Gulamali v Sary & 13 others (Environment & Land Case 46 of 2017) [2022] KEELC 2921 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2921 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 46 OF 2017

M SILA, J

JUNE 16, 2022

BETWEEN

ISMAIL GULAMALI .... PLAINTIFF

AND

SALIM ALI SARY .... 1ST DEFENDANT

MARYAM AHMED RUBEYA .... 2ND DEFENDANT

MOHAMED JUMA .... 3RD DEFENDANT

OMAR NASSOR .... 4TH DEFENDANT

AHMED SALIM .... 5TH DEFENDANT

THUREYA MOHAMED AWADH .... 6TH DEFENDANT

ESHA KHALID .... 7TH DEFENDANT

ZUHURA ALI .... 8TH DEFENDANT

ARTHUR H. BUKI .... 9TH DEFENDANT

ANZWAN MOHAMED SALIM .... 10TH DEFENDANT

ZEITUN IDDI .... 11TH DEFENDANT

AZIZ MOHAMED SALIM .... 12TH DEFENDANT

NAUSHAD KHAN .... 13TH DEFENDANT

AMINA HAMAJ .... 14TH DEFENDANT

(Suit by plaintiff seeking vacant possession to the suit land; defendants raising defence of limitation; evidence showing that 1st – 13th defendants were previously tenants who stopped paying rent to the registered proprietor; plaintiff purchasing the land and issuing a notice to the defendants to vacate the property; court upholding the position that tenants who

have stopped paying rent can raise defence of limitation; 14th defendant having been put into possession by the previous registered proprietor and allowed to build a madrassa on a portion of the land; the madrassa being built; plaintiff cannot claim this portion of land as it was donated for a charitable purpose which has materialised; question whether, since the defence of Page 1 of 21 limitation has been upheld, the court should allow title to be issued to the defendants on the basis of adverse possession; court reviewing the authorities and holding that in the circumstances, it would be unwise to grant an order of issue of title to the defendants based on the doctrine of adverse possession; plaintiff's suit otherwise dismissed)

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 21 February 2017. In the plaint, the plaintiff has pleaded to be the registered owner of the land parcel Mombasa/Block XVI/323 (the suit property) after purchasing it on 13 February 2012 from the former proprietors, The Registered Trustees of the Mombasa Parsi Anjuman (hereinafter simply referred to as "Parsi Anjuman" or "the Parsi Community"). It is pleaded that at all material times, the defendants were tenants at the suit property, paying monthly ground rent, and that they have constructed semi-permanent and temporary structures and houses. It is pleaded that the plaintiff notified the defendants that he has purchased the property through a letter dated 14 March 2012, and after being registered as the new owner, he wrote to the defendants a letter dated 13 February 2013, asking them to pay rent to him. No rent was paid. The plaintiff avers that in the circumstances, on 1 December 2016, he issued notice to the defendants to vacate the premises by 31 December 2016. The plaintiff pleads that despite expiry of the notice, the defendants have refused to hand over vacant possession. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :-

    a. Vacant possession of the suit property.

    b. Removal and/or demolition of all structures and houses on the suit property.

    c. A prohibitory and permanent injunction restraining the defendants from trespassing, building or interfering with the plaintiff's quiet possession of the suit property.

    d. The OCS, Makupa to provide security during implementation of the court decree.

    e. Any other further order deemed fit to be granted.

    f. Costs of the suit.

2. The 1st to 13th defendants entered appearance and filed a joint statement of defence on 11 April 2017. The defence was subsequently amended on 26 November 2020 to introduce it also as the defence of the 14th defendant and to add a counterclaim. In it, it is pleaded that in the year 1988 or thereabout, the Government of Kenya informed the defendants of its engagement with the erstwhile registered proprietors so as to have the occupants of the land assume ownership of the portions that they occupied. Pursuant to the said directive, the defendants made payments to the District Treasury as advised. They aver that they paid Kshs. 30,000/= each for the road frontage plots and Kshs. 15,000/ = for the interior plots. They plead that since the onset of this arrangement, they have not been required to pay rent and they have been waiting for the actualization of the arrangement between the Government and the erstwhile proprietors which the proprietors had acquiesced to. The defendants aver that with the full knowledge of the plaintiff's predecessor, they maintained their residential houses

