



**Mwarandu & 2 others (Suing on their behalf and of all the residents of Miritini Majengo Mapya Estate all occupying own portions of Lands/Plots on L.R MN/IV/3640) v Doshi & 2 others (Environment & Land Case 183 of 2009) [2024] KEELC 1658 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1658 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 183 OF 2009**

**LL NAIKUNI, J  
MARCH 5, 2024**

**IN THE MATTER OF: REGISTRATION OF TITLES ACT (CAP 281, LAWS OF KENYA) AND THE LIMITATION OF ACTIONS ACT (CAP 22, LAWS OF KENYA)**

**AND**

**IN THE MATTER OF: CIVIL PROCEDURE ACT AND RULES ENACTED THERETO**

**AND**

**IN THE MATTER OF: LAND REFERENCE NO. MN.VI/3640  
WITHIN MOMBASA MUNICIPALITY, MOMBASA DISTRICT**

**BETWEEN**

**FESTUS MWARANDU ..... 1<sup>ST</sup> PLAINTIFF  
SAMSON OMOLO ..... 2<sup>ND</sup> PLAINTIFF  
JULIUS OKOTH ..... 3<sup>RD</sup> PLAINTIFF  
SUING ON THEIR BEHALF AND OF ALL THE RESIDENTS OF MIRITINI  
MAJENGO MAPYA ESTATE ALL OCCUPYING OWN PORTIONS OF LANDS/  
PLOTS ON L.R MN/IV/3640**

**AND**

**ASHOK LABSHANKER DOSHI ..... 1<sup>ST</sup> DEFENDANT  
MANESHKUMAR KISHORKUMAR DOSHI ..... 2<sup>ND</sup> DEFENDANT  
BUTLER ESTATES LIMITED ..... 3<sup>RD</sup> DEFENDANT**



## JUDGMENT

### I. Introduction

1. The Judgment before this Honourable Court pertains to the suit instituted by the Festus Mwarandu, Samson Omolo and Julius Okoth (Suing on their own behalf and behalf of all the Residents of Miritini Majengo Mapya Estate all occupying own portions of Lands/ Plots on L.R. MN/VI/3640 the Plaintiffs herein through Originating Summons dated 9<sup>th</sup> June, 2009 and filed in Court on 10<sup>th</sup> June, 2009. The Suit was instituted under the provision of Section 38 of the Limitations of Actions Act and Order XXXVI Rule 3D of the Civil Procedure Rules, 2010 against the Ashok Labshanker Doshi, Maneshkumar Kishorkumar Doshi and Butler Estates Limited Defendants herein. It is instructive to note that in the course of the proceedings, this suit was consolidated with another civil suit known as “HCCC (Mombasa) No. 262 of 2007 - Mangrove investment – Versus - George Mangale Mwajusi and 141 others (Hereinafter referred to as “The Civil Suit No. HCCC. No. 262 of 2007”) taking that it referred the same subject matter.
2. Upon Service of the originating summons and Summons to Enter Appearance dated 2<sup>nd</sup> November, 2007 upon the Defendants, the 1<sup>st</sup> Defendant filed a Replying Affidavit dated 16<sup>th</sup> July, 2009. Thereafter, all parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - Trial conference, the suit was fixed for full trial on 16<sup>th</sup> February, 2022 where the Plaintiff all their witnesses PW - 1 to PW - 3 and the Defendants called their witnesses on 26<sup>th</sup> September, 2023. It is instructive to note that, on 1<sup>st</sup> April, 2015 this Court conducted a site visit (“Locus in Quo”) by the Deputy Registrar and a report dated 20<sup>th</sup> April, 2015 to that effect is attached to this Judgement for ease off reference.
3. On 10<sup>th</sup> November, 2021 the Plaintiff’s case commenced.

### II. The Plaintiffs’ Case

4. The Originating Summons were supported by a 9 paragraphed Affidavit sworn by Festus Mwarandu, the 1<sup>st</sup> Plaintiff herein on 9<sup>th</sup> June, 2009 with annexures marked as ‘FM – 1 and 2 - AN’. He averred:-
  - a. The Plaintiffs herein and all those who had given their Authority and Consent to them were in actual, Exclusive and open possession and occupation of their respective portions of Lands/ Plots upon Plot No. L.R. 3640/VU/MN (Hereinafter referred to as “The Suit Property”) prior to it being allotted to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sometime in 1988 [Copy of Certificate of Title and Postal Search was annexed and marked as “FM – 1”].
  - b. The Plaintiffs herein and all of the Parties whom they act and plead for in this proceedings had since the year 1988 continued with the said Open and exclusive occupation and use of their respective portions of Land/Plots without any interference, interruption and/or hinderance by the Defendants or any other persons whosoever to date.
  - c. The Plaintiffs herein and all of the Parties whom they act and plead for in this Proceedings had for a period exceeding the last Twelve [12] years and until commencement of this Suit carried out uninterruptedly various development activities in and upon their respective Portions of the Lands/Plots that they are in actual occupation/possession, [Series of “A – S” Pictures taken at random are annexed and marked as “FM - 2 AN”].



- d. For a period exceeding the last Twelve [12] years and until the commence of this Suit none of the Defendants herein has set foot on or upon any of the portions of the Suit Property or in any manner obstructed any of Plaintiffs and/or of the parties they represented in these proceedings from quiet possession and exclusive use and enjoyment of the respective.
  - e. The Plaintiffs contend that the purported Transfer by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the Suit Property to the 3<sup>rd</sup> Defendant on 28<sup>th</sup> May, 2008 are of no consequence as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants interest over the same stood extinguished as at the Year 2003.
  - f. In the circumstances the Plaintiffs pray that this Honourable Court do grant an Order to the effect that the Plaintiffs and all of those Parties whom they plead and act for have since acquired Ownership of the Suit jointly and severally and that therefore the Suit Title be registered in the names of the Plaintiffs herein as Trustees for themselves and for all of the Parties to whom they act and plead for in this Proceedings in the stead of the 3<sup>rd</sup> Defendant M/s Butler Estates Limited.
5. The Plaintiffs in the originating summons sought for the following orders:-
- a. That the Plaintiffs herein be registered as Proprietors of all the leasehold Interest comprised in all that parcel of Land known as L.R. No.MN/VI/3640 as Trustees for themselves and for all of the parties who are named in the List annexed to the “Authority and Consent to Act” filed in this matter in the stead of M/s. Butler Estates Limited for reasons that the Plaintiffs and the said Parties have since become Proprietors thereof jointly and severally by virtue of cumulative Adverse Possession.
  - b. That the Costs of this Suit be borne by the Defendants jointly and severally.
6. On 16<sup>th</sup> February, 2022, the Plaintiffs called their witness PW - 1 to PW - 3 who testified as follows:-

**A. Examination in Chief of PW – 1 - by Mr. Mwadzogo Advocate**

7. PW – 1 was sworn and testified in Kiswahili language. He identified himself as Festus Kombe Mwarandu. He told the Court that he lived at Miritini Mzunguko – County of Mombasa. He was a holder a Kenyan national identity card (he showed it to Court and its particular were noted). He was the 1<sup>st</sup> Plaintiff. He filed this case on behalf of the officials and other 142 persons. He adopted his written witness statement dated 29<sup>th</sup> March, 2017 as part of the Plaintiff’s evidence in chief. Further, he produced the list of documents dated 29<sup>th</sup> March, 2017 and marked as Plaintiffs Exhibit numbers 2 to 11 in that order which were adopted and admitted accordingly.

