



**Katana v Nova Holdings Limited (Environment & Land Case
205 of 2021) [2024] KEELC 3261 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3261 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 205 OF 2021**

LL NAIKUNI, J

APRIL 4, 2024

IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION

- AND -

IN THE MATTER OF: PLOT NO.9901/I/MN [CR 28953]

BETWEEN

FARIDA ZAWADI ALI KATANA PLAINTIFF

AND

NOVA HOLDINGS LIMITED DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court regards the Originating summons instituted by the Farida Zawadi Ali Katana the Plaintiff/ Applicant herein dated 27th September, 2021 and filed in court on 1st October, 2021 against the Nova Holdings Limited Defendant/ Respondent herein.
2. The service of the Originating summons and the Summons to Enter Appearance upon the Defendant was effected through substituted means pursuant to the leave of Court granted on 29th November, 2021. An advertisement was published in the one of the local dailies with a wide national circulation – “The Daily Nation” the edition of 15th December, 2021. A four (4) Paragraphed Affidavit of Service dated 19th January, 2019 attaching an extract of the advertisement was filed to that effect. Pursuant to that, the Defendant responded by way of filing a Memorandum of Appearance dated 9th May, 2022, a Statement of Defence and Counter - Claim dated 5th October, 2022 and filed in Court on 1st November, 2022 respectively. The Plaintiff/Defendant in the Counter – Claim filed a Response to the Defence and Counter Claim dated 1st November, 2022. In accordance with the provision of Order 37 Rules, 11, 13 and 16 of the Civil Procedure, 2010, directions are taken ideally converting



the Originating Summons to Plaintiff and the parties from Applicant and Respondent to Plaintiff and Defendant respectively while the documents attached to the supporting affidavits to be exhibits and the matter to be disposed off by way of adducing “Viva Voce” evidence accordingly.

3. Subsequently, on 20th September, 2022 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - trial conference, it was fixed for full trial on 1st November, 2022. By and large, this was a matter, though highly contested, the Court had strong intuition that it ought to have been amicably settled through an out of Court negotiation in tandem with the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Section 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011. Actually, although the proposal was floated to the parties but in the course of time, the efforts became a cropper paving way for the Court to hear and make a final determination through rendering of this Judgement whatsoever.
4. It is imperative to note that upon the closure of the case by both the Plaintiff and the Defendant on 4th October, 2023, both parties requested that the Court conducts a Site Visit (“Locus In Quo”) under the provision of Orders 18 Rule 11 and Order 40 Rule 10 (1) (a) of the Civil Procedure Rules, 2010 for purposes of deducing the full information pertaining to the suit property. Indeed, by consensus, on 3rd November, 2023 a site visit was conducted and a report prepared and shared dated 26th February, 2024. The is report has been re – produced herein verbatim and attached as part of to this Judgement for ease of reference.

II. The Plaintiff’s case

5. The Plaintiff claimed to be entitled to the ownership of the Plot No. 9901/I/MN [CR.28953] virtue of acquiring a title through the doctrine of land adverse possession. (Hereinafter referred to as “The Suit Land”)
6. The Plaintiff possessed the following questions for determination:-
 - a. Whether the Defendant the registered proprietor of the suit land.
 - b. Whether the Plaintiff been in possession since 2001 of the suit land.
 - c. If so, had the said possession of the Plaintiff been quiet, continuous and adverse to the Title of the Defendant?
 - d. If so, should the Land Registrar, Mombasa District be ordered to have the Plaintiff - Farida Zawadi Ali Katana be registered as the absolute proprietor of the suit land free from all other encumbrances? And a Provisional Title Deed be issued in favour of the Plaintiff.
 - e. What Orders as to costs?
 - f. Were there any further or other reliefs the Court may deem just?
7. The suit was premised on the 12th Paragraphed supporting affidavit of Farida Zawadi Ali Katana sworn on 27th September, 2021 with four (4) annexures marked as “FZAK - 1 to 4” where the Plaintiff averred that:-
 - a. She stayed at Mombasa on suit land where she had her residential house/home with a permanent storey building which had her Tenants.
 - b. She had built a residential story building where she stayed with her family and had tenants. She attached in the affidavit a copy of the Valuation Report dated 16th September, 2021 marked as Plaintiff Exhibit No. “FZAK-1”.



- c. Having settled on the said property, she started building her residential house/home cum residential building whereby she resided with her family and had tenants; she started the construction way back in the year 2003.
 - d. She continued to occupy, reside on the said property continuously and uninterruptedly with her family and tenants as per a comprehensive survey report dated 5th March, 2021 marked as Plaintiff Exhibit No. "FZAK - 2".
 - e. Ever since she settled on the suit property to date she had never been requested to move out from it nor left it or at all. Indeed she knew the property to be hers and had been her property. She had used it as such to date without any interruptions whatsoever. She attached in the affidavit copies of self-explanatory letters by the area Assistant Chief dated 8th September, 2021, letter of Village elders and a religious Leader all dated 7th September, 2021 marked as Plaintiff Exhibits No. "FZAK – 3 (a),(b), (c) and (d)".
 - f. Her family had been in continuous and uninterrupted occupation of the suit property for the last twenty [20] years and they continued to occupy the suit property wherefrom she had her home and a residential Storey building with her Tenants.
 - g. Since she had been in continuous and uninterrupted occupation for over twenty (20) years now, she would like to have title for the suit property in her name, that is Farida Zawadi Ali Katana to enable her use it profitably. For instance by using the same as security and even by commercial, constructing permanent developments thereon obtaining security in the knowledge that it legally belonged to her.
 - h. The suit property was registered at the Lands Registry, Mombasa in the name of Nova Holdings Limited. She produced the copies of the Certificate of title marked as Plaintiff Exhibit No. "FZAK - 4".
 - i. She had been advised by her advocates on record Mr. Omwenga that by dint of her uninterrupted occupation and development the suit property for over twenty [20] years now and based on the operation of the provision of the Limitation of Action Act Cap. 22 of the Laws of Kenya, she was entitled to be registered as the proprietor in place of the Defendant herein.
 - j. The Affidavit was sworn in support of her suit herein to have the Registrar of Titles register her interest in her favour as opposed to the Defendant's interest as she had adversely possessed the suit property to date.
8. As the Plaintiff, she responded to the Statement of Defence and as the Defendant to the Counter - Claim dated 5th October, 2022 through a Defence dated 1st November, 2022 and filed on the same day where she averred that:-
- a. In response to the contents of Paragraph 3 of the Defence she started construction way back in the year 2003 and not 2013 as alleged thereof and averred that in the year 2013 she was already in occupation of the house; indeed the Plaintiff asserted that she had been in continued and uninterrupted occupation of the Suit Premises for over nineteen [19] years now. The possession had been exclusive without any interference from the Defendant and or any other Party.



- b. The Plaintiff was a total stranger to the allegation of other persons mentioned in Paragraph 3 (i) and (ii). The Plaintiff averred that in her building she had Tenants who were occupying and paying her rent as the Landlord.
 - c. The Plaintiff in reply to the contents of Paragraphs 3, 4, 5, 6, 7 & 8 of the Defence denied all the averments therein and reiterated the contents of Paragraphs 2 to 11 of the Supporting Affidavit.
9. Her Defence to the Counter - Claim as the Defendant she denied that she commenced construction works on the Suit Premises in the year 2013 as alleged. On the contrary, she averred having started the constructions works in the year 2003. She further averred that she had never been stopped from staying and or constructing on the Suit Premises. She affirmed not having had any interruption and or even been chased or denied exclusive occupation and usage of the Suit Premises since the 2003 to-date.
 10. She denied all the allegations and particulars of trespass into the Suit Premises as alleged in the contents of Paragraph 13 (i) to (iii) and averred that to the contrary she moved into the Suit Premises in the year 2003. From that time, she had had exclusive use, occupation and uninterrupted stay and usage of the Suit Property. Hence the particulars of trespass never arose taking into account the over nineteen [19] years of exclusive and uninterrupted occupation of the Suit Premises by her.
 11. The Plaintiffs allegations of trespass contained under the contents of Paragraphs 14 and 15 of the Counter – Claim were pure afterthought without any legal basis since the Defendant had never been interrupted in her stay in the Suit Premises. The Defendant denied the particulars of loss and of illegality as alleged in paragraph 15 and 16 of the Counter-Claim. The Defendant reiterated that her stay, developments and usage of the Suit Premises had been open and indeed exclusive for over nineteen [19] years now.
 12. The Defendant in the Counter-Claim denied the contents of Paragraphs 13 to 16 of the Counter - Claim and averred that she had been lawfully staying and using exclusively Suit Premises since the year 2003 to-date. The Defendant in the Counter-Claim stated that no Notice was given to her of the intended Counter-Claim prior to filing the same and the Plaintiff in the Counter-Claim were to be put to the strict proof of the same.
 13. The Plaintiff in the Counter - Claim had filed its' Counter - Claim in bad faith and hence the prayers it was seeking ought not to be granted. Indeed the Defendant in the Counter - Claim shall aver at the hearing of this suit that the Plaintiffs' Counterclaim was fatally defective and incompetent and ought to be dismissed or struck out with costs. Save as it was hereinabove expressly admitted the Defendant in the Counter - Claim denied each and every allegation contained in the Defence and Counter Claim as though the same were set out and traversed seriatim.
 14. The Defendant in the Counter - Claim prayed that the Defendant/Plaintiff's Defence and Counter - Claim be dismissed with costs and that the Plaintiff's suit be granted as prayed in the Plaint dated 27th September,2021.
 15. On 1st November, the Plaintiff called her first witness PW - 1 who testified to Court as follows:

A. Examination in Chief of PW - 1 by Mr. Omwenga Advocate.

16. PW – 1 was sworn and testified in English language. He identified himself as Mr. Samuel Nthanze Musyoki. He as a holder of the Kenyan National Identity card bearing all the details as noted by Court. He lived at Shanzu near kwa Maji place. He was a Property Valuer with a fine trading as “Musyoki & Associates Valuers”. He graduated from the University of Nairobi in the year 1981 with a



Bachelors of Science in Land Economics. He recalled being instructed to inspect a property in Shanzu on 16th September, 2021. It was Plot No. 9901/I/MN CR. 28953. He carried out the instructions. He investigated the property and prepared a report. According to him it was a big property with two wings near a petrol station. It was not a new property. The 1st, 2nd 3rd floors were complete. From his report the estimated value was a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000/-) based on open market value. They gave the details of the report. At page 4 to 7 of the report there were details of the building. The Plaintiff had commercial and rental houses.

17. The witness told the Court that the house had been built for over years. The report was dated 16th September and he produced as Plaintiff Exhibit - 1.

B. Cross - Examination of PW - 1 by Mr. Oluga Advocate.

18. PW – 1 told the Court that he was given instructions by the law firm of Messrs. Mogaka, Omwenga & Mabeya Advocate through a telephone call to attend his office. He found M/s. Farida Zawadi Katana in the office. The instructions were given orally and he valued the property. He knew the owner of the property as being Ms. Farida Zawadi Ali Katana. He was introduced to her through the advocate.
19. He told the court that before the instructions were given he had not known her. He could not recall when he went to the site. When he told the Court that building belonged to Farida Zawadi Ali Katana, he never seen any document but he saw some correspondence from the people in the neighbourhood. The Plaintiff was residing in the building. But before she started the construction she lived in the neighbourhood. He never saw any document on the land ownership. He never saw any approvals for the building. He saw a copy of the certificate of title. It was listed as an appendix L. But a copy of the title was not in the report. (When referred to page 9).
20. The witness testified that he valued the property at a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000/-) and for the building and part of the space it occupied. He did not remember the size but its likely to be bigger than the ground floor meaning the foundation was done leaving a veranda which is 0.0475 HA or 0.1173 acres. He saw the petrol station and there were Swahili houses in the surrounding area. When he went there the 3rd Floor was still under construction.

C. Re-examination of PW - 1 by Mr. Omwenga Advocate:-

21. He confirmed that there were no habitation to the shops when they were conducting the valuation and there was no title. So longer as the property was pointed out by a Land Surveyor. In this case they had a registered Land Surveyor who had a ground report.

D. Examination in Chief of PW - 2 by Mr. Omwenga Advocate.

22. PW – 2 was sworn and testified in Kiswahili language. She identified herself as M/s. Farida Zawadi Ali Katana, born in Utange and the Plaintiff in the case. She was a holder of the Kenya National identity card bearing all the details (such as the numbers, date of birth, location, sub – location date of issue etc) as noted by Court on record. She was a business lady. She had a witness statement dated 27th September, 2022 and 1st November, 2022 and a list of document which she relied on her evidence in chief. The documents were:-
- a. Copy of title deed.
 - b. Copy of the official search dated 9th June, 2020. Which she produced as Plaintiff's Exhibits numbers 2 and 3.



