



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 127 OF 2000 (O.S)
(formerly Nairobi HCCC NO. 328 of 2000 (O.S))

TELKOM KENYA LIMITED PLAINTIFF

VERSUS

MOHAMED OMAR HAJI & 9 OTHERS DEFENDANT

JUDGMENT

INTRODUCTION

0. The plaintiff is a government corporation established under the Kenya Communications Act of 1998 as one of three successors, with regard to telecommunication services, to the Kenya Posts and Telecommunications, to which the assets and liabilities of the former corporation were transferred. [The other successors were the Communication Commission of Kenya and the Postal Corporation of Kenya charged respectively with regulatory services and postal services, according to the Third Schedule of the Act]. The Kenya Posts and Telecommunications Corporation was itself a successor of the East African Posts and Telecommunications, and the events of this case stride through the lives of all three corporations.
0. By Originating Summons dated 28th February 2000 filed in the High Court at Nairobi and brought under Order XXXVI Rule 3D of the Civil Procedure Rules, and Sections 7, 17, 37 & 38 (1) of the Limitation of Actions Act, the plaintiff, a government parastatal which claimed to have continuous, uninterrupted notorious and exclusive occupation of a parcel of land for a period of 15 years since 1984, sued the defendants seeking, principally, a declaration that it had become entitled, by adverse possession for a period of over 12 years, to the said land, the suit property herein, plot No. 228 Mambui/Malindi registered in the Registry of Titles at Mombasa as C.R 7277/1 measuring 57 acres, and prayed for specific reliefs as follows:
 1. ***THAT the Plaintiff be declared to have become entitled by adverse possession of over 12 years to all that piece of land measuring 57 acres registered in the Registry of Titles at Mombasa as C.R. 7277/1 and comprised in plot No.228 Mambui***
 2. ***THAT the Plaintiff be registered as the sole proprietor of the said piece of land on the ground that since the year 1984, the plaintiff has been openly and peacefully enjoying the occupation for over twelve years preceding the presentation of this Summons.***
 3. ***THAT by reason of the aforesaid occupation, the Defendants titles to the said parcel of land be declared extinguished.***
 4. ***THAT the Plaintiff be granted leave to utilize uncertified copies of the title documents pending such certification by the Land registry.***
 5. ***THAT the Defendants do execute a Transfer and all acts necessary to convey the said***

title to the Plaintiff as the rightful proprietor and to enable it to be registered as such and in default, the Deputy registrar be authorized to sign the relevant papers on behalf of the Defendants.

6. THAT Costs of this application be provided for.

0. By an order of the Court (Aluoch J., as she then was) made on 28th February 2000, the matter was transferred to the High Court at Mombasa on the ground that the cause of action arose in Mombasa.
0. The defendants filed a Defence and Counter-Claim dated 16th October 2000, in which they denied the plaintiff's adverse possession claim and sought damages for trespass and for an order that the plaintiff delivers vacant possession of the suit property. The defendant averred that sometimes in 1996, they had become aware of trespass by way of a transmission tower and receivers erected on the parcel of land by the defunct predecessor of the plaintiff, Kenya Posts and Telecommunications Corporation, with whom they had commenced negotiations with a view to purchase the property but the said Corporation had dragged the negotiations for a period of four years, 'until in 1999 when the defendants demanded vacant possession.'
0. The Plaintiff filed a Reply to Defence and Defence to Counter-Claim dated 27th October 2000, reiterating adverse possession for 12 years and contending therefore that the defendants' counter-claim was time-barred and un-maintainable. There were attempts to settle the suit out of court which were unsuccessful and on 27th August, 2003, the Court declined an application dated the 6th June 2003 for the dismissal of the suit for want of prosecution.
0. The suit eventually came up for hearing on the basis of viva voce evidence before Sergon, J. on 23rd April 2009 and later before Okwengu, J (as she then was) on 3rd October 2011 and 17th November 2011. Upon Okwengu, J's appointment to the Court of Appeal, the proceedings were subsequently typed for easy reference by the court that writes the judgment and the parties filed their respective submissions. On 31st October 2012 judgment was reserved for 13th December 2012. It was not possible to render judgment on the scheduled date and, following the transfer of this Judge to Kisii High Court in 2013 and the overloaded diary upon return effectively in 2014, it has also not been possible to deliver this judgment earlier. The delay is greatly regretted.

