



**Muthee v Wambua & 4 others (Environment & Land Case
1234 of 2016) [2022] KEELC 2864 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1234 OF 2016**

JA MOGENI, J

MAY 26, 2022

BETWEEN

DAVID MUTHAMI MUTHEE PLAINTIFF

AND

ESTATE OF JAMES TITUS WAMBUA 1ST DEFENDANT

ANDREW MUTUA TITUS 2ND DEFENDANT

**CHARLES KIMELI MUGE (SUED AS THE ADMINISTRATOR OF THE ESTATE
OF ELPHAS KIMNYANGO(DECEASED)) 3RD DEFENDANT**

CHARLES KIMELI MUGE 4TH DEFENDANT

**ATTORNEY GENERAL ON BEHALF OF THE CHIEF LAND
REGISTRAR 5TH DEFENDANT**

JUDGMENT

Introduction

1. This suit was brought by way of Plaint dated 10/04/1997. It was first filed in the High Court as civil case No. 956 of 1997. Later the suit was moved to the Environment and Land Court and the plaintiff filed an amended plaint dated 20/03/2019 where the plaintiff filed suit against the Defendants seeking the following reliefs:
 - a. A declaration that the transfer effected to transfer L.r No. 36/vii/275 From James Titus Wambua (deceased) to the 2nd Defendant on 9/10/1995 then to Elphas Kimuge Kimnyango (deceased) on 26/01/1996 and later to the 4th Defendant is null and void and the same to be cancelled forthwith by the 5th Defendant.
 - b. A declaration that the Plaintiff is the owner of plot no. 36/VII/275.



- c. A declaration that the Plaintiff has acquired plot LR No. 36/VII/275 through adverse possession.
 - d. An order directed to the 5th Defendant for rectification of the registered records in Land registry in respect of L.R No. 36/VII/275 and the said to be registered in the name of the Plaintiff.
 - e. Costs.
 - f. Any other relief that this court deems fit.
2. The 1st and 2nd Defendants never entered appearance since the matter started despite having been served through substituted service, the Daily Nation Newspaper of 27/02/2020 and an affidavit of service dated 2/06/2020. The 5th defendant also never filed a defence to the plaintiff's amended plaint. The 3rd and 4th Defendants filed a statement of defence dated 24/10/1997 and a Counter-Claim and Amended Defence dated 15/11/2019, denying the Plaintiff's claim and seeking the following orders;
- a. A declaration that Elphas Kimuge Kimnyango (deceased) is the rightful and/or legal owner of parcel of land L.R. 36/VII/275
 - b. A permanent injunction do issue against the Plaintiff his agents, servant, employees and/or any other person acting on his behalf restraining him from trespassing, entering, occupying, interference, further usage and/or encroachment in any way with on the suit property name LR 36/VII/275
 - c. An order of eviction to issue as against the Plaintiff from the suit land LR 36/VII/275
 - d. A declaration that the Plaintiff whether by himself or his agents, servants, employees and/or any other person acting on his behalf are wrongfully in occupation of the suit property name L.R 36/VII/275 by the Plaintiff.
 - e. A mandatory order do issue against the 5th Defendant the Chief Land Registrar, Nairobi County to remove the caveat and/or restriction and amend and/or rectify the register to read the names of the 4th Defendant herein Charles Kimeli Muge as the registered proprietor of land parcel number L.R 36/VII/275
 - f. General damages for trespass
 - g. Costs and Interest of the suit
 - h. Any other relief the Honorable Court may deem fit and just to grant.
3. The plaintiff in his response to the 3rd defendant's counter-claim averred that he has been in physical and actual possession of the suit property since 1985 and that he acquired a good title by adverse possession.
4. The plaintiff prayed that the 3rd and 4th defendant's statement of defence be struck out and the 3rd defendant's counter-claim to be dismissed and judgment entered against the defendants jointly and severally.
5. The parties thereafter filed their compliance documents under Order 3, 7, and 11 of the Civil Procedure Rules.



