



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 199 OF 2010**

1. GEORGE MULI MUTUA
2. DANSON NJOGU MWANGI
3. JOHN KIMEU ISIKA
4. JOHN KAMETI MUINDE
5. BERNARD KILONZO
6. JOHANA MUTUKU
7. GEOFFREY KYALO MUTUKU
8. JANE KANINI
9. JACOB MUSAU
10. MUSYOKI KAVOI
11. NULONZI KAVOI SIMON
12. FRANCIS MUTUKU KISINGA
13. VERONICAH MUNYIVA KAVOI
14. BAPTIST CHURCH
15. SIMON MAKAU MUTUA
16. GRACE WAMBUI
17. PETER KIMANI
18. STEPHEN NDUNGA MUTUA
19. JOHN MUTISYA
20. JOEL KYENGO.....PLAINTIFFS

**VERSUS**

1. DAVID WAWERU NDUNGU
2. JEREMIAH GATHIRIMU GIKONYO

### 3. PATRICK FREDRICK KIRUGU

### 4. NATIONAL BANK OF KENYA.....DEFENDANTS

#### JUDGMENT

This suit was instituted by way of Originating Summons dated 30<sup>th</sup> April, 2010 in which the plaintiffs sought the following orders;

1. A declaration that the plaintiffs are entitled to be registered forthwith as the owners of all that parcel of land known as L.R No. 4929/1 (hereinafter referred to as "the suit property") which the plaintiffs have been in adverse possession since the year 1994 and on which they have lived openly and continuously as of right and that the 3<sup>rd</sup> defendant's title to the suit property has been extinguished pursuant to section 37 and 38 of the Limitation of Actions Act,
2. An order for permanent injunction restraining the defendants from evicting the plaintiffs from the suit property and/or in any other way interfering with the plaintiffs' quiet possession of the same.
3. Costs of the application and interest.

The Originating Summons was supported by the affidavit of the 1<sup>st</sup> plaintiff, George Muli Mutua sworn on 30<sup>th</sup> April, 2010 on his own behalf and on behalf of the other plaintiffs. The 1<sup>st</sup> plaintiff averred that the plaintiffs entered the suit property in 1994 and started cultivating the same. The 1<sup>st</sup> plaintiff averred that while they were in occupation, the 1<sup>st</sup> defendant subdivided the suit property into portions measuring one (1) acre each. The 1<sup>st</sup> plaintiff averred that the plaintiffs were in occupation of the entire land comprised in the suit property. The 1<sup>st</sup> plaintiff averred that in 2001 the 1<sup>st</sup> defendant purported to sell to them the suit property at Kshs. 1,500,000/=. The 1<sup>st</sup> plaintiff averred that when they conducted an official search on the suit property after making some payments to the 1<sup>st</sup> defendant, they learnt that the suit property was registered in the name of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> plaintiff averred further that after the plaintiffs had paid to the 1<sup>st</sup> defendant in excess of Kshs.1,000,000/=, the 3<sup>rd</sup> defendant came to the suit property and claimed that he was the owner of thereof. The 1<sup>st</sup> plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were all along aware of their occupation and that they never made any attempt to evict them from the suit property. The 1<sup>st</sup> plaintiff averred that it was until the 3<sup>rd</sup> defendant acquired the suit property in 2009 that an attempt was made to evict them from the suit property. The 1<sup>st</sup> plaintiff averred that the plaintiffs had occupied the suit property openly and continuously without interruption for a period of more than 12 years and as such they had acquired the same by adverse possession. The 1<sup>st</sup> plaintiff annexed to his affidavit an extract of title for the suit property.

The Originating Summons was opposed by the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The 3<sup>rd</sup> defendant opposed the application by way of a replying affidavit sworn on 22<sup>nd</sup> October, 2010. The 3<sup>rd</sup> defendant averred that he purchased the suit property through a public auction that was conducted in January, 2008 by the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant averred that the 4<sup>th</sup> defendant sold the suit property in exercise of its statutory power of sale after the 2<sup>nd</sup> defendant who had charged the property to the 4<sup>th</sup> defendant defaulted in his loan repayment. The 3<sup>rd</sup> defendant averred that he was the highest bidder at the auction and that he paid the full purchase price after which the property was transferred to him. The 3<sup>rd</sup> defendant averred that when he started constructing a dam on the suit property, some of the plaintiffs told him that they were the owners of the suit property having purchased the same from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant averred that there was no way the 2<sup>nd</sup> defendant could have sold the suit property to the plaintiffs since the property was charged to the 4<sup>th</sup> defendant which had not authorized such sale. The 3<sup>rd</sup> defendant averred that the plaintiffs had not placed before the court evidence of any sale agreement that they entered into with the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant averred that if the plaintiffs had been in occupation of the suit property since 1994 as claimed, they were not in adverse possession thereof since their occupation was with the permission of the 2<sup>nd</sup> defendant.

The 3<sup>rd</sup> defendant averred that the plaintiffs had been in occupation of the suit property for a period of only 7 years as at the time they purported to purchase the suit property from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant denied that the plaintiffs had acquired the suit property by adverse possession or at all. The 3<sup>rd</sup> defendant averred that since the 2<sup>nd</sup> defendant was in possession of the suit property at all material times which was evidenced by the 2<sup>nd</sup> defendant's use of the same as a security for a loan, the plaintiffs' claim over the suit property by adverse possession had no basis. The 3<sup>rd</sup> defendant reiterated that there was no evidence of sale of the suit property by the 2<sup>nd</sup> defendant to the plaintiffs and that the plaintiffs could not claim the suit property by adverse possession and through purchase at the same time. The 3<sup>rd</sup> defendant averred that since the plaintiffs were occupying the suit property with the permission of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, time could not start running for the purposes of Limitation of Actions Act until that permission was withdrawn. The 3<sup>rd</sup> defendant averred that the plaintiffs had not acquired the suit property by adverse possession as against the 2<sup>nd</sup> defendant whose interest in the property was transferred to the 3<sup>rd</sup> defendant by the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant averred that the plaintiffs were trespassers on the suit property and should be evicted from the property.

The 4<sup>th</sup> defendant opposed the application through a replying affidavit sworn by Damaris Wanjiku Gitonga on 22<sup>nd</sup> July, 2010. The 4<sup>th</sup> defendant averred that the 2<sup>nd</sup> defendant was at all material times a customer of the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant averred that on 21<sup>st</sup> December, 1989, the 2<sup>nd</sup> defendant was granted an overdraft facility of Kshs. 50,000/= which he renewed from time to time. The 4<sup>th</sup> defendant averred that the said facility was granted on the security of a charge over the suit property. The 4<sup>th</sup> defendant averred that the 2<sup>nd</sup> defendant defaulted in the repayment of the said facilities as a result of which the suit property was sold by public auction on 25<sup>th</sup> January, 2008 in exercise of the 4<sup>th</sup> defendant's statutory power of sale. The 4<sup>th</sup> defendant averred that the 3<sup>rd</sup> defendant who placed a bid of Kshs. 1,010,000/= was the highest bidder at the public auction. The 4<sup>th</sup> defendant averred that the 3<sup>rd</sup> defendant paid the purchase price in full on 8<sup>th</sup> May, 2008 after which the suit property was transferred to him. The 4<sup>th</sup> defendant averred that it was a stranger to the 1<sup>st</sup> defendant and that it never had any dealings with him. The 4<sup>th</sup> defendant averred that the suit property was lawfully sold to the 3<sup>rd</sup> defendant and that the

plaintiffs' claim as against it does not lie. The 4<sup>th</sup> defendant averred that it was wrongly joined in the suit since there is no cause of action against it.

