



**Mbala & 22 others v Makau & 2 others (Environment & Land Case
23 of 2021) [2023] KEELC 19060 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 23 OF 2021**

**LG KIMANI, J
JULY 18, 2023**

BETWEEN

MBENDWA NYAA MBALA & 22 OTHERS PLAINTIFF

AND

HELLEN MUTENDE MAKAU 1ST DEFENDANT

ELIZABETH MUNYIVA MBUVI 2ND DEFENDANT

RICHARD MUIITHI MWIKYA 3RD DEFENDANT

JUDGMENT

1. This suit was instituted by way of an Originating Summons dated 12th April 2013 and amended on 19th October, 2018. The Applicants seek to be declared to have become the legal owners entitled by adverse possession to land parcel No. Matinyani/Kalindilo/911 situated within Kitui County which was subdivided into two parcels Matinyani/Kalindilo/1470 and Matinyani/Kalindilo/1471. They seek registration as tenants in common in place of the Respondents.
2. The application is supported by the 1st and 2nd Applicants affidavits on behalf of the other applicants deposing that they are descendants of the late Mbala Ngunga (deceased) who owned the suit land before land adjudication and is buried on it. They claim Mbala Ngunga had eight sons and upon his demise Mbuvi Mbala, one of the sons and father to the 1st and 2nd Respondents was entered as the owner of the suit land to the exclusion of the rest of the family and he went on to transfer it to the 1st and 2nd Respondents.
3. The Applicants claim they were all born on the suit land and have ploughed, grazed and exclusively utilized the land with their families without the consent and interruption of the Respondents and that the Respondents do not live or work on the suit land. They claim that while the suit herein was pending, the 1st and 2nd Respondents subdivided the initial Land Parcel Reference No. Matinyani/



Kalindilo/911 into two parcels Matinyani/Kalindilo/1470 and Matinyani/Kalindilo/1471 and sold parcel 1470 to the 3rd Respondent.

4. Some of the Applicants filed a notice dated 18th January 2019 withdrawing their suit claiming that their names were erroneously included without their consent and knowledge. The said Applicants are John Nyaa Mbala, Mulwa Mwendwa, Jacinta Kavengi Mutinda, Kasyoka Nyaa, Catherine Syombua Kivuthi and Robert Kamile Makau. Further, on 2nd July 2019, Mbala Nyaa Mbala the 3rd Applicant's case was marked as struck out for being Res Judicata.

The 1st and 2nd Respondent's Case

5. The 1st Respondent filed a replying affidavit and a witness statement in response to the originating summons on her own behalf and on behalf of the 2nd Respondent. She denied the Applicants claim of occupation of the suit land since 1940s. She confirmed that Mbuvi Mbala is her deceased father but denied that he was wrongly registered as owner of the suit land. They stated that the estate of their patriarch Mbala Ngunga (Deceased) was distributed to all his sons and each got his share.
6. The 1st and 2nd Respondents claim that their father Mbuvi Mbala's land was initially registered as land parcel No. Matinyani/Kalindilo/278 which he subdivided into two Matinyani/Kalindilo/911 and Matinyani/Kalindilo/912 and sold 912 to one of his brothers Muthwii Musyoka Mbala. They stated that he later sold the other portion Matinyani/Kalindilo/911 to them for valuable consideration.
7. The Respondents accused the Applicants and/or their relatives of trespassing onto their father's land which resulted some of the Applicants namely Mbala Nyaa and Munywoki Mbala filing Kitui SPMCC No. 23 of 1995 against their father and another party. The suit was decided in favour of their father and his co-defendant, and the Applicants and/or their relatives herein were ordered to be evicted from the suit land.
8. That the Plaintiffs in that suit appealed to the High Court at Machakos HCCA No.28 of 2004, but the appeal was dismissed with costs. The Respondents deposed that as a result of the court order the plaintiffs in the suit and their relatives, some of whom are Applicants in this suit, stopped committing acts of trespass. However, the said acts resumed after the Respondents obtained title deed to land parcel Matinyani/Kalindilo/911. The Respondents claim they were forced to lodge a complaint to the police and the trespassers were arrested and criminal charges preferred against them in Principal Magistrates Court at Kitui Criminal Case No. 1801 of 2003. The accused were found guilty and convicted of the offence of trespass upon private land contrary to section 3(1) of the *Trespass Act*. Subsequently the Respondents claim that they instituted a civil suit in Kitui SPMCC No. 343 of 2010 which was determined in their favour and the Defendants were ordered to vacate the land and pay general damages for trespass and costs of the suit.
9. The 1st and 2nd Respondents state that contrary to the Applicant's claim, they have not been in adverse possession of the land and they have faced resistance and interruption all through. Further, that the Applicants have not produced any evidence that any of them resides, ploughs, grazes or otherwise currently use the land.

