



**Hamadi & 151 others v Safaricom Investments Co-operative Society Ltd & 5 others
(Environment & Land Case E005 of 2022) [2023] KEELC 17218 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E005 OF 2022**

EK MAKORI, J

MAY 3, 2023

BETWEEN

KIBWANA HAMADI & 149 OTHERS 1ST PLAINTIFF

KIBWANA HAMADI 2ND PLAINTIFF

KIBWANA HAMADI & 149 OTHERS & 149 OTHERS 3RD PLAINTIFF

AND

SOCIETY LTD 1ST DEFENDANT

SOCIETY LTD 2ND DEFENDANT

**SAFARICOM INVESTMENTS CO-OPERATIVE SOCIETY LTD 3RD
DEFENDANT**

JOHN KIMOGUT KIPTOO 4TH DEFENDANT

JOHN KIMOGUT KIPTOO 5TH DEFENDANT

JOHN KIMOGUT KIPTOO 6TH DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit vide the plaint dated 1st February 2022 seeking the following reliefs:
 - a. An order suspending three months' notice from the 25th of November 2021 which sought the eviction of the plaintiffs with regard to occupation in title Number CR. 37354 pursuant to a sub-division registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. Or thereabouts and sub-division number 4379 (Original No. 563/1) Section III Mainland North as delineated on Land Survey Plan Number



252120 annexed to the Certificate of Title registered as CR. No 37354/1 pending hearing and determination of this suit.

- b. An order of cancellation of the titles known as Title Number CR. 37354 pursuant to a sub-division registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-division number 4379 (Original No 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No 37354/1 which was bought from the 2nd defendant and also plot number MN/III/6224 whose registered owner is the 2nd defendant being also a sub-division stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR. 56690 subdivision No. 8221 (original 6224/2) average being 38.4 Ha. and plot No MN/III/6224 sub-division of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 sub-divisions thereof including CR. 64260 plot No MN/III/9911 sub-division original number 8221/2 acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225 and further sub-divisions thereafter as the process used in the transfer was a void ab initio and thus null and void.
- c. A declaration that they are not in occupation of all that parcel of CR. 64260 plot No MN/III/9911 sub-division original number 8221/2 acreage being 31.43 Ha.
- d. A declaration that any eviction concerning the plaintiffs herein concerning various portions of land they occupy of about 99.4 acres spanning from Title Number CR. 37354 pursuant to a subdivision registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. Or thereabouts and sub-divisions number 4379 (Original No.563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No. 37354/1 which was bought from the 2nd defendant and also plot number MN/III/6224 whose registered owner is the 2nd defendant being also a sub-divisions stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further sub-divisions thereafter including Title No CR. 56690 subdivision No. 8221 (original 6224/2) average being 38.4 ha and plot No MN/III/6224 sub-division of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 sub-divisions thereof including CR. 64260 plot No MN/III/9911 sub-division original number 8221/2 acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225 and further sub-divisions are time-barred as per the provisions of Section 7 of the Limitation of Actions Act Cap. 22.
- e. A declaration that the plaintiffs have acquired title to the various portions of land they occupy of about 99.4 acres spanning from Title Number CR. 37354 pursuant to a sub-division registered as CR 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts



and sub-divisions number 4379 (Original No. 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR No. 37354/1 which was bought from the 2nd defendant and also plot number MN/III/6224 whose registered owner is the 2nd defendant being also a sub-divisions stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR. 56690 sub-divisions No 8221 (original 6224/2) average being 38.4 Ha. and plot No MN/III/6224 sub-divisions of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 sub-divisions thereof including CR. 64260 plot No MN/III/9911 sub-divisions original number 8221/2 acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225 and further sub-divisions by way of prescription as per section 7 of the Land Act No. 6 of 2012.