and they and/or their forebears have lived for periods in excess of 50 years and have continued to improve their houses. In the circumstances, they plead that the arrangement under which they had previously occupied their houses became adverse to the registered title holder. They plead the defence of limitation under Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya and contend that the plaintiff's right of possession has been extinguished and the suit should be dismissed with costs. In the alternative, they plead that having developed their houses with the full knowledge and acquiescence of the erstwhile registered proprietors, the plaintiff cannot seek to obtain vacant possession without compensating the defendants, and in the event that their defence of limitation fails, then they seek compensation for their developments. In the counterclaim, they reiterated the above and they have made specific their alternative claim for compensation as follows :-

Salim Ali Sary – Kshs. 3,500,000/=

Maryam Ahmed Rubeya – Kshs. 7, 200,000/=

Mohamed Juma – Kshs. 2,500,000/=

Omar Nassor – Kshs. 3,500,000/=

Ahmed Salim – Kshs. 2,600,000/=

Thureya Mohamed Awadh – Kshs. 4,300,000/=

Esha Khalid – Kshs. 3,500,000/=

Zuhura Ali – Kshs. 3,100,000/=

Arthur H. Buki – Kshs. 3,800,000/=

Anzwan Mohamed Salim – Kshs. 4,400,000/=

Zeitun Iddi – Kshs. 5,700,000/=

Aziz Mohamed Salim – Kshs. 3,400,000/=

Naushad Khan – Kshs. 3,600,000/=

Amina Hamaj – Ksha. 30,000,000/=

3. The 7th defendant, Eshad Khalid, died in the year 2017 and her case was marked as abated.

B. Evidence of the Parties

4. The plaintiff testified as the sole witness for his case. He adopted a statement that he had recorded as his evidence in chief. His statement is more or less a reiteration of what he pleaded in the plaint, which I have already set out above. In court, he commented about the allegation of the defendants that they were buying the land from the Government. He stated that what he is aware of is that the area Member of Parliament (MP) was trying to help them get the land from the Parsi Community, the previous owners of the land. He testified that when the defendants disputed his title, he informed the previous owners and they handed him documents for the case Mombasa SRMCC NO. 2169 of 2002, where the 9th defendant had been sued by the previous owners. In his defence in that suit, the 9th defendant pleaded that he was a tenant paying Kshs. 142.55 as rent and therefore enjoys protection under the *Rent Restriction Act*. Cross-examined, he testified that he began interacting with the property in the year 2011 when the Parsi Community approached him to purchase the land. He bought the land through a sale agreement dated 13 February 2012. It had a condition that the purchaser was to evict the squatters. The vendors issued him with a power of attorney dated 27 April 2012 which he used to file the suit Mombasa HCCC No. 153 of 2012 to evict the squatters therein. He had earlier obtained orders in the suit Mombasa High Court Miscellaneous Suit No. 16 of 2015 for the identification of

the squatters on the land and he sued those so identified. He was also given a ledger of the tenants but he did not have it in court. What he identified as squatters were not the people in the list of tenants. He stated that in this suit he has sued some who were tenants and some squatters. He was asked whether there is any payment of rent made after the year 2002 and he thought that no payment of rent was made. He stated that he was not made aware of any directive by the Government to have land owners sell to individual occupants. He was not aware of any dealings between the Government and some occupants. He acknowledged that there was a madrassa on the land but he did not know who put it up. He stated that the Parsi Community did not inform him that they had allowed a person to put up a madrassa. It was however present when he purchased the land. He did not know what each person owed as rent if at all they were tenants. He could not tell the last time the tenants paid rent.

