



**Shede v Mweri & 54 others (Environment & Land Case 196 of 2019)
[2024] KEELC 4362 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4362 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 196 OF 2019**

LL NAIKUNI, J

APRIL 11, 2024

BETWEEN

JOHN MWATELA SHEDE PLAINTIFF

AND

DAVID CHARO MWERI & 54 OTHERS & 54 OTHERS DEFENDANT

JUDGMENT

I. Preliminaries

1. The amended Judgment by this Honorable Court pertains to the Civil Suit instituted by the Plaintiff herein – John Mwatela Shede through a Plaint dated and filed on 1st November, 2019 against the 54 Defendants herein.
2. It is instructive to note that upon this court delivering its Judgment on 31st October, 2023 the Plaintiff herein filed a Notice of Motion dated 8th April, 2024 seeking for the court to review its judgment accordingly.
3. Upon being served with the summons to enter appearance dated 4th November, 2019 on 3rd December, 2019 the Defendants entered appearance and on 12th January, 2010 filed their Defence and on 25th March, 2021 filed an Amended Defence and Counter Claim dated 31st March, 2020. Pursuant to that on 19th April, 2021, the Plaintiff filed Reply to the Amended Defence and Counter Claim accordingly.

II. The Plaintiff's Case

4. From the filed pleadings the Plaintiff, a male adult of sound mind and understanding held that at all material times to this case he was the duly appointed Legal Adminstratrix of the estate of the late Ngala Mbui Chuphi (Hereinafter referred to as “The Deceased”). The deceased was his grandfather and who had been the registered owner of Plot Nos. 2847/IV/MN, Plot No. 2848/VI/MN, 2851/VI/MN, No. 2852/VI/MN and 2853/VI/MN (Herein after referred to as the suit land”) having been gifted to him



by his then employer Vitabhai Patel who left the country years ago and never came back. Hence, prior to filing of the suit, the Plaintiff in HCCC (Mombasa) Succession Cause Numbers 414 of 2012 applied and obtained the Grant Letters of Administration for the estate of the deceased on 10th October, 2013. Subsequently, he was issued with a Certificate of Confirmation of Grant dated 4th May, 2018 where all the suit properties were listed thereof.

5. He averred that the Defendants had at all times to this suit had been ground tenants of the late Ngala Mbui Chuphi paying a monthly rent for a sum of Kenya Shillings Two Hundred (Kshs. 200/=) per month. They were paying the said ground rent.
6. The Plaintiff averred that the Defendants had turned to activism so that the Plaintiff give them the land herein by force. However, he negotiated with them to buy portions of it were their houses stood and he expected they would start payments of the agreed negotiated and agreed purchase price, but the Defendants reneged on the agreement and insisted on remaining in occupation for free.
7. The Plaintiff held that the Defendants had all along been reminded to honour their agreement pay deposit of the purchase price which was by the year 2005 agreed at a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) per plot but they had totally refused insisting on taking the land belonging to the Plaintiff for free. The Plaintiff had always been paying the property rates for all the suit properties at times in his names and other in the names of Vita Bhai B. Patel.
8. He asserted that he was still desirous of selling the land to the Defendants but they had proved to be so uncooperative and unwilling such that the parties were not to agree and the Defendants had become stubborn and unreasonable and the Plaintiff believed that the only way to address the issue was by filing this suit against Defendants and seeking for orders of their eviction. He held that the Defendants had no right whatsoever to be on the suit land and not prayed that this court should order their removal and hand the Plaintiff vacant possession. Their continued occupation of the land affected his right to ownership to the suit land.
9. Their occupation of the suit land for free, it was making the Plaintiff lose financially to the tune of equivalent to a sum of Kenya Shilling One Hundred Million (Kshs. 100,000,000/=) which was a convertible estimated value of the land and hence called for the courts intervention.
10. The Plaintiff prayed for the following prayers for judgment to be entered against the Defendants jointly and severally for; -
 - a. An order for vacant possession from Plot Nos. 2847/IV/MN, 2848/VI/MN, 2851/VI/MN and 2853/VI/MN.
 - b. An order for eviction from Plot Nos. 2847/IV/MN, 2848/VI/MN, 2851/VI/MN and 2853/VI/MN.
 - c. An order for “Mense Profits” Projects of Kenya Shillings 1,000/= from each Defendant per month from the date of filing this suit in court to the date of Judgment.
 - d. Costs and Interest of this suit.

III. The Testimony by the Plaintiff

A. Examination in Chief of PW – 1 by M/s Mwanzia Advocate

11. PW – 1 testifies and sworn in the Kiswahili language. He identified himself as Mr. John Mwatela Shede. He was a holder of the national identity card bearing numbers 8435023. His date of birth was 4th December, 1967. He lived at Bamburi of County of Mombasa. He recorded a statement dated 1st



November, 2019. He also filed a List of documents dated 1st November, 2019. Plaintiff 1 to 6 marked as Plaintiff Exhibit No. 1 to 6.

12. There were 5 Plots numbers 2847, 2848, 2852, 2853 and 2851 located at Port Reitz area. They belonged to his grandfather Mr. Ngala Mbui Chuphi. His father was an employee of VitalBhai B. Patel who gifted him the land. Mr. VitalBhai left the Country along time ago and never came back. He used to pay the land rates for all the properties in his names and sometimes in the names of VitalBhai B. Patel. The tenants were meant to be paying land rent but they had declined. They would be paying a sum of Kenya Shillings Two Hundred (Kshs. 200/=) per month. He had a copy of the Grant Letters of Administration issued to him on 10th October, 2013. He had been paying land rates and rent to the County Government of Mombasa.
13. On the 14th June, 2018 they issued the tenants to pay or leave. They never responded. The Defendants were claiming the land was theirs. They had been paying the land rent. His father followed the right procedure in acquiring the land. He was praying for eviction or they buy.

B. Cross Examination by PW – 2 Mr. Mbwiza Advocate.

14. PW - 2 did not had anything to proof the ownership of the land. His grandfather was a shamba boy of an Indian Vital Bhai Patel after he died, we used the affidavit to process the ownership. When Indian died it was taken by over his grandfather and then his father took over. There was no transfer. He was born in year 1967. He saw his grandfather, father and the Indian MR. VITAL BHAI PATEL. He understood the importance of title to land.

There was a process for the acquisition of land. His was the Letter Grand of Administration gotten on 10th October, 2013 and the Certificate of Confirmation of Grant make reference to the 5 parcels issued on 4th May, 2018.

15. They leased the land-they were licensees as they were paying the ground rent. By the time the Indian Taj Bhai Patel died there were no people there. There were eight (8) plots. He had only mentioned 5 which were on the grant. The other three (3) did not have any dispute. There existed an agreement dated 11th March, 1997 for a rental lease. its just a sample of the many they used for leasing. He did not have the Original copy of the Tenancy Agreement.
16. He did not have the original Grant and Confirmation of Letters of Administration. The demand letters bear error on the Land Reference referring to MIRITINI dated 14th June 2018 and 22nd August 2018. The official receipts which were paying are not Certified as true. They stopped paying after they came to Court in the year 2002.
17. The receipt in the name of VITAL BHAI PATEL but some bore his names John Mwatela Shede on 12th February, 2009, but now he had not gotten the Grant Letters of Administration. The Indian disappeared in year 1997 to his country. That is all.

