REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL SUIT NO 155 OF 1993 (O.S)

BAHATI TEMO & 6 OTHERS....................................PLAINTIFFS

VERSUS

SWALEH MOHAMED SWALEH..........................RESPONDENT

JUDGMENT

This Ruling comes after a considerable period of delay and I must on the outset apologize to the parties. To a large extent the reason was my transfer to another station of this court.

What falls for consideration is the Originating Summons dated 23.07.1993. It was taken out by the 7 Plaintiffs under Order 36 r 3(1) Civil Procedure Rules and Section 38 of the Limitation of Actions Act, Cap 22. They claim that they are entitled to adverse possession of all that parcel of land known as 358/Msabaha/Malindi and they seek determination of the following questions:-

> “2. Whether an order vesting a good title to the aforesaid land should or ought to issue and be registered in favour of the plaintiffs?
>
> 3. When and how the defendant got to be registered as proprietor of the aforesaid plot and whether such registration has in any way affected the plaintiffs interest acquired by adverse possession.
>
> 4. An injunction do issue restraining the defendant from continuing to occupy, harassing, disposing or in any other manner dealing in the said property on his own or through his agents or servants.
>
> 5. The issue of costs of this summons.”

The disputed land is more fully described in the Indenture of Conveyance dated 14.2.1987 as:-

> “ALL THAT portion of land comprising one hundred twelve point eight two (112.82) Acres or thereabouts situate South-West of Malindi Township at Malindi and known as Portion No 358 Malindi more particularly demarcated delineated and bordered red on Land Survey Plan No 5165 attached to Certificate of Ownership No 678 issued on 31.3.1916 registered in the Land Title Registry at Mombasa (Malindi) in Vol LT XIV Folio 178/1 Title 3552.”

The land is traversed by the Mombasa/Malindi Road. I will refer to it henceforth as the disputed land.

Although the Defendant sued as “Swaleh Mohamed Swaleh” nothing turns on the name as he is one and the same person as “Swaleh Mahdi Swaleh” or “Saleh Mahdi Saleh” which are variously used in his Identity Card and in Affidavits on record. I will hereinafter refer to him as “Swaleh” or “the deceased”.

Before the disputed land was formally conveyed into Swaleh's name it was held in common in equal shares by 5 other persons described in the said indenture. Ownership was first recorded on 31.3.1916 under the Land Titles Ordinance 1908 and a Certificate was issued to one "Said bin Suleiman as trustee and guardian of Omar bin Abdulla Hussein and his co-heirs."

The Ordinance (now referred to as Land Titles Act, Cap 282) was introduced on 30.11.1908

> "to make provision for the removal of doubts that have arisen in regard to Titles to land and to establish a Land Registration Court".

It is common ground that it applied to all land within the Coast Province and that it ceased operation in 1.1.1920 when the Registration of Titles Ordinance was enacted.

A certificate of Title granted under Section 20 of the LTA had the effect stated in Section 21, that is:-

> "21. Save as in this Act otherwise expressly provided, every certificate of title duly authenticated under the hand and seal of the Recorder of Titles shall be conclusive evidence against all persons (including the Government) of the several matters therein contained, and a certificate of ownership shall be conclusive proof that the person to whom the certificate is granted is the owner of the coconut trees, houses and buildings on the land in respect of which the certificate is granted, at the date of the certificate, unless there is noted thereon in manner hereinafter provided a memorandum to the contrary effect."

I will revert to the matter of Registration and effect when I consider the evidence of the Registrar of Titles (DW 3).

First the application itself.

In the Affidavits filed in support of the Originating Summons, the Plaintiffs purport to speak for and to seek the orders on behalf of themselves and other persons they claim have been on the disputed land from time immemorial. In other words this is a representative suit. But I see no order having been sought or granted for such representation. It is not a representative suit. I will therefore consider the claims of the seven Plaintiffs as they are the only ones on record.