THE ISSUES

0. The Issue for determination is whether the plaintiff as a public corporation acquired title by adverse possession of the suit property having occupied the suit property for a period of more than 12 years in accordance with section 37 of the Limitation of Actions Act, consequently entitled to be registered as the owner thereof under section 38 of the Act.

THE EVIDENCE

0. The parties called witnesses in support of their respective cases as follows:

PW1: GODFREY MIGWI THEURI at the time a retiree, had previously worked with the plaintiff since 1978 as the property manager on the said property. He produced, with the consent of counsel for the defendants, a bundle of documents marked as PExb.1. The documents in PExb.1 indicated that the plaintiff had been in occupation of the property from 1975. There had been no claim of ownership of the property by anybody until 1999. He stated that the plaintiff's development on the plot included a 50 meter tower and covered an area of 50M x 50M which is fenced and guarded, plus an access road. This is despite the Plaintiff having claimed 57 acres in the plaint.

PW2: TOMICKY RANDU, had worked for the plaintiff from 1981 – 2006. He was stationed in Malindi in charge of Radio and Maintenance. He was familiar with the property on which he claimed the Mambui Radio Station ("the station") was established in 1975. The station was operated by a generator until electricity was supplied in 1982/83.

DW1: FADHILA MOHAMED ABDULMUJID testified that she was a house wife. The other

defendants are her brothers. They had inherited the property measuring 57 acres in 1996 from her maternal aunt, Fatma Swaleh Abdalla. She produced a Certificate of Title showing that the land belongs to them. She admitted that the plaintiff entered their land without permission. She stated,

*“Telkom had taken ¼ acre. It is not true that we had abandoned the land. We have been going there often. Initially it was only Telkom who had their station there, now Telkom has brought in many other people like Orange, Safaricom etc. We had given part of the land to Royal Media Services. They pay us Kshs.120,000/- per year. **The rest of the land is in our hands. We object to the whole land being taken by Telkom. We did not allow Telkom to use the ¼ acre. They just took it. We came to court to challenge their action. That was the best that we could do. They did not respond to our advocate's letter. We are urging the court to dismiss the plaintiff's application – we do have a title deed in the land.**”*

On cross-examination, she stated,

“...The land is on a hill... The transmitters have been put up on a hill. The hill is visible at the road going to Malindi. The transmitters were on our land. I cannot tell how long the transmitters have been on our land. It is possible they could have been on the land for 13 years... From 1996 – 1999, we tried to talk to Telkom officials, but they did not want to talk... We knew that my aunt Fatma had the land. The land was very big. It is 57 acres. I could see the transmitter from a distance but I could not tell from a distance that the transmitter was on our land...”

SUBMISSION BY THE PARTIES

0. The parties filed respective written submissions as follows:
 1. The Defendants submissions dated 1st December 2011 and filed on 7th December 2011
 2. The Plaintiff's submissions dated 9th December 2011 filed on 13th December 2011; and
 3. The Defendant's Further Submissions dated 19th December 2011.
0. The substance of the Plaintiff's Submissions was that while the claim was for the entire 57 acres, the plaintiff had proved that it was in fact in occupation of a defined portion on which the station was situate, and the access road to it. It was submitted that in the circumstances, the plaintiff ought to be entitled to this. In paragraphs 5 and 6 of the submissions, it was stated that;

“5. The first prayer sought by the Plaintiff seeks adverse possession over the entire 57 acres but what is evident is that the Plaintiff exclusively occupies only a defined portion of the Defendants suit land and the access road to the site. We hereby maintain that the Plaintiff should be excised the portion they have established as to be in exclusively in possession and unreserved and unconditional use the access road to the portion they occupy.

