



**Dzuya & another v Anjarwalla (the Legal Representative of the Estate of Hussein Karimbhai Anjarwalla) (Environmental and Land Originating Summons 132 of 2019) [2023] KEELC 17614 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17614 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 132 OF 2019**

**LL NAIKUNI, J**

**MAY 10, 2023**

**BETWEEN**

**DAVIS MWATELA DZUYA ..... 1<sup>ST</sup> PLAINTIFF**

**MASUDI BAKARI MUSA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SALIM ANJARWALLA ..... DEFENDANT**

**THE LEGAL REPRESENTATIVE OF THE ESTATE OF HUSSEIN KARIMBHAI ANJARWALLA**

**JUDGMENT**

**I. Preliminaries**

1. This Judgment pertains to a suit that was instituted by both “Davis Mwatela Dzuya and Masudi Bakari Musa”, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff herein respectively against the Defendants herein through Originating Summons together with a 14 paragraphed Supporting Affidavit all dated July 14, 2019 sworn by the 1<sup>st</sup> Plaintiff and two annexures marked as “DMD – 1 and 2” respectively being copies of the authority to plead and a Certificate of title deed filed before this Honorable Court on July 15, 2019
2. From the filed Originating Summons, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein sought for the following orders:-
  - a. That the Originating Summons herein be served on the Defendant/Respondent herein by way of Substituted service through his last known address PO Box 90324 - 80100 Mombasa or alternatively by way of advertisement in any newspaper with national wide circulation.
  - b. That the Respondent’s interest in the parcel of land situated in Mombasa County, known as sub-division No 858 of Section One Mainland North (MN/1/858) measuring approximately



two decimal nought four 2.204) acres hereinafter known as the “The Suit Land”) have been extinguished .

- c. That the 1<sup>st</sup> and 2<sup>nd</sup> the Plaintiff/Applicants herein be registered forthwith as the owners of the suit parcel of land situated in the County of Mombasa known as sub - division Number 858 of Section One Mainland North (MN/I/858) measuring approximately two decimal two nought four (2.204) acres in place of the Respondents by reason of the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants have become entitled to the said parcel of land by Adverse Possession.
  - d. That the Registrar of Titles Mombasa do issue Certificate of Title for the suit land in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs without gazettelement.
  - e. That the Registrar of Title Mombasa be and is hereby ordered to reconstruct file/records for the suit land without gazettelement and cause an entity and registered the Plaintiff as the registered owner.
  - f. That the orders referred to in Paragraphs 1, 2, 3, 4 and 5 above be registered against the title to the suit land in terms of Section 38(2) of the Limitation Actions Act chapter 22 of the Laws of Kenya.
  - g. That the Costs of the Originating Summons be provided for.
3. From the records, it is instructive to note that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs earlier on in the year 2017 had filed another suit being Civil Suit No ELC. No 110 of 2017 against the Respondent. However, for their own reasons on June 4, 2019 decided to file a Notice of withdrawal of the suit without orders to costs.
  4. Upon effecting service the Respondent engaged his current Advocates whom on October 1, 2019 filed a Memorandum of Appearance dated September 30, 2019. Subsequently, on November 25, 2019, the Respondent filed a 17 Paragraphed Replying Affidavit sworn by Salim Anjarwalla the Respondent herein and dated November 25, 2019, together with nine (9) annexures marked as “SA-1 to 5” thereof.
  5. Pursuant to this on September 23, 2020 the Respondent moved this court under the Provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Order 25 Rules 4 and 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 basically seeking to have the proceedings in this case – Civil Case ELC No 132 of 2019 (OS) be stayed until the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs settled the Costs for the Defendant/ Respondent emanating from the withdrawn Case ELC (OS) No 110 of 2017 and the time upon which the costs were to be paid. The Defendant/Respondent argued that there was a Certificate of Taxation issued on June 17, 2020 that certified the costs awarded to the Defendants to the time of Kenya Shillings Two Hundred and Fifty-Two Thousand Seven Hundred and Fifteen Hundred (Kshs 252,715.00/=).
  6. He averred that in the quest of demanding the said costs the Defendant wrote to the Advocate on record for the Plaintiffs on July 7, 2020 to settle the costs but there was no response hence the reasons he decided to institute this application. On November 13, 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff while opposing the application by the Respondent filed grounds of opposition stating that the application was a waste of courts time and an abuse of the due process which lacked merit and that the instant suit was distinct from the ELC No 110 of 2017. Further, that the Defendant had not demonstrated to court he had unsuccessfully tried to execute and/or recover his costs from the Plaintiffs to warrant stay of proceedings in this suit not had he been unsuccessful in executing and/or recovering his costs from the previous suit.



7. On March 23, 2021 in its short ruling the Honorable Court having considered all the issues of facts and law on the matter it allowed the application under the provisions of Order 25 Rule 4 which provides:-

“if any subsequent suit shall be brought before payment of costs of a discontinued suit, upon the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid”
8. From this provision, the Honorable Court felt it needful and indeed proceeded to define the term:- “Subsequent Proceedings” to mean proceedings that were substantially between the same cause of action as the discontinued proceedings. It noted that there existed a lot of similarities in those two suits in that the parties and the subject matter were all the same. The suit property and it had not been denied that the costs in the previous one had not been paid before commencing the second suit and hence there ought to be stay of proceedings in this suit for a period of sixty (600 days failure to which the current suit to stand dismissed. From the records there is no indication whether the orders of this court were complied with or not as the matter seem to subsequently have proceeded.
9. On 1<sup>st</sup> July, 2021, the Defendant/Respondent filed a Notice of Motion application dated even date under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21, Section 152E of the Land Act No 6 of 2012 basically seeking for eviction orders of the Plaintiffs from the suit land and injunction orders against them. The said application was premised on a 20 paragraphed Supporting Affidavit of Salim Anjarwalla sworn and dated on June 24, 2021 together with six (6) annexures marked as (“SA-1 to 6” annexed thereto. In summary he averred that being the registered owners to the suit land, the Defendant had refused to give vacant possession. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had been permitted to enter and occupy the land. They had continued to prevent the Defendant and their assigns from causing any development on the land by building a boundary wall/fence around the suit property and were harassing, intimidating and threatening the Defendant and his employees. The Defendant had issued the Plaintiffs with 3 months’ notice to vacate from the suit property which he alleged they were occupying illegally but despite of this they had refused to do so.
10. Finally, that the Plaintiffs through their agents and various land brokers were in the process of fraudulently, unlawfully and illegally disposing off the suit property.