23. According to her in the year 2002, she got into the plot. But before that, they lived near it as a family. In the year 2003, she started building on the suit land slowly. She used to be in Norway for 22 years where she lived and worked for the aged people. Also, she worked at the airport at some point she would be selling newspapers during the day and at night. That was how she earned her income. From the year 2003, she would give money for construction. She would come and stay there. She started construction until its completion. During all this time, nobody stopped her from the construction or being evicted. The building was not completed – it was on the 4th Floor with 35 units being apartments plus commercial shops.
24. According to her, at all this moment, she had never been stopped by anyone including the Defendant. It was today that she learned that the land was theirs from the Counter claim which was filed i.e. 1st November, 2022. The construction was on going. From all this time, she had lived there for 20 years. She had never been interrupted. She was seeking to be given the suit land by Court. She did the construction during the day. She was prayed that the Land Registrar to cancel the title and give her the rights to ownership.

E. Cross Examination of PW – 2 by Mr. Oluga Advocate.

25. She reiterated with reference to the Land Valuers' report prepared by Mr. Musyoka that they indicated that the building construction was still on going. It was meant to go up to the 4th Storey building as per the architectural plan and the builder knew that. The building had a plan and that was what they used to do the building. The plan was drawn by one Charles an Architect who was based at the Municipal Council of Mombasa building/ officers at the Treasury Square.
26. She told the Court that she had not brought the architectural plan to Court. It was still with Charles; she only had a copy which according to her was a long story. She went to them because as per the laws of Kenya one was required to have a building plan. Her main mason was Hassan Obiero but now she had another mason called Sabastian. Before she had a contractor whom she consulted but she could not remember his name. At the time of her testimony she did not have any contractor as she had experienced theft a couple of times.
27. She told the Court that she had been a citizen of Norway from 2014. She had been there for over 20 years. All her children were born in Norway. She went there on 16th May, 1997. She would be coming to Kenya as a guest but she now had Dual citizenship. When referred to her passport at page 11 she indicated that she had been granted a visa. She worked and was paying for it until she got the dual citizenship. However, for the extension time for the Visa she would use her Kenyan identification card. Her Kenyan passport was no. BK031129. She was given the passport in the year 2018. She had been living in the suit property since the year 2005.
28. When referred to a statement by one of the witnesses called Hassan Hamisi Mwambungale, stated that there was a letter attached to it and it alleged that Farida had bought the suit land. On this one, PW - 1 admitted that she had bought the land from the family. The plan was approved by the municipal. She was given a receipt. She had not brought the receipt to Court as she was never asked to bring it.

F. Re - examination by PW - 2 by Mr. Omwenga Advocate.

29. She used the architectural plan to build. It was her guide while constructing the suit property. All this time she had never had anybody stop her construction. She has always lived on the suit property with her mother. She had two passports. She always lived at Shanzu and she was born there. She did not know any other place as home. This was her place.



G. Examination - in - Chief of PW - 3 by Mr. Omwenga Advocate.

30. PW – 3 was sworn and testified in Kiswahili language. He identified himself as Mr. Hassan Hamisi Mwambungale. He was a holder of the national identity card bearing all the details and particulars (numbers, pace of issue, date of birth, location and sub – location etc) as noted by Court on record. He was the Imam and resided at Shanzu. He recorded his statement dated 15th November, 2022 and a letter dated 7th September, 2021. He knew M/s. Katana well. He had known her as the owner of the suit land. This was here she resided for over 20 years. It had been constructed a three story building on it. All this time there had been no one who had claimed it.

H. Cross examination of PW - 3 by Mr. Oluga Advocate.

31. PW – 3 confirmed that PW – 2 had bought the land in the year 2009. There had been a sale agreement. He was in Court as a religious leader and the Plaintiff was a family member. She had studied at an Islamic Centre in Shanzu. He held a Certificate in Islamic Education. He was related to PW – 2. She was his step sister. His father married the mother to M/s. Farida. He was an Iman.

I. Examination in chief of PW - 4 by Mr. Omwenga Advocate:-

32. PW – 4 was sworn and testified in Kiswahili language. He told Court that he was Mr. Benson Simba Kitsao. He was a holder of the Kenyan national identify card bearing all the details and particulars (the numbers, date of birth, place and date of issue, location, sub – location etc) as noted down by court on record. He lived at Shanzu. He was a Village leader (Mzee wa Mtaa). He prepared a statement dated 15th November, 2022 and a letter dated 7th September, 2021. He knew Farida Katana. He knew there was a house on the land. She had bought the land from the late Mr. Mzee Mohammed. There had been no one who had stopped her from constructing the house. She lived there.

J. Cross examination of PW - 4 by Mr. Oluga Advocate.

33. He testified that he had his identification card in Court. The house was bought from the late Mr. Mohamed. M/s. Farida bought it from Mohamed. He had done only the foundations. The plot was a sub divided unit of 2 blocks named ‘a’ and ‘b’. When referred to paragraph 2 of his statement showed he was the area village elder of Shanzu Sub – location Kisauni Sub country.

K. Re - examination of PW - 4 by Mr. Omwenga Advocate.

34. From his letter dated 7th September, 2021 according to the witness it showed he was an elder of Block B where the house was situated.
35. The matter was adjourned and on 15th May, 2023 the Plaintiff called its last witness PW - 5 who told the Court that:-

L. Examination in Chief of PW - 5 by Mr. Omwenga Advocate.

36. PW – 5 was sworn and testified in English language. She told the Court that she was Serra Sidi Sarro. She was a holder of the Kenyan national identify card bearing all the details and particulars (the numbers, date of birth, place and date of issue, location, sub – location etc) as noted down by court on record. PW – 4 was the designated Area Chief Shanzu and had been a chief for the last year. She had lived at Shanzu area for over 30 years. She held an identification from the Ministry of Interior and national administration no. 364648 serial no. 2020019905 designated Chief II. She knew the Plaintiff for many years as they grew together in Shanzu. On 28th November, 2022 she recorded a witness statement.



37. According to her to the best of her knowledge, no body had reported the matter to her offices. She had knowledge of a building on the suit land. She had knowledge that there was someone claiming the ownership of the land but nobody had lodged any complaint over the construction of the building taking place. She urged the Court to grant the Plaintiff the title deed as she had been there from the year 2000. She would be coming frequently from abroad and stay there. She was familiar with the previous owners of the suit property.

M. Cross Examination of PW - 5 by Mr. Oluga Advocate.

38. She confirmed that she became an assistant chief in the year 2020. Under paragraph 7, she indicated that since Farida started building nobody had lodged a complaint to her office - the Chief's office. From paragraph 9 she had not produced the said letter dated 8th September, 2021. She knew the previous owners by the name of Mr. Mohamed in the year 2000. She did not know the consideration of the land. She did not know when the Plaintiff started staying there.

39. She did not know the registered owner of the suit property. She had not mentioned the property number from her statement. The office of the chief handled some land disputes; some may not have been reported. They dealt with cases of trespass. Sometimes they went to the ground to see the problems and their ruling was binding. They performed arbitration. They used the Chief's Act. She knew that some sections of the Chief Act were repealed but most were still operational.

40. She had known Farida for over 30 years; she started living in Norway from the year 1990s and in 2000 she came back to Kenya. PW – 5 now went to Tanzania from the year 2001 to 2009; she was away for 8 years as she was working there.

41. On 15th May, 2023 the Plaintiff through her counsel Mr. Omwenga marked the close of her case.

III. The Defendant's case

42. The Defendant filed their Statement of Defence and Counter - Claim dated 5th October, 2022 on 1st November, 2022. In its defence denied that the Plaintiff lives on the suit property. The allegations that the Plaintiff started construction on the suit property in the year 2003. The Defendant averred that the Plaintiff's construction commenced in 2013 which was less than the requisite 12 years for title on the land adverse possession. The Defendant further averred that the Plaintiff was not in exclusive possession of the suit property to warrant being granted the entire property by way of adverse possession as demonstrated hereunder:

- i. There was another person (not the Plaintiff) in occupation of the suit property and currently operating a petrol station thereon.
- ii. There was another lady called MARY WAITHERA who had trespassed on the suit property and currently developing part of the suit property. The Defendant had sued the said MARY WAITHERA in "ELC No. 83 of 2022: Nova Holdings Limited – Versus - Mary Waithera which was pending determination.
- iii. By the Plaintiff's own admission, there were other persons occupying the suit property who the Plaintiff referred to as tenants.

43. The Plaintiff had therefore failed the exclusive possession test which was a crucial legal requirement for a claim of Land adverse possession to succeed. The Plaintiff's building was still under construction and the upper floor was still being constructed currently. Therefore, it was not true that the Plaintiff's building was complete. The Defendant denied that the Plaintiff had been in continues and



uninterrupted occupation of the suit property for the last 20 years as alleged. Further, the Defendant averred that the Plaintiff could not be granted the suit property by way of adverse possession because the Plaintiff's occupation and possession thereof as it was not non-permissive or non-consensual. The Plaintiff's development on the suit property was illegal and non-compliant with the applicable laws and approvals. The Defendant prayed that the Plaintiff's suit be dismissed with costs.

44. As per the Counter - Claim, the Plaintiff in the Counter claim with reference to the "Plaintiff" implying Nova Holdings Limited while reference to "Defendant" implying Farida Zawadi Ali Katana. The Plaintiff is the registered owner of the suit property. On about the year 2013, the Defendant commenced development of a block of flats on the suit property without the Plaintiff's consent thereby trespassing on the Plaintiff's property.
45. The Plaintiff in the Counter - Claim relied on the following particulars of trespass by the Defendant:-
 - i. The Defendant directly and through her agents, contractors, employers and /or other persons authorised by the Defendant ingressed on, entered and gained access to the suit property without the Plaintiff's consent, permission and approval.
 - ii. The Defendant directly and through her agents, contractors, employers and /or other persons authorised by the Defendant commenced and undertook development on the suit property without the Plaintiff's consent, permission and approval.
 - iii. The Defendant authorized tenants to be on the on the suit property without the Plaintiff's consent, permission and approval.
46. According to the Plaintiff in the Counter suit, as a result of the Defendant's trespass as pleaded herein, the Plaintiff had been denied the right and the opportunity to use, access and occupy the Plaintiff's property thereby denying the Plaintiff its constitutional right to own, use and occupy its said property. Further and in addition to the foregoing, the Defendant had been collecting rent from the suit property to the detriment of the Plaintiff thereby subjecting the Plaintiff to loss and damage.
47. The Plaintiff relied on the following particulars of loss by the Plaintiff:-
 - a. The Defendant never and had not obtained the necessary approvals and consents of the relevant agencies for her construction/development.
 - b. The Defendant never got approval and consent from the Plaintiff to carry out the development on the Plaintiff's property.
48. There was no suit previously filed or pending between the parties respecting the subject matter herein. The Plaintiff averred that despite the notice to sue being issued the Defendants failed to comply. The Plaintiff in the Counter - Claim submitted to the jurisdiction of this Honourable Court. In their Counter – Claim. They prayed for Judgment against the Plaintiff/Defendant in Counter - Claim for:-
 - a. A declaration that the Defendant has encroached and trespassed on the Plaintiff's property known as Land Reference No.MN/1/9901 situate in Shanzu in Mombasa County.
 - b. A declaration that the Defendant, her agents, assigns, employees, guards, officers, tenants, or any other person authorized by the Defendants have no rights whatsoever to access, occupy, use, manage, run, lease, sub-lease, charge, sell, transfer or in any other manner interfere with the Plaintiff's property known as Land Reference No. MN/1/9901 situate in Shanzu in Mombasa County.