With the Originating Summons the Plaintiffs took out a Chamber Summons seeking a temporary injunction to restrain Swaleh from subdividing the disputed land or alienating it. He had applied for the consent of the Land Control Board to do so and the Board had given its approval. An *ex-parte* order was granted on 23.7.93 (Mbaluto, J.) but was discharged on 2.12.93 (Mbogholi, J.). When the application was heard inter-partes on 8.2.94 before Wambilyangah, J, he stated:-

> "It is my considered view that the substantive matter should be expeditiously heard and determined. An interim order is of no conclusive assistance to the parties."

The parties agreed to have the main case heard on 18th & 19th May, 1994 after agreed issues were filed. There was liberty to apply and the *status quo* was to be maintained. There was no definition of the "*status quo*" to be maintained and it is no wonder that the Plaintiffs commenced other developments in earnest soon after but Swaleh sought an *ex-parte* injunction on 18.2.94. It was granted against the Plaintiffs on the same day until it was heard *inter-partes* on 30.3.94 and was issued as prayed. As there were no agreed issues filed before May 1994, the parties recorded a consent that the suit would be heard in July 1994 and the hearing would proceed "on the basis of Affidavits filed". They dispensed with summons for directions. The matter was adjourned in July and in November 1994 and further Affidavits were filed. On 3rd December, 1994 Swaleh was shot dead by unknown assailants in his house on the disputed land.

It took sometime to obtain grant of representation for the deceased's estate but when the grant was issued, the legal representatives took out an application under Order 36 r 8A Civil Procedure Rules for Directions as to the sufficiency of facts, mode, place and time of hearing of the Originating summons.

That was on 21.5.97. Ang'awa, J, made directions on that day that the suit shall proceed on oral evidence on the issues outlined in the Originating Summons.

I adverted to those matters in some detail because issues were raised in the course of the hearing and in submissions of counsel as to whether the affidavits on record should be used in evidence and secondly, on the subdivision and sale of portions of the disputed land whether the defendant was in breach of a court an existing court injunction.

The matter came up before me for hearing but none of the 7 Plaintiffs was present to testify orally. Applications for adjournment had earlier been made on the ground that some of the Plaintiffs were in prison custody awaiting trial for the alleged Murder of Swaleh. Further adjournment was however refused for reasons on record and learned counsel on record for the Plaintiffs, Mr Gachiri Kariuki offered no oral evidence. He however submitted that the court should consider the Affidavits on record which he introduced. The suggestion was strongly resisted by learned counsel for the Defendant Mr S M Kimani who referred to the order of Ang'awa, J, made on 27.5.97.

Should I consider the Affidavits of the Plaintiffs which are on record? It seems to me that I ought to. Firstly because it is trite that the Plaintiffs need not appear before court where they are able by other means or through counsel to prove their case. The Plaintiffs here appeared through counsel at the hearing. Secondly, because there is the order made by consent of the parties before Wambilyangah, J, on 18.5.94 that the trial shall proceed on the basis of the Affidavits filed. That consent order was not subsequently set aside or reviewed and it cannot be argued that it was superceded by the order of Ang'awa, J. Ang'awa, J's order does not so state and it could not so state unless there was another consent, since both courts are of concurrent jurisdiction. For whatever they are worth therefore the Affidavits on record are for consideration. The variant is the weight to be placed on such evidential material which has not been subjected to the same cross-examination as the oral evidence tendered by the Defendants.

That finding takes care of two of the three technical objections raised by Mr Kimani: firstly, that the failure by the Plaintiffs to attend court rendered the suit liable to dismissal under O.9B r.4 Civil Procedure Rules and secondly, that such failure meant that there were only pleadings on record and the Defendants had no case to meet as there was no evidence. The third objection was that the Certificate of Title was not exhibited as required under the mandatory provisions of Order 36 r 3(1) Civil Procedure Rules. There is evidence on record from the DW.3 Rosemary Anyango Ngonga then the Registrar of Titles Coast Province that there were no Title Deeds properly so called under the Land Titles Act. All the Registrar or Recorder of Titles did under the Act was to record Indentures or Conveyances in huge volumes, two of which she brought in court. The act of recording is the one that conferred Title to the owner not the holding of an indenture. The only record there is therefore the entry in the Land Titles Register as the Registry returned the original Indenture to the owner. In such a system I doubt the applicability of Order 36 r 3(1). At all events I see no prejudice arising since the Defendant has annexed copies of the Indenture entitling him to ownership of the disputed property, and the Registrar produced copies of the Records.