C. Re - Examination of PW – 1 by Ms. Mwanzia Advocate

18. PW – 1 would pay the rates. It would be in the names of VITAL BHAI PATEL. The agreement was in his uncle's name. Over 70 people came to Court to sue him. His grandfather died in the year 1990. While his father died in year 1998. His grandfather left behind only his father. By that time, his father had died. He had not gotten the title in his name. He asked them to process it for themselves. That is all.



D. Examination in Chief of PW – 2 by Ms. Mwanzia Advocate.

19. PW – 2 was sworn and testifies in Kiswahili language. He identified himself as being Mr. Samwuel Rumba Shede. He was a holder of the national identity card bearing numbers 8401137. His date of birth was 1st January, 1956. He lived in Samburu. He was a Pastor of the – E.A.G. Church. PW -2 informed Court that John Mwatela Shede, the Plaintiff herein was his younger brother.
20. Mr. Ngatia Mbui Chuphi was his grandfather. In the year 1970's, he used to work for an Indian by the name VITAL BHAI PATEL. The Defendants were claiming that the suit land was theirs. His grandfather left the land to his father but now it was in the names of the Plaintiff. The Defendants were tenants on the suit land. They would be paying rent but they stopped. He recorded an undated witness statement filed in Court on 1st November 2019.

E. Cross Examination of PW - 2- Mr. Mbwiza Advocate

21. PW – 2 stated that the land belonged to his grandfather. It was given to him by an Indian. He used to work for the said Indian. It was a gift. PW – 2 saw the Indian. The Plaintiff was very young by then. By the time the Indian left there were a few people on the land. He was 30 years old by then. There was no proof of the ownership. His grandfather told him not to leave the land as it belonged to him. He urged him not to leave. They lived at Mwingo. His father was polygamous with two wives. By that time, he had not known the size of the land but now he knew the measurement. He lived at Samburu of the County of Kwale as a Pastor. He did not have any evidence to show that the Defendants were tenants. He had not been promised anything by John – the Plaintiff for him to have come to Court to testify.

F. Re - Examination of PW – 2 by Ms. Mwanzia Advocate

22. He was given the land by the Indian. He used to work for him. He urged him never to leave/vacate the land.

G. Examination in Chief of PW – 3 by M/s. Mwanzia Advocate

23. PW – 3 testified and was sworn in the Kiswahili language. He identified himself as Beja Shedi Ngala. He was a holder of the national identity card bearing numbers 6728627. His date of birth was 1957. He lived at Samburu of the County of Kwale. He was not employed. He recorded an undated witness statement and filed in Court on 1st November, 2019.

Court:-

24. The Court has noted that the national identity of this person posing and summoned as PW-3 reads MR. BEJA SHEDI NGALA. According to his undated witness statement it reads “WILLIAM BEJA SHEDE”. These are two different persons. He claims he acquired the Christian names “WILLIAM” after he got born again in the year 1971. From that, which is close to 52 years ago, he ought to have sworn an affidavit under the Oath and Declaration Cap 15 and Registration of Persons Cap. 107. The provision of Section 5 of Cap 15 which mandates one to declare that MR. BEJA SHEDI NGALA and WILLIAM BEJA SHEDE are not different people but one and the same person. No such affidavit exists. This is a legal lapse. As it is, from record this witness does not have a written statement as required under the Provision of Order 11 of CPR. For that reason, he should be stepped down forthwith and the statement of WILLIAM BEJA SHEDE, unless otherwise stated, is expunged from records.

Ms. Mwanzia :-

I do not wish to appeal.



H. Examination in Chief of PW – 3 by M/s. Mwanzia Advocate

25. PW – 3 testified and was sworn in the Kiswahili language. He identified himself as Mwaka Jondo Mwakalu. He was a holder of the national identity card bearing numbers 8400715. His date of birth was 1959.

Court: -

26. Once again the Court has observed that the names on the identity card is that of Mr. Mwaka Jondo Mwakalu while the recorded witness statement which he intent to rely on is that of ELIZABETH MWAKA SHEDE is hereby expunged from the record for the same reasons given in the above ruling on the one for William Beja to apply "Mutatis Mtandis".

27. To support their case, the Plaintiff relied on the following documents:

- a. A copy of the Grant Letters of Administration dated 10th October, 2013 issued by HCCC (Mombasa) Succession Cause No. 414 of 2012;
- b. A Copy of the Certificate of Confirmation of Grant issued on 4th May, 2018.
- c. A copy of bundle of some of the Land rates payment receipts in the names of the Plaintiff and VitaiBhai B. Patel to the County Government of Mombasa.
- d. Copies of letters dated 14th June, 2018 and 22nd August, 2018 to the Defendants proposing sale of the suit property to them.
- e. A copy of agreement of lease with some of the occupants of the land.

Ms. Mwanzia: -

I wish to close the Plaintiff's Case.

IV. The Defendant's Case.

28. As indicated the Defendants filed an Amended Defence and Counter Claim dated 31st March, 2020 and filed on 25th March, 2021 whereby they denied all the allegations contained in the Plaint. They refuted that the Plaintiff was the duly appointed Legal Administratrix of the estate of the Ngala Mbui Chuphi and held that all the documents that were used for obtaining grant were forgeries. They further stated the suit land did not belong to the late Ngala Chuphi and hence could not be passed to the Plaintiff because a person could not pass title which he did not have.

29. They denied ever being the tenants on the suit land and at no time had they ever negotiated and/or requested to purchase the suit property from the Plaintiff as he was not a lawful owner. They held that they were both staying on the suit property together with the Ngala Mbui Chuphi (deceased) where they both worked as employees of the land owner one Vital Bhai B. Patel and not Ngala Mbui Chuphi.

30. The Defendants held that the alleged transfer of the suit property to Ngala Mbui Chuphi from the initial owner was a forgery for the following reasons:-

- a. The documents called the transfer was typed documents yet there was no computer at that time in the year 1976.
- b. Until the year 2009, the Defendants had been paying rates for the suit property and the registered name of the owner was Vital Bhai B. Patel and not Ngala Mbui Nchupi.



- c. There was no transfer documents in respect of the suit property from the names of the initial owner to that of Ngala Mbui Chupi (Deceased).

Hence they added the plaintiff never had good title that was passed to him.

