



Kibe & 2 others (Suing as the Treasurer, Secretary and Chairlady on their Own Behalf and on Behalf of Twiga Estate Squatters Society) v Mboi-Kamiti Farmers Company Limited (Environmental and Land Originating Summons 149 of 2011) [2025] KEELC 293 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELC 293 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 149 OF 2011
EK WABWOTO, J
JANUARY 31, 2025
IN THE MATTER OF LR. NOS. 9312, 9313, 3760 AND 252, NAIROBI
AND
IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

BETWEEN

DAVID MWATHI KIBE, JOHN KIBARU MWAI AND SALOME MWIHAKI NJENGA PLAINTIFF

SUING AS THE TREASURER, SECRETARY AND CHAIRLADY ON THEIR OWN BEHALF AND ON BEHALF OF TWIGA ESTATE SQUATTERS SOCIETY

AND

MBOI-KAMITI FARMERS COMPANY LIMITED DEFENDANT

JUDGMENT

1. By an amended Originating Summons dated 23rd December 2013 the Plaintiffs herein sought the following reliefs:-
 - a. Declaration that the title of Karume Investments Ltd in L.R No. 9312, 9313, 3760 and 252 became extinguished for all purposes in the year 1985 or soon thereafter.
 - b. Declaration that Karume Investments Ltd did not have a good Title to L.R No. 9312, 9313, 3760 and 252 which it could pass to the Defendant Mboi-Kamiti Farmers Company Limited in the year 2004 since its title to the said lands had become extinguished by effluxion of time.



- c. The Plaintiff society on behalf of 4000 squatters be declared to have become absolutely entitled to adverse possession of over twelve (12) year ALL THAT piece or absolutely parcel of land registered under the Registration of Titles Act (Chapter 281 of the Laws of Kenya) and comprised in Title Number L.R No. 9312, 9313, 3760 and 252 and situate in the city of Nairobi.
 - d. Order that the names of Mboi-Kamiti Farmers Company Limited in L.R No. 9312, 9313, 3760 and 252 be cancelled and in lieu thereof the names of the Plaintiffs herein be substituted on behalf of their 4000 members who are members of Twiga Estates Squatters Society.
 - e. Order that the said Plaintiff society on behalf of its 4000 members be registered as the sole proprietor of the said piece of land namely L.R No. (original number) in the place of the above named Mbo-I- Kamiti Farmers Company Limited in whose favour the said parcel of land is currently registered.
 - f. The registrar of this Honourable Court duly execute all the necessary instruments and documents to effect transfer of parcel of land known as L.R No. 9312, 9313, 3760 and 252 from the Defendant to the Plaintiff's name.
 - g. The costs of this Originating Summons be awarded to the Plaintiffs against the Defendants.
2. The Originating Summons was contested and opposed by the Defendant.

The Plaintiff's case

- 3. It was the Plaintiffs case that the suit has been filed by the officials of Twiga Estate Squatters society for and on behalf of the 3805 member as per the revised list of members of the society who they and their parents have lived continuously, openly, uninterruptedly and in possession and occupation and without authority of the defendants of the suit property from the 1950's during the colonial period up to 20th December, 2012 when they were unlawfully, barbarically, savagely and forcibly evicted from their land by the defendant in collusion with Gatundu OCPD and Municipal Council of Ruiru following a court order fraudulently entered between them by consent and in the absence of the Plaintiffs. That as a result of the said occupation, they have acquired proprietary rights over the said parcels of land by dint of Adverse Possession.
- 4. It was the Plaintiffs' further averment that the land originally belonged to a white settler one Mr. Graham Bell during colonial period and that the white settler left the country in 1965 upon Kenya attaining independence. Before leaving however, the white settler and his family informed the squatters that he was leaving the whole land to them. The squatters have since then occupied the entire land exclusively, continually, openly and uninterruptedly till the events set out in this suit occurred. Further that their occupation of the suit land extinguished the Defendant's title and the Defendant has been holding it in trust for the Plaintiffs.
- 5. The Plaintiffs also filed witness statements to buttress their claim that the Plaintiffs, their parents and even grand parents have never known any other home or residence save the said land which they have continually occupied over the years, cultivated thereon, used the entire land as their own and derived their livelihood therefrom. They have buried their relatives on the land, they exercise their cultural rights thereon, hold religious services, built churches and schools and have a voting centre on the farm and built permanent houses thereon.
- 6. It was further averred that they have planted different species of plants and are therefore entitled to it.
- 7. During trial six (6) witnesses testified on behalf of the Plaintiff.