I now move on to the substantive merits of the case:

Apart from the original Affidavits in support of the application sworn on 23.7.93 by Kesi Mjape (Kesi) (P6) and Robert Lugo (Robert) (P7), there were further Affidavits sworn on 21.11.94 by Stephen Kahindi Mwadzani (Stephen) (P3) and William K Mjape (William) (P2). Bahati Temo (Bahati), Charles Charo (Charles) and Johnson Koya (Johnson) did not swear any Affidavits.

Their case is basically the same and it is this. All of them were born on the disputed parcel of land and have since lived and worked on it. Kesi for 60 years when he swore the Affidavit in 1993, Robert for 30, Stephen 46, and William 42. There never was anyone else before them except their forefathers and there are established homes and farming activities in seasonal and cash crops like Mangoes, Coconuts, Cassava, Cashewnuts and others. They were in continuous and uninterrupted occupation of the land until the Defendant herein started claiming an interest therein in the year 1990 when he sued some of the Plaintiffs and their fathers claiming that he had bought the land in 1978. If there was any Title claimable by the Defendant therefore it was extinguished after the expiry of 12 years and the Plaintiffs had acquired new

Title through adverse possession.

The Defendant's case on the other hand is that he purchased the property from the previous registered owners on 17.10.1978. No document was produced to confirm such purchase but there was the oral evidence of the daughter of the deceased and the Administrator of his Estate. She is Sofia Swaleh Mahdi Swaleh (Sofia) (DW.1) aged 45 years when she testified on 26.2.98 (Born 1953). She was informed by her father about the purchase in 1978 and she went there with him. She found no developments or houses but only saw bush. There were however small shacks belonging to some 20 families which the deceased told her to note down. The deceased took the list to the area chief and they were ordered to leave. Fourteen families left leaving 6 occupying some small portions of it. These were:-

1. Kesi Mjape

2. Bahati Temo

3. Johnson Koya (who stayed with his brother Stephen Koya).

4. Willian Kahindi

5. Robert Lugo (who is the son of Kesi Mjape and lived with him).

Johnson and Stephen went to the deceased and said they would buy the area of about 21/2 acres that they occupied. The purchase price was agreed on and they made part-payment. They failed to complete the purchase and so the deceased repudiated the agreement and sued them for eviction before Malindi SRM's Court in CC 168/91 on 15.5.1991. Certified copies of the proceedings and judgment were produced as Exhibit D 5. That court found for the deceased and ordered Johnson and Stephen to vacate the land after a grace period of 6 months from 14.11.1991. An attempt to appeal against the judgment came to nought on 19.5.1993 when leave to appeal out of time was refused by Wambilyangah, J. The entire file on Misc C App 167/92 was produced in evidence by Benjamin Mwangi (DW2) an Executive Officer, Civil Registry as Exhibit D 10. No further attempts were made to challenge those decisions and there still remains unexecuted the Warrant of Eviction issued by the Malindi Court on 22.6.1992 Exhibit D4.

Sofia further testified that there was another case before the same court, SRMCC 51/1990 in which the deceased had sued 8 squatters:

1. Kesi Mjape

2. Katana Karisa

3. Bahati Temo

4. John Mwambire

5. Charo Mwanzavi

6. Tembe Kalume

7. Maline Kalama

8. Msanzu Baha

Judgment was entered against those persons on 13.12.1990 and they were ordered to vacate. A grace period of 6 months was given either to vacate or to purchase the portions they occupied. The others moved out except three, Kesi Mjape, Bahati Temo, and Chari Mwanzari who said they would take up the offer made for sale of 5 acres at reduced prices while another 21/2 acres would be given to them by the deceased for free. Two of those three, Kesi and Bahati are also Plaintiffs in this suit. Kesi made some

payments towards the purchase but the sale was never completed. Orders were finally made on 17.12.92 that the three vacate the land after compensation is made for their crops. They did not vacate and did not appeal against the decision. A Warrant for eviction of the three issued on 27.1.1993 is still pending execution. Both the court record of proceedings and judgment and the Warrant of Eviction were produced as Exhibits D7 and D6 respectively.