**B. Cross Examination of PW - 1 by Mr. Amadi Advocate**

8. He told the Court that he had authority to represent 142 people. (The Court noted that he never had the authority to plead under Order 1 Rule 13 of the Civil Procedure Rules, 2010). Legally, and as things stood currently, the suit land belongs to Mr. Butler Estate Limited. PW -1 and others had been on the suit land since the year 1987. Amongst the Plaintiffs, there were those who came in the land from the year 1988 and so forth. He had no documentary evidence for instance a Chief’s letter or Children’s notification of birth and so forth to demonstrate having occupied the land from the year 1988.
9. He stated that from the photographs, he had attached a document marked as the Plaintiff Exhibit number 2. However, it never showed when they got into the suit land. He knew the Chief of the location and the District Officer called Charles Wangai. He was aware of the meeting held on 7<sup>th</sup> February, 1988, where some squatters were paid. He had never seen a perimeter wall around the suit



land. He was referred to the Plaintiff's Exhibit Number 10 of the Plaintiff's bundle of documents. It was a report of the site visit dated and conducted on 1<sup>st</sup> April, 2015 by the Deputy Registrar. He was there as the Chairman, and occupying house hold No. 52. He confirmed it was a new house; 6 years. There were other houses being numbers 21, 22, 3 and 9. He was saying the truth as he was there and there were several old houses. He insisted that he had authority to file the case.

#### **C. Re- Examination of PW - 1 by Mr. Mwadayo Advocate.**

10. PW – 1 confirmed that he had been on the suit land for over 12 years. From all those who attended the meeting and were paid the none of them came to Court. Those who came to Court were those who had not been compensated. There were houses which had been there since the year 1987. However, they looked new because of renovations and repairs. The Deputy Registrar was not lying. The majority of them who were there were not landlords because they had been there for over 6 years. When they got there, they found nobody. The land was vacant. They would produce a small token of appreciation called “Kajima” amounting to a sum of Kenya Shillings Twenty Thousand (Kshs 20,000/-) for the occupation of the to the Chief/Mzee wa Kijiji.

#### **D. Examination in Chief of PW - 2 - by Mr. Mwadayo Advocate:-**

11. PW – 2 was sworn and testified in English. He identified himself as Mr. Samson Odira Omoro. He was a holder of the Kenyan national identity card. (He showed to Court and all the details were noted). He stated that he lived in Miritini Majengo Mpya. He was in Court because they were served with Court documents stating that they were living on someone else's land. He had been living on the land from the year 1986. He had a house. He lived there with other people. There was a site visit by the Court and a report was tendered after the visit. There were some houses which had been renovated. Some of them were the Swahili built houses – permanent and semi-permanent residence. They were not new houses. There was a Mzee wa Mtaa. There was a meeting held in the year 1988, he had not physically come. He never participated in the meeting.

#### **E. Cross Examination of PW - 2 by Mr. Amadi Advocate.**

12. PW – 2 confirmed that he negotiated for the land in the year 1986 but by the year 1988 he had not physically moved in. That is to say, he had not been in occupation. They were negotiating with Mzee wa Mtaa. He negotiated in the year 1986. It was in January 1987 when he built the house. He had nothing to show that he had been in occupation of the land. He was referred to the site visit report. He confirmed that the report showed that household number No. 3 belonged to Samson Omalo. It indicated that they were new houses with a sign reading ‘house to let’”.

#### **F. Re - Examination by Mr. Mwadayo Advocate.**

13. PW - 2 confirmed that the front of his house was being renovated. The Deputy Registrar never lied. He worked for Kenya Marine services. He used the houses for residential purposes. He got water from the Ministry of Water and power from the Kenya Power and Lighting (KPLC).

#### **G. Examination in Chief of PW - 3 by Mr. Mwadayo Advocate.**

14. PW – 3 was sworn and testified in English language. He identified himself as Mr. Julius Stanley Okoth. He was a holder of the Kenyan national identify card which he showed to Court and its details were noted on file. He lived at Miritini – Mzunguko. He was in Court as a person claiming the suit land. He prayed to have title to the land. He had occupied the land from the year 1988. He lived at the suit land with his uncle who used to work for the Kenya Railways Corporation. He had schooled at Bungoma in the Western part of Kenya.



15. The witness was stepped down because he had not filed a witness statement as required by Order 11 of the Civil Procedure Rules, 2010. It was to avoid ambushing the oppose side.
16. On 16<sup>th</sup> February, 2022 the Plaintiff marked the close of their case through their legal representative Mr. Mwayayo.

## **II. The Defendants' case**

17. On 17<sup>th</sup> July, 2009, the 1<sup>st</sup> Defendant filed his 22 paragraphed replying affidavit dated 16<sup>th</sup> July, 2009 sworn by ASHOK LABSHANKER DOSHI, a director of the 3<sup>rd</sup> Defendant with four (4) annexures marked as "ALD 1 to ALD 4". He averred that:-
  - a. The 3<sup>rd</sup> Defendant was the current registered proprietor of L.R No 3640/VI/MN, the transfer thereof having been effected from M/s Margrove Investments on the 28<sup>th</sup> May 2008.
  - b. The original registration of ownership of L.R No. 3640/VI/MN was in the name of Margrove Investments Limited for a term of 99 years from the 1<sup>st</sup> November 1987 in which the 2<sup>nd</sup> Defendant and himself were partners.
  - c. In the year 1988, the suit property was invaded by squatters, who erected shanties on a portion thereof.
  - d. The Defendants in liaison with the Provincial administration held meetings with the said squatters and it was amicably resolved that the squatters would move off the suit property and the Defendants out of their own volition duly compensated the trespassers for their buildings on the suit property.(Annexed in the affidavit and marked ALD 1 are copies of the proceedings before the Area Administrator and acknowledgement of receipt of compensation by the squatters who were then on the suit premises).
  - e. Subsequent to the aforesaid settlement between the owners and the squatters, all the squatters moved out of the suit property and he duly fenced the entire property. Thus, the property remained undisturbed until the year 2000.
  - f. In or about the year 2000, the Plaintiffs and other squatters invaded the suit property and took possession thereof. They set up settlement without any colour of right, which constituted trespass on the subject property.
  - g. He again sought the assistance of the Provincial administration to remove the trespassers in the year 2000, but the trespassers remained in possession of the suit property albeit wrongfully.
  - h. Therefore, it was not true that the Plaintiffs in this suit and all the parties whom they act in this proceedings had been in open and exclusive occupation and use of the suit property without any interference and / or hindrance by the Defendants or any other person whatsoever since the year 1988 to date.
  - i. It was evident from the annexures marked as "ALD – 1" that the Defendant indeed removed all trespassers to subject property in the year 1988, albeit on amicable terms and duly secured the property with a fence, which was subsequently infringed by the present trespassers in or around the year 2000.
  - j. Upon realizing that, the Plaintiffs and other squatters were determined to persist in their wrongful occupation of the said suit property, he instructed their Advocates on record to institute legal proceedings at the High Court in Mombasa, seeking for eviction orders against