8. John Kibaru Mwai testified as PW1. He adopted and relied on his witness statement dated 23rd May 2014 and also produced the Plaintiff's bundle of documents filed in court in his evidence in chief.
9. It was his testimony that he was born in the estate since his parents were workers at the suit property. He also stated that he was married to Agnes Wainaina in 1965 and they had their first born child in 1967. Later they were blessed with 5 more children and they continued working in the farm until the white man left the farm.
10. According to him, when the white man left the farm, he left the land to his workers as an appreciation of the good work to them.
11. It was his testimony that in 2003, he found a society and called it Twiga Estate Squatters Society where he was elected Secretary. The same was registered in 2006 and its certificate was issued to them in 2011.
12. He also added that they started subdividing the land amongst themselves. A process which the Government was aware of the same. They buried their dead on the land because they did not have problems getting burial permits. They had also built permanent houses there without any objection from any quarters. It was also his testimony in his evidence in chief that they were evicted from the property on 20th December 2012 and their houses demolished and at this stage they seek to be resettled in the suit land and be compensated for the demolished houses.
13. On cross-examination, he stated that he was employed in 1964 by the owner of the land. He was given a house on the farm. He also stated that he had photographs of the house which had been produced at pages 502 to 520 of the Plaintiffs' bundle. His employer built the house and the land had been left to the workers by the previous owner. The land had coffee, livestock and workers quarters.
14. On further cross-examination, he stated that the land had moved to Karume Investments and the Plaintiffs had not filed any case against Karume Investments since they did not have a case against them. He stated that he was aware one of the cases had been dismissed in 2004. In respect to Case No. 57 of 2012 he stated that the Plaintiffs had not appealed against the same. He also stated that the 4,000 members had not signed any authority to enable him represent them. He further stated that he had not been back to the land since 2012.
15. On re-examination, he stated that the subdivisions was done by them. Karume never gave any person land and that he was just a visitor in the farm. He did not sign any pleading in respect to the 2004 case. The land has a polling station known as Twiga Polling Station.
16. Josephat Mwangi testified as PW2. He adopted and relied on his witness statement dated 23rd May 2014 and bundle of documents dated 3rd November 2016 which was produced in his evidence in chief.
17. It was his testimony that he was born in 1960 in Twiga Estate. His father Erastus Wanyiri was a factory supervisor in the Twiga Estate. He studied at a nursery school and primary school at Twiga and he continued staying there with his parents. He also stated that he got married while still residing in the farm and had 5 children and lived there peacefully until 20th December 2012. His permanent house was demolished and he had acquired title to the land by virtue of adverse possession because he had lived in Twiga Estate for a period exceeding 12 years.
18. On cross-examination, he stated that he was born in Twiga Estate and his parents were workers at the farm which was owned by the white man. He also stated that he had attached photos of his house on the land. There were other cases which he was aware of the same and even after the eviction in 2012 they filed another case.