- f. A declaration that the plaintiffs are the owners of the land they occupy of about 99.4 acres spanning from Title Number CR 37354 under sub-divisions registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-divisions number 4379 (Original No. 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No. 37354/1 which was bought from the 2nd defendant and also plot number MN/III/6224 whose registered owner is the 2nd defendant being also sub-divisions stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further sub-divisions thereafter including Title No. CR. 56690 sub-divisions No 8221 (original 6224/2) average being 38.4 Ha. and plot No MN/III/6224 sub-divisions of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 sub-divisions thereof including CR. 64260 plot No MN/III/9911 sub-divisions original number 8221/2 acreage being 31.43 MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225 and further sub-divisions.
- g. Consequent to the grant of prayers above, an order of sub-division of the land they occupy of about 99.4 acres spanning from Title Number CR. 37354 pursuant to sub-divisions registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-divisions number 4379 (Original No. 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No 37354/1 which was bought from the 2nd defendant and also plot number MN/III/6224 whose registered owner is the 2nd defendant being also a sub-division stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot no. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further sub-divisions thereafter including Title No CR. 56690 sub-division No. 8221 (original 6224/2) average being 38.4 Ha. and plot No MN/III/6224 sub-divisions of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 subdivisions thereof including CR. 64260 plot



No MN/III/9911 sub-divisions original number 8221/2 acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225 and further sub-divisions are to be directed at the Mombasa Land Registrar to transfer the Land to the plaintiffs of their various portions of land they occupy spanning as per their occupation spanning 99.94 acres.

- h. An order that the Deputy Registrar of this court is hereby authorized where necessary to sign any documents required to ensure the transfers order under this judgment is realized, to that end the Land Registrar shall accept such documents signed by the Deputy Registrar as being sufficient to effect the transfer. (sic).
- i. A permanent injunction restraining the defendants or any person purporting to act on his behalf, servants, workmen, licensees or agents from howsoever dispossessing, harassing the plaintiffs or interfering with their peaceful entitlement occupation and possession of their portions spanning 99.4 acres spanning from Title Number CR. 37354 pursuant to sub-divisions registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-divisions number 4379 (Original No 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No 37354/1 which was bought from the 2nd defendant and also plot number MN/III/6224 whose registered owner is the 2nd defendant being also a sub-divisions stemming from Plot No. 248 and subsequent subdivisions thereafter from plot no. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No. CR. 56690 sub-divisions No. 8221 (original 6224/2) average being 38.4 Ha. and plot no. MN/III/6224 sub-divisions of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 sub-divisions thereof including CR. 64260 plot No MN/III/9911 sub-divisions original number 8221/2 acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225 and further sub-divisions.
- j. An order of cancellation of the three months' notice from the 25th November 2021 which sought the eviction of the plaintiffs with regard to occupation in title Number CR. 37354 pursuant to a sub-divisions registered as CR 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-division number 4379 (Original No. 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No 37354/1.
- k. Costs of the suit.

2. The 1st defendant filed a defence dated 19th April, disputing the assertions made by the plaintiffs and a counterclaimed seeking inter alia, a declaration that it is the lawful owner of Title No. CR 35955/3 LR No 4379/111/MN, vacant possession, permanent injunction, and police supervision of the plaintiffs' compliance with orders of the court. The 1st Defendants claim acquisition and ownership of the suit property measuring approximately 10 acres by way of transfer after purchase from the 2nd defendant.



3. The 2nd defendant filed a defence with a counterclaim seeking various orders ranging from a perpetual injunction, declaration of ownership of the suit property, and eviction of the plaintiffs from the suit properties enumerated in the counterclaim.
4. The plaintiffs' case is that the parcel of land, which is partly in contestation, was owned by one Salim Bin Hero and was known as Subdivision No. 284 Section III Mainland North measuring approximately 1590 acres. Since time immemorial they have been in occupation of the said land parcel of land and using portions of the same having been born there which parcels were distributed on or about 6th February 1957 by order of the Supreme Court of Kenya as listed in the schedule thereto given in the court order.
5. It was averred that on or about the year 1965 one William Kiptoo Barkoria (the 2nd defendant's deceased father) bought a parcel of land measuring approximately 16 acres vide a transfer dated 2nd May 1967 from one Momo Binti Abubakar Bin Rashid who had a portion on Plot No. 284. That the father of the 2nd Defendant further purchased 10 acres from one Radhia Bibi Abud Rabbi in addition, the plaintiffs lived undisturbed in their portions of land with a cumulative acreage of about 99.94 acres until the 2nd defendant illegally, unlawfully, and unprocedurally obtained title to the land after the demise of his father in the year 2000.
6. The plaintiffs' further averment is that the court in Shanzu Criminal Case number 112 of 2016, appreciated that the plaintiffs' occupation fell outside Title number CR 64260 plot No MN/III/9911 and directed the 2nd defendant to restrict his dealings to Title number CR 64260 plot No. MN/III/9911 sub-division Original number 8221/2 measuring 77.6 acres. Moreover, the survey conducted on 22nd September 2017 in the course of the criminal case in the presence of all the parties including the 2nd defendant all beacons were found to be intact and indeed fell outside the parcel occupied by the plaintiffs. Further, the plaintiffs' occupation has never been about land Title number CR 64260 Plot No. MN/III/9911 sub-division Original number 8221/2 measuring 77.6 acres which is the subject matter of suit in Malindi ELC No. 44 of 2020.
7. The illegalities leading to the issuance of titles to the defendants were set out as follows:
 - i. Title No CR 5660 Sub-division No 8221 (Original 6224/2) measuring 38.4 acres.
 - ii. Title No CR 64260 plot No MN/III/ 9911 sub-division original no. 8221/2 measuring 77.6 acres
 - iii. CR No 37358 sub-division No 4381 original number 563/6 measuring 2.024 Ha.
 - iv. CR No 37357 sub-division number 4381 original number 563/5 measuring 53.64 Ha.
 - v. CR No 37356 sub-division no 4381 original number 563/3 measuring 2.026 Ha.
 - vi. CR No 37355 sub-division No 4380 original number 563/1 measuring 2.024 Ha.
 - vii. CR No 37354 sub -division no. 4380 original number 563/2 measuring 4.047 Ha

