

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC. CAUSE NO. 191 (O.S.) OF 2020

KANGWEI CHARO KARISA

SIDI KANGWEI

MARRIAM CHARO BENZI & 65

OTHERS.....PLAINTIFFS

- VERSUS -

SALIM AHMED HAJI

FATUMA AHMED HAJI

HALIMA AHMED HAJI & 16 OTHERS (*Sued in their Capacity as the Beneficiaries to the Estate of AHMED BIN HAJI BARAWA*)

DEFENDANTS

JUDGMENT

I. Preliminaries

1. The Judgement by this Honourable Court pertains the Civil Suit instituted by by *Kangwei Charo Karisa, Sidi Kangwei, Marriam Charo Benzi* and *65 Others* the Plaintiffs herein. It was against *Salim Ahmed Haji, Fatuma Ahmed Haji, Halima Ahmed Haji* and *16 others*

(Sued in their capacity as the Beneficiaries to the estate of Ahmed Bin Haji Barawa, the Defendants herein. The suit was by way of Originating Summons on the 14th October, 2020 filed on 16th October, 2020 premised under the provision of Sections 7, 13, 17, 37 and 38 of the Limitation of Actions Act, Chapter 22, Laws of Kenya, Sections 1A, 1B, 2, 3 & 3A of the Civil procedure Act, Chapter 21, Laws of Kenya, under Order 1 Rules 11, 12, 13, 14, Order 5 Rule 17, Order 37 Rules 7, 8, 11, 13, 14, 15, 16, 17, 18, and 19 of the Civil Procedure Rules 2010 Act (Cap. 21) Laws of Kenya and all other enabling Provisions of the Law.

2. Upon filling of the Originating Summons the Defendants they responded through filing of a Statement of Defence and Counter - Claim dated 10th November, 2021. Thereafter, Plaintiffs further responded by filing replies and a defence on 30th November, 2021.

II. Court directions before the hearing

3. Through a Ruling delivered on 4th October, 2021, directions were taken on how to dispose off the Originating Summons pursuant to the provision of Order 37 Rules 13, 16 & 18 of the Civil Procedure Rules, 2010. Subsequently, on 1st December, 2021, after confirming that the Plaintiffs had complied with Order 11 of the Civil Procedure

Rules 2010, the Honourable Court set the hearing date on 14th March, 2022. The Plaintiffs called their witnesses and closed their case on 26th July, 2022 and the Defendants called their witnesses on 13th February, 2023 and marked their cases closed.

III. The Plaintiffs' case

4. The Plaintiffs claimed that adverse possession against the Defendants on the following orders: -

- a. ***THAT this summons be served on SALIM AHMED HAJI, FATUMA AHMED HAJI, HALIMA AHMED HAJI, AHMED MAHMOUD AHMED, FUTESMA MAHMOUD AHMED, MUMIN MAHMOUD AHMED, KHADIJA MAHMOUD AHMED, BAKARI MAHMOUD AHMED, FARUIKI MAHMOUD AHMED, ZULEIKA MAHMOUD AHMED, MARIAM MAHMOUD AHMED, ABDIO IBRAHIM, YUSUF IBRAHIM, HAJI IBRAHIM, ABDALLA IBRAHIM, SAIDI IBRAHIM, AMADI IBRAHIM, KHADIJA IBRAHIM AND IBRAHIM ABDIO, by fixing a copy thereof on the court Notice Board in the court house or by advertisement once in the Daily Newspaper.***
- b. ***THAT the Respondents' interest in all that piece of land situated in the Mombasa Municipality in the Mombasa District Subdivision Number 402 of Section II Mainland North measuring approximately Five Decimal Nine Six (5.96) Acres, registered in the Land Titles Registry at Mombasa as Number CR 1032/1 and is delineated, demarcated and described on the Land Survey on title has been extinguished.***
- c. ***THAT the Registrar of titles, Mombasa do delete entry in favour of the Respondents if any on the Green Card/Register in***

- consideration of paragraph 2 above and/or register the appropriate discharge in respect thereof without gazettelement.*
- d. THAT the Applicants' be registered as the proprietors of all the that parcel land situated in the Mombasa Municipality in the Mombasa District Subdivision Number 402 of Section II Mainland North measurement Five Decimal nine Six (5.96) Acres which said piece of land is comprised in a Certificate of title registered in the Land Titles Registry at Mombasa as Number CR 1032/1 in place of AHMED BIN HAJI BARAWA by reason of the fact that the Applicants have become entitled to the said land by adverse possession.**
- e. THAT the Registrar of titles, Mombasa do issue certificate of title for the parcel land situated in the Mombasa Municipality in the Mombasa District Sub - division number 402 of Section II mainland North measurement Five Decimal Nine Six (5.96) Acres which said piece of land is comprised in a Certificate of title registered in the land Titles Registry at Mombasa as Number CR 1032/1 in the names the Applicant KANGWEI CHARO KARISA, SIDI KANGWEI, MARRIAM CHARO BENZI and 65 others.**
- f. THAT the Prohibitory Order dated 8th August 1975 prohibiting Ahmed Haji Barawa from transferring or charging the property by sale or otherwise be lifted.**
- g. THAT the orders referred to in Paragraphs 2, 3, 4, 5 and 6 above be registered against the Titles to all the parcel land situated in the Mombasa Municipality District Sub - division Number 402 of Section II Mainland North measurement Five Decimal six (5.96) Acres which said piece of land is comprised in a Certificate of title registered in the Land Titles Registry at Mombasa as Number CR 1032/1 in terms of section 38 (2) of The limitation Action Act, Chapter 22, Laws of Kenya.**

h. THAT the costs of this Originating Summons be provided for

5. The Original Summons was based on the following grounds on the face of it and those of the 16 paragraphed supporting affidavit sworn by KANGWEI CHARO KARISA, the 1st Plaintiff sworn on the same day with the Originating summons where the Affiant averred:-

- a) The Plaintiffs at all times to the suit herein were still living in all that parcel of land situated in the Mombasa Municipality in the Mombasa District subdivision number 402 of Section 11 Mainland North measuring Five Decimal Nine Six (5.96) Acres which said piece of land is compromised in a Certificate of Title registered in the Land Titles Registry at Mombasa and is delineated, demarcated and described on the Land survey Plan (Hereinafter referred to as “The Suit Property”).
- b) The Plaintiffs herein had been and are in physical occupation and possession of all that parcel of land situated in the Mombasa Municipality sub - division Number of the parcels of land being subdivision number 402 of Section 11 Mainland North measuring Five Decimal Nine Six (5.96) Acres which said piece of land was compromised in a Certificate of title registered in the Land Titles registry at Mombasa. (Annexed and marked as ‘KCK -2’ were copies of photos).
- c) The Plaintiffs had occupied the suit land for more than 12 years and now craved to be registered as owners.

- d) The Plaintiffs herein resided on the suit land with their families and had brought up their families knowing this suit land as their only home because many were born in this land.
- e) The Plaintiffs herein had resided in the suit property and developed it openly and without hindrance or interruption for more than 12 years.
- f) The said suit property in issue belonged to Ahmed Bin Haji Barawa. (Annexed and marked as 'KCK 3' was a copy of certificate of Postal search and copy of demand notice from county Government of Mombasa showing they are paying the rates).
- g) The Plaintiffs herein did not have other homes to move to and all their families would be rendered destitute, landless and/or homeless.
- h) The land now belonged to them since the owner had been absent and that they had stayed in the said land for over 12 years as per the Limitations of Actions Cap. 22.
- i) The Plaintiffs had never seen the owners of the said parcel of land and they craved to be given the ownership together with the other Applicants.
- j) For all this period, the Plaintiffs peacefully exercised proprietary rights, like construction of both permanent and temporary houses, shops and play grounds among other social amenities in addition to the said developments. They also cleared the Lands that was bushy and created gardens in

which they planted and has continued to plant various food crops and cash crops.

k) They stood to suffer irreparable loss, damages and rendered homeless if not heard and granted the suit property.

l) They had commenced their said action for adverse possession by way of an originating summons as mandated by law.

6. The Plaintiffs responded to the Defendants Statement and Counterclaim stating that: -

a. The Plaintiff joined issue with the Defendant's defence and reiterated the contents of the originating summons (converted into Plaintiff) in its entirety.

b. The Plaintiffs reiterated the contents of the Originating Summons and paragraphs 1-16 of the Supporting Affidavit (now converted to a Plaintiff).

c. Save and except what was herein expressly admitted, the Plaintiffs deny all the contents and allegations laid out in the Defence as if the same were laid out herein verbatim and traversed seriatim.

d. The Plaintiffs averred that they moved and some were born in the suit property in the period between years 1948 and 2000.

e. The Plaintiffs averred that sometimes in the years 1950s a man by the name Mohammed Farah found him and his family already residing on the suit land and introduced himself as the land owner.

- f. The Plaintiffs averred that the said Mohamed Farah died in the year 1958 when he had lived on the land for 10 years with his family and the 1st plaintiff never heard from his family to date.
- g. The Plaintiffs averred that at the time of demise of the said Mohammed Farah, he had his neighbours within the property namely Mzee Machache and family, Mzee Kimbiri Mramba and family and Mzee Kiparapara and family.
- h. The Plaintiff averred that it was during the period that Mzee Kangwei, Mzee Machache, Mzee Kimbiri Mramba and Mzee Kiparapara lived on the suit land that the number of residents of Plot No. 402 grew to the number in the list and they could be more because more children are still being born and the adults are marrying.
- i. The Plaintiffs averred that together they peacefully, quietly and openly to the exclusion of the owner occupied the suit property and have built permanent and temporary houses, installed electricity, water and demarcated access roads and occupy various portions of the land and were willing to have the court carry out a ground survey to ascertain their occupation.
- j. The Plaintiffs averred that, the 1st and 2nd Plaintiffs moved into the land with their two children KADZO and KACHE in the year 1948, afterwards they were blessed with several other children whom they gave birth to while living on the Suit land namely:
- Kazungu Karisa Ngoa born in 1960;

- Tabu (deceased) and buried on the Suit Property,
 - Hamisi Mae Kangwei born in 1968;
 - Shida (deceased and buried on the land)
 - Kavumbi;
 - James Kadhuwa Kambwe born on 16th July 1971.
- k. And some two who died at a younger age before they could be named.
- l. The Plaintiffs averred that the 3rd Plaintiff's grandfather was known as Mohammed Mazers A.K.A Kiparapara and had two wives and four children; 1st wife Mariam and 2nd wife Rukia Bakari Mariam had 3 children namely; Kizuri Mohamed Mazera, Memsap Mohamed Mazera and Rehema Mohamed Mazera while Rukia Bakari had 2 children namely; Saidi Mohamed Mazera and Halima Mohamed Mazera.
- m. The 3rd Plaintiff was born and raised on the suit land after her mother Memsap left and got married elsewhere.
- n. The 3rd Plaintiff and family lived on the suit land together with her family and built permanent structures and farmed on it, some of the 3rd Plaintiff's relatives namely Said Mazera, Rukia Bakari and Suleiman Mazera and Kadzo Kibanzu and their grand - father Mohamed Mazera a.k.a Kiparapara were buried on the suit land.
- o. The Plaintiffs averred that they carried out farming activities on the land and would grow mangoes and coconut and sell to those who came to purchase in wholesale and vend some in Mombasa town and within the neighborhood.

- p. The Plaintiffs averred that they occupied the said suit land openly, quietly and without interruptions until sometimes in year 2016 when strangers were seen loitering with cars around the suit premises, upon being confronted, they claimed that they wanted directions to the chiefs' office.
- q. The Plaintiffs aver that shortly after, the 1st Plaintiff informed them that he had received summons to attend a meeting at the Chiefs' office to discuss the plot they were living in.
- r. The Plaintiffs averred that despite the summons being only directed at Mzee Kangwei, some of the Plaintiffs representatives such as Sidi Karisa, Jackline Hadisa, Mariam Charo Benzi, Rehema Mohammed, Kadzo Ndogo, Mariam Saidi, Francis Kazungu, Mohammed Saidi, Peter K. Karisa, Boniface Chogo, James Kathua Kangwei, Hamisi Chembe, Mbaraka Saidi, Claris Tsuma and Kazungu Kangwei, attended the said meeting.
- s. The Plaintiffs averred that it was not true that the 1st Plaintiff acknowledge that he was employed as a caretaker of the suit land, to the contrary the 1st Plaintiff expressed that those people were strangers and he had never met them and questioned where they have been all this while if at all they were the owners of the suit land.
- t. The Plaintiffs' averred that the Area Chief requested for another meeting where all the alleged grandchildren to the property owner would be present as well as all the grand children of Kangwei so that they could be interrogated.

