



**Elms v Heard (Environment & Land Case 135 of 2022)
[2025] KEELC 3155 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 135 OF 2022**

LL NAIKUNI, J

APRIL 4, 2025

BETWEEN

JEAN MARGARET ELMS PLAINTIFF

AND

MARGARITA SUSIE MAACBETH HEARD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to a civil suit instituted by way of Originating Summons dated 8th November, 2022 and filed on the 15th November, 2022. The suit was by the duly appointed Legal Administrator to the Estate of the late Jean Margaret Elms (Hereinafter referred to as “The Deceased”), the Plaintiff herein. It was against Margarita Susie Maacbeth Heard, the Defendant/ Respondent herein. The case was premised under the provision Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21, Section 13 of the Environment & *Land Act*, No. 19 of 2011, Sections 37 and 38 of the Limitations of Actions Act, Cap. 22, the Sections 28, 101 of the *Land Registration Act*, No. 3 of 2012, Section 7 of The *Land Act*, No. 6 of 2012, Order 37 Rule 7 of the Civil Procedure Rules of 2010, and all Other Enabling Provisions of the Law.
2. Despite of the service being effected by way of substituted means in accordance with the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010 by publishing an advertisement in one of the local dailies – “The Daily Nation” newspaper the edition of 9th July, 2024 with a wide national circulation, the Defendant never entered appearance nor file any defence. Pursuant to that the matter was fixed for formal proof in accordance with the provision of Order 10 Rules, 4, 5, 6, 7, 9 and 10 of the Civil Procedure Rules, 2010.
3. It is instructive to note that, during the pendency of the proceedings, on 30th October, 2024 the Honourable Court directed that there be conducted a site visit (“Locus in Quo”) in accordance with



the provision of Order 18 Rule 11 of the Civil Procedure Rules, 2010. On 22nd November, 2024 the said site visit was conducted in the presence of all the parties and a report prepared which forms part of this Judgement for ease of reference.

II. Court directions before the hearing

4. On 22nd June, 2023, direction on the Originating Summons were taken in pursuant to the provision of Order 37 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010 whereby the Originating summons was converted to a Plaint. and full compliance on Order 11 of the Rules accordingly. Thereafter, on 29th July, 2024, the Honourable Court set the hearing date on 30th October, 2024. The Plaintiff called PW - 1 on the same day and closed her case thereafter.

III. The Plaintiff's case

5. The Plaintiff claimed entitlement of the suit property by virtue of land adverse possession. He therefore sought for the determination of the following questions:-
 - a. Whether the Defendant's title of the property known as Sub - division Number 793 of Section II Mainland North (the "Suit Property") situated in Mombasa be deemed to have been extinguished by adverse possession of the same by the Plaintiff for over 45years.
 - b. Whether the Plaintiff's occupation or possession of the Suit Property has been open, quiet, continuous, uninterrupted and adverse to the Defendant's title to the Suit Property for a period of over 12 years.
 - c. Whether the Plaintiff has acquired title or interest to all the Suit Property measuring nought decimal five (0.5) acres against the Defendant by way of adverse possession thereof.
 - d. Whether the Plaintiff should be registered as the owner of the Suit Property having acquired the same by adverse possession free of encumbrances and any overriding interests.
 - e. Whether the Defendant, by herself, servants or anyone claiming under her should by order of permanent injunction be restrained from demolishing the structures built on by the Plaintiff, evicting the Plaintiff, re-entering, charging, leasing, selling, disposing off or in any way interfering with the Plaintiffs' quiet possession, use and or ownership of the Suit Property.
 - f. Whether the Plaintiff should be awarded costs of these proceedings
6. The Original Summons was based on the following grounds on the face of it and those of the 12 Paragraphed supporting affidavit sworn by Jean Margaret ELMS, the Plaintiff sworn on the same day with the Originating summons where she averred:-
 - a. Since the year 1977, her deceased husband one Brain Elms and herself had been in an open, quiet, interrupted continuous occupation and possession of all that piece of land/plot known as Subdivision Number 793 of Section II Mainland North measuring nought decimal five (0.5) acres and situate in Mombasa (Hereafter referred to as "The Suit Property") registered in the name of the Defendant.
 - b. As fate would have it, her said husband died on 26th June, 2020 and she continued to reside and occupy on the Suit Property at all material times of this suit. She had been in the said quiet, open, without permission or consent of the Defendant, forced occupation of the suit property or any interruption for over a continuous period of 45 years since the year 1977.



