



**Amin v Musili (Environmental and Land Originating Summons
E079 of 2022) [2024] KEELC 7422 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E079 OF 2022
LL NAIKUNI, J
NOVEMBER 4, 2024**

BETWEEN

HASSAN LUKU AL AMIN PLAINTIFF

AND

SOLOMON CHANDA MUSILI DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court regards the Originating summons instituted by the Hassan Luku Al Amin the Plaintiff/ Applicant herein dated 19th July, 2022 and filed in court on 21st July, 2022. It was against the Solomon Chanda Musili Defendant/ Respondent herein. The Originating Summons brought under the dint of Sections 7,13,17,37 and 38 of the Limitations of Actions Act (Chapter 22) Laws of Kenya, Section 1A,1B,2,3 & 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, Orders 11, 12, 13,14 Order 5 Rule 17, Order 37 Rules 7, 8,11, 13,14,15,16, 17, 18 & 19 of the Civil Procedure Rules 2010 Act (Cap 21) Laws of Kenya and all enabling Provisions of the Laws of Kenya.
2. The service of the Originating summons and the Summons to Enter Appearance upon the Defendant was effected through substituted means pursuant to the leave of Court granted on 24th November, 2022. An advertisement was published in the one of the local dailies with a wide national circulation and readership – “The Standard” the edition of 7th January, 2023.
3. Subsequently, a seven (7) Paragraphed Affidavit of Service dated 9th January, 2023 attaching an extract of the advertisement was filed to that effect. Pursuant to that, the Defendant failed to respond to the same and failed to comply with the provision of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010. Accordingly, the matter was disposed of by way of adducing “Viva Voce” evidence accordingly.



4. Thereafter, on 20th April, 2023 upon all parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - trial conference, it was fixed for full trial the same day at 2.30 pm.

II. The Plaintiff's case

5. The Plaintiff claimed to be entitled to the parcel of the Land known as Title Number MOMB ASA/BLOCK XVII/77/A valued at a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) by virtue of Land adverse possession.
6. The Plaintiff possessed the following questions for determination: -
 - a. That the Respondent interest in all that piece of land situated in Mombasa County containing by measuring hectares or there about being Title Number Title Number Mombasa/Block XVII/771/A has been extinguished.
 - b. That the Registrar of Titles, Mombasa County do delete entries in favour of the respondent if any on the green card/Register and or register the appropriate discharge in respect thereof without gazettelement.
 - c. That the Registrar of Titles, Mombasa County do reconstruct a Skeleton file in respect to Title Number Title Number Mombasa/Block XVII/771/A thereof.
 - d. That the Applicant Hassan Luku Al Amin be registered as the proprietor of all that piece of land situated in Mombasa County containing by measurement Hectares or thereabout being Title Number Title Number Mombasa/Block XVII/771/A in place of Solomon Chanda Musili by reason of the fact that the Applicant had become entitled to the said land by adverse possession.
 - e. That the Lands Registrar-Mombasa without gazettelement do proceed and issue a Title Document/Provincial Certificate for parcel of land in Mombasa County containing by measurement Hectares or there about being Title Number Mombasa/BlockXVII/771/Ain the names of the Applicant Hassan Lulu Al Amin.
 - f. That the Orders referred to in paragraphs 1, 2, 3, 4 and 5 above be registered against the Title to property known as the parcel of land situated in Mombasa County by measurement Hectares or thereabout being Title Number Mombasa/Block XVII/771/A in terms of Section 38 (2) of The Limitation Actions Act,. Chapter 22, Laws of Kenya.
 - g. That the Land Registrar, Mombasa County do dispense with the production of the original title document and all other legal documents to be produced by Hassan Luku Al Amin.
 - h. That costs of this application be provided for.
7. The suit was premised on the 11th Paragraphed supporting affidavit of Hassan Luku Al Amin, the Plaintiff/ Applicant sworn on 19th July, 2022 where the Plaintiff averred that: -
 - a. He represented his family unit and homestead that included him, his wife and children.
 - b. The parcel of land comprises of Title Number Mombasa/Block XVII/771/A Mombasa County, after carrying out search on the same, confirmed that the 1st Defendant was the registered owner of the said Land. (Annexed in the affidavit copy of the search marked as“B”).