- c. An order of permanent injunction be and is hereby issued restraining the Defendant, her agents, assigns, employees, guards, officers, tenants, contractor, fundi or any other person authorized by and/or acting for the Defendant from accessing, occupying, developing, using, managing, running, leasing, sub-leasing, selling, charging, transferring or in any other manner interfering with the Plaintiff's property known as Land Reference No.MN/1/9901 situate in Shanzu in Mombasa County.
 - d. An order of mandatory injunction be and is hereby issued compelling the Defendant, her agents, assigns, employees, guards, officers, tenants, or any other person authorized by and/or acting for the Defendant to, within 14 days of this order, vacate the Plaintiff's property known as Land Reference No.MN/1/9901 situate in Shanzu in Mombasa County and to demolish and remove therefrom any unauthorized structures and debris at the Defendant's costs in default of which the Plaintiff be at liberty to lawfully evict them therefrom and the expenses incurred in the process shall be borne by the Defendant.
 - e. An order of permanent injunction be and is hereby issued restraining the Defendant, her agents, assigns, employees, guards, officers, tenants, or any other person authorized by and/or acting for the Defendant from entering, accessing, trespassing into and using the Plaintiff's property known as Land Reference No.MN/1/9901 situate in Shanzu in Mombasa County.
 - f. Damages for trespass.
 - g. An order be and is hereby issued directing the Defendant to refund to the Plaintiff all the rental proceeds collected by the Defendant from the Plaintiff's property known as Land Reference No.MN/1/9901 situate in Shanzu in Mombasa County.
 - h. The Officer Commanding Station (OCS), Bamburi Police Station to ensure compliance with the court orders herein and to ensure that peace, law and order is maintained at all times that this order is in force.
 - i. Costs of this suit and the Counterclaim to be paid to the Plaintiff by the Defendant.
 - j. Any other and further relief this court may deem just to grant.
49. On 15th May, 2023 the Defendant called its first witness DW 1 who testified as below:-

N. Examination in Chief of DW - 1 by Mr. Oluga Advocate.

50. DW – 1 was sworn and testified in English language. He identified himself as Mr. Ashok Labhshanker Doshi. He held a Kenyan national identity Card bearing all the relevant details as noted by Court on record. He informed the court that he was the director of the Defendant company and he lived in Mombasa. He had signed a witness statement dated 2nd November, 2022 and he adopted the same as his evidence in chief. He filed a list of documents dated 5th November, 2022 which he produced and marked it as Defendant Exhibit Numbers 1, 2 and 3. It was not true that he last visited the suit plot in the year 2013. But he visited the land then. By the time he visited there was no construction on the plot at all. Currently there was development and the construction was on going. There was a third story building on the suit property by Farida. There was a petrol station on the plot. There was another building and there was a Civil case “ELC No. 83 of 2022 Nova Holdings – Versus – Mary Waithera pending the hearing and determination. It had not commenced yet. The Plaintiff lied when she said she exclusively occupied the property which was not true as there were other developments. He constructed a perimeter wall around the property in the year 1998. When he visited the land in the year 2013 he found that the perimeter wall was intact.



51. According to her page 16 of the Defendant's bundle, it was approved by the Municipal Council of Mombasa i.e. the perimeter wall – coral block wall approval was done on 17th October, 1997. It was the approval of the plan. It was not true that the property was owned by one Mzee Mohamed. He said this as he had been the holder of the certificate of title deed from the year 1st October, 1996 and had been paying rates – as per page 12 – which was a copy of the title deed. (DW – 1 produced the Original Certificate of Title Deed of the suit land in Court). It was the same copy that the Plaintiff had produced. She did not produce any document on ownership. That was why he had prayed in the Counter – Claim for the 10 orders (with reference to want those orders to be granted by Court.

O. Cross - Examination of DW - 1 by Mr. Omwenga Advocate.

52. According to the DW – 1, his Certificate of Title was a leasehold issued by the Government of Kenya. It had special conditions. He confirmed he did the Deed of Variation onto the said conditions overleaf the Lease document. He had fully complied accordingly. He was given for put residential houses with that time. He did not do so; he did not even prepare any building Plan as his health was deteriorating and he could not fulfil the terms of the lease. He never wrote to the Commissioner of Lands for failure to fulfil the said special conditions.

53. He did not have any evidence of payment for the approval for the construction of the perimeter wall. They had an in house contractor. He never had the prove of the purchase of the material for the construction of the perimeter wall. From the written statement there was no evidence of him visiting the suit property in the year 2013. He knew the Plaintiff had constructed on his property and on the reserve road. He did not know whether the Petrol station belonged to the Plaintiff. During the Construction, she never came to Court as it had been in year after 2013. He had not been on the suit land for 4 years; after knowing the construction was on and upon the filing of this suit.

54. He reiterated that it was a fact that her property occupied Plot No. 9901/II/MN CR. No. 28953, the other lady was behind her plot. By the time he was allocated the plot, he had no ground report but he knew that there was no Swahili house on the land. The perimeter wall was demolished after the year 2013. This was a lease given to him by the Government of Kenya. When he got the title the plot was vacant/no structure was on the land or any occupant.

55. He told the Court that he was aware that if he had not developed the Plot the Government of Kenya may re – possess the land. But he had not received any notice to that effect. Besides he was experiencing poor health conditions and would be travelling frequently abroad for medication. His son was a shareholder but he did not handle property matters. He was authorized by a resolution of the company to file the suit.

56. He testified that they came to know that the Plaintiff was in occupation when she filed this case. Hence they could not report the matter to the police due to the pending case. He admitted the case No. 83 of 2022 which was filed after this case can be filed. They agreed that the Counter - Claim in this case was triggered by the filing of the case as there was a wrong claim of land adverse possession by the Plaintiff herein.

P. Re - Examination of DW - 1 by Mr. Oluga Advocate.

57. DW – 1 indicated to Court that there was a resolution send to their Advocate to file the case. The name of the director of the Plaintiff was there. Unfortunately, the said resolution was not filed in Court. When referred to the verifying affidavit, the witness stated that his being in Court was never challenged. His rights to the land was a lease hold but the freehold belonged to the Government of Kenya. His lease



was never cancelled by the Government because he never fulfilled the condition. He was still holding a legal lease. Nobody had ever challenged the lease.

Q. Examination in Chief of DW - 2 by Mr. Oluga Advocate.

58. DW – 2 was sworn and testified in English language. He informed Court being Mr. Edward M. J Kiguru, a Licensed Land Surveyor. He told Court that on through an instruction note dated 20th May, 2022, he was engaged by the Law firm of Messrs. Oluga & Company Advocates. In a nutshell, he was tasked to do a Cadastral Surveying of the suit land. Specifically, the survey was locate the boundaries and beacons of the suit land. He was also to do the topographically survey – identifying the physical features within and around the site area.
59. He was able to prepare a map on what was on the ground and how much was on the land. At page 77 he plotted and showed the development – plot. There was a story building marked as “SB”. It occupied more than the plot. There was a petrol station marked “P.S.S”. He did not know the person operating the Petrol Station. The “SB” extended to other properties than the suit property. The suit plot was on block line – rectangular shape marked as “JB – 1”, “JB – 2”, “JB – 3” and “JB – 4” all measuring its length in 61.75 meters and width 19.42 Meters at 0.0199 Ha.
60. According to him from his finding, the property was U shaped. It went beyond the suit plot, the house occupies 600 meters ½ of the property including the place marked as “SH” that is Swahili House shaded in red and dotted portion on the Southern part as part marked “U.C” meaning being under construction. He suspected it was a construction by Mary Waithera. The north portion was about 10 meters which was unoccupied. The story building marked as “SB” encroached to other two plots no. 2251 and 2250. There was an access road. The story building encroached on to the access road.
61. He told the Court that he also looked at the construction of the building using the google earth technology which was accepted as evidence these days. From the information he obtained, this story building was started in the beginning of year 2013. He started checking from the year 2003 i.e. the satellite map 7A, there was nothing and no building on the ground as blocked - page 84.
62. He further stated that there was GE for 2011. There was no U shaped building but there was a perimeter wall/ fence along the northern part 7(b) at page 85. GE for the year 2013 – there was a foundation on the norther part of the suit land. GE 7(c) page 86 would appear to have some developments hence some building on the ground. Page 87 there were photographs taken from the Mombasa – Malindi road. The construction appeared to be complete apart from the 3rd floor. There were four photographs on pages 88, 89 and 90. Photographed marked (d) was the plot for Mary Waithera in ELC No. 83 of 2022. After all these tasks, he prepared and filed the report dated 24th March, 2022 (Defendant Exhibit No. 1. It enclosed a copy of the title; an official search; a copy of the approved Survey Map – F/R 304/32 which showed that the suit land was surveyed in the year 19196 and its Deed Plan Numbers 208332 and is are 0.1199 HA;

R. Cross examination of DW - 2 by Mr. Omwenga Advocate.

63. DW – 2 reiterated with reference to 7(a) to 7(c) that in respect to the years there were all hand written. These google technology anybody could access them. When referred to 7(a) to 7(c) he stated that there was nothing on them to show they were serials of 2001 to 2013 apart from the hand written years. They never showed the parcel number. He did not use the technology on the same plot. From the G.E. 2003 it showed some plantation – a place called Janson Hardware where the petrol station was or adjacent to it outside the plots.



64. According to him, from the “G.E. 2011” – it showed there was Janson Hardware was inside the plot. When he went there was a Swahili house (SH). In the GE of the year 2003 the Swahili house was picked but was not very clear. But in the GE for the years 2015, 2016, 2017 and 2018 the Swahili house was clear; he had confirmed that there was a building and people resided in it. He could confirm that the petrol station and there were people living there. He confirmed that the building and the shops were facing Mombasa – Malindi road. He had opportunity of seeing the lease and the conditions in it.
65. The witness stated that from the G.E. photographs of 2003, he was not able to detect he perimeter wall constructed there. From the G.E. photographs of 2003 it appeared there were some structures of some sort. From the sketch map on page 77 he picked four structures marked as “SB”, “PSS”, “SH” and “MC” all on that suit land (story building) (petrol station) (Swahili House) and (Under construction). In the course of his survey work he never interviewed the owners. They never interfered with him. He could not tell when these people started occupying these structures. In the G.E. for 2003 – 7(a), he could see some structures but they were not as clear as from the G.E. of 2011; where there was some line.

S. RE – Examination of DW – 2 by Mr. Oluga Advocate.

66. NIL

IV. Submissions

67. On 15th May, 2023 the Honourable Court upon the closure of the case by both the Plaintiff and the Defendants in the presence of all the parties gave directions on the disposition of the originating summons dated 27th September, 2021 by way of written submission.
68. However, this was to await the court conducting a Site Visit intended for 21st July, 2023 but pushed to a mention on 4th October, 2023 whereby the Site Vits was fixed for 3rd November, 2023. Pursuant to that, the parties were granted an extension of time to file their Submissions and after the Honourable Court confirming compliance set the Judgment date on 15th February, 2024 but deferred to 28th February, 2024 and finally the 4th April, 2024 due to unavoidable circumstances by Court.

A. The Written Submissions by the Plaintiff

66. Through the Law firm of Messrs. Mogaka, Omwenga & Mabeya Advocates, the Plaintiff filed their Written Submissions dated 13th December, 2023. Mr. Omwenga Advocate started by stating that the submissions was on her claim as against the Defendant. The Learned Counsel informed Court that the Plaintiff commenced the proceedings against the Defendant through an Originating Summons inter alia seeking orders for adverse possession for Plot No. 9901/1/MN (C.R.28953). The Plaintiff filed her claim inter alia seeking to answer the above stated questions.
67. He stated that the above matter was inter alia supported by the Plaintiffs Supporting Affidavit, her exhibits, witnesses who were five (5) in number including herself. The Defendant opposed the suit and proceeded to call two (2) witnesses. They were Mr. Ashok Labshankor Doshi (as DW – 1) and the Land Surveyor, Mr. Edward M.J Kiguru (DW – 2), who filed and relied on the report. After the above testimonies of the witnesses the Court did conduct a Site Visit to the suit property on 3rd November, 2023 and shared its report dated 26th February, 2024 thereof.
68. On all this, the Learned Counsel provided brief facts. He stated that from the filed pleadings and the testimony by the Plaintiff and her witnesses were the following facts. According to the Valuation report and testimony by PW – 1, the Land Valuer, Messrs Musyoki and Associates dated 16th September 2021 and which was produced as Plaintiff Exhibit No.1. the suit property stood at a value of a sum of



Kenya Shillings Sixty Million (Kshs. 60,000,000/-). It stated that there were residential and business premises on the suit property built by the Plaintiff. A copy of the Title Deed and official search produced as Plaintiff's Exhibits No.2 and 3 confirmed that the Defendant is the registered proprietor of the suit land. PW – 2, the Plaintiff herself stated that she entered the suit land in the year 2001. In the year 2003 she started constructions works on the suit land. She used to work in Norway for 22 years. She stated that she saved cash which she used to do the construction works slowly or bit by bit to date. She was neither stopped from constructing, evicted nor interfered with by the Defendant and or anyone. The construction was ongoing. She had lived on the suit property for over 20 years. Hence, she sought for the land she was occupying. All constructions works were done during the day she asked for prayers as per her pleadings. PW - 3 the Imam, PW - 4 the Village elder and PW - 5 the Chief all did testify that the suit property belonged to the Plaintiff and nobody had ever gone to their offices to complain of any trespass case. They confirmed that the Plaintiff was one who had constructed the suit building for over 15 years without interference.