- c. The deponent constructed a perimeter wall around the Suit Property and domestic staff quarters on the Suit Property in the year 1977 and had since then been occupying the Suit Property and using it to house her domestic staff as well as reside thereon as an extension of our family home, compound and garden. Her family home and compound was built on her property known as Sub-division Number 794 (Original Number 68/12) of Section II Mainland North and was next and or adjoins the suit property. Copies of photographic evidence of the said perimeter wall, domestic staff quarters and garden as well as Certificate of Accuracy and a copy of the Certificate of Title for the Plaintiffs property are attached hereof.
- d. The Defendant had never at any time since the year 1977 come on the Suit Property, claimed and or attempted to regain possession whether by herself or her agents. The Deponent had also on several occasions tried to reach out to the Defendant regarding the ownership of the Suit Property but without any response or success.
- e. The Deponent had obtained a search over the Suit Property and a certified copy of the Title, illustrating that the Defendant was the registered owner of the Suit Property free of encumbrances. Attached in the affidavit was a certified copy of the Title and search for the Suit Property.
- f. The Deponent had paid Land Rates over the Suit Property which are up to date. Attached in the affidavit was a certified copy of the Land Rates receipts.
- g. The Deponent had never been required to pay any rent or any form of payment to the Respondent to occupy the Suit Property at any time or obtained a consent, license or lease over the Suit Property from the Defendant. The Deponent's possession of the Suit Property had at all material times been adverse and without the Defendant's permission.
- h. The Defendant's title to the Suit Property had in the circumstances been extinguished by her adverse possession having failed to assert ownership and possession against me for a continuous period of over 45 years.
- i. The Affidavit was sworn in support of her summons filed. Annexed in the affidavit and cross reference above were documents collectively marked as exhibits "JME – 1".

IV. The Further Affidavit in support of the Originating summons by the Plaintiff

7. The Plaintiff in further support of the affidavit of the Originating summons filed a 16 paragraphed further affidavit dated on 28th June, 2024 and sworn by Guy Spencer ELMS, an Advocate of the High Court of Kenya and the Executor/Legal Representative of the estate of Jean Margaret Elms who died on 30th January, 2024. He deponed thus:-
 - a. On 19th February, 2024, the High Court of Kenya sitting at Mombasa granted the Executors of the deceased Estate Limited Grant of Letters of Administration Ad Litem in Mombasa HC Succession Cause No. E013/2024 - In the matter of Jean Margaret Elms (Deceased) upon their (the Executors) application therein for purposes of pursuing the deceased pending suits.
 - b. He had been unaware that there was a pending Petition for full Grant of Probate of the Written Will of the deceased in the above said matter. Attached in the affidavit a copy of Limited Grant of Letters of Administration Ad Litem dated 19th February, 2024 granted by the High Court in Mombasa HC Succession Cause No. E013/2024 - In the matter of Jean Margaret Elms.



- c. This Honourable Court by an Order given on 8th May 2024, substituted the deceased in this suit with the Executors of her written Probate Will herein (Clive Elms and himself) upon their application to this Court dated 24th February, 2024 which he was aware was part of the record in this Court.
- d. The Plaintiff herein filed a suit in this matter on 15th November, 2022 by an Originating Summons dated 8th November 2022 against the Defendant/Respondent seeking reliefs inter-alia that the Plaintiff has acquired the suit property known as Subdivision Number 793 of Section II Mainland North Measuring 0.5 acres and situated in Mombasa by adverse possession as elaborate from the suit papers in the suit herein.
- e. He had read and understood the said originating summons and the Affidavit in support thereof sworn by the deceased sworn on 8th November, 2022. He affirmed the contents of the said deceased affidavit in support of the originating summons with annexed documents thereto.
- f. The Deponent had also perused the documents and annexed to the Plaintiffs list and bundle of documents and filed in this matter on 29th January, 2024 and adopted them as the Plaintiffs List and bundle of documents in support of the suit herein.
- g. The deceased Plaintiff was my mother who at all material times since 1971 until her demise, lived with his Co-Executor herein and himself as her only children and heirs of her estate together with our demised father one Brian Elms at their paternal home on Sub-division No. 794 (original no. 68/12 of section 11 Mainland North) that was next to or adjoined the suit property without any boundary or fence separating them and as such, we the Executors and only surviving children and heirs of the deceased Plaintiff estate had known the above property and the suit property which we lived with the deceased Plaintiff while of minority age and as adults regularly returned to visit her thereon as their paternal home. Even after the Plaintiff's demise, the Co - Executor and himself herein as the only surviving heirs of the demised Plaintiff continued to visit and utilize the suit property their said paternal home.
- h. The Deponent stated that his co- executor and himself were both Kenyan Citizen born on 22nd January, 1969 and 17th September, 1965 respectively of their said parents namely Brian Elms and the deceased Plaintiff herein who acquired their said paternal home on sub – division No. 794 (Original No. 68/12 of Section II Mainland North) in 1971 and immediately moved to live thereon with them. Attached in the affidavit were copied of Kenyan Identity Cards of the Executor and Plaintiffs herein.
- i. Since the said year of 1971 when they moved onto their paternal home, the suit property was vacant with a temporary house which tore down to neglect and no one living thereon. He recalled that on or about year 1977, their deceased parents took over the suit property which is registered in the name of the Defendant, planted various species of indigenous and exotic trees thereby annexing the suit property to their paternal home as a compound and garden for our said paternal home, build on the portion of the property their domestic staff house for about 4 workers and there had since 1977 been no beacon or boundary between the suit property and their said paternal home to date.
- j. His co – executor herein, himself and their deceased parents had since 1977 been in open, quiet, uninterrupted continuous occupation and possession of the suit property as part of their paternal home and utilise the same in the above capacity at all material times without any interruption. The said occupation was adverse to the Defendants title to the suit property as