5. Re-examined, he testified that he wrote to the defendants informing them that he has purchased the land and was no longer interested in keeping them as tenants and he wanted vacant possession. He never received rent. He got orders in the year 2015, for identification of the occupants of the land, which was about two years after he got registered as proprietor. He stated that 2005 is the last year that he has record of the Parsi Community being paid rent.

6. With the above evidence, the plaintiff closed his case.

7. DW-1 was Amina Ahmad Abdul Fadhir, the 14th defendant, sued as Amina Hamaj. She stated that she doesn't know the plaintiff and has never been served with any notice to vacate. She had a witness statement which she adopted as her evidence. In it, she stated that they were initially tenants of houses without land. She stated that there was directive in the late 1980s by former President Moi where occupants of the suit property as well as other contiguous properties were required to purchase the plots that they occupy and through the District Treasury at Mombasa. Occupants made payments of Kshs. 30,000/= for the road frontage plots and Kshs. 15,000/= for the interior plots. She stated that though many residents made these payments, the process was never formalised or completed, but what changed significantly was that most, if not all occupants, stopped paying ground rent. She stated that in the year 2004, the former proprietors approved her request to put up a madrassa and boarding facility for orphans. She put up the development with the help of well-wishers after planning permission was granted. She stated that at no time thereafter did the issue of rent arise. In court, she testified that the suit land was at some point being used to sell drugs and she approached Hon. Najib Balala, who was then a cabinet minister, so that she can be given a space to build the madrassa . She built the madrassa, called, Tul Muadh Al Islamiya, with Hon. Balala as the trustee of the madrassa. She had letters dated 19 October 2004 and 15 December 2004 regarding the madrassa. She does not live on the land and all she has on it is the madrassa.

8. DW-2 was Rashid Harun Shake a practising valuer with 25 years experience. He prepared a valuation report of the properties of the defendants. He identified 15 units on the ground but prepared reports for 12 units. He excluded the 3rd, 7th and 12 defendants. The explanation given was that the 3rd and 12th defendants did not cooperate and the case against the 7th defendant had abated. He stated that in respect of the 14th defendant, what she has developed is a mosque. He produced the valuation report as an exhibit. The counterclaim in respect of compensation adopts the valuation of the individual units.

9. DW-3 was Mr. Omar Nassir, the 4th defendant, described in the suit as Omar Nassor. He had authority of the other defendants to testify on their behalf. He is 63 years old. He testified that he lives on the land in a house built in 1935. He moved into the house about 40 years ago. He stated that all defendants live on this land and they have lived together over the years. They used to pay rent to Parsi Anjuman. They paid rent until they received a letter that they should pay the District Commissioner Kshs. 30,000/= for the plots fronting the road and Kshs. 15,000/= for the inner plots. This directive to pay came from the District Commissioner. They were in the inner plots and they paid Kshs. 15,000/=. They then

stopped paying rent to Parsi Anjuman. They later received a letter that the land had been purchased by the plaintiff. The plaintiff obtained a power of attorney from Parsi Anjuman and filed the suit ELC No. 153 of 2012 (The suit was later withdrawn). He stated that all persons occupying the land have been sued in this case. They engaged a valuer who prepared the valuation report.

10. Cross-examined, he stated that they recognized that the land belonged to Parsi Anjuman. They came into the land with the permission of Parsi Anjuman as tenants. They were allowed to build houses and pay ground rent. On his part, he purchased the house where he lives in from his mother in law who is the one who developed it. She is the one who used to pay ground rent. He was questioned on the alleged directive to pay Kshs. 30,000/= and Kshs. 15,000/=. He stated that they made payment. He however did not have any evidence of such payment.

