land was theirs. They conducted the official search and confirmed it was theirs.
 10. They never wrote to them, they served the Company through substituted means but there has never been a response. They said that they had a title deed. He represents may others in this suit. He told the court that he would like to live in peace and his family and that applies to all and was seeking for the orders as prayed in the pleadings and costs. He sought a permanent injunction against the Defendant.
 11. PW 2 - Mr Saha Mwera Saha testified in Kiswahili language. He told the Court that his identification card no. 9627620, with his date of birth being 14th July, 1967. He lived at Kilifi Za Ziwani-Jomvu and was a farmer living with is family. He told the court that he is the 3rd Plaintiff. They had a land dispute, he recorded a statement dated and filed 9th June, 2022 which he would like to rely on as his evidence. He also filed a list of documents from the list of documents he would like to produce the copy of the national identification card for the Plaintiff and a set of photographs and a title deed. They were the same annexed in his supporting affidavit, they lived on the land with his family. He was born there. There were approximately 300 families on the land as it was a big portion of land. Before they came to Court in the year 2019. There was a group of people who came on the land. They tried to survey the land. They sensed danger and instead of causing any confrontation they decided to institute this suit.
 12. When they confronted the company, the company showed them documents which indicated that the land belonged to Kenya Filters Ltd. Before this, the land was for the Crown. They were never given permission to live there. There were graves for their forefathers and structures of permanent buildings. They did not have any problem on having the court visit the land. He asked the Court to give him the land as they do not have any other place they may move to if they were asked to move. PW - 1 conducted an official search which indicated that the land was Government land.
 13. PW - 3 – Robert Nyabunga Ongando told the court that his identification card number was 23575481. It showed a birthday of 18th August, 1984 at Gucha. He was a registered Land Surveyor. He made a site visit to the parcel-Plot 290/V/MN. The report showed that the plot and the property. He listed the properties and he attached the photographs. The photographs were for up to the year 2002. He used the Survey Plan and the Google Maps. The Plaintiff was allocated Plot NO. MN/V/290. The Survey Map showed it was a community land which was allocated on 29th February, 1924. It's under the County Government. The Survey Plan was done by the Government.
 14. In the Survey Plan dated 15th June, 2014, it showed that the Plaintiffs were granted Letter of Allotment on 15th July, 1998. He took some photographs of the site and he did a sketch on the entire Plaintiff's property. The land was initially 627 Acres. But to date there was a water pipe hence a water wayleave and Riparian reserve reducing the acreage of the suit land to 540 acres.
 15. In conclusion, he told the court that the land was occupied by villagers whose livelihood was dependent on. he pointed out that public utilities such as roads, water pipelines and electricity supply existed within the parcel to support human liability and the portion of land to be surrendered for public use are completely vacated e.g. market, Mosque, Schools.



16. He told the court that he never conducted any official search as he assumed it to be government land and did not see the need for it. Besides when conducting an official search one is required to have a CR and sign as proof of land ownership. He produced the Surveyor's report as Plaintiff as Exhibit No. 4.

III. Submissions

17. On 13th October, 2022, immediately after the closure of the Plaintiffs' case, the Honorable Court directed the Advocate for the Plaintiffs to file written submissions in support of this suit. Thereafter, on the 23rd November, 2022 the Plaintiffs fully complied and the Honorable Court reserved a date for delivery of Judgement accordingly.

A. The Written Submissions by the Plaintiff

18. On 20th February, 2023, the Learned Counsel for the Plaintiffs, the law firm of Messrs. Waziri Omollo and Company filed their written submissions dated the same day on the even date in support of the Plaintiffs suit.
19. Mr. Waziri Advocate commenced his submissions by stating that the Plaintiffs herein filed a suit claiming for title under the land adverse possession commenced by way of Originating Summons dated 8th December 2020. The Plaintiffs also filed a Notice of Motion application of even date seeking interim injunctive Order pending the hearing and determination of the application and suit. The same was placed before Hon. Yano J who issued interim injunctions vide an Order dated 9th December 2020. The same was served upon the Defendants and they did not enter appearance. The same proceeded for formal proof. The application dated 8th December 2020.
20. The Learned Counsel asserted that the Plaintiffs filed the above-mentioned notice of motion and had prayers for orders that:-
- a. THAT service of this application be dispensed with in the first instance.
 - b. THAT an interim injunction do issue against the defendants by themselves, their servants, agents and or any other person from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by section 90(3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that land parcels known TITLE NO. 2717/V/MN/(CR67154), 2718/V/MN (Cr 68116) and 2719/V/MN (CR 67153) pending the hearing and determination of this application.
 - c. THAT an interim injunction do issue against the defendants by themselves, their servants and/or agents from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers' or exercising any power conferred by section 90(3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that land parcels known as TITLE NO. 2717/V/MN/(CR67154), 2718/V/MN (Cr 68116) and 2719/V/MN (CR 67153) pending the hearing and determination of this suit.