Which parcels are known as:



Plot number MN/III/6224 and sub-division of plot No MN/III/6224 being six namely MN/III/8220, MN/III/8221 sub-division thereof including CR 64260 plot No MN/III/9911 sub-division original number 8221/2 measuring 77.6 acres MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225 and further sub-divisions thereafter.

The particulars of fraud were particularised as below:

- a. Non-ownership of the subject matter titles and parcels of land indicated above stemming from unknown methods of transfer to the 2nd defendant in the absence of sale agreements and land transfer.
 - b. The transfer of portions belonging to the deceased William Kiptoo Barkoria seemingly without a succession process to the 2nd defendant amounting to intermeddling with the property of the deceased.
 - c. The purchase by the 1st defendant of a portion of land subject to an ownership dispute and occupation by the plaintiffs.
 - d. The eventual process of issuance of deed plans and title deeds to the 1st defendant without any colour of right.
8. In response, the 1st defendant filed defence and counterclaim dated 19th April 2022 denying the plaintiffs' claim and averred that it legally and lawfully acquired the land in question - Title No. CR 35955/3 LR No 4379/111/MN from the 2nd Defendant for valuable consideration and that all due processes in the acquisition of the land were above board. It proceeded to seek the following reliefs:
- a. Vacant possession;
 - b. Permanent injunction, and;
 - c. Police supervision of the plaintiffs' compliance with orders of the court
9. In response, the 2nd defendant filed an amended defence and counterclaim dated 31st May 2022 denying the plaintiffs' claim and averred that his late father William Kiptoo Barkoria bought for valuable consideration the respective shares of Plot No. 284 from Momo Binti Abubakar Bin Rashid 133.24 acres share of Plot No 284/III/MN through a transfer registered as CR. 7172/160, 10.515 acres from Radhia Binti Abdulkadir Rabbi through transfer registered as plot No. 284/III/MN and 29.46 acres from Nyinyi d/o Bwanamkubwa Maalim registered as CR 7172/397 thus the total acreage purchased was 173 acres and his father took possession and stayed on the property until his demise in 1999.
10. In the counterclaim, the 2nd defendant seeks orders that:
- a. The suit by the plaintiffs against the 2nd defendant be dismissed.
 - b. A declaration that the 2nd defendant's father William Kiptoo Barkoria acquired 173 acres of L.R no 284/III/MN for valuable consideration and the 2nd defendant was properly registered as the owner of L.R 563/III/MN and the consequent subdivisions thereof and transfer of portions thereof passed the property and are protected by law.
 - c. A permanent injunction be issued restraining the plaintiffs by themselves, their agents assigns or anybody else from encroaching, entering into any portion of land being a resultant subdivision of L.R 563/III/MN.