The 3rd Respondent's Case

10. The 3rd Respondent filed a replying affidavit in response to the amended Originating Summons deposing that he is the owner of Matinyani/Kalindilo/1470 which he purchased from the 1st and 2nd Respondents herein and he believes that the title deed was issued legally and procedurally. He further deposes that at the time he took possession of the land there was no activity or development and that the developments on the suit land belong to him.



11. According to the 1st Respondent he has been living peacefully and quietly on the suit property until it was invaded and the fence maliciously destroyed. That he reported the matter to the police and the same is now the subject of Kitui Criminal Case No.415/105/2018. He also stated that he is aware of the existing court decisions over the same subject matter in Machakos HCCA No.28 of 2004, HCC NO.28 of 2004, ELC NO. 451 OF 2013, Kitui SPMCC No.343 of 2010. He accused the Applicants of forum shopping and going on a fishing expedition and that they have failed to establish any claims over the suit land.

Evidence at the Trial

12. The suit herein proceeded by way of oral evidence and 1st and 2nd Applicants and two witnesses Patrick Mavevi Mwanzia and Mkuwekwe Malusi testified on behalf of the applicants.
13. PW 1, Mbendwa Nyaa Mbala reiterated the Applicants case as contained in the originating summons, supporting affidavit and witness statement which he adopted. He stated that the 1st Respondent is his brother's daughter and the 2nd Respondent is his aunt's daughter. He knew the 3rd Respondent when he bought part of the suit land. He produced his bundle of documents in evidence. PW1 stated that he was born in the year 1949 and found his parents cultivating and grazing on the suit land but that he did not find Mbuvi Mbala utilizing the same. That the Applicants were shocked to learn that Mbuvi Mbala transferred the suit land to the Respondents in a bid to disinherit the entire family of Mbala Ngunga (Deceased) instead of having the suit land sub-divided among his 8 sons. The Applicants claim the entire land under adverse possession and seek to have it registered in trust for the entire family. PW 1 stated that when the 3rd Respondent bought part of the suit land in 2018, he demolished his house and burnt his crops. He noted that the 3rd Respondent's portion is separated by a valley and he used to cross the valley to cultivate.
14. PW 1 stated that he claims the land having inherited it from his grandfather together with all the grandfathers eight sons and that the land was registered in the name of one of the sons, Mbuvi Mbala, the first-born in trust since it was family land.
15. It was PW1's statement that when land adjudication was being done, his father was already deceased and he stood in place of his father. He acknowledged that there is no evidence that the sons of Mbala gave him authority to claim the suit land Matinyani/Kalindilo/277. He denied knowing that Mukula Mbala is the registered owner of land parcel Matinyani/Kalindilo/277.
16. PW 1 confirmed that Parcel 911 and 912 used to be one and that Muthui Musyoka Mbala, his cousin is the owner of parcel 912, and that the said Muthui was not sued because he bought the land from the original owner, Mbuvi Mbala.
17. PW1 further claimed that he could not remember giving evidence in Criminal Case No. 1801 of 2003 R Vs Kaluku Mbala & others.
18. On cross-examination by counsel for the 3rd Defendant, PW1 confirmed that women can own land according to Kamba Custom and that if a father has no sons the daughters can take all the property of their father but denied knowledge that Matinyani/Kalindilo/911 was given to the 1st and 2nd Defendants by their father.
19. Further, PW 1 denied knowing how land parcel 278 was sub-divided. His statement is that they live on Matinyani/Kalindilo/192 which has 4 registered owners. He confirmed that the 3rd Respondent evicted them from the land but he did not report the matter to the police. He denied knowledge of