the trespassers in HCCC No. 162 of 2007, (Annexed in the affidavit and marked as “ALD 2” was a copy of the Plaintiff in said civil suit).

- k. It was quite apparent that the three Plaintiffs in the present suit were named as Defendants numbers 6, 3 and 112 in HCCC No. 162 of 2007; as were the rest of the parties who were set out in the Notice of Authority and consent filed in this suit.
  - l. Summons to enter appearance were issued by this Honourable Court to be served by means of a public advertisement and the same was duly effected through the Daily Nation of the 17<sup>th</sup> January 2008.
  - m. The Plaintiffs herein duly instructed Advocates to enter appearance and defend them in HCCC No. 262 of 2007. Annexed in the affidavit and marked as “ALD – 3” were copies of the Memorandum of Appearance filed by the Plaintiff’s Advocates in HCCC 262 of 2007.
  - n. The Plaintiffs’ advocate in HCCC No.262 of 2007 then filed and served Statements of Defence to their Advocates on record. Annexed in affidavit and marked as “ALD – 4” were true copies of the Statement of Defence in HCCC No. 262 of 2007).
  - o. It was instructive that at paragraph 13 of the Statement of Defence filed by M/s Melissa Morangi & Company Advocates on the 25<sup>th</sup> February 2008, the Plaintiffs (but Defendants therein) claimed, “The Defendants state that by the year 1976, some of the Defendants herein were in physical occupation of the land, some from birth and others moved in as squatters in early 1970’s” yet;-
    - a. The Plaintiff’s in the present suit never disclosed when they entered the suit premises
    - b. There was evidence that the Defendant herein removed, in liaison, with the Provincial administration all the squatters upon the suit property in 1988.
  - p. The Plaintiffs had deliberately failed to disclose the material facts that there was in existence of a Civil suit HCCC No.262 of 2007 in which they were parties and in which they had filed defences similar to their present claims.
  - q. The material non-disclosure as set out herein before on the part of a party such as the Plaintiffs, who were seeking access to this Honourable Court’s equitable remedy of land adverse possession, outrightly disentitles them to such relief and their suit should be dismissed.
  - r. Further to the foregoing paragraph of this affidavit; the Plaintiffs herein but Defendants in HCCC No. 262 of 2007 admitted the jurisdiction of this Honourable Court to deal with and determine the suit and that parties to proceedings are bound by their pleadings.
  - s. The present suit was incompetent and due to the aforestated material non disclosures. It should be dismissed with costs.
18. On 25<sup>th</sup> May, 2023, the Honourable Court scheduled the hearing of the Defence case on 26<sup>th</sup> September, 2023 where the Defendants called their witness DW 1 who testified as follows:-

#### **H. Examination - in - Chief of DW - 1 by Mr. Amadi Advocate.**

- 19. DW – 1 was sworn and testified in English language. He identified himself as Mr. Ashok Labshanker Doshi. He was a holder of the Kenyan national identity card. He showed it to Court and all its particulars were noted. He lived in Kizingo estate within the County of Mombasa. He filed a witness statement dated 31<sup>st</sup> March, 2017 and which he wished to rely on as his evidence. Further, he also filed a



list of documents dated 11<sup>th</sup> May, 2015 and 31<sup>st</sup> March, 2017 which he produced as Defendants Exhibit numbers 1 to 14 in that order. The suit property was registered as indicated in Defendants Exhibit Number 1 to 13. When they bought the land there were squatters. They wrote a letter to the District officer produced as Defendant Exhibit Number 5. They held the meeting and there were minutes – Defendant Exhibit Numbers 6. The squatters were compensated and they received the money – Defendant Exhibit Number 7. They later applied and obtained approval for the construction of a perimeter wall – Defendant Exhibit Numbers 8. They started the construction of the wall in the year 2009. By the time when they constructed the wall the land was vacant.

20. However, he informed Court that it was later on that they discovered the squatters had broken the boundary wall with the help of the local chief. They got in the suit land and started building semi permanent structures there. They wrote a letter dated 9<sup>th</sup> January, 2006 marked and produced as Defendant Exhibit Number 9 to the District Commissioner. But he never took any action. He was very silent on the matter. On 1<sup>st</sup> April, 2015 there was a site visit conducted by the Deputy Registrar. A Site Visit report dated 1<sup>st</sup> April, 2015 – Defendant Exhibit 10. It showed that the Plaintiffs were not in occupation of the land. It showed they had only been on the land for 3 years. This could not be a sustainable case for Land Adverse Possession – for 12 years. The Plaintiff invaded the land which already had a perimeter wall. He had all along been paying rent for the Plot – produced and marked as Defendant Exhibit Number - 14). He urged Court to dismiss the suit and let him have the suit land.

#### **A. Cross Examination of DW-1 by Mr. Mwadzogo Advocate**

21. They filed a case seeking to be granted vacant possession. The case was filed in the year 2009. It was Civil Case No. 183 of 2009. Previously there was HCCC. Civil Case 262 of 2007 by Mangrove Investment Limited. In this particular case, Mangrove had sued 142 people. By then the Plaintiff was claiming to be the owner of the land. He was a director of Mangrove Investment Ltd. The owners of the suit properties were Butler Estates Ltd where his son and himself were Directors. In the year 2008, the property was transferred from Mangrove to Butler Estate Limited – the 3<sup>rd</sup> Defendant. This transfer took place when there was an active suit in court i.e. during the pendency of this suit. At the time of the transfer of the land the company knew that there were squatters on the land. Despite of this the Butler Estate Limited still bought/transfer the land. That is it had full knowledge of the occupation of squatters on the land by the time they were buying it. There were 142 people on the land by this time.
22. He testified that although there was a perimeter wall that was erected, he never had that evidence in court. But from the documents in court, there was an approval for building the perimeter wall. There was nothing that had been done on the suit land. There was no activity on the land. He could not go there as it was dangerous. They were violent.
23. He confirmed that the Deputy Registrar visited the site and he prepared a report which was part of documents he produced. From the report, it was densely populated. Due to the morphology they were unable to visit all places. He said that one of the houses was an old mud house. Number 35 was an old school. Some of the structures were old but upto 5 years. He confirmed that he may not go to the suit property as the Plaintiffs were likely to kill him. The last time he was at the property was in the year 2006. He confirmed by the year 1988 there were some squatters on the land and they owned houses. It was his evidence that he had paid some squatters. However, the Plaintiffs herein were not paid as they had got into the land illegally.
24. He refuted the contention that the Plaintiffs had been living on the land for more than 12 years. It was not correct. There were squatters before 1998 i.e. 13 people and those after the 1998. He confirmed that despite of all this neither Butler Estate Limited nor Mangrove Limited instituted any civil case in



the year 2007 nor lodged any complaint. However, he agreed Butler Estate Limited had knowledge of these people on the land.