6. The 1st and 2nd Plaintiff witnesses have testified expressly that the Plaintiff occupies a portion of 50m by 50m within Plot No. 228, being 0.67 acres and have prayed that this honorable court declares that they are entitled to the portion by way of adverse possession. The 2nd Plaintiff's witness admitted expressly that all they want excised is the portion the Plaintiff occupies and not the entire parcel.

We clearly pray that this court proceeds and declare the Plaintiff to be entitled to the portion occupied by way of adverse possession including unreserved and unconditional use of the access road they constructed to access the site.”

0. The plaintiff relied on the decisions of **Kanda Kimamet vs Chepkiyeng Kimamet Chebobei**, Eldoret HCCC No. 218 of 2000, **Lazaro Kabebe vs Ndenge Makau & Another**, Nairobi HCCC No. 1222 of 1999 and **Johnson Kinyua vs Simon Gitura Rumuri**, CA No. 265 of 2005. The plaintiff submitted that it had clearly demonstrated that it was in occupation in the property, having dispossessed the defendants, citing **Kinyanjui Chege & Another vs Mworio Gathungu**, Nairobi HCCC No. 518 of 2000. It was submitted that the plaintiff had proved that its occupation

on the property was unauthorized, open and was continuous for a period in excess of 12 years. The plaintiff added that its unauthorized occupation was despite the full knowledge of the defendants, even though such knowledge is immaterial to the proof of adverse possession. The plaintiff cited also the cases of ***Ithongo vs Thindiu***, CA No. 16 of 1981; ***Christine Nyamalwa vs Syad Walatshwa***, Mombasa HCCC NO. 134; ***Gerald Muriithi Kamonde vs Wamugunda Muriuki & Another***, Nyeri HCCC No. 41 of 2003; ***Githu vs Ndete*** (1984) KLR 776.

0. The case for the Defendants as set out in the Submissions was that a claim for adverse possession must be shown by actual occupation of the land citing the case of ***Jonathan O. Oyalo Wabala and Anor. vs. Cornelus Otaya Okumu***, C. A. No. 208 of 1997. It was submitted that the mere presence of transmitters and receivers on the suit land cannot entitle the plaintiff to ownership by adverse possession. It was also submitted that the portion occupied by the plaintiff is only 30 x 50 ft and cannot entitle the plaintiff to the whole 57 acres. The defendants argued that they had suffered loss as the plaintiff has locked out other potential customers and has cost them an agreement with an international television company. They further accused the plaintiff of coming to court with unclean hands, by lying that they had been in occupation since 1984 whereas PW1 and PW2 gave evidence that the occupation commenced in 1975. It was contended that the plaintiff's evidence did not refer at all to Plot No.228 until 1999, meaning it did not know it was in occupation of the defendants' plot until then, and as such the 12 years have not expired. The Originating Summons was also said to be supported by a defective affidavit since the *jurat* appears on a separate page from the text.