he did not recall the Defendant ever having permitted his deceased parents' permission onto the suit property, licensed or leased the same to them.

- k. The Deponent recalled that they at all material times during their childhood to date knew that the Defendant left her property and relocated to Kiambu within the Republic of Kenya and have never heard of her or seen her on the suit property at any time from the said 1977.
 - l. Their deceased mother and Plaintiff herein paid land rates in the sum of Kenya Shillings Two Ninety-Six Thousand One Hundred and Five (Kshs. 296,105/-) in respect of the suit property in July 2022 as evidenced by Invoices and Receipts at page 18 of the exhibits annexed to the Affidavit in support of the Originating Summons sworn by the deceased on 8th November, 2022 and filed with the suit hereof.
 - m. On 12th January, 2014, the Plaintiff also paid the annual land rates for the suit property then assessed at a sum of Kenya Shillings Eighteen Thousand (Kshs. 18,000/-) as evidenced by documents numbered 2 to 4 of the Plaintiffs List and Bundle of Documents dated and filed in this matter on 29th January, 2024.
 - n. The Defendant's title and interest in the suit property was extinguished by the Plaintiff's adverse and open, uninterrupted continuous occupation and possession of the suit property for a period of over 47 years since the year 1977 without the permission of the Defendant and the deceased Plaintiff as well as themselves have acquired interest in the suit property by prescription and adverse possession.
 - o. The Affidavit is sworn in support of the Originating Summons-filed herewith adopt the evidence and exhibits produced in the Plaintiffs List and Bundle of Documents dated and filed in this matter on 29th January, 2024 and pray that the Originating Summons dated 8th November, 2022 be granted as prayed. Annexed in the affidavit and cross reference in his Affidavit herein and the Plaintiff's List and Bundle of Documents dated 29th January, 2024 were hereby produced and collectively marked as "GSE – 1".
8. The Plaintiff called PW - 1 on 30th October, 2024 he testified as follows: -

A. Examination in Chief of PW - by Mr. Litoro Advocate.

9. PW - 1 was sworn and testified in English language. He identified himself as Guy Spencer ELMS, a citizen of Kenya with all the particulars as indicated on his national identity card shown to Court. He was an Advocate of the High Court of Kenya in Nairobi practicing in Lavington. He wished to rely on the 11 Paragraphed of the Supporting Affidavit by the deceased dated 15th November, 2022 and his 15 Paragraphed further Supporting Affidavit sworn and dated 28th June, 2024. He further stated that he would be relying on all the annexures attached to the said Supporting affidavits as the evidence in chief and in support of his case herein. He recalled that on 28th June, 2024; he filed a 16th paragraphed further affidavit. He was the duly appointed Legal Executor/Representative of the Estate of his mother Jean Margaret Elms who was the Plaintiff in this case. PW - 1 recalled that on 19th February, 2024, in HC (Mombasa) Succession Cause No, E013 of 2024 he was issued with a Limited Grant – Plaintiff Exhibits Number 1 at page 12. He produced with pages 7 to 10 as Plaintiff Exhibit Numbers 2.
10. PW - 1 told the court that there was a Certificate of Death at page 11 – died on 30th January, 2024. The deceased died after filing the case. It was produced as Plaintiff Exhibit Number - 3. On being referred to paragraph 4 of his further affidavit, the witness told the court that the deceased on 15th November, 2022 had filed a suit against the Defendant seeking for reliefs the Plaintiff had acquired the suit property known as sub division numbers 793 of Section II Mainland North measuring 0.5 acres by land adverse



possession (Plaintiff Exhibit 4). With reference to Paragraph 7 of the originating summons was the copy of the Certificate of title. They obtained it from the land. They did not have the original title. They did the search which was at page 17 of the list of documents. The registered owner of the property was Margarita Sisie Macbeth Heard as at 9th September, 2024 marked as Plaintiff Exhibit Number 5. She was the Defendant herein. His late mother was on the suit property; at the time of his testimony the workers resided on the suit property. It was part of their paternal home.