The Originating Summons was heard through oral evidence. Some of the plaintiffs gave oral evidence while others adopted their witness statements as their evidence. The first to give evidence was the 1<sup>st</sup> plaintiff, George Muli Mutua (PW1). In summary, PW1 stated as follows in his evidence in Chief: He was born on the suit property in 1976. His parents were staying on the suit property when he was born and were still alive and staying on the same property as at the time he was giving evidence. He was cultivating the portion of the suit property that he was occupying and had planted a number of food crops, fruits, trees and sisal. He had also constructed a house on the property where he was residing. The other plaintiffs and he had been staying on the suit property openly. The 1<sup>st</sup> defendant had offered to sell the suit property to the plaintiffs through an advocate. As at that time, he had been in occupation of the suit property for over 30 years. The suit property measured 34 acres and each of the plaintiffs occupied a district portion. The 3<sup>rd</sup> defendant came to the suit property in 2009 and claimed that the property belonged to him. A number of the residents of the suit property had died and were buried on the suit property. When the 1<sup>st</sup> defendant came to the suit property, he came with an advocate by the name, Karuga Wandai. The 1<sup>st</sup> defendant claimed to be the owner of the suit property and offered to sell the same to the plaintiffs through the said advocate. The plaintiffs contributed money to purchase the suit property. The plaintiffs later learnt that the suit property did not belong to the 1<sup>st</sup> defendant. The plaintiffs lodged a complaint against Karuga Wandai advocate with the Law Society of Kenya in respect of the transaction.

PW1 produced the documents attached to the plaintiffs' list of documents dated 2<sup>nd</sup> August, 2011, 14<sup>th</sup> November, 2013 and 10<sup>th</sup> January, 2017 as plaintiffs' exhibits 1, 2 and 3 respectively. PW1 stated further that, the plaintiffs did a search that revealed that the suit property was owned by the 3<sup>rd</sup> defendant and that the 3<sup>rd</sup> defendant acquired the property in 2009. Before the 3<sup>rd</sup> defendant acquired the suit property, the same was owned by the 2<sup>nd</sup> defendant who was registered as the owner thereof in 1978. The 2<sup>nd</sup> defendant had acquired the property from the 1<sup>st</sup> defendant who was registered as the owner of the property in 1964. PW1 stated that the plaintiffs entered the suit property without the permission of the defendants and that the plaintiffs had acquired the property by adverse possession.

On cross-examination by the 3<sup>rd</sup> defendant's advocate, PW1 denied that the plaintiffs entered the suit property in 1994 as stated in his affidavit filed in support of the Originating Summons. He reiterated that he was born on the suit property. He stated that he was occupying a portion of the suit property measuring 1¼ acres. He stated further that the portions of the suit property occupied by each of the plaintiffs varied in size. He stated that the suit property was subdivided by Karuga Wandai advocate on behalf of the 1<sup>st</sup> defendant in 2006 and portions thereof occupied by each of the plaintiffs demarcated. He stated further that the plaintiffs did not enter into any written agreement for sale with Karuga Wandai. He stated that the agreed purchase price was Kshs. 70,000/= per acre and that he paid Kshs. 22,000/- to Karuga Wandai. PW1 stated further on cross examination that it was not until 2007 that the plaintiffs discovered that the 1<sup>st</sup> defendant was not the owner of the suit property and that Karuga Wandai advocate was out to defraud them. He stated that the plaintiffs' complaint against Karuga Wandai to the Law Society of Kenya was that he had received money from them through false pretense. He stated that as at the time of the complaint, the plaintiffs had paid over Kshs.1,000,000/= to Karuga Wandai Advocate of which the said advocate offered to refund only Kshs.800,000/=. He stated that the plaintiffs agreed to purchase the suit property because they were residing thereon and that Karuga Wandai had claimed to be the owner of the property. He stated that the plaintiffs were not occupying the whole of the suit property. He stated that portions of the suit property consisted of roads, a dam and a quarry.

On cross-examination by the advocate for the 4<sup>th</sup> defendant, PW1 stated that he was 42 years having been born on 12<sup>th</sup> April, 1976. He stated that it was in 1994 that he started developing the suit property. He denied that that was the year that he entered the property. He stated that apart from him, there were about 20 other families in occupation of the suit property excluding the church. He stated that initially, the plaintiffs were occupying the suit property freely but when the 1<sup>st</sup> defendant subdivided the property through Karuga Wandai Advocate, each of the plaintiffs started occupying specific portions of the property. He stated that Karuga Wandai claimed to have been representing the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He stated that they later learnt that the suit property did not belong to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The plaintiffs' second witness was the 2<sup>nd</sup> plaintiff, Danson Njogu Mwangi (PW2). PW2 told the court that he was staying on the suit property and he was a farmer. He stated that he entered the suit property in 1984 together with his parents. He stated that his parents were occupying the adjacent farm known as Muri Farm before they moved into the suit property. He stated that after they moved to the suit property, he followed them in 1984. He stated that his parents found the suit property vacant and they put up their homestead thereon. He stated that he had children aged 32 and 20 years who were born on the suit property. PW2 stated that he was occupying a portion of the suit property measuring 1¼ acres on which he had his homestead and had also planted several fruits and trees. He stated that he entered the suit property without the permission of the defendants. He stated further that the 1<sup>st</sup> defendant came to the suit property and told the plaintiffs that the suit property was used as a security for a bank loan and that if the plaintiffs paid the said loan, they could be given a title for the property. PW2 stated further that the 1<sup>st</sup> defendant introduced the plaintiffs to Karuga Wandai advocate to whom the plaintiffs started making payments. He stated that as at the time the 1<sup>st</sup> defendant came to the scene; he had been in occupation of the suit property since 1984. He stated that the 3<sup>rd</sup> defendant came to the suit property in 2009. PW2 stated that when he entered the suit property, he found the 1<sup>st</sup>, 8<sup>th</sup> and 13<sup>th</sup> plaintiffs in occupation. He stated that during the subdivision of the suit property, the occupants were allocated specific portions of the property which they were occupying. PW2 also adopted his witness statement as part of his evidence in chief.

