



**Nyangweso & another v Siku (Environment & Land Case  
2 of 2022) [2022] KEELC 3690 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3690 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 2 OF 2022  
E ASATI, J  
JULY 28, 2022  
IN THE MATTER OF WEST BUNYORE/EMBALI/1082  
AND  
IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 SECTION 37 & 38  
AND  
BETWEEN  
MADSON AMUKHOYE NYANGWESO ..... 1<sup>ST</sup> PLAINTIFF  
LEONARD MUNALA NYANGWESO ..... 2<sup>ND</sup> PLAINTIFF  
AND  
JAMES MAKONJIO SIKU ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. *Vide* the originating summons dated February 11, 2022 filed in court on the same date, the Plaintiffs jointly sued the Defendant on a claim of adverse possession to land parcel known as West Bunyore/Emball/1082 measuring 0.44 Hactares (the suit land herein).
2. The Plaintiffs' case is that even if the suit land is registered in the name of the Defendant, they (Plaintiffs) have been in peaceful occupation of the suit land and have developed the same for a period of over 40 years hence they have acquired prescriptive rights over the same.
3. The Originating Summons was stated to be brought pursuant to the provisions of Order 37 Rule 7 (i) of the *Civil Procedure Rules*. It was supported by the Supporting Affidavit sworn by the 1<sup>st</sup> Plaintiff on February 11, 2022 and the annexures thereto.



4. The Plaintiffs' claim was opposed vide the contents of the Replying Affidavit in respect to the Originating Summons sworn by the Respondent on February 21, 2022.
5. The Respondent contends that he is the sole proprietor of the suit land and that since it was registered in his name, he and his family have been in actual use thereof. That the Plaintiffs have never been in peaceful, uninterrupted use or occupation of the suit land since there have been protracted disputes over the land. He prays that the suit be dismissed.
6. Directions on the Originating Summons were taken on 26<sup>th</sup> April, 2022 that the Originating Summons be treated as a plaint and the Replying Affidavit as Defence and the matter to proceed by way of oral evidence.

### **The Evidence**

7. Both Plaintiffs testified and called one witness. PW1 was the 1<sup>st</sup> Plaintiff. He adopted the contents of the supporting Affidavit, the Answer to Replying Affidavit and the Further Affidavit as his evidence in chief. In the Supporting Affidavit the 1<sup>st</sup> Plaintiff deponed that the suit land was bought by his late father but during land adjudication, erroneously registered in the name of the Defendant. But that, nonetheless, he and his parents have stayed on the suit land since 1973 openly, peacefully and without interference. That his parents died and were buried on the suit land. That the Defendant never occupied or laid claim on the suit land during the lifetime of the Plaintiffs' father. That the Plaintiffs' father died in the year 2020 and that is when he learnt that the suit land was registered in the name of the Defendant. That the Defendant has always lived on land parcel known as West Bunyore/Embali/1026 which is the ancestral land. That the Defendant is an uncle to the Plaintiffs.
8. In the Answer to Replying Affidavit dated March 2, 2022, the 1<sup>st</sup> Plaintiff added that the Defendant was released from prison in the year 1980 and since then more than twelve (12) years have elapsed without the Defendant laying claim to the suit land.
9. PW2 (the 2<sup>nd</sup> Plaintiff) adopted the evidence of PW1 as his evidence and stated on cross –examination that his father bought land parcel Nos. West Bunyore/Embali/1081 and 1082.
10. PW3 was Peter Amukoye Nyangweso. He relied on his witness statement dated May 11, 2022 as his evidence. He stated that the Plaintiffs were his brothers. That his brothers stay on land parcel No West Bunyore/Embali/1082 where the father settled them. That the land is registered in the name of the Defendant who is a step brother of the Plaintiffs' father. That the Plaintiffs' father by name Johnstone Ernest Nyangweso Siku died on May 19, 2020. That the Defendant has never stayed on or utilized the suit land. That it is him and the Plaintiffs who have been using the same. That the suit land and land parcel No. West Bunyore/Embali/1081 were purchased as one piece of land by the Plaintiffs' father from one Joshua Odero Paul. That the first part of the purchase price was paid by the Plaintiffs' father through the Plaintiffs' grandfather as the Plaintiffs' father was then in Uganda working in the East African Community Ministry of Works as a painter.
11. PW3 stated further that there are documents made in 1956 and 1959 by his father with regard to the purchase. That their ancestral land is parcel No West Bunyore/Embali/1026 and that is where the Defendant resides. That there has never been any boundary between West Bunyore/Embali/1081 and West Bunyore/Embali/1082. That they never destroyed any boundary.
12. PW3 added that there was never a dispute over the suit land during the lifetime of their parents. That their occupation of the suit land has been peaceful, open and continuous. That Defendant is the administrator of his father's estate which comprise of 3 parcels of land namely West