11. With the above evidence, the defendants closed their case.

C. Submissions of Counsel

12. Counsel filed written submissions which I have taken note of. In his submissions, Mr. Hassan, learned counsel for the plaintiff, submitted inter alia that the suit property belongs to the plaintiff. He submitted that the defendants occupied the suit property as tenants of the former owners and were liable to pay ground rent. He submitted that the plaintiff issued a one month's notice terminating the tenancy and the defendants are therefore obligated to vacate. He referred me to the case of Abdukrazak Khalifa Salimu vs Harun Rashid Khator & 2 Others (2018) eKLR. He submitted that the erstwhile owner did not have any arrangement or understanding where the defendants would occupy the land in perpetuity. He submitted that the directive to pay to the Government money to purchase the land did not confer property rights to the defendants. He submitted that in any event, the defendants did not tender any evidence that they paid the money. On the question whether the plaintiff's suit is time barred, counsel submitted that the arrangement between the parties was one of house without land and what the tenant owns is the house but not the land. He submitted that the structures were put up with permission of the land owner and therefore the defendants have been on the land pursuant to consent of the proprietor. He submitted that the defendants' argument is that the tenure of land changed upon them purchasing it, and contended that this line of argument lacks basis, as the defendants do not say when they purchased the land and have no proof of purchase. He submitted that the notices issued terminated the defendants' tenancies and tenure on the land, and that it is when they refused to hand possession that the cause of action accrued. He finally submitted that the defendants are not entitled to any compensation as there was no such agreement. He relied on the case of *John H. Mramba (suing as the Administrator of the estate of Paul George Kenga vs Kombo Chinando & 22 Others* (2019) eKLR. He also questioned the figures provided in the valuation report and submitted that the valuation report lacks credibility.

13. For the defendants, Mr. Mwakisha, learned counsel, submitted that the 1st – 13th defendant were at one time owners of house without land, while the 14th defendant was granted a separate consent to construct a madrassa on the property. He submitted that the relationship between the 1st – 13th defendants was at some point fundamentally altered which is what informed the previous suit with the persons therein being sued as squatters. He submitted that at the time the plaintiff purchased the land there was no longer a landlord/tenant relationship subsisting. He submitted that the disruption of this relationship occurred on or about the year 1988 when the Government mooted the directive for occupants to purchase the land that they occupied. He submitted that time could thus run in their favour. He relied on the cases of *Public Trustee vs Wanduru*(1984) eKLR, *Sisto Wambugu vs Njuguna* (1983) eKLR, and *Murai vs Wainaina* (1982) eKLR and Chevron (K) Limited vs Harrison Charo (2016) eKLR. He submitted that a tenant at will can acquire prescriptive rights and that time starts

running once a licence is terminated. He further referred me to the English case of Hayward & Another vs Challoner (1967) 3 All ER 122, to support the argument that possession by a tenant can be adverse from the period covered by the last payment of rent. Counsel submitted that the defence of limitation is a mirror image of the right of adverse possession and referred me to the case of Gulam Mariam Noordin vs Julius Charo Karisa, Civil Appeal No. 26 of 2015 and Chevron vs Harrison Charo (supra). For the 14th defendant, he submitted that she was accorded use of the land for a charitable cause, through a trust, and she is insulated from the plaintiff's action. He submitted that if they are to vacate, then equity would apply, and they should be compensated. He relied on the case of Runda Coffee Estates vs Ujagar Singh (1966) EA 568.

D. Disposition

14. In a nutshell, the plaintiff asserts ownership of the suit property and seeks vacant possession of it. The defendants in essence raise the defence of limitation and in the alternative seek compensation for the land if they are to vacate. There was no specific pleading seeking to have the land by adverse possession but it will be observed that in his submissions, Mr. Mwakisha, learned counsel for the defendants, did refer me to the cases of Gulam Mariam Noordin vs Julius Charo Karisa and Chevron vs Harrison Charo, to support the argument that a defence of limitation is a mirror image of the right to adverse possession, and that in an appropriate case, the court in upholding the defence of limitation under Section 7 of the *Limitation of Actions Act*, can make orders recognizing the defendant's right to the land notwithstanding the absence of a claim for adverse possession.