69. On the other hand, the Learned Counsel stated that the Defence briefly testified as hereunder by the Defendant admitting it was the registered owner of the suit land. DW – 1 as the Director of the Defendant alleged that there was no constructions in the year 2013 on the ground but there was a building. He stated that there was another civil case ELC No. 83 of 2022 over the suit land. The Defendant alleged that in the year 1998, the Defendant constructed on the suit land a perimeter wall. It was approved in the year 1997. The Defendant prayed its Counter - claim be allowed. The Defendant had not put up residential houses as per Lease terms. Further, there was no evidence for payment of approved plans for the perimeter wall. There was no evidence from witness statement by DW - 1 of any visitation of suit land in the year 2013. Admitted not to having stopped constructions works. At allocation time no ground report was given or prepared. The Counterclaim was triggered by this suit. Although the resolution to file suit was made but was never filed in Court. It was the Land Surveyor who identified the Plaintiff's structure on the grounds and that it was on the Defendant's Land. On thorough cross-examination the surveyor did confirm that from "photograph (GE) of the year 2003, it appeared there were some structures of some sort on the suit land". The Land Surveyor did confirm that he could not tell when the people started to occupy the structures.
70. The Learned Counsel averred that from the above testimony, the Court could easily answer the questions raised in her Originating Summons as hereunder;
- (a) The Defendant is the registered proprietor of the suit land that is Plot No.9901/I/MN (C.R. 28953). This was as per the testimonies of both Plaintiff and Defendant witnesses and the exhibits produced in evidence.
 - (b) There was no doubt that indeed it's the Plaintiff who had been in possession, occupation and usage of portion of suit land since the year 2001 to date. The Plaintiff and her witnesses confirmed that fact. The Defendant too through its testimony confirmed that it had never taken possession of the suit land since it was allocated.

According to the Counsel, the possession, occupation, usage and developments by the Plaintiff had been quiet, continuous, peaceful and indeed adverse to the title of the Defendant. The Defendant admitted under oath that its Counter - claim was triggered by the Claim herein. It confirmed it had never filed any Application to injunct the Plaintiff from developing the suit property.

71. The last questions would be answered upon making reference to various legal authorities as hereunder below. He referred the Court to a few case law in support of her suit herein. These were "Mombasa



“For an adverse possession suit to succeed, the Plaintiff must prove the following:-

- a) They have used the suit land as a right;
- b) The registered owner must know of the possession or occupation;
- c) The possession must be continuous and uninterrupted for over 12 years.

In their testimony PW-1 and PW-2, both tendered evidence which was uncontroverted. - They stated that they and all the other Plaintiffs had been non-permissive, non-consensual, actual, open, notorious, exclusive and adverse users of the suit land continuously and without any interruption from the year 1981 and 1996 to date.

It was their testimony that from the time the land was sold on 10th November, 2004 and its consequent transfer to Ras Kisauni Company Limited on 3rd December, 2004, the Plaintiffs had caused massive development on the land in form of construction of Permanent houses of several storey buildings, additional units and renovations of old and damaged portions all sitting on the suit land as evidenced from the set of photographs produced in court as Plaintiff Exhibits No.6. The Plaintiffs have lived on the land todate with their families a fact which was never denied nor refuted by the 1st Defendant hence a clear admission as provided for under Order 13 (1) and (2) of the Civil Procedure Rules. In the final analysis, the Learned Counsel refred Court to the the now famous decision of “Mtana Lewa - Versus- Kahindi Ngala Mwangandi (2005) eKLR where Court of Appeal held as follows:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period in Kenya 12 years”. For these reasons, this Honorable Court was completely persuaded that the Plaintiffs have been able to fully meet and/or established all the threshold required to be granted the title under the land Adverse Possession and there the answer to the query under this sub-heading was in the affirmative.

On the contrary, the Plaintiffs from the 3rd December, 2004 to date when the land was transferred to the Defendant, had continued living on the land and using it in form of causing permanent structures and lived there with their families. For all these reasons, therefore, the Honorable Court was fully persuaded that the Plaintiffs are entitled to all the orders they have sought from their further amended Originating summons dated Th July, 2021.

The ultimate analysis and in view of the foregoing in depth analysis I do proceed to enter judgment in favour of the Plaintiffs severally and jointly against the 1st Defendant. For avoidance of doubt I direct and order as follows:-

- (a) That an Order declaring that the Plaintiffs have hereby acquired title of the whole parcels of land Known as MN/I/11723and MN/I/11726 situated in Kisauni within the County of Mombasa by way of Land Adverse possession”.



72. In the same point, the Learned Counsel cited the case of “ELC NO. 128 OF 2017 Murang’a Harrison Kamore Kagutu – Versus -Harrison Muraguri Ndonga Nephath where the court held:-

“By an Originating Summons filed on 22nd July, 2016 the Plaintiff sought the following orders;

- a) 'That a permanent injunction be granted restraining the Defendant by himself, his agents and/or anyone claiming through him as against evicting, entering, transferring, charging, selling and/or in any way whatsoever interfering with the Plaintiffs quiet occupation and possession of LR. No.Loc.15/Kigongo/1426 (1 Acre portion).
- b) That the Defendant's interest over the one (1) Acre out of LR No.Loc.15/Kigongo/1426 occupied by the Plaintiff be deemed to have been extinguished through adverse possession of the Plaintiff and the Plaintiff be declared and registered as the proprietor of the said one (1) Acre out of LR. No. Loc.15/Kigongo/1426.
- c) That the Deputy Registrar of this Honourable Court be authorized to execute all legal documents to facilitate the sub-division and consequent transfer of LR. No.Loc.15/Kigongo/1426 and the Land Registrar Murang’a be ordered to dispense with the production of the old title deed should the Defendant default.
- d). That costs be borne by the Defendant.

For one to succeed in adverse possession he has to prove the following; See “Kasuve – Versus - Mwaani Investments Limited – Versus - 4 Others 2004 IKLR 184:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

The Plaintiff had tabled evidence by way of a valuation report in support of evidence that he has occupied the suit land and made developments.

This Court is satisfied that the Plaintiff has been in possession of the suit land for over 12 which is more than adequate in continuity, publicity and in extent that it has established an adverse interest against the registered owner, namely the Defendant.

There is therefore no evidence that has been placed before the Court to show that the Plaintiffs occupation and possession of the portion of the suit land that he claims has been either interrupted by the Defendant filing suit or making a successful entry on to the land occupied by the Plaintiff before the year 2000, which period adverse possession had crystallized. The Plaintiffs occupation and possession has been open and in the knowledge of the Defendant as is attested by the Defendant from the evidence adduced in Court.



From the above the Court is satisfied that the Plaintiff has met the requirements set by the Court in the case of “Kimani Ruchire – Versus - Swift Rutherfords & Co. Ltd (1980) KLR 10 where it stated:-

“.....the Plaintiffs have to prove that they have used this land which they claim, as of right, nec vic, nec clam, nec precario.....The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by way of recurrent consideration”.

From the evidence the Court is satisfied that the Plaintiff has established that he is entitled to 1.0 acres out of the suit land by adverse possession.

The upshot is Judgement is entered in favour of the Plaintiff against the Defendant as follows;

- a) That a permanent injunction be granted restraining the Defendant by himself, his agents and/or anyone claiming through him as against evicting, entering, transferring, charging, selling and/or in anyway whatsoever interfering with the Plaintiffs quite occupation and possession of LR. No.Loc.15/Kigongo/1426 (1 Acre portion).
- b) That the Defendant's interest over the one (1) Acre out of LR No.Loc.15/Kigongo/1426 occupied by the Plaintiff be deemed extinguished through adverse possession of the Plaintiff and the Plaintiff be declared and registered as the proprietor of the said one (1)Acre out of LR. No. Loc.15/Kigongo/1426.
- c) That the Deputy Registrar of this Honourable Court be and is hereby authorized to execute all documents necessary to facilitate the sub-division and consequent transfer of all that piece or parcel of land comprising or measuring one (1)acre out of LR. No. Loc.15/Kigongo/1426 and transfer of the same to the Plaintiff and the Land Registrar Murang'a be ordered to dispense with the production of the old title deed should the Defendant default.d) That such registration should be in accordance to the position being occupied by the Plaintiff currently.
- c) Each party to bear their own costs.

73. Additionally, the Learned Counsel referred Court to yet another case of “Nyeri Civil Appeal No. 83 of 2016 Joseph Kithinji M'eringo & Another and Christine N. Mbiti, where the Court held as follows:-

“ Emboldened, the respondent filed an originating summons dated 21st October 2008 that is subject of this appeal under Section 38 of the Statute of Limitations Act and Order XXXVI Rule 3D & 7 of the Civil Procedure Rules seeking the following principal orders;

- a) That the ownership of the land parcel number L.R No.2787/1289 now vests in the plaintiff by virtue of the fact that she has been in continuous and uninterrupted occupation of the whole said parcel for over twelve years by virtue of Sections 13 and 38 of the Limitations of Actions Act.



- b) That the Defendants forthwith transfer the said land to the plaintiff.
- c) That a perpetual injunction issues (sic) restraining the defendants, their personal representatives, success assigns from interfering with the Plaintiffs quiet enjoyment of the ownership and possession thereof.

After considering the submissions of counsel, hearing the testimonies and evidence adduced, the Learned Ombwayo, J delivered a Judgement in favour of the Respondent. He found that the respondent had satisfied the court as being entitled to the land by adverse possession. The property therefore vested in the Respondent by virtue of Sections 13 and 38 of the *Limitation of Actions Act*. He further issued a perpetual injunction restraining the appellants, their personal representatives, successors and assigns from interfering with the respondent's quiet enjoyment of the ownership and possession of the suit property.

The sole issue for consideration is whether or not the learned Judge erred in holding that the respondent had established her entitlement as an adverse possessor and was therefore entitled to be registered as the owner of the suit property.

Every limitation of actions, including adverse possession, does come with certain exceptions and extensions to ensure justice and fairness as far as possible. See the dicta of Ouko, JA in "Mtana Lewa – Versus - Kahindi (Supra). This Court pronounced itself on the elements to be considered in an adverse possession application in the case of Mate Gitabi Versus Jane Kabubu Muga & Others (Nyeri Civil Appeal No. 43 of 2015 (unreported) as follows:-

"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 secrecy, without force, 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 maxim nec vi, nec clam, nec precario. See also Eliva Nyogesa Lusena & Ano. – Versus - Nathan Wekesa Omacha - Kisumu civil appeal no.134 of 1993 and Kasuve – Versus - Mwaani Investments Limited & 4 others [2004] KLR 184 at page 188 where this Court stated as follows:-

"In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.' See also Wanje – Versus - Saikwa [1984]KLR 284."

Therefore, the law was clear that in order for a claim of Land adverse possession to succeed, the applicant must demonstrate that the occupation was continuous, open and uninterrupted for a period of twelve years. In this appeal, it is the respondent's case that she moved into the suit property in 1992 after purchasing it from Jelagat. She testified that in her occupation of the suit property for more than twelve years, she had planted trees, cultivated, kept cattle, had constructed a house and made other developments thereon. She admitted that there was a modern structure at the time she moved into the suit property but the same was unoccupied.

In support of her case, the respondent called Michael Jeremy Gatuguta who had moved into an adjacent piece of land in June 1992. Testifying as PW1, he stated that the respondent



moved into the suit property, around December 1992. He even distinctly remembered her borrowing a jembe from him. He averred that there were four houses on the suit property comprising of two residential homes, a house for the workers and a chicken house all belonging to the respondent.

We hold that on a balance of probabilities, the respondent proved that she was in actual occupation and possession of the suit property since 1992, cultivated on it and built structures thereon. We are satisfied that on evidence the respondent did dispossess the appellants. We accept the position stated in Halsbury's Laws of England, 3rd Edn. Vol 24 at page 252;

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by a person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

It is trite that the rights of an adverse possessor are equitable rights which are binding on the land. See *Mwangi & Another Versus Mwangi* (1986) KLR 328. It is therefore our considered view that by the time the appellants purchased the property, it was already burdened with the presence of an adverse possessor and the onus was on them to evict the said possessor before the maturity of the statutorily required timeline of twelve years. We restate what this Court held in the case of:- “*Kairu – Versus - Gacheru* [1986 - 1989] E.A;

In the end we find that the respondent established that she had been in open, continuous and uninterrupted possession of the suit property for the requisite twelve years from 1992 to 2004, when the appellants issued her with a demand letter and eventually in 2005 when the appellant filed the impugned suit at the Magistrate's Court.

Being of that mind, we find that this appeal is devoid of merit and is accordingly dismissed.

74. Further, the Learned Counsel referred Court to the case of:- “*Malindi Civil Appeal No. 17 of 2016 Chevron (K) Ltd (formerly known as Caltex Oil Kenya Ltd) and Harrison Charo Wa Shutu* where the Court observed “inter alia”:-

“The ultimate question still remains whether the Respondent had been in possession of the suit premises for over 12 years as at the time the suit to evict him was instituted in 2008, and whether his possession was adverse to that of the appellant? It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See *Sophie Wanjiku John – Versus - Jane Mwhaki Kimani Nairobi ELC Civil Suit No. 490 of 2010*.