### **B. Re-Examination of DW-1 Mr. Amadi Advocate.**

25. With reference to his witness, DW – 1 reiterated that the Plaintiff only came to the land after the construction of the boundary wall in the year 1997. On being referred to the site visit report, he stated that from the Coram, there was no presence of the Land Surveyor. The Deputy Registrar acknowledged that there were boundaries issues. From it House Number 119 was not habitable; House No. 142 and 21 were freshly built houses. The introduction of the report indicated that it was an area which was densely populated. The transfer of the property was done on 28<sup>th</sup> May, 2008. There was no court order barring the transfer of the land. The people on the land were 142 in number, They were all were squatters. They were not claiming ownership. Thus, he was at liberty to do anything with the land. The site visit report was dated 1<sup>st</sup> April, 2015. He built the perimeter wall about 1998. That is 17 years ago. .
26. On 26<sup>th</sup> September, 2023 the Defendants through their legal representatives marked the close of the Defendants' case.

### **III. Submissions**

27. On 26<sup>th</sup> September, 2023 in the presence of both parties the Court directed that the Petition dated 12<sup>th</sup> February, 2021 be dispensed off by way of written submissions. Pursuant to that on 29<sup>th</sup> January, 2024 after the Honourable Court confirmed compliance the Honourable Court issued a Judgment date on 5<sup>th</sup> March, 2024 accordingly.

#### **A. The Written Submissions by the Plaintiffs.**

28. The Learned Counsel for the Plaintiffs herein, the law firm of Messrs. J. K. Mwarandu & Company Advocates filed their written submissions dated 10<sup>th</sup> January, 2024. Mr. Mwandzogo Advocate commenced his submissions by stating that before the Court was Originating Summons filed on 9<sup>th</sup> June, 2009 by the Plaintiffs as a representative suit seeking the following the orders as already spelt out herein above.
29. The Learned Counsel informed Court that this suit was consolidated with HCCC (Mombasa) No. 262 of 2007. He averred that on 17<sup>th</sup> October, 2014 the Plaintiffs herein made an application to this Honorable Court seeking an order to have the Deputy Registrar conduct a site visit (“Locus in quo”). The said application was certified as urgent. Eventually, this Honorable Court directed and/ or ordered the Deputy Registrar of this Court in accompany of the Counsel for parties visit the suit land and file a report on its status. Also, this Honorable Court granted further orders and/or suitable directions to facilitate the obtaining and filing of the Deputy Registrar's Report as per prayer above. To wit that:-
  - i. the ground of the application was hinged on Adverse possession of which the Defendants had denied.
  - ii. for experiencing and the gathering of evidence it was appropriate that the Deputy Registrar of this Honorable Court do a site visit (“the Locus in quo”) and filed a Report on the status obtaining within such period as the Court Decreed.
  - iii. neither party to the suit would be prejudiced with such visit and / or the compiling and filing of the report on the status.



30. The Learned Counsel informed Court that on 1<sup>st</sup> April, 2015, the Deputy Registrar visited the "locus in quo" and prepared a report which was submitted in this Court. According to the Counsel, the report showed that, the Suit Premises was densely populated with very old houses and other new houses (which were renovated and put new iron sheets). Due to time the Deputy Registrar could not finish going through and ascertaining all the houses on the suit premises which were over 200 with 12 rooms each and a population of over 3,000 on the ground together with mosques and schools. The upshot of the report indicated that the suit premises had no shanty houses as claimed by the Defendants but nicely built permanent houses. There were people who had been there since early 1980's and others born there in the early 1960's without any interference by either the Defendants or any other third parties until the year 2007, when the Defendants filed the said Civil suit ELC No. 262 of 2007. It was the Plaintiffs contention that when the said Civil suit ELC No. 262 of 2007 was filed some of the Plaintiff's had been on the Suit Property as from the year 1989 uninterruptedly. Hence, the Defendant's assertion that they paid the Plaintiffs in the suit ELC No. 183 of 2009 (OS) was wrong taking that when the Plaintiffs entered the suit premises from all walks of life, the Plot had been vacant. They were welcomed by the Village Elders who would point out the spot where to settle down in the vacant Plot. He asserted that should there have been people who were compensated by the Defendant and they moved out of the Suit Premises which was denied, then the alleged people were not in court as the Plaintiffs herein. The list of the alleged payment was never produced in Court. Further, should there have been any payment made, it was in a discriminative way as the people making the payments would only selectively call some people at the administrative meetings. Thus, many were left out without being paid at all. These people had been living quietly without any disturbances since the early year of 1989 until the year 2007, when the Defendant filed a Suit ELC 262/2007. However, in the said suit they sued the wrong people.
31. It was during the pendency of the Civil case - ELC 262 of 2007, that the Defendant herein transferred the suit property to Butler Estates Limited which was a sister Company to Mangrove Investments with the same Directors the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein on 28<sup>th</sup> May, 2008. This was made with the sole purpose of defeating the ends of justice being disrupting the Plaintiffs' claim of title under the land Adverse Possession. Nonetheless, this matter was heard. It was the evidence by the 1<sup>st</sup> Plaintiffs (PW - 1) and other witnesses that they came in the suit land in diverse years of 1987 and 1989. They stated how they would be welcomed by the Village Elders and showed a place to build their houses. Indeed, the PW - 1 testified that he was already on the suit premises in the year 1988. He was not called by the Defendant or the administration for the alleged payments. He was never issued with any notice to vacate the Suit Premises. He went further to state that he lived harmoniously and without any disturbance until the year 2007 almost 20 years of stay. As a result, they became legal owners by way of Adverse Possession. They were became registered as proprietors of all the leasehold interest of all that parcel of land known as L.R NO MN/VI/3640 as trustees for themselves and for all of the parties who were named in the list annexed to the "Authority and Consent to Act" filed in this matter instead of M/s. Butler Estates Limited.
32. It was then that the Defendants filed a Suit and served them through advertisement. That PW - 1 evidence was consistent save for minor discrepancies by the PW - 2 who was an aged person but their evidence corroborated. The Learned Counsel argued that all Plaintiffs herein and all those who had given their authority and Consent in these proceedings were entitled to a claim of title by way of land Adverse possession. They were in actual, open, exclusive, open possession and occupation of their respective portions of the suit land without interference, interruption and/or hindrance by the Defendants or any other persons whosoever to date. They were in this state for a period exceeding the last Twelve (12) years and until the commencement of this suit carried out uninterruptedly various



development activities in and upon their respective portions of the lands/ plots that they are in actual occupation /possession.