- d. THAT an order be issued directing the Land register to prohibit or restrict dealings to all that parcel of land known as MOMBASA/BLOCK XXI/154 pending the hearing and determination of this application inter parties and the main suit thereafter.
 - e. THAT the cost of this application be provided for
21. The Learned Counsel averred that the Plaintiffs in his supporting affidavit acknowledged that he was representing the interests of his immediate family and other members residing on the aforementioned suit properties. He further stated that together with the other Plaintiffs, they had peacefully been settling in the piece of land for over 12 years continuously without any interference. He further explained that sometimes in the year 2019, people whom he later learnt were agents of the Defendants started erecting beacons on the suit properties claiming ownership and that they intended to develop the same. They later on came back in 2020 with surveyors and informed the plaintiffs that they intended to occupy the suit property and develop the same. It is the evidence of the plaintiff that the defendants were rude and arrogant to the plaintiffs and claimed that they will use any amount of force to evict the plaintiffs from the piece of land and that the said suit property was registered in the respondent's name. He further avers that all reasonable attempts to conduct a search on the suit property have proven futile since the physical file cannot be traced in the Land registry in Mombasa.
22. The Learned Counsel submitted that they will rely on the following issues of determination:-
- a. Whether the Plaintiffs have met the threshold for grant of orders for adverse possession.
 - b. Whether the Applicant was entitled to the title.
 - c. Who should bear the costs of the suit?
23. On whether the Plaintiffs had met the threshold for grant of orders for adverse possession the Learned Counsel submitted that adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open, uninterrupted, peaceful, exclusive and continuous occupation of it to the exclusion of the registered owner for a period of 12 years or more. The law on adverse possession is provided for under the Limitations Act. Section 7,13 and 38 of the Limitations Acts.
24. He referred to 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.”
25. The Learned Counsel also made reliance to the case of” “Samuel Miki Waweru – Versus - Jane Njeru Richu, Civil Appeal No 122 of 2001, the court of appeal delivered the following dictum:
- “it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with)provisions of an agreement of sale or lease or otherwise.”
26. He cited the provision of Section 15 of the Limitations Act which states that:-
- “For the purpose of this Act, no person is taken to have been in possession of any land by reason only of his having made a formal entry thereon, and no continual or other claim upon or near any land preserves any right of action to recover the land. With this provision, the



defendant can therefore not come to court and claim that he has title and yet he took no action on the land after acquiring title back then in 1998. The Plaintiffs in this case settled in the land from way back in 1963.”

27. He further referred Court to the provision of Section 28 of the [Land Registration Act](#) which states that:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without there being noted in the register.”

28. The Learned Counsel contended that at the time the Defendant were acquiring title in the year 1998, the Plaintiffs in this suit were already in occupation of the parcel of the suit land and the same was subject to an overriding interest in the form of land adverse possession in favour of the Plaintiff as set out under the relevant provisions of the law. The Plaintiffs averred that they were born in the parcels of land. This means that they have been in occupation of the land ever since they were young till in old age. For instance, one of the Plaintiffs, Mr. Nyawa Malau was born in the year 1963 and had and still was been in occupation of the land since then. It was therefore evident that they had been in occupation of the land for more than 12 years as the law of adverse possession requires. Therefore, it was further evident that the occupation of the land was open, without secrecy, uninterrupted and with sole intention of acquiring ownership. The Plaintiffs in this case had acquired rights over the suit land because they had possession of the same from time immemorial.

29. The Learned Counsel submitted that in addition, the set of photographs of the property produced as Plaintiffs’ exhibits portray that there were buildings which were still in good shape and proved that indeed there had been habitation to the suit property. It was therefore evident that there was continuous possession of the said property.

30. To buttress his case, the Learned Counsel relied on the case by the Court in Malindi in App No.56 of 2014 Mtana Lewa – Versus - Kahindi Ngala Mwangandi (2015) eKLR where the Court held that:-

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites of the adverse possessor are neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

31. It follows therefore, the Learned Counsel submitted that indeed the Plaintiffs in this case had met all the necessary requirements of adverse possession since they had been born in the parcels of land. He stressed that they were of old age as at now and these had been their homes. They took possession of the same from their parents and they had exceeded the 12-year rule of adverse possession.