19. In re-examination, he stated that he was born in 1961 and stayed there until 2012. He stated that he constructed his house on the land and stayed with his family and four children who studied at Twiga Primary School which was within the farm.
20. David Mwathi Kibe testified as PW3. He relied and adopted his witness statement dated 17th October 2020 in his evidence in chief. He stated that he was born in 1952 in Twiga Estate. He is the treasurer of the Plaintiff and had the authority of the Plaintiffs to file the suit on their behalf. He also stated that he had attached the list of the said workers even though some of them had passed away and others were too old to attend court and testify.
21. It was his testimony that around 1974, five workers being three men and two women paid a courtesy call to then President of Kenya H.E Jomo Kenyatta and discussed issues to do with the suit lands. The President summoned Hon. Njenga Karume and instructed him to organize the workers so that they raise money for survey and other activities. He also stated that there was no evidence that anybody sold or transferred the said land to Njenga Karume although he was registered as the title holder in 1974.
22. He also stated that they occupied the suit lands peacefully since 1965 and openly until 2004 when Mbo-I- Kamiti came claiming ownership and they were evicted on 20th December 2012.
23. Upon cross examination, he stated that he was the treasurer of the Plaintiff. He also stated that he did not have a birth certificate. His father participated in the previous meetings where the previous owner gave them the land. He also stated that he is not affiliated to Twiga Men and Women Group. Salome Mwhaki is their Chairlady. Case No. 592 of 2013 was filed by them and dismissed but an appeal was filed which appeal is still pending. He also stated that Njenga Karume was not registered as the owner of the suit property. He was not in actual possession of the land and they have not sued him in the matter. He also stated that the members of the society only paid Kshs. 5,000/=for the survey. He never did a search prior to the filing of the suit and neither does he know its L.R number.
24. When re-examination, he stated that they have buried some members in the farm and there is also a nursery school in the farm.
25. Nancy Njeri Mwaura testified as PW4. She relied on her witness statement dated 23rd May 2024 in her evidence in chief. It was her testimony that her parents came to Twiga Estate in 1962 when she was young. She got married to Mwaura Gathu in 1975. She has had 4 children at the estate. She also worked in Twiga Estate in a coffee plantation upto 1989 when she resigned on medical grounds. They were evicted on 20th December 2012 which was an unfortunate event that changed their lives.
26. On cross-examination, she stated that she resigned from working in the farm in 1989 and they were evicted in December 2012.
27. Joseph Njoroge testified as PW5. He relied on his witness statement dated 23rd May 2014 in his evidence in chief. It was his testimony that he came to Twiga Estate in 1958 as a labourer in coffee plantation. He married Mary Waithira while working there and they had 6 children and they lived there until December 2012 when they were evicted.
28. Salome Mwhaki Njenga was the last witness to testify on behalf of the Plaintiff and he testified as PW6. She adopted and relied on her statement dated 23rd December 2013 in her evidence in chief.
29. It was her testimony that she was born in Twiga Estate and his father was an employee at the farm. She also stated that she joined Twiga Primary School in 1967 and after school she was employed as a nursery school teacher in 1980. In 2006 she was elected as the Chairlady of Twiga Estate Squatters Society which position she holds to date. She also stated that they were evicted on 20th December 2012.



30. On cross-examination, she stated that even though they had sued Mboi-I-Kamiti Farmers Company Limited, they are also seeking some orders against Karume Investments Limited.
31. When cross-examined against the list of the members, she conceded that the same does not show all the names for members of the society and the same does not have signatures.
32. She also stated that she was not involved in ELC Case No. 487 of 2010 and was not aware of the judgment delivered in that case. She also stated that she was not aware of Civil Appeal No. 23 of 2018.
33. On re-examination she stated that she has been a Chairlady since 2006. All the members were staying in the farm. They were evicted while staying on the land.