V. Counter Claim

31. The Defendants as the Plaintiffs in the Counter Claim sought for the following claims from the Plaintiff in the main suit but now a Defendant for purposes of the Counter Claim. There were: -
 - a. They were the lawful owners to the suit land/properties.
 - b. They took possession upon the departure of the original owner of the suit properties one Vital Bhai B. Patel sometimes in the year 1960.
 - c. They had acquired right over the suit property by way of Land Adverse Possession having stayed on the suit properties for more than 12 years without any interruptions.
 - d. Since they were in occupation of the suit land whose owner had relocated to Europe and therefore they ought to be registered as the legal owner under the Government Settlement Scheme.
32. For all these they sought for the following reliefs.
 - a. A declaration that the Defendants were the lawful owners of the properties known as Plots No. 2847/IV/MN, 2848/VI/MN, 2849/VI/MN, 2851/VI/MN, 2852/VI/MN and 2853/VI/MN.
 - b. A permanent injunction restraining the Plaintiff himself, agents, servants or employees from entering, selling, leasing, mortgaging or evicting the Defendants from the suit premises.
 - c. An order directing the Registrar of Land to register the suit properties in the names of the Defendants.
 - d. Cost of the suit.

VI. Reply to Defendants Amended Defence and Counter Claim by the Plaintiffs.

33. On 19th April, 2021, the Plaintiff as the Defendant in the Counter Claim filed a Reply dated even date. He reiterated all the averments brought out in the filed Plaint while denying all the allegations made out from the filed Amended Defence and Counter Claim. From Paragraphs 1 to 6 thereof. As a defence the Plaintiff states as follows:-
 - a. He denied the Defendants had ever taken possession of the suit land as they were all along being ground tenants but refused to pay rent.
 - b. The occupation by the Defendants was with the permission of the Plaintiff.
 - c. The Defendants were not entitled to any costs and interests as alleged.
 - d. The Defence was defective a sham and an abuse of the due process of the court and ought to be struck out. He prayed for the Amended Defence and Counter Claim to be struck out with costs as prayed in the Plaint



VII. The Testimony by the Defendants

I. Examination in Chief of DW - 1 by Ms. Shihundu advocate

34. DW – 1 testifies and sworn in the Kiswahili language. He identified himself as David Charo Mweri. He was a holder of the national identity card bearing numbers 0508163. His date of birth was 1.1.1953. He lived at Port Reitz, within Changamwe of the County of Mombasa. He was the named 1st Defendant herein. He was there acting on behalf of the other 48 Defendants. He knew the Plaintiff as John Chege. Occasionally, he would go to greet them. He knew he was there in Court due to the land. He got into the land which was located at Lilongwe Port Reitz being Plot No. 2851 and the other were Plots Nos. 2852, 2847, 2848 and 2853. They were 5 plots.
35. The land was for one VITALAIBHAI B. PATEL. He left the country after independence. He left Mama Aduor as the Caretaker. After he left he never came back again. DW – 1 got into the land from the year 1967. He was in Primary School. His mother was cultivating the land. Hence the Caretaker allowed them to get in there to undertake temporary cultivation. DW – 1's parents constructed some semi-permanent Swahili structures on it. They lived next to the Caretaker, Lady Mama Oduor. In the year 1995/1996 or thereabout, Mama Oduor died while aged close to 100 years. The Plaintiff had never lived on the land. DW – 1 had lived there until he retired. They built houses and shops there. He had a restaurant but closed it down due to the global insurgency of COVID-19 pandemic. Even the County Government had put street lights and Cabro for them. Now the place was full of houses. There could not be any more construction to take place there anymore. It was so congested. They had lived at Lilongwe continuously and in peace without any interruption.
36. They had never been paying any rent to anyone. The person who gave them the land was Mama Oduor. She never demanded for any rent. They never bought nor had any intentions of buying the land. They received a letter indicating it was for MIRITINI. Referred to the letters from the Plaintiff's bundle, dated 22nd August 2018 and 14th June 2018 by the Plaintiff's Advocates to them respectively. The letters made references made to plots at Miritini and not Lilongwe where the Defendants were situated. They were more than 6 Kilometres away from Miritini in Jomvu and Port Reitz which were near the Moi International Airport, Mombasa.
37. He filed some documents in Court. The List of documents were filed 23rd February, 2022. They were - 2 documents and Marked for Identification "DFMFI-1, DFMFI-2 being;
- a. Copy Land Rates Receipts
 - b. Copy of Authority to Act.
- They be produced as "Defendant Exhibit 1 and 2"
38. They would be paying the Land rates. They were advised not to be paying for Absentee Landlord. There were 78 houses there. It was close to 4 acres or slightly higher in size. He would like to be granted the ownership of the property via land adverse possession. They would like to be given the Land.

J. Cross Examination of DW - 1 – Ms. Mwanzia Advocate.

39. DW – 1 had lived on the land – Plot No. 2851. He had paid for the rates 4 times. He paid in the name of VITALBHAI PATEL. Referred to Defendants Exhibit 1 & 2. These were the documents they were issued by the Municipal. The document did not indicate the plot number. They never brought the drawing and the design plans. They were advised by the late Honourable Eliud Maitha not to pay any



further ground rate from the year 2001 onwards. He was referred to the witness statement. They only paid land rate upto the year 2001.

40. The document by John were forgery. There were no computers by then. He alleged he inherited the land from Vital Bhai Patel in the year 1989. DW – 1 wondered how old was he by then. DW -1 was welcome there by Mama Oduor. There were 3 plots. He knew John came occasionally to greet the people then he would leave. He never met Vitabhai Patel. He left a long time but by then he had constructed a house for Mama Oduor. Referred to Paragraph 7 of the Amended Defence. He had disowned the same.

Paragraph 8(b) = to wit:

“Paragraph 7:- “The Defendants further states that they were both staying on the suit property together with Ngala Mbui Chupi (deceased) where they both worked as employees of the land owner one VITABHAI B. PATEL and not Ngala Mbui Chupi...” and

Paragraph 8 (b) :- “ That the alleged transfer of the property to Ngala Mbui Chupi from the initial owner was a forgery because: until 2009, the Defendant have been paying rates for the suit property and the registered name of the owner was VITABHAI B. PATEL and not NGAL MBUI CHUPI”

41. They made the payment of rate until the year 2009. It contracted what they had said upto 2001. The land which was not his. The documents for the transfer were forgery. They had lived on the land for over 30 years. They deserved to be granted the land through land adverse possession. They appointed Adam Peter as the Village Elder to be dealing /collecting rent from the licencees. Samsom Kavoi was one who bought from Adam. These were people from John. DW – 1 had never bought land elsewhere. It's his parents who were welcome there by Mama Oduor. He continued being there to date.

K. Re - Examination of DW – 1 by M/s Shihundu Advocate

42. DW – 1's land was Plot No. 2851. He paid the land rates and was issued with receipts. They stopped paying rates around the years 2001 and 2002 when they met Honourable Maitha. He advised them not to be paying any absentee rates. He said he would deal with it.

Court: -

43. The Plaintiff only comes to the land to greet people. He does not have any structures there. That was the close of the Defendants case.

