



Gami Quarries Limited & another v Mohamed & 3 others (Environment & Land Case 255 of 2018) [2022] KEELC 15316 (KLR) (22 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 255 OF 2018
LL NAIKUNI, J
NOVEMBER 22, 2022**

BETWEEN

GAMI QUARRIES LIMITED 1ST PLAINTIFF

RAMJI DHANJI GAMI 2ND PLAINTIFF

AND

MUSA FAKIR MOHAMED 1ST DEFENDANT

SALHAN RAHEMTULLA 2ND DEFENDANT

SAADA HYDER SALIM 3RD DEFENDANT

AZIZA HYDER SALIM 4TH DEFENDANT

JUDGMENT

I. Preliminaries.

1. This Judgement pertains to a case, initially instituted by the 1st and 2nd Plaintiffs vide a Plaint dated March 24, 2009. Primarily, it was filed in court on March 25, 2009 against the 1st to the 4th Defendants herein. From the time of filing the case, it is now close to thirteen (13) years old while still pending in this Honorable Court. Initially, it had been filed before the High Court but subsequently with the inception of this Court and the promulgation the *Constitution* of Kenya, 2010, it was transferred to this Court on October 17, 2018. Later on, in the year 2021 the Plaintiffs with the leave of Court amended their Plaint. Based on the initial filed Plaint, the 1st and 2nd Plaintiffs sought for the following reliefs:-
 - a. Kshs 776,034.00;
 - b. Interest on (a) above
 - c. Vacant possession of the premises known as Plot No 3/2/MN Mkomani



- d. Costs of this suit with interest
- e. Any other relief as the court may deem fit and just to grant.

While from the Amended Plaintiff, the Plaintiffs sought for the following reliefs:-

- a. A declaration that the distraining of the 1st Plaintiff's Motor Vehicle Registration Numbers xxxx and xxxx and other chattel assets on the suit premises for recovery of the alleged arrears of rent claimed by the Defendants from the 2nd Plaintiff was illegal and an abuse of the due process of the law.
 - b. An injunction to restrain the Defendants whether by themselves, their servants, employees of agents or auctioneers of however else from continuing with or pursuing the distress wrongfully and illegally levied on March 12, 2009 (or from levying a further or other distress in the matter_ and/or from interfering with the Plaintiff's quiet possession of the suit premises situate on Plot No 10947 Section MN/I/Mkomani.
 - c. A declaration that the Plaintiff is entitled to the ownership of the suit Plot known as Plot No parcel No Sub - division 10947 section I Mainland North by the Doctrine of Adverse Possession as the Defendant's title as alleged or any if at all to the suit property known as Plot No. Parcel No Sub - Division 10947 Section I Mainland North has been extinguished by operations of law and that the Plaintiff be registered owner thereof under Section 38 Cap 22 and Doctrine of adverse possession in place of the Defendants.
 - d. A declaration that the Defendants Plot Parcel No Sub-Division 10947 Section I Mainland North was held in trust for the Plaintiff who had acquired the same by way of adverse possession.
 - e. Costs of and incidental to this suit.
 - f. Any other relief that this honorable Court may deem fit to grant.
2. Upon being served with Summons to Enter appearance, on April 15, 2009 1st to the 4th Defendants filed a Defence and Counter Claim. Subsequently, on February 27, 2007 they filed a Further Amended Defence and a Counterclaim. The main bone of contention was that the Defendants as the legal owners to all that parcel of land known as Plot No Sub - Division 10947 Section I Mainland North, Mkomani (Hereinafter referred to as 'The Suit Property) and thus its Land Lord levied distress upon the goods of the Plaintiffs claiming payment of outstanding rent arrears.
3. As a reaction, the Plaintiffs being agitated and holding that they were invited into the land by one Aisha Binti Rahamani to carry out business on the land and hence not tenants to be levied distress on allegations of an outstanding rent ostensibly owed to the Defendants instituted this suit seeking injunctive orders restraining any further actions of omission or commission by the Defendants alleging there was no Land Lord – Tenants relationship between them. The Plaintiffs also claimed to have acquired title by way of land Adverse Possession from the period they occupied and used the suit land. That is the main substratum of the case.

II. The 1st & 2nd Plaintiff's Case.

4. The hearing of the 1st and 2nd Plaintiffs' case commenced on March 15, 2022. The Plaintiffs summoned only one witness – PW – 1. He testified as follows:-



Examination in Chief of PW - 1 by Mr Muganda Advocate

5. The PW – 1, Mr Gami Ramji Dhanji Moorji was sworn and testified in the English language. He said that he held a Foreigner’s Certificate bearing numbers xxxx. It was issued on April 3, 2020.

He was a businessman dealing in matters of publishing and transport. He was the 2nd Plaintiff herein. The 1st Plaintiff was a company incorporated as such. He had sued the Defendants as they were always disturbing him time and again.

He was seeking to restrain the Defendants from levying any distress of rent of the suit land. He informed Court that the suit land was given to him by the great grandparents of the owner of the suit land, one Aisha Binti Rahamani (now deceased). He therefore claimed the land to be his own. The land was given to him only verbally. He admitted that he was no longer living on the land. According to him, he never vacated from the suit land as he only went to the United Kingdom for medical treatment. They were removed from the suit land by M/s Azziza through an eviction order from another suit. Asha’s brother was working with Musa’s brother. PW – 1 claimed that the 1st Defendant, Mohamed introduced the 2nd Plaintiff to the family many years after working for them. He was given the premises for purposes of carrying out manufacturing, business and farming. PW – 1 stated that after being given the land they were not supposed to be paying any rent.

He claimed to have known Ms Aziza, the 4th Defendant. They were brothers and sisters. She was not a landlady. He had never seen any title deed as Aziza had kept it. The owner of the land was Mama Aisha, Mohamed and Samza as far as he was concerned. He was never notified of the change of ownership. PW – 1 identified a document shown by the Defendants’ Counsel. It was the original Certificate of title. The owner as shown on it under Entry No 3 was Shamza Rahamani. While referring on the title, PW – 1 stated that the Entry No 2 to the title deed indicated the suit land was in the names of Saada Hyder Salim, Aziza Hyder Salim and Hilmy Salim. He denied the rest of the Defendants being the owners of the land.