On cross-examination by the 3<sup>rd</sup> defendant's advocate, PW2 told the court that he was born in 1952 at Muri Farm where his parents were residing. He stated that his parents moved to the suit property from Muri Farm. He stated that his parents were both deceased. He reiterated that he entered the suit property in 1984. He stated that when he came to the suit property, he found three families already settled on the property. PW2 denied that he entered the suit property in 1994. He stated that in 2002 the plaintiffs wanted to purchase the suit property from the 1<sup>st</sup> defendant through his advocate at Kshs. 70,000/= per acre. He stated that he was to pay Kshs. 87,750/= for the portion of the suit property measuring 1¼ acre that he was occupying. He stated that there was no formal agreement entered into with the 1<sup>st</sup> defendant but the payments were being made to his advocate Karuga Wandai. He stated that the plaintiffs were told that unless they purchased the suit property the same would be sold by the bank and they would be evicted. He stated that the plaintiffs learnt later that the suit property did not belong to the 1<sup>st</sup> defendant when the 3<sup>rd</sup> defendant came to the property in 2009 and claimed to be the owner of the property. PW2 stated that it was at that point that they lodged a complaint against Karuga Wandai Advocate.

On cross-examination by the 4<sup>th</sup> defendant's advocate, PW2 reiterated that he entered the suit property in 1984 and that as at that time the property was vacant. He stated that when he accepted the offer to purchase a portion of the suit property, he already owned the said portion and that he only bought the same so that he could get a title.

The next witness was the 19<sup>th</sup> plaintiff, John Mutisya Mutua (PW3). PW3 told the court that he was staying on the suit property. He adopted his witness statement dated 19<sup>th</sup> January, 2017 as part of his evidence in chief. PW3 stated that he was born on the suit property and that he had a homestead on the property. He mentioned a number of people who died and were buried on the suit property. He stated that he was 35 years old and that he did not enter the suit property with the defendant's permission. He stated that he had occupied the suit property openly. He stated that he was occupying a portion of the suit property measuring 1 acre. On cross-examination by the advocate for the 3<sup>rd</sup> defendant, he stated that he was born in 1981. He stated that as at that time, there were already other people occupying the suit property. He stated that the plaintiffs entered the suit property at different times. He denied that he entered the suit property in 1994. PW3 corroborated the evidence of PW1 and PW2 on how the 1<sup>st</sup> defendant attempted to sell the suit property to them through Karuga Wandai advocate and how the 3<sup>rd</sup> defendant came up in 2009 to claim ownership of the suit property. He stated that the plaintiffs were not buying the suit property because it belonged to someone else but due to the fact that they had occupied the same for a long time and were told that they could be issued with a title deed.

On cross-examination by the 4<sup>th</sup> defendant's advocate, PW 3 stated that there were people who entered the suit property before him. He stated that the 1<sup>st</sup> plaintiff was his elder brother and that both were born on the suit property. PW3 stated that he was allocated the portion of the suit property that he was occupying during the demarcation of the suit property. He stated that he was claiming a portion of the suit property because that is where he was born.

The next to give evidence was the 5<sup>th</sup> plaintiff, Bernard Kilonzo (PW4). PW 4 told the court that he was living on the suit property. He stated that he had lived on the suit property for 34 years and that he had a home thereon. He stated that he did not enter the suit property with the defendant's permission. He stated that he entered the suit property in 1984 and that the portion of the suit property he was occupying measured 1 acre. He adopted his witness statement as part of his evidence in chief.

On cross-examination by the 3<sup>rd</sup> defendant's advocate, PW4 stated that he was born in 1973 and that he came to the suit property with his parents in 1984. He stated that when he entered the suit property, he met the 2<sup>nd</sup> plaintiff. He stated that the other plaintiffs came to the suit property later. He stated that as at 1984 he was still young. PW4 corroborated the evidence of the previous witnesses on the attempted sale of the suit property to the plaintiffs through Karuga Wandai advocate. PW4 denied that he entered the suit property in 1994. In re-examination, PW4 stated that in 1984, it was only his parents and the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs who were on the suit property. He stated that the other plaintiffs came to the suit property later.

The next witness was the 8<sup>th</sup> plaintiff, Jane Kanini Mutuku (PW5). PW5 stated that she was staying on the suit property. She stated that she entered the suit property without the defendant's permission. PW5 stated that she was born on the suit property. PW5 denied that she entered the suit property in 1994. She stated that she was occupying a portion of the suit property measuring 1 acre. On cross-examination by the 3<sup>rd</sup> defendant's advocate, PW5 stated that she was born in 1957 and that she had lived on the suit property for the rest of her life. She mentioned a number of people who were her neighbors on the suit property. PW5 stated that each of the plaintiffs entered the suit property at different times. PW5 reiterated the evidence of the previous witnesses on the attempt to sell to the plaintiffs the suit property through Karuga Wandai advocate. PW5 stated that she paid Kshs. 40,000/= to the said advocate. She stated that her claim was for adverse possession and not for the performance of the sale agreement between the plaintiffs and Karuga Wandai advocate. PW5 stated that she was born on the suit property and got married while still on the suit property. She stated that she had brought her claim on her own right and not on behalf of her parents. PW5 stated that she had her house on the suit property and she had also planted trees, nappier grass and mangoes on her portion of the suit property. PW5 stated that the 3<sup>rd</sup> defendant purchased the suit property while the plaintiffs were in possession thereof. On re-examination, PW5 mentioned names of some of those who were their neighbours on the suit property when she was born. She stated that she could recall the parents of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs.

The next witness for the plaintiffs was the 17<sup>th</sup> plaintiff, Peter Kimani Mutua (PW6). PW6 told the court that he was born on the suit property and that he had a home on the property. He adopted his witness statement as part of his evidence in chief. He denied that he entered the suit property in 1994. On cross-examination by the 3<sup>rd</sup> defendant's advocate, PW6 stated that he was born in 1978 on the suit property. He stated that his parents were living on the suit property and that the portion of the suit property he was claiming measured  $\frac{3}{4}$  of an acre. PW6 corroborated the evidence of the previous witnesses on the attempt to sell the suit property to the plaintiffs through Karuga Wandai advocate. PW6 stated that the 3<sup>rd</sup> defendant should not have purchased the suit property while the plaintiffs were in occupation thereof.

On cross-examination by the 4<sup>th</sup> defendant's advocate, PW6 stated that the 1<sup>st</sup>, 18<sup>th</sup> and 19<sup>th</sup> plaintiffs were his brothers. He stated that the 1<sup>st</sup> plaintiff was the first born in the family and that he was his follower. He stated that the 18<sup>th</sup> and 19<sup>th</sup> plaintiffs were their younger brothers. In re-examination, PW6 stated that he could recall that when he was young their neighbours were the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> plaintiffs. He stated that developments on the suit property started in 1994. He denied that he entered the suit property in 1994.