We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the Appellant, as described earlier in this Judgment, the Respondent manifested “*animus possidendi*”, a clear mind and intention of dealing with the suit premises as fit was exclusively his and in a manner that was in clear conflict with the appellant's rights. The appellant was, as such dispossessed of the suit premises by those acts. The Respondent's acts were “*nec vi, nec clam, nec precario*” (that is, neither by force, nor secretly and without permission).



As this court stated in “Mweu – Versus - Kiu Ranching & Farming Co - operative Society Limited [1985] KLR 430:

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

It follows therefore that when the appellant instituted the action in 2008 its title to the suit premises had been extinguished.

For all the reasons given above the appeal fails and is dismissed”.

75. Finally, to still buttress on this point, the Learned Counsel cited the case of: “Nyeri Civil Appeal No. 22 of 2013 Peter Mbiri Michuki and Samuel Mugo Michuki” where the Court held:-

“The other issue for determination is whether adverse possession of the suit property by the Plaintiff was proved.

This Court in “Francis Gicharu Kariri -Versus - Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) approved the decision of the High Court in the case of: “Kimani Ruchire – Versus - Swift Rutherfords & Co. Limited (1980) KLR 10 at page 16 letter B, where 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). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.”

In the instant case, the record shows that the Plaintiff entered the suit property in the year 1964; constructed a house thereon in 1970 and put his elder brother to live in the house and the Plaintiff together with his wife occasionally visited and lived in the house. These facts on record not only prove actual possession but also constitute constructive possession of the suit property by the Plaintiff. The elder brother of the Plaintiff was in possession of the suit property by license and permission of the Plaintiff. In law, actual possession of any property by a licensee is constructive possession thereof by the licensor. The evidence on record shows that in each of these years, the Plaintiff/Respondent was in actual and or constructive possession of the suit property; that the possession by the Plaintiff was open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value. From whichever year adverse possession is computed, as at the time of filing the Originating Summons in 1991, twelve (12) years had lapsed and the Plaintiff's right and claim based on adverse possession had arisen, accrued and vested. The record shows that the Plaintiff's possession of the suit property was *nec vi, nec clam* and *nec precario*; possession by the Plaintiff continued uninterrupted and without force until his death on 25th December, 2002; after his death, possession by the plaintiff continued through his dependants and personal representative until 2011 when the Appellant demolished the house that had been constructed on the suit property. Our analysis and appreciation of the facts established on the record leads us to conclude that the trial Judge did not err in finding that the 12 year period for adverse possession had been proved.



From 18th August, 1978, onwards, the continued occupation and possession of the suit property by the Plaintiff was adverse to the Appellant's title. Computing adversity from 18th August, 1978, we are satisfied that the Plaintiffs claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7th February, 1991.

The totality of our evaluation of the evidence and the law relevant in this matter is that the Respondent proved adverse possession and this appeal was hereby dismissed. The Judgment of the trial court dated 25th October, 2012, be and was confirmed. The costs of this appeal shall be paid by the Appellant”.

76. The Learned Counsel submitted that guided by the above five (5) cited case law to details. the Plaintiff on a balance of probabilities established a good case. The same warranted that orders or prayers for the Land Registrar, Mombasa District be ordered to have the Plaintiff be registered as absolute proprietor of the portion. The portion was identified by the Defendant's Surveyor of the property known as Plot No. 9901/1/MN (C.R.28953) being registered in her name free from all other encumbrances. Further a Provisional Title Deed be issued in favour of the Plaintiff. This is based on the clear findings in all the above case law. It will be noted that two (2) of the above cases were from this Honourable Court, while three (3) cases were the Court of Appeal.
77. To the Counsel, the Plaintiff had demonstrated in fact and indeed that she had proved adverse possession ingredients as against the Defendant. She had proved that she had had a continued possession, occupation and usage of the portion of the suit land which possession had been continued, uninterrupted and adverse to the Defendant's title for a period exceeding 12 years. On the other hand, the Defendant never tendered any evidence worth from the issuance of the orders sought in the Counterclaim.
78. Nonetheless, this being a Court of equity, the Plaintiff had indeed demonstrated that her possession and usage of the suit property has been continuous, uninterrupted and open, leading to constructions of a building worth (Kenya Shillings Sixty Million (Kshs. 60,000,000/-) in the worst scenario now that she has tendered uncontroverted evidence of the value of her suit property, if the Defendant was passionate of wanting to have its land, as per the Counterclaim which was triggered by this suit, then the Court should order the Defendant to pay the Plaintiff a sum of Kenya Shillings Sixty Million (Kshs.60,000,000/-) within a limited period of time, then she could give vacant possession, failure of which adverse possession orders to issue in respect of the said portion of land. He urged the Court to allow the Plaintiffs claim from the filed Originating Summons dated 27th September, 2021 and the costs of the suit. The Defendant's Counterclaim be dismissed with costs.

B. The Written Submission by the Defendant

79. The Defendant through the Law firm of Messrs. Oluga & Company Advocates filed their written Submissions dated 20th March, 2024. Mr. Oluga Advocate commenced by stating that vide the Originating Summons dated 27th September 2021, the Plaintiff sought to be registered as owner of the suit property by way of adverse possession. The Defendant filed its Statement of Defence and Counter - Claim dated 5th October 2022. The Defendant contends that it is the owner of the suit property and seeks, inter alia, an order directed at the Plaintiff to vacate the suit property.
80. It was the view of the Learned Counsel that the following issues present themselves for determination by the court. These were, firstly, whether the Plaintiff is entitled to be registered as proprietor of the suit property by reason of adverse possession. The Plaintiff claimed to be entitled to the suit property by



virtue of adverse possession. The law on adverse possession was now well settled. It was their humble submission that the Plaintiff had not satisfied the legal requirements for adverse possession because of a number of reasons which we discuss below.

The Learned Counsel averred that the Plaintiff never had the intention to claim the land by way of adverse possession from the word go. To support his point, he relied on the case of: "Karsan Sanghani – Versus - Pamur Investment Limited [2021] eKLR (attached to these submissions), the Court of Appeal stated as follows:

"24. In considering whether the appellant satisfied the principles stated above, we think it is important to restate the dicta in *Kweyu – Versus - Omutut* [1990] KLR 709 at page 716 where Gicheru, J.A. delivered himself as follows:

"...Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation.

To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously."

25. For possession to be adverse, it must start with a wrongful dispossession of the rightful owner of the land in a peaceful and open manner; must be continuous and exclusive for over a period of twelve years, with a clear and manifest intent by the claimant of asserting his or her right of ownership of the land in question so as to defeat that of the registered owner. As Gicheru, J.A. put it, it is not enough for a claimant to simply prove that he has been in occupation of the land for a period exceeding twelve years, the claimant must also prove that the intent of such occupation was to assert right of ownership." [emphasis added]

81. The Learned Counsel submitted that the ratio set in the above case was that it was not enough for an adverse possession claimant to simply prove that he/she had been in occupation of the land for a period exceeding twelve years. The claimant must also prove that the intent of such occupation was to assert right of ownership.

Therefore, the intention of the claimant was a very crucial factor that the court must look into. There must be intention by the dispossessor to hold the land adversely. Further, there must be entry under a colour of right claiming title hostile to the true owner.

82. In the instant case, the Learned Counsel wondered whether there was a wrongful dispossession of the rightful owner of the land with a clear and manifest intent to defeat the Defendant's right. His response was by referring the Honorable court to the evidence by the Plaintiff and her witnesses. In the



Plaintiff's List of Documents, there was a letter dated 7th September 2021 written by Hassan Hamis Mwambungale – PW – 3, where it stated as follows:-

“..... I know Farida Zawadi Ali Katana very well ...my father did marry her mother.....Farida Zawadi Ali Katana is the true owner of this plot no.9901/1/MN which she bought herself when she was living and working in Norway...I believe that the plot sale agreement will show the truth of this land purchase. I also confirm that when we were both young this area was our parents shamba where we used to cultivate maize and also plant cassava, in short we were brought up here.”

83. In yet another letter contained in the Plaintiff's List of Documents dated 7th September 2021 and written by one Benson Simba Kitsao, a Village Elder, it stated as follows:

“I Benson Simba Kitsao.... hereby confirm know how of Farida Zawadi Ali Katana since her birth because both have been living together...At Norway Farida Zawadi Ali Katana tried... to work hard save money which enabled her buy this plot from the late Mzee Mohamed....I confirm that Farida Zawadi Ali Katana is the owner of this plot even before it was given number 9901 MN as she bought it herself.....The plot was bought from the late Mzee Mohamed and the plot sale agreement is still there...”

The authors of the above two letters testified for the Plaintiff in court and restated the contents of their respective letters.

Hassan Hamis Mwambungale who testified as PW - 3 stated as follows when cross-examined by Mr. Oluga:-

“She (the Plaintiff) bought the land in 2009, there has been a sale agreement.”

Benson Simba Kitsao who testified as PW - 4 stated as follows:

“I know Farida Katana. I know there is a house she bought from Mr. Mohamed.”

When cross-examined by Mr. Oluga, PW - 4 stated as follows:

“The house was bought from Mohamed. He had done only the foundation.”

In addition, the area Assistant Chief, Serra Sidi Sarro, PW – 5 also authored a letter dated 8th September 2021 where she confirmed knowing the Plaintiff. She testified as PW - 5 and stated as follows when cross- examined by Mr. Oluga Advocate:

“I know the previous owners, Mzee Mohamed, father to PW - 2. Mzee Mohamed sold it to Farida. I don't know how much was paid.”

84. The evidence of PW - 3, PW - 4 and PW - 5 as contained in their respective letters and oral testimony in court as highlighted above shows the following:

- i. The Plaintiff purchased the suit property from one Mzee Mohammed and the witnesses confirmed existence of a sale agreement for the transaction.
- ii. The Plaintiff purchased the suit property when its construction had already started. According to PW - 3, the Plaintiff bought the house with the foundation already done.
- iii. The Plaintiff purchased the suit property in the year 2009, according to Hassan Hamis Mwambungale, PW - 2.



Indeed, the Plaintiff admitted when being cross-examined by Mr. Oluga Advocate that she had purchased the suit property. The court proceedings have captured the foregoing as follows:

“Refer to a statement by one of the witnesses called Hassan- there is a letter attached to it. It alleges that Farida bought the land. PW - 2 admits she bought the land from the family.”

Therefore, it was clear that when the Plaintiff took over the suit property, she did not do so with the intention to adversely possess it. She did not gain access to the suit property as an adverse possessor but as a purchaser. She purchased it from Mzee Mohamed whom she thought was the owner. The Plaintiff's possession/occupation of the suit property did not start with a wrongful dispossession of the Defendant of the land. There was no clear and manifest intent by the Plaintiff of asserting her right of ownership of the suit property against the Defendant with the aim of defeating the right of the Defendant. At the time the Plaintiff gained access to the suit property, she did so through purchase and not with intent to adversely possess the same. The evidence of the Plaintiff's own witnesses has disqualified her from being an adverse possessor. Whether Mzee Mohamed was competent to sell the suit property to the Plaintiff was a different issue. What was material for purposes of this case was that the Plaintiff was not a squatter but a purchaser for valuable consideration. The Plaintiff never had the intention to claim the land by way of adverse possession from the word go. On that score alone, the Plaintiff never qualified for adverse possession and her case must fail.

87. Secondly, whether the Plaintiff had been in continuous occupation of the suit property for over 12 years. The other ingredient that the court is called upon to consider is whether the Plaintiff had been in continuous occupation of the suit property for 12 years. According to the Learned Counsel, the burden was on the Plaintiff to prove that she had been in continuous occupation of the suit property for 12 years. The Plaintiff never discharged that burden, as we would be demonstrated shortly. At paragraph 7 of her Supporting Affidavit to the Originating Summons, the Plaintiff averred that she had been in occupation of the suit property “for the last twenty [20] years.” Since the Supporting Affidavit was sworn on 27th September 2021, 20 years would mean that the Plaintiff started occupying the suit property from the year 2001. The Defendants casts aspersion on the truth onto this fact as shown below. At paragraph 4 of her Supporting Affidavit to the Originating Summons, the Plaintiff averred that she started construction in the year 2003. Of course she never occupied the house immediately she started constructing it. Her occupation could only be after she had undertaken some measure of construction to make the house habitable. That could only happen at a later date and not in the year 2003 when she alleged to have commenced construction. That meant that if its true as she alleged that she started construction in the year 2003, then her occupation must have come later. But even assuming that she started occupying the house immediately she started constructing it in the year 2003, by 2021 when she filed this case, the period of time would be 18 years and not over 20 years as alleged at paragraph 7 of the Supporting Affidavit. There was clear contradiction in the Plaintiff's pleading and evidence. The Plaintiff wondered whether the period of her occupation over 20 years (from 2001) or for 18 years (from 2003).