The Plaintiff held they were claiming the land by adverse possession having continuously lived on it for over 12 years and without any interruption. They held that the Respondent could not be purporting to be evicting them at this point as the same would defeat their claim on the land and they would not be able to ascertain the extent of their occupation and right over the suit land. They denied having ever threatened, intimidated nor prevented the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs from entering the suit property and further having ever advertised the suit property for sale and they had no such intention whatsoever taking that it was their own home. The Plaintiffs averred that the Respondent in an attempt to circumvent justice purported to erect a fence so as to deny the Plaintiffs access to the suit land and illegally evict them from it before the hearing and determination of the suit before the court. They urged court to dismiss the case with costs.
11. On October 7, 2021, while all the parties were present in court the Defendant/Applicant informed court that they had decided to withdraw the Notice of Motion application dated July 1, 2021 with no orders to costs in order to pave way for the hearing of the matter on merit and in earnest. This proposal was not opposed save that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs indicated they would be pursuing costs.
12. Pursuant to that, the Honorable Court provided directions on how the matter was to proceed under the provisions of Order 37 Rules 16,17, 18 and 19 of the Civil Procedure Rules 2010 on the October 11, 2021, the matter was fixed for hearing on November 30, 2021



## II. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs Case

13. On November 30, 2021 and July 27, 2022 the Plaintiff case commenced whereby they summoned one witness PW-1 who testified as follows: -

Examination of PW 1 by Mr. Shimaka Advocate.

PW – 1 sworn and testified in Kiswahili language. He identified himself by names as Davis Mwatela Dzuya. He was a holder of the Kenya National Identity Card bearing numbers 9475969. He produced it as Plaintiff Exhibit No 1. He lived at Serena – Mombasa. He was there having lived on the suit land. He would rely on the contents of the supporting affidavit sworn and dated July 14, 2019. Also, he would rely on the list of documents annexed dated July 14, 2019.

Court:- There was no objection on these documents being produced apart from the photographs. It was directed that the said photographs be accompanied by a certificate of production.

14. PW – 1 testified that that his family and himself had lived on the suit land for over thirty two (32) years. He was not the employee of the Defendant as alleged by them. He urged the Honorable Court to grant him the title deed for the suit land as he was entitled to it. They never had any other place to turn to if they were to be evicted.

### **Cross Examination of PW – 1 by Mr. Lulu Advocate.**

15. He did not have a job. He was unemployed. He lived on the suit Plot at Shanzu with his family. He had thirteen 13 children. But some were now married and lived elsewhere. They were 7 boys and 6 girls. The girls were called Sada; Merly; Loise; Lilia; Fancisca and Eline Memuda respectively. Three of them were under the age of 18 years.
16. He knew the cell phone numbers 0720354044. He confirmed they were his own phone numbers. He did not know Mr. Edward June nor Fred Mwatela. He did not know a company by the names “African Cotton Limited. He was referred to the Defendant’s documents – a Safaricom Mpesa statement on page 23 a transaction made on December 21, 2016. All these payments were done by the African Cotton Limited to Mr. Davis Dzuya, the 1<sup>st</sup> Plaintiff herein. They send him a sum of Kenya Shillings Seven Thousand (Kshs 7,000/=). On page 27 - transaction done on March 21, 2017 for a sum of Kenya Shillings Twenty Five Thousand (Kshs 25,000.00/=); On page 26 there was a transaction made on February 7, 2017 for a sum of Kenya Shillings Fifteen Thousand (Kshs 15,000.00/=); On Page 40, there was a transaction made on June 8, 2017 for a sum of Kenya Shillings Fifteen (Kshs 15,000.00/=); He confirmed that the company used to pay him the money. They used to do so as a friend. It was done by Ms. Salma. He was referred to paragraph 7 of the supporting affidavit. He had never known the owner of the suit land. M/s. Salma was a friend but not the owner to the suit land.
17. Referred to pages 17, 18 and 19 – it was dated June 1, 2007. He had signed it. He confirmed having been taken to Bamburi Police Station. Under Page 49 – he got the letter dated November 10, 2017 but he had now forgotten about it. They did not have his signature. He brought the case (OS No 110/2017 against the Defendant but he later on withdrew it. In all his documents, they indicated that they lived there for over thirty two (32) years. He got onto the suit Plot in the year 1991.
18. He admitted that the owner of the suit land used to know that he was in occupation of the land. He died. The wife – called Mehmuda Anjarwala also died. She used to know and they agreed that he lives on the suit land. He had no evidence to show that he have lived on the land. His friend, Masudi Bakari



Musa, 2<sup>nd</sup> Plaintiff was unwell. He had also lived on the suit land. He knew a lady called Mehmuda. They allowed me to look for a prospective buyer. Hence his daughter was also called Mehmuda.

**Re - Examination of PW – 1 by Mr. Shimaka Advocate Court: -**

19. PW – 1 got extremely emotional on the issues raised. He got hurt and not composed to proceed further in the given circumstances. He was stepped down.

Further Re – Examination of Delvis Watela Dzurya – Mr. Shimaka

He remembered the payment of Mpesa means. The payments were from the company. It was African Cotton Limited. He was not an employee of the company. He was only occupying the land. His last born was 10 years. She was called the name Memunda. All his children were born while we were on the land.