6. PW – 1 testified that he had never seen any tenancy or lease agreement for the suit land. He had never paid rent to the suit land. He prayed to be granted the suit land. He urged for it to be reinstated to the Plaintiffs. The Plaintiffs were also seeking for injunctive orders restraining the Defendants from levying any distress of rent by the Defendants and have it declared as illegal and unlawful. They also made a claim for title by way of Land Adverse possession to the suit land. That is it.

Cross Examination of PW - 1 by M/s Natasha Ali:-

7. PW – 1 stated that he was given the land by Mama Asha. She was related to the Defendants as she was their grandmother. He admitted not having the title deed for the suit land. He stated that, the 1st Defendant, Mr Mohamed was deceased. He informed Court having been removed from the suit property two months earlier. His Advocate on record went to Court to lodge a complaint and filed a suit. The high court told directed that he stays on the suit land.

While being referred to the original Certificate of title deed, PW – 1 confirmed that he saw the names of Shamza Rahamani on it. He also acknowledged that from the title the land was transferred as per the Entries under Numbers 2nd and 3rd. He informed Court that his called Manoj Rami would be the Manager of the business on the suit land. He would be running and doing all the day to day affairs of the business. Everything he did was within his knowledge. He was referred to the MPESA Statement of the month of March 2017. He confirmed the entries showing funds send from Mr. Manoj to the 4th Defendant on diverse dates as rent. These were a sum of Kenya Shillings Twenty Thousand (Kshs



20,000/=); On February 17, 2017, Payments made on September 19, 2017 by Manoj for a sum of Kenya Shillings Twenty Thousand (Kshs 20,000/=).

He could not remember the Plot number but he testified that it was No 3 by then. PW – 1 reiterated that he brought the case to court as the Defendants were always disturbing him a lot. That was the close of the Plaintiff's case.

III. The 1st, 2nd, 3rd & 4th Defendants' Case.

8. The 1st, 2nd, 3rd and 4th Defendants case commenced on March 15, 2022. The Defendants summoned only DW – 1 who testified in chief and was cross examined accordingly.

Examination in Chief of DW – 1 – by M/s Natasha Ali Advocate.

9. DW – 1 testified and sworn in the English language. He was called Mr Aziza Hyder Salim Idd. He was a holder of the national identity card bearing the national identity card numbers No xxxx. His date of Birth was July 10, 1957. He recorded his witness statement on December 6, 2021. He adopted as part of the evidence for the Defendants. He also filed a here is a list of documents dated December 6, 2021. The List was admitted without any objection raised. The documents were marked as Defendant Exhibit numbers 1 to 5. That was all.

Cross Examination of DW - 1 by Mr Muganda Advocate

10. DW - 1 emphasized that the Plaintiffs were tenants. He insisted that there existed an implied tenancy agreement by all the parties. These was in form of the numerous SafariCom Short Messages Services written texts exchanged between Mr Ramji and himself. He admitted that from the texts there was no figure mentioned. The text were for the period of the year 2010. There were no texts from before the month and year of May, 2020. That is all.

Re - Examination: -

11. He admitted not having any express duly executed tenancy agreement. He was rented the premises by his father. The suit land belonged to his grandmother and not the Plaintiffs as they claimed. The arrangement was for the Plaintiffs would be paying rent on monthly basis but they stopped paying suddenly. That was all.

IV. The Submissions.

12. On March 15, 2022 upon the closure of the cases for both the 1st and 2nd Plaintiffs and the 1st to the 4th Defendants herein, the Honorable Court directed parties to file and exchange their written submissions within 21 days. Pursuant to that, all parties fully complied accordingly. Subsequently, the Honorable Court reserved a date for the delivery of Judgement.

A. The Written Submissions by the 1st and 2nd Plaintiffs

13. On April 6, 2022, the Learned Counsels for the 1st and 2nd Plaintiffs herein the Law firm of Messrs Ondinko & Company Advocates filed their written submissions dated April, 2022. Mr Muganda Advocate for the 1st and 2nd Plaintiffs submitted based on the following three (3) broad issues. Firstly, the Counsel commenced on the issue as to whether the Plaintiffs' were entitled to the declaratory and injunctive orders on to restrain Defendants from levying rent as pleaded by the Plaintiffs and they were entitled to the reliefs sought. The Counsel contended that the Defendant had failed to prove that there existed a tenancy relationship between the Plaintiff and Defendants. Indeed, he opined that the 4th Defendant – Azziza in her evidence only produced screen shots of the text messages as proof of a



tenancy relationship between her and the Plaintiffs which in law or circumstantial was not proof of a tenancy. To demonstrate on this point, the Counsel held:-