33. It was their argument that for a period exceeding the last Twelve (12) years and until the commence of this suit the Defendants herein had not set foot on or upon any portions of the suit property or in any manner obstructed any of the Plaintiffs and / or of the parties they represent in these proceedings from quiet possession and exclusive use and enjoyment of their respective portions. The Plaintiffs contended that the purported transfer by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant of the suit property to the 3<sup>rd</sup> Defendant on 28<sup>th</sup> May 2008, was of no consequences. They stated so as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants interest over the Plot No LR 3640/VI/MN stood extinguished as at the year 2003.
34. He averred that the 1<sup>st</sup> Defendant (DW - I) never called any witness either the Police or the Administration he purported to have informed them to evict the Plaintiffs. It was on his sworn evidence that he or the other defendants have not set foot on the suit property since the year 1988 fearing for their life, which is not true because for over 19 years prior to filing of his suit he has not visited the suit property and issue notices for the Plaintiffs to vacate the suit property, he could have used the Police, Administration or the Court before the Plaintiffs achieved the Cumulative Adverse Possession. The Learned Counsel averred that they doubted the authenticity of the Title of Plot No LR 3640/VI/MN. They averred that the said title was obtained without following the legal proceedings. It ought to have been surrendered to the Government of Kenya on 23<sup>rd</sup> November, 1973 taking that it had been given to the indigenous Persons on the ground. Despite of this, the Defendants went overboard and obtained the Title. Furthermore, the Defendant never complied with the special conditions inscribed on the Title. Also they failed to cause any development on the land as was a requirement under the provision of Section 2 of the Special Condition which stated in part:-

“The Grantee shall within six calendar months of the actual Registration of the Grant Submit in triplicate to the local Authority and the Commissioner of lands plans.....”

Clearly, this was never done as seen from the copy of the title Annexed in List of documents by the Defendant thereof.

35. Thus, it was submission of the Learned Counsel that the Defendants evidence was half baked. They felt DW – 1 kept on contradicting himself. He could not even remember where the suit property was and how it was developed. The only thing he kept on saying was that there were only seven shanty houses, which were demolished and the owners were paid off. The Learned Counsel reiterated that the Deputy Registrar never saw shanties but developed old and permanent houses within a densely populated area. He referred Court to the provision of Section 7 of the Limitation of Action Act, Cap. 22. To buttress on this point, the Counsel cited the case of (1984) KLR.314-Civil Appeal No 73 of 1982 Kneller JA stated that:-

“the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from anyone in possession or actual occupation but if he does not exercise it he may not bring an action to recover the land after the twelve years (Section 7(ibid) whether or not an action to resume possession would have succeeded in irrelevant.

In (1984) Potter JA stated:-

“I am satisfied that the Applicant did nothing to asset his right to the portions of land in the possession of the respondents until he commenced legal proceedings on April 30, 1976. It



would be sufficient for the Respondents to show that possession was uninterrupted since a day before April 30, 1964".

In (1984) Potter JA stated:-

"I am satisfied that the Applicant did nothing to asset his right to the portions of land in the possession of the Respondents until he commenced legal proceedings on April 30, 1976. It would be sufficient for the Respondents to show that possession was uninterrupted since a day before April 30, 1964".

36. Finally, the Learned Counsel averred that the Defendant brought his case after thought and could not even call the other Defendants or supportive documents touching the existence of the Plaintiffs after the year 1989 or 12 years before filing his case. Therefore, his case could be deemed as being time barred according to the Limitation of action Act. The said suit No ELC 262/2007 should fail and judgment entered for the Plaintiffs against the Defendants jointly and severally plus costs and interest as prayed in the Originating Summons.

### **B. The Written Submissions by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants**

37. The Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein the Law firm of Kadima & Company Advocates filed their written submissions dated 6<sup>th</sup> February, 2024. Mr. Amadi Advocate commenced his submission by informing Court that the Plaintiff initiated this claim by way of originating summons dated 9<sup>th</sup> June, 2009 seeking for the prayers as itemized therein. The aforementioned claim was consolidated with HCCC NO.262 OF 2007 and matter commenced for hearing.
38. According to the Learned Counsel, the following were the undisputed facts. These were:-
- a). The Defendants were the registered proprietors of the suit property having initially been registered in the names of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants and later transferred to the 3<sup>rd</sup> Defendant.
  - b). From the evidence adduced, on 1<sup>st</sup> April, 2015, the court conducted a site visit on the suit property and prepared a report dated 20<sup>th</sup> July, 2015.
39. The Learned Counsel held that from report their observations were that on the area where the suit land was situated. The report only provided a general description of the surrounding area and not necessarily the suit land. The same only served to aid this Honorable Court on the generality.
40. Further, the report noted the general overview on the fact that some houses were both old and new. Specifically, it never distinguished them. The Learned Counsel made a brief sample of the Plaintiffs' habitation. For instance, this Honorable Court noted that household Numbers 3, 7, 6, 9, 10, 20, 21, 22, 46 and 47 were new houses.
41. According to the Counsel, the other households were categorized as old houses and/or fairly old. That was the reason it was noteworthy to point out the two (2) oldest houses. This Honorable Court gave estimations of when they were no. 119 and No. 22 which were built in the year 2007 and 2004 respectively. It places them placed them outside the scope of the claim of title for land adverse possession as the Defendants filed HCCC No. 262 of 2007 in 2007.



42. Further, to him, it spoke volumes where this Honorable Court noted that within the boundaries of the suit property, there were no graveyards. Indeed, he noted that this Honorable Court concluded as hereunder:-

“From the sample above it can be seen that most of the houses were rental houses with the landlords who were the Plaintiffs not occupying them.”

43. Based on the brief facts stated out above, the Learned Counsel submitted on the following three (3) issues for the determination by this Honourable Court. These were as follows:- Firstly, whether the Plaintiffs were in possession for a continuous period of 12 years. Secondly, whether the possession was without the permission of the owner. Finally, whether the Plaintiff asserted a hostile title to the owner.