The Defendant's case

34. The suit was contested by the Defendant. It was the Defendant's contention that the Plaintiffs had not attached any extract of title to support their claim. It was also contended that the land in question is no longer the property of the Defendant having been transferred to individual owners.
35. During trial, Thuo Mathenge testified as the sole Defendant's witness. He relied on his witness statement dated 5th October 2021 and bundle of documents dated 3rd December 2021, 7th September 2017 and further list dated 30th November 2021.
36. It was his testimony that he is the Chairman of the Defendant's company which acquired the land through purchase from Karume Investments Ltd in the year 2003. It was also his testimony that there were employees working in the farm who occupied in various houses but did not have proprietary rights. They never had any individual parcels.
37. It was also his testimony that from the year 2011, they started having serious invasion of the land by squatters which led them to file HCCC No. 201 of 2011 upon which they obtained orders against the Plaintiff which orders are in existence to date.
38. He also stated that they were previous suit filed by various persons including the Plaintiff who identified them as Twiga Men and Women Group. In 2012, they moved to court vide HC ELC No. 57 of 2012 and obtained orders to demolish structures in their land which structures had been constructed without the approval of Ruiru Municipality Council. The High Court granted orders of eviction which was subsequently executed. It was also his testimony that the purported list of the 4,000 persons as presented by the Plaintiffs was false, the authenticity of the photos of their houses cannot be ascertained and that the land in question had already been subdivided and title deed issued to third parties.
39. When cross-examined, he stated that he has been a Director and Chairman of the Defendant on and off since 1990. He also stated that he did not have any resolution in court to confirm that he had been authorized to testify on behalf of the Defendant.
40. On further cross-examination, he also stated that he bought the land from Karume Investment and they did not know its previous owner. He also stated that at the time of purchase, there were no squatters on the said land however the Plaintiffs were collecting money from other parties to sell them the land. He also stated that the eviction orders which were issued had not been challenged on appeal.
41. When re-examined, he stated that he has testified in many cases as a Director and Chairman of the Defendant and the same has never been challenged by any person. He also stated that the land is 80 acres and the workers employed by the company do not own the land. The criminal case was not dealing with adverse possession. He also stated that he was not aware if Phylis Macharia was called as a witness



in this case. He further stated that Salome Mwhiki, David Kibe and John Mwai were petitioners in the previous case.

42. He further stated in re-examination that the photographs produced by the Plaintiffs are not from the Defendant's land. Their land was not owned by a white person. There is no IDP camp in their land. The land was subdivided and sold to other shareholders. The old title was returned to the Ministry.

The Plaintiffs written submissions

43. The Plaintiffs filed written submissions dated 6th November 2024 and 10th December 2024. Counsel submitted on the following singular issue. Whether or not the Plaintiffs have acquired title to the suit properties by way of adverse possession.
44. Citing Sections 7, 13, 17 and 38 of the *Limitation of Actions Act* Cap 22, it was submitted that the Plaintiffs have testified that the suit is filed on behalf of the 4,000 squatters and members of the society who they and their parents have lived continuously, openly, uninterruptedly and in possession and occupation of the suit property from the 1950s up to the 20th December 2012 when they were unlawfully and forcibly evicted from their land by the Defendant in collusion within Municipal Council of Ruiru and Gatundu OCPD following a court order fraudulently entered between them by consent and in their absence.
45. It was contended that the Plaintiffs have acquired proprietary rights over the said parcels of land by dint of adverse possession. The land originally belonged to a white settler one Mr. Graham Bell during colonial period and that the white settler left the country in 1965. Before he left the country, he informed the squatters that he left the land to them. It was also submitted that even though the land was later transferred to Karume through his company known as Karume Investments they were assured of peaceful occupation. Later in the year 2004 they learnt that the legal title of the said land had been transferred to the Defendant who then commenced harassment and intimidation of the Plaintiffs.
46. It was also submitted that on 10th December 2012, the Learned Magistrate in Nyeri CM Criminal Case No. 662 of 2010 did visit the suit property and noted that there were squatters on the land.
47. It was also submitted that suit ELC No. 57 of 2012 and HCCC No. 170 of 2010 was never served upon the Plaintiffs and neither were the Plaintiffs a party. The orders leading to their eviction from the said suit was obtained fraudulently.
48. Reliance was placed on the cases of Wilson Njoroge Kamau vs Nganga Muceru Kamau (2020) eKLR, Chevron (K) Ltd vs Harrison Chao Wa Shutu (2016) eKLR and Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR.
49. As to whether the suit was resjudicata, Counsel submitted as follows:-
- i. HCCC NO 781 OF 2004
The case was against Twiga Men and Women Group who are different from the Plaintiffs herein.
 - ii. HCCC NO 170 OF 2010
This was another friendly case where the Plaintiffs herein obtained stay orders.
 - iii. HCCC NO 201 OF 2011
The Respondents were Twiga Men and Women who are different from the Plaintiffs herein.
 - iv. HCCC NO 57 OF 2012



The Respondents were busy bodies from Ruiru who had nothing to do with the Plaintiffs herein.

v. HCCC 430 OF 2015

This is a case filed by the Plaintiffs herein where they have taken the impersonators of 57 of 2012 to court. The case is pending hearing at Kiambu High Court.

vi. HCCC NO 592 OF 2014

This is a case by the Plaintiffs herein where they are seeking compensation for the illegal eviction of 20th December 2012.