- u. The Plaintiffs' averred that as they waited for summons to the area chief, the strangers traversed the land with unknown people with cars prompting the Plaintiffs' to chase them away and thereafter filed this suit
- v. The Plaintiffs' maintain that they did not know and had never met the Defendants since they moved into the suit premises, the defendants are therefore strangers to the plaintiffs.
- w. The Plaintiffs' averred that the Defendants in the course of these proceedings, filed a Notice of Motion application dated 5th May 2021 under certificate of urgency, on grounds that the substratum of this application which is the subject property is in dispute in the instant suit and is in danger of being wasted, damaged and wrongfully acquired by the Plaintiffs'.
- x. Further, the Defendants stated that the Plaintiffs had commenced and continued with unlawful sub - division, fencing, and erecting/ building structures on the subject property being Plot No.402 Section II Mainland North.
- y. The Defendants then at paragraph 8 of the supporting Affidavit sworn by AHMED MAHMOUD AHMED, annexed and marked as "AMA - 5" were photos of the subject property with ongoing construction.
- z. The Plaintiffs' averred that upon perusal of the said photos, the Plaintiffs' realized that the said photos were strange and did not give a true reflection of the ground status.

- aa. The Plaintiffs' averred that the said photos indicated that the suit property contained a mosque funded by UAE Red crescent to Build Mira Morshed Almazroi Mosque.
- bb. The Plaintiffs' averred that, realizing this conspicuous error, they instructed their advocate to instruct a surveyor to distinguish whether the said photos annexed emanated from the land and are actual buildings erected on the land.
- cc. The Plaintiffs' averred that the findings by the surveyor indeed confirmed that the annexed photos do not emanate from Plot MN/II/402 but rather from Plot MN/II/390 and MN/II/644, the said report forms part of the plaintiffs' evidence.
- dd. The Plaintiffs' averred that if the Defendants indeed owned land in Utange, then the said property was Plot No. 390 and 644 and not Plot No. 402 and/or their intention is to grab the Plaintiffs' land.
- ee. The Plaintiffs averred that the Defendants if at all they were the beneficiaries of the deceased owner, then their interest in the suit premises has been extinguished by virtue of the Plaintiffs adverse possession and that the Defendants despite having knowledge of the existence of the suit property as alleged, voluntarily relinquished their rights over the suit property by failing to safeguard the estate of their deceased grandfather for a period of 60 years being years 1954 - 2014., and for the following further reasons:-

- i. Upon demise of the registered owner in the year 1954, the estate was left to waste without an Administrator despite the deceased children being alive.
- ii. It was only in the year 2010 that the grandchildren attempted to administer the estate, 54 years after the demise of the registered owner contrary to what they have stated at Paragraph 3 of the Defence that upon death his beneficiaries instituted succession proceedings.
- iii. The Defendants nor their grandfather Ahmed Bin Haji Barawa have never had actual physical occupation of the Suit land since the year 1921 when the property was allocated to them.
- iv. As a result of the Suit being left to waste and without an administrator, the rates accrued prompting the Municipal Council of Mombasa to file Civil Suit No.137B of 1973 against Ahmed Haji Barawa.
- v. The Municipal Council of Mombasa obtained a decree against Ahmed Haji Barawa for a sum of Kenya Shillings Four Thousand Five Hundred and Four and Ninety Five Cents (Kshs. 4, 504.95/=) in the year 1975.
- vi. Upon failure to satisfy the decree, a prohibitory order dated 8th August 1975 was registered against the Title prohibiting Ahmed Haji Barawa from Transferring or charging the property by sale or otherwise and that all persons be and that they are hereby prohibited from

receiving the same by purchase, gift or otherwise, until further orders of the Court.

- vii. To date the said prohibition has never been lifted and/or discharged nor has there been any further orders of the court regarding the prohibition.
- viii. From the invoices for Municipal Council services annexed by the Defendants, the Defendants paid their first rates in the year 2005 when they offset a sum of Kenya Shillings Two Hundred and Nine Thousand Six Fifteen Hundred Seventy Eight Cents (Kshs. 209,615.78/-), 51 years after the demise of their grandfather contrary to their averments that they have been paying rates from the year 1954.
- ix. The Defendants had never been to the suit property and even assuming they were shown the location of the said property in the year 2005, which is denied then the property shown to them was separate and distinct from the one occupied by the Plaintiffs' going by the photo annexed to their earlier application dated 5th May 2021 and which after survey revealed that they are photos taken from Plot MN/II/390 and MN/II/644.
- x. The Beneficiaries to the estate are not well defined, the list of Beneficiaries and signatures appearing in the Succession cause done by ABDIO MAHMOUD AHMED (deceased) vary from those that appear in the list by

AHMED MAHMOUD AHMED, thereby casting doubt as to the genuineness of the Defendants.

xi. That therefore all the dealings on the suit land by the defendants from 1975 to date have been illegal and in blatant disregard of the court order that ordered a registration of the prohibition against the title and the defendants are in contempt and should be punished accordingly.

ff. The Plaintiffs denied the contents of Paragraph 6 of the Defence and state that, the 1st plaintiff has never been employed by Ahmed bin Haji Barawa, the 1st Plaintiff is only aware of one Mohamed Farah who died in the year 1958.

gg. The Plaintiffs denied the content of Paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 12 of the Defence.

7. The Plaintiffs prayed that the Defendants Defence be dismissed with costs and Judgement be entered for the Plaintiffs as prayed in the O.S (converted into Plaint).

8. Further the Plaintiffs put a defence to the counterclaim where they averred that

a. In response to Paragraph 14 of the Counter - Claim the Plaintiffs averred that the Defendants were strangers to them and if they are the beneficiaries as alleged then they are guilty of laches by failing to assert their rights over the suit premises thereby voluntarily relinquishing their rights over the suit land to the Plaintiffs. The Defendants voluntarily failed

- to appoint an administrator to preserve the deceased estate from wasting and the administrator was only appointed 60 years after the demise of their grandfather; when the administrator was appointed, the Plaintiffs' had occupied, and utilized the land exclusively, quietly and openly for a period of more than 12 years.
- b. In response to the contents made under Paragraphs 15 and 16 of the Counter - Claim, the Plaintiffs averred that the Defendants had not demonstrated whether they made a report to the police over the existence of trespassers on the land and whether they made attempts to obtain an order of removal of the trespassers, to the contrary, the Plaintiffs had had an uninterrupted occupation of the Suit property for a period of more than 12 years and the registered owners title to the Suit premises is now extinguished.
- c. In response to Paragraph 17 of the Counter - Claim, the Plaintiff averred that the Defendants were guilty of laches, they delayed in asserting their rights over the said property and have never been in possession of the Suit property since the year 1921, the Defendants were absentee Land - lords and to the contrary. It was the Plaintiffs' that would suffer irreparable loss and damage, due to the fact that they occupy and live on the Suit premises with their families.
- d. In response to Paragraph 18 of the Counter - Claim the Plaintiffs aver that the Summons by the Area Chief recognized

that the Plaintiffs were indeed in occupation and use of the Suit land.

9. The Plaintiffs prayed that the Defendants Counter - Claim be dismissed with costs and Judgment be entered for the Plaintiffs as prayed in the OS (now Plaint).

10. The Plaintiffs called PW - 1 on 14th March, 2024 at 1.30 pm wherein the witness told the court that: -

A. Examination in Chief of PW - 1 by M/s. Anyango Advocate.

11. PW - 1 testified under oath and in Swahili language. He identified himself as MOHAMED SAID MAZERA, a Citizen of Kenya bearing all the particulars as indicated in his national identity card shown to Court. He was born on 29th August, 1981. He recorded a witness statement dated 30th November, 2021 and filed in court on 1st December, 2021. He was one of the occupants of the suit land. There was a further list of documents on Page 22 and a list of documents on Pages 50 to 52; which he produced as his exhibits and his evidence in chief. PW - 1 told the court that as the same appeared No. 26 was the land he was born in. The elders stated on the land and his grandfather the late Mzee

Mohammed Mazera (commonly known as “Mzee Kiparara”). They resided there in peace. According to him his father was born there and buried there. On the death Certificate of Death indicated that he had died in the year 1997. All his relatives had been buried there without any problems it was until the year 2016 when some people came over claiming the land. They had a letter from the Chief of Utange. They approached Mzee Kangwei See pages 85 and 86.

12. The witness told the court that he heard that Mr. Kangwei had been called. He decided to go there; he decided to attend the meeting being one of the occupants to the suit land No. 402. They claimed to be the grand children of the land owner. Later on they wanted to be considered to have vacant possession/ places page 15 Defendants/Defence Counter. They claimed to be the grandchildren of the Land Owner. Later on they wanted to be considered the vacant possession/places. They were claiming the land which was not justifiable. They never agreed with them. Mzee Kangwei was his neighbor; he was not related to him. When they conducted the official search on page 84; there was evidence there had been a case by the Municipal of Mombasa

against Ahmed Haji Barawa. There was prohibitory order - Plaintiff Exhibit No. 3.

13. PW - 1 told the court that the Defendant's list of defence page - official search of 21st July, 2021 - the prohibitory order was still registered. At pages 53 to 83 of their bundle; they saw their grandfather who had died in 1954 but they applied for letters of administration in the year 2010 almost 60 years. They had not known they had applied for letters of administration. They came to court seeking for the construction to be stopped pages 88, 89, 90 to 95 the Notice of Motion Application Page 94 Paragraph 8 Marked as "AMA - 5" were photos which he looked at them. The witness found out that they were from Plot No. 406 and 390 as they had no forest on the land.
14. PW - 1 stated that they called the Surveyor who confirmed these photos; they found that the surveyor photographs were not from the land. From the reports there were plots of his house and the graveyard of his grandfathers. There were houses of his family. He prayed to be granted the prayers sought from the pleadings. From their report there are places which were open - they were 390, From Plot No. 402 here was no space. There were many

houses. The Plaintiffs were his brothers. They were 12 people who had built the land. They alleged the land was under Mzee Kangwei who was a caretaker. He was well known. He did not know them. They never came, they were cultivating the land.

B. Cross Examination of PW - 1 by M/s. Kihoro Advocate.

15. The Witness told the court that his father was called Said Mohamed Mazera. He only had the Certificate of Death to show that he was his father. From the statement his father died in the year 2015 and he was buried on the land. It did not show exactly where he was buried and whether it was indeed on that land. From the photographs there was an indication that the cemeteries/burial places where they were buried. They did not show their names. He did not have any documents to show that he was a beneficiary of the estate. It was his grandfather who came after Mzee Kangwei. From the year 1950, there was someone Mohamed Farah indicated that he was the owner was not factual as he did not know him. He knew all the friends of his grandfather and their activities; he did not know how his grandfather got to the suit land. They were never given any summons.

16. Further the witness told the court that on 18th March, 2016, the chief convened a meeting of the Kangwei Family, he was present during the meeting. He never opposed anything that was discussed during the meeting. They had been on land for a long time. They had never paid rate. He was not aware whether the family members had been paying rates. The documents shown indicated the rates were paid by the Defendants. Mr. Benzi's statement at page 146 - showed that his main reason for coming to court was to stop them from entering on the land. He was entitled to 2 acres, he came to court to prevent any invasion by strangers. But they were all together. With refer to the further documents.

C. Re - Examination of PW - 1 by M/s. Onyango Advocate.

17. PW - 1 stated that he was 41 years; His name was Mohamed Said Mazera. From the Certificate of Death he was buried at Zei. His grandmother and the father died and they were buried on the land. Mzee Kiparapara was his grandfather and he was buried there. He never heard of Mohamed Farah and his ownership of the land. He was not aware that the title changed from Mzee Kiparapara - page 27 showed they started paying the rent on 14th

December, 2009. It was not true according to the witness that the whole land was 2 acres with development and 4 occupants.

18. The Plaintiffs called PW - 2 who told the court that:

A. Examination in chief of PW - 2 by M/s. Onyango Advocate.

19. The Plaintiff witness - 2 was sworn and testified in Swahili language. He was called FRANCIS KAZUNGU KASIWA. He was a citizen of Kenya holding a national identity card bearing all the particulars as shown to Court. He told the court that he resided at Utange and was a wine tapper. He recorded a witness statement dated 30th November, 2021 which adopted as his evidence in chief. He had 3 acres of land. He had been there from when he was 11 years. Mzee Farah came to be on their land. He came as a guest on his father's land until his father passed on. In the year 2007 its then some people came claiming the portion of land. From the minutes of 18th March, 2016, that his grandmother accepted the land belonged to Kangwei. But the witness never signed the minutes.

B. Cross Examination of PW - 2 by M/s. Kihoro Advocate.

20. PW - 2 told the court that he never left the land. He knew Mzee Kambui; Mr. Mohamed Farah claimed the land. But they knew all

was an error. From the minutes dated 18th March, 2016 they disagreed - the context. They never paid any rates. He did not know whether the rates were being paid or not. He was referred to the Notice in the Gazette in 2016 - the witness stated that they never filed any objection as expected. He had no documents to show that Kangwei was his father neither Kangwei was the son of his grandfather. The 65 people claiming the land had not filed any documents. Mzee Kangwei had filed documents in court. With reference to the surveyor's report, PW - 2 told the court that he refuted the same. They only allowed the family of Mzee Kangweu. All the 65 people were neighbors.

C. Re - Examination in Chief of PW - 2 by M/s. Onyango Advocate.

21. PW - 2 reiterated that he had brought documents to show he inherited the land. He attended the chief's meeting. The Kenya Gazette was of the year 2015. He knew it was Crown land and he had never seen the children of the chief. From the land there had never been a surveyor - nor Mr. Abbas on the land. Mr. Mohamed Farah never had brought any documents on the land ownership.