- Bunyore/Embali/1026, West Bunyore/Embali/993 and West Bunyore/Embali/929 vide Vihiga PMC Succession Cause No 238 of 2020 in which the court has already ruled and given directions.
13. PW3 testified further that there are homes built on both West Bunyore/Embali/1081 and West Bunyore/Embali/1082. That the Plaintiffs parents among others were been buried on the suit land when they passed on in the presence of the Defendant. That the Plaintiffs have been tilling the land planting crops and trees. That the Defendant only collected the title to the suit land in October 2020 after the death of the Plaintiff's father which led to the placing of the caution on the register.
  14. That upon realizing that the Defendant had taken out Letters of Administration they filed objection in the Succession Cause which objection was ruled in their favour.
  15. That the Plaintiffs have been in continuous and open occupation and utilization of the suit land for a period exceeding 12 years, planted trees, maize, bananas, beans, nappier grass, groundnuts, potatoes and sugarcane. That they also have a home on the land.
  16. The Defendant testified and called 2 witnesses. DW1, the Defendant, relief on his witness statement dated April 19, 2022 as his evidence in chief. He stated that the Plaintiffs are children of his late step brother known as Ernest Nyangweso who died sometime in May 2020. That the Plaintiffs' father is the son of the 1st wife and he is the son of the 2<sup>nd</sup> wife of late Mzee Absalom Siku Amukhoye. That both of them were born and raised as a family by Mzee Absolom Siku Amukhoye on both land parcel number West Bunyore/Embali/1081 and West Bunyore/Embali/1082. That Mzee Absolom Siku was the beneficial owner of both parcels of land at that time before they were sub-divided.
  17. That in the year 1964 when the registration of land began, Mzee Absalom Siku Amukhoye sub-divided the land into two giving the one portion registered as West Bunyore/Embali/1081 to the first wife's son Ernest Nyangweso the father of the Plaintiffs and the other portion registered as West Bunyore/Embali/1082 to the Defendant as the son of the second wife.
  18. The Defendant stated that he has been cultivating the suit land till sometime when he was arrested and when he came back from jail in 1992, he found that the Plaintiffs had removed the beacons that were separating the suit land and parcel No 1081 making them to be one parcel of land. That the Plaintiffs trespassed onto his land. That he reported the trespass to the Council of elders and to the chief but the Plaintiffs have been adamant and continued with the trespass. That the Plaintiffs chased his mother from the suit land while he was away.
  19. The Defendant further stated that the Plaintiffs cannot claim adverse possession since they are the ones who destroyed the boundary between the two lands and trespassed on his land by extending a part of their home onto his suit land. He prayed that the suit be dismissed.
  20. DW1 produced exhibit namely certificate of official search for land parcel West Bunyore/Embali/1081 as D ex 1, a copy of title deed for the suit land as D ex 2(a) and a green card for the suit land as D ex 2(b), certificate of official search for the suit land as D ex 2(c), copy of map sheet No 9 as D ex 3, copy of Chief letter dated April 11, 2022 as D ex 4 and copy of Chief's letter dated July 12, 2021 as D ex 5.
  21. On Cross-examination, he stated that the Plaintiffs have their temporary house on the suit land. That when his mother died she was buried on land parcel No 993 and that he lives on land No 1026 which belonged to his mother. That he has never utilized the suit land since he left prison but before then he used to plant crops. That it was in 2020 that he discovered that the land was registered in his name. That he had never done any search on the land before 2020. He stated further that the Plaintiffs chased his mother from the land in 1987 and occupied the land. That the Plaintiffs have their houses on the suit land and are cultivating it. That there are 3 pieces of land given to his mother. That when the Plaintiffs entered the suit land by force, his mother moved to another land.