THE LAW APPLICABLE

0. The law as set out in the decisions cited by the parties is as follows:
 1. ***Kanda Kimamet vs Chepkuyeng Kimamet Chebobei***, Eldoret HCCC No. 218 of 2000 (Ibrahim, J): In that case, the parties were brothers each holding title to ancestral land bordering each other. The plaintiff was in possession of 6.5acre portion which originally belonged to the defendant's piece of land, and had been utilizing it for over 12 years openly and defiantly without the defendant taking action. Although the plaintiff had sued for the whole of the defendant's plot measuring approximately 22 acres, the court found that the claim was for only 6.5 acres and ordered for the subdivision of the defendant's plot so as to grant the plaintiff the 6.5acres he was occupying.
 2. ***Lazaro Kabebe vs Ndenge Makau & Another***, Nairobi HCCC No. 1222 of 1999 (Osiemo, J): In that case, the plaintiff sought a declaration of adverse possession over the 1st defendant's suit land. The plaintiff had purchased the suit land measuring 5.5acres from the 1st defendant in 1977. However, the sale became null and void for lack of consent from the Land Control Board. The 1st defendant filed suit for vacant possession in 1977 which was later withdrawn. In 1987, the 1st defendant sold 3 acres to the 2nd defendant for which LCB consent was granted. The court found that the plaintiff's possession had been open, continuous and interrupted for at least 12 years over only 2.5 acres and granted the application in respect of only the 2.5 acres.
 3. ***Johnson Kinyua vs Simon Gitura Rumuri***, CA No. 265 of 2005 (O'Kubasu, Aganyanya & Nyamu, JJA): In that case the respondent had filed for adverse possession over a suit property measuring 12 acres. It was proved that the respondent had in fact been in occupation of a portion of the suit property measuring 8 acres. The High Court had granted the entire 12 acres to the respondent. The Court of Appeal setting aside the judgment of the High Court observed that the respondent was only entitled to 8 acres and ordered that the 8 acres be registered in favor of the respondent while the remaining portion remains in the name of the appellant adding that this was just and an illustration that equity follows the law.
 4. ***Kinyanjui Chege & Another vs Mworira Gathungu***, Nairobi HCCC No. 518 of 2000 (Mugo, J): The court opined that to interrupt occupation in adverse possession, an owner must assert his right over the land in a manner as would be effective to stop time from running. Following the Court of Appeal case of ***Githu vs Ndeete*** (1984) KLR 776, the court held that the giving of notice to quit, without more, cannot be effective assertion of right as to stop time from running under the Limitation of Actions Act. The court added

that where an owner abandons his land, without any intention of using it in future, possession taken by a trespasser may be adverse possession for which the owners' right will extinguish in the event that such possession remains uninterrupted for more than 12 years.

5. ***Ithongo vs Thindiu***, CA No. 16 of 1981 (Law, Miller JJA & Simpson Ag JA): The Court of Appeal set aside the judgment of the High Court. The High Court had held that adverse possession could not attach for the reason that the respondent due to fraud as defined in Section 2(1) of the Limitation of Action Act, was not aware that he was the registered proprietor of the suit land until much later. Law, JA stated that, “...A right to land is extinguished, in the absence of fraud, after the statutory period, **although the owner is unaware that adverse possession has been taken (Rains vs Buxton [1880] 14 Ch D 537)**. As is stated in *Rustomjee on Limitation and Adverse Possession* at p 1380, **ignorance on the part of the owner whether of his right or of the infringement of his right does not prevent... the operation of the statute.**”
6. ***Christine Nyamalwa vs Syad Walatshwa***, Mombasa HCCC NO. 134 (Mwera, J): The plaintiff had lived on the suit land for over 30 years openly and without interference. The land owners/ defendants had left her grandparents on the land and she had never met them nor did she know them. She applied to be registered as the owner by virtue of adverse possession. The defendants were served by advertisement but failed to enter appearance. The court found that the defendants had lost the right to the land by dispossession and allowed the orders sought in the originating summons.
7. ***Gerald Muriithi Kamonde vs Wamugunda Muriuki & Another***, Nyeri HCCC No. 41 of 2003 (Sergon, J): The defendants in this case filed Replying Affidavits but failed to attend the hearing of the suit but filed submissions. The land in question had been in the name of the 1st defendant's father, who sold it to the plaintiff's father. The plaintiff's father immediately took possession and stayed on the land. The title unfortunately was never transferred to his name. Upon the death of his father, title to the property passed to the 1st defendant, and he sold it to the 2nd defendant. The court for reasons given was not satisfied that the 2nd defendant was a bona fide purchaser for value without notice although a title had been issued in his name. The court followed the principles for adverse possession in ***Wambugu vs Njuguna* (1983) KLR 172** and ***Githu vs Ndeete* (1984) KLR 776** in holding that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. Judgment was entered in favor of the plaintiff, stating that at the time of transmission, the plaintiff's father had been occupying the land for 32 years and the 1st defendant did not therefore have good title to pass to the 2nd defendant.
8. ***Wambugu vs Njuguna***, (1983) KLR 172 (Kneller, Hancox JJA & Chesoni Ag JA): The appellant had sued for eviction of the respondent from the suit land claiming that he had allowed the respondent to occupy it under a lease agreement. The respondent in turn claimed to have bought the land for Kshs.2,485 and had paid Kshs.2,300 and that he had received a notice of eviction after continuous uninterrupted possession for 19 years. He challenged the eviction on the grounds of the sale agreement and under adverse possession. The court held, inter alia, that in order for a person to acquire title by adverse possession, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Hancox, JA applied *Githu vs Ndeete* stating that a notice to vacate by itself is not sufficient to assert an owner's right as to determine adverse possession.
9. ***Jonathan O. Oyalo Wabala & Nyangweso Musumba vs. Cornelus Otaya Okumu***, C. A. No. 208 of 1997 (Kwach, Omolo & Owuor, JJA): This was a second appeal, and was on the issue of whether one can be said to be in constructive occupation of another person's land. The respondent was claiming adverse possession on the ground that he had been sold to the land and lived on it for 5 years before he moved out. The land had also previously been sold to the appellants. The respondent urged the court to find that although he was not physically on the land, he had continued to farm it for a period of over 12 years. The court of appeal opined that it would be dangerous to introduce the concept of constructive