Plaintiff's case

6. PW1- David Muthami Muthee - At the trial, the Plaintiff led evidence and relied on his witness statement as well as list of documents dated the 20/03/18 and a further supplementary list dated 1/11/2021 and another one dated 5/11/2021. I also filed a defence and counter-claim dated 28/11/2019. In brief he stated that he entered into a sale agreement with agents who were purporting to be acting on behalf of James Titus Wambua in respect of L.R 36/275/VII situated in Nairobi and he paid a down payment of Kshs. 700,000. That the agents never obtained the transfer documents but later claimed that James Titus Wambua had died in 1989 before the transfer was effected and that they were unable to refund the money. He testified that the agents disappeared without trace.
7. Upon their disappearance to protect his interest the plaintiff testified that without permission or consent from James Titus Wambua (deceased) or legal representative entered upon the suit property in 1985 and has been in peaceful occupation to date. That he has developed the land and is in control of the same and his claim of title in Adverse Possession has accrued to him having occupied the land in excess of 12 years. That he has been paying rates and that he did an official search in 1997 and got an official search indicating that the registered owner as at 17/02/1997 was James Titus Wambua from the records of the Chief Land Registrar.
8. That he obtained a consent judgment on 9/12/1997 but the 5th defendant declined to comply and register him as the owner of the suit property. This forced him to file a Judicial Review No. 88 of 2016 which later was withdrawn. That he later learned that the suit property was transferred to 2nd defendant on 9/10/1995 and then to Elphas Kimuge Kimnyango (deceased) on 26/01/1996 and later to the 4th defendant without following the due process. He therefore alleges that the 2nd, 4th and 5th defendants were perpetuating fraud and misrepresentation.
9. He itemized the particulars of fraud by the 2nd, 4th and 5th defendants from a – f. He also engaged a hand writing expert and forensic examiner, who verified the signatures of the later V.V Patel and Emmanuel Karisa Kenga and he prepared a report which is included in the plaintiff's list of documents as numbers 7, 8, 15, 16, 17 and 20 showing the letters and the resort.
10. He testified that he occupied the suit property continuously for over 12 years since 1985 without permission consent or authority and have acquired a good title against the 1st to 4th defendants.
11. In cross-examination he testified that he had paid Kshs. 700,000 as deposit but never concluded the process of payment since he realized that he had been conned and that he had no sale agreement. Further that he never met James Titus Wambua the alleged seller and he never reported the incidence of being conned to the police. That he applied for adverse possession in 1997 against the 5th Defendant the Attorney General. In re-examination he stated that he is claiming adverse possession. That there is a caveat on the land placed by the Land Registrar.
12. PW2 – Emmanuel Karisa Kenga a Forensic document Examiner testified that he received instructions through a letter dated 12/08/2016 asking him to examine and compare signatures and come up with a report. In his testimony he stated that there was no similarities for signatures in Exhibit A and B further that the signatures in Exhibit C and D and these did not agree either. In cross-examination he just confirmed the assignment and stated that he did not know what the plaintiff was alleging in 1997. There was no re-examination.
13. PW3 – Jared Omondi Okumu a court administrator at the High Court Family division in his testimony produced file No. 613 of 1994 which was the Succession Cause for the estate of Peter Wachira Kooro. He stated that the award in this matter was made on 24/01/2022 and filed on 25/01/2022. He



produced the Succession Cause File No. 613 of 1994 and the Award as part of the evidence. In cross-examination he stated that in the entire file there was no name of Elphas Kimuge Kimnyango and Charles Kimeli Muge,

14. It was his testimony that the Succession Cause of No. 613 of 1994 which was a file closed by the late Justice V.V Patel, related to the Estate of Peter Wachira Kooro and the grant was issued on 13/07/1994 to Stephen Kooro Ngare and Peris Muthoni Kooro. He stated that he did not see anything in the file relating to Elphas Kimuge or Charles Kimeli.
15. At this point the plaintiff's counsel closed his case