He remembered Masudi Bakari. He used to be with him but he did not know where he went. There was a house on the land. He lived on the house. The house was there before he was born. He had documents which he had even hand written as was on pages 17, 18 and 19. He confirmed the signatures on it were his own. They were written one day. Mama suggested he does that as be for security purposes to avert the insurgences of the AL SHAABAB so that he should not be arrested. Mama indicated that she had wanted to sell the land. He stated that she indicated he would give him one acre of the suit land. He urged the Honorable Court to be assist him to live on the land. He lived there with his family.

**III. The Defendant’s Case**

20. On July 27, 2022, the Defendant case commenced. He summoned one witness – DW-1 who testified as follows: -

Examinations in Chief of DW – 1 by Mr. Noorani Advocate

DW – 1 testifies and sworn in English language. He identified himself by names as being Mr. Salim Hussein Anjarwalla. He was a holder of the Kenyan national Identity Card bearing numbers 13198160. His date of birth was August 26, 1956. He was the Defendant herein. He was the Chairman of company trading in the names and style of African Cotton Industries Limited. He lived in Nairobi. His witness statement was dated November 9, 2021. He produced it as his evidence in chief. There was also a bundle of documents filed and dated November 10, 2021. DW – 1 stated that they were eighteen (18) documents. They were produced and marked as Defendant’s Exhibit Numbers. 1 to 18. He was one of the Executives of the Estate of his late father.

21. DW – 1 informed Court that the suit property was No 858 Section No Mainland. It was purchased by his father. Later on after his demise in the year 1989, his mother became the custodian after his death. He knew the 1<sup>st</sup> Plaintiff having been employed by his mother. There was a dispute of the land. The employees were paid by African Cotton Limited, where she was a shareholder. After she died in the year 2016 this was managed by his sister. They never had any problem with the 1<sup>st</sup> Plaintiff until he started claiming the ownership of the suit land. He filed a civil suit before Court. They called him to explained to them what was happening but he refused to show up. They could not remove him due to the summons. His mother was not well educated but she made him to sign the documents. The shareholders of African Cotton Limited included his mother – through another company called Mirak Limited as was shown on Pages 48 being a CR - Form - 12.
22. It was the testimony of DW – 1 that the property was bought as a beach house. There already was a structure on the suit land. It was a house with three (3) bedrooms and a servant quarters and gardens.



The letters on pages 17, 18 and 19 were signed. They were not witnessed. It was very unlikely they came from one person.

#### **Cross Examination of DW - 1 – Mr. Shimaka Advocate**

23. DW – 1 was the duly appointed Legal Administrator of the Estate of his father. He had obtained a limited grant as seen from Pages 14, 15 and 16 of the bundle. He was the Executor of the Estate. In his witness statement he had omitted the name “Hussein”. Referred to page 48. It had been left out. But from his national identity there were three (3) names “Salim Hussein Anjarwalla”.
24. He knew the plot and the number but not off head. He did not know whether the property was still registered in the names of his father or mother. He could not recall exactly when he visited the property but it must have been a year or so from that day. From his last visit but there were a lot of people. Definitely, it was Davis and his family who were living there though he was not there himself. From pages 1 to 12 was a copy of the title deed. He had the original Certificate title deed. On page 13 was the official search undertaken on in the year 2013. On Page 15 of the bundle was a copy of the Certificate of Confirmation of Grant. He confirmed that they had not attached the Probate Will. The suit property was not contained there on pages 17, 18 and 19 of the Defendant’s documents.
25. DW – 1 was not personally present when the documents were being made. His parents had at some point stayed at Kizingo Estate. From the three letters, none were notices asking Dzunya to vacate the land. From the time when the first letter was written, it was 15 years ago. The second letter was 12 years ago while the third one was 8 years. On Page 20 the document was not made by African Cotton Oil. It was from Safaricom (K) Limited. It confirmed payment between Davis and Company. The 1<sup>st</sup> Plaintiff was not an employee of the company. The company was not carrying out any activities on the land. Page 27 did not show anything. On Page 29 - it was payment between the African Cotton Industries Limited to Davis. From pages 31 to 33 showed the line owned by their mother which she was using to communicate and make the payments to the 1<sup>st</sup> Plaintiff. He did not know which line of service she had – whether it was for Airtel or Safaricom services.
26. When the property was bought there was a house. When they went to see the house with his father they found out that it was a disputed property. On Page 55 – summon filed and then withdrawn. The costs for the withdrawal of the Civil suit ELC No 110 of 2017 filed by the 1<sup>st</sup> Plaintiff were paid. Being an employee, they could not evict him on humanitarian grounds. They were prepared to compensate him for the damages he incurred. They never wanted to get him out of the property as he was working well and diligently.

#### **Re - Examination of DW - 1 by Mr. Noorani Advocate**

27. DW – 1 informed Court that his mother died in March, 2016. On Page 23 of the bundle of documents showed the payment to the 1<sup>st</sup> Plaintiff were made on December 21, 2016 after his mother had died. The other payments were on Page 29 – on March 21, 2017 and on Page 40 made on June 8, 2017. Clearly, the payments were made after his mother had died. They paid him a salary. The payments were paid not through their mother’s cell phone gadget. He was being paid through African Cotton Industries Limited. It was a family business and the payments would be made through the activities/ transaction of the family. He was referred to page 17. These were documents signed by his mother and the 1<sup>st</sup> Plaintiffs. He was aware of the 1<sup>st</sup> Plaintiff making a claim of the land when he filed the case in the year 2019. By the year 2007 it was 12 years. On page 55 – its dated March 2017 June 2007 to 2017 which was approximately 10 years.



#### IV. The Submissions

28. On October 17, 2022 while all the parties were present in court , and upon closure of both the Plaintiff's and Defendant's cases the Honorable Court directed them to file in their written submissions accordingly. Pursuant to that, the Honorable Court reserved a date for the delivery of this Judgement hereof.

##### A. The Written Submissions by the Plaintiff

29. On November 21, 2022 the Learned Counsel for the Plaintiff the law firm of Messrs. Marande Necheza and company filed their written submissions dated November 2, 2022 Mr. Shimaka Advocate commenced his submissions by providing the background of both the suit as instituted by the Plaintiff and thereafter defended by the Defendant.