- d. An order of eviction against the plaintiffs do issue to evict any of the plaintiffs' defendants to the counterclaim and their assignee and beneficiaries of any portion of land being a resultant sub-division of L.R 563/III/MN.
 - e. Costs of the suit and the counterclaim be awarded to the 2nd defendant/ counter-claimant.
11. The plaintiff called two witnesses PW1 Kibwana Hamadi adopted his witness statement dated 1st February 2022 as his evidence and produced as PEX 1-16 a bundle of documents as per the list of documents. He said they were in court because of threats of eviction. A notice had been issued that they vacate the land in question. They had lived on the land for over 12 years and had acquired it through adverse possession. The title obtained by the 1st defendant from the 2nd defendant was fraudulently obtained. The alleged sale by Binti Abubakar to the father of the 2nd defendant never happened. The people listed in the claim were his relatives and had granted him authority to represent them in court. Some had not signed the consent. No surveyors were taken to the ground to establish the acreage of land allegedly purchased by the father of the 2nd defendant. A surveyor needs to go to the ground. Their claim was 99 acres to be carved from the original title No 284.
 12. PW2 Kahindi Bongo adopted his witness statement dated 28th June 2022 as his evidence in chief. He admitted his name was not part of the plaintiffs but he was supporting their case. He is a neighbour to the plaintiffs and the 2nd defendant. On cross-examination by Mr Wanjohi, he told the court that he was aware that Safaricom purchased the land from the 2nd defendant. It was his testimony that he knew the late William Kiptoo who lived on the adjacent land for a while but he did not know how many acres he had acquired or how he had acquired them.
 13. DW1 Jared Osoro Nyagoka - a project officer of the 1st defendant company adopted his witness statement dated 19th April 2022 as his evidence in chief and produced as exhibits a list of documents marked 1-11 as per the list of documents. He added that the title for the 1st defendant is title No. CR 35955/3 LR No 4379/111/MN measuring 10 acres purchased in 2015 and transferred in 2016. It was his testimony that the plaintiffs were never on the ground and that it was only after they had subdivided the land that people invaded it, prompting them to publish in a Kenya Gazette and in the dailies to have them lawfully evicted. He explained that due diligence had been performed during the purchase. Nobody was on the ground. The land was vacant. A land office search revealed that the 2nd defendant was the registered owner of the land in question and thus could sell to them. On cross-examination by Mr Nyabena, he told the court that they build a wall to shield the 10 acres, which was brought down in 2020 by invaders claiming ownership.
 14. DW2 John Komogut Kiptoo the 2nd defendant adopted his witness statement dated 1st March 2022 as his evidence in chief. He produced as exhibits a bundle of documents marked 1-12 as per the list of documents. He added that the land is legally his. He gave a history of how the land was acquired by his father through purchase from the original shareholders for valuable consideration. The original land was subdivision No 284/111/MN, which was approximately 1590 acres. The title was issued on 11th December 1923. The purchase by his father was as follows: - vide transfer dated 2nd May 1967 Radhia Binti Abubakar sold her share that is 5/6th of 1/126 i.e. 5/756 share of No. 284 which was approximately 10.51 acres. The transfer was endorsed on 3rd May 1967. Vide sale agreement dated 2nd of May 1967, he purchased 30 acres from one Nyinyi Bwanamkubwa Malim Hero, the transfer was dated 6th June 1996 and registered on 13th June 1998. Vide transfer dated 23rd July 1967 he purchased from Momo Binti Binti Abubakar Bin Rashid 5/16 undivided share out of 429/5120 i.e. 429/5120 of LR No 284 which works out as approximately 133.224 acres the transfer was endorsed on 20th September