At paragraph 3 of her Further Witness Statement dated and filed on 1st November 2022, the Plaintiff stated that she had stayed on the suit property since year 2001. At paragraph 4 of the same Further Witness Statement, the Plaintiff stated that she moved into the suit property in the year 2001. The Learned Counsel wondered if the Plaintiff had started constructing the house in the year 2003 as she alleged at paragraph 4 of her Supporting Affidavit, she could not have moved into the suit property two years earlier (in 2001) before even starting the construction. The apparent mix-up on the year when the Plaintiff started her alleged construction/occupation of the suit property was a clear pointer that



the Plaintiff lied about the period of time she has been in occupation of the suit property – whether it was 2001 or 2003.

88. One would contend that whether it was 2001 or 2003, the Plaintiff had been in the suit property for over 12 years. However, the Learned Counsel averred that there was more to the mix-up which pointed to the fact that the Plaintiff had not been on the suit property for over 12 years. The Plaintiff alleged to have entered the suit property in 2003 (or is it 2001?) and continued with her occupation therein. The allegation that the Plaintiff had been in occupation of the suit property continuously for over 20 years was not true. The Plaintiff was living in Norway at the material time and not in Kenya. She admitted that she was living in Norway when she was cross-examined by Mr. Oluga Advocate whereupon she stated as follows:

“I am a citizen of Norway from 2014. I have been there for over 20 years. All my children were born there. I went there on 16/5/1997. I would be coming to Kenya as a guest but now I have dual citizenship... My Kenyan Passport is No. BK031129. I was given in year 2018. I have been living in this house since 2005.” [emphasis ours]

Again, the Plaintiff contradicted herself when she stated orally in court that she had been living in the house since the year 2005. All in all, the Plaintiff cited three different years: 2001, 2003 and 2005 as the years when she started living on the suit property. One wondered which of the three was the correct one.

When re-examined by her advocate, Mr. Omwenga, the Plaintiff thickened the narrative by asserting that she was born on the suit property and does not know any other place:-

“I have always lived here with my mother...I have always lived at Shanzu. I was born there. I do not know any other place.”

The above testimony marries with the contents of the letter by Hassan Hamisi Mwabungale, PW – 3 who stated that he grew up with the Plaintiff on the suit property. The questions, then, would be:

- i. Did the Plaintiff gain entry to the suit property in the years 2001, 2003, 2005 or 2009 when she purchased it?
 - ii. Did the Plaintiff purchase the suit property from Mzee Mohamed?
 - iii. Was the Plaintiff born and brought up on the suit property?
89. An adverse possession claim required to be pleaded and proved with precision without faltering or flip-flopping. But here it was seen a Plaintiff who was faltering and flip-flopping. A Plaintiff who admitted to have been living in Norway for over 20 years (since 16th May 1997 to be precise) but at the same time she claimed to have continuously lived on the suit property here in Kenya for over 20 years! The Plaintiff could not have lived in Kenya continuously for 20 years and at the same time live in Norway, a distance of 10,669.7 kilometers away from Kenya. Therefore, as far as the Learned Counsel was concerned, the allegation that the Plaintiff had been living on the suit property continuously for over 20 years was not true. The truth was that she had been living in Norway all along and only visited Kenya periodically. As highlighted at paragraph 29 of these submissions, the Plaintiff admitted to have been coming to Kenya “as a guest.” The documents contained in her Supplementary List of Documents dated and filed on 23rd November 2023 were her visas which confirmed those periodic visit to Kenya. Her occupation of the suit property never qualified as continuous. A “guest” could not qualify to secure land through adverse possession.
90. The Plaintiff admitted to be a Norwegian citizen. Although she lied in court that she became a citizen of Norway in the year 2014, her Norwegian Passport No.20571839 contained in her Supplementary



List of Documents showed that the same was issued on 23rd September 2004. That, perhaps was the time she became a Norwegian citizen if not earlier. At that time, the Plaintiff ceased being a Kenyan because the retired Constitution never permitted dual citizenship. Indeed, the Plaintiff regained her Kenyan citizenship on 3rd August 2018 when she was issued with a Kenyan Passport No. BK031129.

The documents contained in her Supplementary List of Documents showed that the Plaintiff travelled in Kenya only occasionally and used a Visa to travel to Kenya because she was then a foreigner (Norwegian). Since she travelled to Kenya only occasionally, the allegation by the Plaintiff that she lived on the suit property with her family since the year 2003 was not true. In fact, the Plaintiff admitted that her children were all born in Norway. It was not possible that she lived with them in Mtwaya, Kenya. For these, the Learned Counsel submitted that the Defendant had demonstrated that it was not possible that the Plaintiff lived on the suit property continuously for over 20 years as she was living abroad. However, the issue was whether then she the Plaintiff lived on the suit property for over 12 years and the exact date and year when she commenced construction on the suit property and occupation of the house were very material to her claim because the same determined whether she had met the statutory period of limitation or not.

91. Further to this, the Plaintiff admitted during cross-examination that she was aware that approval of the building/architectural drawings was a requirement of the law.

“The building has a plan... The plan was drawn by Charles- he is an architect based at Municipal building/offices at Treasury Square. I have not brought the architectural plan. It is still with Charles. I only have a copy. It is a long story. I went to them as per the laws of Kenya one is required to have had a building plan...

The plan was approved by the Municipal. I was given a receipt. I have not brought it and was never asked to bring it. "[emphasis ours]

The architectural plan, the payment receipt and the approval itself were key evidence for the purpose of showing when the Plaintiff actually commenced her construction. Architectural plans ordinarily contain the date when they were prepared and once submitted for approval would bear the date of receipt or even the date of approval. The approval would specify the time frame within which the construction should be undertaken. The Plaintiff opted not to produce the architectural plan in court and when asked stated that “it is a long story.” The learned Counsel wondered loudly what story was so long that the court could not be told about. Even if the original architectural plan was still with Charles as alleged, why didn't the Plaintiff produce the copy which she admitted to be in her possession? And where were the payment receipt she was given when she submitted the architectural drawings for approval? When asked about the receipt, the Plaintiff stated that she had it but did not bring it to court because she had not been asked to do so. Who was to ask her? Is the case not hers to prove? The failure by the Plaintiff to produce at least a copy of the architectural plan, the payment receipt and the approval itself leaves a lot to be desired.

92. Further, the Plaintiff testified that her main mason was one Hassan Obiero. The said mason was not called to testify. Even the subsequent fundis whom the Plaintiff worked with were not called to testify. Yet, those were key people who would have proved the Plaintiff's allegation that she commenced construction and occupied the building in the year 2003.

The Plaintiff did not produce a single receipt of purchase of building materials. Not even one! The Learned Counsel strongly felt that it was by default that Plaintiff never produced these crucial documents and failed to call any of the persons who participated in the actual building exercise built



for her. The only logical and plausible conclusion one could arrive at from the Plaintiff's omission of all such crucial evidence was that the omission was by design, with the sole intention of hiding the truth from court. Had the Plaintiff produced the crucial evidence, the truth that the Plaintiff never begun the construction and occupation in the year 2003 and which would have come out. The Plaintiff chose not to bring to court the crucial evidence to hide the truth from court. The Plaintiff left a gap in her evidence regarding the exact date when she commenced the construction of her building. That gap was filled by the Defendant through the evidence of Mr. Edward Kiguru who testified as an expert and produced a Survey Report dated 14th March 2022 (see the Defendant's List of Documents dated 5th October 2022 and filed on 1st November 2022). The Learned Counsel also refer the court to the Google Earth reports (print out) forwarded to court vide their letter dated 4th October 2023 pursuant to an order of the court.

93. The Survey Report and the Google Earth print out showed that the construction of the Plaintiff's building on the suit property started in the year 2013. Before 2013, the construction of the Plaintiff's building had not commenced. The Google Earth prints were scientific evidence. The Plaintiff neither presented any evidence nor call her own expert witness to counter and controvert the evidence by Mr. Edward Kiguru. In light of the glaring contradiction by the Plaintiff on the exact year when her construction started and when she occupied the premises, the only option left for the court was to go by the scientific and expert evidence presented by the Defendant.
94. In summary, the Learned Counsel asserted that the Plaintiff's evidence was contradictory and could not be taken as proof that the Plaintiff was in occupation of the suit property for over 20 years as alleged. The Plaintiff's own witness, Hassan Hamis Mwambungale, PW - 3 stated that the Plaintiff purchased the suit property in the year 2009. That means that the Plaintiff could not have started construction or even occupied the suit property earlier than the date of her purchase thereof.

On a balance of probability, the Defendant's evidence was consistent and reliable. The Plaintiff's evidence on the other hand was mixed up, mercurial, shaky and unpredictable. The same keeps shifting between the years 2001, 2003, 2005 and 2009. The Plaintiff mixed herself up by citing three different years as the date she commenced her occupation of the suit property, to wit, 2001, 2003 and 2005. The Defendant, on the other hand, presented scientific and expert evidence to show that the Plaintiff started construction of her building in 2013. We urge the Honourable Court to believe the Defendant's evidence and disregard the Plaintiff's shaky and non-static evidence. Since the Plaintiff only commenced construction on the suit property in 2013, even assuming that she occupied immediately she commenced construction, which was not possible, it meant that by the time the Plaintiff filed this suit in 2021, the Plaintiff had been on the suit property for only eight (8) years which fell short of the statutory period of 12 years.

95. It was instructive to note that when the court visited the suit property on 3rd November 2023, the court observed in the Site Visit Report dated 26th February 2023 as follows:

“e) In the inside of the suit land consisted of a huge permanent and well constructed storey residential flat. In total, it consisted of 32 units of 2 bedrooms, 1 bedroom and bedsitters. Some of them were complete- (3floors and all units occupied) and fully occupied with tenants while other units were still undergoing construction. ” [underling ours]

The above observation clearly confirmed that the Plaintiff's building is still undergoing construction. It could not be a building whose construction started over 20 years ago as alleged by the Plaintiff.



Whether a foreigner could claim land by way of adverse possession. The Plaintiff, had been shown, was admittedly a citizen of Norway. From years 2004 to 2018, the Plaintiff was purely a citizen of Norway and not a Kenyan. She regained her Kenyan citizenship in 2018 when she was issued with a Kenyan passport. Other than the fact that the Plaintiff was living abroad all along, the period when the Plaintiff was not a Kenyan could not be factored in when computing the period for limitation.

96. Thirdly, whether the Counter - Claim should be allowed. Having shown that the Plaintiff was not entitled to the suit property by way of adverse possession, the orders sought in the counterclaim should be granted. The Plaintiff had no right whatsoever to be on the suit property which undisputedly belonged to the Defendant.

Finally, who should bear the costs of this suit. Costs follow the event. Upon dismissing the Plaintiff's suit, the court should order the Plaintiff to bear the costs of both her suit and the Defendant's Counter - Claim.

V. Analysis and Determination

97. I have carefully read and considered all the filed pleadings herein, the evidence adduced by the witnesses summoned 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.
98. This Honourable Court will still examine the facts of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has issues for its determination. These are:-
- a. Whether the Plaintiff had acquired the title by way of adverse possession as required by Law?
 - b. Whether the Plaintiff is entitled to the suit property
 - c. Whether the Defendant/ Respondent's counter claim is sustainable?
 - d. Who will bear the Costs of originating summons and the counter claim?

Issue No. a). Whether the Plaintiff had acquired the title by way of adverse possession as required by Law

99. Under this sub title, the main substrata of the case on acquiring of title to land based on the Doctrine of Land Adverse Possession based on the dictum of the Law. This Honourable Court will examine if the Plaintiff has made out her case from the filed originating summons leading to the title deed held by the Defendants be extinguished thereof. If yes when did time start running for purposes of determining these rights and finally whether or not the Plaintiff is entitled to the prayers in the originating summons.
100. From the surrounding facts and inferences of the instant case, it will be imperative and hence inevitable not to divulge onto the Concept of the Land Adverse possession indepth as a matter of precedence. Whilst doing that, the Honourable Court takes cognizance of the elaborate citations made by the Learned Counsels particularly the one for the Plaintiff herein and hence will tended to avoid belaboring on the point herein. It is trite that a claim for title to land through the doctrine of adverse possession is attached to land and not title. It is a matter whereby it is not on whether the land was owned by either Kimingi Wairera or Mwangi Kimingi. This was the position in "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".



101. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ 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”.

102. The principle of adverse possession is well settled under *Limitation of Actions Act*. 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:

- “(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.”

103. 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.”