VIII. Submissions

44. On 26th October, 2022, upon the closure of both the Plaintiffs and the Defendants case, the Honorable Court directed the parties to file and serve their written submissions accordingly on given specific timelines. Pursuant to that only the Plaintiff complied accordingly hence court reserved to deliver its Judgment on Notice accordingly.

A. The Written Submissions by the Plaintiff.

45. On 15th November, 2022 the Learned Counsel for the Plaintiff, through the law firm of Messrs. Stephen Oddiaga & Company Advocates filed their written submissions accordingly. M/s. Mwanzia Advocate commenced her submissions by rehashing on the background of the case through the brief facts as founded on the pleadings and the testimony testified in court. She also summarized the case by



the Defendants. In order to guide her, she framed two (2) issues to be considered by the Honorable Court. There were

46. Firstly, whether the Plaintiff had established his case to the required standard. The Learned Counsel held that the Plaintiff had proved his case to the required standards of balance of probabilities through the filed and oral evidence given by the two (2) witnesses and the exhibits produced in court she urged court to consider the holding in the case of David Sironga Ole Rukai –Versus- Francis Arap Muge & 2 Others (2014) eKLR where the court held as follows:-

“The Court, on its part is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denials of justice”.

43. To the Learned Counsel although from the filed Defence and Counter Claim claimed to be the owners of the suit land but they failed to avail any evidence to that effect. During the hearing the witnesses stated have been in occupation of the suit land for a period of 12 continuous years and hence a claim of Land Adverse Possession.

44. According to the Counsel during the cross examination they admitted for never having made specific orders of declaration that they he considered for Land Adverse Possession. Hence further relying on the case of David Sironga Ole Tukai Supra, to buttress her point as this: -

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for and that it will not determine issues which the parties have not pleaded. In an adversarial system such as ours, parties to litigations are the ones who set the agenda and subject to rules of pleadings, each party is left to formulate its own case in its own way, and it is for this purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it had pleaded without due amendment being made”

47. Further, the Learned Counsel submitted that the Defendants testified that their parents were welcomed to the suit land by one Mama Oduor. To the Learned Counsel it was new information that was only availed during the hearing and not captured anywhere in the pleadings filed by the Defendants. Thus, she urged court to disregard the evidence.

48. On the allegation that the transfer of the land to the late Ngala Mbui was done through forgery, was never proved through production of any evidence. Under Section 107 of Evidence Act. He who alleges has to prove – as per the burden of proof. To buttress her point, she cited several authorities.

“Vijay Morjaria –Versus- Nansing Madhu Singh Darbar & Others (2000) eKLR Civil Appeal No. 106 of 200 court held: -

“It’s well established that fraud must be specifically pleaded and that particular of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It also settled law that fraudulent conduct must be distinctly alleged and is distantly proved and it is not allowable to leave fraud to be inferred from the facts”



The other cases were yangate Guto alias Watson Mogere Mogotho – Versus- Mazwell Okwemwa Mogoro & National Bank of Kenya Ltd., Central Bank of Kenya Ltd. – Versus- Trust Bank Ltd. & 4 others (1991) eKLR Civil Appeal No. 215 of 1996.

He Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case”.

Hence, to her the Defendants failed to satisfy the legal requirements that fraud must be pleaded with meticulous particulars and proved strictly.

49. Secondly, the Learned Counsel raised the issue of whether the Plaintiff deserved the prayers sought and who should bear the costs of the suit. She submitted that the Plaintiff had established his case as required and hence the Defendant should be evicted from the land for being trespassers. He further prayed for mesne profits under Section 2 of the *Civil Procedure Act*, Cap.21 of a sum of Kenya Shillings One Thousand (Kshs. 1,000/=) per month from each Defendant since the filing of this suit until Judgment was delivered in addition to costs

To buttress on these points, she relied on the decision of “Bata Engineering Co. Ltd and Another –Versus- Joseph Mbithi Njau & 4 Others (2017) eKLR, Mombasa Technical and Training Institute –versus Agnes Nyeru Charo & others Mombasa Civil Appeal No. 282 of 2020 Park Towers Ltd. – Versus John Muthama Njika & 7 Others (2014) eKLR & Ajit Bhogal –Versus- Kenya Power & Lighting Co. Ltd. (2020) eKLR

Where trespass was proved a party needed not prove that he/she had suffered any specific damage or loss to be awarded damages. The Plaintiff prayed for the suit to be allowed as prayed.

B. The Written Submissions by the Defendants

50. On 13th December, 2022, the Learned Counsel for the Defendant from the Law firm of Khatib & Company Advocates filed their written Submissions. M/s. Omondi Advocates commenced her submission by stating that she was submitting on behalf of the Defendants herein. It was in respect of the Plaint dated 1st November 2019 and in the respect of the Defendant's Counter Claim dated 31st March 2020 wherein both the Plaintiff and Defendants were both claiming ownership of the suit property known as Plot NO. 2847/VI/MN, 2848/VI/MN, 2851/VI/MN, 2852/VI/MN and 2853/VI/MN.

51. In Particular, the Plaintiff pleaded ownership by virtue of being registered owner of the suit property which he claimed he inherited from Ngala Mbui Chuphi's Estate – the deceased. He further pleaded that, the Defendants were licensees who had refused to pay rent for the premises, while the Defendants denied being Licensees and instead claimed ownership of the land through adverse possession.

52. From these facts, the Learned Counsel raised the following two (2) issues.

Firstly, whether the Plaintiff had proved a case for grant of the prayers sought. She noted that the Plaintiff testified as PW - 1 and William Beja Shede testified as PW - 2. In general, the Plaintiff's case was that he was the duly appointed Legal Administrator of the Estate of the late Ngala Mbui Chuphi who was his father and had since obtained Grant Letters of administration and the suit property was inherited therein. He added that, the Defendants were tenants on the suit premises and were paying rent of a sum of Kenya Shillings Two Hundred (Kshs.200/=) per month to the deceased. That after the death of the deceased, the Defendants refused to pay the rent and had now fallen into arrears hence the suit. He added that, he had even offered to sell the suit property to the Defendants' respective



portions at a price of a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) which the Defendants' declined. The Plaintiff relied on the list of documents which were produced as exhibits in their order.

53. During cross examination, the Plaintiff witnesses could not explain how the property changed hands from the original owner Vithalbai B Patel to the deceased. The Defendants testified through one witness David Charo Mweni – DW – 1. He testified that the Plaintiff had never inherited from deceased and any document purported to be a grant were a forgery. DW - 1 added that they had been living on the suit land together with the late with the deceased whereby both were squatters and at no time they ever paid any rent to the deceased because he was their fellow squatter. They denied any negotiations engaged by the Plaintiff in respect of selling the suit property to him. DW - 1 concluded that the suit property was not a property of the deceased. Therefore, the same could not be inherited in the succession of the estate of Ngala Mbui Chuphi.
54. The Plaintiff pleaded that the Defendants were tenants. However, on cross examination he could not produce a single document to show that the Defendants were tenants. Even though he alleged that the Defendants had been paying rent of a sum of Kenya Shillings two Hundred (Kshs. 200/=) per month, he did not produce any record or receipts to prove the same. The Plaintiff prayed inter alia mesne profit of a sum of Kenya Shillings One Thousand (Kshs. 1,000/=) per month from the date of filing the case until Judgment date.
55. To buttress her point, the Learned Counsel cited the provision of Section 2 of the Civil Procedure Act, Cap. 21 which defined “Mesne Profit” as follows:-

“The profit which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profit but does not include profit due to improvements made by the person in wrongful possession”.