11. While referring to the contents of Paragraph 14 of his further supporting affidavit, PW - 1 told the court that were his identification card and on page 15 was the identification card for his biological brother Clive Leonard Elms. They were the only children to the deceased. His parents bought a plot and then in the year 1977 they bought the adjacent plot. In December 1977, it was transferred to his parents - Page 14 of the originating summons – L.R. No. 794 – Plaintiff Exhibit number 6. But they later knocked down the wall as they could not get the Defendant. His parents had been living on the land. It was where their dogs had been buried.
12. PW - 1 further told the court that they had annexed pictures of photographs at page 8 to 13 of the originating summons. The wall ran through to the creek. Photographs produced as Plaintiff Exhibit 7(a), 7(b), 7(c), 7(d) and 7(e). The certificate of Accuracy was produced as Plaintiff Exhibit 8. The Court had seen the photos and he would not have a problem with the court conducting a site visit. The place was at Mshomoroni near Tudor. Currently, there were four servants – 2 Cooks and gardeners on the land. They used to work for his mother. He spent the night there. He was maintaining the workers.
13. The place was ratable. PW - 1 told the court that he had been paying the rate; before it was his mother who used to pay but upon her death he took over. It was still M/s. Heard who was the registered as the rate owner (See pages 18 and 19). Plaintiff Exhibit 9(a) and 9(b) were the official receipts by the County Government of Mombasa. On being referred to the further affidavit at pages 17, 18 and 19 of the affidavit, it showed that he had been making the rate payments as follows:-
 - a. 8th January, 2024 – Kshs 18,000/-.
 - b. 12th January, 2023 – Kshs 18,000/- (Pex 10(a) and 10(b)).
14. PW - 1 further told the court that, the previous rates were paid by his mother as she was still alive by then. He produced his statement dated 12th January, 2023 marked as Plaintiff Exhibit 11. His mother had sued the Defendant for land adverse possession. The property had always been next to their land. Their mother died and decided to pursue her wishes. He was still standing to the prayers sought in the Originating Summons. He still pursued the same prayers.
15. PW - 1 stated that they had never met the Defendant. All along they had been thinking that the property was for the person who sold the land to them. However, this position changed after they conducted the official search that the ownership of the land became clear. He informed the Court that when both his father and mother died, they were cremated and their ashes were poured on the suit land.
16. On 30th October, 2024 the Plaintiff through the legal counsel Mr. Litoro marked their case as closed.

V. Submissions

17. On 30th October, 2024, immediately after the closure of the Plaintiff the Honorable Court directed the parties to canvass the originating summons dated 8th November, 2022 filed on the 15th November, 2022 through written submissions. Thereafter, the Applicants having fully complied and the Honorable Court reserved a date for delivery of Judgement on 28th February, 2025. However, due to unavoidable circumstances, it was eventually delivered on 4th April, 2025 accordingly.