15. I have looked up at the two cases. The first of these two cases is that of Gulam Mariam vs Charo Karisa. In this case, the appellant sued the respondent for vacant possession. A defence of limitation was raised but no counterclaim for adverse possession was filed. After hearing the matter, the learned Judge, Angote J, held that the respondent had been on the land for more than 12 years and the appellant's case was barred by limitation. The case of the appellant was dismissed but no order for title to issue in the name of the respondent was made (on the reasoning that there was no counterclaim for adverse possession and that this would need to be canvassed in a separate suit). On appeal, it was raised inter alia that the Judge erred in failing to appreciate that the respondent had not pleaded adverse possession as such claim needed to have been presented by way of an Originating Summons. The Court of Appeal upheld the finding that the title of the appellant had been extinguished by dint of Section 17 and 38 of the *Limitation of Actions Act*. On whether a claim for adverse possession could be sustained through a defence, the court held that it could. The court reviewed past authorities, which were of opinion that a suit for adverse possession would need to be advanced before such order is made, and held that this position is no longer tenable. It held that the trial court could make an order for title to be issued to the defendant in such an instance. The court reasoned that if the order is not made, then that left the issue of title hanging. It pronounced itself as follows :-

> Where does this leave the respondent? Does he re-litigate as was directed by the court in Njuguna Ndatho (supra) ? Under Section 38 to which we have referred earlier the adverse possessor; "....may apply to the High Court for an order that he be registered as the proprietor..."When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's title was so extinguished. By Section 3(2) of *Appellate Jurisdiction Act* we order the appellant do transfer the suit property to the respondent at the latter's expense

within 30 days from the date hereof failing which the Deputy Registrar, High Court, Malindi will execute on behalf of the appellant all the necessary transfer documents.

16. It will be seen from the above that the court ordered title to issue to the respondent despite the respondent not having a suit or counterclaim for adverse possession. Only a defence of limitation had been raised in the suit.

17. The same position was taken by the Court of Appeal in the subsequent case of Chevron vs Harrison Charo (supra). In this case, the appellant filed suit against the respondent, seeking to have the respondent vacate the disputed premises and to demolish the buildings he had constructed thereon. The respondent in his defence pleaded that he was born on the suit land and his family had settled on the land more than 45 years back and as a result, the appellant was barred by Section 38 of the *Limitation of Actions Act*, from recovering it. The suit was again heard by Angote J. He found that after lapse of 12 years, and pursuant to Sections 7 and 17 of the *Limitation of Actions Act*, the appellant was precluded from bringing an action to recover the suit premises. The Judge, just as in the case of Gulam Mariam vs Charo Karisa, held inter alia that an adverse possessor can raise a defence of limitation without necessarily filing suit or counterclaim, though in such scenario, the adverse possessor will not get an order for title to be issued in his favour. Aggrieved, the appellant lodged appeal to the Court of Appeal. In its decision, the Court of Appeal held that under Section 7 of the *Limitation of Actions Act*, a registered owner is precluded from bringing an action to recover the land after lapse of 12 years. The court held that at the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law. The court relied on its decision in Gulam Mariam vs Charo Karisa and ordered the appellant to transfer title to the respondent.

18. It will be observed that in both cases cited above, no counterclaim seeking adverse possession was filed. What was filed was a defence of limitation. The Court of Appeal did not only stop at dismissing the case of the plaintiff but also ordered that title be issued to the defendant on the basis that the defendant had acquired title to the land by way of adverse possession. It does therefore appear, that a court can in fact make an order that the defendant has acquired the disputed land by way of adverse possession, despite no counterclaim or separate suit for adverse possession being filed, so long as the defence of limitation has been successfully raised. I am guided by the above decisions of the Court of Appeal. I however think that there are circumstances which may militate against making the order for title to issue to the defendant by way of adverse possession. For instance, there may be a situation where the plaintiff has only sued one defendant, but the land is occupied by several other persons. In other words, it may happen that the plaintiff has not sued all the occupants of the land but only one or some of them. It may be imprudent for the court, in those circumstances, to order that title be issued to the defendant who has been sued, because it may be that he is not the sole occupant of the land, and it is not him alone who is entitled to the whole of the land by way of adverse possession. I do not therefore think that it is in all cases that title must issue to the defendant even where the court is persuaded that the defence of limitation must be upheld. The court may, in appropriate instances, stop only at dismissing the case of the plaintiff, so that the question of who has a right to be registered as proprietor of the land is squared out in later proceedings. Sometimes also, an adverse possessor may not be in occupation of the whole land but only a portion of it. In such case, if a suit is filed against him for vacant possession, and he raises the defence of limitation, and assuming his defence is upheld, the court cannot order that he be declared the owner of the whole land. There may also be insufficient evidence within that suit for the court to ascertain the exact portion or area occupied by him for purposes of issue of title. But if the court is persuaded, from the facts, that the sole defendant is in occupation of the whole of the land, or that in case of multiple occupants, that all the occupants are in the suit, and nobody else has been left out, and that they occupy the whole or an ascertained portion of the land, in circumstances that entitle the sole or multiple occupants the right to obtain title by way of adverse possession, then