- the survey report and the presence of the chief during the sub-division. He denied knowledge of the meeting to share the inheritance of Mbala Ngunga, though he admitted knowing the people present.
20. PW 2 Wambua Munywoki adopted his witness statement dated 28th February 2014 as his evidence in chief and testified that as the grandson of Mbala Ngunga he was born and brought up and has utilized the suit land. He stated that they appointed Mbuvi Mbala (Deceased) to head their parents and uncles in a case against a land grabber, one Munyoki Kyei but were later shocked to learn that Mbuvi Mbala had transferred the suit land to the Respondents, having held it out to be solely his. He stated that it was his wish that the said parcel of land be sub-divided among the 8 sons of Mbala Ngunga(Deceased) but since the Respondents have refused, they have chosen to claim the entire land under adverse possession.
 21. PW 2 confirmed that his father is Munywoki Mbala and that the suit land had no occupants but had been left for grazing by all the family members. He also stated that his father had no title to any land and that he lives on Land Parcel 192 and has cultivated the parcel which the 3rd Respondent bought. He further stated that Mbuvi Mbala had never built on the suit land and neither did the 1st and 2nd Respondents.
 22. PW 2 confirmed that his father Munywoki Mbala is among the 4 listed as the owners of the land parcel LR Matinyani/Kalindilo/192. He acknowledged that apart from the land in dispute and Parcel 192, there are other lands belonging to their grandfather that are in the names of other children. He also stated that he was aware that there was a case filed by the 1st and 2nd Respondents and they were ordered to vacate the land but he never sought to be enjoined in that case. He could not remember the case where the family members appointed Mbuvi Mbala to head the entire family against Munywoki Kyei.
 23. PW 2 denied knowledge of the Agreement for sharing of the properties of Mbala Ngunga stating that it was made in 1972 when he was 5 years old. He also stated that in 2018 when the Chief gave a report on surveyor's visit, they had already been chased from the land and they were not present during the alleged survey.
 24. PW 3 Patrick Mavevi Mwanzia testified and confirmed knowing the family of Nyaa and their parcels of land. He denied that any survey was ever carried out subdividing the suit land. Upon cross-examination the witness stated that Mbala Ngunga died when he was 38 years old. He also stated that he has land which has a title deed in the name of his father and that all land in the area where the suit land is have title deeds.
 25. PW 3, Patrick Mavevi Mwanzia confirmed that when he recorded the witness statement, the title deed to the suit land was not in the name of Mbala Ngunga and the land had been sub-divided. On cross-examination, PW 3 confirmed that daughters can inherit land but the 1st and 2nd Respondents were given the land by mistake since the land was to be shared by all family members.
 26. PW 4 Mkuwekwe Malusi adopted his witness statement dated 28th February 2022 where he stated that he knew Mbala Ngunga (Deceased) and the parcel of land through Munyasya Katitu, the oldest wife of Mbala Ngunga (deceased). He stated that the family patriarch was buried on the suit land where a baobab tree stands and that he has never heard of the said land being sub-divided. He stated that his land borders the land belonging to Mbala Ngunga(Deceased). On cross-examination, he could not identify the parcel number of the suit land and that his own land is registered in the name of his father. He acknowledged that most land in the area have title deeds and that survey was done.
 27. Defence hearing proceeded on 5th October 2022 when the 1st and 2nd Respondents testified. DW 1, Hellen Mutende Makau reiterated the contents of her replying affidavit which she adopted together with her witness statement dated 13th May 2004. She stated that the 2nd Respondent is her younger sister and the 3rd Defendant is not her relative. She stated that Land Parcel Matinyani Kalindilo/911