The next witness was the 6<sup>th</sup> plaintiff, Johana Mutuku (PW7). PW7 adopted his witness statement as part of his evidence in chief. PW7 stated that he entered the suit property with his mother in 1975 and that he started farming on the suit property in 1994. On cross-examination by the 3<sup>rd</sup> defendant's advocate, he stated that he was born in 1964 in Makueni. PW7 stated that his mother came to the suit property in 1975 and that he accompanied her. He stated that he started farming on the suit property in 1994 which is the year in which he got his parcel of land. He stated that his mother used to be a casual labourer on the suit property which was a coffee farm. PW7 stated that the portion of the suit property that he was occupying measured 2 acres. He stated that when they came to the suit property some of their neighbours were Mwangi Wa Gichea, Muinde Kilaki and Mutua. He stated that these neighbours were also casual labourers on the suit property. PW7 corroborated the evidence of the previous witnesses concerning the attempt to sell the suit property to the plaintiffs through Karuga Wandai advocate. He stated that the 3<sup>rd</sup> defendant purchased the suit property while they were in possession. He denied that he entered the suit

property in 1994. He reiterated that that is when he started cultivating the property.

On cross-examination by the 4<sup>th</sup> defendant's advocate, PW7 stated that most of the parents of the plaintiffs used to be workers on the suit property and that the parents of the 1<sup>st</sup> plaintiff used to be workers on the suit property. He stated that the person who was in charge of the suit property then was one, John who was being brought to the property by the 1<sup>st</sup> defendant. On re-examination, PW7 stated that when he came to the suit property, he was between 9 to 10 years old and that he started cultivation on the suit property when he was about 20 years old. He stated that his mother worked on the suit property until 1987 which is the time when the person who was employing them stopped doing so and also stopped coming to the suit property. He stated that when the owner of the suit property stopped using the farm, the plaintiffs started cultivating the same.

The next witness was the 7<sup>th</sup> plaintiff, Goeffrey Kyalo Mutuku (PW8). PW8 adopted his witness statement as part of his evidence in chief. PW8 identified the owners of the various houses whose photographs were produced in evidence by PW1. He also did the same in cross-examination by the 3<sup>rd</sup> defendant's advocate. He stated that he was born in 1976 and that his parents were staying on the suit property. He stated that he was the son of the 8<sup>th</sup> plaintiff who was also born on the suit property. PW8 mentioned a number of people who were their neighbours on the suit property when he was young. He stated that the plaintiffs entered the suit property at different times. He stated that the portion of the suit property he was occupying measured 1 acre. He stated that the 9<sup>th</sup> plaintiff was his brother and that the 9<sup>th</sup> plaintiff and his mother, the 8<sup>th</sup> plaintiff both owned land measuring 1 acre each. He stated that he started cultivation on the suit property when he became an adult. He corroborated the evidence that was given by the previous witness regarding the attempted sale of the suit property to the plaintiffs through Karuga Wandai advocate. He stated that when Karuga Wandai purported to sell the suit property to the plaintiffs, the plaintiffs had been in occupation of the property for several years. He stated that the 3<sup>rd</sup> defendant who came to the suit property in 2009 claiming that to be the owner of the property bought the same while the plaintiffs were in possession of the property. On cross-examination by the 4<sup>th</sup> defendant's advocate, PW 8 stated that when he was born, there was no activity on the suit property apart from the cultivation that was being undertaken by the plaintiffs' parents.

After the evidence of PW8, the parties agreed that the witness statements of the 3<sup>rd</sup>, 4<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup> and 20<sup>th</sup> plaintiffs be admitted as their evidence in this suit without the makers thereof being called to testify. In his witness statement, the 3<sup>rd</sup> plaintiff stated that he entered the suit property in 1990. The 4<sup>th</sup> plaintiff stated in his witness statement that he started living with his parents on the suit property in 1984. The 10<sup>th</sup> plaintiff stated in his statement that he entered the suit property in 1974 when he was young and that he was brought up on the property with his parents who were staying on the property from that year. In his witness statement, the 11<sup>th</sup> plaintiff did not give his age but claimed to have been born on the suit property and was occupying a portion thereof measuring ½ of an acre. The 12<sup>th</sup> plaintiff stated in his statement that he was 36 years old and that he was born on the suit property. He stated that he was occupying a portion of the suit property measuring ½ of an acre.

The 13<sup>th</sup> plaintiff stated in his statement that she entered the suit property with her husband in 1984. Benjamin Wambua recorded a witness statement on behalf of Baptist Church, the 14<sup>th</sup> plaintiff. He stated in his witness statement that the church was started on the suit property "a long time ago" as Apostolic Church and that it was later on taken over by Baptist Church. He stated that the church building is occupying a portion of the suit property near the quarry measuring ½ of an acre.

In his witness statement, the 15<sup>th</sup> plaintiff stated that he was 48 years old and that he was born on the suit property where he was occupying a portion thereof measuring 1 ¼ acres. In his witness statement, the 18<sup>th</sup> plaintiff stated that he was born on the suit property. He did not state his age or the year when he was born. The 19<sup>th</sup> plaintiff stated that he was 34 years old and that he was born on the suit property. He stated that he was occupying a portion of the suit property measuring 1 acre. The 16<sup>th</sup> and 20<sup>th</sup> plaintiffs neither gave evidence nor recorded witness statements.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not defend the suit. After the close of the plaintiffs' case, the 3<sup>rd</sup> defendant was the first to give evidence for the defendants. The 3<sup>rd</sup> defendant, Patrick Fredrick Kirugu (DW1) adopted his witness statement filed in court on 5<sup>th</sup> December, 2011 as part of his evidence in Chief. He also produced the documents attached to his list of documents dated 2<sup>nd</sup> December, 2011 as DExh. 1. In his brief oral testimony, the 3<sup>rd</sup> defendant stated that the plaintiffs used to occupy Kwega farm and moved to the suit property in 2010. He stated that when he noticed there were people on the suit property, he filed a suit against them at the Land Disputes Tribunal at Makuyu. The Land Disputes Tribunal gave a determination in his favour that was adopted as an order of the court at the Chief Magistrates Court at Thika. DW1 urged the court to assist him to get back the suit property from the plaintiffs. On cross-examination by the plaintiffs' advocate, the 3<sup>rd</sup> defendant admitted that he was also known as KIRUBI. The 3<sup>rd</sup> defendant reiterated that the plaintiffs entered the suit property in 2010. He stated that he visited the suit property before he purchased the same from the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant admitted that the 4<sup>th</sup> defendant valued the suit property before putting the same up for sale by public auction. On being shown the valuation report that was prepared before the suit property was put up for sale, the 3<sup>rd</sup> defendant contested the observation that was made by the valuer in the said report that the suit property was occupied by squatters. The 3<sup>rd</sup> defendant maintained that when he was purchasing the suit property, there were no squatters in occupation. The 3<sup>rd</sup> defendant contended that he thought that the houses which were on the suit property when he was purchasing the same belonged to the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant stated that he went to the Land Disputes Tribunal when the plaintiffs were entering the suit property and that he purchased the suit property in vacant possession. The 3<sup>rd</sup> defendant admitted however that the terms of sale that he signed indicated that the property was not sold with vacant possession. The 3<sup>rd</sup> defendant admitted also that the decision of the Land Disputes Tribunal was quashed by the High Court. The 3<sup>rd</sup> defendant stated that the plaintiffs were professional squatters moving from one farm to the other. The 3<sup>rd</sup> defendant admitted that he was living on the neighbourhood of the suit property and that that was where he was born. He denied that the plaintiffs were born on the suit property. In re-examination, the 3<sup>rd</sup> defendant reiterated that when he purchased the suit property, the same was not occupied by the plaintiffs.