- a. The 4th Defendant admitted the Safaricom SMS texts never defined the monthly rent payable;
 - b. The 4th Defendant also admitted that the SafariCom SMS texts never showed that there were a contract between her and the Plaintiffs under the law of Contract as there was no offer and acceptance between the parties to the suit herein and a consideration paid to the infer even remotely an oral acceptance of tenancy and rent to be paid.
 - c. The 4th Defendant never produced proof of tenancy record and payments for any specific period to correctly rebut the Plaintiffs' claim that the Plaintiffs were not tenants.
14. Further, the Counsel emphasized that there was no tenancy agreement between the parties as the provision of Section 58 of the Land Act No 6 of 2012 read together with the provision of Section 4 of the Registration of Documents Act required any lease of more than two (2) years to be in writing and duly registered. In this case there was none. Besides, the Plaintiffs had lived on the suit land more than thirty (30) years. For this reasons, therefore, the Counsel reiterated that since the Defendants were not tenants onto the suit premises, the Plaintiffs were entitled to the orders they sought from their filed pleadings.
15. The Counsel submitted that the 2nd Plaintiff adduced evidence to the effect that he entered the suit premises on an open offer from the matriarch of the Defendants who was then deceased – Aisha Binti Rahamani. The Counsel held that this fact was never disputed by the 4th Defendant who on her defence and cross examination conceded that she knew the 2nd Plaintiff was given the land by her parents then. He held that by then, the 4th Defendant was not present or privy to the transaction or arrangement that got the Plaintiffs to the suit land.
16. Additionally, the Counsel submitted that the 2nd Plaintiff had lived in the suit Plot since the year 1984 to date and during this period the Defendants had never offered him any rent or lease agreement for the suit property either as an individual or corporate entity. He stated that the 1st Plaintiff was a company while the 2nd Plaintiff was a person operating business at the suit property. They underscored the fact that they had never had any tenancy relationship with the Defendants for them to levy distress on them or their goods on allegations of there being any outstanding rent areas.
17. Secondly, the Counsel submitted on whether the occupation of the Suit property by the Plaintiffs for that long period had any averse to the suit land. The Counsel averred that the 2nd Plaintiff gained occupation and lived onto the suit property from the year 1984. He stated that he incorporated the 1st Plaintiff in the year 1996. This was a period of over thirty (30) years past the minimum statutory period of 12 years required for establishing a claim for Land adverse possession. To support his claim, the Counsel cited the cases of 'Wambugu – Versus – Njuguna, (1983) eKLR, 172 and 'Kasuve – Versus – Mwaani Investments Limited & 4 others I KLR 184. and the provisions of Sections 37 & 38 of the Limitation of Actions Act Cap 22 and Land Registration Act No 6 of 2012; It was the Counsel's submission that the 1st and 2nd Plaintiffs produced a valuation report by a valuation company trading in the name and style of Dominion Valuers Limited hence entitled to be making a claim for Land Adverse possession was proved. The Counsel averred that despite the 4th Defendant evicting the Plaintiffs unlawfully and demolishing their house after seeking orders in another duplicate suit - ELC E14 of 2021. This was done despite there being a Court orders dated December 20, 2020 barring her from doing so. The Counsel averred that the 4th Defendant also admitted that the Plaintiffs had lived on the suit property from the year 1980. Finally, the Counsel submitted that having come to Court on the malfeasance of the Defendants, the Plaintiffs were entitled to costs as provided for in Law.



B. The Written Submissions by the 1st, 2nd, 3rd & 4th Defendants.

18. On May 13, 2022 the Learned Counsel for the 1st, 2nd, 3rd and 4th Defendants, the Law firm of Messrs NA Ali & Company Advocates filed their written submissions dated May 12, 2022. M/s Natasha Ali Advocate provided the background of this case by stating that the Plaintiffs filed this suit initially vide a Plaint dated March 24, 2009 whereby the Plaintiffs' sought for distress levied against the Plaintiffs' goods by the Defendants to be declared as unlawful. That the Plaintiffs also sought for injunction to restrain the Defendants from proceeding on with the levy of distress against the Plaintiffs and from interfering with the Plaintiffs quiet and peaceful possession of the suit land.
19. According to the Counsel, from the filed pleadings it appeared the Plaintiffs was basically pre – occupied by the facts that they were not the tenants for the Defendants and that the Defendants never had any basis to levy distress against them. She averred that the Defendants had commenced the process of levying distress on the March 12, 2009. The Counsel recounted the whole evidence adduced by both the 1st and 2nd Plaintiffs and the 1st, 2nd, 3rd and 4th Defendants herein to detail.

The Counsel submitted that there was no doubt that the suit property was legally and absolutely owned by the 4th Defendant, Hilmy Hyder Salim and Saada Hyder Salim and indeed the Certificate of Title was in their names. Juxtapose, the Counsel argued that the 1st and 2nd Plaintiffs were tenants on the land whereon they operated a quarry. She opined that they had always been irregular in payment of rent which led to the Defendants levying distress in order to recover the rent arrears. However, the Plaintiffs received restraining orders as result of which the distress never took place. The Counsel argued the Plaintiffs had been misusing the obtained restraining Court order to the Defendants prejudice and leading to the quest for vacation of the said orders.

20. The Counsel submitted that based on the admission by PW – 1 that the Plaintiffs were no longer on the land having been evicted, the Land Lord – tenant relationship between the Plaintiffs and the Defendants had already been severed. Thus, the substratum of the case no longer existed. The suit was no longer live. She stressed that there would be no practical value could be derived from the suit herein as the substratum of the case had now changed. Moreover, the distress that Plaintiff aimed to be curbed in the year 2009, which was 13 years ago had since passed. It was trite law that this Court Could not give orders in vain. The Counsel held that by this ground alone, it was enough to dismiss this suit.
21. However, the Counsel argued that should the Court be inclined to determine the suit on its merit, then she submitted as follows. The 1st and 2nd Plaintiffs suit was basically a complaint by the Plaintiffs that the Defendants were not entitled to levy distress as there existed no tenancy or lease agreement and therefore no Land Lord – tenancy agreement between the 1st and 2nd Plaintiffs and the Defendants and hence could not liable to pay rent. The Plaintiffs argued that the Defendants were not the legal owners of the land. On the contrary, the Plaintiffs contend that they were given the land by Aisha Binti Rahami. For this, the Counsel relied on the provision of Section 107 (1) of the Evidence Act, Cap 80 whereby the Plaintiffs' failed to prove nor show nexus or prove in terms of ownership of suit property. The Counsel held that they failed to show proof of having been invited or allowed or given the suit land by the one person they referred to as Aisha Binti Rahamani as provided for under the provision of Section 26 (1) of The Land Registration Act. They could not show any goodwill paid for the suit land. The Counsel submitted that on the other hand the Defendants were able to demonstrate by showing to Court that the initial owner was Shamza Rahamani had transferred the land the current owners. The names of Aisha Binti Rahamani never featured at all from the face of the Certificate of Title deed to the suit land. Instead, they were the legal and registered owners to the suit land. They held a good title deed and hence indefeasible rights, title and interest on the suit land.