- was registered in joint names with the 2nd Respondent after their father sold it to them for valuable consideration and had transferred the title prior to his death.
28. She denied that the Applicants have been using the suit land for over 12 years since the 1940s. She claimed that when land adjudication commenced their father was registered as the absolute owner of the suit land. The suit land was part of the larger parcel known as land parcel Matinyani Kalindilo/278 which was registered in their father's name but was sub-divided into two and portion 912 was sold to Muthui Musyoka Mbala, their father's nephew.
 29. PW1 stated that at some point the Applicants trespassed on the suit land and their father complained which led the 3rd Applicant to file to file Kitui SPMCC No.23 of 1995 against their father and another but it was decided in their father's favour. They filed an appeal which was dismissed. The 1st Respondent said that this suit is aimed at grabbing their land but the same has been met by stiff resistance from their father and themselves. She stated that the Applicants are trespassers, who should be evicted. She concluded by saying that the land of their grandfather Mbala Ngunga was shared among his sons and their father got the portion Matinyani/ Kalindilo/278 while his siblings got their own portions registered in their own names. She gave an example where Mukula Mbala got land parcel Matinyani Kalindilo/280 and she listed the names of the others, concluding that the originating summons lacks merit. She also produced her documents in evidence as a bundle as filed in court.
 30. DW 1 stated that jointly with the 2nd Respondent they bought the parcel of land from their father for KShs. 180,000.00. It was her statement that they were only sued because they are women and that the Applicants thought they could get the land because their father had no sons. They pointed out that the person on Parcel 912 was not sued in this case. She referred to Criminal Case 1801/2003 where together with the 2nd Respondent they were the complainants and all the accused are related to the Applicants. She insisted that the Applicant, Mbendwa Nyaa was a witness for the accused in that criminal case and that he also knew about the civil case. She denied that her father registered land parcel 278 fraudulently.
 31. DW 1 confirmed that the 1st Applicant have no structures on the suit land and has never had any and neither do the other Applicants. DW1 stated that her relationship with the 3rd Respondent is that he bought a part of their land Parcel 911 and subdivided it and he got parcel 1470 while they retained 1471. She stated that the land was vacant when they sub-divided it into two parcels and sold it.
 32. Upon re-examination, DW 1 stated that the 1st Plaintiff does not have a home on the suit land and his home was on land parcel 192. It was her statement that she would not know the criteria used by her grandfather to share out his property and why some family members were not in the 1972 Agreement as she would not be allowed in such a meeting at her young age then.
 33. DW 2, Elizabeth Munyiva the 2nd Respondent testified and adopted the evidence of DW 1 and did not wish to add anything more.
 34. DW 3, Richard Muithi Mwikya the 3rd Respondent testified and adopted his replying affidavit as evidence in chief and the annexures thereto. He confirmed that he bought land parcel Matinyani/ Kalindilo/1470 from the 1st and 2nd Respondents and entered into a Sale Agreement. He confirmed that he obtained title in his name.
 35. DW 3 stated that before the transfer was effected, they called a surveyor, the neighbours and the area Chief and after survey a report was made and produced in court. He stated that he made developments on the land and that the land was purchased honestly.
 36. On cross-examination, DW 3 stated that he did not know the 1st and 2nd Respondents before they sold the land to him. He stated that he only learnt of the persons claiming the land when after 4 months his



fence was cut off. He reported the matter to the chief but stated that the same chief had not told him that the 1st Plaintiff had an interest in the land during the survey exercise. He also stated that he was not informed and did not know that there was an ongoing case when he took possession of the land and that there was no caution placed against the title to the land. DW 3 insisted that he had carried out due diligence and done a search on the title. He lodged a complaint with the police and there is a criminal case pending.

Applicants' submissions

37. Counsel for the Applicants submitted that the Respondents father acquired massive land very well knowing that the same belonged to the family. He submitted the understanding that in the current jurisprudence there are some rights that override a title or that could be infused into a registered title where a trust is shown in order to cure injustices within the family. Counsel claims that that present case covers two regimes of law being trust and adverse possession.
38. It was the Applicants submission through Counsel that their patriarch Mbala Ngunga had land in Matinyani and in Kauwi, and when he went to Kauwi he married more wives there having a total of 5 wives. He stated that the Respondents did not own the land by themselves but they owned it through Mbala Ngunga (Deceased) and that they must prove why they owned the land to the exclusion of the other children, where the Respondents had more than 100 acres while the other family did not get anything.
39. Counsel for the Applicants pointed out that the Applicants were not parties in the previous court cases Kitui PMCC 23 of 1995 and Criminal Case No.1801 of 2003. They also highlighted that the titles were obtained on 20th September 2000 while the suit was filed on 12th April 2013, 13 years later. They claim that possession was exclusive and had not been broken.
40. It is also their submission that the statutory period for enforcement of the judgment has long lapsed and that after the period of 12 years, the stay became adverse to their title. They relied on the case of Peter Ndung'u Njenga v Sophia Watiri Ndungu[2000]quoted with approval in the case of Francis Kaagu Karichu v Lucy Nyambura Civil Appeal No.64 of 2015, the case of Samuel Gichina Muiruri vs Evanson Kimemia Civil Appeal Case No.65 of 2000(Nakuru) and Njuguna Ndatho v Masai Itumo & 2 others are Civil Appeal Case No.231 of 1999.(Nakuru).