The 4<sup>th</sup> defendant called Paul Chelanga (DW2) as its witness. DW2 adopted his witness statement dated 26<sup>th</sup> March, 2013 as his evidence in

chief. He also produced the documents attached to the 4<sup>th</sup> defendant's list of documents dated 7<sup>th</sup> November, 2011 as DExh. 2. On cross-examination by the plaintiffs' advocate, DW2 stated that the suit property was charged to the 4<sup>th</sup> defendant by the 2<sup>nd</sup> defendant. He stated that the 1<sup>st</sup> charge was created in 1989. DW 2 stated that he could not tell whether the suit property was occupied by squatters when the same was charged to the 4<sup>th</sup> defendant. DW2 stated that the 4<sup>th</sup> defendant sold the suit property to the 3<sup>rd</sup> defendant at a public auction. DW2 stated that a valuation that they carried out before putting up the property for sale noted that there were squatters on the suit property. He stated that the valuer also noted that that the squatters had developed the property.

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 27<sup>th</sup> January, 2020. The plaintiffs submitted that they entered the suit property on diverse dates between 1957 and 1980. The plaintiffs averred that as at the time the 3<sup>rd</sup> defendant acquired the suit property on 8<sup>th</sup> December, 2009, the plaintiffs' adverse possession claim had already crystallized. The plaintiffs cited Githu v Ndeete [1984] KLR 776 and Janet Ngendo Kamau v Mary Wangari Mwangi, Nairobi Court of Appeal Civil Appeal No. 173 of 2003 and submitted that change in ownership of land does not interrupt possession since the right of adverse possession attaches to the land. The plaintiffs submitted further that their adverse possession claim was not interrupted by the purported sale of the suit property to them by the 1<sup>st</sup> defendant through Karuga Wandai advocate. The plaintiffs submitted that the 1<sup>st</sup> defendant's rights in the suit property ceased in 1978 when he transferred the property to the 2<sup>nd</sup> defendant. The plaintiffs submitted that 1<sup>st</sup> defendant could not sell land in respect to which he had no title. The plaintiffs submitted that the 3<sup>rd</sup> defendant's claim that the plaintiffs entered the suit property in 2010 was false since the valuers who valued the suit property before the same was sold by the 4<sup>th</sup> defendant to the 3<sup>rd</sup> defendant noted that the plaintiffs were in possession of the suit property. The plaintiffs submitted that the evidence that was adduced by the plaintiffs were not rebutted by the Defendants since the 3<sup>rd</sup> defendant could only testify as to the matters that occurred as from 2009 when he acquired the suit property. The plaintiffs cited Ndahio v Itumo & 2 Others [2002] 2 KLR 637 and urged the court to make a finding that the plaintiffs' occupation of the suit property was open and uninterrupted for a period of over 30 years as at the time they came to court. The plaintiffs urged the court to grant the orders sought in the originating summons.

The 3<sup>rd</sup> defendant filed his submissions on 30<sup>th</sup> October, 2020. The 3<sup>rd</sup> defendant submitted that in order for the plaintiffs to succeed in their adverse possession claim, the plaintiffs had to establish the following; that they were in actual and physical possession of the suit property, the possession was continuous, uninterrupted and exclusive, the possession was for a continuous and uninterrupted period of at least 12 years, the possession was openly hostile without challenge or permission from the lawful owner and that there was open and notorious use of the suit property. The 3<sup>rd</sup> defendant submitted that the plaintiffs had not satisfied any of the foregoing ingredients for adverse possession claim. The 3<sup>rd</sup> defendant cited Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR and submitted that parties are bound by their pleadings and that any evidence however strong that tends to be at variance with the pleadings must be disregarded. The 3<sup>rd</sup> defendant submitted that the evidence that was adduced by the plaintiffs was at variance with their pleadings. The 3<sup>rd</sup> defendant submitted that the plaintiffs pleaded in their Originating Summons that they had been in adverse possession of the suit property since 1994. The 3<sup>rd</sup> defendant submitted at the hearing, the plaintiffs led evidence that they were born on the suit property. The 3<sup>rd</sup> defendant submitted that the plaintiffs did not amend their pleadings. The 3<sup>rd</sup> defendant urged the court to reject that evidence.

The 3<sup>rd</sup> defendant submitted that the plaintiffs did not prove that they were in possession of the suit property since 1994. The 3<sup>rd</sup> defendant submitted that the photographs produced by the plaintiffs in evidence had no probative value since the same were undated and no one could tell where they were taken. The 3<sup>rd</sup> defendant submitted further that the person who took the photographs was not called as a witness and that from the photographs, the age of the structures could not be determined. The 3<sup>rd</sup> defendant submitted that the plaintiffs' claim that they entered the suit property in 1994 was rebutted by the valuation report that was produced by the 3<sup>rd</sup> defendant in evidence in which the valuer stated that in his previous inspection, the boundaries were open and he was able to view the beacons but during inspection conducted on 31<sup>st</sup> October, 2007 he found the land subdivided into various parcels with beacons and live hedges. The 3<sup>rd</sup> defendant submitted that this piece of evidence shows that the plaintiffs were not in occupation of the suit property prior to 2007.

The 3<sup>rd</sup> defendant submitted that in their pleadings, the plaintiffs contended that they entered the suit property in 1994 while in their evidence they contended that they entered the suit property at different times. The 3<sup>rd</sup> defendant submitted that it was difficult to determine from when time started running in favour of the plaintiffs for the purposes of adverse possession. The 3<sup>rd</sup> defendant submitted that the plaintiff did not establish that they had occupied the suit property from 1994.

The 3<sup>rd</sup> defendant averred that the plaintiffs did not prove that they occupied the entire 34 acres of land comprised in the suit property. The 3<sup>rd</sup> defendant submitted that the evidence adduced by the plaintiffs was to the effect that they occupied portions of the suit property that varied in sizes from ½ of an acre. The 3<sup>rd</sup> defendant averred that from the evidence, the plaintiffs occupied a total of 2¾ acres only of the entire parcel of land. The 3<sup>rd</sup> defendant submitted that the burial permits produced by the plaintiffs did not prove that the deceased persons were buried on the suit property.

The 3<sup>rd</sup> defendant submitted further that if it is assumed that the plaintiffs were in occupation of the suit property from 1994 and that they purchased the suit property between 2001 and 2003, the purported purchase suspended time from running for the purposes of adverse possession. The 3<sup>rd</sup> defendant cited Sisto Wambugu v Kamau Njuguna Civil Appeal No. 10 of 1982 and submitted that once a person has acquired status of a purchaser then that person cannot be said to be an adverse possessor. The 3<sup>rd</sup> defendant submitted that the relationship that is created between a seller and a purchaser is that of a licensee and licensor.