occupation, adding that to be able to acquire title to land registered in another person's name, one has to literally be in occupation of the land for mere presence of crops is not enough to assert a claim of ownership to the land.

THE FINDINGS

0. On the basis of evidence presented by the parties, I make the following findings of fact on a balance of probabilities:
 1. It was clear that, contrary to contention by the defendants, the plaintiff became aware that its site was part of private property **Plot No. 228 Mambrui Town** and despite advice by the Commissioner of Lands, by letter of 22nd September 1975, to that effect did not seek the consent of the owner of the property to so occupy, and its occupation of the land was, therefore, adverse from the beginning.
 2. The plaintiff took possession of 50x50 metre portion of the defendant's parcel of land measuring 57 acres sometime in 1975 as shown in the letter of 4th July 1975 to the Commissioner of lands which sought to take possession of the site immediately, on the belief that the parcel of land in which it was situate was government or trust land; construction of the station was completed about 21st July 1976 with subsequent improvements by electricity installation, improvement of access road and later construction in 1997 of telephone exchange.
 3. The plaintiff was informed by the Commissioner of Lands by a letter of 22nd September 1975 that the land was private land and asked to seek consent of the owner of plot 228 Mambrui Town but there was no evidence of any search for the owner as advised. Its occupation of the land was without any consent of the owner of the land.
 4. The events leading to the occupation of the site on the suit property is, principally, set out in a chronology of correspondence whose contents are as follows:

Letter No. 1

428 &258

DF:722/M.67

4th July 75

Commissioner of Lands,

P.O. Box 30069,

NAIROBI.

Kenya

SITE FOR THE PROPOSED MAMBRUI V.H.F.

A site measuring approx. 50.M. X 50.M. is required immediately for the above station.

The location of the site is on top of a hill overlooking Mambrui Township. The site is adjacent to Survey of Kenya Trig. Point 193-S1 and approx. 20M. From the Trig. Point on Malindi direction. In addition to the site, an access road to the site will be required and for convenience, I am enclosing 4 copies of our DRG. No. 556 showing the site layout of the station .