Besides those efforts by deceased to assert his title and authority in the disputed land, Sofia testified that the deceased had a sub-division scheme of a large portion of it which had the approval of the Land Control Board. That is the portion on the side of the Malindi/Mombasa road towards the sea. She produced 10 certificates of official search marked Exhibit 3(a) – (f) to confirm the registration and alienation of those portions of the land to persons who are not parties to this suit. They are mainly of Italian Nationality and have taken possession of their plots.

The Registrar DW 3 confirmed the approval of the sub-division of the disputed land on 20.1.1991 into approximately 21/2 acre plots (1.02 Hectares) and alienation of the sub-plots to the 10 transferees who are the Registered owners. The ownership was recorded on various dates between 1995 and 1997. She denied that there was a court order made on 8.2.94 restraining the alienation of any part of the disputed land and stated that if any such order existed, it would have been served on the Registrar and Registered against the Title but there were no entries made, hence the registration of the Conveyances. The Registrar also testified that the Government had acquired some 8 acres of the land for Public use on 1.2.1994 after notifying the Registered owner.

Finally, Sofia testified that it was indeed the deceased who had, since he purchased the land in 1978 and for 16 years thereafter until he was shot dead, developed the disputed land substantially. He constructed a four bed-roomed Swahili house with a shop. He brought Electricity power and piped water from two wells he sank on the land. He fenced the portion he occupied and had kept cattle, goats and planted various crops and trees. No complaints were raised against the deceased by any of the Plaintiffs when he was doing all that. They were never on the land continuously or interrupted for over 12 years since the deceased took over the property. She did not however know when the Plaintiffs entered the portions of the land they occupied.

On those facts learned counsel Mr Gachiri Kariuki submitted that the occupation of the disputed land by the plaintiffs long before the Defendant bought it in 1978 cannot be disputed. There were farming activities of long standing to vouch for it and Sofia confirmed having found the Plaintiffs there in 1978. After the purchase the Plaintiffs never moved out. The suits referred to in 1991 affected only three of the Plaintiffs and not the other 4. The claims of the 4 to continuous occupation of portions if not all the disputed land was not shaken. At any rate, in the nature of the tenure of land under the Land Titles Act Section 20 concurrent interests over the same land are recognized. One person may be registered as the land owner while another may be registered as the owner of other interests on the same land.

In his submission, time started running against the Defendant in 1978. By 1993 when this suit was filed the Defendant could not recover the land by dint of S 7 of the Limitation of Actions Act, Cap 22. The activities of the Defendant in sub-dividing and alienating portions of the land in 1994/95 must be ignored since there was an existing court order restraining any dealings with the land and the Defendant had full knowledge of that order. The transfers therefore were null and void.

As to whether between the time of the Sale Agreement in 1978 and the Registration of the Conveyance in 1987 time was deemed to run against the Defendant, Mr. Kariuki referred to the case of *Sospeter Wanyoike v Waithaka Kahiri*. [1979] KLR 236 where a Sale Agreement for purchase of land by payment of instalments was signed in 1965 with the last instalment payable in 1969. The transaction was not completed but the purchaser sought a declaration on adverse possession since the signing of the Agreement which was more then 12 years when he filed the application. Todd, J, held dismissing the action:-

> "that as the payments of the purchase price by instalments after the date of the agreement recognized the defendants title to the land the period of limitation for adverse possession did not

> begin to run until the last instalment was paid, the plaintiffs action for a declaration was premature".