30. According to the Learned Counsel the main issue for the determination by this Honorable Court was whether the Plaintiff had proved a claim for title through Land Adverse Possession. To the counsel he argued that for one to prove that he had a claim for adverse possession one had to prove that he had been in uninterrupted occupation of the suit property for over 12 years. To the counsel the Plaintiffs testified that indeed they had been occupation of the suit land to the exclusion of the Defendant and without any interruption for over 12 years. He asserted that the Defendant alleged that they could not evict the Plaintiffs from the land because of a previous case. He held this argument could not stand.

In response to that, the Learned Counsel argued that prior to the said suit and even after the Defendant had never evicted the Plaintiffs. Further the Defendant never demonstrated any attempts at taking possession of the suit property.

31. The Learned Counsel referred to a further argument by the Defendant to the effect the Plaintiff was an employee to the Defendant however they were silent on the 2<sup>nd</sup> Plaintiff who had been in occupation of the suit property as well for more than the statutory twelve (12) years.

The Defendant relied on the Mpesa transactions but the money send was only for a period of eight (8) months in the year 2017 when the Plaintiff had instituted the ELC No 110 of 2017 which was later on withdrawn. There was no proof of payment to the 1<sup>st</sup> Plaintiff for period of 32 years. He argued that these payments were an afterthought and a cover up by the Defendants to try to make the Plaintiff look like was their employee.

32. To buttress his argument the Learned Counsel averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had fulfilled the requirements as stated in the Malindi Application No 56 of 2014 *Mtana Lewa –Versus Kahindi Ngala Mwagendi* (2015) eKLR where it was held:-

“Adverse Possession is essentially a situation where a person takes possession of land and assets 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 (2) years. The process springs into action essentially by default or in action of the owner. The essential pre-requisites being that the possession of adverse possession is neither by force of stealth nor under license of the owner. It must be adequate in continually, in publicity in extent to show that possession is adverse to the title owner”

Further they also relied on the case ELC. No 7 of 2021 (OS) of Steven Mwangi Gatunge – versus- Edwin Onesmus Mwanjau eKLR



33. In addition to the payment made through Mpesa services, the Defendant tried to prove employment by producing handwritten notes purportedly done by the 1<sup>st</sup> Plaintiff which the 1<sup>st</sup> Plaintiff denied being the author and not appending his signature to it. The counsel argued that a close look at the notes also showed that the language used was broken Swahili with Indian influence hence raising suspicion of its authenticity. He submitted that the same was suspiciously done periodically after every three years without any clear reason for it.
34. In conclusion the Learned Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had proved their case and urged court to allow it as prayed with costs.

#### **B. The written submission by the defendant**

35. On November 18, 2021 the Learned Counsel for the Defendant the Law firm of Messrs. Daly Inamdar Advocates filed their written submissions dated November 18, 2022. Mr. Abdulhafees Noorani Advocate commenced his detailed submissions by providing court with a detailed factual background and evidential analysis of the case.
36. The Learned Counsel stated that the central bone of contention in this suit was whether the Plaintiffs were entitled to an order of Land Adverse Possession over the suit property. According to him the evidence by the Defence illustrated that the occupation by the Plaintiff on the suit land was by virtue of the Plaintiff's employment and with the express permission of the legal representatives of the deceased registered proprietor. But in Cross Examination he stated having named his daughter Mehmuda after his employer – Defendant's mother Mehmuda Anjarwalla. In support of this the Defendant placed reliance on copies of the following documents: -
  - a. Handwritten statements signed by the 1<sup>st</sup> Plaintiff
  - b. Certified true copies of African Cotton Industries Limited Mpesa statements for the period between December 12, 2016 to July 31, 2017.
  - c. Show cause letter to the 1<sup>st</sup> Plaintiff dated November 21, 2017 and termination of employment letter dated November 27, 2017.
  - d. Letter from Messrs. Musinga and Co. Advocates addressed to the "SMB" dated March 24, 2014, September 3, 2014 and October 13, 2014.
  - e. A letter from "SMB" addressed to Messrs. Musinga & Co. advocates dated September 15, 2014.
37. The Learned Counsel averred that from his affidavit the 1<sup>st</sup> Plaintiff intimated that he had been in "actual and active possession" of the suit property for over 12 years. He proceeded to claim he had never seen the owner of the suit land and had developed it openly. To the counsel it was plain that there was no evidence to support the plaintiff's claim neither had any independence witness testified in support. He further argued that the few photographs attached to the Supporting Affidavit were only marked for identification and were never produced as evidence. But even if they were the photographed bore the time stamp to show when they were taken nor any way to confirm that they were actually taken at the suit property.
38. To the Learned Counsel all these photographs were taken on the same day and most likely within the minutes of each other going by the position and appearance that people and domestic animals were located in them and the clothes that the person were wearing. They showed that some persons and domestic animals were sitting at some point in time when they were photographed.



