



**Baya v Ahmed (Environment & Land Case E007 of 2023)
[2024] KEELC 6999 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E007 OF 2023
LL NAIKUNI, J
OCTOBER 16, 2024
IN THE MATTER OF: LAND REGISTRATION ACT 2012
AND
IN THE MATTER OF: SECTIONS 7, 17 AND 38 OF
THE LIMITATIONS OF ACTIONS ACT CAP. 22
LAWS OF KENYA
AND
IN THE MATTER OF: AN APPLICATION FOR
ACQUISITION OF TITLE BY ADVERSE POSSESSION OF THE
PARCEL OF LAND KNOWN AS CR 27666**

BETWEEN

REHEMA KAZUNGU BAYA PLAINTIFF

AND

KHALID OMAR AHMED DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains the suit that was instituted by the Plaintiff/Applicant herein against the Defendant/Respondent by way of Originating Summons on the 21st August, 2023. The suit was premised under the provision of Article 159 of *the Constitution* of Kenya, 2010, Section 38 of the Limitations of Actions Act, Cap. 22; Order 37 of the Civil Procedure Rules, 2010, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Cap. 21 Laws of Kenya and all enabling Provisions of the law.



2. Despite of filing and proper service of the Originating Summons, the Defendant/Respondent never filed any responses. On 13th February, 2024, after confirming that service had been effected by all means including but not limited to substituted means service supported by a six (6) Paragraphed Affidavit of Service sworn by Ruth Otieno, an Advocate of High Court dated 7th February, 2024 and an attached advertisement notices published in both English and Kiswahili languages in two local newspapers with a wide national circulation and readership within the Coastal region as dictated under the provision of Order 5 Rule 17 of the Rules.
3. Following the provision of Order 37 Rules, 11, 13 and 16 of the Rules, directions of the Originating summons were taken thereof. Taking that the Plaintiff/Applicant had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the matter for formal proof hearing under the provision of Order 10 Rules, 4, 5, 6 and 7 of the Rules on 24th June, 2024. The Plaintiffs called PW - 1 on the same day closing her case thereafter.

II. The Plaintiff/Applicant case

4. The Plaintiff/Applicant sought to be declared owners by way of Land adverse possession for the determination of the following questions:-
 - a. A declaration be issued that the Applicant has been in adverse possession of the whole of parcel of land parcel number CR 27666 for a period of 12 years
 - b. A declaration be issued that the Applicant has acquired title to 0.3092 Ha comprised in the land title number CR 27666.
 - c. An order be issued that the Respondent holds the title to land parcel number CR 27666 in trust of the Applicant.
 - d. An order that land parcel number CR 27666 be transferred to the Applicant /Plaintiff and the Applicant/Plaintiff be registered as the owner of the land parcel number CR 27666.
 - e. An order that the Respondent do execute all transfer documents in favour of the Applicant and in event of default the Deputy Registrar of the Court do execute the same documents for transfer
 - f. That the costs of this application be provided for
5. The suit was based on the following grounds on the face of it:-
 - a. The Applicant had been in constant exclusive occupation, use, possession of the parcel of land CR. 27666 since 2005 and to date there have been no interruption of the occupation for a period of over 12 years, she has acquired the said parcel of land by adverse possession by operation.
 - b. The applicant had lived on the parcel of land CR. 27666 together with her family since 2005.
 - c. The Respondent was registered as the proprietor of said land through misrepresentation, fraud and or deceit.
 - d. The Respondent hold title in trust in favour of the Applicant/Plaintiff by operation of the law.
 - e. Despite registration of the suit parcel of land in the name of the Respondent, the Applicant herein has continued to stay on the said parcel of land uninterrupted, undisturbed and peacefully without any interference for over 12 years from July 2005