A. The Written Submissions by the Plaintiff

18. The Plaintiff through the Law firm of Messrs. Litoro & Omwebu Company Advocates filed their written submissions dated 3rd December, 2024. Mr. Litoro Advocate commenced the submissions by providing a brief background of the matter, He stated that it was in support of the suit by way of an Originating Summons dated 8th November, 2022 accompanied with Supporting Affidavit even dated sworn by Jean Margaret Elms (The deceased) and the List and Bundle of Documents dated 29th January, 2024.
19. The Learned Counsel noted that the Court allowed the application by the Plaintiff's Personal Representative to substitute her, after her demise on 30th January, 2024 and allowed for filing of Further Affidavits if need be. Consequently, the Plaintiff filed the Further Affidavit sworn by Guy Spencer Elms on 28th June, 2024. Indeed, the Plaintiffs relied on these pleadings in these submissions. He reiterated that despite service being effected via substituted means (See the affidavits of service dated 25/04/2023 and 12/07/2024 respectively) the Defendant never entered appearance and or file any response to the suit.
20. Whilst the Defendant is the bona fide owner of the property known as Sub-division No.793 of Section II Mainland North in Mombasa (Suit Property), the Plaintiff had quietly, openly, without permission and without force resided on the Suit Property without any interruption for over a continuous period of 47 years since the year 1977. The Plaintiff had never been required to pay any rent or any form of payment to the Defendant so as to occupy the Suit Property at any time or obtained a consent, license or lease over the Suit Property from the Defendant. Her possession of the Suit Property had therefore been adverse at all material period, and without the Defendant's permission. PW – 1 – being the Plaintiffs Legal Representative who is also the son and heir of the estate living on the suit property testified in Court on 30th October, 2024 and the Court visited the suit property on 6th November 2024 and filed a report in this matter dated 22nd November, 2024. The Plaintiffs relied on the Affidavits in support of the Summons, the testimony of PW - 1 in Court on 30th October, 2024 and the Site Visit Report dated 22nd November, 2024 in support of the suit. Therefore, the Plaintiff prayed that this Court should find that the Defendant's title to the Suit Property had in the circumstances been extinguished by her adverse possession of the suit property having failed to assert ownership and possession against the Plaintiff for a continuous period of over 45 years.
21. To buttress on these points, the Learned Counsel relied on several provision of the Law. These were Sections 7, 13, and 38 of the Limitations of Actions Act, Cap. 22.; Section 28 (h) of the [Land Registration Act](#), Number 3 of 2012 and Order 37 Rule 7 of the Civil Procedure Rules, 2010. Additionally, the Leraned Counsel cited the case of the Court of Appeal – “Wilson Kazungu Katana & 101 others – Versus - Salim Abdalla Bakshwein & Another [2015] eKLR” which sought to define what constitutes adverse possession and observed as follows:

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner...”



22. From an analysis of the facts of this case and the law as set out hereinabove, the Learned Counsel crafted two issues for court's determination. Firstly, whether the Plaintiff had been in adverse possession of the suit property for a period in excess of 12 years. In her Affidavit sworn before her demise, the Plaintiff deponed that she had been in open, quiet and uninterrupted occupation of the suit property from the year 1977, for more than 45 years without permission or force, together with her husband. The Plaintiff demonstrated through photographic evidence that she had constructed a perimeter wall around the suit property as an extension her family home, compound and garden, built on her property known as Sub-division Number 794 (Original Number 68/12) of Section II Mainland North which adjoins the suit property. PW – 1 reiterated that they had been in the property since the year 1977 after they moved into their paternal home and annexed the subject property/ registered in the name of the Defendant as their own since it was vacant.
23. After said annexation the Plaintiff and her family planted various species of trees and have since utilized the property without any Interruption. Indeed, it was clear from the report by the Honourable Christopher Yalwala (Deputy Registrar) prepared after the site visit on 22nd November, 2024 commissioned by this Court, that the subject suit and the Plaintiff's property (Sub-division Number 794) comprise one indivisible compound land surrounded by a perimeter wall as one home and that it contains various tree species that were fully. Therefore, it was evident, that the Plaintiff and her family had been in possession of the subject property for a long period of time. The site visit report noted that not only were the trees in the subject property old; meaning they must have been planted a long time ago, the surrounding wall was also quite old. Further, it was evident from the County Government of Mombasa E-Services Statement in respect to the property that, the land rate had remained unpaid for a long period of time and as such, the penalties had accumulated to more than sum of Kenya Shillings Kenya Twenty One Million Five Seventy Four Thousand Six Sixty Five Hundred (Kshs. 21,574,665 / =) as at January, 2023 before the Plaintiff made payment and cleared the outstanding amounts. From the fact that the land rates had remained unpaid for a long period of time such that the penalties had accrued to such figures and that the Plaintiff had continued to maintain uninterrupted possession of the subject property as could be noted from the photographs produced by the Plaintiff together with the report prepared by the Hon. Deputy Registrar. The Learned Counsel submitted that the Plaintiff had demonstrated that she had maintained quiet possession of the suit property for a period of more than 12 years adversely, without permission from the Defendant.
24. That even if, the Defendant was to be granted the benefit of doubt on the number of years that the Plaintiff was in possession of the suit property, it was clear that she had failed to enter appearance and or file defence in opposition to the claims set out in the Originating Summons and the accompanying pleadings despite service. It was clear from the evidence and oral testimony by the Plaintiff that she had been in possession of the subject suit since the year 1977, and that she subsequently caused the construction of the perimeter wall around the 'indivisible compound' comprising the properties registered in her name and the subject property without the owner's permission. Therefore, he contended that the Defendant had not cared for the subject property for a period of more than 12 years even which allowed the Plaintiff to construct a perimeter wall (which per the Deputy Registrar's account is fairly old), around the subject property, and subsequently constructed stone plaque commemorating her deceased husband. As such we submit that the threshold required to demonstrated continuous quiet possession without interference had been met by the Plaintiff. See the decision of the Court in the case of:- "Robert Shume, Kazungu Dzombo, Nicholus Ngolo Gona & Lucy Buya – Versus - Samson Kazungu Kalama [2015] KECA 185 (KLR) that authoritatively cited



the decision of the Court “Teresa Wachuka Gachura – Versus - Joseph Mwangi Gachira Civil Appeal No.325of 2003 where the Court observed that:

“possession could be by way of fencing or cultivating, the Court stated as follows “Possession” could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

25. Furthermore, the Court of appeal in the recent decision of “Kakuzi Limited – Versus - Makuyu Club (Suing through Joel Wanoike, Irungu Ndirangu & SK Kirubi as Trustees of the Club)[2024] KECA 1607 (KLR)” delivered on 8th November, 2024 reiterated judicial precedent on adverse possession at paragraphs 21-22 and 32 of the judgment as follows:

“21. The burden of proof of adverse possession lies with the one claiming entitlement under adverse possession. In the case of Celina Muthoni Kithi Nji – Versus - Safiya Binti Swaleh & 8 Others [2018] eKLR, the Court stated as follows: “It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The Possession should not have been through force, not in secrecy and without the authority or permission of the owner.”

22. What constitutes adverse possession is well settled. It is defined in Halsbury's Laws of England Volume 24 3rd Edition at page 252 thus:” To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it; fencing off is the best evidence of possession of surface of land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

32. In Mtana Lewa – Versus - Kahindi Ngala Mwangandi (above), Asike-Makhandia, JA.explained that:

the land and asserts rights over it and the person having title omits or neglects “Adverse position is essentially a situation where a person takes possession of 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 or und er 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. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act.”

26. The Plaintiff had demonstrated adverse possession of the suit property for more than twelve years since she had not only been paying rates that had been outstanding for more than 12 years. She had also without the permissions of the Defendant, done acts on the suit land, that were inconsistent with the Defendant's enjoyment of the property for the said period. To this end, the Learned Counsel relied on the decision in “Chevron (K) Ltd – Versus - Harrison Charo Wa Shutu [2016] KECA 248 (KLR)”, where the Court of Appeal observed as follows at page 4 of the decision:

“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to



the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it."

27. Secondly, whether the Plaintiff was entitled to the reliefs sought. The Learned Counsel argued that having demonstrated that the Plaintiff had been in open, quiet and uninterrupted possession of the suit property for a period of more than 12 years, he urged Court to find that the Plaintiff was entitled to the relief sought since the threshold set out in the case of "Wilson Kazungu Katana & 101 others – Versus - Salim Abdalla Bakshwein & Another (Supra) had been met. Foremost, the Plaintiff had produced the title to the suit property, together with an official search indicating that the Defendant is the registered owner of the suit property. Further the Plaintiff had demonstrated that his occupation had been open, notorious and exclusive, with intention to hold adversely as there was actually a perimeter wall going jointly round the subject property and her properties, forming one indivisible compound that she was enjoying together with her family for more than 12 years and had subsequently constructed the stone plaque and security lights. See the finding in the case of "Nairobi Civil No.283 of 1990 Gabriel Mbui – Versus -Mukindia Maranya (1993) eKLR", where the Court observed as follows;

"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"

28. In conclusion, the Learned Counsel submitted, the Plaintiff had proved his case to the balance of probabilities. He prayed that this Court finds that the Defendant's rights in the suit property had been lawfully extinguished by the Plaintiff's claim for adverse possession and prayers sought in the Originating Summons dated 8th November, 202 be granted as prayed.

VI. Analysis and Determination

29. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff and the relevant provisions of the law. As already indicated above, this matter proceeded by way of formal proof as the Defendant was despite of being served with the summons never complied. The Plaintiff's evidence herein has not been controverted as the matter proceeded as a formal proof. However, it does not mean because the Plaintiff's suit is uncontroverted, then the Plaintiff's claim has to be allowed automatically. The Plaintiff has a duty to call sufficient evidence and prove his claim on the required standard of balance of probabilities. See the case of "Samson S. Maitai & Another – Versus - African Safari Club Ltd & Another [2010] eKLR", where the Court held that: -

"I have not seen judicial definition of the phrase 'formal proof'. 'Formal' in its ordinary dictionary meaning refers to being 'methodical' according to rules of evidence. On the other hand, according to Halsbury's Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed



is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

30. In this regard, for the Honourable Court to arrive at an informed, reasonable and fair decision, it has farmed three (3) issues for its determination. These are as follows:-
- a. Whether the Plaintiff has made out his claim for land adverse possession?
 - b. Whether the Plaintiff is entitled to the prayers sought?
 - c. Who meets costs of the suit

Issue No. a). Whether the Plaintiff has made out his claim for land adverse possession

31. Before embarking on the analysis, as already indicated the Honourable Court undertook a Site Visit and now wishes to attach the said report herein.