32. On whether the applicants were entitled to the title, the Learned Counsel argued that under the provision of Sections 37 and 38 of the Limitations Act, Cap. 22, clearly stipulated the mode of acquiring title in instances of adverse possession. The provision of Order 37 Rule 7 of the Civil Procedure Rules, 2010 also highlights the procedure.

33. The provisions of Sections 37 and 38 of the Limitations Act stipulate that if the land was registered under one of the registrations Act, then the title was not extinguished but held in trust for the person



in adverse possession until he shall have obtained and registered by a High Court Order vesting the land in him. The Plaintiffs in this case had adhered to the provisions as it was required by law and hence are entitled to have title.

34. The Learned Counsel argued that in the case of “Teresa Wachuka Gathira – Versus - Joseph Mwangi Gachira Civil Appeal no 325 of 2003, the court of appeal emphasized on the importance of following the prescribed procedure in adverse possession claims because they are mostly anchored on the fact that the suit property belonged to a registered owner and the same must be produced as evidence. From the instant case and in an effort to comply with the provision of Order 37 Rule 7(2), the applicant annexed copy of the title marked as ‘NMN – 3”. The Applicant had therefore met all the requirements of adverse possession and those required by law and was therefore entitled to title.
35. On the issue of who should bear the costs, the Learned Counsel submitted that it was trite law that costs follow the event as provided for in the provision of Section 27 of the *Civil Procedure Act*, Cap. 21. The Defendant in this case did not enter appearance making the suit undefended despite the fact that they were informed as it is required by law. They therefore prayed that the Defendants should bear the Costs of this suit should the court find that the application merits.
36. In conclusion, the Learned Counsel urged the Honourable Court to allow the suit and the application dated 8th December 2020 as prayed. He emphasized that the Plaintiffs had been staying on the suit properties for a continuous uninterrupted period of over twelve years and hence have a valid claim for adverse possession. Hence it was in the interest of justice that this suit be allowed and granted as prayed.

IV. Analysis and Determination

37. 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 Constitution* of Kenya, 2010 and the statutes. There are three (3) key issues framed herein for determination in order for the Honorable Court to arrive at an informed, reasonable, Just and fair decision. These are:
 - a. Whether or not the Plaintiffs have acquired title by way of adverse possession. If yes when did time start running for purposes of determining these rights;
 - b. Whether or not the Plaintiffs are entitled to the prayers in the suit in form of the originating summons.
 - c. Who will bear the costs of the Suit.

Whether or not the Plaintiffs have acquired title by way of adverse possession. If yes when did time start running for purposes of determining these rights;

38. Under this sub heading, the main substratum of this suit is on the acquisition of title through the Doctrine of Land Adverse Possessions. For that reason, therefore, it is critical that the Court expends a little bit of time on the doctrine. The law in respect to adverse possession is now settled. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

“ 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. Section 13
“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this



Act referred to as adverse possession), and, 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 ceases 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 purposes 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”.

39. The provision of Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession.

Under the provision of Sections 37 and 38 of the Limitations Act, Cap. 22, clearly stipulated the mode of acquiring title in instances of adverse possession. The provision of Order 37 Rule 7 of the Civil Procedure Rules, 2010 also highlights the procedure. The provision of Section 37 of the Limitation Act states that:

“Where person claims to have been entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement 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. Section 38 of the Limitations Acts states that

Where a person claims to have become entitled by adverse possession to land, he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner.”

40. Under Order 37 Rule 7 of the Civil procedure rules states as follows:-

- “(i) An application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons
- (ii) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

The provision of Section 38 on the other hand 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.”

41. Legally speaking, for one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of “Maweu – Versus - Liu Ranching and Farming Cooperative Society 1985 KLR 430 where the Court held:-

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was



adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

42. Has the Plaintiff proved adverse possession? In the case of “Samuel Miki Waweru – Versus - Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

“.....it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu – Versus - Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”

43. In the case of “Wambugu – Versus - Njuguna (1983) KLR 172 the Court held:-

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

44. In the case of “Public Trustee – Versus - Wanduru, Madan J A stated as follows:-

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

45. In this instant case the Plaintiffs had been put in possession the 1940s. 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.’



46. The Court of Appeal in the case of “Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi – Versus - Ben Munyifwa Songoi [2020] eKLR opined that a person claiming adverse possession must establish the following:-

- (a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.

Further that for the Applicant to be entitled land by Adverse Possession, the Claimant must prove that he has been in exclusive possession of the land openly and as without interruption for a period of 12 years either after dispossession the owner or by discontinuation of the possession by the owner on his own volition.