56. Further, in support of her case, the Learned Counsel referred Court to the case of:- “Ajit Bhogaz – Versus – KPLC (2020) eKLR Court held as follows:-

“The Court is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case in this case, the Plaintiff has stated that, he has been unable to develop and or commercialize the property owing to the actions of the Defendant”.

The Plaintiff in his submission claim an award of a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000,000/=) for compensation calculated at rate of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) per year. This amounts to

special damages which the Plaintiff neither pleaded nor proved. This Court can therefore in the circumstance grant nominal damages as provided by the Law.

She submitted that there was no evidence that the Plaintiff was obstructed from generating income or commercializing the suit property in whatever manner. Infact PW - 2 during cross examination confirmed that the Plaintiff was not living on the suit premises. Further, there had never been any attempt to construct which the Defendants obstructed. The Plaintiff had not proved any damages to be compensated as mesne profit.

In conclusion, the Learned Counsel averred that the Plaintiff's case was unmerited and the same should be dismissed with costs.



Secondly, was on whether the Defendants had proved a case for adverse possession of the suit property. The Defendants' Counter Claim was for land adverse possession of the suit property as they claim that they had stayed on the suit property for more than twelve (12) years without any interruption enjoying quiet possession and have developed the same. To support their case, the Learned Counsel cited the case of: "Maweu – Versus - Liu Ranching & Farming Co - operative Society (1985) eKLR_ as quoted in Gachana Gacheru – Versus - Mama Kabuchwa (2016) eKLR where the Court held as follows:-

"Adverse possession is a fact to be seen, observed upon the land. It is not to be seen on the title. A claim for adverse possession is attached to the land and not to the title. It matters not that the land is owned by either person"

57. The Learned Counsel reiterated that on 17th May 2022, when the Plaintiff prosecuted his case testified that the Defendants were licensees on the suit land who ought to be paying rent but had since refused to pay rent. He added that the Defendants were in occupation of the land but had no any interest or proprietary rights over the land.
58. During cross examination by Defendant's Advocate, the PW - 1 stated that, he had inherited the land from Ngala Chuphi whom he alleged that, he was the initial owner of the suit property. However, he could not explain how the suit property changed hands from the initial owner Vithalbhair B. Patel to Ngala Mbui Chuphi and could not produce any documents to that effect. He maintained that, he procedurally inherited the suit property from his ancestor, Ngala Mbui Chuphi. PW - 2 William Beja Shede testified that the Plaintiff was the Legal administrator of the Estate of Ngala Mbui Chuphi who was the registered owner of the suit property. He added that, the Defendant was tenants to the suit property whereby they used to pay monthly rent to the late Ngala Chuphi and upon demise of the late Ngala Chuphi, the Defendant had refused to pay rent hence the suit.
60. On cross examination by Defence Counsel, the PW - 2 could not shed any light on how the property changed hands from the late Vithalbhair B. Patel to Ngala Mbui Chuphi (deceased). On 26th October 2022, the Defendants prosecuted their case. They called one witness to testify on their behalf. David Charo Mweri, the 1st Defendant testified on behalf of the Defendants as DW - 1. He adopted his statement dated 7th July 2022 and the list of documents dated 14th February 2022. He testified that:-
 - a. The Plaintiff was not a lawful administrator of the Estate of Ngala Mbui Chuphi and succession documents relied on was forgeries.
 - b. The suit properties did not belong to the Estate of Ngala Mbui Chuphi and therefore, the same could not be inherited.
 - c. The suit properties were properties of Vithalbhair B. Patel who was an Indian.
 - d. The transfer document was typed dated year 1976 and in the year 1976 there were no computers which could be used for typing in Mombasa.
 - e. The Vithalbhair B. Patel the owner of the suit property left the Country more than 50 years ago. Upon his absence, the Defendant took possession of the suit property adversely and had developed the developed the same and had stayed there without any interruption for more than twelve (12) years.
 - f. The Defendants had acquired prescriptive rights over the suit property against the registered owner.
61. In a claim for adverse possession, the Claimant must prove the following,



- a) non permissive, notorious and exclusive use of the property.
 - b) without interruption
 - c) twelve (12) years have elapsed since the land was occupied by the Defendant.
62. The Learned Counsel further cited the case of “Mombasa Teachers Co - operative Saving – Versus - Robert Muhambi Katana & 15 Others [2018] eKLR. According to the Counsel, from the evidence tendered in this Court, it was clear that the Defendants had been on the suit land for more than 12 years enjoying quiet possession. This was after the owner Vithalbhai B. Patel had left the Country leaving them in occupation. The Plaintiff testified that the Defendants were licensees on the land. However, he could not produce any evidence towards the licensee he was alleging. Adding that he could not explain how the property changed hands from the owner Vithalbhai B. Patel to Ngala Mbui Chuphi. Defendant testified that they have been carrying on agricultural activities on the land and the Plaintiff had never been on the suit property.
63. The only defence to the Defendant’s Counter Claim, was where the Plaintiff alleged that he had since inherited the suit property and therefore, the same was not available for an action of adverse possession. Whether or not the Counter Claim succeeded now rested entirely on the issue of twelve (12) years time limitation had elapsed. She submitted above that a claim of adverse possession was attached to the land and not title to the land. See the case of Maweu – Versus - Liu Ranching & Farming Co - operative Society (Supra).
64. Resultantly, the Defendants had proved “nec vi, nec clam, nec precario, the Latin maxim for adverse possession. They had therefore acquired prescriptive rights against that land and it matters not whether the Plaintiff inherited the land or not.

In conclusion, the Learned Counsel contention was that the Plaintiff’s case was unmerited and the same should fail. On the other hand the Defendants had proved adverse possession of the suit property. She heavily relied on the principles enshrined in the case of Maweu – Versus - Liu Ranching & Farming Co - operative Society (Supra) to wit that:-

“A claim for adverse possession is attached to land and not to title. It matters not whether title changed hands or not”.

She submitted that the Defendants’ claim was merited and the same should be allowed as prayed. They annexed hereto the authorities referred herein for ease of reference.

IX. Analysis and Determination

65. I have carefully assessed the filed pleadings herein by the Plaintiffs and the Defendants, the adduced evidence by the summoned witnesses, the written submissions and the cited authorities, the relevant and appropriate provision of *the Constitution* of Kenya, 2010 and the statutes.
66. For the Honourable Court to reach an informed, Just, fair, equitable and reasonable decision, it has crafted three (3) salient issues revolving around the subject matter herein for its determination. These are:-
- a. Whether the Plaintiff and the Defendants have proved their cases from the filed Plaint dated 1st November, 2019, the Amended Defence and the Counter Claim dated 31st March, 2020.
 - b. Whether the Parties are entitled to the reliefs sought from the filed Plaint, Amended Defence and Counter Claim.