22. Furthermore, the Counsel argued that the Plaintiffs failed to show how they got into the land apart from being tenants to it. In any case, the 4th Defendant produced evidence and which were admitted in terms of the Safaricom Short Messages Services texts and the Mpesa statements showing that Plaintiff used to pay rent to the Defendants through his son, Mr Manoj Rami. These texts were produced as Defendants' exhibits.

She contended that it was a clear indication they were doing as they were tenants. There was no other explanation or reason given by the Plaintiffs for making these payments to the Defendants.

23. Further, the Counsel submitted that the 1st and 2nd Plaintiffs from their submissions raised other issues that were not pleaded. She argued that it was trite law that parties were bound by their own pleadings. To buttress on that point, the Counsel relied on the case of *'Independent Electoral and Boundaries Commission & Another – Versus - Stephen Mutinda Mule & 3 Others [2014]* Where the Court held:-

' It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded'

24. Based on the foregoing, the Counsel opined that the Court Could not determine issues which were not pleaded. According to her, the only issue to be pleaded was regarding levying of distress. The Counsel urged Court to find that the suit had no merit and hence should be dismissed with Costs.

V. The Issues For Determination.

25. I have carefully assessed the filed pleadings, the oral and documentary evidence adduced by the summoned witnesses, the written submissions by both the 1st and 2nd Plaintiffs and 1st, 2nd, 3rd and 4th Defendants herein, the provisions of the *Constitution* of Kenya, 2010 and the Statutes. In order to arrive at an informed, Just, Equitable, reasonable and fair Judgement in the matter, the Honorable Court has condensed the subject matter into the following six (6) salient issues for its determination. These are:-

- a. Whether from the filed pleadings and the proceedings conducted by this Honorable Court the Ownership, Use and Occupation – indefeasible rights, title and interest to the suit property was established.
- b. Whether there should be made any declaration on the legality of the distress levied against the Plaintiffs goods by the Defendants vide the Plaint dated March 24, 2009 and Amended Plaint of October 25, 2021.
- c. Whether the 1st and 2nd Plaintiffs are entitled to be granted permanent injunction orders sought vide the Plaint dated March 24, 2009 and Amended Plaint of October 25, 2021 restraining the Defendants from levying any against the Plaintiffs and from interfering with the Plaintiffs quiet and peaceful possession of Plot Number, 10947 Section 1 MN/ Mkomani.
- d. Whether the 1st and 2nd Plaintiffs are entitled to the claim of a title by way of Land Adverse Possession as provided for under the provisions of Section 38 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
- e. Whether the parties herein are entitled to the reliefs sought.
- f. Who should bear the costs of this suit.



VI. Analysis And Determination.

Issue No a). Whether from the filed pleadings and the proceedings held by this Honorable Court the Ownership, Use and Occupation – indefeasible rights, title and interest to the suit property was established.

Brief facts.

26. Before embarking on the analysis of the framed issues, the Honorable Court feels it imperative to provide a summarized version of the facts to this case. From the filed pleadings, it is indicative that the Plaintiffs filed this suit vide a Plaint dated March 24, 2009. They sought for injunctive orders to restrain the Defendants from levying any distress against their goods which included two motor vehicles registration numbers xxxx and xxxx and other goods on allegations of non payment or being in default of outstanding rents for the use of the suit land. They urged Court to declare the actions by the Defendants as unlawful. The Plaintiffs also sought for injunctive orders to restrain the Defendants from interfering with their quiet and peaceful possession of the suit land. The Plaintiff categorically denied ever being the tenants of the Defendants as there had never been any tenancy agreement between them and the Plaintiff as the Land Lord as was being implied by the Defendant. Indeed, the Plaintiff claimed to have been in occupation and used the suit property having been invited and/or allowed the same by Aisha Binti Rahmani for over thirty years (30) and therefore were claiming the title to the suit land by way of Land Adverse Possession in accordance with the provision of the law.
27. Upon being served, the Defendants filed both a Defence and Counter Claim. They claimed being the legal registered owners to the suit property. Indeed to support this assertion, they produced an original Certificate of title as 'prima facie' conclusive evidence with the 4th Defendant, Hilmy Hyder Salim and Saada Hyder Salim indicated as the legal and absolute owners to the suit land. According to the Defendants, the Plaintiffs entered into the suit land as tenants and one of the sons of the 2nd Plaintiff, called Mr Manoj Gami, who had been the manager of the business for the Plaintiff, would be exchanging long messages through the Safaricom Short Messages Services (SMS) means and remitting payments through services known as MPesa it is assumed they were for that purposes. Unfortunately, they started defaulting in payments of the rent and had a substantial outstanding rental arrears of a sum of Kenya Shillings Seven Seventy Six Thousand Thirty Four Hundred (Kshs 776,034.00).
28. Through a Court order from another suit – CMCC ELC No E14 of 2021, the 1st and 2nd Plaintiffs were eventually legally evicted and were no longer in occupation of the suit premises. According to the Defendants, the suit was basically to levy distress against the Plaintiffs for the settlement of the outstanding arrears. Actually, perhaps that may have been the reason that in the course of time of this proceedings, on November 4, 2021 the Defendants saw it fit and suitable to withdraw the filed Counter Claim to the suit. That is adequate on the facts of the case. On October 25, 2021 the Plaintiff filed a Further Amended Plaint and reply to Defence and Counter Claim. The 1st and 2nd Plaintiffs profusely denied ever owing any rent arrears and thus disrepute any basis for levying distress on them. The Defendants urged Court for the suit to be dismissed and Judgment entered in favour of the Defendants for the sum of Kenya Shillings Five Hundred Thousand (Kshs 500,000/=) plus costs and interest.
29. On October 25, 2021, the Plaintiffs filed a Further Amended Plaint. They stated that at all material times to the suit, the 2nd Plaintiff was invited into the suit land by one Aisha Binti Rahmani in the year 1984. In the year 1996, the 2nd Plaintiff registered the 1st Plaintiff and had since lived adversely on the suit land. It is for this reason that he was claiming the suit land through the Doctrine of Land Adverse Possession.