- c. During his livelihood peacefully exercised proprietary rights, like constructing of both permanent and temporary house, among other social amenities in addition to the said developments. He also cleared the land that was bushy and created gardens in which he planted and have continued to plant various food crops and cash crops.
 - d. He had never seen the Defendant who was the registered owner of the said parcel of land and cave to be given the ownership of the land known as Title Number Mombasa/BlockXVII/771/A thereof situated at within the County of Government of Mombasa measuring (0.2028) Hectares.
 - e. The Plaintiff/ Applicant herein did not had other home to move to and his family herein shall be rendered destitute, landless and /or homeless if his prayers were declined.
 - f. Unless the prayers sought for herein were granted the Plaintiff/Applicant would stand to suffer irreparable loss, damages and rendered homeless if not heard and granted the (0.2028) Hectares piece of land (herein called the suit property) while the defendants/Respondents would not suffer any prejudice.
 - g. By this virtue and by the fear of the Applicant that the Respondents may evict the Applicant anytime that's it had prompted the Applicant to file a suit for adverse possession.
 - h. Indeed, he was under fear of being evicted from the said land by the Respondents, who according to the record attained ownership and he was claiming adverse possession against the said title.
8. On 20th April, 2023, the Plaintiff called him first witness PW - 1 who testified to Court as follows:

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

- 9. PW – 1 was sworn and testified in English language. He identified himself as Mr. Hassan Luku Al Amin. He was a holder of the Kenyan National Identity card bearing all the details as noted by Court. He lived at Buxton - Mombasa. He was a business man and dealt in Construction works. He was here to be given the portion of land where had lived for a long from the year 1990. It was land reference No. Mombasa/ BlockXVII/ 771/A - measuring 0.208 Ha. (hereinafter referred to as “The Suit land”). He came there for works and after that he continued to live on the land. He had constructed a house and Plantations.
- 10. PW - 1 confirmed he resided there with his family. He had never known anyone who had come to claim the land. He had not been interrupted by one. Mr. Solomon Chanda Musili was served in the newspaper being “The Standard” edition of 7th January, 2023. Despite of the service having been effected, he had not come forward to claim the land or file any Defence as required by law whatsoever. They prayed for the relief sought from the originating summons filed; he lived there with his family two children and wife.
- 11. On 20th April, 2023 the Plaintiff through his counsel Mr. Idi marked the close of his case.

III. Submissions

- 12. On 20th April, 2023 the Honourable Court upon the closure of the case by both the Plaintiff and the Defendants in the presence of all the parties gave directions on the disposition of the originating summons dated 19th July, 2022 by way of written submission. Pursuant to that, the Honourable Court set the Judgment date on 4th November, 2024.



IV. Analysis and Determination

13. I have carefully read and considered all the filed pleadings herein, the evidence adduced by the witnesses summoned by the Plaintiff, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
14. Before proceeding to the issues I should proceed to state that the Plaintiff's evidence herein has not been controverted as the matter proceeded as a formal proof. However, it does not mean because the Plaintiff's suit is uncontroverted, then the Plaintiff's claim has to be allowed automatically. The Plaintiff has a duty to call sufficient evidence and prove his claim on the required standard of balance of probabilities. See the case of "Samson S. Maitai & Another – Versus - African Safari Club Ltd & Another [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 Halsbury’s 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”
15. This Honourable Court will still examine the facts of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has issues for its determination. These are: -
 - a. Whether the Plaintiff had acquired the title by way of adverse possession as required by Law?
 - b. Who will bear the Costs of originating summons?

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

16. Under this sub - title, the main substrata of the case on acquiring of title to land based on the Doctrine of Land Adverse Possession based on the dictum of the Law. This Honourable Court will examine if the Plaintiff has made out her case from the filed originating summons leading to the title deed held by the Defendant be extinguished thereof. If yes when did time start running for purposes of determining these rights and finally whether or not the Plaintiff is entitled to the prayers in the originating summons.
17. 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 tended to avoid belaboring on the point herein. It is trite that a claim for title to land through the doctrine of adverse possession is attached to land and not title. It is a matter whereby it is not on whether the land was owned by either Kimingi Wairera or Mwangi Kimingi. This was the position in "Maweu – Versus - Liu Ranching & Farming Cooperative Society [1985] eKLR" as quoted in "Civil Appeal No 164 of 2011 Gachuma Gacheru – Versus - Maina Kabuchwa [2016] eKLR" where the Court held:

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



18. 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”.