The station has been programmed to be in operation during our current building programme and construction would therefore be appreciated if approval could be given for the Corporation to go onto the site immediate while acquisition of the site is still going on. It is believed that the

site is either in Government or Trust land.

Your immediate attention to this matter will be appreciated.

Yours faithfully,

G.N. MUNGAI

For: REGIONAL DIRECTOR/KENYA

Letter No. 2

Survey of Kenya

P.O. Box 30046, NAIROBI

KENYA

CR266/III/304.4

5th August, 1975

The Regional Director (Kenya),

East African Posts & Telecommunications,

NAIROBI.

SITE FOR THE PROPOSED MAMBRUI V.H.F. - STATION

Please refer to your letter ref. No. DF.722/M.67 dated 4th July, 1975 addressed to the Commissioner of Lands and copied to me among others.

According to the survey Act (Cap. 299) of the laws of Kenya, every trigonometrical station or fundamental benchmark shall be deemed to comprise the land within twenty feet of the center-mark of such station or within twenty feet of the centre of the pillar or of such fundamental benchmark together with a right of way to and from Trig Point 193.S.1 is Government Land.

I am at present fully engaged in New Grant surveys and would not be able to carry out the survey for you. You can however, employ the services of a licensed Land Surveyor to do the work after the acquisition of the site has been done by the Commissioner of Lands.

(A.K. Njuki)

For: DIRECTOR OF SURVEYS

Letter No. 3

428 & 258

NO.CR/266/111/304

DF.722/M.67

15th August, 75

The Director of Surveys,

P.O. BOX 30046,

NAIROBI,

Kenya.

SITE FOR THE PROPOSED MAMBRUI

V.HF. STATION

Thank you for your letter dated 5th August, 1975 in connection with the above subject.

We shall take all precautions to site our plot at least 7 meters away from Trig.Point 193.S.I in accordance to Survey Act (cap. 299) of the laws of Kenya. **The Commissioner of Lands is being requested by copy of this letter to expedite allocation of the site after which we shall commission a private surveyor to carry out survey of the Plot.** It however appears to me as if this would be a new grant and I would have expected your Office to carry out the survey of the Plot.

G.N. Mungai

For: Regional Director/Kenya

Letter No. 4

DEPARTMENT OF LANDS

P.O. BOX 30089, NAIROBI

22nd September, 1975

35664/40

The Regional Director/Kenya,

E.A.P. & Telecommunications,

P.O. BOX 30301,

NAIROBI

SITE FOR THE PROPOSED MAMBRUI V.H.F. STATION

Your ref. DF. 722/M.67 of 15/8/75

It appears your proposal falls on private freehold land i.e. plot No. 228 Mambui Town. As such

I have no jurisdiction over it and therefore suggest you negotiate directly with the owner. You can make a search in our Mombasa office to establish the legal owner. If you do not succeed in this way, you can come back to me for compulsory acquisition.

(D.K. Muthua)

For: COMMISSIONER OF LANDS

5. It is clear from these letters that occupation was immediate without the consent of the owner of the Plot No. 228 Mambui Town so that the adverse possession must be reckoned from 1975 or latest March 1976 when the Safari Report to Coast by J. Okore, Plaintiff's Senior Architectural Assistant to the Regional Architect, Nairobi dated 17th March 1976 indicated the commencement of construction of the base station on the Site as follows:

SAFARI REPORT TO COAST

6.3.76 – 13.3.76 Mambui – VHF Station

1. Site setting out

*Visited the site accompanied with Messrs. Ibrahim and Rimui, checked and found the setting out of the proposed building and plot not as shown on our working drawing NO. BBK 556, and **the excavation of trench foundations completed**, made another setting out in line with the drawing for both plot and building and instructed both Messrs. Ibrahim and Rimui to fill up the first trench and start excavating the correct positioned one which was agreed.*

2. Road of Access

Construction of the road of access is now complete a part from some section that needs some improvement and were pointed to both Messrs. Ibrahim and Rimui. We managed to drive up in a Roho up to the Site with no difficulty.