The Site Visit report

1. By the order of Hon. Justice Naikuni dated 30th October, 2024, the Deputy Registrar was directed to conduct a site visit on the subject plot herein situated at Mushomoroni, Tudor Estate as per Order 18 Rule 11 of the Civil Procedure Rules, 2010.
2. The matter was mentioned before the Deputy Registrar on 6th November, 2024 and the Deputy Registrar scheduled the site visit to be conducted on 22nd November, 2024 and conducted the same on the said date in presence of the Court Assistant and the Plaintiffs and the report of the said site visit is as follows; -
3. The subject plot is comprised in a compound surrounded by a perimeter wall which also has the Plaintiffs’ family house, swimming pool, car park and staff quarters.
4. The Plaintiff’s family house, swimming pool, car park and staff quarters are said to be on a plot which the plaintiffs’ parents initially bought in or about the year 1974. Then, there is another plot adjacent to it said to have been bought by the said parents subsequently in or about the year 1975. The third plot adjacent to it is the subject plot herein.
5. There are no any boundaries on the said 3 plots and hence, all comprise one indivisible compound land surrounded by a perimeter wall as one home.
6. The subject plot has several coconut trees that appear to be quite old as well as several non coconut trees, which also appear to be old.
7. The perimeter wall on the side of the subject plot, which separates the compound from the neighbor, has an old stone wall.
8. The perimeter fence on the side of the water front appear relatively new (not very old).
9. On the subject plot there is a stone plaque inscribed with the name “Brian ELMS” and it indicates that he died on 26th June 2020.
10. The family house, the swimming pool, the car park and the staff quarters are all situated on the first plot to be bought by the plaintiffs’ parents, which has no dispute. The adjacent plot to it also has no dispute.
11. There are no any structures on the subject plot, except the said plaque and a security light post erected thereon with security lights.



Dated at Mombasa this 22nd day of November, 2024.

C. L. Yalwala

Deputy Registrar – Elc, Mombasa

Signed By: Hon. Christopher Yalwala

32. Under this sub – heading, the Honourable Court has deciphered that the main issue is whether the Plaintiff is entitled to ownership of all that parcel of land known as Sub - division Number 793 of Section II Mainland North by virtue of land adverse possession. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as “the Burden of Proof” and is encapsulated for by the provision of Section 107 of the Evidence Act, Cap 80 laws of Kenya which provides as follows:-

“107. Burden of Proof (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

33. The ingredients to be established in a case of adverse possession are well settled as highlighted in the case of “Mtana Lewa – Versus - Kahindi Ngala Mwangandi (2015) eKLR”. Order 37 Rule 4 of the Civil Procedure Rules, 2010 pursuant to which the application was brought provides that:-

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgage.”

34. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on the provisions of Sections 7, 13 and 38 of the Limitation of Actions Act, cap. 22. Section 7 provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

35. The provision of Section 13 of the Limitation of Actions Act, Cap. 22 provides:-

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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 purpose 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.
36. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the [Limitation of Actions Act](#), Cap 22 and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides:-
- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land
 - (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
37. And the provision of Order 37 (1) & (2) Civil Procedure Rules, 2010 provides:-
- “(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.”
38. The provision of Article 162 (2) of [the Constitution](#) of Kenya 2010, Section 13 of the [Environment and Land Court Act](#), No. 19 of 2011 and Section 38 of the [Limitation of actions Act](#), Cap. 22 confer jurisdiction on this court to handle claims premised on adverse possession.
39. In the present case, it has been averred that since the year 1977, the deceased’s husband one Brain Elms and the Plaintiff had been in an open, quiet, interrupted continuous occupation and possession of all that piece of land/plot known as Subdivision Number 793 of Section II Mainland North measuring nought decimal five (0.5) acres and situate in Mombasa registered in the name of the Defendant. As fate would have it, unfortunately, the Deceased’s said husband died on 26th June, 2020. However, she continued to reside and occupy on the Suit Property at all material times of this suit. She had been in the said quiet, open, without permission or consent of the Defendant, forced occupation of the suit property or any interruption for over a continuous period of 45 years from the year 1977.
40. The deponent constructed a perimeter wall around the Suit Property and domestic staff quarters on the Suit Property in 1977 and had since then being occupying the Suit Property and using it to house her domestic staff as well as reside thereon as an extension our family home, compound and garden. Her family home and compound was built on her property known as Sub-division Number 794 (Original Number 68/12)of Section II Mainland North and was next and or adjoins the suit property. Copies of photographic evidence of the said perimeter wall, domestic staff quarters and garden as well as Certificate of Accuracy and a copy of the Title for the Plaintiffs property were produced. Indeed, when the parents died, they cremated and their ashes were spread out on the suit land an indication this was their home and thus property.