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

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

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

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

20. 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.”

21. 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.

22. 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.

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

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

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

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

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

Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed



for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.

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

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

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

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

24. Further, R.C.N. Kuloba, J in the case “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” elaborately enlisted 7 key elements that a person claiming adverse possession must establish. Summarily, according to the retired Judge, the elements that a person claiming a right by adverse possession.
- a. The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. This is because a right of action cannot accrue unless there is somebody against whom it is enforceable.
 - b. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. That is to say, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means,



that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else's power.

- c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, ie without permission from the true owner of the land occupied. Acts done under licence or permitted by, or with leave of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as "hostile" possession.
- d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.
- e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies. That is to say the possession and user was such as to give a cause of action or right to sue for possession, throughout the twelve years preceding the suit.
- f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The purpose of this element is to afford the owner an opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose. Possessory acts carried out only under cover of darkness will be insufficient to justify a claim based on adverse possession. Related to the requirement of actual possession, the requirement of openness and notoriety, also calls for the need that the possessory acts must be substantial and leave some physical evidence. If the acts are too insubstantial or temporary, there is no actual possession and the possession will not be notorious
- g. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. There are circumstances under which adverse possession which has begun to grow may be interrupted. Possession may be interrupted;
 - i. by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or



- ii. by the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - iii. by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
25. The rightful owner must know that he is ousted, he must be aware he had been dispossessed. The owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted. The land or portion of land being adversely possessed must be a definite, with clear boundaries. Order 37 Rule 7 is mandatory that title to the land must be attached to the Originating Summons. The squatters claiming adverse possession must be individually identified, they ought to produce their ID cards when filing suits and not a mere stating Mwanaisha Juma and 300 others.
26. The burden of proving the above elements is on the person seeking title by Land adverse possession, he/she proves it in the usual standard of proof in civil cases i.e. balance of probability. The facts that must be asserted, pleaded and proved are; the date of occupation, the nature of possession, whether the occupation is known to the owner, how long the occupation has been going on, whether possession has been open and undisturbed. All these are questions of facts and unless they are asserted and proved adequately through a trial.
27. Recently, the Supreme Court had an opportunity to further address the issue of the Land Adverse Possession but only in jest in the matter of “Supreme Court Applications No. 16 (E026) of 2021 – Thomas Muka Maulo & Walter Washington Barasa Nyogensa – Versus – Robert Ouma Oduori”. Briefly, the Applicants had sought the Supreme Court to review the Court of Appeal decision declining to grant Certification of leave against its Judgement of the general importance under the provision of Article 163 (4) (b) of *the Constitution* of Kenya. The subject matter was that the Court of Appeal in its Judgement had ignored critical evidence and facts on record thereby arriving at a decision that would amount to conflicting principles on a claim of Land Adverse possession. In its ruling, on 19th May, 2021 while dismissing the application the Court held:
- “ that the jurisdiction of the Supreme Court under Article 163 (4) (b) of *the Constitution* went beyond resolving factual contestations between parties. In any event, the principles of Land Adverse Possession were settled and the Applicants had not demonstrated any inconsistency of findings by the Court of Appeal on the Doctrine. The Supreme was not convinced that there was any miscarriage of Justice or violation of any Constitutional provision as alleged by the Appellant or at all. The Appellant were merely in disagreement with the ultimate Court determination & that did not suffice to invoke the Supreme Court’s jurisdiction or amount to miscarriage of Justice”.
28. From these decisions of Court, and in a nutshell, for one to qualify for a title by virtue of a claim of Land Adverse possession, one has to have fulfilled the following ingredients. These are: -
- a. There has to be a registered proprietor of the land being claimed;
 - b. The Claimant ought to have occupied the suit land without any interruption and continuously.
 - c. The Claimant ought to have used and taken possession of the suit land for over twelve (12) years.
 - d. The Claimant should not have been granted any permission to use or occupy the suit land by the registered owner, the principle of non-permissiveness.



29. Having laid - down the principles on the doctrine of Land Adverse possession, the Honorable Court will now proceed to apply it to the instant case herein below. Additionally, the principle of adverse possession was more elaborately set out in the case of “Wambugu – Versus - Njuguna [1983] KLR 172”, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

30. And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

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

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

32. Further, in the case “Mbira – Versus - Gachuhi (2002) 1 EALR137”: the court stated as follows;

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

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

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

34. This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above. It is the Plaintiff’s case that he lived at Buxton - Mombasa. He was a business man and dealt in Construction works. He was here to be given the portion of land where had lived from the year 1990.