Defendant's case

16. DW1- Charles Kimeli Muge – adopted his witness statement dated 15/11/2015 as his evidence in chief including the evidence in chief for the 3rd and 4th defendants. Further that the list of documents dated 28/11/2015 to be produced as his list of exhibits. He testified that the registered owner of the suit property is Elphas Kimuge Kimnyango (deceased) and a grant was issued and now the suit properties are in his name. In cross-examination he confirmed that he is the registered owner and that he used the grant to register the property in his name.
17. It was his testimony that he has never resided on the suit property since the plaintiff is the one in occupation. He stated that he had no sale agreement but had an indenture that could pass for a sale agreement the words provisional were written by hand on the document. That this was a copy because the original document got lost. He reported to the police but he had not filed the police abstract.
18. He testified that the suit property was not listed in the will of his father. Further that he had not filed any suit to counter the report of the Forensic Examiner whose report show that the signature of his father is not the same as the signature purported to have been appended on the will. It was his testimony that he had receipts showing he paid for rates totaling Kshs. 42,632 by cheque but the same receipts are in the plaintiff's documents showing that he is the one who paid the rates with a banker's cheque of Kshs. 671,093.00, further that the plaintiff also paid for the the Kshs. 42,632 rates.
19. It was his testimony that the plaintiff had been on the suit premises for 34 years and that he never filed a suit seeking vacant possession though he reported to the CID. The counter – claim was filed in 2019. That the plaintiff has been on the suit property for 34 years yet they have not given him the permission to be on the suit property. He stated that he did not have any original documents in relation to the suit property.
20. In re-examination he stated that the suit property was bought at a consideration of Kshs. 300,000 on 8/12/1995 and the conveyance was done by one CM Nzuva advocate between Andrew Mutua Titus as the vendor and Elphas Kimuge Kimnyango. That the grant by Judge V.V. Patel was made to Andrew Mutua Titus in respect of the property of James Mutua Titus. He testified that he was never presented with a land clearance certificate but that he had a receipt of payment. That in December 2014 when they went to the suit property they found someone on the land and they reported the matter to CID under OB No. CID/C/General/Comp/6/11/2016/140
21. That it is the police investigations that made them know there is a land dispute filed in court and they then sought to be enjoined. Counsel for the defence then closed his case.

Analysis and Determination

22. The court has carefully considered the evidence on record, the written submissions made together with case law presented by the parties through their Counsels, Mr Ongegu for the Plaintiff and Mr Isiji for



the 3rd and 4th defendants. From the pleadings and aforesaid evidence on record, the issues that call for determination are:

- i. Whether the Plaintiff has met the threshold for grant of orders for adverse possession and acquired the suit land LR No. 36/VII/275
- ii. Whether the 3rd Defendant is a bona fide registered owner of the suit land.
- iii. Whether the Defendant is entitled to the prayers sought in the counter claim.
- iv. Whether the Plaintiff is entitled to the prayers sought in the plaint.

Whether the Applicant has met the threshold for grant of orders for adverse possession and acquired the suit land LR No. 36/VII/275?

23. It is trite that a claim for adverse possession is attached to land and not title and it matters not that the land was owned by either James Titus Wambua or Andrew Mutua Titus or Elphas Kimuge Kimnyango. This was the position in *Maweu vs Liu Ranching & Farming Cooperative Society* [1985] eKLR as quoted in Civil Appeal No 164 of 2011 *Gachuma Gacheru vs Maina Kabuchwa* [2016] eKLR where the Court held “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”
24. This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above.
25. It is the plaintiff’s case that he has been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the plaintiff. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

26. The principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:
- (1) (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.”



27. Finally, Section 38 of the Act provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

28. The principle of adverse possession was more elaborately set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

29. And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

30. This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. See the findings of the Court in Malindi App No. 56 of 2014 *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR where it held;

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 inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence 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. Further, in the case *Mbira v. Gachubi* (2002) 1 EALR 137: the court stated as follows;

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

32. Therefore, to determine whether the Applicant’s rights accrued the Court will seek to answer the following

- i. How did the Applicant take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?