22. DW2 was Wellington Alfred Atolwa. He adopted the contents of his witness statement dated April 19, 2022 as his evidence. He stated that he is the 3<sup>rd</sup> son of Mzee Absalom Siku Amukhoye and a brother to Ernest Nyangweso Siku the father of the Plaintiffs. That Absalom gave Ernest Nyangweso land parcel No West Bunyore/Embali/1081 and the suit land he gave to the Defendant. That Absalom Siku caused the lands to be registered accordingly in the year 1964. That the wishes of their late father cannot be changed .
23. On cross-examination, DW2 stated that the Defendant's mother was removed peacefully by her husband Absalom Siku from the suit land to land Parcel No 993. That land parcel No. 993 is in the name of Absalom Siku. That Absalom Siku has never been registered as owner of the suit land. That the Defendant's mother was moved from the suit land to No 993 in the year 1964 during the land adjudication. That the Defendant has never built a house or utilized the suit land. That the Plaintiffs have used the suit land since 1964. That the Plaintiffs father used to use parcel No 1081 and he then settled the Plaintiffs on No 1082. That during registration there was a demarcation to mark the boundary but it is not there anymore.
24. DW3 was Edward Siku. He testified that the Plaintiffs and PW3 are his step sons. That both parcel No 1081 and 1082 belonged to his grandfather known as Amukhoye Oluoch Rao and when he died the land was taken over by his son Absalom Siku. That Ernest Nyangweso the father of the Plaintiffs was given parcel No 1081 while No 1082 was given to the Defendant. That there was a road that marked the boundary between the two parcels. That since the Defendant came back from prison, he tried to sort out the problem but it never worked. On cross examination, DW3 stated that his mother was cultivating the suit land till 1988. That the Defendant has never utilized the suit land. That the boundary between the two parcels of land was a footpath which was removed in the year 1992. That his mother stopped using the land in 1982 when she was removed by the Plaintiffs.

### Submissions

25. At the close of the evidence, the parties chose by consent to file written submissions on the case.
26. Written submissions dated July 6, 2022 were filed on behalf of the Plaintiffs by the firm of Oscar Wachilonga & Associates Advocates. Counsel submitted that the Plaintiffs proved that they have been in open, continuous and peaceful occupation of the suit land for a period exceeding 40 years. That the defence allegation that the Defendant inherited the suit land from his father is not supported by evidence because the suit land has never been registered in the name of the said father. That there is currently pending before the subordinate court a succession cause in which the Plaintiffs are seeking their father's share from their grandfather's estate. That the Defendant is barred by Section 7 of the Limitation of Actions Act from evicting the Plaintiffs from the land. Relying on Section 13 of the same Act, Counsel submitted that a right of action lies in favour of the Plaintiffs.
27. Written submissions dated July 12, 2022 were filed on behalf of the Defendant by the firm of Nyatundo and Company Advocates. Counsel framed two issues for determination in the matter as firstly; - Whether the Plaintiffs have *locus standi* to institute a suit on behalf of the deceased's (Ernest Siku's) estate who died on May 19, 2020 and secondly whether the Plaintiffs have proved title by adverse possession. That from the evidence, it was Ernest Siku, deceased who moved the Plaintiffs together, with their other 6 siblings to land parcel No West Bunyore/Imbali/1081 in 1971. That the late Ernest Siku being the beneficial owner, when he died the Plaintiffs had no option but to obtain Letters of Administration in respect of his estate. That the Plaintiffs did not produce any Letters of Administration to prove that they had capacity to file, institute or defend the suit. That they are required to do so under the provisions of Order 3 Rule 7 of the Civil Procedure Rules 2010. Counsel



submitted that in the circumstances, the Plaintiffs have no locus standi to institute the instant suit on behalf of their late father's estate. Counsel relied on the case of *Daniel Njuguna Mbugua vs Peter Kiarie Njuguna & 2 others* (2021) eKLR to demonstrate this submission.