47. Additionally, the courts held:-

“the onus is on the persons claiming adverse possession.

“To prove that they have used the land which they claim as of right Nee Vi, Nec Clam, Nec Precavio (No force; No Secrecy, No evasion) so the Applicants must show that the Company had knowledge (or means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

The courts also held that the main elements of adverse possession that a claimant has to prove include:-

- i. Actual
- ii. Open
- iii. Exclusive
- iv. And hostile possession of the land claimed.

The burden of proof is always on the claimant to prove all these elements and ingredients do exists.

Whether or not the Plaintiffs are entitled to the prayers in the suit in form of the originating summons.

48. In the instant case, the Plaintiffs herein contended that their forefathers had been on the suit property since the years 1940s, as for PW - 1 he stated that he had been living on the suit property since the year 1997 and has been in occupation since then for a period of over 12 years. If that is the case, he has been in occupation of the suit land for a period of 26 years which is beyond the statutory claim.

49. In the case of “Kasuve – Versus - Mwaani Investments Limited & 4 others 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove:-

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a



period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

50. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. It is therefore the view of the Court that the right to Adverse Possession accrued and vested in the Plaintiffs as at 1997 so much so that by the year 2019 when the Defendant is changing the title in his name, title had been extinguished in favour of the Plaintiffs and he therefore held the title to the suit land in trust for the Plaintiff. There is no evidence that the Defendant ever retook possession of the suit land nor that he successfully removed or ousted the Plaintiff from the possession of the suit land. The subsequent cases cited above are not helpful either in assisting the Defendant to assert title to the suit land because title by way of Adverse Possession had accrued and vested in favour of the Plaintiffs.
51. The Plaintiffs led evidence that he has been in exclusive control of the suit land and demonstrated his animus possidendi in developing the suit land through Planting and tending tea bushes, growing trees and practicing subsistence farming on the suit land as though it was as of right.
52. In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts in the case of ‘Kweyu – Versus - Omuto, C A Civ Appeal 8 of 1990 (as yet unreported)’.
53. Therefore, based on all the surrounding facts and inferences in law herein, this Court is satisfied that the Plaintiffs have proved having acquired title based on the doctrine of Land Adverse Possession as stated out in the provisions of the law. The title of the suit land is being held in trust for the Plaintiffs.

Who will bear the Costs of the suit.

54. 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 granted at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By the event it means the results or out come of the legal action or proceedings.
55. In the instant case the Plaintiffs have been able to ably establish their case on the required standards of facts and laws. It follows therefore that the Plaintiffs herein are entitled to costs of this suit to be borne by the Defendants herein.

V. CONCLUSION AND DISPOSITION

56. The totality of the evidence adduced herein above, it’s the Honorable Court’s legal view that the Plaintiffs have managed to prove their case on the preponderance of probabilities. Thus, the Court proceeds to grant the following orders:
 - a. THAT Judgement be and is hereby entered in favour of the Plaintiffs as prayed herein as against the Defendant in entirety with costs.
 - b. THAT a declaration that the title in the name of the KENYA FILTERS LIMITED in respect land parcel No. 2717/V/MN, 2718/V/MN and 2719/V/MN (suit land) has been extinguished by the Plaintiffs’ Adverse Possession thereof for a period of more than 12 years in terms of the provisions of Sections 7, 13, 15, 37 & 38 the Limitations of Actions Act, Cap. 22 of the Laws of Kenya.



- c. THAT the Plaintiffs have become entitled to Adverse Possession to the suit land being land parcel No. 2717/V/MN, 2718/V/MN and 2719/V/MN.
- d. THAT an order that the Land Registrar, Mombasa to register the Plaintiffs as the absolute proprietors of land parcel number land parcel No. 2717/V/MN, 2718/V/MN and 2719/V/MN within the next ninety (90) days of the delivery of this Judgement.
- e. THAT the Chief Land Registrar be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Defendant to the Plaintiffs.
- f. THAT this Honourable Court do issue an order against the Defendant, its agents, servants and/or any other authorized independent contractor be restrained by permanent injunction from entering the suit land or demolishing the Plaintiffs' houses and/or properties, structures thereon and/or evicting the Plaintiffs, their families and/or tenants or in any other manner whatsoever interfering with the Plaintiffs' and their tenants peaceful occupation of the suit land.
- g. THAT the costs of the suit to be awarded to the Plaintiffs to be borne by the Defendant.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS14THDAY OFJUNE.....2023.

HON. JUSTICE MR. L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Yumna – the Court Assistant.
- b. Mr. Waziri Advocates for the Plaintiffs.
- c. No appearance Advocates for the Defendant