- iii. What was the nature of his possession and occupation?
- iv. How long has the Applicant been in possession?
33. This Court notes that the land in question is registered in the name James Titus Wambua (now deceased) as at 17/02/1997 . The plaintiff has attached a copy of an official search to attest to this fact. On the other hand, the 5th defendant and the 3rd defendant contend that as per the conveyance dated 8/12/1995 and registered on 26/01/1996 the land belonged to one Elphas Kimuge Kimnyango. Part of the plaintiff's documents are receipts of rates showing that the plaintiff had been paying rates to Nairobi City Council which is now Nairobi City County. He also contends that he has done developments on the land and attached copies of receipts and photographs.
34. The Applicant's mode of entry was as a result of a sale agreement which means it was a permissive one. It is trite that claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See *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.”
35. The Applicant's occupation having been permissive, it will follow that a claim for adverse may not issue. However, Courts have found that such claim can be sustained after payment of the last installment. The Court in Nairobi Appeal No. 73 of 1982 *Public Trustee v Wanduru Ndegwa* [1984] eKLR found that Limitation of Action begun running from the date of final payment. In the case *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last installment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he henceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. Since there is no sale agreement, I am constrained to note that it is not possible to know how much the sale of the land was pegged at and therefore I cannot conclusively find that the amount paid was the first and last instalment to allow time for adverse possession to run.
36. The Applicant contends that he took occupation of the land after paying the agents the amount of Kshs. 700,000. The 3rd defendant Mr. Charles Kimeli Muge in his testimony told the Court that the plaintiff has been in occupation for 34 years and that they filed the counter claim in 2019. Therefore, it follows that he entered into the suit property immediately after the sale and has remained in occupation. For purposes of computing time as elaborated above, this Court can assume that time started running in 1985 once the plaintiff paid the Kshs. 700,000 to the agents of James Titus Wambua.
37. As to the nature of occupation, the Applicant contends that he has been in open, continuous and exclusive occupation, a fact which has not been disputed by the defendants though the 3rd defendant admitted the plaintiff has occupied the land for a period of 34 years. To determine the nature of possession, this Court is guided by the decision 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”

38. The plaintiff did not produce any evidence to show that he has put up a home or planted a thing thereon, but the defendant in cross-examination corroborated the plaintiff’s evidence that he is in occupation of the land and has been in occupation for over 34 years. The act of occupying the land for more than fifteen years is a demonstration of the plaintiff’s intention of dispossessing the defendant. Undoubtedly, the nature of his possession was open, without secrecy and with the sole intention of acquiring ownership.
39. On whether time stopped running at any point, the defendant told the Court that he filed a succession cause which however at the hearing the officer from the office of the Registrar, Probate division testified that there was no Succession Cause filed.
40. It is trite that the filing of a suit asserting rights over land stops time from running in adverse possession. A Succession Cause is initiated for the purpose of distributing the property of the dead owner, to the persons entitled. Adverse possession on the other hand is about occupation of land belonging to another and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. In the instant case, there was no evidence that the filing of the Succession Cause was for eviction of the plaintiff from the suit property or was meant to assert rights over the land. Adverse possession accrues to land and not title and unless the defendant took steps to evict the plaintiff from the suit land, which he did not, the mere act of claiming ownership does not stop time from running. In Eldoret Civil Appeal No. 212 of 2012 :- [Isaac Cypriano Shingore v Kipketer Togom](#) [2016] eKLR the Court held:

“By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent’s possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

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

41. The filing of succession case did not amount to assertion of rights that could stop time from running. As to the civil case, the suit was commenced by the plaintiff, and there is no evidence of assertion of rights by the plaintiff. This Court finds no reason to infer that the filing of the Succession cause and Civil case stopped time from running. The Court of Appeal in Civil Appeal No. 121 of 2006; - [Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees](#) [2016] eKLR affirmed the sentiments of the Court in *Amos Weru Murigu v. Marata Wangari Kambi & Another* where the Court held:

“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the



chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”

42. This Court finds that there was nothing that stopped time from running as the defendant never took any plausible step to assert rights over the suit property. There being nothing that stopped time from running, this Court finds and holds that the Applicant as at the time of filing the suit had been in occupation of the suit property for a period of 15 years.
43. To this end, the Court finds and holds that the Applicant has on a balance of probability established that he meets the threshold for the grant of orders for adverse possession.
44. For a claim of adverse possession to issue, it is important that the said land is clearly identified as was held by the Court in Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR where the Court observed:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs. Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”[Emphasis added]

45. The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules, which requires that an application for adverse possession be accompanied with a title deed extract.
46. The doctrine of adverse passion has its statutory underpinnings in Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in Mtama Lewa v Kahindi Ngala Mwagandi, [2015] eKLR and held that the doctrine does not offend the spirit and letter of the Constitution of Kenya 2010 on protection of the right to property.
47. Under Section 38 of the Limitation of Actions Act, an adverse possessor is entitled to initiate court proceedings in the appropriate court for an order that he be registered as the proprietor of the subject land in place of the registered proprietor against whom the claim of adverse possession is made. Order 37 rule 7 (1) (2) and (3) of the Civil Procedure Rules provide the following mandatory legal framework on how the application under Section 38 of the Limitation of Actions Act is to be made:

Adverse Possession (Order 37, rule 7)

An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.