28. On whether the Plaintiffs have proved title by adverse possession, Counsel relied on the Court of Appeal decision in *Mtana Lewa v Kabindi Ngala Mwagandi* (2015) eKLR and submitted that no claim of adverse possession can be made against a minor. That the Plaintiffs have not proved by way of evidence the time from when the period required for adverse possession to accrue started to run because in 1971 the Defendant was 13 years old whereas in 1973 he was 15 years old. Counsel relied on the case of *M'mbaoni M'thaara v James Mbaka* (2017) eKLR that since the Plaintiff's family used force against the mother of the Defendant their claim for adverse possession fails in toto. Counsel relied on the case of *Mtana Lewa* (Supra) where it was held that;-

“The essential prerequisite being that the possession of the adverse possessor is neither by force nor stealth nor under the licence of the owner”

29. On the claim by the Plaintiffs that the suit land together with parcel No 1081 was bought by their father, Counsel submitted that the Plaintiffs did not discharge the burden of proof of the same under sections 107, 108 and 109 of the *Evidence Act* as they failed to produce any land sale agreements.
30. Counsel further submitted that a claim of adverse possession cannot co-exist with a claim for a purchaser interest. That such a position renders the case frivolous and untenable. Counsel relied on the case of *Muchanga Investment Ltd v Safaris Limited (Africa) Ltd & 2 others* (2009) eKLR. That occupation with leave and license of an owner pursuant to a valid sale agreement does not translate to adverse possession. Counsel relied on the cases of *Waweru v Jane Njeri Rechu*, CA No 122 of 2011 (UR) and *Wambo v Njuguna* KLR 172.
31. Counsel submitted that the plaintiffs did not produce any documents or photos to convince the court that they were in actual utilization of the land.
32. Further that the Originating Summons was defective for noncompliance with the provisions of Order 1 Rule 13 (1) and (2) which require that where there are more than one Plaintiff one or more may be authorized to appear, plead or act for the rest. That such authority shall be in writing and signed by the other Plaintiffs. Counsel submitted that for failure to comply with the said provisions, the Originating Summons ought to be struck out. Counsel prayed that the suit be dismissed.

### Issues for Determination

33. From the pleadings filed, the evidence adduced and the submissions made, this court identifies the following as the issues for determination herein; -
- (a) Whether or not the Plaintiffs have locus standi to bring the suit.
  - (b) Whether or not the Originating Summons is defective for non-compliance with the provisions of order 1 Rule, 13(1) and (2) of the *Civil Procedure Rules, 2010*.
  - (c) Whether or not the Plaintiffs have had peaceful, open, continuous and uninterrupted possession and occupation of the suit land for a period of 12 years and therefore acquired title thereto by adverse possession.
  - (d) Whether or not the Plaintiffs are entitled to the relief sought
  - (e) Whether or not the Defendant's right and title to the suit land as the registered proprietor have been extinguished by operation of law.



- (f) What order to make on costs.

### Analysis and determination

34. Since the Originating Summons was deemed to be a plaint and the Reply thereto a defence, the Civil Procedure Rules governing judgements and decrees apply. Hence under Order 21 Rule 4 Civil Procedure Rules, 2010 this court is enjoined to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue.
35. The first issue is whether or not the Plaintiffs have a locus standi to bring the suit. The Plaintiffs pleaded in the Originating Summons that they claim the suit land as occupiers of the thereof. In the Supporting Affidavit, they deposed in paragraph 5 and 6 that they have had occupation of the suit land since 1973 peacefully and without interference. The Defendant submitted it was the Plaintiff's father one Ernest Siku who moved the Plaintiffs from the ancestral land to the suit land in the year 1971. That it was the said Ernest Siku who was the beneficial owner, hence when he passed on, the Plaintiffs had the Plaintiffs had no option but to obtain Letters of Administration. That without such letters of Administration, the Plaintiffs are in breach of the provisions of Order 3 Rule 7 of the Civil Procedure Rule 2010. That in the circumstances they have no *locus standi* to bring the suit on behalf of the estate of Erenst Siku deceased.
36. I have keenly read the pleadings. I appreciate and agree with the submissions by counsel for the Defendant that the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case as held in the case of Julian adoyo Ongunga vs Francis Keberenge Abano Migori Civil Appeal No 119 of 2015. It is also my view that it important that the court satisfies itself in a civil matter that the party before it has *locus standi* to bring the action, lest the court spend precious court time entertaining busy bodies. In the present case I find nothing to suggest that the Plaintiffs filed the suit on behalf of the estate of their late father. What I find is that the Plaintiffs filed and prosecuted the claim in their own capacity as occupiers who claim to have occupied the suit land for a period in excess of twelve years and are seeking relief based on the doctrine of adverse possession. In absence of evidence to the contrary. I find that the plaintiffs have capacity and *locus standi* to bring the suit as filed.
37. The 2<sup>nd</sup> issue is whether or not the Originating Summons is defective for non-compliance with the with the provisions of Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules 2010. Order 1 Rule 13 (1) and 2 of the Civil Procedure Rules provides that; -

“(1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any pother of them to appear, plead or act for such other in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

The Defendants submitted that the Plaintiffs did not comply with the mandatory requirement in the above quoted provision of the law and urged the court to strike out the Originating Summons.