41. Now the Honourable Court wishes to extrapolate more on the legal position onto this concept using case law. In the case of “Kimani Ruchure – Versus - Swift Rutherfords & Co. Ltd (1980)KLR 10” Kneller J held that:

“ the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion).”

42. Similarly, in the case of “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” adverse possession was defined as:-

“.....the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

43. Additionally, in the case of: “M’ikiara M’rinkanya & Another – Versus - Gilbert Kabeere M’mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR”, the Court held that:-

‘.....From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher – Versus - Donovan [1948] 2 All ER 11, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession...

.....as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in Lowsley – Versus - Forbes [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.’

44. Further, in the case “Mbira – Versus - Gachuhi [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...”

45. Therefore, to determine whether the Applicants’ 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?
46. On examination of the questions above, the Plaintiff has contended that they had been in possession of the suit property from the year 1977. The Defendant has not disputed that the Applicant has been in occupation of the suit land for a period of more than 45 years which was quiet and continuous without any interruption. Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides that an action to recover land cannot be brought after the end of 12 years from the date when the right of action accrued. Section 17 of the same Act provides that at the expiration of the said period of 12 years, the title of the person who was entitled to bring an action in respect of the land in question is extinguished.
47. The applicant led evidence that her occupation of the suit property has been open. No action had been brought against the applicant by the respondent to recover the property. I am satisfied from the evidence on record that the applicant has established that she has acquired the suit property by adverse possession. Therefore, I am fully in agreement with the Plaintiff that the title held by the Defendant over the suit property has been extinguished by operation of law. Section 38 of the *Limitation of Actions Act* gives power to the court to order that the person who has acquired land by adverse possession be registered as the owner of the land in place of the person whose interest in the land has been extinguished. In the given circumstances, therefore, the Plaintiff is entitled to be registered as the proprietor of the suit property.

Issue No. b). Whether the Plaintiff is entitled to the prayers sought

48. Having held that the Plaintiff has proved her claim on adverse possession and being that the Plaintiff has led evidence through official search showing that the Defendant is the registered owner of the suit land, the Court holds and finds that the Plaintiff has established her rights on possession adverse to the Defendant’s ownership rights over the suit property.

Issue No c). Who bears the costs of the suit

49. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

50. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. Section 27 (1) of the *Civil Procedure Act* provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the



costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

51. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.
52. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
53. In this case, as this Honourable Court has opined above, the Plaintiff who has proved his case shall have the costs.

VII. Conclusion and Disposition

54. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Plaintiff had established his case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-
- a. That the suit by the Plaintiff as per the originating summons dated 8th November, 2022 filed on the 15th November, 2022 succeeds in its entirety and is hereby allowed.
 - b. That a Declaration be and is hereby issued that the Defendant’s title of the property known as Subdivision Number 793 of Section II Mainland North (the “Suit Property”) situated in Mombasa be deemed to have been extinguished by adverse possession of the same by the Plaintiff for over 45 years.
 - c. That a Declaration be and is hereby made bequeathing the Plaintiff the title and interest to all the Suit Property measuring nought decimal five (0.5) acres against the Defendant by way of adverse possession thereof having occupied and possessed of the Suit Property has been open, quiet, continuous, uninterrupted and adverse to the Defendant’s title to the Suit Property for a period of over 12 years.
 - d. That an order be and is hereby made directing the Land Registrar, Mombasa to have the Plaintiff registered as the legal and absolute owner of the Suit Property having acquired the same by adverse possession free of encumbrances and any overriding interests.
 - e. That an order of permanent injunction be and is hereby issued restraining the Defendant, by herself, servants or anyone claiming under her from demolishing the structures built on by the



Plaintiff, evicting the Plaintiff, re-entering, charging, leasing, selling, disposing off or in any way interfering with the Plaintiffs' quiet possession, use and or ownership of the Suit Property.

f. That the costs of the suit to be awarded to the Plaintiff.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED
AND DATED AT MOMBASA THIS 4TH DAY OF APRIL 2025.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT
AT MOMBASA**

Judgement delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

Mr. Litoro Advocate for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