22. On 25th July, 2022 the Plaintiffs called PW - 3 who told the court that:-

A. Examination in Chief of PW - 3 by M/s. Onyango Advocate.

23. PW - 3 testified under oath and in Swahili language. She was called MARYAM CHARO BENZI, a Citizen of Kenya holding the national identity card bearing all the particulars as shown to Court. She was born on 1st January, 1958 and she recorded a witness statement dated 30th November, 2001. She applied to have it adopted and admitted as his evidence.

B. Cross Examination of PW - 3 by M/s. Kihoro Advocate.

24. PW - 3 stated that his grandfather, his grandmother and others they had been buried on the suit property. There were 7 burial sites there. It was Mzee Kangwei who got there first then his grandfather followed. He did not know Mzee Farah. She was not in that meeting of Chief - 18th March, 2018.

25. The Plaintiffs called PW - 4 on 26th July, 2022 at 12.30 pm who testified that: -

A. Examination in Chief of PW - 4 by M/s. Onyango Advocate.

26. PW - 4 was sworn and he testified in English language. He was called MR. BATHLOMEW. C. MWANYUNGU. He was a Licenced Registered Surveyor. He carried out the survey and prepared a Survey Report - based on a Letter written to him by Onyango Advocates. These were his observations. The boundaries were on Acres 2.25 HA - 5.9 acres. There were several houses. They were trying to check whether the houses were within the area/land. All buildings that appeared on the axed photos were not within parcel No. MN/II/402. The Mosque was on parcel No. 644 and not on. The pictures were annexed in the report. The property was fully occupied. There were approximately 65 structures. These included massionates, bungalows, Swahili houses and a few other semi permanent structures. They were on Parcel No. 390. There were other buildings which did not appear on the suit land. He produced the Survey Report marked as "MFI - 6" be produced - as Plaintiff's Exhibit No. 6. The aerial report or satellite images one could not make conclusion. One had to go on the ground.

B. Cross examination of PW - 4 by M/s. Kihoro Advocate.

27. PW - 4 reiterated that he interacted with the community. He did not note all of them. The photographs were gotten from the parcels No. MN/II/401, 403, 390 and 1481. Figure 7 the witness told the court that a photograph which was incomplete. There was a few Swahili Houses (Semi Permanent Houses). He never came across any school on the suit land. He encountered a grave. His report did not apportion on the ownership of the land nor the occupation.

C. Re - Examination of PW - 4 by M/s. Onyango Advocate.

28. PW - 4 confirmed that there was no land which had been left vacant. The area was fully occupied. Most of the structures were stone blocks. He interacted with the residents.

29. The Plaintiff called PW - 5 on the same day who told the court that:-

A. Examination in Chief of PW - 5 by M/s. Onyango.

30. PW - 5 testified under oath and in Swahili language. He was called JAMES KADHIWA KAMBWE, a Citizen of Kenya holding the national identity card bearing all the particulars as shown to Court. He was born on 6th July, 1971 and he resided on Plot on 405. His parents

were Kangwei Charo. His parents were old. They could not walk well. He recorded a witness statement dated 30th November, 2022. Most of them were deceased. All the ones who died were buried there. His father had 3 acres. The other parties were neighbours and there was a brother. In the year 2016 he heard there was someone who came to claim to be the owner of the land. He did not know Mr. Mohamed Farah. He was not aware of the Chief's meetings but was informed what transpired there. The witness had two children aged 18 and 22 years. He had prepared an affidavit to correct his names. The affidavit was produced as Plaintiff Exhibit. He had never seen Mr. Fatah. It was not true that only 2 acres in use while 4 acres was not in use.

B. Cross Examination of PW - 5 by M/s. Kihoro Advocate.

31. PW - 5 confirmed that he was not aware of the chief's meetings. He was born on the land. He knew the owner of the neighbouring house as Mr. Kodonde. The other was for Jane. They came to Court to testify.

C. Re - examination of PW - 5 by M/s. Onyango Advocate.

32. PW - 5 reiterated that page 40 the resident of the house, he could identify these people. From the list all these were people with

houses there. They knew this land was Crown Land. His father had 3 acres. It was after they got married that he gave them.

33. The Plaintiffs marked their case closed through their Counsel on record M/s. Onyango on 26th July, 2022.

IV. The Defendant's case

34. The Defendants' responded to the Originating summons which were converted into Plaint and Defence on the Defendants averred as follows:

a) Save as hereinafter specifically admitted, the Defendants herein denied each and every allegation of fact contained in the Originating Summons now Plaint dated 14th October 2020 (Hereinafter referred to as the Plaint and the Supporting Affidavits sworn by Kangwei Charo Karisa, Sidi Kangwei and Marriam Charo Benzi and Witness Statements all dated 14th October 2020 (Hereinafter referred to as the statements) as if the same were set forth verbatim and traversed seriatim.

b) The Defendants averred that Ahmed Bin Haji Barawa (deceased) was the registered proprietor in freehold ownership interest of that piece of land containing 5.96 hectare or thereabout situate in the district of Mombasa registered under title No.MN/II/402, which interests in land now vests upon his beneficiaries, successors and Administrators to the estate.

- c) The Defendants' averred that upon the death of Ahmed Bin Haji Barawa, his beneficiaries instituted succession proceedings at the Kadhi's Court the most recent being in March 2019 when Administration letters of the estate were issued.
- d) The Defendants averred that at all material times to date they were responsible for payment of land rates to the Municipal council of Mombasa.
- e) Sometime in 2015, the Defendants averred that an application for provisional title was made and the same issued by the Land Registrar with no objections from any party including the Plaintiffs.
- f) The Defendants averred that at all material times the 1st Plaintiff was an employee of Ahmed Bin Haji Barawa, who with permission of the deceased would occupy and guard the property and in return farm portion of the land identified to him for his subsistence provision.
- g) The Defendants averred that at all material times the deceased and his children would visit the farm, after his death the children and their children would visit the farm from time to time.
- h) The Defendants averred that at all material times until sometime in the year 1995, the 1st Plaintiff and/or his agents would deliver mangoes and produce from the farm to the Defendants' family until when his age and body grew weak

after which the delivery stopped but the Defendants' would visit farm from time to time.

i) The Defendants were strangers to the contents of Paragraphs 2, 3, 4, 5, 6, 7 a,b,c,d,e of the Plaint and puts the Plaintiff to strict proof of all the allegations contained therein and further wishes to state as follows:-

- i. At all material times the occupation of the 1st Plaintiff and his family on the subject property was with the permission of the registered owner and with the understanding that he would care and till the land on behalf of the Registered owner and his beneficiaries.
- ii. The Plaintiffs had not identified specific and distinct portions they occupy and/or were entitled by virtue of adverse possession, noting that the claim is made by 68 Plaintiffs.
- iii. Save for the 1st Plaintiff, who was allowed by the registered to reside on a portion of the land, the other 67 Plaintiffs have not indicated the length of occupation by each of them.
- iv. The 67 Plaintiffs were notorious trespassers into the suit property and masquerade as Plaintiffs in this suit noting that no identification documents have been presented before this Court, the Plaintiffs may as much be fictional names and a creation of imagination.
- v. The 67 Plaintiffs' had invaded the subject property as from sometime in late year 2016 and as recent as year

2018, when the 1st, 2nd, 3rd Plaintiffs began illegally selling portions of the property.

- vi. Save for the 1st, 2nd and 3rd Plaintiffs' the other alleged 65 Plaintiffs had not tendered any evidence before this Court in support of their claim.
 - vii. The occupation had been interrupted severally as the Defendants had visited the subject property with an aim to have the same subdivided and sold.
 - j) The Defendants averred that there are inconsistencies in evidence before this Court.
 - k) The Jurisdiction of this Honorable Court was admitted.
 - l) The Defendants denied that the Plaintiffs are entitled to any of the reliefs sought for in the Plaint and the Plaintiffs are put to very strict proof thereof.
9. The Defendants raised a Counter - Claim where they stated that:
- a. In the Counter - Claim, the Defendants reiterated the contents of Paragraphs 1 - 12 hereinabove.
 - b. The Defendants are beneficiaries of the estate of Ahmed Haji Bin Barawa (deceased) who was the registered owner and proprietor of the suit property in dispute herein being plot No. 402/section II/ Mainland, with the 4th Defendant Ahmed Mahmoud Ahmed, being the Administrator of the deceased's estate.
 - c. The Defendants contend that the Plaintiffs herein had whether by themselves, their agents, and/or employees entered and encroached on/and trespassed upon the suit

property and erected structures and continue to be in illegal occupation and possession of the suit property.

- d. It was the Defendants contention that the 1st Plaintiff and his Kin had commenced and continue with unlawful subdivision, fencing, demarking, and erecting/building structures on the subject property.
- e. That as a consequence of the Plaintiffs aforesaid actions, the Defendants continue to suffer loss of use of the suit property and stood to suffer irreparable prejudice and as such Defendants shall claim damages for loss of use.
- f. That despite demands and summons by the areas office of the Chief, the Plaintiffs have refused to vacate the subject property and had instead continued to trespass upon the subject property.

10. The Defendants prayed that the Plaintiffs' claim before this Honourable Court be dismissed and the property be vested upon the Administrator of the Estate of Ahmed Haji Bin Barawa and the Defendants further prayed as follows:-

- i. A Declaration that the Defendants are the registered and absolute and indefeasible owner and proprietor of all that property known as Plot No. 402/section II/Mainland measuring approximately 5.96 hectares.*
- ii. An Order evicting the Plaintiffs whether by themselves, servants, agents, employees and/or anyone claiming therefrom, from all that property known as plot No.402/section II/ Mainland within Thirty (30) days from the date of entry of*

judgment herein, failure upon which the OCS and OCPD Bamburi/ Utange to intervene and use reasonable force to assist in enforcement of the eviction order against the Plaintiff.

- iii. An Order for a Permanent Prohibitory Injunction to restrain the Plaintiff whether by themselves, their servants, agents, employees and/or anyone claiming under the Plaintiff from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any manner whatsoever dealing in the Defendant's Property known as plot No.402/section II/Mainland.**
- iv. Damages for Loss of use of the property plot No. 402/section II/ Mainland and/or General damages for trespass on the Defendant's property plot No. 402/section II/Mainland.**
- v. Costs of the Suit.**

35. On 28th February, 2024 at 11.30 am the Defendants called their 1st witness DW - 1 who told the court that: -

A. Examination in Chief of DW - 1 by M/s. Kihoro Advocate.

36. DW - 1 was sworn and testified in Swahili language. He was called AHMED MAHMOUD AHMED, a Citizen of Kenya holding the national identity card bearing all the particulars as shown to Court. He was born on 14th February, 1956. He swore a witness statement dated 11th November, 2021 and had 14 documents of which 13 of them were admitted as Defendants' Exhibit 1 to 13.

With reference to the title deed, it indicated that Ahmed Haji Barawa was the registered owner to the land MN/III/402. He was his grandfather and the witness was the legal administrator to the estate of the deceased. The witness knew the land existed as they were young. It was at Utange. In the year 2005 they would be going to the land. They were taken there by their auntie. They found Mzee Kangoi - he was living there. He was the caretaker. There were plantations - mango trees, oranges, coconut e.t.c. There were 10 Semi Permanent houses for Mzee Kangwei. They would be paying rates for the land. At page 16, the witness told the court that there was a clearance of the rates certificate. The title deed had been misplaced - so they decided to first pay the rates and then they applied for a Provincial Title Deed in the year 2015 and which was issued by the Land Registrar. It was advertised in a Kenya Gazette. There were no objections.

37. According to the witness, it was later on that there were people who got into the land. They decided to inform the locational Chief about the matter. He took up the matter. The Chief summoned all the people and Mr. Kangwei. At the meeting, there were 15 people who attended. With reference to the minutes of the

meeting of 18th March, 2016, the Chief informed people and family of Kangwei of the land. Mzee Kangwei never spoke. It was only his son who spoke. However, out of the meeting he agreed that he was ready to leave the land but only on one condition - that he be compensated for the plantation. His son stressed that he was ready to institute a case. They went back to the land and they were shocked to find over 50 people who had settled on the land. From their case, they had not filed any documents of ownership of land.

38. With reference to the list of authority, the witness told the court that there were 70 people although there were 65 people who came and filed the case. PW - 3 indicated that they had buried 7 people on the land but from the Survey Report indicated that there were no burial sites. With reference to the certificate of illiteracy of 14th November, 2020, they had used their left hand thump print, but from the list of authority the same people had appended their signatures. From the meeting by the chief only 15 people and not 65 people who attended the said meeting. DW - 1 was referred to the Plaintiff's bundle and the children for Mzee Kangwei.

39. DW - 1 stated that Kathima Kangwei - had not brought any document e.g Certificate of birth to proof that he was a son of Mzee Kangwei. He did not know Mzee Kiparapara and 5 others. He had not mentioned the 65 people. When they went to the meeting the 65 people were not there. They wondered where they came from. He was aware that the land had been sold to third parties and yet there were developments on the land.

B. Cross Examination of DW - 1 by M/s. Onyango Advocate.

40. DW - 1 stated that he was born on 14th February, 1956. His grandfather was called Ahmed Haji Barawa. He passed on in the year 1959. He applied for the Grand Letters of Administration and he was appointed as the Legal Administrator. He now confirmed that his grandfather died in the year 1954 - page 79, from the letter by the chief dated 18th September, 2009 was still young. He confirmed that all what he had said was hearsay. The beneficiaries were:-

- (a) Asma Binti Salim.
- (b) Mohamed Ahmed Haji.
- (c) Fatuma Ahmed Haji.
- (d) Salim Ahmed Haji.