- c. Who will bear the costs?

ISSUE No. a). Whether the Plaintiff and the Defendants have proved their cases from the filed Plaintiff dated 1st November, 2019, the Amended Defence and the Counter Claim dated 31st March, 2020.

Brief facts

67. Before embarking on the issues for analysis herein, the Honourable Court feels it imperative to extrapolate on the brief facts of the case. From the filed pleadings and the evidence adduced herein by the various witnesses summoned by the Plaintiff and the Defendant herein, at all material times to this case the Plaintiff was the duly appointed Legal Administrator of the estate of the late Ngala Mbui Chuphi who was his grandfather. The deceased was gifted the land by his former employer – Mr. VitalBhai B. Patel who left the Country and never came back a while ago. His grandfather had been the registered owner and/or owner of the suit land. Hence, prior to filing of this case, he applied and obtained the Grant Letters of Administration dated 10th October, 2013 in the estate of the deceased and subsequently the Certificate of Confirmation of Grant dated 4th May, 2018. He would be paying the land rates in his names and other times in the names of VitalBhai B. Patel. He averred that the Defendants had at all times to this suit had been ground tenants of the late Ngala Mbui Chuphi paying a monthly rent for a sum of Kenya Shillings Two Hundred (Kshs. 200/=) per month. They were paying the said ground rent. He stated that the Defendants had turned to activism so that the Plaintiff give them the land herein by force. However, he negotiated with them to buy portions of it were their houses stood and he expected they would start payments of the agreed negotiated and agreed purchase price, but the Defendants reneged on the agreement and insisted on remaining in occupation for free. He held that the Defendants had all along been reminded to honour their agreement pay deposit of the purchase price which was by the year 2005 agreed at a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) per plot but they had totally refused insisting on taking the land belonging to the Plaintiff for free.
68. He asserted that he was still desirous of selling the land to the Defendants but they had proved to be so uncooperative and unwilling such that the parties were not to agree and the Defendants had become stubborn and unreasonable and the Plaintiff believed that the only way to address the issue was by filing this suit against Defendants and seeking for orders of their eviction. He held that the Defendants had no right whatsoever to be on the suit land and not prayed that this court should order their removal and hand the Plaintiff vacant possession. Their continued occupation of the land affected his right to ownership to the suit land.
69. Their occupation of the suit land for free, it was making the Plaintiff lose financially to the tune of equivalent to a sum of Kenya Shilling One Hundred Million (Kshs. 100,000,000/=) which was a convertible estimated value of the land and hence called for the courts intervention. The Plaintiff prayed for the following prayers for judgment to be entered against the Defendants jointly and severally for; -
- e. An order for vacant possession from Plot Nos. 2847/IV/MN, 2848/VI/MN, 2851/VI/MN and 2853/VI/MN.
 - f. An order for eviction from Plot Nos. 2847/IV/MN, 2848/VI/MN, 2851/VI/MN and 2853/VI/MN.
 - g. An order for “Mense Profits” Projects of Kenya Shillings 1,000/= from each Defendant per month from the date of filing this suit in court to the date of Judgment.



- h. Costs and Interest of this suit.
70. On the other hand, the Defendants filed an Amended Defence and Counter Claim whereby they denied all the allegations contained in the Plaint. They refuted that the Plaintiff was the duly appointed Legal Administratrix of the estate of the Ngala Mbui Chuphi and held that all the documents that were used for obtaining grant were forgeries. They further stated the suit land did not belong to the late Ngala Chuphi and hence could not be passed to the Plaintiff because a person could not pass title which he did not have.
71. They denied ever being the tenants on the suit land and at no time had they ever negotiated and/or requested to purchase the suit property from the Plaintiff as he was not a lawful owner. They held that they were both staying on the suit property together with the Ngala Mbui Chuphi (deceased) where they both worked as employees of the land owner one Vital Bhai B. Patel and not Ngala Mbui Chuphi.
72. The Defendants held that the alleged transfer of the suit property to Ngala Mbui Chuphi from the initial owner was a forgery for the following reasons:-
- d. The documents called the transfer was typed documents yet there was no computer at that time in the year 1976.
- e. Until the year 2009, the Defendants had been paying rates for the suit property and the registered name of the owner was Vital Bhai B. Patel and not Ngala Mbui Nchupi.
- f. There was no transfer documents in respect of the suit property from the names of the initial owner to that of Ngala Mbui Chuphi (Deceased).

Hence they added the plaintiff never had good title that was passed to him.

Counter Claim

73. The Defendants as the Plaintiffs in the Counter Claim sought for the following claims from the Plaintiff in the main suit but now a Defendant for purposes of the Counter Claim. There were: -
- a. They were the lawful owners to the suit land/properties.
- b. They took possession upon the departure of the original owner of the suit properties one Vital Bhai B. Patel sometimes in the year 1960.
- c. They had acquired right over the suit property by way of Land Adverse Possession having stayed on the suit properties for more than 12 years without any interruptions.
- d. Since they were in occupation of the suit land whose owner had relocated to Europe and therefore they ought to be registered as the legal owner under the Government Settlement Scheme.
74. For all these they sought for the following reliefs:-
- i. A declaration that the Defendants were the lawful owners of the properties known as Plots No. 2847/IV/MN, 2848/VI/MN, 2849/VI/MN, 2851/VI/MN, 2852/VI/MN and 2853/VI/MN.
- j. A permanent injunction restraining the Plaintiff himself, agents, servants or employees from entering, selling, leasing, mortgaging or evicting the Defendants from the suit premises.
- k. An order directing the Registrar of Land to register the suit properties in the names of the Defendants.



I. Cost of the suit.

That is adequate on the facts of the case.

75. Now turning to the issues under this Sub – heading. Based on the surrounding facts and the inference of the case, the main substratum of the matter is on the legal ownership of the suit land between the Plaintiff and the Defendants herein. To begin with, I wish to take judicial notice that Land is such an emotive issue in Kenya. It is a commodity that people depend on largely for livelihood. The provision of Articles 61, 62 and 64 of *the Constitution* of Kenya, 2010 classifies land into three broad categories – Public, Private and Community land. The mode upon which one may legally acquire land in Kenya are provided for under the provision of Section 7 of the *Land Act*, No. 6 of 2012. It provides as such:

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

- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;
- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or
- ix. Any other manner prescribed in the Act of Parliament.