30. The Plaintiffs held that they had never executed any lease agreement between themselves and the Defendants herein and that there existed no Tenant – Landlord relationship between the parties. Therefore, the Defendants had no rent claim against the Plaintiffs. On November 4, 2021 for unclear reasons, the 1st, 2nd, 3rd and 4th Defendants through a Notice of Withdrawal dated November 4, 2021 and filed on the same date decided to withdraw the filed Counter claim. That is adequate on facts of the case.
31. Now turning to the issues for the analysis under this sub – heading. From the very onset, the Honorable Court wishes to point out that the Land legal system in Kenya. All said and done, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the Land Act No 6 of 2012 provides the said methods as follows:

S. 7 Title to land may be acquired through:-

- i. Allocations;
 - ii. Land Adjudication process;
 - iii. Compulsory acquisition;
 - iv. Prescription;
 - v. Settlement programs;
 - vi. Transmissions;
 - vii. Transfers;
 - viii. Long term leases exceeding Twenty one years created out private land; or
 - ix. Any other manner prescribed in the Act of Parliament.
38. In Kenya, the effect of the Registration of Lands is founded in the provisions of Section 24 of 'The Land Registration Act' which provides as follows:-

' Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;

To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the 'prima facie' evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of 'The Land Registration Act' No 3 of 2012 provides as follows:-

' The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in



this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever.'

39. This fact is strengthened by the following decisions - '[ELC \(Nku\) No 272 of 2015 \(OS\) – Masek Ole Timukoi & 3 others – Versus- Kenya Grain Growers Ltd & 2 others](#)' and '[ELC \(Chuka\) No 110 of 2017 – M'Mbaoni M'Thaara – Versus- James Mbaka](#)'. And in '[Civil Appeal 60 of 1992 – 'Dr Joseph MK Arap Ngok – Versus- Justice Moiyo Ole Keiwua'](#)' where courts has held that:-

'It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.'

In order for this Honorable Court to effectively deal with the afore stated three (3) issues, I wish to cite the provisions of Section 26 (1) of the [Land Registration Act](#) Verbatim:-

' (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.'

In the case of '[Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No 2 of 2016 \(2018\) eKLR](#)' - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery un procedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of [Land Registration Act](#), the Provisions of Section 80 (1) & (2) of [Land Registration Act](#) for the cancellation and rectification of the title comes to play – '[Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others' ELC \(Kjd\) No 204 of 2017.](#)'

40. In the instant case, it is not disputed that the 4th Defendant, Hilmy Hyder Salim and Saada Hyder Salim acquired the suit land from a transfer from Shamsa Rahamani, the initial owner as per July 16, 1996, in the year December 19, 2003. That is well captured from the Entries Nos 1, 2 and 3 of the certificate of Title deed. Therefore, the suit land is legally and absolutely registered in their names from the Certificate of title deed produced which vests the indefeasible rights, interest and title to them. The 1st and 2nd Plaintiffs claim that sometimes thirty (30) years back, they were invited and allowed to enter into the suit land by the then legally registered owner of the suit land, Aisha Binti Rahmani. To them then they were entitled to the title of the land through Land Adverse possession. Categorically, the Plaintiffs the existence of any land Lord – Tenants relationship with the Defendants for them to have had any justifiable reason and/or good reason for levying distress onto their properties on the grounds of the accumulated outstanding rental arrears from the suit land.
41. From the filed pleadings and the evidence adduced particularly the Certificate of Title deed under the Registered Titles Act, Cap 281 which was the Defendant's Exhibit Numbers 1 to 6 the title was owned by Shamsa Rahamani by July 16, 1999. Under entry No 1, 2 and 3 the land was on December 9, 2003



transferred to the 4th Defendant, Hilmy Hyder Salim and Saada Hyder Salim. On February 7, 2005 they obtained Grand Letters of Administration for the estate of the late Shamsa Rahamani. It is still not clear who this Aisha Binti Rahamani was in the whole of this transaction. Therefore, legally speaking the land belongs to them. The 1st and 2nd Plaintiffs if at all were in occupation of the suit land from the permission of the deceased who was then the legal registered owner. Today, they are no longer in occupation of the suit land. For these reasons, this Court fully concurs with the arguments advanced by the Learned Counsel for the Defendants by the fact that the Plaintiffs were no longer in occupation or using the suit land, then the initial substratum of the case filed by the Plaintiffs had drastically changed. Indeed, the Court now appreciates what led the Defendants to taking such a courageous decision to file a notice of the withdrawal of the Counter Claim dated November 4, 2021. Ideally, this would be perceived to be such a risky step to take with severe effect to their case. The Court confirms that the intent and purpose by the Plaintiffs from their filed suit was already overtaken by events.

Issue No b). Whether there should be made any declaration on the legality of the distress levied against the Plaintiffs goods by the Defendants vide the Complaint dated March 24, 2009 and Amended Complaint of October 25, 2021.