(e) Halima Ahmed Haji.

(f) Isha Ahmed Haji.

41. According to the witness, apart from (e) above all were deceased. After the death of the grandfather there were beneficiaries lodged for the Administration of the Estate of the deceased, but he had not brought any of the documents to court. His grandfather also had bought property at Kitui, Uganda and Mombasa Utange. Their grandfather used to reside at Kibokoni while Mr. Abdio Ahmed used to reside on the land. He was the son to grandfather.
42. With reference to the letter dated 18th September, 2009 by the chief (page 79) the witness told the court that he was Mr. Abdio, who was mentioned as a beneficiary from the said list. The children used to cultivate on the land. They planted coconut, mango e.t.c. but he did not have proof to that. Although he used to visit the land well but he did not know the neighbor's. He knew the beacons. He also did not know the plot numbers well, but they were 401, 402 and 403. The chief of the area at the time of the testimony was called Macheche Jeremiah - i.e. an Assistant chief. He did not know the names of the village elders, his grandfather was called Ahmed Haji Barawa.

43. DW - 1 confirmed when referred to the title deed on page 74 that being the title deed were the names Ahmed Haji Bin Barawa and Pages 68, the names were different. With reference to page 16 of the Plaintiff's documents it was Ahmed Bin Mohamed. At page 36 of the Plaintiff's document; it was the official search dated 8th August, 1995, the land being at Utange. He guided the court on the direction to the land - it was situated at Bamburi, then Bombo village, Chief Offices and then where there was a Power station. The plot was after 4 houses from Power station its adjacent to KEMJI's land. The main land mark was an area occupied by squatters/Mosque.
44. DW - 1 stated that he recalled they filed the case in court and they attached photographs. The mosques was not on their land and that is why he said the information given was wrong. They took a land surveyor on the land, he did not recall when it was but it was in the year 2023. With reference to the letter dated 18th February, 2022; it indicated that they went on the land survey which was undertaken in January and the land survey report was dated 9th February, 2022. He indicated having conducted the survey on 2nd February, 2022. With reference to page 53 of the

Defendants' bundle the witness told the court that it was the Succession Cause No. 73/2010. On page 54 showed that Abdio Mahmoud Ahmed died on 17th July, 2017. They applied for Grant Letters of Administration in the year 2009. That was after 55 years when they started pursuing the succession process.

45. DW - 1 confirmed that it was not true that they had been paying rates. The court order came out 27 years from then. Today, they had never had the court order vacated. They would be frequently visiting the land but there was nothing to show to that effect. They had knowledge of the persons in occupation but by the year 2016 all the houses were new. With reference to the land surveyor's report the witness told the court that it showed that there structures and they were increasing by the year 2016. They reported the matter to the police and Chief but he never brought any such proof. They never filed a suit in court.
46. According to DW - 1 at paragraph 5 of the Defendant's witness statement, he confirmed it was as indicated. He knew the land for the 1st time in the year 2005. The fact that their grandfather had been a caretaker. He never witnessed this as this information was written for him. His parents died in the year 2018 and hence

nobody regularized the status of the caretaker. He had not given any form of employment. He was never employed nor made any payment. He saw him for the 1st time at the Chief's office. With reference to Paragraph 9(d) of the witness statement - they were notorious trespassers. Its them who stated that being professional squatters. There were 67 persons. With reference to page 16 of Defendant's List of documents he got into the land in the year 2005. It was 25 years later. During the meeting with the chief - Kangwei was present but he never talked He attended later while very drunk.

47. According to the witness, at pages 13 and 14 of the Defendant's bundle of document, these were the Chief's letter addressing the Plaintiff, which meant that the chief summoned them. They arrived and they were not necessary Kangwei's children. He confirmed that the land was for his grandfather. It's possible for anybody to acquire land from elsewhere within the Republic of Kenya. For instance, they got the land at Utange yet they came from Kitui. With reference to the submissions by the Defendants at paragraph 23, the witness told the court that they said they

never wanted to set aside or vary the order of this court of 22nd January, 2021.

C. Re - Examination of DW - 1 by M/s. Kihoro Advocate.

48. The witness reiterated that his testimony was from what he was told by his parents. This was one of the parcels of land that their parents had told them about. Mr. Abdio Mohamoud was given the land. He was his brother. He was never the son to the deceased. After that he took over as the Legal Administrator of the Estate. Hence he could not be in the list of beneficiaries by Chief. He confirmed they would frequently visit the land. He would know the chief and village elder, also the children of Kangwei, his father was Mohamed Ahmed.
49. DW - 1 stated that he was called Ahmed Mohamed his grandfather was called Ahmed Haji Barawa and his father was Haji Barawa. The land had a prohibitory order by Municipality to the Haji Mohamed Barawa for non - payment of rates. They were advised to trace the court file and take action. Between the years 1954 and 2009 , they used to visit the land, the Provincial title came out in the name of their grandfather. They were sued in the year 2016, when the houses increased they tried but they

became violent. He did not know whether Kangwei was alive or not.

50. With reference to the minutes by the chief, the witness stated that the same was signed by all the 67 people who were not involved nor called to the Chief's meeting. The chief summoned only the people on Kangwei's land. Today they were prevented from entering the land. They were harassed by people. The witness attended the meeting as per his statement. He clarified his names recorded as "BIN" - "BIN" which was not his names but meant the "SON OF". They got prohibitory orders for the land not to be sold or interfered with. People got into the land from the year 2016.

51. The Defendants called DW - 2 on the same day where the witness stated that: -

A. Examination in Chief of DW - 2 by M/s. Kihoro Advocate.

52. DW - 2 was sworn and testified in English language. She was called RACHEL MUTHEU NDAMBUKI. She was a Land Surveyor and she knew the suit property. She was instructed by M/s. Kihoro & Company Advocates. She was to trace, study and avail the survey access road; establish whether there had been any

encroachment. She carried out a survey on 25th February, 2024 and did a report which she produced as Defendants Exhibit 14. She told the court that she was not a licensed surveyor. The findings were that the land had been encroached on.

53. From the year 2003, as per the evidence of satellite map, there was only one permanent structure. The rest had been vacant and bushy. In year 2004 there were two empty spaces but the place was developed with permanent structures - i.e. since 2003 - there is one which has feature. But in 2008 there were two (2) makeshift structures. But in the years 2016, 2022 and 2024 the permanent structures seem to have increased i.e. from the year 2016 - there had been a lot of encroachment on the land MN/I/402. One could not see the grade.

B. Cross examination of DW - 2 by M/s. Onyango Advocate.

54. DW - 2 told the Court that she was not a licensed surveyor but a government surveyor. As a Government Surveyor having been appointed in the year 2005, she was allowed to practice but had not produced her academic papers in court. The property was within Utange. She did not know the exact place from here. But

with the GPS IT she was able to take the boundaries - 404, 644, 386. There was property not claimed 643, 401, 403 and 390. The property stood out from her were the permanent structures. They used boda boda to get there, she never saw a Mosque as she never got there/inside. They just wanted to know if it was occupied. There were random spaces in between. She conducted a confirmation survey of the situation on the ground and using the Google Images.

55. The Google Imagery was and is an application and it has to be updated. That was what was used in Kenya. They confirmed the authenticity of the images as its obtained from the Data Centre. With reference to findings No. 3 the witness told the court that the Survey Plan of the property did agree with its ground location. The coordinates agreed with the images of the Google. They converted the coordinates. She had not produced the machines for the conversion. The F/R confirmed the exact location and existence on the land. They got to the ground. Her survey was based on the records, her focus was on the ground and the MAP to see whether it agreed. She was not a GIS expert but a Land Surveyor.

56. DW - 2 stated that by the time she got to the land there were some parts which were not fully occupied. Comparing this report and that by ABBAS Surveyor - there were some spaces which were not fully occupied and which they could do upon doing that by a physically access to the land. According to her report as per 25th September, 2024 there were many structures. They could not count them.

C. Re - examination of DW - 2 by M/s. Kihoro Advocate.

57. DW - 2 reiterated that Abbas gave an estimate to 52 structures. She never counted them but they were many. From the instruction, she got there were many. But Abbas said the encroachment increased from the year 2016. The report she produced was a summary - it was the final product as there were so many things that happened on the land. They did an external survey using the coordinates to confirm the exact situation of the and they had a view of the land.

58. The Defendants called DW - 3 on the same date and he testified as follows: -

A. Examination in Chief of DW - 3 by M/s. Kihoro Advocate.

59. DW - 3 was sworn and testified in Swahili language. He was called ABDI NUR SALIM, a Citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court. He was born on 11th November, 2021. He told the court that he was the grandson to the owners of the land. They were informed about the land in the year 2005 by their auntie. Later on they visited the land in the year 2009. Before that there was a caretaker called Mzee Kangwei. He was there on the land. They would be able to go there with the chief and meet the people. They would dispute that the land was not theirs but Mzee Kangwei would confirmed the land belonged to their grandfather. He spoke during the meeting. There were minutes - it stated (in Kiswahili) (Refer to the minutes). It was Mzee Kangwei who stated this. In the year 2016, people started storming in the land and they would be building on the land. They found they had already constructed. They tried to evict them and that was why they went to the Chief.

B. Cross examination of DW - 3 by M/s. Onyango Advocate.

60. DW - 3 confirmed that he was 58 years and he had never seen his grandfather. His mother was called Fatuma Haji Barao. She died a while ago. He did not know when the grandfather had died. He

was told he died in in the year 1948. This was history he got from their parents and their aunties. He got to the land in the year 2005 and he died in 1948. Those were 57 years. It was Mr. Kangwei who was left as the caretaker. But from the family viewpoint there were no Grant Letters of administration but the title deed stated that the owner was Haji Barawa.

61. DW - 3 stated that he was in court on the strength of the title. They filed a case at the Kadhi's Court seeking to be granted the land. Mr. Abidio Mohamed Ahmed was appointed as the Trustees by court in Succession Cause given in the year 2010. There were people who were mentioned as the family members of the deceased (with reference to the list) of the family. With reference to the letter of authority - the witness told the court that the name of Ahmed Haji was missing.

62. With reference to the letter dated 8th March, 2016, the witness told the court that he knew Mzee Kangwei would be visiting the land from the year 2005 and 2009. He used to live in the side of the land on makeshift houses. There was more than one structure. He had 12 children, but when he went year 2005 he found one of the sons, he did not know their names as it was not

important to him. He confirmed that Mr. Kangwei was the caretaker who oversaw and looked after the property but not on payment. On notice he could be asked to leave/ vacate the land. They had never given him any notice to vacate the land. They had never given him any notice to vacate the land. They had never reported the matter to the police that he had refused to vacate the land.

63. With reference to the minutes of the meeting for the settlement on the land matter. He knew the wife but he did not know her names. The minutes were never signed by the participants, the chief never called them to read and confirm the contents of the minutes. They had held the 56 Plaintiffs were notorious invaders. It was because they came on the land from the year 2016, he got onto the land from 2005. Every time there could be increase of the occupants they went to the chief. He never took any other step. The deceased grandfather had property in Kitui and Mombasa on rental purposes. From the history there was no time that his grandfather occupied the land.

C. Re - examination of DW - 2 by M/s. Kihoro Advocate.

64. DW - 2 confirmed that their parents were pursuing the land. They were informed by their Auntie. In the 57 years it (title) never changed it was intact. Before the year 2016, they got the title deed and they had rates. The chief summoned Kangwei and family to attend the meeting and not the other people (57). They could not remove Kangwei as he had taken care of the land. The Chief' letter confirmed the contents of the minutes of the meeting. His name was in the list of the authority to inherit the land. The people mentioned as the Defendants had nothing to do with the people to inherit the estate of the deceased.

65. The Defendants closed their case through the Legal Counsel M/s. Kihoro Advocate on 10th December, 2024.

V. Submissions

66. On 10th December, 2024 after the Plaintiffs and Defendants marked the close of their cases. The Honourable Court directed that the parties file their submissions within stringent timeframe thereof on. By the time of penning down the Judgement, the Honourable Court was only able to access the Submissions by the Defendant. It could not access the one for the Plaintiff neither from the Judiciary CTS Portal nor the Court file.

67. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 19th September, 2025 on notice.

A. The Written Submissions by the Defendants

68. The Defendant through their Advocates Messrs. Kihoro & Company Advocates filed their written Submissions dated 12th March, 2005. M/s. Kihoro Advocate commenced her submissions by providing a brief background of the matter. The Learned Counsel stated that the Defendants were the lawful, legitimate and equitable owner's beneficiaries of all that piece of land being Plot numbers 402 section II Mainland North - the suit property. That the Defendants patriarchal kin were known as Barawa Bin Haji. They entered into a verbal agreement with one Mr. Kangwei Charo Karisa who was one of the Plaintiffs. The agreement was that Mr. Kangwei Charo Karisa was engaged as a caretaker and hence was permitted to live on a portion of the property. He would be allowed to plant subsistence food on the farm, part of his mandate was to take food from the farm to Defendants home in Kibokoni. It was the Defendantss evidence that Mr. Kangwei severally

visited their home in Kibokoni with mangoes and farm produce.