44. The Learned Counsel indicated to Court that he would collapse all the above three (3) issues taking that they were intertwined. To buttress his point on the issues, he cited the case of:- “Sammy Mwangangi & 10 others – Versus - Commissioner of Lands & 3 others [2021]eKLR, the Supreme Court of Kenya held that the principles of adverse possession are well settled. Further, he referred Court to other long court decisions including “J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford)Land Limited – Versus - The United Kingdom” which quotes Halsbury’s Laws of England (Fourth Edition, Reissue 1998), “Titus Mutuku Kasuve – Versus - Mwaani Investments Limited & 4 others [2004] eKLR, “Wambugu – Versus - Njuguna (1983) KLR” and “Gabriel Mbui – Versus - Mukindia Maranya (1993) eKLR” the principles of adverse possession were settled ‘inter alia’:

- i. One must have been in continuous and uninterrupted possession of the land for at least 12 years
- (ii) Such possession had been open and notorious to the knowledge of the owner
- (iii) Such possession is without the permission of the owner; and
- (iv) That the Plaintiff had asserted a hostile title to the owner of the property.

45. As far as the Learned Counsel was concerned, the Plaintiff had failed to prove they were in continuous and/or any occupation as they never resided therein as alleged. To support his case further, he referred Court to the case of “ELC (Siaya) No. 27 of 2021 (OS), Alphonse Agutu Dera – Versus - Fanuel Dera Achongo, at Paragraphs 13 & 14 while expounding on what entailed possession stated as such;

“ 13. The 2<sup>nd</sup> principle is whether such possession has been open and notorious to the knowledge of the owner. The Plaintiff contended that he has been in open and notorious possession of the suit property. He produced copies of photographs as evidence of his possession and occupation of this property. This court has scrutinised these photographs and they only portray the existence of trees and maize. It is only in one photograph that one catches a glimpse of a rooftop. In his list of documents, he described the photographs as “photographs of crops and trees on the land” and in his witness statement, he stated he has planted trees “along the boundary” and subsistence crops. This evidence shows that the house whose rooftop can be glimpsed from his exhibits is not part of his evidence. Possession is a matter of fact and there must be actual possession which requires some sufficient degree of physical occupation. The case of William Kipnyor Rotich – Versus - Paul Kiprof Karoney /2020| eKLR\_ cited with approval the case of Ernest Wesonga Kweyu - Versus - Kweyu Omuto CA Civil Appeal No.8 of 1990 where Gicheru J.A (as he then was) held thus on occupation and possession;



“there must be facts showing a clear intention to hold adversely, and under a claim of right, de facto use, and occupation must be shown.”

14. With mere photographs of seasonal crops and trees demarcating boundaries as evidence of his occupation for a purported period of over 49 years, this court is not satisfied that the plaintiff has been in occupation and possession in a manner that demonstrates that he has been in open and notorious occupation to the knowledge of the owner. The Plaintiff fails on this 2<sup>nd</sup> principle.’
46. He submitted that, the assertion that the Plaintiffs had been in occupation since year 1988 was not believable. Indeed, PW - 1 and PW - 2 never produced any evidence to enable this Honorable Court reach the said finding. The photographs relied upon were questionable at best as they never confirmed their claim as they were not dated/time stamped.
47. On the other hand, both parties relied on the site visit report. To him, the said Site Visit found that there were a mixture of old and new houses. Actually, it further pointed out that the oldest house was constructed in the year 2004. Furthermore, the report point out that there were no graves within the boundaries of the suit property. Additionally, it found out that most of the houses were rental houses with the landlords who were the Plaintiffs not occupying them.
48. The Learned Counsel submitted that the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants in their defense gave evidence supported with documentation. DW – 1 in his evidence stated that the Government of Kenya awarded them a Letter of Allotment dated 22<sup>nd</sup> November, 1987 and thereafter registered a leasehold. That when they purchased the suit property, only thirteen (13) squatters were on the land and who were compensated to vacate with the involvement of the area District Officer, the District Commissioner, the Chief and several elders. That indeed, payment was made and the squatters vacated on or before 31<sup>st</sup> March, 1998. Further, he testified that that they proceeded and obtained approvals for the construction of a perimeter wall which was erected and consequently the squatters could only have invaded the suit property after the said date.
49. In conclusion, the Learned Counsel strongly contended that the principle of land adverse possession had been the subject of litigation before the courts numerous times. Its constitutionality had also been challenged before this Court post the 2010 Constitutional era in “Mtana Lewa – Versus - Kahindi Ngala Mwangandi (2015) eKLR” and ultimately upheld. In that case, this Court quoted with approval, a passage from the Supreme Court of India which discussed the essentials of adverse possession in the case of:- “Karnataka Board of Wakf – Versus - Government of India & Others (2004) 10 SCC 779 as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”



50. To the Counsel, it was not in dispute that the registered owners of the suit land were the Defendants. The issue was whether or not they held a good title by virtue of the Plaintiff's claim of adverse possession. The Counsel reiterated that in determining whether or not to declare that a party had acquired land by adverse possession, there were certain principles which must be met as quoted by Seron J in the case of: "Gerald Muriithi – Versus - Wamugunda Muriuki & Another (2010) eKLR while referring to the case of "Wambugu – Versus - Njuguna (1983) KLR page 172 the Court of Appeal held as follows:-

- '1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
2. The *limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.'

51. He submitted that the Plaintiffs herein had failed to prove their case that they acquired the suit property by adverse possession. Consequently, he prayed that the Originating Summons dated 9<sup>th</sup> June, 2009 should be dismissed with costs and order of vacant possession to issue as prayed in HCC NO. 262 OF 2007.

#### **IV. Analysis and Determination**

52. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. This case proceeded whereby the parties gave evidence and produced several documents in support of their cases. This Honourable Court will still examine the facts of the case.

53. In order to arrive at an informed, just, equitable and reasonable decision, the Honourable Court has crafted the following three (3) issues for its determination. These are:-

- a. Whether the Plaintiffs have met the threshold for grant of orders for issuance of a Title on claim of Land adverse possession?
- b. Whether the Plaintiffs entitled to adverse possession of the suit properties?
- c. Who bears the Costs of the Originating summons dated 9<sup>th</sup> June, 2009?

#### **Issue No. a). Whether the Plaintiffs have met the threshold for grant of orders for issuance of a title on claim of land adverse possession**

54. Under this Sub – heading the Honourable Court has deciphered the main substrata in this matter is a claim for title through the doctrine of Land Adverse possession. The Plaintiffs instituted this suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein seeking to be granted title for the suit land based on the Doctrine of Land Adverse possession. As already indicate, this suit was consolidated with another –



HCC No. 262 of 2007 which has been extensively referred to by all the parties herein. The suit was vehemently contested. The Honourable Court will critically assess all these issues in the course of this Judgement.