39. The Counsel held that the 1<sup>st</sup> Plaintiff in his testimony confirmed the signature on the hand written statements to be his. The signed statements were of diverse dates between the year 2007 and 2014. They contained an acknowledgement to the effect that the 1<sup>st</sup> Plaintiff had received his employment dues including his salary and leave as a caretaker at the suit property.
40. He confirmed that the signed statements were entered between him and Defendant's mother who had been the duly appointed legal representative of the registered owner at the time of the Al Shabaab to protect him and his family from being arrested as terrorism suspects. He would have to show the original of this to the police whenever they visited the suit property as a reason he was occupying the land. He later on during the cross examination admitted he knew the owner of the suit land.
41. The Learned Counsel held that the Defendant in his testimony stated that the family chose to have the 1<sup>st</sup> Plaintiff continue in employment even after the demise of their mother. His salary was paid by African Cotton Industries Limited. Where the Defendant was a Director/Shareholder together with other family members. The mobile number upon which payments of Mpesa was paid was confirmed during the cross examination that it belonged to the 1<sup>st</sup> Plaintiff.
42. The Learned Counsel referred to the testimony by the Defendant to the effect that after they found out that the Plaintiffs had filed a civil suit ELC. No 110 of 2017 against them they decided to terminate his employment services on grounds of gross misconduct. In further demonstrating that not only that occupation by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was permissive but that the properties by succession were actually or in part occupying, developing and taking care of the suit property. The Defendant produced various correspondences with the National Land Commission (MLC) and the Ministry of Lands between the years 2007 and 2016 regarding a sea frontage dispute.
43. The Learned Counsel submitted that the Plaintiffs had not met the legal threshold for an order of Land Adverse Possession to be granted. He relied on the decision of ELC No 36/2015 (on 2022) he decision of "Wambugu –Versus- Mugi (KLR 172) where court held:-
- “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”.
44. In a nutshell, the Learned Counsel relied on various other decision to support his arguments to include:-
- Malindi App. No 56 of 2014 Mtana Lewa (Supra), Mombasa Teachers Co-operative Saving and Credit Society Ltd. –Versus- Robert Muchambi Katana & 15 Others (2018) eKLR, Gabriel Mbui – Versus- Mukingia Muranya (1993) eKLR; and Mbita –versus- Gachuhi (2002) 1EALR 137, where court held:-
- “..... 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 statutory prescribed period without interruptions...”
45. The Learned Counsel underscored the fact that the deceased purchased the suit property on November 6, 1987 and erected some structures including a servant quarters where the 1<sup>st</sup> Plaintiff and his family had been occupying. During the cross examination he admitted having been a caretaker, signed the



statement and acknowledgement of receipt of payments and having known the widow and executor of the deceased's estate –M/s. Mehimuda Anjarwalla – by itself it created permissive occupation. Having proved that the Plaintiffs occupation was permissive by virtue of employment as a caretaker all other elements fall apart.

46. He argued that the relief sought by the Plaintiffs was not warranted as it had fallen short of proving each of the prerequisite elements. They had not tendered evidence in support of their claim or in rebuttal of the Defendant's evidence. Further the Defendant has demonstrated that the owner had been actively either present through their agent or directly taking care of the suit property between years 1990 to date.
47. The 2<sup>nd</sup> Plaintiff never produced any documents nor turned up to give evidence in court in support of his claim of occupation of the suit property. The 1<sup>st</sup> Plaintiff held that he used to know the 2<sup>nd</sup> Plaintiff but he does not know where he went to. The Defendant is entitled to costs having been denied the enjoyment of the suit property. They are also entitled to costs and interest from the date of Judgment. In conclusion the Learned Counsel urged court to dismiss the claims by the Plaintiff as prayed with costs to the Defendant.

## V. The issues for determination

48. I have critically assessed all the filed pleadings, both oral and documentary evidence adduced in Court, the written submissions and the myriad of authorities by the parties herein and the appropriate and relevant provisions of the [Constitution of Kenya, 2010](#) and statutes.

For the Honorable Court to reach an informed decision on the subject matter, it has condensed the issues into the following three (3) broad sub – headings. These are:-

- a. Whether the suit instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein have any meet.
- b. Whether the parties herein are entitled to the reliefs sought on the Doctrine of land Adverse possession from the filed pleadings.
- c. Who will bear the Costs of the suit.

## VI. The Analysis & Determination

### **issue No a). Whether the suit instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein have any meet.**

49. By way of recapping on brief facts as contained from the pleadings and the evidence adduced herein, the main bone of contention in this matter is whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein were entitled to title by way of Land Adverse possession as provided for by law and prayers. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs claim to have continuously and uninterruptedly lived on the suit land for over thirty (30) years having taken possession from the year 1991. Indeed, the 1<sup>st</sup> Plaintiff holds to have been living on the suit land with his family. He asserted all his thirteen (13) children were born while in occupation of the land. During examination in chief, he emphatically denied ever being an employee of the Defendant. It was a result of this claim that he decided to institute a civil suit which he later on withdrew but immediately thereafter, once more filed the instant one making the same claim. On the other hand, the Defendant claims to be the legal owner of the suit land and that they are the ones permitted the 1<sup>st</sup> Plaintiff to occupy the land as a Caretaker of the land while at the same time also commissioned to be looking for potential and prospective purchasers of the land. The Defendant claimed they would be paying him a salary to that effect either through M/s Mehmuda and upon her demise through the family company. Further, during that period there was the insecurity insurgence caused by terrorism within



the Country and particularly the Coastal region. Hence, to have the Plaintiffs occupy the land was as a safety measure for them and their families as they would be showing the employment letter to the police whenever they conducted the regular and random inspection. They had a cordial relationship. It for these reasons, therefore, they could not evict them from the suit land. It was after he filed the case that they became aware of his intentions and all efforts to meet with him to understand what he had intended failed. They vehemently opposed that the doctrine of land adverse possession was available to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff due to the fact of permissiveness to occupy the land as an employee.

50. Therefore, with this background, the Honorable 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 cease 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 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.

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.



51. 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.
52. 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.
53. 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 No325 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 No265 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.

54. 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 & 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”

55. 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.
56. 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.
57. 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.
58. 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 May 19, 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”.
59. From these decisions of Court, 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.



60. 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.