69. The subject property had been passed down from generation to generation of the Defendants and the generations kept visiting the farm from time to time to supervise and check the progress of farming as conducted by the said Mr. Kangwei Charo Karisa. DW - 1 and DW - testified that their parents and aunt who were now old and bedridden took them to visit the farm and introduced them to Mr. Kangwei. This position was buttressed by the minutes of the meeting at the chief dated 18th March, 2016 and produced as evidence in Court by the Defendants as Exhibit number 10 where Mr. Kangwei said in Swahili at paragraph 2 at page 2 that "***alivyosema wajukuu wa barawa ni kweli katika shamba wakati huo walikua wakichukua maembe na nazi wakipeleka kwa wenyewe, nyanya aliruhusiwa kupanda maembe na minazi***"
70. At all material times when the kin of Barawa visited the farm the only household that lived there was that of Kangwei and this was evident by the Chief's summon to the occupants on the land in year 2016, was addressed to Mzee Kangwei as he

was the only occupant in the subject property. The other alleged occupants had invaded the suit property post year 2016 with the assistance and consent of Mr. Kangwei who had filed a suit together with them with a fictitious claim for adverse possession. The majority of the alleged occupants of the suit property never appeared in Court to testify and lay a specific claim over a specific area and section of land that they allege to have occupied since ages immemorial. The Defendants had brought before this Court documents evidencing payment of municipal rates dating back to year 2005 being a sum of Kenya Shillings Two Hundred and Nine Thousand Six Fifteen Hundred (Kshs. 209,615/=) as they sought to have the caution lifted at the lands registry after which they diligently maintained payment of rates whenever they fell due. See Exhibit number 3 which a copy of the title with an entry. The Defendants also pursued administration of Bin Barawa's (deceased) estate and sometime in the year 2013 had the subject property gazetted for issuance of a new land title issued by the Registrar, there was no objection received by the registrar by any occupant or alleged owner of the property. See Exhibit number 6 being

Gazette notice of 5th June, 2015. The Defendants had therefore not been lackadaisical with protecting their interest. They had been making steps towards eventual distribution of the estate of Barawa but the sole caretaker of the property had other ideas in mind - to disenfranchise the original beneficiaries vide the fictitious claim of land adverse possession. As a caretaker was a good thing that demonstrated responsibility.

71. On the other hand, all the Plaintiffs witnesses purported to have been born in the suit property. However, none of them produced any documents for instance Certificate of births etc to prove the name of their parents or buttress their parents identity and place of birth. The Originating Summons the Plaintiffs were 68 of them whereby 65 claim to have resided on the suit property for a period of not less than 12 years. These were never pleaded with specificity and/or adduced evidence. Mr. Kangwei claims to have had the suit property as his home. That he had occupied it for more than 12 years before the year 1963. In the second supporting affidavit by MMariam Charo Benzi, the 3rd Plaintiff insisted having resided on the property for more than 12 years but failed to specify the date and time

of entry on the suit property. In the Plaintiffs reply to Defence and Counter - Claim dated 30th November 2021, the Plaintiffs averred that they moved and some were born in the suit property between year 1948 and 2000s. The 1st and 2nd Plaintiffs were alleged to be husband and wife. At paragraph 10 of the reply to Defence and Counter - Claim, the 1st and 2nd Plaintiffs further alleged to have moved into the land with their two children KADZO and KACHE in 1948 and were blessed with several other children afterwards. The 2nd Plaintiff was called SIDI KANGWEI. In the Plaintiffs further list of documents filed together with the Reply to Defence - A bundle of the National Identity Cards belonging to the Plaintiffs were filed and curiously one for SIDI KANGWEI CHARO indicated that the 2nd Plaintiff was born in 1st January 1950 and district of birth was Kilifi County not the suit property. How was it possible for someone who was born in the year 1950 to have moved into the suit property with her own two children in the year 1948? This was a fictitious claim. The court is either dealing with phantoms or stories from the figment of the Plaintiffs

imaginings and on this illusory account alone and lack of candour the Plaintiffs case must fall down.

72. It was also alleged in the Reply to Defence at Paragraphs 11,12, and 13 that the 3rd Plaintiff was born and raised on the suit land after her mother by the name MEMSAP left and got married elsewhere. At page 35 of the Plaintiffs further list of documents filed with the reply to Defence was a copy of Identity card belonging to MARYAM CHARO BENZI indicating that her district of birth was Kilifi and not MOMBASA county where the suit property is situated. The Court should also note the discrepancy in the name MARRIAM and MARYAM indicative of different identities. The information as to where someone was born and indicated in their national Identity card was crucial and was different from the information as to where the Identity card was issued. One could be born in Kilifi and the identity card issued in Bamburi or Mombasa. The rubric "District of Birth" in the national Identity card is the sole legitimate evidence of where one was born and could give this court a leading grasp as to where the Plaintiffs were born in view of their allegations that they were born at the suit property.

73. The Registration of Persons rules 2009 (Under CAP 107 Laws of Kenya) under the second schedule-rule 4, provided that the DISTRICT OF BIRTH is directly translated in SWAHILI LANGUAGE as WILAYA YA KUZALIWA. Therefore, it was clear that from the 3rd Plaintiffs identity card she was not born on the suit property as alleged in her pleadings but was born in Kilifi. Another curious discrepancy was expressed in paragraph 13 of the reply to defence and Counter - Claim. It was where the Plaintiffs alleged the 3rd Plaintiffs relative's names SAID MAZERA, RUKIA BAKARI and SULEIMAN MAZERA AND KADZO KIBANZU were buried on the suit land. In the initial pleadings filed in Court, the Notice of Motion application dated 14th October 2020, Kangwei Charo Karisa, the 1st Plaintiff swore an affidavit annexing the Authority to Act/Sue and it was accompanied with a list of residents alleged to be on the suit property. In the list at number 31 was one SAID MOHAMED MAZERA of identity card numbers 0658070 and who had executed the authority to Act and yet the disclaimer in paragraph 13 of the reply to Defence was that SAID MAZERA was dead and buried on the suit land. This was as strange as it could get. At paragraph 10 of the

reply to Defence the 1st and 2nd Plaintiffs alleged that their other children (some who were the Plaintiffs in the case) included KAZUNGU KARISA NGOA, HAMISI MAE KANGWEI and JAMES KADHUWA KAMBWE. In the list of signature of persons forgoing the Authority to Act filed by Kangwei Charo Karisa, the above persons appear at numbers 3,4 and 5 and each bear different names as KAZUNGU KANGWEI, HAMISI KANGWEI and JAMES KANGWEI. At page 49 of the Plaintiffs further list of documents was an affidavit sworn by the said JAMES KADHUWA KAMBWE who claimed to be one and the same person as JAMES KANGWEI yet they failed to annex any birth certificate to prove he was the son of KANGWEI the 1st Plaintiff. This was not an anomaly to be cured by throwing to the Court a simple affidavit as it remained a substantive anomaly incurable by an affidavit. The evidence by the Plaintiffs therefore lacked probative value and painted a dark picture as to the identity of the Plaintiffs. To conclude of the nefarious identity of the Plaintiffs, it was curious that the Plaintiff had only annexed 45 identity cards alleged to belong to the Plaintiffs/residents on the suit property instead of

68 Identity cards of persons in the Plaint who claim have resident and were born on the suit property.

74. The identity of the 1st Plaintiff, Mr. Kangwei could not be ascertained as he never testified in Court and no Identity card had been produced. A cursory pick of the Identity cards in the Plaintiffs further list of documents reviewed as below showing they were born in different parts of Kenya and not in the suit property but have conjoined for purposes of the suit;

PAGE NO.	NAME	IDENTITY NO.	DISTRICT OF BIRTH AS P THE IDENTITY CARD
2	SIDI KANGWEI CHARO	2269577	KILIFI
21	KADONDE EZEKIEL ONUNGA(No 25 on the List of Residents)	22613215	SIAYA
3	KAZUNGU KARISA NGOA(NOT IN	1381780	MOMBASA

	THE LIST OF RESIDENTS)		
4	HAMISI MAE KANGWEI(No4 in the List of Residents)	9964866	KILIFI
6	FRANCIS KAZUNGU KASIWA(NO 6 on the list of Residents	21779679	KILIFI
7	SAIDI BAYA CHIKO(NO 7 ON THE LIST	23803415	KILIFI
8	BONIFACE GARAMA CHOGO	23628068	MALINDI
9	SWALHA WANJIKU	27409108	LAMU WEST
10	GRACE WANJUGU WAIRAGU (No 10 on the list of residents)	21153540	NYERI
11	JANE NYAMBURA	8107269	NYERI CENTRAL

	NJOGO(No 11on the list of residents)		
	STEPHEN MWERI NGOKA(12 on the list of residents	24080991	KILIFI
	RACHEL KANINI MKUNGU(No 15of the List of Residents)	9774943	NYALI
	LAWRENCE OKIRU MUGITA (No 16 on the list of residents	9662024	CHANGAMWE
	FRANCISCA MBODZE MANGALE (No 21 on the list of residents)	20080470	KWALE/MATUGA
	JANE WRIGIA MACHARIA(No 18on the list of residents)	21018092	GATUNDU NORTH
	DELDAH RUTH WAKIO MWASI No 23 on the List of	24256384	TAITA

	Residents.		
	BONFACE MUGONDI OBUYA No 24 on the list	24319236	KAKAMEGA

75. The suit property is located in Utange - Mombasa. It was curious that people born as recently as late year 1980s and in different places in Kenya would claim to have been born in the suit property, buried their relatives therein and/or had occupied the suit property beyond 12 years. It was further curious on why all this group of people would avoid coming to court to testify and fight for the specific area of land they occupy. The court was invited to award them title over the suit property but the question was which portion do they occupy and when did each start occupying the property. To buttress on this point, the Learned Counsel cited the case of: ***“Samuel Kimintae Mparo, Wangui Kimindai Joseph, Anna Mbenek, Albert Mparo, Richard Turere Mparo & Andrew Saibulu Kimintae - Versus - Arvind Kanji Patel [2020] KEELC 2793 (KLR)*** the Plaintiffs had failed to be specific on what they occupied and the court held:-

"PW - 1 claimed each of the Plaintiff's occupied 200 acres of the suit land but confirmed they had not brought in a surveyor to undertake measurements of the portions they each occupy. For a party to fulfil a claim for adverse possession, it is pertinent for them to be specific on the exact portion they occupy, when they entered the said portion and if the registered owner was well aware of their presence thereon. In respect to this point I wish to make reference to the case of *Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR*, where the Court of Appeal held that: 'The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See *Kimani Ruchine & Another vs. Swift Rutherford & Co. Ltd (1980) supra*. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012. 'Samuel Kimintae Mparo, Wangui Kimindai Joseph, Anna Mbenek, Albert Mparo, Richard Turere Mparo & Andrew Saibulu Kimintae v Arvind Kanji Patel (Environment & Land Case 662 of 2017) [2020] KEELC 2793 (KLR) (30th April 2020) (Judgment)-Kenya Law'.

76. In the present case the Plaintiffs had brought an initial suit against the original registered owner by the name of Ahmed Bin Haji Barawa being MOMBASA ELC NUMBER 88 OF 2016(OS). At the time of filing the suit Ahmed Bin Haji Barawa the registered owner had died sometimes in the year 1954 and the property

was in the hands of beneficiaries. By a ruling dated 8th October 2020 whereby Hon. Justice Yano struck out the entire suit for being incompetent as filed against a dead person. It was the contention by the Learned Counsel that the law in adverse possession was that possession must be with the knowledge of the registered owner of the suit property and time starts running until the registered owner becomes aware that there was a trespasser occupying his or her land. In the instant case, the registered owner was dead and the property was in the hands and care of beneficiaries and any occupation that was legitimate was by one Mr Kangwei on account of being the appointed caretaker. Any other occupation was by stealth and clandestinely taking advantage that the registered owner was dead and not aware of their alleged possession. Even if for arguments sake the beneficiaries were aware that Mr. Kangwei was occupying the suit property, it was not in dispute that the beneficiaries visited the suit property and only recognized Mr. Kangwei as a Caretaker and nothing more, nothing less or else. The minutes filed by the Defendants of the happenings at the meeting at the Chief's office as Defendant Exhibit Number - 9

was testament that the grandchildren of Mr. Barawa' visited the property occasionally and lodged a formal claim over plot number 402 and actually proposing before the Chief's office that they wanted the property to be surveyed so that the boundaries could be ascertained. This happened in the year 2016 before the conception of this present case. The letters filed by the Plaintiffs from the area Chief dated 8th March 2016 where Mr. Kangwei was summoned together with his children to appear before the area Chief in respect to a complaint over the property they was staying demonstrated that the beneficiaries took steps to complain against Mr. Kangwei's refusal to vacate the suit property or allegation of ownership.