The 3<sup>rd</sup> defendant submitted that there was no way the plaintiffs would have purchased the suit property which was charged to the 4<sup>th</sup> defendant without the 4<sup>th</sup> defendant's consent. The 3<sup>rd</sup> defendant averred that in the circumstances, the sale of the suit property by the 4<sup>th</sup> defendant to the 3<sup>rd</sup> defendant was lawful and protected under Section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and Section 69(B) (2) of the Indian Transfer of Property Act 1882 (now repealed).

The 3<sup>rd</sup> defendant submitted further that even if the plaintiffs were not occupying the suit property as purchasers, they were occupying the same with the permission of the 2<sup>nd</sup> defendant and as such no adverse possession claim could arise. The 3<sup>rd</sup> defendant submitted further that the 2<sup>nd</sup> defendant charged the suit property in 1994 four years before the plaintiffs entered the suit property which charge was varied on a number of occasions. The 3<sup>rd</sup> defendant submitted that these variations meant that the 2<sup>nd</sup> defendant was enjoying possession of the suit property. The 3<sup>rd</sup> defendant submitted that the plaintiffs were not in possession of the suit property as adverse possessors but as trespassers.

The 3<sup>rd</sup> defendant submitted that the plaintiffs had failed to establish their adverse possession claim. The 3<sup>rd</sup> defendant submitted that there was no evidence that 2<sup>nd</sup> and 3<sup>rd</sup> defendants were dispossessed of the suit property. The 3<sup>rd</sup> defendant submitted that until the property was acquired by the 3<sup>rd</sup> defendant, possession of the same was still being enjoyed by the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant submitted further that the plaintiffs had not established that the 3<sup>rd</sup> defendant's title had been extinguished since adverse possession claim had not been proved as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 3<sup>rd</sup> defendant urged the court to dismiss the plaintiffs' suit with costs.

The 4<sup>th</sup> defendant filed its submissions on 2<sup>nd</sup> September, 2020. The 4<sup>th</sup> defendant submitted that it was wrongly joined as a party to this suit since the plaintiff had no cause of action against the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant submitted that the presence of the plaintiffs on the suit property before, during or after the accrual of the 4<sup>th</sup> defendant's rights as a chargee did not extinguish the 4<sup>th</sup> defendant's rights or transaction undertaken by the 4<sup>th</sup> defendant as chargee. The 4<sup>th</sup> defendant submitted further that the presence of squatters on a property does not extinguish the right of a registered proprietor to use the property as a security neither does it prohibit a bank from registering a charge over the property. In support of this submission, the 4<sup>th</sup> defendant cited Michael Oringo Ahisi v Jobson Salono Mulanda [2016] eKLR. The 4<sup>th</sup> defendant submitted that the plaintiffs remained as squatters on the suit property until the court declared them adverse possessors. The 4<sup>th</sup> defendant submitted that in the circumstances, neither the 2<sup>nd</sup> defendant nor the 4<sup>th</sup> defendant were impeded in any way in the exercise of their rights in relation to the suit property. In support of this submission, the 4<sup>th</sup> defendant cited the case of Bakari Wangatia Oluoch v Cassim Wangatis Omusebe & Another [2015] eKLR. The 4<sup>th</sup> defendant submitted that the mere fact that a squatter is in possession of land cannot stop a chargee from exercising its statutory power of sale.

The 4<sup>th</sup> defendant submitted further that the plaintiffs' rights in the suit property if any were subject to the 4<sup>th</sup> defendant's rights in the property as chargee. The 4<sup>th</sup> defendant submitted that the 4<sup>th</sup> defendant lawfully exercised its power as chargee in respect of the suit property and as such the plaintiffs had no basis for challenging the same. The 4<sup>th</sup> defendant urged the court to dismiss the plaintiffs' suit with costs.

#### **Analysis of the issues arising and determination thereof:**

The issues arising for determination in this suit in my view are the following;

1. Whether the plaintiffs acquired the suit property or any part thereof by adverse possession and the effect if any of the charge and further charge that were created by the 2<sup>nd</sup> defendant over the suit property in favour of the 4<sup>th</sup> defendant on the plaintiffs' adverse possession claim.
2. Whether the plaintiffs are entitled to the reliefs sought in the Originating Summons.
3. Who is liable for the costs of the suit?

Whether the plaintiffs acquired the suit property or any part thereof by adverse possession and the effect if any of the charge and further charge that were created by the 2<sup>nd</sup> defendant over the suit property in favour of the 4<sup>th</sup> defendant on the plaintiffs' adverse possession claim.

In Gabriel Mbui v Mukindia Maranya[1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

- 1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.**
- 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.**
- 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.**
- 5. 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 purpose for which he intended to use it.**
- 6. 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.**

7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.

8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.

9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.

10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

**“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion) .....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”**

In Wambugu v Njuguna [1983] KLR 172 the court stated as follows:

**“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. 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 for the requisite number of years.”**

From the evidence on record, the suit property was registered in the name of the 1<sup>st</sup> defendant on 11<sup>th</sup> August, 1964. The same was subsequently transferred to the 2<sup>nd</sup> defendant on 10<sup>th</sup> November, 1978. The 2<sup>nd</sup> defendant charged and further charged the property to the 4<sup>th</sup> defendant on 16<sup>th</sup> August, 1989 and 29<sup>th</sup> November, 1991 respectively. The 4<sup>th</sup> defendant sold the suit property and transferred the same to the 3<sup>rd</sup> defendant in exercise of its statutory power of sale on 8<sup>th</sup> December, 2009.

In their Originating Summons, the plaintiffs stated that they all entered the suit property in 1994. This allegation was contained in the reliefs sought and in the affidavit sworn by the 1<sup>st</sup> plaintiff in support of the Originating Summons. In their oral evidence and witness statements that were adopted as part of their evidence, the plaintiffs contented that some of them were born on the suit property at different times while others entered the suit property also at different times. From the evidence on record, it is clear that the allegation in the Originating Summons and the supporting affidavit that all the plaintiffs entered the suit property in 1994 was erroneous. Although the Originating Summons was not amended, I will take the dates given by each of the plaintiffs in their witness statements and oral evidence as the correct dates of their entry into the suit property.

This suit was filed on 30<sup>th</sup> April, 2010. The 1<sup>st</sup> plaintiff claimed that he was born on the suit property in 1976. The 1<sup>st</sup> plaintiff became an adult in 1994. That means that he started his adult life on the suit property in 1994. As at the time this suit was filed, in 2010, the 1<sup>st</sup> plaintiff had spent 16 years of his adult life on the suit property. The 2<sup>nd</sup> plaintiff entered the suit property in 1984. As at the time he was giving evidence in 2017, he was 65 years old meaning that he was born in 1952. It follows therefore that the 2<sup>nd</sup> plaintiff entered the suit property as an adult and had occupied the property for 26 years as at the time the suit herein was brought. The 3<sup>rd</sup> plaintiff entered the suit property in 1990. He had occupied the suit property for 20 years as at the time the suit was filed. The 4<sup>th</sup> plaintiff entered the suit property with his parents in 1984. His date of birth or age was not given. He had been on the suit property for 26 years as at the time the suit was filed. The 5<sup>th</sup> plaintiff entered the suit property in 1984 as a child with his parents. He was born in 1973 meaning that he attained the age of majority in 1991. As at the time the suit was filed in 2010, he had lived on the suit property as an adult for 19 years.