**Issue No b). Whether the parties herein are entitled to the reliefs sought from the filed pleadings.**

61. Under this sub – heading, the Honorable Court will now proceed to apply these principles to the facts of the instant case. From both documentary and oral evidence adduced by both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on the one hand and the Defendant on the other, undoubtedly and it is illustrative that the suit property belonged to the Defendant having been bought by their father as fate would have it before he died. Factually, the Honorable Court was informed that the deceased purchased the suit property on November 6, 1987 and erected some structures including a servant quarters where the 1<sup>st</sup> Plaintiff and his family had been occupying. To this effect, the Defendant did produce the original Certificate of Title deed, which is “a prima facie” conclusive proof of ownership of land with indefeasible title, rights and interest vested on the land as provided for under the provisions of Sections 24, 25 and 26 of the Land Registration Act, 2010. The land measures approximately two decimal nought four 2.204) acres. Thus the issue of ownership and legal proprietorship of the land is settled.
62. Further to this, upon the demise of the late Anjarwala, the mother of the Defendant – M/s. Mehmuda Anjarwala took over the full control and management of the property. Clearly and on admission by the 1<sup>st</sup> Plaintiff during cross examination, he was requested to occupy the land by M/s. Mehmuda to be taking care of the it and be sourcing out for potential and prospective purchasers. It was also for his security safety against being suspected as a terrorist. From the proceedings, it is stated that being that time of high insecurity and insurgencies of Al Shabaab terrorism mainly prevalent within the Coastal region, this would be a precautionary measure to protect the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs from being arrested and confined as suspects of terrorism. He claimed to have been promised an acre out of it. These facts were never controverted. It is rather clear that there existed a mutual and cordial relationship between the 1<sup>st</sup> Plaintiff and M/s. Mehmuda to an extend of him naming his last born daughter after her. However, the Court has observed and taken judicial notice that it was with the passage of time that things started getting sour and moving south after the demise of M/s. Mehmuda in the year March, 2016. It is not by mere coincidence that immediately thereafter, in the year 2017 that the 1<sup>st</sup> Plaintiff instituted the first Civil suit. He even declined holding any consultative sessions with the estate of the deceased. He must have lost hope the promises that M/s. Mehmuda had made to him now that she had passed away. Perhaps, there was no linkage nor communication between him and the beneficiaries to the estate. This is pure human nature. For that fact alone, the Honorable Court fully appreciates where he was coming from. The demeanour was demonstrated during the hearing as the 1<sup>st</sup> Plaintiff while testifying was caught in high rage and emotion and could not proceed any further. He had to be stepped down for a few days to cool off. Suffice to say, from these facts, it cannot be gainsaid that the occupation by the 1<sup>st</sup> Plaintiff on the suit land was by virtue of the Plaintiff’s employment as a Caretaker from the year 2007. It is evident that his occupation was with the express permission of the legal representatives of the deceased registered proprietor. In further demonstrating that not only that occupation by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was permissive but that the properties by succession were actually or in part occupying, developing and taking care of the suit property. The Defendant produced various correspondences with the National Land Commission (MLC) and the Ministry of Lands between the years 2007 and 2016 regarding a sea frontage dispute.
63. Additionally, as per the provision of Section 107 of the Evidence Act, Cap. 80 holds that he who alleges has to prove. The Defendant was able to demonstrate that there existed employer – employee relationship by their placing reliance on copies of the following documents: -



- a. Handwritten statements signed by the 1<sup>st</sup> Plaintiff
  - b. Certified true copies of African Cotton Industries Limited. The M-Pesa statements for the period between December 12, 2016 to July 31, 2017.
  - c. Show cause letter to the 1<sup>st</sup> Plaintiff dated November 21, 2017 and termination of employment letter dated November 27, 2017.
  - d. Letter from Messrs. Musinga and Co. Advocates addressed to the “SMB” dated March 24, 2014, September 3, 2014 and October 13, 2014.
  - e. A letter from “SMB” addressed to Messers. Musinga & Co. Advocates dated September 15, 2014.
64. On whether the 1<sup>st</sup> Plaintiff had been on the land continuously and uninterruptedly for over thirty (30) years from the year 1991 is an issue of facts. The Learned Counsel averred that from his affidavit the 1<sup>st</sup> Plaintiff intimated that he had been in “actual and active possession” of the suit property for over 12 years. At first, the 1<sup>st</sup> Plaintiff had proceeded to claim he had never seen the owner of the suit land and had developed it openly. On this argument, the Honorable Court holds that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were not able place any evidence to support this claim whatsoever neither had any independence witness testified in support. It is instructive to note that the few documentary exhibits in form of photographs. The learned Counsel for the Defendant objected to their production on grounds that they never bore the time stamp to show when they were taken nor any way to confirm that they were actually taken at the suit property. He argued that they were all were taken on the same day and most likely within the minutes of each other going by the position and appearance that people and domestic animals were located in them and the clothes that the person were wearing. They showed that some persons and domestic animals were sitting at some point in time when they were photographed.
65. Further, there was need for the Certificate of production to be produced. The objection was sustained. The Honorable Court ordered that they be marked for identification. Although the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were accorded an opportunity by Court to produce a Certificate of Production as required under the provision of Section 106A and B of the *Evidence Act*, Cap. 80 of the Laws of Kenya they never bothered to utilize it. Thus, these photographs can never be relied on as evidence at all in this case. The Honorable Court is fully satisfied that the 1<sup>st</sup> Plaintiff in his testimony confirmed the signature on the hand written statements to be his. The signed statement were of diverse dates between the years 2007 and 2014. They contained an acknowledgement to the effect that the 1<sup>st</sup> Plaintiff had received his employment dues including his salary and leave as a Caretaker at the suit property. By way of sampling, the signed statements stated in the Kiswahili language:-
- “Nafanya kazi ya Kuchunga Shamba mimi nemewekwa na mama – Anjarwalla mimi nalipwa mshahara.. mimi naka na familiyangu yote”
66. He confirmed that the signed statements were entered between him and Defendant’s mother who had been the duly appointed legal representative of the registered owner at the time of the Al Shabaab to protect him and his family from being arrested as terrorism suspects. He would have to show the original of this to the police whenever they visited the suit property as a reason he was occupying the land. He later on during the cross examination admitted he knew the owner of the suit land. Indeed, the Defendant demonstrated to Court that the owner had been actively either present through their agent or directly taking care of the suit property between years 1990 to date. Hence an issue of permissiveness is sealed while the aspect of being on land continuously and uninterruptedly does not apply at all as it is unfounded and baseless in law.