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 court shall direct on whom and in what manner the summons shall be served.

48. The rationale informing the above mandatory legal framework is that an order of adverse possession under Section 38 of the Limitation of Actions Act only issues against a registered proprietor of land. It does not issue against any other person. Secondly, an order of adverse possession under Section 38



- relates to a specific registered and defined piece of land. Thirdly, an order of adverse possession under Section 38 serves to direct the land registrar to alter the parcel register by changing ownership from the registered proprietor to the adverse possessor. The mandatory requirement for a certified extract of the title is intended to ensure that the above two parameters are satisfied before the order is granted.
49. The determination and order sought in the present relate to land parcel number L.R 36/VII/275. No certified extracts of titles in respect to the alleged parcel of land were attached to the originating summons. Similarly no certified copies of relevant registered survey plans and deed plans relating to the alleged parcel were produced. What was attached to the plaint was a search. Given that the plaintiff seeks a determination and adverse possession order under Section 38 of the *Limitation of Actions Act* relating to specified parcel of land purportedly bearing specified registered land reference number, it was mandatory that he places before the court certified extracts of the relevant titles. In my view, failure to annex certified extracts of the title in respect of the specified parcel of land is fatal because existence of the land registers relating to the alleged parcels cannot be vouched.
50. My understanding of Section 38 of the *Limitation of Actions Act* is that an order of adverse possession would not issue under that section unless the court is satisfied that the subject parcel exists in the register and the land registrar can properly be directed to delete the name of the registered proprietor and enter the name of the adverse possessor. Consequently, in the absence of certified extracts of titles relating to Land Reference Numbers 36/VII/275 whose existence the plaintiff has alleged, the plea for determination and grant of adverse possession orders under Section 38 of the *Limitation of Actions Act* is unsustainable. Even if the plaintiff satisfied all the other elements relating to adverse possession but failed to annex the certified extracts of titles, in my view, an order under Section 38 would not issue.
51. Accordingly, the plaintiff's herein fails for non-compliance with the mandatory requirements of Order 37 rules 7 (1), (2) and (3) of the Civil Procedure Rules. The plaintiff in this matter has not attached a copy of a title deed extract as required by law. Therefore, this Court has not had the benefit of being able to identify the exact location of the suit property.
52. It must be appreciated that the claim by the plaintiff is a claim solely based on adverse possession. Ordinarily, a claim of adverse possession is instituted by way of Originating Summons pursuant to the provisions of Order 37 of the Civil Procedure Rules, 2010, (formerly Order 36 of the previous rules. The plaintiff's was instituted on 10/04/1997 through a plaint and therefore the provisions of the former Order 36 prevailed. Order 36 Rule 7 provided as follows :-
- (1) An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
 - (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
 - (3) The court shall direct on whom and in what manner the summons shall be served.
53. The plaintiff's claim of adverse possession was not instituted by way of Originating Summons but by way of plaint. Strictly, this is not permitted. However, practice has evolved where a the court now does not focus too much on technicality. That does not however mean that the plaintiff bringing such a suit is precluded from supporting such their claim with an affidavit to which he needs to annex a certified extract of the title to the land in question. This was not done in this case. Indeed, the plaintiff has neither attached the extract of the title to the suit property to his pleadings, and neither did he produce any in evidence. Even if I was to hold that the failure to file a supporting affidavit and the extract of the title to the pleadings were mere procedural technicalities, there is no way the plaintiff can assert to have proved his case without producing the extract of the title, or at least some documentary



evidence, indicating the person who is the registered owner of the suit land and against whom the claim for adverse possession is targeted. None has been produced in this case, and it is impossible for me to tell who the registered owner of the suit land is, and against whom the claim for adverse possession is aimed at. For that reason alone, the claim for the plaintiff must fail.