it may proceed to make an order that title to the land, or part of it as may be shown to be occupied, be issued to the defendant/s. It will thus, in my view, remain in the discretion of the court, to decide whether to only stop at dismissing the case of the plaintiff, or go further to make an order of issuance of title to the defendant/s by way of adverse possession. I take the opinion that in doing so, the court needs to consider the peculiar facts circumstances of the case before it.

19. In our case, the defence of limitation has been raised and I need to interrogate it in light of the evidence presented. The plaintiff stated that he purchased the property in the year 2012 and he subsequently obtained title in his name on 12 February 2013. When he purchased the property in the year 2012, there were people in occupation. He then got an order for a census to be done which exercise took place and he identified the defendants as those in occupation. The fact that it is the defendants who are in occupation of the property is therefore not disputed. The question that arises is when this occupation commenced. The evidence of the 1st – 13th defendants is that they were tenants in the property, and it appears that they and their forebearers, have been on the property for a considerable amount of time. Their case is that they were in occupation in the 1980s when a directive was issued for persons in occupation to be allowed to purchase land. They say that they paid the money that they were directed to pay and from that time they ceased paying rent to the previous owners of the property.

20. The plaintiff did not call any evidence to controvert this evidence of the defendants regarding the last time that they paid rent. The plaintiff in fact does not appear to know much about the occupation by the defendants of the property, for he emerged in the year 2012, save that the 1st – 13th defendants were tenants. He did not know whether they still paid rent at the time that he purchased the property, and if not, when they stopped paying rent. The question of whether or not they paid rent would have been one which was in the knowledge of the previous owners and/or the plaintiff could have produced a rent book or receipts for rent. The previous owners of the property were not called by the plaintiff to testify and neither did the plaintiff produce any rent book or receipts for rent.

21. I have no reason to disbelieve the evidence of the defendants that they stopped paying rent in the 1980s. The plaintiff produced pleadings in the suit Mombasa SRMCC No. 2169 of 2002 where Parsi Anjuman sued one Arthur Hill Buki for vacant possession and the defence raised was that he is a tenant who was not in arrears. That case does not help the plaintiff, firstly because I have no idea what happened to the case for nothing else apart from the plaint and defence were presented by the plaintiff, and secondly, if at all rent was paid, then it was paid up to the year 2002. From that year to the year 2017, when this case was filed, is a period of 15 years, which is beyond the time frame of 12 years required for one to acquire title by way of adverse possession. In any event, even if this case was to apply in favour of the plaintiff, it cannot be used against the other defendants in this case. The production of the pleadings in the case Mombasa SRMCC No. 2169 of 2002 does not therefore help the plaintiff. I am prepared to hold that the last time rent was paid was more than 12 years before this suit was filed.