42. Now turning to the issues as stated out under this sub – heading. According to the Counsel for the Plaintiffs, they categorically refuted being the tenants to the Defendants. To them, they were the beneficial owners of the suit land having been invited onto it by the initial registered owner. They were in occupation and use of the land for over thirty (30) years. They argued there was no legal reason why the Defendants were purporting to levy distress against them. Even anything, they were entitled to the title of the land as the title held by the Defendants had been extinguished. The Counsel averred that the Defendants had commenced the process of levying distress on the March 12, 2009.
43. On the other hand, the Counsel for the Defendants recounted the whole evidence adduced by both the 1st and 2nd Plaintiffs and the 1st, 2nd, 3rd and 4th Defendants herein to detail. The Counsel submitted that there was no doubt that the suit property was legally and absolutely owned by the 4th Defendant, Hilmy Hyder Salim and Saada Hyder Salim and the Certificate of Title was in their names. The Counsel argued that the 1st and 2nd Plaintiffs were tenants on the land whereon they operated a quarry. She opined that they were always been irregular in payment of rent which led to the Defendants levying distress in order to recover the rent arrears. However, the Plaintiffs received restraining orders as result of which the distress never took place. It was only through a Court order by this Court that it was seen that the Plaintiffs were misusing the restraining order to the Defendant's prejudice leading to the vacation of the said orders.
44. There are a number of grey areas on this matter. For instance, the main anchor of the Plaintiffs case is they contend having been invited or given the land by one Aisha Binti Rahamani. It is trite law according to the provision of Section 107 (1) of the *Evidence Act*, Cap 80 he who alleges has to prove. The Plaintiffs have not been able to demonstrate firstly, who this Aisha Binti Rahamani was in relation to the suit land as apparently her name does not feature at all in the title deed. Secondly, on what basis did she invite or give them the suit land. Anyway, PW – 1 confessed it was done verbally. That is rather unfortunate. The Plaintiffs' failed to prove nor show nexus in terms of ownership of suit property and having been given to them by Aisha Binti Rahman as provided for under the provision of Section 26 (1) of The *Land Registration Act*. They could not show any goodwill paid for the suit land. Be that as it may, the Court has been able to see that the initial owner of the land - Shamsa Rahamani on December 9, 2005 transferred the land to the current owners. For whatever its worth, they held a good title deed and hence indefeasible rights, title and interest on the suit land.



46. Furthermore, the Plaintiffs failed to show how they got into the land apart from being tenants to it. In any case, the 4th Defendant produced evidence and which were admitted in terms of the Mpesa Safaricom Short Services text messages showing that Plaintiffs used to pay rent to the Defendants through his son, Mr Manoj Rami. These texts were never controverted by the Plaintiffs. It was admitted by the 2nd Plaintiff that Mr Rami his son used to run the business. For instance, on February 29, 2020 and March 16, 2020 below were the extract of the texts exchanged between the Mr Manoj Rami and the Defendants:-'Today is the last day of February. Please Manoj, I need my remaining money. I too have bills and workers to pay. Ramji gave me Kshs 10, 000.00 and promised the remaining by end of the month. Can you make arrangements to give me something today.' 'By afternoon we are sending you Kshs 40, 000.00 in Mpesa and Kshs 50, 000.00 by March 27, 2020. My money from London not come. I have organized local (sic)'; 'Hello Ramji Bhai when do you think you will be able to pay your rent arrears? You have kept silent and every time I ask you for rent you tell me to wait for the Covid - 19 to ease. How long are we waiting for? Business have resumed even though slow. I need to be paid my rent as even us have our needs'
47. It was admitted by the 2nd Plaintiff that Mr Manoj Rami his son used to run the business. Undoubtdly, the Plaintiffs were doing so as tenants. There was no other explanation or reason given for making these payments to the Defendants apart from the intuition that there existed Land Lord – tenants relationship between the 1st & 2nd Plaintiffs and the Defendants. Hence, the doctrine of estoppel come to play here stopping the Plaintiffs from denying that very obvious fact. For these reasons, the Defendants levying distress for the recovery of their outstanding rent was lawful and legal based on the surrounding facts and inferences thereof.

However, these facts have changed. The fact that and it own the admission of the 2nd Plaintiff that the Plaintiffs were no longer on the land and that subject to another suit had been evicted from the land, the Court assumes that the Land Lord – tenant relationship between the Plaintiffs and the Defendants had already been severed. Thus, the substratum of the case no longer existed. The suit was no longer live. No practical value could be derived from the suit herein.

Issue No c). Whether the 1st and 2nd Plaintiffs are entitled to be granted permanent injunction orders sought vide the Plaintiff dated March 24, 2009 and Amended Plaintiff of October 25, 2021 restraining the Defendants from levying any against the Plaintiffs and from interfering with the Plaintiffs quiet and peaceful possession of Plot Number, 10947 Section 1 MN/ Mkomani.

48. Whether the 1st and 2nd Plaintiffs are entitled to be granted the Permanent Injunction restraining the 1st and 2nd Defendants from levying any distress on them taking that there existed no Land Lord – tenants relationship between them whatsoever. In fact, they have categorically held that they was no tenancy agreement between them and if anything the Plaintiffs having been in occupation onto the suit property for over thirty years they were entitled to a title to them vide Land Adverse Possession as provided for by law.

Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court. Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined as in the instant case.

49. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. It is now well established that this Court has the powers to grant the Permanent Injunction under the provision of Articles 22 and 23 of the *Constitution* of Kenya, 2010, Sections 1A,



3 & 3 A of the [Civil Procedure Act](#), Cap 21 and Order 40 of the [Civil Procedure Rules, 2010](#) if it feels the right of a Party has been fringed, violated and/or threatened. The Honorable Court cannot just seat, wait and watch under these given circumstances.

It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of '[Malier Unissa Karim –Versus - Edward Oluoch Odumbe \(2015\)](#) [eKLR](#) as follows:-

' The test for granting a Mandatory Injunction is different from that enunciated in the 'Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of 'Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109' had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

'A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application'.

50. Further the same Court of appeal in the case of '[Jay Super Power Cash and Carry Limited –Versus - Nairobi City Council and 20 others CA 111/2002](#)' held that:-

' This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it'.

In the instant case, it is not in dispute and it has not been contested at all that the 4th Defendant, Hilmy Hyder Salim and Saada Hyder Salim are the legal registered and absolute owner to all the suit property.