The 6<sup>th</sup> plaintiff entered the suit property with his mother in 1975. He was born in 1964. He attained the age of majority in 1982. As at the time the suit was filed he had lived on the suit property as an adult for 18 years. The 7<sup>th</sup> plaintiff was born on the suit property in 1976. He reached the age of majority in 1994. As at the time the suit was filed he had lived on the suit property as an adult for 16 years. The 8<sup>th</sup> plaintiff was born on the suit property in 1957. She attained the age of majority in 1975. As at the time the suit was filed she had occupied the suit property as an adult for 35 years. The 9<sup>th</sup> plaintiff neither recorded a witness statement nor tendered oral evidence. It is not possible to ascertain when he entered the suit property if at all. The 10<sup>th</sup> plaintiff entered the suit property in 1974 as a young man. He did not give his date of birth or his age. He had lived on the suit property for 36 years as at the time the suit was filed. The 11<sup>th</sup> plaintiff claimed to have been born on the suit property. He did not give his age or date of birth. It is not possible to determine when he started living on the suit property so as to determine for how long he had lived on the suit property as at the time the suit was filed. The 12<sup>th</sup> plaintiff stated that he was 36 years old as at 2017 when he recorded his witness statement and that he was born on the suit property. That means that he was born in 1981 and attained the age of 18 in 1999. He had therefore lived on the suit property as an adult for 11 years only as at the time the suit was filed.

The 13<sup>th</sup> plaintiff entered the suit property with her husband in 1984. That means that she had occupied the suit property for 26 years as at the time the suit was filed. The 14<sup>th</sup> plaintiff is a church. Benjamin Wambua who recorded a witness statement on behalf of the church did not state when the church was constructed on the suit property. In the circumstances, it is not clear as to how long the church had been on the suit

property as at the time the suit was filed.

The 15<sup>th</sup> plaintiff stated that he was 48 years old as at 2017 when he recorded a witness statement and that he was born on the suit property. That means that he was born in 1969 and attained the age of 18 in 1987. As at 2010 when the suit was filed he had occupied the suit property as an adult for 23 years. The 16<sup>th</sup> plaintiff never recorded a witness statement and never tendered oral evidence. It is therefore not known as to when she entered the suit property if at all. The 17<sup>th</sup> plaintiff was born on the suit property in 1978. He attained the age of 18 years in 1996 which means that as at the time this suit was filed, he had lived on the suit property as an adult for 14 years. The 18<sup>th</sup> plaintiff did not state his age or when he was born although he claimed to have been born on the suit property. It is not possible therefore to ascertain for how long he had lived on the suit property as at the time the suit herein was filed. In his witness statement, he stated that he got married in 2004 which means that he was at least 18 years old at that date. It follows that he was born around 1986. The 18<sup>th</sup> plaintiff had occupied the suit property as an adult for about 6 years only as at the time this suit was brought. The 19<sup>th</sup> plaintiff was born in 1981 on the suit property. He attained the age of 18 years in 1999 which means that as at the time this suit was filed he had lived on the suit property as an adult for 11 years only. The 20<sup>th</sup> plaintiff never recorded a witness statement and never tendered oral evidence. It is therefore not known as to when he entered the suit property if at all.

From the above analysis, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> plaintiffs proved that they had occupied the suit property for over 12 years as at the time they brought this suit seeking to be registered as the owners of the suit property by adverse possession. I am satisfied from the totality of the evidence before me that these plaintiffs were in open, continuous and exclusive possession of the portions of the suit property which each of them occupied. On the other hand, I am not satisfied from the evidence on record that the 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> plaintiffs have established that they had occupied portions of the suit property for 12 years prior to the institution of this suit. The 9<sup>th</sup>, 16<sup>th</sup>, and 20<sup>th</sup> plaintiffs did not tender evidence of any nature while the evidence tendered by 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> plaintiffs fell short of establishing that they had occupied the suit property for 12 years prior to the filing of this suit.

From the evidence before the court, none of the plaintiffs who had occupied the suit property for 12 years and more as at the time this suit was filed had acquired the portions thereof which they occupy by adverse possession as at 10<sup>th</sup> November, 1978 when the suit property was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. That means that the suit property was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant free from the plaintiffs' adverse possession claim that had not accrued.

From that finding, it follows that the 2<sup>nd</sup> defendant acquired a clean title from the 1<sup>st</sup> defendant. For the purposes of Limitation of Actions Act, Chapter 22 Laws of Kenya, time started running against the 2<sup>nd</sup> defendant with effect from 10<sup>th</sup> November, 1978 which is the date when the suit property was registered in his name. The 2<sup>nd</sup> defendant charged the suit property to the 4<sup>th</sup> defendant for the first time on 16<sup>th</sup> August, 1989. Again as at that date, none of the plaintiffs had acquired any portion of the suit property by adverse possession as against the 2<sup>nd</sup> defendant. The first charge that was created by the 2<sup>nd</sup> defendant in favour of the 4<sup>th</sup> defendant was in the circumstances free from the plaintiffs' claim over the suit property by adverse possession since such right had not accrued as at the time the charge was created. It follows therefore that the 4<sup>th</sup> defendant's first charge was not subject to the plaintiffs' right of adverse possession since it had not accrued and as such was not an encumbrance against the title of the suit property as at the time the charge was created.

The 2<sup>nd</sup> defendant created a second charge in favour of the 4<sup>th</sup> defendant on 29<sup>th</sup> November, 1991. As at this date, only the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs had occupied portions of the suit property for 12 years from the date that the 2<sup>nd</sup> defendant became registered as the owner thereof and as such had acquired the said portions by adverse possession but subject to the first charge that had been registered against the title in favour of the 4<sup>th</sup> defendant. The other plaintiffs had not acquired the portions of the suit property by adverse possession as against the 2<sup>nd</sup> defendant as at the time he created the second charge in favour of the 4<sup>th</sup> defendant. The second charge was therefore created subject to an encumbrance in the form of the 8<sup>th</sup> and 10<sup>th</sup> plaintiff's adverse possession claims over portions of the suit property that they were occupying but free from any claim by the other plaintiffs.

In Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR the Court of Appeal stated as follows:

**“32. In 1996 the appellant charged the suit land to the Kenya Commercial Bank to secure a loan of Shs. 400,000/= and in 1997 he took a further loan of Shs. 600,000/= and a further charge for that sum was registered against the title to the suit land. What were the legal implications of this on the respondent's claim for adverse possession? The point of law was addressed by the High Court sitting in Kericho in the case of Kipkoech Arap Langat & Another versus Kipngeno Arap Laboso [H.C.C.C. No.124 of 2004 (O.S.)] Kericho in which the court correctly held –**

***“Where a proprietor charges or mortgages land occupied by a trespasser adversely to the title of the proprietor, regardless of whether the trespasser is aware of such transaction, the act of charging or mortgaging the land does not interrupt time from running in adverse possession. Time for adverse possession continues to run. Such adverse possession is an overriding interest acquired or in the process of being acquired by virtue of Section 38 of the Limitations of Actions Act. It must be noted that where the proprietor transfers land, the act of transfer does not interrupt the running of time in adverse possession. In both cases of transfer and mortgage of land on which a trespasser is in adverse possession, the running of time in adverse possession is not interrupted. As adverse possession is an overriding interest (acquired or in the process of being acquired) under Section 30 (f) of the Registered Land Act, Cap 300, the mortgagee or transferee takes subject to such overriding interest.”***

My understanding of the foregoing High Court decision that was cited with approval by the Court of Appeal is that it protects the rights of squatters whose adverse possession claims have crystalized as against registered owners of properties; meaning that they have been in adverse possession of land for 12 years or more and what remains is for the court to declare the existence of such right and to order for the property to be registered in their names. Such rights cannot be defeated by a charge. That is however not the case here for most of the

plaintiffs. When the first and second charges were created over the suit property by the 2<sup>nd</sup> defendant in favour of the 4<sup>th</sup> defendant, most of the plaintiffs had not occupied the suit property for 12 years from the time the 2<sup>nd</sup> defendant acquired the property. Some of them had not even entered the property. The said plaintiffs had therefore not acquired the property by adverse possession as against the 2<sup>nd</sup> defendant thereby extinguishing his title.

It follows that when the said charges were created, there was no encumbrance on the suit property save for what I have stated earlier with regard to the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs. I am in agreement with the 4<sup>th</sup> defendant that the rights accruing to a chargee under a lawful charge created before an adverse possession claim has crystalized in the manner explained above cannot be defeated by the rights of adverse possessors accruing after the charge. In my view, all the rights of adverse possession acquired after the charge are subject to the charge just like charges created after an adverse possession claim has crystalized is subject to the rights of adverse possessors. I am not in agreement with the plaintiffs that the rights of squatters entering a property that has been charged can defeat the rights of a chargee whose charge was created before such entry or after such entry but before the squatters' adverse possession claims had crystalized. If that was to be the case, then what one needs to do to keep off a bank seeking to realize a security would be to plant squatters on charged property. To be clear on the issue, my view is that a right to acquire land by adverse possession accrues only after the expiry of 12 years after occupation of land. It is after the 12 years that the title of the registered owner is extinguished. Before the title is extinguished by operation of law, the owner of a property is free to use the property as security notwithstanding the fact that the property is occupied by squatters. The mere fact of occupation of a property by squatters does not confer on them any right to the property as against a registered owner. Such occupation in my view is neither an encumbrance nor an overriding interest. In my view, it only becomes an encumbrance on the title or an overriding interest if the occupation has been for 12 years or more and what is awaited is for the occupants to be declared to have acquired the property by adverse possession.

The 2<sup>nd</sup> defendant defaulted in his obligations under the first and second charges aforesaid. When the 4<sup>th</sup> defendant exercised its statutory power of sale on 25<sup>th</sup> January, 2008, it was in respect of the debts that were secured by the first and second charge over the suit property. Since the first charge was valid and free from any encumbrance when it was created, I am of the view that the 4<sup>th</sup> defendant could in exercise of its rights under the same pass a good title to the auction purchaser of the suit property. For the second charge, the same was created after the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs had acquired title to the portions of the suit property by adverse possession. The said charge was therefore subject to the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs' claims of adverse possession. The exercise by the 4<sup>th</sup> defendant's statutory power of sale under the said charge was similarly subject to the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs' rights aforesaid. I am of the view that to the extent that the sale of the suit property was carried out also pursuant to the further charge, the purchaser could not take the suit property free from the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs' rights of adverse possession.

When the suit property was being sold, the 4<sup>th</sup> defendant engaged a valuer to advise them on the open market and forced sale value of the property. In a report dated 1<sup>st</sup> November, 2007, the said valuer noted that the suit property was occupied by squatters. As at the time the 4<sup>th</sup> defendant put up the suit property for sale and sold it to the 3<sup>rd</sup> defendant, both were aware or ought to have been aware of the occupation of the same by the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs. The 3<sup>rd</sup> defendant ought to have made inquiries from the 8<sup>th</sup> and 10<sup>th</sup> defendants as to what interest if any they had on the suit property. Since no such inquiry was made, it is my finding that the suit property was transferred to the 3<sup>rd</sup> defendant subject to the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs' right of adverse possession that had accrued.

As concerns the other plaintiffs namely, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> plaintiffs, their rights of adverse possession accrued after valid charges had been created over the suit properties. Their rights of adverse possession were therefore subject to the said charges. Since the 2<sup>nd</sup> defendant defaulted in his obligations under the two charges that were created in favour of the 4<sup>th</sup> defendant, the 4<sup>th</sup> defendant's right to exercise its power of sale under the said charges was not subject to these plaintiffs' rights that accrued after the charges. In the circumstances, the 3<sup>rd</sup> defendant acquired the suit property free from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> plaintiffs' rights of adverse possession.

Due to the foregoing, it is my finding that of all the plaintiffs, it is only the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs who have established that they are entitled to the portions of the suit property that they occupy by adverse possession.

#### **Whether the plaintiffs are entitled to the reliefs sought in the Originating Summons.**

From my findings above, it is only the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs who have proved their case and even for them, only as against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The remaining plaintiffs did not prove their claims to portions of the suit property by adverse possession. It is therefore only the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs who are entitled to the orders sought in the Originating Summons.

#### **Who is liable for the costs of the suit?**

Costs of and incidental to a suit is at the discretion of the court. In this case, the plaintiffs have succeeded partially in their claim. I am of the view that each party should bear its costs of the suit.

#### **Conclusion:**

In conclusion, I hereby make the following orders;

1. I declare that the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs are entitled to be registered as the owners of portions measuring 1 acre each which they occupy within all that parcel of land known as L.R No. 4929/1 ("the suit property") which they have acquired by adverse possession.

2. The 3<sup>rd</sup> defendant shall cause the suit property to be subdivided within 90 days from the date hereof and shall transfer to the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs the portions thereof which they occupy measuring 1 acre each.

3. The 8<sup>th</sup> and 10<sup>th</sup> plaintiffs shall pay the statutory fees and other charges required for the transfer of the said portions of the suit property to them.

4. An order of permanent injunction is issued restraining the 3<sup>rd</sup> defendant from evicting the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs from the suit property and/or in any other way interfering with their quiet possession of the same.

5. The claims by the remaining plaintiffs are dismissed.

6. Each party shall bear its own costs of the suit.

**Delivered and Dated at Nairobi this 17<sup>th</sup> day of June 2021**

**S. OKONG'O**

**JUDGE**

**Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Maina for the Plaintiff

Mr. Ndegwa for the 3<sup>rd</sup> Defendant

Mr. Evayo h/b for Mr. Sisule for the 4<sup>th</sup> Defendant

Ms. C. Nyokabi-Court Assistant