- f. The Applicant had been exercising all the rights of ownership over the said portion of land parcel number CR27666 without any interference from the Respondent and that he has built permanent structures which has taken more than 12 years.
 - g. In the premise the Respondent's Proprietary interests in the land parcel number CR 27666 have been extinguished by operation of the law and that he is now holding the same in trust of the Applicant.
 - h. It would be just and equitable if a portion of land parcel number CR 27666 should now be registered in the name of the Applicant by virtue of his continuous, peaceful, exclusive and uninterrupted occupation of the same for a period totaling to more than 12 years and or cumulative.
 - i. It was in the interest of the overriding objectives to grant the orders sought.
6. The Originating summons was based on the grounds on the face of it, testimonial facts and averments made out under the 15 Paragraphed Supporting Affidavit of Rehema Kazungu Baya together with two (2) annexures marked as "RKB – 1 & 2" annexed thereto, She averred that:-
- a. On or about November 2005 she entered in the land parcel number CR 27666 without the consent and or the permission of the registered owner who was the Respondent herein and she had been residing in the said parcel of land together with her family (Annexed in the affidavit and marked as "RKB – 1" was a copy of the Chief's letter to confirm the same).
 - b. Immediately he took possession of the said parcel of land he built a permanent structures which consists of her home where she lived with her family.
 - c. The Respondent herein was the current registered owner of the suit property of land herein (Annexed in the affidavit and marked as "RKB – 2" was a copy of Search).
 - d. Despite registration of the suit parcel of land in the name of the Respondent, she had continued to stay on the said parcel of land uninterrupted, undisturbed and peacefully without any interference for over 12 years from November 2005.
 - e. She had been exercising all the rights of ownership over the said land parcel number CR 27666 without any interference from the Respondent and that she had built permanent structures which has taken more than 12 years.(Annexed in the affidavit and marked as "RKB – 2" were copies of the Photographs showing the said structures).
 - f. In the premises the Respondent's Proprietary interests in the land parcel number CR 27666 have been extinguished by operation of the law and that he was now holding the same in her trust.
 - g. It would be just and equitable if the land parcel number CR 27666 should now be registered in her name by virtue of her continuous, peaceful, exclusive and uninterrupted occupation of the same for a period totaling to more than 12 years and or cumulative.
 - h. It was in the interest of the overriding objectives to grant the orders sought.
7. The Plaintiff/ Applicant called PW - 1 on 24th June, 2024 testified as follows:-
- A. Examination in Chief of PW - 1 by M/s. Otieno Advocate
8. PW - 1 testified under oath. She identified herself as Rehema Kazungu Baya and a citizen of Kenya holding a national identity card bearing all the particulars stated out there. She told the Court that she



lived at Kenol Nyali and was a business lady selling food. She recorded a witness statement dated 18th June, 2024 and list of documents dated the same. She was the one on the suit land and she had taken the whole land where she carried out all her activities. When her husband died she moved to the suit land where her husband was the caretaker. She used to see Mr. Khalid Omar Ahamed who was the registered owner of the land.

9. PW - 1 told the court that she got onto the land in the year 2005 upto date. They produced the list of documents consisting of four (4) documents:-
 - a. A copy of the Chief's letter dated 7th July, 2023
 - b. A copy of the Chief's letter dated 18th June, 2024.
 - c. A copy of the Survey Report dated 3rd June, 2024
 - d. A copy of search dated 3rd November, 2023 as at 1st November, 2023.
10. The witness stated that they expunged the Grounds report on file as it was erroneously filed.
11. PW - 1 told the court that she wished to be given the title of the land. She went to the land after the death of her husband. She was not given the permission of the land owner. She last saw the owner of the land in the year 2019. She lived there and carried out cultivation of maize, beans and poultry. She had lived there continuously and uninterruptedly from the year 2005 with her family. She urged Court to grant them the reliefs sought from the filed pleadings. These facts were confirmed by the location chief through the two letters dated 7th July, 2023 and 18th June, 2024.
12. The Counsel for the Plaintiff/Applicant M/s Otieno marked the close of their case on 24th June, 2024.

III. Submissions

13. On 24th June, 2024, immediately after the closure of the Plaintiff/Applicant's case, the Honorable Court directed the parties to canvass the originating summons through written submissions. Thereafter, on the 29th July, 2024 the Applicants having fully complied and the Honorable Court reserved a date for delivery of Judgement on 17th September, 2024 accordingly.

A. The Written Submissions by the Plaintiff

14. The Plaintiff through the Law firm of Messrs. Otieno & Achieng' Company Advocates filed their written submissions dated 4th July, 2024. M/s. Otieno Advocate commenced her submission by stating that the Plaintiff filed this suit against the Defendant vide an originating summons dated 21st August 2023. The Plaintiff's claim were supported by the affidavit sworn Joan Ludia Saka on the 6th July 2018 which is based on the following grounds:-
 - a. A declaration be issued that the Applicant has been in adverse possession of the whole of parcel of land parcel number CR 27666 for a period of 12 years.
 - b. A declaration be issued that the Applicant has acquired title to 0.3092 Ha comprised in the land title number CR 27666.
 - c. An order be issued that the Respondent holds the title to land parcel number CR 27666 in trust of the Applicant.
 - d. An order that land parcel number CR 27666 be transferred to the Applicant /Plaintiff and the Applicant/Plaintiff be registered as the owner of the land parcel number CR 27666.