51. What is disputed and main contention herein is the 1st and 2nd Plaintiffs herein having been invited and/or allowed to take occupation of the suit property in the year 1984 by Aisha Binti Rahamani they had carried out business on the suit property continuously and without any interruption. To them there existed no Land Lord – tenants agreement between the Plaintiffs and the Defendants and therefore there was no basis for the Defendants to be levying any distress on them claiming an outstanding rent arrears.

The Honorable Court wishes to stress that from the filed pleadings and the evidence adduced in Court, being the production of the original Certificate of Title deed, it shows that the property was registered to Shamsa Rahaman on July 16, 1999. On December 9, 2003 it was transferred to the 4th Defendant, Hilmy Hyder Salim and Saada Hyder Salim who are the current legal registered and absolute owner to all the suit property. Be that as it may, and based on the laid - down provisions of the law as stated herein above. M/s Aisha Binti Rahaman whom they frequently refer to does not feature at all in these documents of land ownership. It follows therefore that the named persons herein have established that they have a 'prima facie' conclusive evidence and legal inclination to the Suit property.



For these reasons, therefore, this Honorable Court is fully satisfied that the 1st and 2nd Plaintiffs have failed to demonstrate their case and that they have met the fundamental threshold on being granted Permanent Injunction restraining the 1st, 2nd, 3rd and 4th Defendants from levying any distress against them over the outstanding accumulated rent arrears over the suit property as laid down in law.

Issue No c). Whether the 1st and 2nd Plaintiffs are entitled to the claim of a title by way of Land Adverse Possession as provided for under the provisions of Section 38 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.

52. Under this sub heading, the Plaintiffs are claiming title for the suit land under the Land adverse passion for having been occupation and use of the land for over thirty (30) years. From the averments of made under Paragraphs 4B of the Amended Plaintiff, the 1st and 2nd Plaintiffs herein claim as follows:-

' The 2nd Plaintiff avers that at all material times to this suit he was invited into the suit Plot known as Plot No parcel No Sub – division 10947 Section I Mainland North by one Aisha Binti Rahaman in 1984 and in 1996 the 2nd Plaintiff registered the 1st Plaintiff and have since lived adversely on the suit land hence claiming against the Defendants the suit plot by adverse possession'.

53. Further to the above assertions, the Plaintiffs from the prayers in the said Amended Plaintiff, they have urged Court to grant them the following reliefs:

' Prayer C – A declaration that the Plaintiffs are entitled to ownership of the suit property known as Plot No parcel No Sub – division 10947 Section I Mainland North by doctrine of Adverse possession Plot No parcel No Sub – division 10947 Section I Mainland North as the Defendants' title or any if at all to the suit property has been extinguished by operation of law and that the Plaintiffs be registered owners thereof under Section 38 of Limitation of Action Cap 22 and the doctrine of Adverse possession Plot No parcel No Sub – division 10947 Section I Mainland North in place of the Defendants accordingly'

Prayer D – A declaration that the Defendants Plot known as Plot No parcel No Sub – division 10947 Section I Mainland North was held in trust for the Plaintiffs who have acquired the same by way of Adverse possessions'

It is for the above reasons, and taking the concept of Land Adverse Possession as claimed by the Plaintiffs, being such a detailed subject, the Honorable Court feels it would be unfair and unreasonable to casually brush through the matter without spending a little bit of time on it. It is imperative it gets indepth into the Concept.

In *Black's Law Dictionary, 10th Edition* Land Adverse Possession is defined as:-

' The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.'

The Doctrine of Land Adverse Possession 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.'



Section 13 on the other hand provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor 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.

54. Finally Section 38 states:-

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.

From the above provisions of the law of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under article 40 of the constitutions become extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.

Filing of an Originating Summons

The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the *Limitation of Actions Act* by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.

55. Under 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 the Environment and Land Court as to handle claims premised on adverse possession. It should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title, where the land is yet to be registered, it cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim.
56. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property



complies with the test for limitations of certain constitutional right set out under Article 24. (See M'noti (JA) in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* (supra))

W OUKO, JA in the same case of '*Mtana Lewa - Versus - Kahindi Ngala Mwangandi* [supra]' while enlisting the strictures for a claim of land through adverse possession observed as follows;

' Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 rule 7 as follows;

'7(1) an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.

- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The Court shall direct on whom and in what manner the summons shall be served.'

In the case of '*Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira*', *Civil Appeal No 325 of 2003*, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See '*Kyeyu Versus - Omuto, Civil Appeal No 8 of 1990*'. See also the present position in case '*Johnson Kinyua – Versus - Simon Gitura Civil Appeal No 265 of 2005*,' where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim. In '*Kimani Ruchine – Versus - Swift Rutherford & Co Ltd (1980) KLR*' it was stated on this point that;

'The Plaintiffs have to prove that they have used this land which they claim, as of right: *nec vi, nec clam, nec precario*. So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours



to interrupt it or by any recurrent consideration; See the case of:- '*Wanyoike Gathire – Versus – Berverly (1965) EA 514, 518, 519* per Miles, J.'

In *Teresa Wachuka Gachira (Supra)*, a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. This Court, on appeal found that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

'There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. 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'

57. Further, RCN KULOBA, J in the case '*Gabriel Mbui – Versus – Mukindia Maranya [1993] eKLR* elaborately enlisted 7 key elements that a person claiming adverse possession must establish. Summarily, according to the retired Judge, the elements that a person claiming a right by adverse possession;
- a. The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. This is because a right of action cannot accrue unless there is somebody against whom it is enforceable.
 - b. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. That is to say, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non - permissive use, ie without permission from the true owner of the land occupied. Acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as 'hostile' possession.
 - d. The non - permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.