3rd Respondent's submissions

41. Counsel for the 3rd Respondent confirmed that the Applicants No. 5, 6, 8 18 and 22 withdrew themselves from the suit and the 3rd Respondents name was struck out of the suit for being Res judicata. Counsel questioned that if indeed the 1st and 2nd Respondent's father unfairly allocated himself Land Parcel Matinyani/Kalindilo/278, then why is the subdivision Matinyani/Kalindilo/912 allocated to Musyoka Mbala not subject to this suit? It is their submission that it is because they hoped to take over Matinyani/Kalindilo/911 from the 1st and 2nd Respondents since they are women. They sided with the 1st and 2nd Respondent's position that the Applicants are trespassers.
42. Counsel submitted that the Applicants case was a complaint about succession and inheritance of ancestral land from the Applicants and 1st and 2nd Respondents Grandfather Mbala Ngunga with the Applicants complaining of unfair distribution of land and that this court has no jurisdiction to deal with succession matters.
43. It is the 3rd Respondent's submission that he has demonstrated that the Applicants have not been in possession of the suit land and that the land was vacant at the time that he took possession. That he involved government officers such as the County Government Surveyor who confirmed that all



the interested parties were present during the survey exercise and the area chief who wrote a letter confirming that there was no activity on the land save for the 3rd Respondent's.

44. Relying on the ingredients of adverse possession as set out in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, submitting that the Applicants' assertion that they have been in possession of the suit property for a period of 70 years is without evidence. The 3rd Respondent highlighted the exhibits presented by the 1st and 2nd Respondents on the previous court cases and decisions proving the interruption of the Applicants on the suit property, coupled with the fact that the 3rd Respondent bought the suit land when it was not under occupation of the Applicants as evidence to impeach the Applicants' claim of uninterrupted possession of 12 years.
45. The 3rd Respondent also noted that the Applicants sought to sneak in an equitable claim under trust at the end of their submissions, submitting that parties are bound by their pleadings as they relied on the Court of Appeal case of *Independent Electoral and Boundaries Commission & Ano v Stephen Mutinda Mule & 3 others* (2014) and the case of *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR..
46. The 3rd Respondent also relied on the holding in a similar case *Wilson Kenyenge v Joel Ombwori* [2001] eKLR which dealt with a similar situation where trust was not pleaded and the Court rejected that.
47. The 3rd Respondent therefore concluded that the claim of adverse possession must fail since it has not been supported by facts.

Analysis and Determination

48. The Applicants seek to enforce a claim to the suit land under Adverse possession. Section 7 of the *Limitation of Actions Act* of 1968 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.”

Section 9(1) provides for the accrual of right of action in case of present interest in land and states that;

“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.”

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 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”

49. The procedure for making such an application is set out under Order 37 rule 7 of the Civil Procedure Rules (2010) which provides that:

“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.”

50. Under Section 38(1) of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.

51. The court has considered the originating summons, and the evidence adduced in support and in opposition to the same and b the written submissions of counsel. The issues for determination in this case is “Whether the Applicants have established their right through adverse possession to be registered as owners of the suit land Matinyani/Kalindilo/911 situated within Kitui County which was subdivided into two parcels Matinyani/Kalindilo/1470 and Matinyani/Kalindilo/1471.

51. It is not in contention that the suit land was initially part of land owned by Ngunga Mbala (deceased) who is the family patriarch of the Applicants and the 1st and 2nd Respondents. Upon land adjudication Mbuvi Mbala, the father of the 1st and 2nd Respondents was registered as owner of the initial land parcel Matinyani/Kalindilo/278 which was subdivided into Matinyani/Kalindilo/ 911 and Matinyani/Kalindilo/912. That parcel No. 911 was transferred to the 1st and 2nd Respondents who later subdivided it into land parcels Matinyani/Kalindilo/1470 and Matinyani/Kalindilo/1471. The parcel No 1470 was subsequently transferred to the 3rd Respondent Richard Muithi Mwikya. The parties hereto have exhibited title deeds and searches for the above parcels of land showing that ownership has been as stated herein.

52. The law provides that legal ownership of land includes a right to possession of the same. In *Kamataka Board of Wakf v Government of India & Others* [2004] 10 SCC 779 quoted in the Court of Appeal case of *Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui* [2017] e KLR the court stated thus:-

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner.”