67. Furthermore, the Honorable Court has fully concurred with testimony by the Defendant the family chose to have the 1<sup>st</sup> Plaintiff continue in employment even after the demise of their mother. His salary was paid by African Cotton Industries Limited where the Defendant was a Director/Shareholder together with other family members. During cross examination, the 1<sup>st</sup> Plaintiff confirmed that his mobile cell phone numbers – 0720 354 044 – would be used for making these payments through the MPESA services. As stated above, all along the beneficiaries had assumed there existed the earlier cordial relationship with the 1<sup>st</sup> Plaintiff until after they found out that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had filed a civil suit ELC. No 110 of 2017 against them. Consequently, they decided to terminate his employment services on grounds of gross misconduct.
68. The 2<sup>nd</sup> Plaintiff never produced any documents nor turned up to give evidence in court in support of his claim of occupation of the suit property. The 1<sup>st</sup> Plaintiff held that he used to know the 2<sup>nd</sup> Plaintiff but he does not know where he went to. The Defendant is entitled to costs having been denied the enjoyment of the suit property. They are also entitled to costs and interest from the date of Judgment. In conclusion the counsel urged court to dismiss the claims by the Plaintiff as prayed with costs to the Defendant.
69. From the foregoing, and the extensively exhausted the legal reasoning, the Honorable Court is fully satisfied that the Doctrine of Land Adverse possession as sought by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein is not available and therefore they are not entitled to it all in law. In the given circumstances, therefore, the Honorable Court need not belabor the point whatsoever.
70. Be that as it may, in the spirit and the letter of the law, it is on record that there existed a cordial and mutual relationship between the Plaintiffs and the Defendants until the litigation process commenced in earnest. Additionally, the parties had commenced an out of Court settlement on the matter in tandem and as provided for under the provision of Article 159 (2) ( c ) of the [Constitution of Kenya, 2010](#). Indeed, during the proceedings, the Honorable Court would encourage them to fully explore this mechanism and try to achieve a settlement with an eventual recording of a Consent. The Honorable Court took cognizance of the fact that the 1<sup>st</sup> Plaintiff in his testimony informed Court of having been promised an acre of the suit land by M/s. Mehmuda Anjarwala whom they seemed to have sustained good relationship to a point of even naming his last born daughter after Mehmuda, the deceased's name. In African tradition and customs this is regarded as major honor. Indeed, the Defendant also offered without imparting any details, they would be ready and willing to meet the damages incurred by the 1<sup>st</sup> Plaintiff. Unfortunately, as fate would have it she passed on before these promises could be fulfilled. She also never left a Probate Will to this effect. For unclear and apparent justifiable and good reasons these efforts became a cropper.
71. This being a Court of Law and established under the provision of the Article 162 (2) (b) of the [Constitution of Kenya, 2010](#), and also governed by several other statutes such as Sections 3 and 13 of the [Environment and Land Act](#), No 19 of 2011, Sections 101 of the [Land Registration Act](#), No 3 of 2012 and Section 150 of the [Land Act](#), No 6 of 2012, the Honorable Court is informed by the fact that the Constitution is a living tissue. Just like all other living tissues, it has to be fed and watered. It breathes and without oxygen and freshness it will die. With the fullness of time, I have learnt that these things are not just metaphorical. They are real. We all must know this fact. For a moment, this might sound rather academic but inevitable. The Courts of Law are guided by Jurisprudence, meaning knowledge of or skill in law, which was the first social science to be born. While making interpretation of Law, the Courts are guided by two broad philosophies. These are, firstly, “the Positivism” interpretation of Law, whereby it means that laws are mere commands of human beings with threats of force. It holds that law is valid notwithstanding its merits or demerits. In other words, law and morality are distinct. In a



nutshell, positivists hold the view that it is not the business of lawyers and the Judges to say whether a law is good or bad. The business of rendering such moral verdicts is best left to Legislators, philosophers and the public. To them the works of Lawyers and Judges is to apply the Law ‘as it is’. Secondly, is “the natural” interpretation of the Law. Here it holds that law and morality cannot be divorced from each other. Like the siamese twins they are inseparable and intertwined. They hold that the law is based on basic human values that are universal and standard. It is based on values of intrinsic to human nature that can be deduced and applied independently of man – made law. Such values include the universal need to preserve human life and livelihoods. It is my intuition that these are the Core Values that the makers and the legal experts of the *Constitution of Kenya, 2010* had in mind by enacting the provisions of Articles 2 (1), (2), (3), (4), (5) and (6) on the Supremacy of the *Constitution* and the fact that any international treaty or law that Kenya has ratified shall be part of the laws of Kenya; 10 (2) (b) on the Core values of human dignity, equity, social justice, equality, human rights, non – discrimination, protection of the marginised and sustainable development; Articles 43 (1) (b) on social and Economic rights – access to and adequate housing and decent standards of livelihood; 48 on access to Justice and Article 159 (2) (c) on Alternative Judicial System (AJS) currently being strongly advocated as a policy by the Judiciary in terms of resolving disputes amicably, justly, expeditiously and cost effectively. It leaves parties as friends and ones sustaining brotherhood and good neighbourhood. This is as opposed to losing a case and followed by forceful eviction.

72. While at this point, the Honorable Court wishes to rely on the case of “Constitution Petition Numbers 65 of 2010 - Satrose Ayuma & 11 Others - Versus - Kenya Railways Staff Retirement benefits Scheme” where the Court adopted the General Comment No 7 of the UN Commission on Human Rights and stated:-

“State Parties are obligated to use all appropriate means to protect the rights recognized in ICSECR and it recognizes that forced evictions ar prima facie violations of the right to adequate housing, and that States should be strictly prohibited in all case, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of the General Comment No 7 also elaborates an appropriate procedural protection and due process to be in place to ensure that human rights are not violated in connection with forced evictions.” The term “Forced Eviction” was defined in the context of the definition accorded to it by the Committee on Economic, Social and Cultural Rights which defines it as:-

“The permanent removal against their will of individuals, families and/or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal or other protection” .