38. I have read the Plaintiffs' pleadings filed herein. Indeed, there are more Plaintiffs than one in the case. In paragraph 2 of the Supporting Affidavit the 1<sup>st</sup> Plaintiff Madison Amukhoye Nyangweso deposes



that he is authorized by one Leonard Munala Nyagweso who is his co-Applicant and younger brother to swear the Affidavit on his own behalf and on behalf of the said Leonard Munale Nyangweso. There is no authority in writing filed in terms of Order 1 Rule 13 (2)

I have also keenly read the provisions of Order 1 Rule 13 *Civil Procedure Rules 2020*. The purpose of the said provision is to ensure that no person is made a party to a suit without their knowledge and permission. Though couched in mandatory terms, in the circumstances of this case and in serving substantive justice, noncompliance with the said rule does not render the Originating Summons invalid. This is because the said Leonard Munala Nyagweso attended court, testified and adopted the evidence of the 1<sup>st</sup> Plaintiff as his own evidence. This confirmed to the court that the party on whose behalf the Affidavit was sworn had knowledge of the existence of the suit and consented to the same. The purpose of the rule was thus achieved. (see *Grace Ndegwa & others vs Attorney General* [2004] eKLR)

39. The third issue is whether or not the Plaintiffs have had peaceful open continuous and uninterrupted possession of the suit land for a period of twelve years. The Plaintiffs deposed, *inter alia*, in paragraphs 5, 6 and 7 of the Supporting Affidavit that they have been on the suit land since 1973 when they were taken there by their father to date. That their parents died and were buried thereon. They adduced evidence that during the said period, they have utilized the land to cultivate and build houses. Counsel for the Plaintiffs submitted that the plaintiffs proved that they entered onto the suit land and have been in peaceful and continuous occupation for a period exceeding 40 years.
40. The Defendant, on his part stated that he was jailed in the year 1987 and that when he came out in 1992 he found that his father had died and that the Plaintiffs had taken over the suit land, destroyed the boundary and entered. That the Plaintiffs have their temporary house on the land. That since he left prison in 1992 he has not utilized the land. That he lives on land number 1026 which belonged to his mother.
41. Counsel for the Defendant submitted that the essential prerequisites are that the adverse possession should be neither by force or stealth. That no claim of adverse possession can be made against a minor. That the Plaintiffs have not told the court when the period of adverse possession began to run; whether it was in 1973 as stated in the Originating Summons or 1971 as stated in evidence (the 1<sup>st</sup> Plaintiffs' statement). Counsel further submitted that the Defendant was cultivating the said land until sometime when he was arrested and that during his imprisonment his mother continued to cultivate the suit land until sometime in 1986 when the Plaintiff/Applicant family chased her away. Counsel submitted that the occupation was not peaceful. That the Plaintiffs family used force to take possession of the suit land and hence the claim for adverse possession fails.
42. On how the Defendant's mother left the suit land there is on record conflicting evidence by the Defence. While the Defendant testified that the mother was chased by the plaintiffs from the land in or about the year 1986, DW2 stated that the mother of the Defendant was moved peacefully by her husband one Absalom Siku to land parcel No 993 in the year 1964 during the land adjudication and registration.
43. 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.



44. The relevant law on the doctrine is found *inter alia* in Section 7, 13 and 38 of the [Limitation of Actions Act](#). 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.”

Section 13 of the [Limitation of Actions Act](#) 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.

The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the [Limitation of Actions Act](#) 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.

And Order 37 [Civil Procedure Rules](#) 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.”

Article 162(2) of the [Constitution of Kenya 2010](#), Section 13 of the [Environment and Land Court Act](#) and Section 38 of the [Limitation of actions Act](#) confer jurisdiction on this court to handle claims premised on adverse possession.