77. Further, the Plaintiffs witnesses claimed that their deceased Kin had graves on the property. However, there was no evidence of graves presented before this court, no tombstone with names of alleged deceased are before this court. All were just mere allegations. The Plaintiff had filed before this court a list of purported residents of plot number MN/II/402 in Utange Bombo Village, Bamburi location. On the list there was a total of 70 names and nowhere in the list did the name of PW - 3 James

Kadhuwa Kambwe National ID no.11568084 appear. In an attempt to go around the same he claimed to have sworn an affidavit wherein he claims that his name was erroneously written as James Kangwei national ID 1156884. Of importance to note was that there was a discrepancy of the Identity cards number as indicated on the copy of ID and the list of residents.

78. In the originating summons, Kangwei Charo Karisa, Sidi Kangwei and Marriam Charo Benzi through their advocate had filed a Certificate of illiteracy and had executed the supporting affidavit by way of left hand thumb print. However, in the fictitious list of persons listed as residents of plot number MN/II/402 Kangwei Charo, Sidi Kangwei and Marriam Charo Benzi were now literate enough to append a signature. This only proved that the list was fictitious and a malady of deceit and clandestine manufacturing of identity and not an actual representation of any real people who claim to reside in the subject property.
79. The Learned Counsel asserted that there was no proper description of the Plaintiffs in this matter. This was a violation of the provision of Order 4 Rule 1 1 (b) of the Civil Procedure Rules, 2010. The heading of the Originating summons which

acted as the Plaintiff herein read, Kangwei Charo Karisa, Sidi Kangwei, Marriam Charo Benzi and 65 others as Plaintiffs. Then how was the court to ascertain who were the 65 others? Each Plaintiff must be identified by their full name in the title of the Plaintiff and be consequently numbered. This was not done in this instant suit.

80. In a failed attempt to comply with Order 1 Rule 13 of the Civil Procedure rules 2010, the Plaintiffs who were 68 in number purported to give authority to plead in this matter to Kangwei Charo, Sidi Kangwei and Marriam Charo Benzi. However the Plaintiffs failed to call Kangwei Charo and Sidi Kangwei whom they had given authority to. It was the Defendants submission that the 64 Plaintiffs claiming adverse had not proved their case before this court. Furthermore, the provision of Order 1 Rule 13 of the Civil Procedure Rules, 2010 states that the authority shall be in writing signed by the party giving it and shall be filed in the case, it's the Defendants submission that what was annexed as exhibit marked "SK - 1" was a list of people not mentioned as Plaintiffs and not verified to had any nexus with the subject property before this Court. The claim for land

adverse possession before this court was weighty and one intended to deny a whole generation of their land that they had owned and had a legal title to. Therefore, it was important to ascertain the identity of parties and their relation to the subject property. It was the Defendants submission that it was not enough to have a list of 68 people who were unknown to this court and who had not presented any evidence to prove their ownership or occupation of the property they adversely claimed against the Defendants. The Plaintiffs had not placed before this court as part of their pleadings, evidence to show the existence or any nexus between themselves and the subject property. The Plaintiffs who testified claim that they lived and occupied the subject property on the assumption that it was given to them by their parents and that it was their ancestral land having been born and brought up on the land. As the learned Judges bench held in the case of:- **“Richard Wefwafwa Songoi - Versus - Ben Munyifwa Songoi [2020] eKLR”**

“The Learned Judge held that the appellant occupied the suit land on the assumption that it was given to him by his father and not on the basis that the occupation was adverse to the interest of the Respondent. The Learned Judge wondered how the appellant could claim adverse possession yet in the same breath challenge

the Respondent's title. The judge in answering this question cited dicta from the case of Haro Yonda Juaje - Versus - Sadaka Dzengo Mbauro & Kenya Commercial Bank,(2014) eKLR where it was stated:

"One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and that the registered owner has never been in possession of such land."

81. The Learned Counsel contended whether the instant suit was a representative suit. She averred that it was not as there was no way adverse possession orders could be entered in favour of over 200 people allegedly occupying the suit property. It was the Defendant's contention that each person claiming the suit property by virtue of adverse possession was required to tender evidence in support of his or her claim. Secondly, the suit was not filed within the meaning of Order 1 Rule 8 of the Civil Procedure Rules, 2010 as there was no notice of institution of the suit as a representative suit issued by court. As was held in the case of:- ***"Mombasa Teachers Co-operative Saving s & Credit Society Limited - Versus - Robert Muhambi Katana & 15 others [2018] KECA 402 (KLR)"*** wherein Honourable Judges of appeal, ARM Visram, J Karanja, FI Koome held that:-

16. Having perused the impugned judgment, our minds are clear that the orders issued therein were not in favour of the alleged over 200 people but the Respondents. It would have been absurd for the learned Judge to have issued orders in favour of unknown/unidentified persons. Furthermore, we do not think the suit as filed by the Respondents was a representative suit within the meaning of Order 1 Rule 8 of the Civil Procedure Rules which reads in part as follows:"

1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.

2) The court shall in such case direct the Plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct....."

This is because a notice of institution of the suit as a representative suit as envisaged under Order 1 Rule 8 (2) was not issued".

82. The Learned Counsel submitted that it was trite law that a person seeking to acquire title to land by of adverse possession must prove non permissive or non - consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, ***nec vi nec clam nec precario***, a party relying on the doctrine bears the burden of demonstrating that the title

holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. As proved by the testimony by the Defendant, and minutes of the meeting held by the Chief, the owner of the property Ahmed Bin Barawa entered into an agreement with Mr. Kangwei to live on the land as a caretaker and would till the land and take the produce to the family's house in Kibokoni. Therefore, the occupation by the Plaintiff was with the consent of the owner who maintained ownership by enjoying the produce of the farm. As testified by the Defendants, they would be visiting the farm severally.

83. Additionally, the Defendants would be paying rates at the Mombasa municipality. Thus, the claim by the Plaintiff that their occupation was uninterrupted was false. It was with the permission by the owner of the suit property. The other occupants who claimed to live on it had not proved that they did reside on it. Further, the testimony by the Land Surveyor and the Survey report indicated that until the year 2003, the suit property was vacant and bushy except for one permanent structure. This structure was consistent through out all the

years. It showed that it was only one person – Mr. Kangwei who was the occupant of the land. To support this legal position, the Learned Counsel cited the case of: **“Kasuve - Versus - Mwaani Investments Limited & 4 Others (2004) 1KLR and Wanje - Versus - Saikwa (2) Supra.** In the first decision, the Court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he had been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, could not be said to be in adverse possession as in

reality he had not dispossessed the owner of the land and the possession was not illegal.

84. Furthermore, the Learned Counsel cited the case of: ***“Samuel Miki Waweru - Versus - Jane Njeri Richu, Civil Appeal No.122 of 2001. (UR)***, the Court of Appeal delivered the following dictum:

“.....it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu - Versus - Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

85. Similarly, the Learned Counsel submitted that in computing the required statutory time, the date that Plaintiff claim to enter the suit property was paramount. The Plaintiffs at paragraph 4 of their Plaintiff's reply to Defence and Counter - Claim, the Plaintiffs averred having moved and some born in the suit property in the period between years 1948 and 2000. The ambiguity in this statement was that none of the Plaintiffs stated when exactly they purported to have taken possession of the property. Thus, it was the Defendant's submission that the illegal occupants of the suit property moved in sometimes

in the year 2016. This assertion was supported by the findings of the Defendant's survey report dated 25th September 2024, which highlighted that between the 9th March 2012 and 18th August 2013 there were two permanent structures and few makeshift structures on the suit land. But with time, as from 8th October 2016, more permanent structures were captured. An essential doctrine of adverse possession is that the Plaintiffs to prove their case have to specify the area they occupy and the length of time they have occupied the land. In the instant suit, none of the Plaintiff had presented evidence with respect to the area occupied and length of occupation by each. Instead they attempted to get illegal orders as a large amorphous group yet no evidence was before this court. In this regard, the learned Counsel referred Court to the High Courts decision in ***“Wilson Kazungu Katana & 101 others - Versus - Salim Abdalla Bakshwein & Another [2015] eKLR*** where the court observed:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu - Versus - Ndele [1984] KLR 776. The Appellants did not discharge the burden of proving and specifically

identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."

86. Also, in the case of "**Mombasa Teachers Co-operative Savings & Credit Society Limited (Supra)**", the Court of appeal Judges held that:

".....We cannot help but note that the evidence tendered in support of the Respondents' case was by five respondents. These respondents only gave evidence with relation to the dates they each entered into possession of the suit property. There was no evidence to show that such possession was without the consent of the former registered owner. The photographs of the structures erected on the suit property could equally not establish the absence of consent from the previous registered owner. In addition, we, unlike the learned Judge, find that no further evidence was given with respect to when the other Respondents took possession. Without such evidence there was nothing to support the respondents' contention that they had been in adverse possession of the suit property prior to the Appellant's title.....Even if we were to accept that the five Respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the Appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit

property. In *Wilson Kazungu Katana & 101 Others - Versus - Salim Abdalla Bakshwein & Another* [2015] eKLR this Court observed:-

***"The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu - Versus - Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."*[Emphasis added]"**

87. In totality, the Learned Counsel argued that the Plaintiffs had failed to prove they were entitled to the suit property by virtue of adverse possession. Consequently, the Defendants prayed that the Plaintiffs be rendered as trespassers and have the Plaintiff's claim for adverse be dismissed and the Defendants Counter - Claim dated 10th November 2021 be ordered as prayed.

VI. Analysis and Determination

88. I have keenly assessed the filed pleadings by all the Plaintiff and Defendants herein, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

89. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -

a) Whether the Plaintiffs have made out their claim of the suit land through the Doctrine of Land Adverse Possession?

b) Whether the Defendants have made out a case in the counter claim?

c) Whether the Parties herein are entitled to the prayers sought?

d) Who meets costs of the suit?

ISSUE No. a). Whether the Plaintiffs have made out their claim of the suit land through the Doctrine of Land Adverse Possession.

90. Under this sub - heading, the Honourable Court has deciphered that the main issue is whether the Plaintiffs were entitled to ownership of all that parcel of land situated in the Mombasa Municipality in the Mombasa District sub - division number 402 of Section 11 Mainland North measuring Five Decimal Nine Six (5.96) Acres which said piece of land is compromised in a Certificate of Title registered in the Land Titles Registry at Mombasa and is delineated, demarcated and described on the Land survey Plan - the suit property belonging to Ahmed Bin Haji Barawa by way of the doctrine of land adverse possession.

91. It is trite law that adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on the provision of Section 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.”

92. Section 13 of the Limitation of Actions Act provides:

(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3)

of this Act, the land in reversion is taken to be adverse possession of the land.

93. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the Limitation of Actions Act and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides;

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land

(2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

94. And Order 37 Civil Procedure Rules provides:

“(1) An Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons

(2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

95. Article 162(2) of the Constitution of Kenya 2010, Section 13 of the Environment and Land Court Act, No. 19 of 2011 and Section 38 of the Limitation of actions Act, Cap. 22 confer jurisdiction on this court to handle claims premised on adverse possession.

96. In the present case, although highly disputed, it is alleged that that some - 65 of the Plaintiffs were at all times to the suit herein

were still living in all that parcel of land situated in the Mombasa Municipality in the Mombasa District sub - division number 402 of Section 11 Mainland North measuring Five Decimal Nine Six (5.96) Acres which said piece of land is compromised in a Certificate of Title registered in the Land Titles Registry at Mombasa and is delineated, demarcated and described on the Land survey Plan. The Defendants raised numerous issues particularly on the 1st Plaintiff who had been engaged as a Caretaker thus an employee of the Defendant turning to be claiming the suit land, the date of moving into the land and thus its occupation by the alleged, apart from the 1st, 2nd and 3rd Plaintiffs none of the others testified and the failure to rebut the Surveyors Report which held that the actual occupation was from the years 2016 as what was evidently present on the land and was consistent in all the years was only one permanent structure supposedly belonging to Mzee Kangwei Kiparapara the caretaker. Despite of this, the Plaintiffs claimed to have been and are in physical occupation and possession of all that parcel of land situated in the Mombasa Municipality subdivision Number of the parcels of land being sub - division of Plot number 402 of Section

II Mainland North measuring Five Decimal Nine Six (5.96) Acres which said piece of land was compromised in a Certificate of title registered in the Land Titles registry at Mombasa (hereinafter called the suit property).

97. The Plaintiffs claimed to have occupied the suit land for more than 12 years and now crave to be registered as owners. The Plaintiffs herein resided on the suit land with their families and have brought up their families knowing this suit land as their only home because many were born in this land. The Plaintiffs herein had resided in the suit property and developed it openly and without hindrance or interruption for more than 12 years. The said suit property in issue belonged to Ahmed Bin Haji Barawa. The Plaintiffs herein did not have other homes to move to and all their families would be rendered destitute, landless and/or homeless. As indicated all these assertions were vehemently disputed by the Defendant through their Defence and Counter - Claim to the suit.