53. The court further stated the principles that and stated that In *Kamataka Board of Wakf v Government of India & Others* [2004] 10 SCC 779 quoted in the Court of Appeal case of *Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui* [2017] e KLR the court stated thus:-

“It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

54. The question that arises is whether the Applicants herein took possession of the suit land by dispossessing the true owner and clearly asserted title in denial of the title of the true owner. The other question is whether possession of the suit land by the Applicants, if any, was open and peaceful and without secrecy.
55. The Applicants claim possession by way of exclusively ploughing, grazing and utilizing of the suit land. The 1st Applicant stated that the 3rd Respondent demolished their houses and destroyed their crops. The evidence on record shows that apart from the Applicants’ statements of the activities they claim to have carried out on the suit land, there is no evidence of the ploughing, planting of crops or houses constructed on the land. The 1st and 2nd Respondents claim that the Applicants have not been in possession of the suit land but have committed intermittent acts of trespass that have been resisted.
56. The 3rd Respondent testified that he took vacant possession of the land parcel Matinyani//4170 and this was confirmed by a surveyor and the area chief who was present during the survey exercise. The Applicants claim that the 3rd Respondent destroyed their homes that were on the suit land. However, it is noted that the Applicants have not shown proof of the existence of the said houses on the land. The 3rd Respondent purchased parcel number Matinyani/Kalindilo/1470 while this suit was ongoing. If the homes existed when this suit was commenced, the court sees no proof of such existence from the Applicants documents. Further, nothing prevented the Applicants from documenting the alleged destruction of homes and crops. The court is satisfied that there were no houses on the suit land either at the time of filing this suit or at the time when the 3rd Respondent purchased the portion of the suit land.
57. The Applicants claim to have been in possession of the land since the 1940s for more than 70 years since they claim that it is their ancestral land. However, it has been stated that during part of the said period the land was not adjudicated and titles had not been issued. Evidence was led to the effect that it was during land adjudication that Mbuvi Mbala had the suit land adjudicated to himself to the exclusion of his brothers. The Applicants claim that they continued possession of the suit land believing that the said Mbuvi Mbala was registered in trust for them.
58. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, where the Court enumerated the required elements to prove adverse possession as follows:

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



59. Aside from open occupation, it must be clear that the adverse possessor has dispossessed the title holder of the land as it was held by the Court of Appeal in Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR, where the court held:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

60. The 1st and 2nd Respondents deny that the Applicants have been in occupation of the suit land for the years claimed. They claim that any acts of trespass by the Applicants or their relatives have been met by assertion of the legal rights to the land by themselves or by title in their predecessor, their father Mbuvi Mbala. They highlighted various cases filed in a bid to evict the Applicants and their relatives from the suit property and stop acts of trespass. They have exhibited a decree issued in Kitui Principal Magistrate’s Court Civil Suit No. 23 of 1995 Mbala Nyaa and Munywoki Mbala versus Mbuvi Mbala, estate of Mukula Mbala and Joseph Mukula Mbala. In this case Mbuvi Mbala had been sued but the case against him was dismissed and it appears he made an application to the same court and orders were issued in his favour. In the decree issued, the prayers sought by Mbuvi Mbala and which were granted were that Mbala Nyaa, the 3rd Applicant herein and Munywoki Mbala, their families, agents and/or anyone claiming under them were ordered to vacate Matinyani/Kalindilo/278(now known as 911 and 912) and Matinyani/Kalindilo/277 and to give vacant possession to Mbuvi Mbala.
61. The connection between Mbala Nyaa, the 3rd Applicant herein and Munywoki Mbala, is explained in the family tree that was exhibited by the Applicants herein. It shows that the applicants Nos 1, 2, 3, 4, 5, 6 and 7 are descendants of the Mbala Nyaa who was the 1st Plaintiff in the said suit No. 23 of 1995. It therefore follows that at that point and by virtue of the decree, the said family members were ordered by the court to vacate the suit land.
62. Further, according to the family tree the family of Munywoki Mbala, the 2nd Plaintiff in PMCC No. 23 of 1995 include the 10th to 15th Applicants in this present suit. According to the 1st and 2nd Applicants’ evidence, the said Munywoki Mbala was the father to the following Applicants, Wambua Munywoki (2nd Applicant), Ronald Ngusu Munywoki 13th applicant, Kivuthi Munywoki 14th applicant, William Munywoki 16th applicant, Andrew Mulwa Munywoki 17th applicant and father-in-law to Catherine Monica Wambua the 15th Applicant the wife to 2nd applicant and Margaret Munywoki (18th applicant who is wife to the 16th applicant). These Applicants were therefore also ordered to vacate the suit land as per the court order dated 23rd February 2003 and issued on 6th November 2003.
63. According to the testimony of the 1st and 2nd Respondents herein, after the said orders were issued by the court the said parties and their relatives stopped acts of trespass and it is only after the title to the suit land was transferred to the Respondents herein that some of the Applicants started new acts of trespass.
64. In the courts considered view, at the time when PMCC No. 23 of 1995 was lodged, only the two plaintiffs in that suit were claiming the suit land. The Applicants in this suit have not shown that at that point they were interested in laying any legal, beneficial or possessory rights to the suit land. They have also not shown that they considered the suit land as their ancestral land as they seem to be doing in this suit.