1977. The total acreage purchased by his father from the original shareholders was thus approximately 172 acres. The evidence of the purchase and transfer was exhibited.
15. The 2nd defendant's father died in 1999. Succession was completed. The title was obtained under CR No 35955 plot No 563 Orig. No 284/9, 68.62 hectares representing what was purchased. Following the acquisition of the title, subdivisions were carried out, including the sale of Plot No. 4379 measuring approximately 10 acres to the 1st defendant on 11th December 2015 for valuable consideration. The transfer was completed on 27th October 2016.
 16. The 2nd defendant further testified that Kibwana Hamadi and others filed Malindi ELC No 26 of 2020 which was later withdrawn and a fresh one filed as Malindi ELC No 44 of 2020. In the latter case, the court issued status quo orders. The plaintiff and others used the orders to invade the 1st defendant's land claiming adverse possession.
 17. The 2nd defendant further testified that the plaintiffs are known to him and reside nearby. They have their own land where they have built. They are not entitled to the 1st defendant's land nor his land subdivisions Nos 9911,3914, 9915,9916 and 9921 are in his favour and registered as such, the court should issue declaratory orders in his favour and order for the eviction of the plaintiffs who have invaded his land.
 18. Counsel for the plaintiffs in his submissions urged the court to consider for determination that the entire subdivisions herein are a product of Plot 284 which was owned based on undivided shares as per the definition in *Godfrey Njogu Mungai v Francis Kagiya & 3 Others* [2021] eKLR. He argued that there was no partition of the land as indicated by evidence and there was no survey.
 19. Counsel challenged the eviction notice while relying on Section 152 (f) of the *Land Act*. Further, the plaintiffs are entitled to the prayers sought in the plaint.
 20. On its behalf, it was submitted by counsel for the 1st defendant argued that the court should consider the following issues for determination;
 - a. Whether the 1st defendant lawfully purchased all that parcel of land known as Title number CR 37354 as delineated on land Survey plan number 25120 from the 2nd defendant. In this regard, it was submitted that the 1st defendant's claim is substantiated by the sale agreement and transfer produced as evidence and the certificate of title as well as deed plans issued to them. The following authorities were relied on *Vijay Morjaria v Nansigh Madbusingh Darbar & Another* [2000] eKLR and *Hassan Mohamed Haji v Mohamed Keynan & Another* [2019] eKLR.
 - b. Whether the plaintiffs are illegal occupants/trespassers of all that parcel of land known as Title Number CR 37354. To this, it was submitted that the 1st defendant has demonstrated that it is the lawful owner of the suit property, and it should be accorded protection under sections 25, 26 and 27 of the *Land Registration Act*. That the plaintiffs have illegally and without any colour of right entered and taken possession of the suit property, which actions amount to trespass. Reliance was placed on the authority of *Alex Waigera Mwaura v Chania Power Company Limited & Another* [2020] eKLR.
 - c. Whether the plaintiffs have acquired any legal right over Title Number CR 37354 by adverse possession. On this, it was submitted that the plaintiffs' claim against the 1st defendant is for adverse possession. Counsel submitted that the 1st defendant acquired the land in 2015 and became registered in 2016 and therefore the plaintiffs cannot allege to have acquired the land by adverse possession as time started running in 2016. The authorities of *Kasuve v Mwaani*



Investments Ltd & Others [2004] KLR 184 and *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR were cited.

- d. Whether the 1st defendant is entitled to the reliefs sought in the counter-claim. On this limb, it was submitted that the 1st defendant having proved on a balance of probabilities that they are the lawful proprietors of the suit property and are entitled to vacant possession.
21. The 2nd defendant submitted the following issues for determination;
- a. Whether or not William Kiptoo Barkoria properly acquired 173.99 acres of L.R 284/III/MN which was registered as L.R 563/III/MN and whether the same and subsequent titles should be revoked. It was submitted that the total acres purchased by the deceased from the original shareholders were 173 acres and the plaintiffs have not tendered any evidence to support the alleged illegalities.
 - b. Whether the plaintiffs have acquired 99.94 acres owned by the 2nd defendant by way of prescription/adverse possession. It was submitted that the right way to bring a claim for adverse possession is by way of Originating Summons as provided for under Order 37 Rule 7 and as held in the case of *Solomon Muathe Mitau & 787 others v Nguni Group Ranch* [2017].
 - c. Whether or not the plaintiffs, their assignees and beneficiaries should be evicted from properties being resultant subdivisions of L.R 563/III/MN. It was submitted that the 2nd defendant's title has not been impeached and thus the court must protect the constitutionally protected property rights.
 - d. Whether the 2nd defendant is entitled to a permanent injunction against the plaintiffs. It was submitted that a permanent injunction is well merited. Reliance was placed on the authorities of *Khalif Mohamed Hure V Mohamed Abdi Karim* and *Sammy Kemoo Arekai v Eliakim M. Olweny & Another* [2021]eKLR.
 - e. Whether or not the notice issued on 25th November 2021 which sought eviction of the plaintiffs has taken effect and the plaintiffs be evicted. It was submitted that the plaintiffs have not succeeded in upsetting the notice issued and the court should therefore uphold the notice and order that eviction proceed as envisaged by the law.
22. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties. The issues arising for determination are:
- a. Whether the claim for prescription/adverse possession is competently suited by way of plaint.
 - b. Whether the 2nd defendant is the lawful owner of 173.99 acres of land and whether his late father William Kiptoo Barkoria properly acquired the same comprised in title L.R 563/III/MN.
 - c. Whether the 1st defendant lawfully purchased all that parcel of land known as Title Number CR 37354 as delineated on Land Survey Plan Number 25120 from the 2nd defendant.
 - d. Whether the eviction notices issued by the 1st Defendant were lawful regular and in order.
 - e. Whether the plaintiffs are entitled to 99.44 acres of land by way of adverse possession.
 - f. Whether a permanent injunction should issue against the plaintiffs from interfering with the suit properties counter-claimed by the 1st and 2nd Defendants