98. In the case:- ***“Kimani Ruchure - Versus - Swift Rutherfords & Co. Ltd [1980]KLR 10”*** Kneller J held that:

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

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

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

100. PW - 1 told the court that as the same appeared No. 26 was the land he was born in. The elders stated on the land and Mzee Kiparapara and they resided there in peace. According to him his father was born there and buried there. On the death certificate it was indicated that he had died in 1997. All his relatives had been buried there without any problems it was until the year 2016 when some people came over claiming the land. They had a letter from the Chief of Utange. They approached Mzee Kangwei See page 85 and 86. The witness told the court that he heard that Mr. Kangwei had been called. He decided to go there; he decided to

attend the meeting being one of the occupants to the suit land No. 402. They claimed to be the grand children of the land owner. Later on they wanted to be considered to have vacant possession/ places page 15 Defendants Counter - Claim. They claimed to be the grandchildren of the Land Owner. Later on they wanted to be considered the vacant possession/places. They were claiming the land which was not justifiable. They never agreed with them. Mzee Kangwei was his neighbor; he was not related to him. When they conducted the official search on page 84; there was evidence there had been a case by the Municipal of Mombasa against Ahmed Haji Barara. There was prohibitory order - Plaintiff Exhibit No. 3.

101. PW - 1 told the court that the Defendant's list of defence page - official search of 21st July, 2021 - the prohibitory order was still registered. At pages 53 to 83 of their bundle; they saw their grandfather who had died in the year 1954 but they applied for letters of administration in the year 2010 almost 60 years. They had not known they had applied for letters of administration. They came to court seeking for the construction to be stopped pages 88, 89, 90 to 95 the Notice of Motion Application Page 94

Paragraph 8 Marked as “AMA-5” were photos which he looked at them. The witness found out that they were from Plot No. 406 and 390 as they had no forest on the land.

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

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

..as regard recovery of judgment debts, the construction of Section 4 [4] of the Act by local courts barring recovery after 12 years, is as shown in Lowsley - Versus - Forbes [1999] 1 AC 329 , consistent with construction given by English Courts to

Section 2 [4] of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.'

103. Further, in the case **"Mbira - Versus - Gachuhi [2002] 1 EALR 137"**

the court stated as follows:-

".....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non - consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption..."

104. Similarly in the case of **"Gabriel Mbui - Versus - Mukindia Maranya**

[1993] eKLR" Kuloba enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;

- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.**
- b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- c. The occupation of land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupant.**
- d. The non-permissive actual possession hostile to the current owner must be un equivocally 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.

e. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,

f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.

g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.

105. Therefore, to determine whether the Plaintiffs' rights accrued the Court will seek to answer the following:-

- i. How did the Applicant take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of his possession and occupation?
- iv. How long has the Applicant been in possession?

106. Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve [12] years. The process springs into action essentially by default or in

action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

107. On examination of the questions above, PW - 1 stated that he was 41 years; his name was Mohamed Said Mazera. From the certificate of death he was buried at Zei. His grandmother and the father died and they were buried on the land. Mzee Kiparapara was his grandfather and he was buried there. He never heard of Mohamed Farah and his ownership of the land. He was not aware that the title changed from Mzee Kiparapara - page 27 showed they started paying the rent on 14th December, 2009. It was not true according to the witness that the whole land was 2 acres with development and 4 occupants.

108. When cross examined PW - 2 told the court that he never left the land. He knew Mzee Kangwei; Mr. Mohamed Farah claimed the land. But they knew all was an error. From the meeting attended at the Chief's offices and the minutes dated 18th March, 2016 its is well noted that Mzee Kangwei attended the said meeting much

later while drunk. He never spoke yet to me being the caretaker and the 1st Plaintiff his statement would have been critical and significant. They disagreed – the context. They never paid any rates. He did not know whether the rates were being paid or not. He was referred to the Notice in the Gazette in 2016 – the witness stated that they never filed any objection as expected. He had no documents to show that Kangwei was his father neither Kangwei was the son of his grandfather. None of the 65 people who claimed land testified nor filed any documents in support of their case. It was only Mzee Kangwei who filed documents in court. With reference to the surveyor's report, PW - 2 told the court that she refuted the same. They only allowed the family of Mzee Kangwei. All the 65 people were neighbors.

109. PW - 3 stated that his grandfather, his grandmother and others they had 7 burial sites there. It was Mzee Kangwei who got there first then his grandfather followed. He did not know Mzee Farah. He was not in that meeting of Chief – 18th March, 2018.

110. The Defendants on the other hand, it was there case that Ahmed Bin Haji Barawa (deceased) was the registered proprietor in freehold ownership interest of that piece of land containing 5.96

hectare or thereabout situate in the district of Mombasa registered under title No.MN/II/402, which interests in land now vests upon his beneficiaries, successors and Administrators to the estate. The Defendants' averred that upon the death of Ahmed Bin Haji Barawa, his beneficiaries instituted succession proceedings at the Kadhi's Court the most recent being in March 2019 when Administration letters of the estate were issued. The Defendants averred that at all material times to date they were responsible for payment of land rates to the Municipal council of Mombasa.

111. Sometimes in the year 2015, the Defendants averred that an application for Provisional title was made and the same issued by the Land registrar with no objections from any party including the Plaintiffs. The Defendants averred that at all material times the 1st Plaintiff was a caretaker thus an employee of Ahmed Bin Haji Barawa, who with permission of the deceased would occupy and guard the property and in return farm portion of the land identified to him for his subsistence provision. Mzee Kangwei would be supplying the defendants with the farm produce occasionally. This is a fact that Mr. Kangwei admitted during the

Chief's meeting of 18th March, 2016 as evidenced under the Defendant Exhibit Number 10 to wit in Kiswahili: ***“walivyosema wajukuu wa Barawa ni kweli shamba wakati huo walikua wakichukua maembe na nazi akipoleka kwa wenywe, nyanya alirihusiwa kupanda maembe na minazi.....”***. In other words, the Defendants averred that at all material times the deceased and his children would visit the farm, after his death the children and their children would visit the farm from time to time.

112. According to the Defendants, at all material times the occupation of the 1st Plaintiff and his family on the subject property was with the permission of the registered owner and with the understanding that he would care and till the land on behalf of the Registered owner and his beneficiaries. The Plaintiffs had not identified specific and distinct portions they occupy and/or were entitled by virtue of adverse possession, noting that the claim is made by 68 Plaintiffs. Save for the 1st Plaintiff, who was allowed by the registered to reside on a portion of the land, the other 67 Plaintiffs have not indicated the length of occupation by each of them.

113. The 65 Plaintiffs were notorious trespassers into the suit property and masquerade as Plaintiffs in this suit noting that no identification documents have been presented before this Court, the Plaintiffs may as much be fictional names and a creation of imagination. The 67 Plaintiffs' have invaded the subject property as from sometime in late 2016 and as recent as year 2018, when the 1st, 2nd, 3rd Plaintiffs began illegally selling portions of the property.

114. The suit was filed in the year 2020, but none of the Plaintiffs could pin point the year they got into the suit property. The question is therefore was the possession uninterrupted for more than twelve years? The answer is not on the affirmative because none of the Plaintiffs have stated when they started residing in the suit property. From the narration of the Defendants it was clear that the 1st Plaintiff was an employee of the Defendants as a Caretaker - put in place to take care of the suit property.

115. In ***“Wilson Kazungu Katana & 101 others - Versus - Salim Abdalla (2015) eKLR”***, the Court of Appeal stated:

“In order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having

discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. A person who occupies another's persons land with that person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. ...In other words his entry must be adverse to the title of the owner of the land. ...Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession..... The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this court in the case of Githu v Ndele (1984) KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."

116. For possession to be adverse it must be actual, open, notorious, regular continuously uninterrupted, hostile, and exclusively occupied without any form of permission from the rightful owner for a statutory period of twelve years.

117. Further, the Plaintiffs were no clear on exactly what they claimed. This is critical and has been subject to authority. In the case of **“Joseph Macharia Mwangi - Versus - Jonah Kabiru [2008] eKLR”**, the applicant filed suit alleging to have acquired 3 acres out of 5.1 acres of the title. The court [Kasango]] was not persuaded that he had put forth sufficient evidence of what he was in occupation of. It was held as follows:

“It was essential in the plaintiff’s claim for him to state in the evidence the exact or definite and distinct land he was claiming out of the five acres of the suit property. Such identification is an integral part of proving a claim for adverse possession. Although in his originating summons plaintiff said he occupied 2 acres, in oral evidence he said that he did not know the exact acres he cultivated but he knew it was bigger than defendant’s. The plaintiff’s claim for that reason does fail.”

118. In the case of **“Titus Mutuku Kasuve - Versus - Mwaani Investments & 4 Others, Court of Appeal at Nairobi, Civil Appeal No. 25 of 2002 [2004] eKLR”**, the appellant had filed an originating summons claiming two portions of land measuring 40 acres and 20 acres respectively by way of adverse possession. His suit was dismissed. The Court of Appeal upheld the dismissal, the claim for 20 acres being premature, and the claim for 40 acres being unmaintainable, inter alia for reason that the appellant had not

proved exclusive possession of ***“any definite and distinct land ascertained to be 40 acres”***.

119. Further, it is the court’s observation that the Plaintiffs insisted that there were burial sites on the suit property; from the survey report, there were no burial sites indicated on the same. The Plaintiffs have failed to prove dispossession or discontinued possession of the suit property by the Defendants throughout the period leading to filing this suit. In saying so, I rely on the facts that out of the 65 people only the 1st Plaintiff produced any documents in support of the case. Further, its only three witnesses who testified and that from the information and particulars on the copies of the identity cards produced, there was no identification of the Plaintiffs having been born on the land as alleged. To worsen the situation, the evidence by the Land Surveyor that there had been no persons on the land by the year 2006 the land having been vacant and bushy until the 8th October, 2016 that more structures started being erected on the land. Indeed, Mzee Kangwei admitted having been the caretaker of the Defendants. Although it was testified that there existed 7 graveyards on the land, no such evidence was adduced in Court.

As I have explained above, it is critical for one to be precise on exactly what land he claims and from where. I am afraid that the Plaintiffs have not established their case. For this reasons, therefore, as I already pointed out that their case for adverse possession have no merit and must be dismissed. In the long run, the Honourable Court finds that the Plaintiffs have failed to demonstrate that they are entitled to the suit property by way of adverse possession as per the required and laid - down statutory standards.

ISSUE No. b). Whether the Defendants have made out a case in the Counter - Claim.

11. Under this sub - title, the Defendants the claimed that the Defendants are beneficiaries of the estate of Ahmed Haji Bin Barawa (deceased) who was the registered owner and proprietor of the suit property in dispute herein being plot No. 402/section II/ Mainland, with the 4th Defendant Ahmed Mahmoud Ahmed, being the Administrator of the deceased's estate. The Defendants contend that the Plaintiffs herein had whether by themselves, their agents, and/or employees entered and encroached on/and trespassed upon the suit property and erected structures and continue to be in illegal occupation and possession of the suit

property. It was the Defendants contention that the 1st Plaintiff and his Kin had commenced and continue with unlawful subdivision, fencing, demarking, and erecting/building structures on the subject property. The Defendants prayed that the Plaintiffs' claim before this Honourable Court be dismissed and the property be vested upon the Administrator of the Estate of Ahmed Haji Bin Barawa and the Defendants further pray as follows:-

- i. A Declaration that the Defendants are the registered and absolute and indefeasible owner and proprietor of all that property known as plot No. 402/section II/Mainland measuring approximately 5.96 hectares.***
- ii. An Order evicting the Plaintiffs whether by themselves, servants, agents, employees and/or anyone claiming therefrom, from all that property known as plot No.402/section II/ Mainland within Thirty (30) days from the date of entry of judgment herein, failure upon which the OCS and OCPD Bamburi/ Utange to intervene and use reasonable force to assist in enforcement of the eviction order against the Plaintiff.***
- iii. An Order for a Permanent Prohibitory Injunction to restrain the Plaintiff whether by themselves, their servants, agents, employees and/or anyone claiming under the Plaintiff from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any manner whatsoever***

dealing in the Defendant's Property known as plot No.402/section II/Mainland.

iv. Damages for Loss of use of the property plot No. 402/section II/ Mainland and/or General damages for trespass on the Defendant's property plot No. 402/section II/Mainland.

v. Costs of the Suit.

120. DW - 1 testified that the land MN.III/402 with reference to the title deed. Ahmed Haji Barawa he was the registered owner. He was his grandfather and the witness was the legal administrator to the estate of the deceased issued to them. The witness knew the land existed as they were young. It was at Utange. In the year 2005 they would be going to the land. They were taken there by their auntie. They found Mzee Kangwei. He was living there. He was the caretaker. There were plantations - mango trees, oranges, coconut e.t.c. There were 10 Semi Permanent houses for Mzee Kangwei. They would be paying rates for the land. At page 16, the witness told the court that there was a clearance of the rates certificate. The title deed had been misplaced - so they decided to first pay the rates and then they applied for provincial title deed in the year 2015 by the Land Registrar. It was advertised in a Kenya Gazette. There were no objections.

121. According to the witness later on there were people who got into the land, they decided to inform the chief about the matter and he took up the matter. The chief summoned all the people; he summoned Mr. Kangoi - the meeting. there were 15 people who attended the meeting. With reference to the minutes of the meeting of 18th March, 2016; the chief informed people and family of Mzee Kangwei of the land. Mzee Kangwei never spoke. It was only his son who spoke but out of the meeting he agreed that he was ready to leave the land but only one condition that he be compensated for the plantation. His son stressed that he was ready to institute a case. They went back to the land and they were shocked to find over 50 people who had settled on the land. The testimony by DW - 2, the Land Surveyor and report dated 25th September, 2024 was paramount. She stated that using the Google Maps, there was only one single permanent structure on the land in the year 2003. This was supposedly the one for the Caretaker. It was from the year 2016 that illegal and makeshift structures started emerging. From their case according to the Defendants, they had not filed any documents of ownership of land.