65. As stated earlier there were no acts of trespass on the suit land after the court orders were issued but the same resumed after the Respondents obtained title deed of Land Parcel Matinyani/Kalindilo/911. The Respondents herein were forced to lodge a complaint to the police and the trespassers then were arrested and criminal charges preferred against them in Principal Magistrates Court at Kitui Criminal Case No. 1801 of 2003. In the said criminal case the accused persons were Kaluku Mbala, Mona Robert, Boniface Musyoka, Musyoka Munguthe, Kalekye Musya, Mbuli Mbaluku, Margaret Kulu, Joseph Kimanthi Mbaluka and Joseph Mbala. The accused persons were found guilty of the offence of trespass, convicted and fined.
66. The 1st and 2nd Respondents further exhibited a decree in Kitui Principal Magistrate's Court Civil Suit No. 343 of 2010 lodged by themselves against the accused persons in the criminal case where judgment was delivered on 15th March 2012 in their favour. The said judgement confirmed that Matinyani/Kalindilo/911 belonged to the 1st and 2nd Respondent herein and an injunction was issued against the Defendants therein restraining them from entering into and trespassing on the suit land.
67. The 1st and 2nd Respondent explained the relationships between the Applicants herein and the accused persons in the criminal case number 1801 of 2003 and Civil suit No. 343 of 2010 and stated that the 1st accused person Kaluku Mbala is the wife to the 3rd Applicant Mbala Nyaa whose suit was struck out for being res judicata, the 2nd accused, Mona Robert Makau is wife to Robert Kamile Makau the 24th Applicant who withdrew himself from the suit herein and the 3rd Accused, Boniface Kilumbu Musyoka is husband to Mwinza Kilumba the 23rd Applicant.
68. The courts assessment of the evidence is that the 1st and 2nd Respondents made complaints of trespass to the suit land in Principal Magistrates Court at Kitui Criminal Case No. 1801 of 2003 and filed Civil Suit No. 343 of 2010 against the persons who were actually trespassing on the suit land at that time. In the Courts view the other Applicants in this suit who were not parties to the said previous suits were left out precisely because they were not on the land. The Applicants have not shown that at the time the two suits were filed in 2003 and 2010 they were also in possession of any portions of the suit land or had committed any acts of trespass to the suit land. It is the courts further view that had the Applicants herein been present on the land, the 1st and 2nd Respondents would have joined them in their complaint in the two suits.
69. Indeed, the Applicants state in their evidence that they were all born and have lived, ploughed, grazed and utilized the land to the exclusion of the Respondents. In the courts view if this contention was true the applicants would have been found on the land and been included in the criminal and civil cases filed by the 1st and 2nd Respondent and their father. It is precisely because the Applicants herein were not personally on the suit land that they were excluded from the suits filed in court to recover the land.
70. Further, though the defendants in the previous suits are not the Applicants herein, the 1st and 2nd Respondent claim that they are relatives of the Applicants herein and state that the orders issued by the various courts applied to all of them and the said orders are evidence that the Respondents asserted their rights to the suit land by way of court cases where the Applicants were ordered removed from the suit land.
71. On the other hand, the 3rd Respondent exhibited developments on the land including what he stated to be a farm house, two ten thousand litre water tanks and crops on the land. The Applicants did not show what they did as the 3rd Respondent made the developments on the land.
72. From the foregoing the court finds that possession of the suit land, if any, by the Applicants and/or their relatives under whom they claim ancestral rights was not peaceful, open or continuous but



the same was resisted and interrupted by assertion of rights by the 1st and 2nd Respondents and their predecessor in title through various court orders. The Court further finds that the 1st and 2nd Respondents asserted rights to the suit land and filed suits against the persons who were actually trespassers on the suit land and the Applicants have failed to show that they were at the same time also present on the land and somehow the 1st and 2nd Respondents did not see them or overlooked their presence when lodging complaints against the other trespassers.