- g. Whether an eviction order and police assistance should issue against the plaintiffs as prayed by the defendants.
- h. Costs
23. Whether the claim for prescription/adverse possession is competently suited by way of a plaint. The plaintiffs lay claim on the suit property through prescription. They, however, averred that they have been on the land for over 20 years and the Limitation of Actions Act limits the defendants from recovering land. Prescription is a non-possessory interest in land through the long continuous use of the same. The plaintiffs seek in one of their prayers a declaration that they have acquired titles to the various portions of land that they occupy. In my view, this is a prayer for adverse possession as opposed to prescription. The decision in *Solomon Muatbe Mitau v Nguni Group Ranch* [2017] eKLR aptly captures this position:
- “This is yet another claim of ownership of land through the doctrine of adverse possession. The claimants in this case, however, conflate the doctrine with prescription, which they pleaded and cited the *Limitation of Actions Act*, Cap 22, Laws of Kenya, as the legal basis. There is a difference between the two. In the case of *Benina Ndungwa Kinyumu & 4 Others vs National Land Commission* [2015] eKLR, Angote, J. explained the distinction between the two, correctly in our view, in the following manner: 18. There is a difference between acquiring a title to land by way of adverse possession and prescription. Of course, it has been said that the similarities between the doctrine of adverse possession and prescriptive easements far outweigh the differences because both result from the operation of the statute of limitation for trespass.
19. The difference between the two doctrines lies primarily in determining what is accomplished. With adverse possession, the goal is to acquire title to real property.
20. an easement by prescription, however, is not directed towards the goal of acquiring title to property. Rather, it is directed towards acquiring an easement. So, if one uses, rather than possesses, the land of another, and the use is open and notorious, adverse, continuous and uninterrupted, for the statutory period, then one acquires an easement and can continue to use that land.
21. Unlike adverse possession, the prescription is a nonpossessory interest in land through the long, continuous use of the land.”
24. From the couching of the pleadings and evidence, the plaintiffs seek to impeach the titles in this matter hence we are dealing with adverse possession
25. The 2nd defendant has challenged how the prayer for adverse possession has been brought. In that, the same does not comply with order 37 rule 7 of the *Civil Procedure Rules*, which provides that a suit for adverse possession should be commenced by way of Originating Summons.
26. The Court of Appeal in the case of *Chevron (k) Ltd V Harrison Charo Wa shutu* [2016] eKLR made it clear that a claim by adverse possession could be brought by way of plaint. The court of appeal in the case referred to the case of *Njuguna Ndatbo v Masai Ituma & 2 others* Civil Appeal No. 231 of 1999 where the court had held that a claim of adverse possession could only be brought by way of Originating Summons.



27. The Court of Appeal referring to the holding in the *Njuguna Ndatbo* case (supra) in the *Chevron (K) Ltd* case (supra) stated thus:

“The courts, have since this decision held that a claim by adverse possession can be brought by a plaintiff. See *Mariba -vs- Mariba* Civil Appeal No.188 of 2002, Counterclaim or defence as was the case here. See *Wabala -vs- Okumu* (1997) LLR 609 (CAK). In *Gulam Mariam Noordin v Julius Charo Karisa* Civil Appeal No 26 of 2015, where the claim was raised in the defence this court in rejecting the objection to the procedure stated as follows: -

“Where a party like the respondent is in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counterclaim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala -vs- Okumu* (1997) LLR 609 (CAK) which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd -vs- Kosgey* (1998) LLR 813 where the plaintiff made no specific plea for adverse possession, the plea was nonetheless granted.”