6. The several Visit Reports to the Site among other stations of the Plaintiff indicated frequent visits to monitor the development of the plot by building the base station, an access road, installation of electricity and construction of telephone exchange on the site.
7. Between 1996 – 1999, the defendants had attempted negotiations with the plaintiff's officials but no explanation was given for failure to file suit earlier nor were any details of the negotiations given.
8. The attempt to seek damages for trespass and or negotiations for sale as alleged by the defendants in 1996 would still be out of time whether the time for adverse possession is reckoned from 1984, as pleaded in the Plaintiff, or 1975 as shown by the exhibits produced in court.
9. There was however no suit for the recovery of possession or removal of the plaintiff from the suit property until the present suit was filed on 28th February 2000.
10. There were visits/safari reports by officials of the plaintiff's predecessor to the suit property in 1976 and subsequently reporting on the construction of the Plaintiff's base station and access road and installation of electric power on the site by Kenya Power and Lighting Company (KPLC) at the plaintiff's request.
11. The defendants' own witness (DW1) confirmed that the plaintiffs could have been on the land for 13 years and that their occupation on a hill in the land could be seen from a distance.
12. In his cross-examination, PW2 testified that the plaintiff was only occupying 50 x 50 meters which is fenced off. He said too that there were some peasant farmers on the land and that the plaintiff never used the rest of the land. This fact is admitted by DW1 who added that there were other entities, namely Orange, Safaricom and Royal Media Services who have leased part of the land for rent at Kshs.120,000/.

DETERMINATION

0. The doctrine of adverse possession in Kenya is embodied in the **Limitation of Actions Act**, Cap 22 of the Laws of Kenya. Section 7 of the said Act 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*”. From this provision, adverse possession may therefore be defined as “*the acquisition of land by limitation of actions*”. The definition in **Blacks Law Dictionary (Page 58, 8th Edition (2007))** embodies the principles of the doctrine as “*...the use or enjoyment of real property with a claim of right when that use or enjoyment is **continuous, exclusive, hostile, open and notorious***”.
0. The submission on the defective *jurat* is not sufficient for the striking out of the Supporting Affidavit of the Originating Summons. This position is now settled and a defect therein, in any event, is cured by the requirement by courts to administer justice without undue regard to technicalities per Article 159 of the Constitution of Kenya.
0. Applying the principles of law set out above on the facts of the case as found by the court, the court determines that the plaintiff is entitled by adverse possession to the portion of land measuring 50 metres by 50 metres in Plot No. 228 Mambui/Malindi. Unlike the situation in ***Jonathan O. Oyalo Wabala & Nyangweso Musumba vs. Cornelus Otaya Okumu***, supra, the plaintiff herein was in continuous occupation by construction of the radio base station with its operation and maintenance with regular visit by its officials from Nairobi as shown in the Safari Reports since the inception and by the regional maintenance official in charge of radio and maintenance stationed at Malindi, as the said official (Witness PW2) testified.
0. It does not matter that the defendants acquired title to the land by transmission from their late Aunt in 1996 or that there were negotiations between 1996-1999 as a change of ownership does not interrupt adverse possession and the procedure to assert an owner’s right is by suit. See ***Wambugu vs Njuguna*** (1983) KLR 172 and ***Githu vs Ndeete*** (1984) KLR 776, supra. It is also immaterial, as held by the Court of Appeal in ***Ithongo vs Thindiu***, supra, that the defendants may not be aware of the plaintiff’s adverse possession.
0. The Plaintiff is despite its claim for the whole 57 acres of the suit property, which the Plaintiff’s 2nd Witness blames on counsel’s pleading, only entitled to a 50x50 metre portion whose occupation in adverse possession it has established. As shown in the Court of Appeal decision in ***Johnson Kinyua vs Simon Gitura Rumuri***, supra, and the High Court decisions in ***Kanda Kimamet vs Chepkuyeng Kimamet Chebobei***, Eldoret HCCC No. 218 of 2000 (Ibrahim, J., as he then was) and ***Lazaro Kabebe vs Ndenge Makau & Another***, Nairobi HCCC No. 1222 of 1999 (Osiero, J.) the Court may declare title for the exact portion occupied by a plaintiff out of the whole parcel of land the subject of the suit.
0. Should the court order registration of portion of land in the plaintiff’s name? By the authority in the Court of Appeal case of Odd ***Jobs v Mubia***, [1970] EA 476, and ***Vyas Industries vs. Diocese of Meru*** [1982] KLR 114, a court may base its decision on an unpleaded issue, if it appears during the trial; the issue was pursued and left for the court to determine. The plaintiff in this case pleaded for the entire suit plot measuring 57 acres claiming occupation from 1984, but from the evidence on record, it is clear that the plaintiff has been in exclusive, open, uninterrupted, defiant, notorious and actual occupation of 50 x 50m portion of the suit plot. They developed this portion for a period of over 20 years between 1975 when they came into the land and 2000 when the case was filed. They have also built access roads to the portion of land. The respondents admit as much.
0. Moreover, Article 159 of the Constitution requires that the court administers substantial justice without undue regard to technicalities. Although the plaintiff’s case was pleaded as a claim against the whole 57 acres of land on which it has put up its base station, evidence adduced before the court shows that the plaintiff was in occupation only of a plot of 50x50 metre of the land. The plaintiff could have under the provisions of O. 8 r. 1 of the Civil Procedure Rules amended the Originating Summons without leave of court, if it was done before close of pleadings, or at any stage of the proceedings with leave of court under O.8 r. 3 and 4 of the Civil Procedure Rules. The default on the part of the plaintiff is remediable under the Article 159 principle.
0. In the interests of justice, to the end that the public corporation which has acquired by adverse possession an interest in portion of land on which it has put up a radio base station for the benefit of the public, the court will deem the Plaintiff herein as amended to claim only the portion of 50x50metre plot in the suit property upon which the plaintiff has constructed its radio base station