104. The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the *Limitation of Actions Act* by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. Under the provision of Article 162 (2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession. As already stated above, it should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title, where the land is yet to be registered, it cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be



entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under Article 24.

105. The principles were well set out in the case of “Kahindi Ngala Mwangandi - Versus - Mtana Lewa [2021] eKLR” where the Court of Appeal sitting in Malindi held:

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

“7

- (1) an application under Section 38 of the Limitation of Actions Act shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The Court shall direct on whom and in what manner the summons shall be served.”

In the case of “Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court.

See the case of:- “Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005,” where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.



In case of: “Kimani Ruchine – Versus - Swift Rutherford (Supra) it was stated on this point that:-

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See the case of:- “Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J.”

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

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

106. Further, R.C.N. Kuloba, J in the case “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR elaborately enlisted 7 key elements that a person claiming adverse possession must establish. Summarily, according to the retired Judge, the elements that a person claiming a right by adverse possession.
- a. The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. This is because a right of action cannot accrue unless there is somebody against whom it is enforceable.
 - b. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. That is to say, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non - permissive use, ie without permission from the true owner of the land occupied. Acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot



be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession.

- d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies. That is to say the possession and user was such as to give a cause of action or right to sue for possession, throughout the twelve years preceding the suit.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The purpose of this element is to afford the owner an opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose. Possessory acts carried out only under cover of darkness will be insufficient to justify a claim based on adverse possession. Related to the requirement of actual possession, the requirement of openness and notoriety, also calls for the need that the possessory acts must be substantial and leave some physical evidence. If the acts are too insubstantial or temporary, there is no actual possession and the possession will not be notorious
 - g. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. There are circumstances under which adverse possession which has begun to grow may be interrupted. Possession may be interrupted;
 - i. by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or
 - ii. by the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - iii. by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
107. The rightful owner must know that he is ousted, he must be aware he had been dispossessed. The owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted. The land or portion of land being adversely possessed must be a definite, with clear boundaries. Order 37 Rule 7 is mandatory that title to the land must be attached to the Originating Summons. The squatters claiming adverse possession must be individually identified, they ought to produce their ID cards when filing suits and not a mere stating Mwanaisha Juma and 300 others.



108. The burden of proving the above elements is on the person seeking title by Land adverse possession, he/she proves it in the usual standard of proof in civil cases i.e. balance of probability. The facts that must be asserted, pleaded and proved are; the date of occupation, the nature of possession, whether the occupation is known to the owner, how long the occupation has been going on, whether possession has been open and undisturbed. All these are questions of facts and unless they are asserted and proved adequately through a trial.
109. Recently, the Supreme Court had an opportunity to further address the issue of the Land Adverse Possession but only in jest in the matter of “Supreme Court Applications No. 16 (E026) of 2021 – Thomas Muka Maulo & Walter Washington Barasa Nyogensa – Versus – Robert Ouma Oduori”. Briefly, the Applicants had sought the Supreme Court to review the Court of Appeal decision declining to grant Certification of leave against its Judgement of the general importance under the provision of Article 163 (4) (b) of *the Constitution* of Kenya. The subject matter was that the Court of Appeal in its Judgement had ignored critical evidence and facts on record thereby arriving at a decision that would amount to conflicting principles on a claim of Land Adverse possession. In its ruling, on 19th May, 2021 while dismissing the application the Court held:
- “that the jurisdiction of the Supreme Court under Article 163 (4) (b) of *the Constitution* went beyond resolving factual contestations between parties. In any event, the principles of Land Adverse Possession were settled and the Applicants had not demonstrated any inconsistency of findings by the Court of Appeal on the Doctrine. The Supreme was not convinced that there was any miscarriage of Justice or violation of any Constitutional provision as alleged by the Appellant or at all. The Appellant were merely in disagreement with the ultimate Court determination & that did not suffice to invoke the Supreme Court’s jurisdiction or amount to miscarriage of Justice”.
110. From these decisions of Court, and in a nutshell, for one to qualify for a title by virtue of a claim of Land Adverse possession, one has to have fulfilled the following ingredients. These are:-
- a. There has to be a registered proprietor of the land being claimed;
 - b. The Claimant ought to have occupied the suit land without any interruption and continuously.
 - c. The Claimant ought to have used and taken possession of the suit land for over twelve (12) years.
 - d. The Claimant should not have been granted any permission to use or occupy the suit land by the registered owner, the principle of non permissiveness.
111. Having laid - down the principles on the doctrine of Land Adverse possession, the Honorable Court will now proceed to apply it to the instant case herein below.
112. Additionally, the principle of adverse possession was more elaborately set out in the case of “Wambugu – Versus - Njuguna [1983] KLR 172”, where the Court held that:
- “In order to acquire by the statute of limitations 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”



And that:

“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 whether or not the claimant has proved that he has been in possession of the requisite number of years.”

113. This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. Set the findings of the Court in Malindi App No. 56 of 2014 “Mtana Lewa – Versus - Kahindi Ngala Mwangandi [Supra]” where it held:-

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

114. Further, in the case “Mbira – Versus - Gachuhi (2002) 1 EALR137”: 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...”

115. Therefore, to determine whether the Applicant’s rights accrued the Court will seek to answer the following:-

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

116. This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above. It is the Plaintiff’s case that she stayed at suit property and she had her residential house/home on the said Plot together with a permanent storey building which had her Tenants. She had built a residential story building where she stayed with her family and had tenants. She attached in the affidavit a copy of the Valuation Report dated 16th September, 2021 marked as Exhibit No. “FZAK-1”. Having settled on the said property known as Plots No.9901/I/MN [CR.289531(“the Suit Property”), she started building her residential house/home cum residential building whereby she resided with her family and had tenants; she started the construction way back in 2003.

117. She continued to occupy, reside on the said property uninterrupted with her family and tenants as per a comprehensive survey report dated 5th March, 2021 marked as Exhibit No.“FZAK-2”. Ever since she settled on the suit property to date she had never been requested to move from the suit property nor leave it or at all. Indeed she knew the property to be hers and had been her property and she had used it as such to date without any interruptions whatsoever. She attached in the affidavit copies of self-



explanatory letters by the area Assistant Chief dated 8th September, 2021, letter of Village elders and a religious Leader all dated 7th September, 2021 marked as Exhibits No. “FZAK-3(a),(b), (c) and(d)”. Her family has been in continuous and uninterrupted occupation of the suit property for the last twenty [20] years and they continued to occupy the suit property wherefrom she had her home and a residential Story building with his Tenants. Since he had been in continuous and uninterrupted occupation for over twenty (20) years now she would like to have title for the suit property in her name, that is Zawadi Farida Ali Katana to enable her use it profitably for instance by using the same as security and even by commercial, constructing permanent developments thereon obtaining security in the knowledge that it legally belonged to her.

118. Being in possession is “pari material” herein and particularly being an isolated issue that has been spiritedly and vehemently opposed and challenged by the Defendants herein. To the Defendants, the Plaintiff never at all occupied nor took possession of the suit land from the year 2003 – a period of 20 years as alleged, as she had been abroad and further there was no construction whatsoever on the land by the year 2013 particularly based on the Google Mapp Photographs and being scientifically proved evidence adduced by the Land Surveyor as an expert witness by the Defendant. 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”

119. Undoubtedly, the suit property was registered at the Lands Registry, Mombasa in the name of Nova Holdings Limited. She produced the copies of the title marked as Exhibit No. “FZAK-4” collectively. She had been advised by her advocates on record Mr. Omwenga that by dint of her uninterrupted occupation and development the suit property for over twenty [20] years now and by dint of the Limitation of Action Act Cap 22 of the Laws of Kenya, she by Law entitled to be registered as the registered proprietor in place of the Defendant herein. The understanding by Court on the way the Defendant interpreted occupation or taking possession meant the physical living into the developed structure. Certainly, I strongly hold that this a misconception and interpretation of the law. The Plaintiff did not produce any evidence to show that she put up a home but in cross examination PW - 2 corroborated the evidence that she had been in occupation of land and has been in occupation for over 20 years. The act of occupying the land for more than twenty years is a demonstration of the Plaintiff’s intention of dispossessing the Respondent. As would be discussed elsewhere, the Court still remains extremely perplexed and curious as to the reason why the Defendants despite of them all along being aware of the construction taking place, they never visited the land from year 2013 nor lodged any complaint against such an illegal and irregular act by a trespasser.

120. From all these assertions, the Defendant mounted the following four (4) broad strong defence countering the suit by the Plaintiff and in support of their Counter – Claim. These were namely:-

- a. The Plaintiff having purchased the suit land. From the evidence adduced by PW – 3, 4 and 5 summoned by the Plaintiff all informed Court that the Plaintiff bought the suit land in the year 2009 from Mzee Mohammed who was now deceased. Further, that there existed a sale agreement to that effect for this purchase of land and the only structure that existed then was only a foundation developed by Mzee Mohamed. That the Plaintiff bought the suit land. In the



given circumstance a claim of Land adverse possession was then not available to the Plaintiff as claimed by her.

- b. Never having been in occupation of the suit land as required by law:- The Plaintiff could never have been in occupation of the suit land continuously and uninterruptedly for a period of 20 years. From the her own evidence and that of her witnesses they testified of her having taken occupation on diverse years of 2001, 2003, 2005 and 2009. It amounted to 18 years if computed to the time she filed the case in the year 2021.
 - c. Eligibility by the Plaintiff to claim land by adverse possession being a Non – Citizen:- The Plaintiff was not a citizen of Kenya but Norway and hence not entitled to the right or claim of land adverse possession. She started living in Norway for over 20 years from 16th May, 1997. All her children were born in that foreign country. Indeed he held a Norwegian passport bearing numbers 20571839 issued in the year 2014. She was only issued with a Kenyan Passport bearing numbers BK031129 in the year 2018 claiming dual – Citizenship. How then could she be in two Countries which were 10, 669.7 kilometres apart at the same time for the period of 20 years? She could only be visiting Kenya as a guest.
 - d. Failure by the Defendant to interrupt occupation:- On why they never interrupted the occupation and the construction of the permanent four story building from taking place caused by the Plaintiff was that the Director of the Defendant company would be travelling frequently abroad due to his ailment and that there existed another civil suit before this Court and hence never saw any need to interfere with the alleged development of upto the fourth floor of the story building. Secondly, there existed another Civil Suit before this Court over the same subject matter and hence perhaps avoided being seem to be interfering with matters already in Court.
121. From the mounted spirited defence, one gets the feeling that despite of the Defendant having gone to slumber over their rights as correctly backed up by the Legal Equity Maxim “Equity does not aid the Indolent” (“Vigilantibus non dormientibus aequitas subvenit”) they seem to have now woken up. With all due respect to the Defendant, the Honourable Court finds all these reasons to be superfluous and not convincing at all, to say the very least. Undoubtedly, it follows that the nature of her possession on the land was open, without secrecy and with the sole intention of acquiring ownership. However, in all fairness, as it appears the Defendant has now all over a sudden developed enormous interest in the suit property, perhaps they should be accorded a second bite of the cherry by they negotiating to compensate the Plaintiff for the expenses incurred in exchange of the suit land. It part of dispensing justice, Equity and Conscience.
122. On the contrary, the Honourable Court discern that the Plaintiff has on a balance of probability established that she meets the threshold for the grant of orders for the claim of title under the doctrine of land adverse possession.

Issue No. b.) Whether the Plaintiff is entitled to the suit property

123. Under this Sub – heading, the Court wishes to deliberate on whether the Plaintiff is entitled to the land or not. In the process and to begin with, it wishes to attached the site Visit report herein below.

Republic of Kenya

In The Environment And Land Court

at Mombasa



- i. Coram
 1. Justice L.L. Naikuni (Judge)
 2. Yumnah – Court Assistant
 3. George Omondi - Bodyguard
 4. John Mwaniki – Assistant
- ii. Plaintiff's representatives
 1. Mr. Omwenga Advocate for the Plaintiff.
 2. M/s. Farida Zawadi (and her Children) the Plaintiff.
 3. Over 10 tenants and the neighbors.
- iii. Defendants representatives
 1. Miss. Silvia Machogu Advocate holding brief for Mr. Oluga Advocate.
(Hereinafter referred to as “The Team”)
- iv. Security Operations (Bamburi Police Station)
 1. Chief Inspector Ezekiel Rotich.
 2. Police Constable David Mungai.
 3. Police Constable Cyrus Mwanzia.
- v. The purpose for the Site Visit (“Locus in Quo”).
 4. The purpose of the site visit was explained. It was pursuant to a Court directive made on 4th October, 2023 to conduct the site visit. The court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, 2010 to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, 2010 to wit:-

40

(10)



(1) “The Court may, on the application of any party to a suit, and on such terms as it thinks fit:-

a. Make an order for ...
.....
Inspection of any property which is the subject matter to which any question may arise therein.