55. Nonetheless, it is trite that a claim for adverse possession is attached to land and not title and it matters not that the land was owned by either the Plaintiffs or the Defendants. This was the position taken in the case of:- “Maweu – Versus - Liu Ranching & Farming Cooperative Society [1985] eKLR” as quoted in Civil Appeal No 164 of 2011 “Gachuma Gacheru – Versus - Maina Kabuchwa [2016] eKLR” where the Court held

“ Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”

56. Principally, based on the above legal position, this Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Cgiv No. 283 of 1990 “Gabriel Mbui - Versus - Mukindia Maranya [1993] eKLR”, where the Court held:

“ The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

57. Legally speaking, the principle of land adverse possession is well settled under *Limitation of Actions Act* Cap. 22 of the Laws of Kenya. To begin with, the provision of Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further, section 13 of the same Act, provides that adverse possession is the exception to this limitation:

“ An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Section 13

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, 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 ceases 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 purposes 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”.



58. The provision of Section 17 of the Act extinguishes the rights of a registered owner where there is a successful claim for adverse possession. While the provision of Section 38 of the Act on the other hand 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.”

59. Finally, Section 38 of the Act provides that:

“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.”

60. I wish to refer to the Court of Appeal in Kisumu Civ App. No. 110 of 2016 case of:- “Richard Wefwafwa Songoi – Versus - Ben Munyifwa Songoi [2020] eKLR” where the Court opined that a person claiming adverse possession must establish the following:-

- a. On what date he came into possession.
- b. What was the nature of his possession?
- c. Whether the fact of his possession was known to the other party.
- d. For how long his possession has continued and
- e. That the possession was open and undisturbed for the requisite 12 years.

61. Now turning to the surrounding facts and inferences of the instant case. The Plaintiffs contend that they entered the land in 1988, and has been in occupation since then for over 12 years. If that is the case, they have been in occupation of the suit property for a period of 36 years, which is beyond the statutory claim.

62. To determine the nature of possession, this Court is guided by the decision in Kisumu Civil Appeal No. 27 of 2013 “Samuel Kihamba – Versus - Mary Mbaisi [2015] eKLR”, where the court held:

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

63. In their own admission during examination in chief, DW – 1 admitted that at the time the 1<sup>st</sup> Defendant acquired ownership of the property, the Plaintiffs, whom he repeatedly referred to as squatters, were already in occupation of the same. The Defendant brandished the annexed copy of the Letter of Allotment to this effect. The Plaintiff through PW - 1 told the Court that he had authority to represent 142 people. By that as it may, the Court noted that there was no express authority to plead as required by the provision of Order 1 Rule 13 (1) & (2) of the Civil Procedure Rules, 2010. Legally, and



from the empirical documentary evidence placed before the Court during the proceedings of the suit, the suit land belongs to a legal entity trading in the names and style of “Butler Estate Limited” the 3<sup>rd</sup> Defendant herein. The PW – 1 claimed to have been on the suit land since the year 1987, he stated that there were those who came on it in the year 1988 and so forth. While answering the Learned Counsel for the Defendants during cross examination, PW – 1 confessed that no documentary evidence e.g. Chief letter or Children’s notification of birth and so for the to demonstrate having occupied from the year 1988. Instead, he stated that from the photographs, he had produced as Plaintiff Exhibit number 2 showed when they got into the suit land. He further informed Court of knowing the local chief and the District Officer called Charles Wangai. He was aware of the meeting held on 7<sup>th</sup> February, 1988, where some squatters were paid. Those who were compensated never attended Court. He denied having ever seen a perimeter wall around the suit land. He was referred to the Site Report dated 1<sup>st</sup> April, 2015 by the Deputy Registrar and produced as Plaintiff Exhibit Numbers 10. He was there as the Chairman of house hold No. 52. He refuted it was a new house. It was 6 years old. The other houses numbers 21, 22, 3 and 9 were not new. The Deputy Registrar had said the truth as there were old houses. He told the court that he had authority to file the case.

64. Clearly, there are serious issues of limitation of time in the instant case. This Court finds that there was nothing that stopped time from running as the Defendants never took any plausible step to assert rights over the suit property. There being nothing that stopped time from running, this Court finds and holds that the Plaintiffs as at the time of filing the suit had been in occupation of the suit property for a period of 21 years.
65. To this end, the Court finds and holds that the Plaintiffs have on a balance of probability established that they meet the threshold for the grant of orders for title through the Doctrine of Land adverse possession.

#### **Issue No. b). Whether the Plaintiffs entitled to adverse possession of the suit properties**

66. For a claim of adverse possession to issue, it is important that the said land is clearly identified as was held by the Court in the case of:- “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 vs. 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]

67. The Court of Appeal in the case of “Ruth Wangari Kanyagia – Versus - Josephine Muthoni Kinyanjui [2017] eKLR” while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of “Karnataka Board of Wakf (Supra)” (Which was also cited by the Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein) where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam,



nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

68. In the 1<sup>st</sup> Defendant’s Replying Affidavit, the Defendants stated that in or about the year 2000, the Plaintiffs and other squatters invaded the suit property took possession thereof and set up settlement without any colour of right, which constituted trespass on the subject property. He again sought the assistance of the Provincial administration to remove the trespassers in the year 2000, but the trespassers remained in possession of the suit property albeit wrongfully. Therefore, it is not true that the Plaintiffs in this suit and all the parties whom they act in this proceedings have since 1988 been in open and exclusive occupation and use of the suit property without any interference and/or hindrance by the Defendants or any other person whosoever to date.
69. Through their witness, the 1<sup>st</sup> Defendant stated that but later they discovered the squatters broke the boundary wall with the help of the chief and got in and started building. They wrote a letter dated 9<sup>th</sup> January, 2006 (see Defendant Exhibit Number 9) to the District Commissioner. According to DW – 1 he never took any action. He was very silent on the matter. However, DW – 1 informed Court that on 1<sup>st</sup> April, 2015 there was a site visit conducted by the Deputy Registrar and a Site Visit report dated 1<sup>st</sup> April, 2015 – Defendant Exhibit 10. According to him, the report showed that the Plaintiffs were not in occupation of the land. It showed they had only been on the land for 3 years. This could not be a sustainable Land Adverse Possession – for 12 years. He stated that the Plaintiff invaded the land which already had a perimeter wall. He had been paying rent for the Plot all along (see Defendant Exhibit numbers 14). They filed a case seeking to be granted vacant possession. The case was filed in 2009. It was Civil Case No. 183 of 2009. Previously there was Civil Case 262 of 2007 by Mangrove Investment Limited. In this particular case, Mangrove had sued 142 people. By then the Plaintiff was claiming to be the owner. He was a director of Mangrove Investment Ltd. The owners of the suit properties were Butler Estates Ltd where the son and himself were Directors. In the year 2008, the property was transferred from Mangrove Investment Limited to Butler Estate Limited. – 3<sup>rd</sup> Defendant. This transfer took place when there was an active suit in court i.e. during the pendency of this suit. At the time of the transfer of the land the company knew that there were squatters on the land. Despite of this the Butler Estate Limited. still bought/transfer the land i.e. it had full knowledge. There were 142 people on the land by this time. The last time he was at the property was in the year 2006. It was his testimony he never step on the land for fear of his life. They would kill him if he was spotted there. He confirmed by the year 1988 there were some squatters on the land and they owned houses. It was his evidence that he had paid some squatters. However, the Plaintiffs herein were not paid as they had got into the land illegally.