together with the access road.

ORDERS

0. Accordingly, for the reasons set out in the judgment, the court makes the following orders on the plaintiff's suit and defendants' Counter-Claim:
 1. **A declaration that the plaintiff has acquired by adverse possession for a period of over 12 years the portion of land measuring 50x50 metres of the suit property Plot No. 228 Mambrui/Malindi on which the plaintiff has constructed a radio base station together with an access road to the site.**
 2. **An order for the registration of the Plaintiff as the registered proprietor of the said portion of land measuring 50x50 metres of the suit property Plot No. 228 Mambrui/Malindi.**
 3. **The defendants will, consequently, within 30 days cause to be subdivided the parcel of land Plot No. 228 Mambrui/Malindi to create as a separate parcel the portion of land measuring 50x50 metres of the suit property and to execute all necessary transfer documents to effect the registration of the said subdivision portion in the name of the plaintiff. In default thereof, the Deputy registrar of the Court to execute the necessary documents for that purpose.**
 4. **The plaintiff will meet the costs of the subdivision of the suit property and the registration of the portion of land into its name.**
 5. **The Plaintiff, having been declared entitled to the 50x50 metre portion of land of the suit property which is to be registered in its name, shall also have a right by way of easement to be registered on the title to the suit property for the use of the road access that it constructed on the suit parcel of land for accessing the Site of its radio base station.**
0. The Plaintiff did not come to court until the defendants had moved to reclaim the land and the defendants will therefore have the costs of both the suit and the Counter-Claim.

DATED AND DELIVERED THIS DAY OF 13TH FEBRUARY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Plaintiff

Mr. Khatib for the Defendants

Miss. Linda - Court Assistant.