He submitted that time ran against the Defendant for those 9 years .

He urged the court to consider the fluid situation in the Coastal area where land tenure has not been harmonized and to find that the Plaintiffs' interests have yet to be determined.

Mr Kimani took up that theme and submitted that in the Coastal area there was recognition of the fact that a person could have a right to use land of another by constructing a semi permanent structure for residential purposes without affecting the rights of the Land owner. There was even an Act of Parliament (now repealed) which recognized that phenomenon. It was Cap 298 Eviction of Tenants (Control) Mombasa Ordinance which came into effect on 31.12.1956. Cases of persons claiming adverse possession in the Province should therefore be considered on that premise. Mr Kimani produced the Act which I have looked at. All I need to say is that it was meant to last until 30.12.1958 and was extended or variously by Ministerial Order until 31.12.1969. It also expressly applied to the Municipality of Mombasa which is far from the disputed land. With respect I do not think it is that Act which forms the basis of the land tenure phenomenon in the Coastal area which is now widely given judicial notice, of "house without land". The Registrar, DW.3, did indeed confirm that such interests were registrable under the Land Title Act once they were determined. S 21 and 24 of the Act creates room for such interest.

Mr Kimani further submitted that although there was no onus on the Defendant to show when he took possession of the property, he had proved that he was not only the Registered owner since 1987 but also took possession in 1978 after the sale by the previous owners. There was evidence that Johnson Koya (P4) entered into an agreement with the Defendant to purchase 21/2 acres of that land. That was recognition of the Defendants title and was not adverse possession as the *Wanyoike* case decided. Johnson could not have been buying his own land. He also cited *Hosea v Njiru* [1974] E.A. 526 where it was held:-

> "On payment of purchase price by a purchaser in occupation his occupation becomes adverse to that of the vendor".

Here even the purchase price by Johnson was not completed and that is why there is an eviction order against him. Bahati, Charles and Kesi were also the subject-matter of court issued eviction orders. The court decisions which were not challenged establish that the four persons were in the disputed land illegally. It was therefore contrary to justice and public policy for them to defy those orders and file another suit here. Thee is no case of adverse possession for those four.

Mr Kimani further referred to the definition of Adverse possession in Section 13 of the Limitation of Actions Act and submitted that the mere entry on land did not dispossess the owner or confer exclusive possession. The test is whether ejectment would lie at his suit against some other person. Possession must be exclusive and dispossessive. That is what *Halsbury's* Vol.24 Pg.251 Para.481, 482 says. The Plaintiffs here do not say no one else was on the land. They had to show dispossession and discontinuance of possession which they did not. The Defendant has been shown to have permanent structures and crops and he has not been prevented from access. Much of it is fenced land and therefore a person claiming to occupy only a small portion cannot claim the whole land in excess of 112 acres. It is an uncertain and undefined claim which cannot be acted upon. Mr. Kimani invited me to find that this, in common with similar cases in this region was a case of a few squatters entering into land they know very well is owned by other persons and staking a claim on it. Even if they had concurrent occupation with the Defendant the law is that there cannot be adverse possession. - See *Treslar v Nute* [1977] 1 All E.R. 230. Possession concurrent with the paper owner is insufficient.

Finally, Mr Kimani refuted the claims on disobedience of a court injunction which he asserted was non-existent when part of the property was alienated. If there was any existing order it was discharged on 2.12.93. The sub-division had started earlier and was alluded to by the Plaintiffs in their suit. Those persons should therefore have been joined in the suit otherwise their interests should not be disturbed. The

entire suit should be dismissed.

I have considered the Affidavits on record, the oral evidence and submissions of counsel.

There is no gainsaying that the onus was on the Plaintiffs to prove on a balance of probability, the truth of the averments they make to warrant a positive answer to the questions they posed.