- e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies. That is to say the possession and user was such as to give a cause of action or right to sue for possession, throughout the twelve years preceding the suit.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The purpose of this element is to afford the owner an opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose. Possessory acts carried out only under cover of darkness will be insufficient to justify a claim based on adverse possession. Related to the requirement of actual possession, the requirement of openness and notoriety, also calls for the need that the possessory acts must be substantial and leave some physical evidence. If the acts are too insubstantial or temporary, there is no actual possession and the possession will not be notorious
 - g. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. There are circumstances under which adverse possession which has begun to grow may be interrupted. Possession may be interrupted;
58. Firstly, from the evidence adduced and the authorities relied on, it has already been established that the 4th Defendant Hilmy Hyder Salim and Saada Hyder Salim are the 'Prima facie' registered owner of the suit land. The 1st and 2nd Plaintiffs have admitted having taken up occupation of the suit property from Aisha Binti Rahamani, who this Court is still to establish her connection to the suit land. Suffice it to say, the only quest by the Plaintiffs is that they had been in occupation for over thirty (30) years. It has been established to the satisfaction of Court that they would be periodically remitting rent through Mpesa services. Besides, there has been many Civil Suits over the matter.
- Secondly as per the pleadings by the 1st, 2nd, 3rd and 4th Defendants, and in their own admission, the 1st and 2nd Plaintiffs got permissive entry to the land from the deceased. Further, the parties have had numerous civil suits over the land. Besides, in his testimony, PW – 1 informed Court having vacated the suit land pursuant to a Court order from lower Court. In other words there was interruption to the said occupation of the land. They never lived there continuously. This Court has already made a determination that there existed a tenancy relationship between the 1st & 2nd Plaintiffs and the Defendants herein. It will be prudent that the 1st and 2nd Plaintiffs legally vacated the suit land following a Court Order from a lower court. Suffice it to say, as we speak and from their own admission during the hearing, the 1st and 2nd Plaintiffs are no longer in occupation of the suit land.



59. I am reminded of Madan, JA (as he then was) in the case of '[*Chase International Investment Corporation and Ano – Versus – Laxman Keshra & Others \(1978\) eKLR 143; 143 \(1976 – 80\) 1 KLR 891*](#)' to the effect that:-

' If the circumstances are such as to raise equity in favour of the Plaintiff (in this case the Defendants) and the extent of the equity is known, and in what way it should be satisfied, the Plaintiff (the Defendants) is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the Judge is to pass through them undeterred' (additions are mine)

For these reasons therefore, the claim for Land Adverse possession over the suit land by the Plaintiffs are pipe dream and a figment of their imagination. Legally speaking, it does not arise at all. It must die on arrival. It cannot be successful.

Issue No f) - Who will bear the costs of this suit?

60. The Black Law Dictionary defines 'Cost' to mean, 'the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other'.

The proviso under the provisions of Section 27 (1) of the [*Civil Procedure Act*](#), Cap 21 holds that Costs follow events. It is trite law that the issue of Costs is the discretion of Courts. In the case of '[*Reids Hewett & Company – Versus – Joseph AIR 1918 cal 717 & Myres – Versus – Defries \(1880\) 5 Ex D 180*](#)', the House of the Lords noted:-

' The expression 'Costs shall follow the events' means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.'

60. The Supreme Court fortified this position in the case of '[*Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others \[2014\] eKLR*](#)' thus:

' so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

60. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The outcome in the instant case is that the 1st and 2nd Plaintiffs herein have fully succeeded in his cases. For that very fundamental reason, therefore, the costs of this suit will be borne by the 1st and 2nd Plaintiffs to the 1st, 2nd, 3rd & 4th Defendants.

VII. Conclusion & Disposition.

60. Ultimately, upon conducting an intensive and elaborate analysis of all the framed issues herein, the Honorable Court based on the principles of preponderance of probability is fully satisfied and finds that the 1st and 2nd Plaintiffs have failed to establish their case herein.



61. Thus, Judgement herein is hereby entered against the Plaintiffs and in favour of the 1st, 2nd, 3rd and 4th Defendants jointly and severally herein. For avoidance of doubt, the Court proceeds to make the following orders. These are:-
- a. That Judgement be and is hereby entered in favour of the 1st, 2nd, 3rd and 4th Defendants herein jointly and severally to wit:-
 - i. The distress levied against the 1st and 2nd Plaintiffs' goods by the Defendants for recovery of rent arrears from the Plaintiffs be declared as lawful.
 - ii. The 1st and 2nd Plaintiffs are not entitled to be granted permanent injunction orders sought vide the Plaint dated March 24, 2009 and Amended Plaint of October 25, 2021 restraining the Defendants from levying any against the Plaintiffs and from interfering with the Plaintiffs' quiet and peaceful possession of all that parcel of land known as Plot No parcel No Sub – division 10947 Section I Mainland North/ Mkomani.
 - iii. The 1st and 2nd Plaintiffs are not entitled to the claim of a title by way of Land Adverse Possession as provided for under the provisions of Section 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.
 - b. That a declaration made herein that Saada Hyder Salim, Aziza Hyder Salim and Hilmy Hyder Salim as per the Entry No 2 and 3 of the Certificate of Title Deed registered on February 7, 2005 be and are the legally and absolute registered owners of all that suit property known as Land Reference Numbers known as Plot No parcel No Sub – division 10947 Section I Mainland North/Mkomani with indefeasible rights, title and interest vested on them by law.
 - c. That the 1st and 2nd Plaintiffs herein, if at all still in occupation of the suit land, by notice are granted ninety (90) days to have fully vacated from the suit premises in accordance with the provisions of Section 152 E of the Land (Amendment) Act, No 3 of 2012 failure to which legal eviction to take effect accordingly.
 - d. That the Officer In Charge of the Central Police Station, County of Mombasa to ensure that there is full compliance of this order.
 - e. That the costs of this suit to be borne by the 1st and 2nd Plaintiffs herein.

JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 22ND DAY OF NOVEMBER, 2022

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:

- a. M/s. Yumnah, the Court Assistant.
- b. M/s. Natasha Ali Advocate for the 1st & 2nd Plaintiffs.
- c. No appearance for the 1st & 2nd
- d. Mrs. Waswa Advocate holding brief for Mr. Mwandeje Advocate for the 3rd
- e. No appearance for the 4th & 5th Defendants.