22. I now need to interrogate whether a tenant who has refused to pay rent is entitled to claim adverse possession after lapse of 12 years since he last paid rent. Mr. Mwakisha referred me to various authorities which I have read. In the case of Moses vs Lovegrove 1952 QB 538, the defendant was a tenant under an oral weekly tenancy and he made his last payment of rent to the plaintiff, his landlord, on 28 May 1938. In 1952, the plaintiff sought to recover possession of the premises. The defendant claimed that the plaintiff's title had been extinguished by virtue of limitation. It was held that the plaintiff's right of action accrued in June 1938 and then there was adverse possession on the part of the defendant. This decision was upheld on appeal. A similar result was reached in the case of Hayward & Another vs Challoner, 1967 3 All ER 122. A portion of the land (about a quarter of an acre of the title in issue) had initially been let out by the plaintiffs' predecessors in title. The last time rent was paid was in 1942. The plaintiffs purchased the property in April 1955 and they did not demand rent. The defendant took

possession of the premises in April 1962 and let out the disputed portion of land. The Court of Appeal (Denning J, dissenting), held that what was in issue was a periodic tenancy, and the right to recover possession accrued in 1942, and therefore the plaintiff's action to recover possession was forbidden by Section 4 (3) of the *Limitation of Actions Act*, 1939 (more or less similar to our Section 7 of the *Limitation of Actions Act*) which enacted that no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or to a person through whom he claims. Russel J, at Pg 127, expounded that "the possession of a tenant is to be considered adverse once the period covered by the last payment of rent has expired…" .

23. Within our jurisdiction, the Court of Appeal decision in the case of *Murai vs Wainaina, (1982) KLR 51*, is apt. In the case, the trial court found that the respondent was a tenant at will and could thus lodge a claim for adverse possession. The plaintiff was allowed to occupy the land in the year 1961 and he filed his suit for adverse possession in the year 1975. Simpson J held as follows :-

> The evidence adduced in the present case I think tends to strengthen rather than negative the presumption of a tenancy at will. I find that the plaintiff was a tenant at will.
>
> The plaintiff's claim is based on adverse possession of the land for more than twelve years. Under section 12(1) of the *Limitation of Actions Act*, a tenancy at will is taken to be determined at the end of one year from its commencement unless it has previously been determined, and accordingly the right of action of Ignatius Murai accrued and the plaintiff's adverse possession commenced sometime in 1962. Section 7 provides:
>
> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person. Thus the right of the defendants as legal representatives of Ignatius Murai, the deceased, came to an end sometime in 1974; let us say, the end of 1974.

24. It is apparent from the above decisions, that a person, who is a tenant at will or a tenant at sufferance, may have time running in his favour. This position is supported by Section 12 of the *Limitation of Actions Act*, which provides as follows :-

> 12. Accrual of right of action in case of certain tenancies
>
> (1) A tenancy at will is taken to be determined at the end of one year from its commencement, unless it has previously been determined, and accordingly the right of action of the person entitled to the land subject to the tenancy accrues on the date of such determination.
>
> (2) A tenancy from year to year or other period, without a lease in writing, is taken to be determined at the end of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy accrues at the date of such determination:
>
> Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action accrues on the date of the last receipt of rent.
>
> (3) Where any person is in possession of land by virtue of a lease in writing by which a rent is reserved, and—

(a) the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease; and

(b) no rent is subsequently received by the person rightfully so entitled,

the right of action of the last-named person to recover the land accrues at the date when the rent was first received by the person wrongfully claiming as aforesaid and not at the date of the determination of the lease.

25. Under Section 7 of the *Limitation of Actions Act*, 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. Under Section 17 of the *Limitation of Actions Act*, at the expiration of the period prescribed by the Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished. I would say that time starts running in favour of the tenant (now possessor) after the lapse of the term for which rent is last paid, and there is no evidence that the landlord has continued to permit him to occupy the land on other allowance, so that it can be considered that he is a licencee, or otherwise in continued possession by the permission of the land owner. If his possession remains to be quiet and uninterrupted, and no rent is offered for 12 years, and all other ingredients required to satisfy the doctrine of adverse possession are met, then such person is entitled to the order for the land by way of adverse possession.