73. The court finds that the Applicants failed to show that their possession, if any, of the suit land was peaceful, open and continuous. In the courts assessment, the Applicants seem to have devised a way in which when some members of their families were ordered removed from the suit land by the courts, others stood in line and alleged to have been in possession of the land. In the process they sought to defeat the 1st and 2nd Respondents and the deceased Mbuvi Mbala the right to the land and to enjoy the fruits of the court orders issued. In the Courts view the Applicants seek to benefit out of a scheme to disregard and disobey court orders in order to defeat the course of justice and the court refuses to be part of such a scheme.
74. The law on adverse possession is that time ceases to run when the owner of land subject to a claim of adverse possession asserts their rights over the property as was held in the case of Githu vs Ndeete [1994] KLR quoted by the Court of Appeal in Kenya Commercial Bank (Suing as administrator of the Estate of Paul Njoroge Muchene) v Serah Njeri Muchene (sued on behalf and as the administratrix of the Estate of Perminus Muchene Mwangi).
- “time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land.”
75. The burden of proof lies on the Applicants to prove that they have a valid claim of adverse possession on the suit land. Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), provides:
- “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.”
76. The court in the case of Wilson Njoroge Kamau v Nganga Muceru Kamau [2020] eKLR held that;
- “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.”
77. The Applicants counsel submitted a claim that the 1st and 2nd Respondent father was registered as owner of the suit land in trust for the family of Mbala Ngungo and that the suit land is their ancestral land and that their fathers were unfairly disinherited, the initial originating summons and the amended one makes a claim under adverse possession and the claim that the suit land was held in trust was not specifically pleaded. The Respondents were not given an opportunity to respond and defend a claim of trust and in the courts view the same cannot stand. Even if the claim had been pleaded it would have required proof that the same be proved. In the case of Cosmas Cheronu & 2 others v Veronica Cheronu [2021] eKLR the court cited with approval as follows;
- “In Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR, the Court also held that It is settled that the onus lies on a party relying on the



existence of a trust to prove it through evidence. That is because: -The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

That in the instant case, the import of the foregoing precedents is that it is upon the plaintiffs to lead evidence proving that indeed a constructive trust existed. It was incumbent on the plaintiffs to demonstrate that the suit property was ancestral land, and that it was vested in Joseph Rutto Cheronu to hold for the family. Importantly, the court is not obligated to imply the existence of a trust outside the express and clear intention of the parties.”

78. Further, it has been held that one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. In this case the Applicants claim that the suit land was part of family land that was wrongly, and/or illegally registered in the name of Mbuvi Mbala to the exclusion of all other sons of the said Mbala Ngunga. They stated that they did not know that Muvi Mbala had transferred the land to the 1st and 2nd Respondents. They claim that the said 1st and 2nd Respondents hold the land in trust for them since their father held the land in trust for the entire family. Indeed, one of their prayers is that the land be subdivided and registered in the name of the eight sons of their deceased father. The court held in *Haro Yonda Juaje v Sadaka Dzeno Mbauro & Kenya Commercial Bank* [2014] eKLR that:

29. One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

79. This position was upheld by the Court of Appeal in *Catherine Koriko & 3 others v Evaline Rosa* [2020] eKLR where it was stated that;

“A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.”

80. The court is satisfied that the Applicants have failed to prove the claim that they were entitled to be declared the owners by adverse possession of all that parcel of land comprised in title number LR Matinyani/Kalindilo/911 and the subdivisions thereof being land parcels Matinyani/Kalindilo/1470 and Matinyani/Kalindilo/1471. and to have the said titles registered in their joint names.
81. As earlier stated some of the initial applicants John Nyaa Mbala, Mulwa Mbendwa, Jacinta Kavengi Mutinda, Kasyoka Nyaa, Catherine Syombua Kivuthi and Robert Kamile Makau withdrew their claim and the 3rd Applicant Mbala Nyaa Mbala's case was marked as struck out for being Res Judicata.
82. The final order of the court is that the suit by the following remaining applicants Mbendwa Nyaa Mbala, Wambua Munywoki, Mutaki Nyaa, Regina Ngii Mbendwa, Miriam Musenya Mulwa, Ndungwa Mutaki, Ronald Ngusu Munywoki, Kivuthi Munywoki, Catherine Monica Wambua,



William Munywoki, Andrew Mulwa Munywoki, Margaret Munywoki, Kanini Ngusu, Joseph Musyoka, Florence Monica Mwinza Kilumbu is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 18TH DAY OF JULY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Judgement read in open court and virtually in the presence of-

C/A Musyoki

Mutuku for the Applicants

No attendance for the 1st and 2nd Respondents

Omondi for the 3rd Respondent