28. I find that the commencement of the instant suit whose backbone is a claim for adverse possession, even if not brought by way of Originating Summons does not render the instant suit fatally defective.
29. Whether the 2nd defendant is the lawful owner of 173.99 acres of land and whether his late father William Kiptoo Barkoria properly acquired the same. I have looked at the various sale agreements to which the 2nd defendant's father acquired the land from the original shareholders. The plaintiffs in their averments do not dispute that the late William Kiptoo Barkoria did legally acquire the said portions of land in question. The plaintiffs were never privy to the purchases and cannot claim to dispute whether such purchases ever existed. When PW1 and PW2 testified, they acknowledged the purchase. PW1 questioned the acreage purchased but as I have said, he was never privy to the same and cannot question the manner of sale or the manner in which the land passed on to the 2nd defendant by transmission. The 2nd defendant in his exhibits produced letters of administration which confirm that he did acquire the same procedurally. The persons who would have questioned the acquisition perhaps were the siblings of the 2nd defendant. They have not complained. On this strength, I find and hold that the father of the 2nd defendant legally and regularly acquired the land comprised in Title No L.R 563/III/MN being subdivision from the original Parcel No LR 284/111/MN. The acreage of the land acquired as depicted in the 2nd defendant's exhibit 7 is 68.62 hectares.
30. Whether the 1st defendant lawfully purchased all that parcel of land known as Title Number C.R 37354 as delineated on Land Survey Plan Number 25120 from the 2nd defendant. Vide a sale agreement dated 15th December 2015, the 1st defendant purchased 10 acres from the 2nd defendant being subdivision No 4379/III/MN. A transfer was subsequently done and during the hearing, DW1 told the court that the 1st defendant had already fenced the plot when the plaintiffs invaded the land. Due diligence was done and there were no occupants on the ground. The root of the title can be traced from the purchase by the father of the 2nd defendant and subsequent transmission to the 2nd defendant and sale to the 1st defendant. Further, the 1st defendant did a search at the land office and established the legal ownership of the land in question. The plaintiffs have not tendered any evidence to impugn the



sale agreement and the subsequent subdivisions and transfers. In the absence of such evidence, it is my finding that the 1st defendant lawfully purchased the land Title Number 37354 in a market overt for valuable consideration from the 2nd defendant who had a good title to pass to the 1st defendant.

31. Having found so, then it follows that the notices for eviction issued by the 1st defendant stand legal and regular. The 1st defendant has a right to proprietary protection as envisaged in Article 40 of the Constitution and Sections 25, 26 and 27 of the [Land Registration Act](#).
32. Whether the plaintiffs are entitled to 99.44 acres of land by way of adverse possession. The plaintiffs aver that they have lived on the land for over 20 years and thus are entitled to the various portions they occupy by way of adverse possession. The burden of leading the court to ascertain this lay with them. I place my reliance on the sentiments of Kuloba J. (as he then was,) in [Gabriel Mbuyi v 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”

33. The principle of adverse possession is well captured under the [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) (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 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 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.”



34. The principle of adverse possession was more elaborately set out in yet another case - *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

“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.”

In addition,

“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.”

35. The Plaintiffs presented evidence that they have had uninterrupted and open possession of the land for over 20 years. This claim was disputed by the 1st and 2nd defendants who were categorical that the plaintiffs invaded the 1st and 2nd defendants’ land in the year 2016 through 2018 and became more hostile when the 1st defendant commenced fencing of the acquired portion of land to subdivide to its members. They started to construct structures in 2020 after obtaining status quo orders in Malindi ELC No 44 of 2020. The plaintiffs admit and state in their plaint that there have been subdivisions on the said land, well within their knowledge. The 2nd defendant contends that indeed he has subdivided and sold to other parties including the 1st defendant portions of the land - those other parties are not joined in this matter. Further, the plaintiffs admit and state that there was an existing case of trespass - Shanzu Criminal Case No.112 of 2016 in which they were charged with trespass. In my view, this is not what I would term an uninterrupted occupation but purely an invasion and incursion unto the defendants’ properties without colour of right.
36. The plaintiffs claim 99.94 acres in what I can say was in the abstract. No evidence was adduced to show the occupation of the said land. No attempt was made to exactly point out what portion the 149 plaintiffs including PWI occupied. Much of what was prosecuted in this case revolved around the subdivision of the parent title, acreage and on cancellation of titles emanating from the subdivisions on allegations of fraud - which was never proved than possession. This is the scenario captured in the case of [Solomon Muatbe Mitau v Nguni Group Ranch](#) [2017] eKLR:

“It is clear from the record that 781 out of 788 individuals listed as claimants in the Originating Summons did not testify on the crucial aspect of possession of the disputed land or any part of it. They could easily have presented themselves for such evidence or instructed one or more of the other claimants to tender their evidence before the court in accordance with the rules of procedure. Rules of procedure are not mere platitudes or technicalities. They make the process of judicial adjudication and determination fair, just, certain and even-handed as the Supreme Court affirmed in the case of *Zacharia Okoth Obado vs Edward Akongo Oyugi & 2 Others* [2014] eKLR. There was no effort made in this case to have the evidence of the 781 claimants presented and considered in any lawful manner. Whatever the reason the appellants may have had for such omission, it lends credence to the assertions by the respondent that such persons were improperly enjoined in the suit and were properly removed as parties by the trial court, or they were minors who had no capacity to sue, or many were dead, or others hailed from far-flung areas and had no interest in the suit. It is



our finding, in those circumstances, that there was sufficient basis for the finding made by the trial court that the fact of possession, adverse or not, by those persons was not proved and their case was for dismissal.”

37. Evidence tendered by PW1 and PW2 was not enough to establish possession whether interrupted or uninterrupted PW2 admitted he was just a neighbour supporting the plaintiffs’ case. PW1 dwelt on the manner in which the 2nd defendant acquired the title in question and the acreage than possession. He did not refer to the other 148 plaintiffs’ occupation of the land with exactitude. As further stated in the Chevron Kenya Ltd Case (supra) the plaintiffs have failed to demonstrate and fall within the armpit and parameter as laid by the court to achieve adverse possession:

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

The defendants allege invasion and incursion on the suit properties. The plaintiff by way of evidence did not torpedo the allegations by the defendants.

38. Several allegations of fraud and illegalities and irregularities in the acquisition of the several subdivisions were pleaded in the plaint. No evidence was tendered at all to prove the same as against the defendants.
39. In the end, the plaintiffs’ suit against the defendants was never proved to merit the orders sought in the plaint. The same is hereby dismissed with costs.
40. On the counterclaims raised by the 1st and 2nd defendants, I have elaborately set above the manner in which the defendants acquired the suit properties - the 1st defendants by way of purchase and transfer and the 2nd defendant through transmission. Those modes of acquisition of land are recognized under Section 7 of the [Land Act](#):

“Methods of acquisition of title to land.

7. Title to land may be acquired through— (a) allocation; (b) land adjudication process; (c) compulsory acquisition; (d) prescription; (e) settlement programs; (f) transmissions; (g) transfers; (h) long term leases exceeding twenty one years created out of private land; or (i) any other manner prescribed in an Act of Parliament.”

41. The acquisition of title by the 1st and 2nd defendant was not as stated extinguished through adverse possession as I have enumerated above. Consequently, the counterclaims by the 1st and 2nd defendants succeeds with costs in the manner I will set out in the final orders here below:
- a. The plaintiffs’ suit against the defendants is hereby dismissed with costs.
- b. A declaration does and is hereby issued that the 1st Defendant is the lawful owner of all that parcel of land known as No CR 35955/3 LR No 4379/111/MN by way of transfer out of purchase and is entitled to vacant possession.



- c. A permanent injunction be and is hereby issued restraining the plaintiffs, their servants or those claiming under them from trespassing, entering or remaining on land parcel No CR 35955/3 LR No 4379/111/MN.
- d. Notice of eviction issued by the 1st defendant be and is hereby declared legal, valid and proper and the 1st defendant is at liberty to enforce the same in accordance with the law.
- e. A declaration be and is hereby issued that the 2nd defendant's father William Kiptoo Barkoria acquired 68.62 hectares. of L.R no 284/III/MN for valuable consideration and the 2nd defendant was properly registered as the owner of L.R 563/III/MN and the consequent subdivisions thereof and transfer of portions thereof passed the property and are protected by law.
- f. A permanent injunction be and is hereby issued restraining the plaintiffs by themselves, their agents assigns or anybody else from encroaching, entering into any portion of land being a resultant subdivision of L.R 563/III/MN.
- g. An order of eviction against the plaintiffs do issue to evict in accordance with the law, any of the plaintiffs' defendants to the counterclaim and their assignee and beneficiaries of any portion of land being a resultant sub-division of L.R 563/III/MN.
- h. Costs of the suit and the counterclaim be and is hereby awarded to the 1st and 2nd defendants/ counter-claimants.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 26TH DAY OF APRIL,

E.K. MAKORI

JUDGE