It was land reference No. Mombasa/ BlockXVII/ 771/A. He came there for works and after that he continued to live on the land. He had constructed a house and Plantations. He confirmed that he had resided there with his family. He had never known anyone who had come to claim the land. He had not been interrupted by one. Mr. Solomon Chanda Musili was served in the newspaper of Standard of 7th January, 2023. He had not come forward to claim the land. They prayed for the relief sought from the originating summons filed; he lived there with his family two children and wife. The land was 0.208 Ha

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

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

36. Undoubtedly, the suit property was registered at the Lands Registry, Mombasa in the name of the Defendant. Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides that an action to recover land cannot be brought after the end of 12 years from the date when the right of action accrued. Section 17 of the same Act provides that at the expiration of the said period of 12 years, the title of the person who was entitled to bring an action in respect of the land in question is extinguished.
37. From the evidence on record, as at the year 2022 when the Applicant brought this suit, he had been in occupation of the suit property for over 30 years. The Applicant has led evidence that his occupation of the suit property has been open. No action had been brought against the applicant by the respondent to recover the property. I am satisfied from the evidence on record that the applicant has established that she has acquired the suit property by adverse possession. I am therefore in agreement with the applicant that the title held by the respondent over the suit property has been extinguished by operation of law. Section 38 of the *Limitation of Actions Act* gives power to the court to order that the person who has acquired land by adverse possession be registered as the owner of the land in place of the person whose interest in the land has been extinguished. The applicant is in the circumstances entitled to be registered as the proprietor of the suit property.

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

38. It is now trite law that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

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

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

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to



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

40. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.
41. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
42. In this case, as this Honourable Court has opined above, the Plaintiff/Applicant has proved his claim against the Defendant/Respondent and therefore the Plaintiff has the costs of the originating summons dated 19th July, 2022 and filed in Court on 21st July, 2022.

V. Conclusion and Disposition

43. 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/Applicant has established his case against the Defendant/Respondent herein. Thus, the Court proceeds to make the following specific orders: -
- a. That judgement be and is hereby entered in favour of the Plaintiff against the Defendant herein as per the Originating summons dated 19th July, 2022 and filed in court on 21st July, 2022.
 - b. That the Plaintiff’s claim for adverse possession succeeds as prayed under the following terms and conditions: -
 - i. The Respondent interest in all that piece of land situated in Mombasa County containing by measuring hectares or there about being Title Number Title Number Mombasa/Block XVII/771/A has been extinguished.
 - ii. The Registrar of Titles, Mombasa County do delete entries in favour of the Respondent if any on the green card/Register and or register the appropriate discharge in respect thereof without gazette ment.
 - iii. The Registrar of Titles, Mombasa County do reconstruct a Skeleton file in respect to Title Number Title Number Mombasa/Block XVII/771/A thereof.



- iv. The Applicant Hassan Luku Al Amin be registered as the proprietor of all that piece of land situated in Mombasa County containing by measurement Hectares or thereabout being Title Number Title Number Mombasa/Block XVII/771/A in place of Solomon Chanda Musili by reason of the fact that the Applicant had become entitled to the said land by adverse possession.
 - v. The Lands Registrar-Mombasa without gazettelement do proceed and issue a Title Document/Provincial Certificate for parcel of land in Mombasa County containing by measurement Hectares or there about being Title Number Mombasa/Block XVII/771/A in the names of the Applicant Hassan Lulu Al Amin.
 - vi. The Orders referred to in paragraphs 1, 2, 3, 4, and 5 above be registered against the Title to property known as the parcel of land situated hi Mombasa County by measurement Hectares or thereabout being Title Number Mombasa/Block XVII/771/A in terms of Section 38(2) of The Limitation Actions Act. Chapter 22, Laws of Kenya.
 - vii. The Land Registrar, Mombasa County do dispense with the production of the original title document and all other legal documents to be produced by Hassan Luku Al Amin.
- c. That the Plaintiff/Applicant herein has the costs of the Originating summons dated 19th July, 2022.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF NOVEMBER 2024.

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

Judgement delivered in the presence of:

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