26. In his submissions, Mr. Hassan referred me to the case of John H. Mramba (Suing as the administrator of the estate of Paul George Kenga) v Kombo Chinando & 22 others. In the suit, filed in the year 2014, the plaintiff sought orders for the eviction of the defendants. The defendants claimed to be entitled to the land because they had lived in it for 12 years and claimed that the plaintiff's right had been extinguished by limitation. The defence was however dismissed for reason that there was proof that the defendants had been paying rent up to the year 2006. The court held that this act acknowledged the title holder's ownership and authority over the suit property. The scenario in our case is different since there has not been any payment of rent since the 1980s, a period that exceeds 12 years, and therefore the facts of this case are distinguishable from the case at hand. In other words, in the said decision, 12 years had not lapsed since the time rent was last paid unlike our case.

27. There is no evidence that the erstwhile owners of the suit property had allowed the defendants to continue occupying the land under any other allowance so as to make them licencees. They took no step to have the defendants evicted until the year 2012 when their title had already been extinguished by dint of Section 17 of the *Limitation of Actions Act*. It is therefore apparent to me that the plaintiff's suit is similarly time barred. The plaintiff ought to have conducted due diligence before he purchased the suit property and he only has himself to blame. Having found that his suit is time barred, as against the 1st – 13th defendants, I hereby dismiss it.

28. The position of the 14th defendant is a little different. The 14th defendant contends that she was given permission to develop a madrassa within the suit land. In his submissions, Mr. Mwakisha submitted that the 14th defendant was given the land for a charitable purpose, which purpose was accomplished, and the same cannot now be taken away without any compensation. I agree. In fact, Mr. Hassan in his submissions did not address this point at all. I have seen the letters dated 19 October 2004 and 15

December 2004 which donated a portion of the land. The letter of 19 October 2004 which is addressed to Madrasatul Muadh Al-Islamiya, inter alia states as follows :-

> " We are pleased to inform you that the Trustees having given due consideration to your proposal to construct a Madrassa- (an educational institute as well as a boarding facility for orphans) have agreed to allocate a portion of the above plot free of charge."

29. It will be seen from the above that a portion of the land was allocated "free of charge" for purposes of building a madrassa. A madrassa has been developed pursuant to this grant. Once land is given for a charitable purpose, which is fulfilled, it will be unfair and inequitable for the land owner to now repossess the land, without offering any compensation to the donee. When a person gives a charitable donation, it is not expected that the donor will take it back if the donee performs the very purpose for which the donation is given. To hold otherwise will be to defeat the very essence of charitable donations. The plaintiff cannot therefore seek to gain the portion that is occupied by the madrassa which is under the charge of the 14th defendant. The case against the 14th defendant cannot therefore stand.

30. It will be seen that I have dismissed the case of the plaintiffs against all the defendants. With the dismissal of the plaintiff's suit, I need not address myself to the counterclaim of the defendants seeking compensation for the developments that they have made.

31. The one point remaining, that I need to address myself, is whether to issue an order that the defendants are entitled to be registered as owners of the suit land. I do not have sufficient material on the actual ground occupation of the defendants and whether they are the only persons who are occupying the subject land. The size of land that is occupied by the 14th defendant is also not defined, and in any event, that portion of land can only be declared as held in trust and not held in adverse possession. I wouldn't want to risk making an order which may negatively affect other persons who may not be parties to this suit. I will therefore leave it at dismissing the plaintiff's suit and declaring that the portion held by the 14th defendant is a portion held in trust by the title holder. If the defendants, or other occupants want title to the land or a portion of it, they are at liberty to file a suit for that to be considered.

32. The only issue left is on costs. The plaintiff's suit is dismissed with costs to the defendants. I have not made any orders over the counterclaim as I have only stopped at dismissing the case of the plaintiffs. All the counterclaim had was a prayer for compensation. I have found that there is no need for the prayer for compensation with the dismissal of the plaintiff's suit. There is no counterclaim for title by way of adverse possession and I have explained why I cannot issue that order for title within this suit. There is therefore nothing more that arises from the counterclaim. The counterclaim is thus dismissed but I make no orders on costs over the counterclaim.

33. Judgment accordingly.

DATED AND DELIVERED THIS 16 DAY OF JUNE 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MOMBASA