5. Ideally the site visit – the Locus in quo was with a view of gathering further evidence on the above stated arising two (2) issues – of the alleged constructions and the settlements onto the suit land to assist it in its decision making functions and/or process. Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the finalization of the case.



- vi. The Methodology and procedure applied.
6. By consensus of the team, it was agreed that taking that none of the parties had engaged a Land Surveyor to be present during the Visit, there be physical walking round the suit land by the team. Essentially, the main objective for the walk to witness what was found on the on the suit land as requested by the parties. Thus, it was agreed that the exercise be led by a representative from both the Plaintiff and the Defendant herein. Further, it was agreed that the team be guided by the Map and the relevant survey documents which were already filed in Court. Therefore, the team conducted the site visit through going round the whole of the suit land.

vii. Observation

The team was able to make the following observations:-

- a. There was heavy rainfall on this material day and the place was exceedingly wet. On some parts almost impassible due to the heavy down pour and stagnated water. The suit land which is along Mombasa - Malindi road is rectangular in shape (Hereinafter referred to as the Suit Land”) as indicated below:-
- Peter Wanjohi
Mombasa/Malindi Road Pastor
- b. The team noted that there were heavy investments and resources (finances, time and man hour) expended on the suit land by the Plaintiff. Within the suit land, on the front side, there existed an independent operated Petrol Station trading in the style and name of “Supreme Petrol” – owned and managed by Mr. Francis Amiani. He was present on site. Being in the midst of a residential area, the petrol station is a highly dangerous component as it may explode anytime. It has to be removed henceforth from that place.
- c. In addition on the front side of the suit land, there were five (5) commercial retail shops and the restaurant or eatery trading in the name and style of “Adusa hotel food palace”.
- d. On three parts of the suit land, there exists several other neighbouring plots. The team was able to identify some of the owners to these plots. These were Mr. Peter Wanjohi and Pastor Steven Mashalanu who were both present during the side and were able to physically point out their plots to the team. Peter indicated to the team that there were 6 residential buildings on the western part of the suit land. Further in the eastern part of the suit land was a car wash premises trading as “Shanzu Car Wash & Parking”.



- e. In the inside of the suit land consisted of a huge permanent and well constructed storey residential flat. In total, it consisted of more than 32 units of 2 bedrooms, 1 bedroom and bedsitters. Some of them were complete - (3 floors and all units occupied) and fully occupied with tenants while other units were still undergoing construction.
- f. There were two septic tanks whereby one is in use and the other is not. Further, there was a soak pit. There was a Pent house comprising of 4 bedrooms at the top floor but which was still under construction. The team noted that, although there was a store equipped with construction materials.
- g. there a lot of waste building material thrown all over the place. The team recommended on the need for a proper cleaning up in order to maintain a clean and healthy environment as required under the provision of Article 42 of *the Constitution* of Kenya, 2010.
- h. There was a 90 meters deep shallow well with 7 of 1000 litres plastic water tanks. It had an electric supported water bump for the water which was used for human consumption to all the floors within the suit land.

iii. Directions

Towards the end of the Visit, the Honourable provided the following guidelines:-

- a. Parties were directed to file and exchange their written submissions accordingly.
- b. Thereafter the Honourable Court would reserve a date for delivering of the Judgement on notice to be issued in good stead to all parties.

The site visit ended at 12.30 pm.

The Site Visit Report Dated at Mombasa This 26th Day of February 2024.

.....

Hon. Justice L. L. Naikuni

Environment And Land Court at

Mombasa

124. As a way of passing, and being so encouraging, the Honourable Court observes that most of the observations made by the team seem to closely coincide and corroborate with the finds from the report dated 16th September, 2029 by the Land valuer independently engaged by the Plaintiffs herein – PW –



1 and produced as Plaintiff Exhibit No. 1. From the evidence by DW – 1 – the Land Surveyor admitted that:-

“The GE of the year 2003 indicated that there were some structures of some sort on the suit land”.

Nonetheless, from the filed Report by the Land Surveyor, Mr. Kiguru it states that he could not tell exactly when people started to occupy the land and the developed structure. But it is all admitted that the Plaintiff bought the land from either the years 2001, 2003 or 2005 were issues which were never contested during the hearing though brought out in the submissions. These facts still don't make things better as they still earn the Plaintiff the qualification of having occupied the land over 12 years as required by law.

125. Taking that the Defendant never hired any Land Valuer to controvert and/or counter the already existing report and its findings made herein, the Court was compelled to fully rely on this one. It noted that the property was located along the Mombasa – Malindi road. They value the property at a sum of Kenya Shillings Sixty Million (Kshs. 60, 000, 000/=). While providing a justification on how they arrived at this value, the report holds that:-

“.....On arriving at this value, we have adopted comparative analysis of the local property market where we considered recent sales, properties listed for sale in comparison to our subject property in order to make necessary adjustments to arrive at current market value for the land.....we proposed to advise on the open market value of the subject property.Market value is defined as the most probable amount for which the property would reasonably be expected to sell at the date of valuation between a willing buyer willing seller in an arms length transaction after a proper and reasonable marketing period wherein the parties under negotiations have each acted knowledgably, prudently and without compulsion”

125. 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 “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]

126. The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010 which requires that an application for adverse possession be accompanied with a title deed extract. The Applicant has attached a copy of a title deed extract as required by law. The title shows that the land is registered in the name of a Land Reference No.MN/1/9901 situate in Shanzu in Mombasa County.

127. While at it, during the site visit the Honourable Court made a peculiar issue. There were several structures established for commercial purposes which included eateries and shops. But what caught the attention of the Honourable Court was the operation of a petrol station by an independent company trading in the name and style of “Supreme Petrol Station”. The said business entity was in the midst of residential place and therefore such a dangerous in terms of human habitation, safety, security and



health hazard contrary to the provision of Article 42 (a) and (b); of *the Constitution* of Kenya, 2010 on clean and healthy environment; *Public health Act*, Cap. 242 and Environment & Management Co - ordination Act, 1999. This Court takes judicial notice of the recent – in the month of February, 2024 - oil and gas cylinder explosion within Embakasi estate in the County of Nairobi and where colossal damages, anguish, trauma and anxiety caused to both loss human life, injuries and property. This should not be allowed to be repeated here in the close eye of the Court. Thus, the only legal remedy available under the provision of Article 70 (1) (a), (b), (c) and (3) of *the Constitution* of Kenya, 2010 for it to be closed and on a short notice to be shifted to an alternative place away from a residential place.

128. In totality, the Court finds and stresses that the Plaintiff has on a balance of probability demonstrated that she is entitled to the claim of title to suit property under the doctrine of Land Possession whereby the existing Certificate of Title registered in the name of the Defendant is extinguished thereof by the operation of law.

Issue No. c.) Whether the Defendant/ Respondent’s Counter - Claim is sustainable

129. Under this sub title we will examine whether the Counter claim by the Defendant is merited. Under leasehold in Kenya tenure system, a person can only hold the land for a certain time-frame subject to frequent payments to the grantor. The government, the local authority, and individuals can grant leases for public land, trust land, and freeholds, respectively.

130. The ownership of a lease hold property is provided by the Government for a tenure of 99 years wherein one can extend the leasehold to 999 years if the owner of the property wishes to extend the lease, one will have to pay a price for the lease extension. One also has the right only to stay for a particular period of time. In this case, the buyer is not the owner of the property. One must pay the ground rent to the owner or the leaseholder of the property, once the lease period is expired, the property rights will go back to the owner and it is possible to extend the leasehold according to one’s comfort.

131. A lease hold agreement is equivalent to a contract as, the government makes the offer to the lessee with conditions that the lessee is to fulfil after which the Government being a Lessor confirmed the compliance and issues the lessee a certificate of lease after consideration has been paid. Section 38 (1) of the *Land Act*, No. 6 of 2012 makes a provision on the validity of contracts in sale of land as thus:-

“Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land:-

- a) The contract upon which the suit is founded:-
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
- b) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

132. It is evident all these legal conditions were fully fulfilled without any doubt at all. In his evidence DW 1 who is the director of the Defendant he could not fulfil the terms of the lease as his health was deteriorating. He did not have any evidence of payment for the approval to the wall i.e. the perimeter wall. They had an in house contractor, he did not have the prove of the purchase of the material for the construction of the perimeter wall. From the written statement there was no evidence of him visiting the site of the suit property in 2013. He knew the Plaintiff had constructed on his property and on the reserve road. He did not know whether the Petrol station belonged to the Plaintiff. During the



Construction, she never came to Court as it had been in year after 2013. He had not been on the land for 4 years; after knowing the construction was upon filing of this suit.

133. The relevant section of Cap 300 concerning the issues raised in this suit are Sections 27, 28, 31, 32, 33, 34, 143 and 144 which provides as follows:-

“27. Subject to this Act –

(a)

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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 –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register;

and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

31. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge subsisting at the time of acquisition.

32.

(1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:

Provided that - (i) only one title deed or certificate shall be issued in respect of each parcel of land or lease; (ii) no title deed or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-five years.

(2) A title deed or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register. (3) When there is



more than one proprietor, the proprietors shall agree among themselves as to who shall receive the title deed or the certificate, and failing agreement the title deed or the certificate shall be filed in the registry. (4) The date of issue of a title deed or certificate of lease shall be noted in the register.

33. If a title deed or certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the title deed or the certificate shows all subsisting entries in the register, a note of the registration shall be made on the title deed or the certificate. (2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor. (3) If the disposition is a charge, the certificate shall be delivered to the chargee.
34. On the registration of any disposition of a lease or charge the duplicate and the triplicate of the lease or charge shall be produced to the Registrar, who shall note particulars of the disposition on the filed lease or charge and on the duplicate and triplicate thereof unless the Registrar is satisfied that they cannot be produced.

“143.

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that a registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default...”

134. Clearly by the aversion of the Defendant’s director the said lease is not valid being that he had under oath testified that he had not fulfilled the conditions of the said lease he seems to claim is the genesis of his ownership on the land. By this it is clear that the Defendant has no cause as the said lease they tend to rely on was irregularly registered.
135. I find that the Defendant cannot claim trespass on a land that does not belong to him that in any event it is in the interest of justice and public policy that the remedies sought by the Defendant herein are declined and the orders granted in favour of the Plaintiff as per the originating summons.



Issue No. c). Who will bear the Costs of suit

136. It is now trite law that the issue of costs is at the discretion of the Court. 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”

137. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) 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.”

138. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

139. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “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.”

140. In this case, as this Honourable Court has opined above, the Plaintiff has proved their claim against the Defendant and therefore the Plaintiff has the costs of the originating summons dated 27th September, 2021 and filed in Court on 1st October, 2021 and the Counter claim dated 5th October, 2022 and filed on 1st November, 2022 to be paid by the Defendant.



VI. Conclusion and Disposition

141. 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 Plaintiff has established her case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgement be and is hereby entered in favour of the Plaintiff against the Defendant herein as per the Originating summons dated 27th September, 2021.
- b. That the Plaintiff's claim for adverse possession succeeds as prayed.
- c. That the Counter - Claim by the Defendant dated 5th October, 2022 be and is hereby found to lack merit hence it is dismissed in its entirety.
- d. That an order be and is hereby made that the , County of Mombasa Registrar of Land Titles within the next 90 days to ensure that there is issuance of a Provisional Certificate of Titles and the rectification of the Grant to the suit land by having an entry of the names Farida Zawadi Katana in it.
- e. That in the alternative, and on a priority basis, the Defendant should consider re – funding the Plaintiff for all the expenses she has incurred in the occupation, use and construction of the four story structure estimated at a sum of Kenya Shillings Sixty Million (Kshs. 60, 000, 000/=) (negotiable) in exchange of her providing the Defendant with vacant possession of the suit property within the next 90 days from this days. In default execution of this Court's orders to ensue.
- f. That based on the provisions of Article 42 of *the Constitution* of Kenya, 2010, the EMCA of 1999, Public Health, Cap. 242 and other relevant provisions of the Law, being a health hazard and dangerous to human habitation, public safety, security and order being in the midst of a residential premises, the independent Petrol Station trading in the names and style of "Supreme Petrol Station" to be henceforth closed and on a short notice to be moved out of the said place to a different non – residential area without further ado.
- g. That the Coast County Commander, the Officer In Charge of Mtwapa Police station, Public health Officers, and the Enforcement and Compliance officers from NEMA and the County Government of Mombasa to ensure that this order No. (f) above is fully complied with.
- h. That each party shall bear their own costs.

It is so ordered accordingly.

JUDGMENT DELIEVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF APRIL 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. Omwenga Advocate for the Plaintiff.



c. Mr. Oluga Advocate for the Defendant