54. In the final analysis I find that the plaintiff's plea for title under the doctrine of adverse possession is unsustainable. Based on the material on record, the claim of adverse possession by the Plaintiff has certainly not been proved to the required standard. His possession on the suit property, if at all, was not nec vi, nec clam, nec precario, that is without force, without secrecy and without permission. It is therefore my finding that the Plaintiff has not met the threshold to warrant this court to grant an order of adverse possession. The Plaintiff's claim is therefore without merit and the same fails.

Whether or not the defendant is the bonafide registered owner of the suit land?

55. The Court has perused and reviewed the indenture of conveyance dated 13/02/1973 pursuant which the said James Titus Wambua was registered as owner of the suit property vis-à-vis the indenture of conveyance dated 8/12/1995 to which one Andrew Mutua Titus conveyed the property one Elphas Kimuge Kimnyango as owner of the suit property make the following observations:

- a. The conveyance dated 8/12/1995 is presented as provisional and the writings are all written by hand. It worth noting that the indentures are never issued in a provisional state
- b. The conveyance dated 8/12/1995 does not bear stamp duty stamps
- c. The indenture dated 8/12/1995 does not bear a survey plan number nor a survey plan annexed to the Indenture this is critical in identification of the exact location of land.
- d. The indenture does not have the Government Lands Registry stamp
- e. And lastly the indenture does nor bear the revenue stamp.

56. In my view having considered the evidence and the documents tendered in evidence I have come to the conclusion that there indeed was no conveyance dated 8/12/1995 that was executed by Andrew Mutua Titus in favour of Elphas Kimuge Kimnyango conveying the suit property and that may explain why there was no original copy produced in court and the copy presented is written at the top provisional. Infact No abstract of Volume N. 47 folio was availed in evidence to show who signed the entry made of the conveyance if at all. In my considered view it is probable that persons in different government offices colluded to alienate the suit land on the assumption that the registered owner was unavailable.

57. It is further my view and holding that even if there was the alleged conveyance of 1995 by which the 3rd Defendant claims the suit property was conveyed to them that conveyance would have been ineffectual since as at that time the said Andrew Mutua Titus did not have any proprietary interest over the suit property and could not convey any interest as he was not the registered owner of the suit property. If the said Andrew Mutua Titus did not have any proprietary which he could have conveyed it follows that no interest on the suit property could pass to Elphas Kimuge Kimnyango and therefore the proprietary interest being claimed by the 3rd and 4th defendant was not passed.

58. I also note that there is a caveat on the suit property which has been placed there by the Registrar of Lands. This Caveat was placed there on 21/03/1997. Caveats play an important role in protecting property. Once a caveat has been put on a piece of land there are no dealing on it. However the grant of letters of administration were made as an entry after the caveat had been put. This not legally possible and neither procedural.



59. I am on the basis of the evidence tendered by the parties in the suit and evaluation of the documents satisfied that the registration of the 3rd defendant as proprietor was in my view unlawful and irregularly obtained as was the purported registration of the indenture by one Andrew Mutua as proprietor of the suit property in 1995.
60. Therefore the 3rd defendant is not a bona fide owner of the suit property.
61. In summary, the plaintiff's suit lack merit.
Whether the 3rd and 4th Defendants are entitled to the prayers sought in the counter claim.
62. I therefore come to the conclusion that the 3rd and 4th Defendants are not entitled to the prayers sought and the counter-claim automatically fails.

Whether the Plaintiff is titled to the prayers sought in the plaint.

63. Going by the foregoing analysis, I have arrived at the conclusion that the plaintiff has not proved the key ingredients required for one to qualify as an adverse possessor and consequently is entitled to the reliefs being sought therein.

Final Disposition

64. Having considered the pleadings the evidence and submissions it is my view that I find no merit in the Plaintiff's case and I dismiss the same. In the same breath, it is apparent to me that the 3rd and 4th Defendant's counterclaim is misconceived, and I equally disallow the same. I can neither make any order in favour of, or against, the plaintiff or defendants over rights in relation to the suit property. The parties will need to assess their positions and bring to court appropriate pleadings through which the court can properly pronounce itself. The caveat lodged against the suit property to remain. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF MAY 2022

.....

MOGENI J.

JUDGE

In the presence of

..... for the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

..... for the 4th Defendant

..... for the 5th Defendant

Vincent Owuor..... Court Assistant