- e. An order that the Respondent do execute all transfer documents in favour of the Applicant and in event of default the Deputy Registrar of the Court do execute the same documents for transfer
 - f. That the costs of this application be provided for.
15. The originating summons had been supported by the supporting affidavit of Rehema Kazungu -Baya sworn on 21st August 2023 where she has averred that she has been in continuous and uninterrupted occupation of the suit property which occupation entitled her to the ownership of the same pursuant to the doctrine of adverse possession. It was also the Plaintiff's assertion that she has been in exclusive possession of the suit parcel of land since 2005 and she has carried out some development on the suit parcel of land namely permanent structures and cultivation and photos were attached to confirm the same.
16. The Learned Counsel submitted that the Plaintiff's claim and evidence was that in support of her case the Plaintiff testified as PW – 1. During the examination in chief she testified that her husband was the caretaker of the Defendant herein and he used to reside on the suit parcel of land while she used to reside in Bamburi. However she used to visit the husband sometimes. On or about the year 2004 the husband passed on and the life became difficult for her after which without the permission of the Defendant she came and occupied the said land where she built her own structures where she is living together with her family and cultivating the remaining portion. All these were happening with the knowledge of the Defendant since he used to visit his land and find the Plaintiff there and the Defendant was the registered owner of the suit parcel of land as per the search that was produced by the Plaintiff and that is where the Plaintiff is still residing up to date.
17. The Learned Counsel further argued that, despite service with pleadings the Defendant never entered appearance nor file their defence hence the matter proceeded ex - parte.
18. The Learned Counsel relied on the following issues for determination below while relying on the case of “Richard Wefwafa – Versus - Ben Munyiwa Songoi [2020]eKLR”, on the requirements for one to acquire land through adverse possession. The Applicant enumerated the following are the elements that such claimant needs to establish. These are;
- a. On what date he came into possession.
 - b. What was the nature of his possession?
 - c. Whether the fact of his possession was known to the other party.
 - d. For how long his possession has continued
 - e. That the possession was open and undisturbed for the requisite 12 years.
19. Further the Learned Counsel submitted that the law of adverse possession was well settled and the essential requirements that one has to meet in-order- to succeed-in an application for adverse possession has been discussed in the case of “Wambugu – Versus - Njuguna (1983) KLR 173” where the court of Appeal held that Adverse possession contemplates two concepts; Possession and discontinuance of possession.



20. The ingredients of land adverse possession are further discussed by the court of appeal in the case of:- “Ntana Lewa – Versus - Kahindi Ngala Mwangandi (2005) eKLR” where it was held that:

“ 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 action against such person in assertion of his title for a period of 12 years.”
21. According to the Learned Counsel it was also a well settled principle that a party claiming adverse possession ought to prove that this possession was ‘nec vi, nec clam, nec precario,’ that is peaceful, open and continuous. The possession should not have been through force, no in secrecy and without the authority or permission of the owner of the property.
22. It was evident that the entry of the Applicant was after the husband who was caretaker and was employed passed on and the said husband used to live on that land alone as the Plaintiff used to reside in Bamburi, and since the husband entry was permissive and he was being paid. However, the moment the Plaintiff entered the suit land she did not enter in to any agreement with the Defendant to take care of the suit land on his behalf neither was she being paid by the Defendant to take care of the same and thus her holding became adverse, and time started running and since she claims that she entered the suit land in the year 2005 the time started running from that period that is twelve (12) years, from the time when the Applicant moved into and settled on the suit property.
23. The Plaintiff also produced a set of photographs indicating some development that are on the suit land she alleged that she developed the suit land without any opposition from the Respondent. Further, she alleged that the Respondent used to visit that land sometime but has never asked her what she is doing on that land, and has never interfered with her possession. This kind of developments cannot be hidden, and therefore, the Respondent must have seen them, and continues to see them. Therefore, the Applicant's occupation and possession is open, with no secrecy. There was no evidence that the Respondent has ever asserted her right from 2005, and therefore, the Applicant's possession is exclusive, and has dispossessed the title holder, who is the Respondent of this suit land.
24. It was evident that the suit land is in the name of the Respondent herein Khalid Omar Ahmed as from November 2005. Further, it was trite that adverse possession runs with the land and not with the title. In the case of:- “Civil Appeal No 164 of 2011 Gachuma Gacheru – Versus - Maina Kabuchwa [2016] eKLR” the Court held that “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”.
25. According to the Learned Counsel the Defendant herein had never taken any steps to enter in to the suit parcel of land or asserts their rights as the owner and yet the Plaintiffs herein had been in open, notorious possession of the suit parcel of land to the knowledge of the Defendant herein who is the owner as evident in the copy of search produced before this Court. The Plaintiff took possession of the same way back in 2005. Time therefore started running against the Defendants in favour of the Plaintiffs from the time the Plaintiff occupied the suit property and was engaged in acts that were inconsistent with the Defendant's title, for instance building houses and cultivating there is nothing to suggest that the occupation was secret or that it was not known to the Defendants.
26. In conclusion, the Learned Counsel submitted that the Honourable court to consider the totality of evidence availed herein and apply the legal principles as outlined above to come to the conclusion that the Plaintiff has proved her case on the balance of probability and has brought the case within the limits of the doctrine of adverse possession and allow the suit as prayed.



IV. Analysis and Determination

27. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff/Applicant and the relevant provisions of *the Constitution* of Kenya, 2020 and the law. I reiterate that the Defendant neither entered appearance nor filed a defence in response to the Plaintiff's allegations and the Plaintiff's case remained uncontroverted. However, it is trite that uncontroverted evidence is subject to the rules of evidence, and therefore the Plaintiff had a duty to prove his case to this Court on the required standard of balance of probability.

28. This was well discussed in the case of "Samson S. Maitai & Ano – Versus - African Safari Club Ltd & Ano. (2010) eKLR", where the Court held that: -

.....I have not seen judicial definition of the phrase 'formal proof'. 'Formal' in its ordinary dictionary meaning refers to being 'methodical' according to rules of evidence. On the other hand, according to Halsburys Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption".

29. Further, in the case of "Gichinga Kibutha – Versus - Caroline Nduku [2018] eKLR" the Court held as follows;

"The hearing referred to above is the one commonly known as "Formal proof". The Civil Procedure Rules do not define "Formal Proof". Black's Law Dictionary defines "Formal" as including "rules established by an institution according to certain processes". This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."

30. This Court has perused the pleadings, the witness statement and the evidence adduced in Court and the exhibits therein, the written submissions and the authorities cited therein and finds the following three (3) salient issues of determination arising therefrom are:

- a. Whether the Plaintiff has shown (on the balance of probability) that they acquired the property by adverse possession?
- b. Whether or not the Plaintiff is entitled to the prayers in the originating summons/ plaint.
- c. Who bears the costs of the suit/ originating summons

Issue No. a). Whether the Plaintiff have shown (on the balance of probability) that they acquired the property by adverse possession

31. Under this sub title, the main substratum of the case is 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 their case from the filed originating summons/plaint.



32. This Court in a previous holding in the case:- “Makau & 25 others v Noor & another (Environmental and Land Originating Summons 11 of 2022) [2024] KEELC 4653 (KLR) (4 June 2024) (Judgment)”, where I opined that:-

“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 in depth 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 tend 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”.

33. The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of “Maweu – Versus - Liu Ranching and Farming Co - operative Society 1985 KLR 430” where the Court held:-

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

34. 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”.

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

“(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.”

36. Finally, the provision of 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.”

37. 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.

38. Has the Plaintiff proved adverse possession? In the case of “Samuel *Miki Waweru – Versus - Jane Njeru Richu, Civil Appeal No. 122 of 2001*”, the Court of Appeal delivered the following dictum:

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

39. In the case of:-“*Wambugu – Versus - Njuguna* (1983) KLR 172” the Court held;

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

40. Additionally, in the case of “*Public Trustee – Versus – Wanduru*”, Madan J A stated as follows; -

“.... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of



the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

41. Further, in the case of “M’ikiara M’rinkanya & Another – Versus -Gilbert Kabeere M’mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR”, the Court held that

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

..as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in Lowsley – Versus - Forbes [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.’