76. From the instant case the Plaintiff was the duly appointed Legal Administratrix of the estate of the late Ngala Mbui Chuphi who had been the registered owner and/or owner of the suit land from the initial owner Vitabhai Patel who left the County many years earlier. The deceased was gifted the suit properties having been an employee of VitalBhai B. Patel. He claims to have brought this suit pursuant to obtaining the Grant Letters of Administration dated 10th October, 2013 for the estate of the deceased and subsequently Certificate of Confirmation of Grant dated 4th May, 2018. He averred that the Defendants had at all times to this suit had been ground tenants of the late Ngala Mbui Chuphi paying a monthly rent for a sum of Kenya Shillings Two Hundred (Kshs. 200/=) per month. They were paying the said ground rent. He stated that the Defendants had turned to activism so that the Plaintiff give them the land herein by force. However, he negotiated with them to buy portions of it were their houses stood and he expected they would start payments of the agreed negotiated and agreed purchase price, but the Defendants reneged on the agreement and insisted on remaining in occupation for free. He held that the Defendants had all along been reminded to honour their agreement pay deposit of the purchase price which was by the year 2005 agreed at a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) per plot but they had totally refused insisting on taking the land belonging to the Plaintiff for free. They denied ever being the tenants on the suit land and at no time had they ever negotiated and/or requested to purchase the suit property from the Plaintiff as he was not a lawful owner. They held that they were both staying on the suit property together with the Ngala Mbui Chuphi (deceased) where they both worked as employees of the land owner one Vital Bhai B. Patel and not Ngala Mbui Chuphi.



77. However, the Defendants denied the alleged transfer of the suit property to Ngala Mbui Chuphi from the initial owner was a forgery. The claimed that until the year 2009, the Defendants had been paying rates for the suit property and the registered name of the owner was Vital Bhai B. Patel and not Ngala Mbui Nchupi. They stated that there was no transfer documents in respect of the suit property from the names of the initial owner to that of Ngala Mbui Chuphi (Deceased). Hence they added the Plaintiff never had good title that was passed to him. To them they were the lawful owners to the suit land/properties having taken possession upon the departure of the original owner of the suit properties one Vital Bhai B. Patel sometimes in the year 1960. They added that they acquired right over the suit property by way of Land Adverse Possession having stayed on the suit properties for more than 12 years without any interruptions the owner having relocated to Europe and therefore they ought to be registered as the legal owner under the Government Settlement Scheme.

78. To proof ownership of land in Kenya, there ought to be registration of land. The efficacy and effect of registration is founded in the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. They provided as The effect of the registration of Land is founded in the provisions of Section 24 of The *Land Registration Act* which provides as follows:-

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

79. To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title is deemed to be the “prima facie” evidence of the stated registration. The Certificate of Title held by the land owner is protected under the provisions of Law- Sections 25 (1) and 26 (1) of the said Act provides as follows:-

“The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever.....”

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

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

Nonetheless, the main bone of contestation in this suit are two (2) fold, namely:-

- a). the documents held by the Plaintiff and the transfer forms to Nguli Mbui Chuphi were acquired through forgery.
- b). the Defendants acquired title through land adverse possession as the Defendant’s title had been extinguished by the operation of law. The Court will deal on this matter indepth later on.



80. In order for this Honorable Court to effectively deal with the afore stated two (2) issues, I cannot agree more with the Learned Counsel for the Plaintiff onto their submission that this allegation was never proved as required by law under Section 107 of the Evidence Act, cap. 80 (See the case of “Central Bank of Kenya – Versus – Trusts Bank Limited & 4 Others (1991) eKLR Civil Appeal No. 215 of 1996”) Further to this, I wish to cite the provisions of Section 26 (1) of the Land Registration Act Verbatim:-

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

81. In the case of “Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title is doubtful, suspect or obtained by fraud or forgery unprocedurally, illegally or corrupt means or by mistake or omission as envisaged under the above provision of Section 26 (1) of Land Registration Act, the provisions of Section 80 (1) & (2) of Land Registration Act for the cancellation and rectification of the title comes to play and which the Plaintiff in the instant case ought to have done. I wish to refer to the case of “Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others” ELC (Kjd) No. 204 of 2017.”

82. For these reasons, therefore, the claim by the Plaintiff must fail. Being issued with a Certificate of Title which is a sanctity to land it bestows on the person indefeasible rights, interest and title to the said land. This particular rights may only be challenged on grounds of having been acquired through fraud, mistake or omission. In the given circumstances, the Honourable Court once satisfied, it may proceed to invoke the provision of Section 80 (1) and (2) of the land Registration for the cancellation and/ or revocation of the said title deed.

83. On the second limb, the Honourable Court has noted that the Defendants have made an attempt in passing to claim the suit land under the Doctrine of Land Adverse possession. The Legal principles that governed the Doctrine of Land Adverse Possession is found under the Provisions of Section 7, 13, and 38 of the Limitation of Action Act Cap 22 Section 7 provides On the claim of land adverse possession. With the background of the matter, the Honourable Court feels it significant to expend a little more time deliberating on the concept of Land Adverse possession. The Doctrine of Land Adverse Possession is



anchored on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap. 22. Section 7 provides that:-

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

The provision of Section 13 on the other hand provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land 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 purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

Finally the provision of Section 38 states:-

38.

- (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

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

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. I take notice that this was exactly what the 1st and 2nd Plaintiffs herein did in the instant suit. 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.

85. 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.

86. 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. 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.

87. 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 the case of: “Kimani Ruchine – Versus - Swift Rutherford & Co.Ltd (1980) KLR it was stated on this point that:-

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

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

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

88. In a summary for the Doctrine of land Adverse possession to be applicable the following ingredients have to be fulfilled. These are:-
- a. The Applicant must prove that he had occupied or owned the land openly that was without secrecy, without force and without permission of the land owner with intention to have the land (of right: nec vi, nec clam, nec precario).
 - b. The party claiming ownership ought to have occupation of the land exclusively, continuously and uninterruptedly for a minimum of 12 anticipated years.
 - c. The occupation of the property must be non - permissive and non - consensual. Occupation must be open and notorious.

ISSUE No. b). Whether the Parties are entitled to the reliefs sought from the filed Plaintiff and Counter Claim.

89. Under this Sub – heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the very onset, it is instructive to note that none of the parties here bear any documentation on the ownership of the land in form of the conventional Certificate of Title deed or Lease nor Letter of Allotment for that matter. Nonetheless, the Plaintiff were able to produce a Grant Letters of Administration for the Estate of the late Ngala Mbui Chupi dated 10th October, 2013 and later on the Certificate of Confirmation of Grant issued on 4th August, 2018 in HCCC (Mombasa) Succession Cause Numbers 414 of 2012. From these vital and legal documents, all the five (5) plots which are a subject matter of this suit are referred to. Ideally, in accordance with the provision of Section 7 of the Land Act No. 6 of 2012 and Sections 55, 56, 57 and 61 (2) of the Land Registration Act, No. 3 the only remaining stage towards acquisition of the Certificate of title deed to the suit land is making the appropriate application for registration through transmission by filing the prescribed forms LRA



42 and 43 by the duly appointed Legal Representatives of the deceased estate under the provision of Section 82 of the Law of Succession, Cap. 160. Section 57 (1) and (2) of the Land Registration Act holds:

“ A transfer by a personal representative to a beneficiary under Section 61 (2) of the Act shall be in Form LRA 42 set out in the Sixth Schedule.