The 1st and 3rd questions may be considered together as they raise the core issue, assuming there was occupation by the Plaintiffs, when time began to run in their favour. Was there occupation in the first place? On the material before me I am prepared to accept that there was. The Plaintiffs however did considerable harm to their case when they did not offer themselves for cross-examination on the statements made on oath. Three of them did not even bother to swear any Affidavits although Kesi says he had authority to swear on their behalf. They talk generally about occupation of the disputed land which measured 112.82 Acres. As far as they were concerned no one else owned it until 1990 when the Defendant sued some of them. They never saw the Defendant or anyone else before then. That of course cannot be true and the reason I think is because they never occupied the entire area of 112.82 Acres. In the absence of clear evidence which is tested in cross-examination I find that the date of commencement of occupation of the land by the Plaintiffs is vague and indeterminate. For similar reasons I find that the Plaintiffs did not occupy the whole area of 112.82 Acres. Sofia (DW 1) who was cross-examined on her evidence, went there in 1978 and largely found bush. But there were some twenty families according to her who were in occupation of portions of the land and most of them left at the instance of the Defendant leaving behind the Plaintiffs. As regards at least four of the Plaintiffs whose cases ended up in court in 1990/91, they did not occupy more than 5 Acres which they were ready to purchase but did not. An offer to give them another 21/2 Acres *gratis* was withdrawn when it was not accepted. The existence of those cases and the orders made thereunder are not challenged. The factual and legal position is therefore that there are warrants of eviction obtained against Johnson Koya, Steven Koya (not a party to this suit), Kesi Mjape, Bahati Temo and Charo Mwanzavi. It is I think an abuse of the court process to seek to circumvent those orders without complying therewith by filing another suit. I would dismiss the suits of those four Plaintiffs for that reason.

Assuming without deciding however that the four could still urge their case for adverse possession of the portions they occupied, is their case and that of the other three Plaintiffs who were unaffected by earlier court orders well founded? Is the failure to prove exclusive occupation of a specific well defined area of land fatal to their case?

There is *dicta* in some decided cases that the land claimed to have been held in adverse possession should be well defined. However, I prefer the *dicta* of Madan, J. (as he then was) in *Gatimu Kinguru v Muya Gathengi,* [1976] KLR 253 at Page 260.

> "The portion occupied by the defendant is not a separately surveyed piece of land with a plot number and title number to it. There is no deed plan in respect of it, at least none has been produced to the court. It is, however, a definitely identified and identifiable portion with a clear boundary. That which can be ascertained is certain; that which is definitive is positive. It is so plotted that if not certain it can be made certain. I think the absence of a plot and title number should present no difficulty or be a bar to the defendant in establishing his claim on the ground of adverse possession. The defendant has established a title to his portion by adverse possession."

All other things being equal therefore the Plaintiffs could lay the claim on the portions that they occupied individually. But their claim is based on S 38 of the Limitation of Actions Act. They say they have been on those portions for 12 years or more before 23.7.1993 when they filed suit. That would be just before 23.07.1981. As a matter of arithmetic they would have been, since there is evidence conceded by Sofia that they were sighted on the disputed land in 1978. The issue that arises therefore is whether they were in continuous uninterrupted occupation and whether they were in adverse possession.

Section 7 of the Limitation of Action Act provides:-

> 7. 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"

It has to be read with S.13 which spells out when adverse possession becomes operative. It states:-

> "13. (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), ..."

The effect of Registration under the Land Titles Act S.21 is reproduced above. Platt, J.A. in *Kisee Maweu v Kiu Ranching*, [1982 – 88] 1 KAR 746 referred to another Court of Appeal decision which dealt with the same section and its effect thus:-

> "In the *Alibhai* case, it was decided that certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interests than those mentioned therein. Secondly it was held that no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate. So it follows that from the time a person acquires registered land the period of limitation runs from that time and not before."

The evidence on record in this matter shows that the Defendant was registered as the owner of the disputed land at 3.46 p.m. on 23.02.1987. If that be the operative date then of course 12 years had not expired by 23.7.1993 when the suit was filed and the Plaintiffs could not therefore claim title by adverse possession. Was it the operative date? The law does not seem to be clear at this point.