122. The Defendants have sought to be declared as the registered owners of the suit property. We examine the ownership of the suit property. The law provides under the provision of Section 26 of the Land Registration Act, No. 3 of 2012 thus:-

“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”

123. From the facts of the case, the Defendants averred that they were beneficiaries of the estate of Ahmed Haji Bin Barawa (deceased) who was the registered owner and proprietor of the suit property in dispute herein being plot No. 402/section II/ Mainland, with the 4th Defendant Ahmed Mahmoud Ahmed, being the Administrator of the deceased's estate. The Plaintiffs had entered and encroached on/and trespassed upon the suit property and erected structures and continue to be in illegal occupation and possession of the suit property.

124. According to the Defendants, the 1st Plaintiff and his Kin had commenced and continue with unlawful sub - division, fencing, demarking, and erecting/building structures on the subject property. As a consequence of the Plaintiffs aforesaid actions the

Defendants continued to suffer loss of use of the suit property and stand to suffer irreparable prejudice and as such Defendants shall claim damages for loss of use. DW - 1 as stated before in this judgment testified that he was the legal administrator of the Estate of Ahmed Haji Barawa and he had applied for a provisional title deed in year 2015 by the land registrar. It was advertised in a Kenya Gazette. There were no objections. According to the witness later on there were people who got into the land, they decided to inform the chief about the matter and he took up the matter. The Chief summoned all the people; he summoned Mzee Kangwei - the meeting. there were 15 people who attended the meeting. With reference to the minutes of the meeting of 18th March, 2016; the chief informed people and family of Kangwei of the land. Mzee Kangwei never spoke. It was only his son who spoke but out of the meeting he agreed that he was ready to leave the land but only one condition that he be compensated for the plantation. His son stressed that he was ready to institute a case. They went back to the land and they were shocked to find over 50 people who had settled on the land. From their case, they had not filed any documents of ownership of land. From the

particulars of their national identity cards, it was evident that none of these people were born on the suit land. They all came from other parts of the Republic of Kenya.

125. Based on the material on record and evidence adduced herein, there is no doubt that the suit property was registered under the Defendants' names. Accordingly, this Court finds that being that the case had already been determined. DW - 1 was issued with the Limited Grant of Letters of Administration ad litem. To that extent and scope of the Defendants rights it is imperative to take cognizance of the provisions of Sections 24 (b), 25 and 26 of the Land Registration Act, No. 3 of 2012. For convenience, the provisions of Section 24 (a) are reproduced as hereunder;

24. Interest conferred by registration Subject to this Act—

(a) 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 appurtenant thereto; and

126. Section 25 provides for the rights of such a proprietor and states that;

“The rights 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 interests and claims whatsoever, but subject-

127. The provision of Section 152A of the Land Act No. 6 of 2012 prohibits unlawful occupation of land and states that **“A person shall not unlawfully occupy private, community or public land.”**

128. I have previously stated in **“Mwenye & 5 others - Versus - Tsama & 3 others [2025] KEELC 152 (KLR)”** where the Court opined that: -

“65. The above rights, interests and privileges accorded to a registered proprietor of land apply to the 1st and 2nd Defendants in this case having established that they are the proprietors of the suit properties. For the reasons tendered herein above, the Counter claim by the 1st and 2nd Defendants succeeds.”

129. Be that as it may and having determined that the Defendants are the rightful owners of the suit property, I find that the Defendants have proved their claim sufficiently to grant prayers 1 and 2 of the Counter - Claim.

130. The Defendants also sought for an Order for a Permanent Prohibitory Injunction, I further refer to the provision of Section 26(1) of the Land Registration Act, No. 3 of 2012. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the

person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

131. On permanent injunction, it was held in the case of ***“Mburu - Versus - Kibara & 2 others (Environment & Land Case 237 of 2021) [2022] KEELC 3226 (KLR) (28 July 2022) (Ruling)”*** that: -

“... 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. This Court has the powers to grant the Permanent Injunction under sections 1A, 3 & 3 A of the Civil Procedure Code if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances ...”

132. Further, in the case of ***“Malier Unissa Karim - Versus - Edward Oluoch Odumbe (2015) eKLR”***, the court set out circumstances under which mandatory injunction can be granted as follows: -

“The test for granting a Mandatory Injunction is different from that enunciated in the *Giella v 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 v 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, if 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 march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

133. In the case of **“Bandari Investments & Co. Limited - Versus - Martin Chiponda & 139 others [2022] eKLR”** this Court dealt with the issue of conditions for grants of mandatory injunctions and stated;

“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 Limited - Versus - 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, if 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.”

134. 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.”

135. In my opinion, the Defendants have proved their case on a balance of probabilities. The Defendants having proved that they were the absolute and legal owners of the suit property are hereby granted Prayer 3 of their counterclaim as they are entitled to be protected under law for any injustices on their rights with regards to the suit property.

136. On the issue of damage for Loss of use of the property and/ or damages for trespass; Section 24 (a) of the Land Registration Act

No. 3 of 2012 provides for the interests a person acquires upon registration of land and states;

“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 appurtenant thereto; and”

137. The above rights, interests and privileges accorded to a registered proprietor of land apply to the Defendants in this case having established that they are the proprietors of the suit properties. Black’s Law Dictionary 10th Edition at pg. 1642 defines trespass as unlawful acts committed against the person or property of another especially wrongful entry of another's land.

138. The provision of Section 3 (1) of the Trespass Act, Cap. 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

139. The Defendants’ case and evidence was that the Plaintiffs invaded the suit parcels of land. As stated earlier, the Plaintiffs did not offer any evidence to justify their claim of the ownership of the land and/ or the claim that they acquired the land by way of adverse possession. The Court thus finds that the Plaintiffs acts

of residing on the suit property without the consent of the Defendants and failure to give back possession and cease their encroachment amounts to trespass and was unlawful interference with the rights of ownership and possession of the Defendants respective parcels of land.

140. The Court of Appeal dealt exhaustively with considerations for the award of general and compensatory damages. In the case of **“Kenya Power & Lighting Company Ltd - Versus - Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment)”** where the Court stated as follows;

The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:

- i) Harlsburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner’s land, exemplary damages are payable where the trespassers conduct towards the owner is not only***

oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

- ii) Duncan Nderitu Ndegwa - Versus - Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.***
- iii) Philip Ayaya Aluchio - Versus - Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.***
- iv) Ephantus Mwangi & Another - Versus - Duncan Mwangi [1981 - 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence. b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.***
- v) Kiambu Dairy, Farmers Co-operative Society Limited - Versus - Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the***

discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.

vi) Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited - Versus - Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;(b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.”

141. From the foregoing authority it is clear that the Defendants are entitled to compensation for offence of trespass to their land by the Plaintiffs and it is only the quantum of such compensation that remains for determination. The Defendant claim for loss of use of their land. I note that the Defendants produced a report that was a summary of the happenings on the suit property. I find that this is sufficient evidence to show the use and/ or activities they had on the land before the encroachment or alternatively what they intended and/ or would have used the properties for had they had access. The Plaintiffs used the Defendants' land

which activities diminished the value of the land to the detriment of the Defendants.

142. As was held in the case of ***“Duncan Nderitu Ndegwa - Versus - Kenya Pipeline Company limited & another [2013] eKLR”*** -

“damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.”

143. The court is required to consider such evidence as would show the state of the land prior to the trespass and after and the amount of compensation that would adequately put the Defendants in the position they were in prior to the trespass. An evaluation of case law shows as follows in relation to compensation for trespass to land;

- i. ***“Philip Ayaya Aluchio - Versus - Crispinus Ngayo [2014] eKLR”*** where the defendant had erected a house on the Plaintiffs land the court observed that ***“The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”*** The court awarded a nominal sum of Kshs. 100,000/- for trespass.

ii. In the case of **“Nakuru Industries Limited - Versus - S S Mehta & Sons [2016] eKLR”** the court having considered the findings in **“Philip Ayaya Aluchio (supra)”** awarded general damages in the sum of Kshs 500,000 and stated;

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However as I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Kshs. 500,000/= (five hundred thousand only)”.

iii. In the case of **“Johnson Mainga Mogaka - Versus - Kenya Power and Lighting Company [2021] eKLR”** the court considered the above two cases **“Philip Ayaya Aluchio (supra)”** stated that;

“Being duly guided by the above decisions, I award the Defendant damages in the sum of Kshs. 1,100,000/= (One million, one hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

iv. The court of appeal in **“Kenya Power & Lighting Company Ltd v Ringera & 2 others (supra)”** made the following final orders;

a) The award of damages for continuous trespass allowed by the trial court at Kshs.2, 000,000.00 for

Eunice and Kshs.4, 000,000.00 for George and Ellah is confirmed.

b) The award of compensatory damages awarded to the respondents by the trial court is set aside and substituted with an award of Kshs. 6,000,000.00 for Eunice and Kshs. 12,000,000.00 for George and Ellah.

144. I do find that evidence has been adduced that there were houses constructed on the land. The evidence is sufficient as to the kind of houses that were build clearly from the evidence on record. For this reason I award the Defendants Kshs. 5,000,000/- as general damages for trespass and/or loss of use of land.

ISSUE No. c). Whether the Parties herein are entitled to the prayers sought.

145. Under this sub - heading, the court shall examine if the Parties are entitled to the prayers sought. I hold that the Plaintiffs have not proved their case on a balance of probabilities and are not entitled to the prayers sought in the plaint. The Plaintiffs case is hereby dismissed with costs of the Plaintiffs' claim awarded to the Defendants.

146. Thus, I discern that the Defendants herein have made out their case and as discussed before in this Judgment they are entitled to the prayers sought in the Counter - Claim. Therefore, in the long

run, I proceed to allow the Counter - Claim with costs to the Defendants.

ISSUE No. d). Who bears the costs of the Plaintiff and Counter - Claim

147. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR*** and ***“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

148. In ***“Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another - Versus - Mutula Kilonzo & 2 others [2013] eKLR”*** quoted the case of ***“Levben Products - Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227”*** the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

149. In the present case, for the fact that the Plaintiffs have not proved their claim; the Defendants shall have the costs of the suit by virtue of the Originating Summons/ Plaint dated 14th October, 2020. Further being that the Defendants have proved their claim as per their counter claim dated 10th November, 2021, the costs of the same are hereby awarded to them.

I. Conclusion and Disposition

150. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the

Preponderance of Probabilities and the balance of convenience finds that the Plaintiffs have not established their case against the Defendants. Thus, the Court proceeds to make the following specific orders:

- (a) THAT Judgment be and is hereby entered in favour of the Defendants in respect to the Statement of Defence and the Counter - Claim dated 10th November, 2021 with costs.**
- (b) THAT the Plaintiffs claim in respect to the Originating Summons and/or Plaint dated 14th October, 2020 filed on 16th October, 2020 be and is hereby found to have no merit and hence it is hereby dismissed with costs.**
- (c) THAT a declaration do and is hereby issued that the Defendants are the legal registered and absolute owners and proprietor of all that property known as Plot No. Mainland Section II/402 measuring approximately 5.96 hectares with all the indefeasible rights, interest and titles thereof.**
- (d) THAT an order do and is hereby issued evicting the Plaintiffs whether by themselves, servants, agents, employees and/or anyone claiming therefrom, from all that property known as plot No.402/section II/ Mainland pursuant to the provisions of Section 152E of the Land Act, No. 6 of 2012 from the date of the delivery of the Judgment herein, failure upon which**

the OCS and OCPD Bamburi/ Utange to intervene and use reasonable force to assist in enforcement of the eviction order against the Plaintiffs.

- (e) THAT an order do and is hereby issued for a Permanent Prohibitory Injunction to restrain the Plaintiff whether by themselves, their servants, agents, employees and/or anyone claiming under the Plaintiff from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any manner whatsoever dealing in the Defendant's Property known as plot No.402/section II/Mainland.**
- (f) THAT the Defendants be and is hereby awarded damages for Loss of use of the property plot No. 402/section II/ Mainland and/or General damages for trespass on the Defendant's property plot No. 402/section II/Mainland to the tune of Kenya Shillings Five Million (Kshs. 5,000,000/-).**
- (g) THAT the Defendants shall have the costs of the suit by virtue of the Originating Summons/ Plaint dated 14th October, 2020. Further being that the Defendants have proved their claim as per their counter claim dated 10th November, 2021, the costs of the same are hereby awarded to them.**
- (h) THAT in the meantime the parties are at liberty to explore an out of Court negotiation as had already**

commenced with a view of arriving at an amicable settlement pursuant to the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Sections 20 (1) & (2) of the Environment & Land Court Act, No. 19 of 2011. There shall be a mention of the matter on 26th September, 2025 before this Court to ascertain progress made and further direction whatsoever.

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JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS19THDAY OFSEPTEMBER.....2025.

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

Judgement delivered in the presence of: -

- a) M/s. Firdaus Mbula - the Court Assistant.
- b) M/s. Onyango Advocate for the Plaintiffs.
- c) M/s. Kihoro Advocate for the Defendants.