#### **V. Site visit report by the Deputy Registrar:-**

70. As stated herein, on 1<sup>st</sup> April, 2015 the Deputy Registrar Hon. D. Wasike conducted a site visit on the suit property. Subsequently, a report dated 20<sup>th</sup> April, 2015 was prepared and filed in Court. Taking that the Site Visit has been exceedingly referred to by all parties herein, the Honourable Court now wishes to re – produce the said report verbatim for ease of reference.

Republic Of Kenya

In The Environment & Land Court

At Mombasa

Elc Case No. 183 Of 2009 (o.s)



Festus Mwarandu & Others.....plaintiff

-versus-

Ashoklabshankar Doshi & Others.....defendant

Report Of The Site Visit Of 01.04.2015

Corum:

Hon. D. Wasike (Deputy Registrar)

Elvis Mwadzuya Court Assistant

Maosa for Plaintiffs

Kedeki for Defendants.

Background

On 11.02.2015 the Court allowed an application that the Deputy Registrar visits the site to ascertain the issue of adverse possession. On 01.04.2015 the Court visited the site.

The Area

The suit property is in Miritini area. It is quite off the main highway and the road leading to the site is quite rough. It is a densely populated area with houses and shops encroaching onto the road. There seems to be no planning and houses are built without any uniform plan, anywhere. Most of the houses are low cost swahili type of houses. Schools are also built amidst residential houses. The area has a feel of a Settlement Scheme that is not properly planned.

The suit premises

We were taken round by the first plaintiff and others. They pointed out the Plaintiffs houses as we went along. Due to the vast area and also the number of Plaintiffs we were unable to visit each place. The general overview was that some houses or buildings in the suit premises were old, while in other instances they were quite new.

Brief Sample of the Plaintiffs habitation

No.55 Okul Joseph Big rental house with tenants. It seemed to have been there for a while. No.51 Mezan Katumo Old house No.52 Honorata Chali A new house rental house. A tenant confirmed that it was about 6 years old. No.119 Tatu Nzuma A derelict house which no one can stay in. Claims to have been living there from 2007 but now lives with her family somewhere else. No.56 Vitalis Otieno A fairly old house. No.46 & 47 Mgodha Evaline & Mgodha Shighi- The two Plaintiffs are actually one person. She is holding two houses that are new. No. 20 Yusufu Mwanza A half built house. No.21 Silvester Onyango A fairly newly built house- fresh paint, beams, and iron sheets and doors. No.22 Hibiba Chovu (referred to as Mkachongo) Fairly newly built house, fresh iron sheets and cement. No vegetation whatsoever. The school said to have been there since 2004. No.38 Mambo Rashid Old house seems to have been there for a while. No.36 Ali Hamis A fairly old house. No.37 Mwalimu Kisinya An old mud house. No.39 Ali Mohamed An old house. No.12 Mangale Ngome A old School. No.9 Adija Juma A rental house & a new shop. Confirmed by tenants she does not stay there. No 10 Douglas Chemako A new shop from the paint, beams and iron sheets. No.8 Nzuma Ngombe An old house. No.7 Martin Owino A very new house. No.6 Festus Mwarandu Partly new and partly old house and partly rental. No.5 Frank Mbaji An old house. No.4 Duncan Nyamawi An old rental house. No.3 Samson Omolo New houses



with a sign reading “houses to let” Outside the boundaries of the suit premises were some graveyards. However in the suit premises, there were no graveyards but habitation.

Conclusion

From the sample above it can be seen that most of the houses were rental houses with the landlords who are the Plaintiffs not occupying them. There was also a mix of what seemed like new habitations of less than 3 years and some old habitation.

Attached to the Report are some photographs taken during the site Visit.

Dated at Mombasa this 20<sup>th</sup> day of July 2015

Hon.d. Wasike

Deputy Registrar

71. In summary, and all these seem to be the consensus by all parties, the Site visit indicates that the area was densely populated. It was habited with both new and old semi – permanent house some of which were used as residential belonging to the Plaintiffs but which were leased out to tenants. There is no dispute the report never noted the existence of any evidence of occupation or possession or use of the land by the Defendants; the constructed perimeter wall, cultivation, nor graveyards on the suit land. These were critical ingredients for consideration while awarding title on a claim of land adverse possession.
72. Be that as it may, from an adverse possessor is only entitled to the portion of land that they have been actively using for the statutory period and no more than that. Since all the witnesses confirmed that the Plaintiffs were using the entire parcel of land except he began doing so in the year 1988. Indeed, in order to break this long term and continuous occupation by the Plaintiffs, it has been admitted there were efforts to buy them off to leave the suit land through meetings held at the Provincial Administration offices. I am satisfied that the Plaintiffs have proved possession of the entire land.
73. In the upshot of the foregoing evidence and analysis I am convinced that the Plaintiffs have proved that their possession of Lands/Plots on L.R. MN/VI/3640 is adverse to that of the Defendants/ Respondents. Therefore, the Plaintiffs have proved their case on the balance of probabilities that their possession of the Suit Land was open, actual, continuous and uninterrupted for more than twelve years.

#### **Issue No. c). Who will bear the Costs of Originating summons dated 9<sup>th</sup> June, 2009**

74. It is the Court’s discretionary power on the award of costs. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to mean:-  
  
“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
75. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs ordinarily follow the event unless the Court for good reasons orders otherwise. The provision of Section 27 provides as follows:-  
  
“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to



what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

76. In the case of “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

77. In this case, as this Honourable Court has opined above, the Plaintiffs have proved their claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Thus, they are awarded the costs of this suit to be paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally.

## VI. Conclusion and Disposition

78. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiffs have established their case against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiffs as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as pleaded in the originating summons dated 9<sup>th</sup> June, 2009.
- b. That an order made herein directing the Land Registrar forthwith have the Plaintiffs herein be registered as Proprietors of all the leasehold Interest comprised in all that parcel of Land known as L.R. No.MN/VI/3640 as Trustees for themselves and for all of the parties who are named in the List annexed to the “Authority and Consent to Act” filed in this Matter in the stead of M/ S Butler Estates Limited for reasons that the Plaintiffs and the said Parties have since become Proprietors thereof jointly and severally by virtue of cumulative Adverse Possession.
- c. That the Costs of this Suit be borne by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally.

It is so ordered accordingly.

**JUDGMENT DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 5<sup>TH</sup> DAY OF MARCH .2024.**

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**HON. 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. Mr. Mwadzogo Advocate holding brief for Mr. Mwarandu Advocate for the Plaintiffs



c. No appearance for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.

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