The case of *Alibhai Tayebali v Abdulhussein Alibhai*, (1938) EACA 1 which Platt, J A. referred to above supports the view that the period before registration shall be excluded. Hancox, J.A. (as he then was) made similar observations in the *Kisee Maweu* Case at Pg.748:-

> "The judge referred to s 21 of the Land Titles Act, Cap 282, which provides every certificate of title issued under the Act is conclusive evidence of the matters therein contained. Accordingly the judge held, following *Tayebali Alibhai v Abdulhussein Alibhai* (1938) 5 EACA 1, that any period of adverse possession prior to the acquisition of title to the land by the respondent was irrelevant for the purpose of the appellants' case. Section 21 of the Land Titles Ordinance, Cap.143 of the 1926 edition of the Laws of Kenya under which *Alibhai's* case was decided was identical to the present section, and the Court of Appeal for Eastern Africa in that case held that the registration under that Ordinance was the foundation of the title and that certificates issued thereunder conferred an absolute and indefeasible title to the property in question. Consequently there could be no entitlement or easement in favour of the respondent in that case, by virtue of the Limitation Ordinance, to the staircase, wooden landing and balustrade which overlapped on to the appellants' plot, unless the possession or use of it had existed for the prescribed period after the date of the grant of the certificate of title. Unfortunately, however the Land Titles Act has no application to the present case. ...."

In our case the Land Titles Act applies and so the *Alibhai* Case is applicable. In another case *Kairu v. Gacheru,* (1988) 2 KAR 111, however, it was held that:-

> "The law relating to prescription affects not only present holders of the Title but their predecessors (S.7 Limitation of Actions Act).

Apaloo, J A (as he then was) reasoned:-

> "If the period the respondent was in adverse possession against Mwangi were to be excluded and the period of limitation reckoned only when the appellant became registered proprietor, an owner of land whose title was in danger of being lost by prescription can better his lot by the simple

> device of alienating the land just a day before the 12-year period ran out. But it is elementary that a grantor of land cannot grant better title than he has. The appellant took Mwangi's title subject to the rights of a prior purchaser in adverse possession. That the law relating to prescription affects not only present holders of title but their predecessors – in title is shown by s.7 of the Limitation of Action Act."

The case however related to Registered Land Act Titles. Assuming the principle is of general application however, there is evidence that the Defendant purchased the disputed land in 1978 and took possession of it. There is evidence that he took action soon after to have the Plaintiffs and others evicted and he succeeded in respect of those others. There is evidence that he went to court in respect of 4 of the Plaintiffs. In short there was not continuous uninterrupted possession. Kneller, J. (as he then was) in *Kimani Ruchine v Swift, Rutherford & Co. Ltd.*, [1980] KLR 10 said:-

> "The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec plecario* (No force, no secrecy, no evasion). 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 purposes or any endeavours to interrupt it or by any recurrent consideration;"

On all accounts I answer the first question posed in the Originating Summons in the negative. Whether the time began running in 1978 or 1987 no interest had been acquired by the Plaintiffs in adverse possession and so the 3rd question is also answered. In view of those findings questions Number (2) does not arise. So does question Number (4).

It is plain however from the proceedings and the exhibits on previous cases that the Plaintiffs have residential structures of whatever nature and have commercial plants on the small portions they occupy. These ordinarily would by definition go with the land. But as the Land Titles Act under which the land is registered recognizes and the peculiar phenomenon of "houses without land" which I take judicial notice of, dictates those properties belong to the Plaintiffs. Accordingly reasonable compensation therefor shall be paid to the Plaintiffs.

Finally, it is not lost to me that there is a larger underlying problem in this litigation - the problem of "squatters" in the Coastal region. It is however a problem of the policy decision makers in the Government and Parliament who must take active steps to rectify the warped land policies that now exist. All the courts can regrettably do is to interpret the law as it exists and in accordance with the current Constitution.

The Defendant shall have costs of the suit.

Dated and delivered at Mombasa this 12th day of November , 2002

P.N WAKI

JUDGE