(2) A transfer under Paragraph (1) shall be supported by:-

- a). A copy of the Grant of Letters of Administration or the grant of probate certified by Court;
- b). A copy of the Certificate of Confirmation of Grant of Letters of Administration or a Grant certified by Court;
- c). The Certificate of title or Certificate of lease of the parcel.
- d). Where applicable a Certificate of land rent Clearance Certificate.
- e). A Land rates clearance Certificate.
- f). Where applicable a Consent of the head lessor.
- g). Any other consent required for the registration unless a particular consent has been endorsed on the instrument of transfer; and
- h). Any other document as may be required under the Act.

90. From the filed pleadings and during the hearing, the Grant Letters of Administration nor the Certificate of Confirmation were never challenged by the Defendants. Ideally, the Plaintiff are only awaiting to be issued with Certificate of Title under Transmission. Further, it is evident that the Plaintiff had been making payment of rates to the Municipal council. In view of these, therefore, it is my view that the Plaintiff are entitled to the ownership of the suit land in accordance with the provisions of the law.

91. On the contrary, it is noted that the Defendants never claimed for title under the land Adverse possession by instituting a suit or even the filed Counter Claim under the Provisions of Order 37 of the Civil Procedure Rules, 2010. They have failed to demonstrate that they deserve being considered for the land under the provisions of Sections 7, 13 and 38 of the Limitation of Action Act Cap. 22. Besides they were instructive to testify that they acquired the land from the permission of one Mrs. Oduor who was once a Caretaker of Mr. Vital Patel. Certainly, Mrs. Oduor was not the owner. She never testified nor any of her representative from her estate. They claimed to have lived on the suit land for many years. Despite of them being over 70 people on the suit land but only one testified – DW – 1. I noted that he had no authority from them under Order 1 Rule 12 of the Civil Procedure Rules, 2010. The Court would easily conclude that DW – 1 had no “locus standi” to be representing the Defendants herein but I have accorded him the benefit of doubt as it was an issue that the Plaintiff also opted to avoid for their own good reasons whatsoever.

92. Their admission that the Plaintiff would be occasionally be visiting them to greet them was quite telling. To worsen the matter, it was their evidence they stopped paying rates on advise from a politician – Hon. Maitha that he would deal with the issue. To be this was very wrong and a nullity. In the case of “Macfoy – Versus – United Africa Company Limited (1961) 3 ALL, ER 1169, Lord Denning stated:-

“ If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado,



though it is sometimes convenient to have the Court declare it is to be so” while Arch Bishop Fullton Sheen on the same point stated “Moral principles do not depend on a majority vote. Wrong is wrong, even if everybody is wrong. Right is right. Even if nobody is right”. It is impossible to imagine how the Defendants would fall into such a misleading advise and then expect the Court to rescue them. Far from it.

93. Critically speaking, and in further support of the assertion made above, the averments made out under the contents of Paragraph 7 and 8 (b) of the Amended Defence acted against the Defendants being statements of admission and corroboration to the facts adduced by the Plaintiff. They stated and are reproduced herein verbatim:-“Paragraph 7 – The Defendant further states that they were both staying on the suit property together with Ngala Mbui Chupi (deceased) where they both worked as employees of the land owner one VITALBHAI B. PATEL and not NGALA MBUI CHUPI.“Paragraph 8 (b) – Until 2009, the Defendants have been paying rates for the suit property and the registered names of the was VITALBHAI B. PATEL and not MGALA MBUI CHUPI”

The provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010 hold that parties are bound by their own pleadings, I need not say no more.

94. Be that as it may, assuming that the Defendants have been in occupation of the suit land and even settled there by construction of permanent and semi permanent structures there for residents and business, in the interest of Justice, Equity and Conscience, it would be a plausible thing to consider having the Defendants properly acquire these parcels of land from the Plaintiff on a first priority. Indeed, I have noted through the letters by the Plaintiffs Advocates dated 14th June, 2018 and 22nd August, 2018 address to the Defendants making an offer for the sale of the land has already been made. They ought to have embraced this golden opportunity but failure to which they should be evicted from the land legally.

ISSUE No. c). Who will bear the costs?

95. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By the event it means the result or outcome of the legal action or proceedings thereof. See the Supreme Court Case of “Jasbir Rai Singh – Versus Tarchalans Rai Singh, (2014) eKLR and RoseMary Wambui Munene – Versus – Ihururu Dairy Societies Limited (2014) eKLR”
96. In the instant case, the Plaintiff has been successful is establishing their case and hence are entitled to costs of the suit.

IV. Conclusion and Findings

87. In conclusion based on the framed issues herein and having caused in depth analysis to them, the Honorable Court is fully satisfied that the Plaintiff has been able to proof its case on the required standards of preponderance of probabilities. For avoidance of doubt, I proceed to make the following specific orders: -
- a. That Judgment be and is hereby entered in favour of the Plaintiff with costs in entirety.
 - b. That there be an order for the vacant possession from Plot No. 2847/VI/MN, 2848/VI/MN, 2852/VI/MN, 2851/VI/MN, 2853/VI/MN.
 - c. That the Amended Defence and Counter Claim dated 31st March, 2020 and filed on 25th March, 2021 by Defendants as the Plaintiffs thereof be and is hereby dismissed for lack of merit.



- d. That there be an order for peaceful and lawful eviction from Plot No. 2847/VI/MN, 2848/VI/MN, 2852/VI/MN, 2851/VI/MN, 2853/VI/MN of the Defendants pursuant to the provisions of Section 152E of the Land Act No. 6 of 2012 within ninety (90) days from the date of the delivery of this Judgement.
- e. That in the alternative to order (b) above, the Defendants embrace the offer to purchase the portion of land where they are occupying as already proposed to them vide the letters by the Plaintiff's Advocates dated 14th June, 2018 and 22nd August, 2018 by entering into a sale agreement terms and condition stipulated thereof as per the Laws of Contract Cap 23 and the Land Registration Act No. 3 of 2012 and Section 38 of the Land Act No. 6 of 2012 within the next (90) days from the date of the delivery of this judgment.
- f. That there be an order for mesne profits of Kenya Shillings One Thousand (Kshs. 1,000/=) from each Defendant per month from the date of filing this suit in court to the date of delivery of this Judgment.
- g. That the costs to be awarded to the Plaintiff.

It is so ordered accordingly.

SIGNED AND DATED AT MOMBASA THIS 31stDAY OF October 2023.

**AMENDED JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS,
SIGNED AND DATED AT MOMBASA THIS 11TH DAY OF ..APRIL, ..2024.**

HON. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:

- a. M/s. Kalekye, the Court Assistant.
- b. No appearance for the Plaintiff.
- c. No appearance for the Defendants.