The Court cited:- “The UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)” which have provided some guidelines to States on measures to adopt in order to ensure that development – based evictions, like the present one in this instant case, are not undertaken in contravention of the existing international human rights standards and violation of human rights. The Court held that:

“These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the rights to adequate housing for all those threatened with eviction, at all times. The Guidelines, inter alia, place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized by law; carried in in accordance with international



human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps that Sates should take prior to taking any decision to initiate an eviction, that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with the international human rights commitments .....the Guidelines also provided conditions to be undertaken during the evictions as follows: that there must be mandatory presence of Government officials or their representatives on site during the eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to election, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.....

73. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. I strongly hold that this must have been the rationale that informed and guided the Legislature in their wisdom to have caused the amendment into the Land Act, and inserted the provision of Section 152E of the Land (Amendment) Act, which provides:-

1. “If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on the person a notice, of not less than three months before the date of the intended eviction. is in occupation of his or her land without
2. The notice under Sub - Section (1) shall:-
  - a. In the case of a large group of persons, be published in at least two daily newspapers of national wide circulation and be displayed in not less than five strategic locations within the occupied land.
  - b. Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
  - c. Be served on the Deputy County Commissioner in Charge of the area as well as the officer Commanding the Police division of the area”.

74. Following this lengthy deliberation, I wish to apply these principles to the instant case. It is imperative to appreciate that the 1<sup>st</sup> Plaintiff was engaged by M/s. Mehmunda Anjarwala as the Caretaker. Before she passed on they seem to have had a cordial relationship. She had requested him to get prospective purchasers. She had attempted to cover him up from any security harassment and being misconstrued as an Al Shabaab terrorists during those mayhem days of insurgencies and insecurity within the Coastal region. He had a large family of thirteen (13) children where some were married off and hence moved out. His last born child was even named after M/s. Mehmuda. She had promised to give him an acre from the suit land. Perhaps him deciding to institute a suit against the Defendant was after the demise of the M/s. Mehmuda as things had been very peaceful there before. He must have despaired and seen



no hope from the surviving beneficiaries of the estate of the deceased. The more reason he declined to their request for a meeting. The Defendant informed Court they would be ready to compensate him for the damages incurred.

75. In order to avoid the 1<sup>st</sup> Plaintiff herein and his family, as the dedicated and devoted employee – a Caretaker for over thirty (30) years becoming destitute and homeless, based on humanitarian consideration – on gratia basis and the right to housing and settlement as provided for under Article 43 of the Constitution of Kenya, 2010, I urge the Defendant to consider awarding the 1<sup>st</sup> Plaintiff a sum of Kenya Shillings Three (3) Million (Kshs 3, 000, 000.00) which from simple arithmetic translates to a sum of Kenya Shillings Eight Thousand (Kshs 8, 000.00/=) per month on a pro rata basis for all that period he was in occupation of the suit land and almost developed some sentimental value to it. The 1<sup>st</sup> Plaintiff rendered services to the Defendant as the Caretaker with great devotion, dedication and diligence. To me this would be adequate compensation prior to him providing vacant possession which will enable him attain a decent and habitable settlement with his family.

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

76. It's trite law that matters of Costs is the discretion of Court. Costs means any award that a party is granted at the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of *Civil Procedure Act* provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of "*Jasbir Rai Singh Rai – Versus Tarchalon Singh* (2014) eKLR; and the Court *Rosemary Wambui Munene – Versus – Ibururu Dairies Co – Operative Limited* (2014) eKLR, *Kenya Sugar Board – Versus – Ndungu Gathini* (2013) eKLR; and *Cecilia Nyayo – Versus Barclays Bank of Kenya Limited* (2016) eKLR" where Courts held that:-

“The basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

77. In the instant case, the Plaintiff has not been able to establish its case against the Defendant. Therefore, they are not entitled to be awarded the costs of the suit. However, arising from the nature and special circumstances of this case as already explained in this Judgement, it is just fair, reasonable and equitable that each party bears their own costs herein.

#### **VII. Conclusion & Disposition**

78. Consequently, having conducted such an elaborate and comprehensive analysis of the framed issues, the Honorable Court has concluded that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein have failed to establish its case on preponderance of probability. For avoidance of doubt, therefore I proceed to make the following specific orders. These are:-
- a. That Judgement be entered to the effect that the suit instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein be and is hereby dismissed for lack of merit.
  - b. That an order for mandatory eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs from all that parcel of land situated in Mombasa County, known as Sub - division No 858 of Section One Mainland North (MN/1/858) measuring approximately two decimal nought four 2.204) acres under the provision of Section 152E of the *Land Act* No 6 of 2012 be and is hereby made within the next ninety (90) days from the date of the delivery of this Judgement.



- c. That in order to avoid the 1<sup>st</sup> Plaintiff herein and his family, as the dedicated and devoted employee – a Caretaker for over thirty (30) years for the Defendant and to avoid them becoming destitute and homeless, based on humanitarian consideration – on gratia basis and the right to a decent and adequate housing and settlement as provided for under Article 43 (1) (b) of the *Constitution* and the spirit founded from the Alternative Justice System (AJS) under the provisions of Article 159 (2) ( c ) of the *Constitution of Kenya, 2010* the Defendant to consider awarding the 1<sup>st</sup> Plaintiff a sum of Kenya Shillings Three (3) Million (Kshs 3, 000,000.00) as adequate compensation prior to him providing vacant possession which will enable him attain a decent and habitable settlement with his family.
- d. Thateach party to bear their own costs of the suit.

It is ordered accordingly

**JUDGEMENT DELIEVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS,  
SIGNED AND DATED AT MOMBASA THIS 10<sup>TH</sup> DAY OF MAY 2023.**

.....

**HON. MR. JUSTICE LL NAIKUNI (JUDGE)**

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**

**Judgement delivered In the presence of:-**

- a. M/s. Yumna, the Court Assistant.  
b. No appearance for the Plaintiff.  
c. M/s. Barasa Advocate for the Defendant.