42. The Court of Appeal in “Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi – Versus - Ben Munyifwa Songoi [2020] eKLR” opined that a person claiming adverse possession must establish the following

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

43. Now applying these legal principles to the instant case. The Applicant herein contends that she has lived in the property for more than 12 years from 2005. Their occupation was uninterrupted, peaceful and open. In the case of “Kasuve – Versus - Mwaani Investments Limited & 4 others 1 KLR 184”, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the 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”.

44. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. It is therefore the view of the Court that the right to Adverse Possession accrued and vested in the Plaintiff as at the years 2005 by 2017 they had actually acquired title by adverse possession. There is no evidence that the Defendant ever retook possession of the suit land nor that he successfully removed or ousted the Plaintiff from the possession of the suit land. The subsequent cases cited above



are not helpful either in assisting the Defendant to assert title to the suit land because title by way of Adverse Possession had accrued and vested in favour of the Plaintiff.

45. The Plaintiff led evidence that on or about November 2005 she entered in the land parcel number CR 27666 without the consent and or the permission of the registered owner who was the Respondent herein and she had been residing in the said parcel of land together with her family (Annexed in the affidavit and marked as “RKB – 1” was a copy of the Chief’s letter to confirm the same). Immediately he took possession of the said parcel of land he built a permanent structures which consists of her home where she lived with her family.
46. The Respondent herein was the current registered owner of the suit property of land herein (Annexed in the affidavit and marked as “RKB – 2” was a copy of Search). Despite registration of the suit parcel of land in the name of the Respondent, she had continued to stay on the said parcel of land uninterrupted, undisturbed and peacefully without any interference for over 12 years from November 2005. She had been exercising all the rights of ownership over the said land parcel number CR 27666 without any interference from the Respondent and that she had built permanent structures which has taken more than 12 years.(Annexed in the affidavit and marked as RKB-2 were copies of the Photographs showing the said structures).
47. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts ‘Kweyu – Versus - Omuto, C A Civ Appeal 8 of 1990 (as yet unreported)’. Thus, the Honourable Court discern that it is fully satisfied that the Plaintiff has proved Adverse Possession and her case is for granting.

Issue No. b). Whether or not the Plaintiff is entitled to the prayers in the originating summons/ plaint

48. Under this sub title the Honourable Court shall examine whether or not the Plaintiff is entitled to the prayers in the originating summons/ plaint. The burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher. The burden squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. Based on foregoing conclusion, I hold once more that that the Plaintiff has made out a case for adverse possession and has proved they have been in possession of the suit property for over 12 years.

Issue No. c). Who bears the costs of the suit/ originating summons

49. It is now well established 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 means:-

“ the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

50. The provision 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. It 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.”

51. 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.
52. 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 the case of:- “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
53. In this case, as this Honourable Court has opined above, the Plaintiff has fully proved her claim against the Defendant herein and therefore shall have the costs of the suit.

V. Conclusion and Disposition

54. 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 Judgment be and is hereby entered in favour of the Plaintiff as per the originating summons dated 21st August, 2023.
 - b. That a declaration be and is hereby issued that the Applicant has been in adverse possession of the whole of parcel of land parcel number CR 27666 for a period of 12 years.
 - c. That a declaration be and is hereby issued that the Applicant has acquired title to 0.3092 Ha comprised in the land title number CR 27666.
 - d. That an order do and hereby issue that the Defendant holds the title to land parcel number CR 27666 in trust of the Plaintiff.
 - e. That an order do and hereby issue that the Land Registrar, Mombasa forthwith causes the rectification of the Entry and registration of the land parcel number CR 27666 be transferred to the Plaintiff and the Plaintiff be registered as the owner of the land parcel number CR 27666 under the provision of Section 79 (1) of the *Land Registration Act*, No. 3 of 2012.



- f. That an order do and hereby issue that the Defendant do execute all transfer documents in favour of the Plaintiff and in event of default the Deputy Registrar of the Court do execute the same documents for transfer.
- g. That the costs of the suit shall be in favour of the Plaintiff.

It is so ordered accordingly.

**JUDGMENT DELIEVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS
SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF OCTOBER 2024.**

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

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Otieno Advocate for the Plaintiff.
- c. No appearance for the Defendant.