45. Section 7 of the [Land Act](#), recognizes adverse possession as one of the methods of acquisition of title to land.



46. In Kisumu Civil Appeal No 27 of 2013, *Samuel Kibamba v Mary Mbaisi* (2015) eKLR the Court of Appeal held that;

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

In *Jandu V Kirplal & Another* (1975) EA 225, the court held that

“...to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity in publicity and in extent to show that it is adverse to the owner. It must be actual visible, exclusion, open and notorious”.

47. I have carefully analyzed the evidence on record. The suit land was registered in the name of the Defendant on 30<sup>th</sup> October 1964 as a first registration of per the copy of Register produced as exhibit. The Plaintiffs began occupation of the suit land in 1973 when they were taken there by their father one Ernest Siku. They have lived there to date. On the basis of the evidence on record I find that the Plaintiffs have had actual, open, exclusive and notorious occupation of the suit land for a period in excess of 12 years. I find that their activities on the suit land including building of houses, cultivating and exclusive occupation are adverse to the title of the Defendant.

48. The forth issue is whether the Defendant’s title has been extinguished by operation of law. The Defendant is the registered owner of the suit land. Under the provisions of section 7 of the Limitation of Action Act, the registered owner loses his right to recover the land at the expiry of twelve years from the date the cause of action arose. Under section 13 of the same Act the person in adverse possession acquires title as the title of the registered owner is extinguished.

The evidence on record shows that the Plaintiffs have had exclusive occupation of the land since 1973. That the Defendant has never used the land. His mother was moved out of the land by his father in 1964.

49. The law expected the Defendant to take steps to assert his title as the registered owner and stop the trespass. He did not do so within the stipulated time. In the case of Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura; civil Appeal no.20 of 1993 quoted in *Presbyterian Church of East Africa (Uthiru Church) & another vs Kiboro & 3 Others* (Civil Appeal 303 of 2018[2022]KECA 49 (KLR) (Civ) (4 February 2022) The Court of Appeal held that:

“time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land...”

None of these actions took place in the present case. The Defendant did not assert his rights and the Plaintiffs as the adverse possessors have not admitted the Defendant’s rights.

The Defendant claimed that when he left prison and found the Plaintiffs had taken over possession of the suit land he reported them to the Council of elders. Firstly, there was no evidence to prove this secondly, this was in 1992 about 30 years ago and the act of reporting the trespass to the elders if at all, did not stop time from running in favour of the adverse possessors and against the Defendant’s title.



The Defendant also produced 2 letters as exhibits D ex 4 and D ex 5 which he claimed were written by the Chief. I have read the letters. D ex 4 was written on April 11, 2022 in the pendency of this suit and D ex 5 is an invitation for a meeting whose subject matter is not disclosed. Assertion of the registered owner's title occurs when the owner takes legal proceedings or makes an effective entry into the land. (see *Gitbu v Ndeete* [1984] e KLR 776 )

50. The last issue is whether the Plaintiffs are entitled to their claim. On the basis of the findings already made herein, I find that the plaintiffs are entitled to their claim.
51. Under section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter, or issue shall follow the event. However, in the circumstances of this case where parties are closely related, each party may bear its own costs.

### **Conclusion**

52. This court has determined firstly that the Plaintiff have locus standi to bring the suit, that failure to comply with order 1 rule 13(1) and (2) did not render the Originating Summons defective, that the plaintiffs have had actual, open and continuous occupation of it to the exclusion of the registered owner for a period of more than 12 years and that Defendant registered owner's title to the suit land has been extinguished by operation of the law.
53. On the basis of the determinations aforementioned. I find that the Plaintiffs have proved their case on a balance of probabilities. I enter judgement in favour of the Plaintiffs jointly and severally for:
  - i. A declaration that the Plaintiffs have acquired title to the suit land by adverse possession.
  - ii. A declaration that the Defendant's rights and title to the suit land as registered owner have been extinguished by operation of the law.
  - iii. An order for the Defendant to transfer the suit land forthwith to the Plaintiffs jointly in default of which the Deputy Registrar of this court to sign all documents necessary so as to effect transfer and registration of the suit land in favour of the Plaintiff.
  - iv. Each party to bear its own costs.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Neville—Court Assistant

Plaintiffs present in person.

Rabote Advocate for the Defendant.

**E. ASATI,**

**JUDGE.**