50. In respect to the titles to the suit land, it was submitted that the Plaintiffs had attached certificates of titles at pages 281 to 293 of their bundle.

The Defendant's written submissions

51. The Defendant filed written submissions dated 28th November 2024.

52. Citing Order 37 Rule 7 of the *Civil Procedure Act*, it was argued that the Plaintiffs did not attach any certified extract of the titles. It was contended that this requirement is intended to ensure that the parties in court are litigating over land that actually belongs to the Defendant and not a third party. It was also submitted that the said property is not the Plaintiffs' property since the same has already been subdivided and transferred to other parties. The cases of *Chege & Another vs Kamau & Another* (O.S E010 of 2023) (2024) KE ELC 1825 (KLR) 4TH APRIL 2024 (Judgment) and *Johnson Wachira Musa vs Nyeri County Council & Another* (2019) eKLR were cited in support.

53. As to whether or not the issues raised in the present suit have been conclusively determined, it was submitted as follows:-

In HCCC No. 781 of 2011 the parties were:-

- i. Twiga Men and Women Group vs. Karume Investments Limited & Mbo-I-Kamiti Farmers Company Limited.
- ii. The claim in the case was for: A declaration that it is the plaintiffs on behalf of their families to be solely registered as the owners of all parcels of land known as land registration numbers 9312, 9313, 3760 and 252. A finding that the defendant has no legal right to claim or occupy walk on land known as land registration numbers 9312, 9313, 3760 and 252. Costs of the suit.
- iii. By its decree of 4th February 2005, the court inter alia held "that the plaintiffs' suit against the second defendant be and is hereby dismissed".

In H.C. Pet. No. 592 of 2013 the parties were:-

- i. Salome Mwhaki Njenga, David Mwachhi Kibe and John Kibaru Mwai and (Suing as Chairlady, Treasurer and Secretary of Twiga Estate Squatters on behalf of 4000 society members/evictees from Twiga Estate Squatters vs. The Honourable Attorney General, The Inspector General of Police, Ruiru Municipal Council and Mbo-I-Kamiti Farmers Co. Ltd.
- ii. They sought orders against the 'eviction' from land parcels L.R. No. 9312, 9313, 3760 and 252 commonly known as Twiga Estate.
- iii. After hearing the petition, the court proceeded to dismiss it on the grounds that the issues raised had been determined in other cases between the same parties.



In case number H.C.C.C No. 487 of 2010 the parties were:-

- i. Twiga Estate Squatters (suing through William Chege (Chairman), Joseph Woru Nganga (Secretary) and George Mwangi Irungu (Treasurer) vs. Mbo-I-Kamiti Farmers Company Limited.
- ii. The claim was for adverse possession on Twiga Estate.
- iii. The case was dismissed on 5th July 2011 by Hon. Justice Muchelule (as he then was). He specifically held “the suit and the application consequently res judicata and are therefore dismissed with costs.”

In ELC Case No. 57 of 2012 the parties were:-

- i. The Municipal Council of ruiru vs. Mbo-I-Kamiti Farmers Company Limited, William Chege, Joseph Woru Nganga, George Mwangi Irungu, Simon Charagu Kimani, Joseph Muthigani Kariuki, Jackson Wilfred Maingi, John Kinge (collectively known as Twiga men and women group) and David Mwachhi Kibe, John Kibaru Mwai and Salome Mwihaki (suing as the Treasurer, Secretary and Chairlady on behalf of) Twiga Estate Squatters Society.
- ii. After analysing the cases aforementioned Honourable Justice Mutungi held as follows:-

“However more significantly the respondents aver that the issues that the proposed interested party raises have been adjudicated upon in previous suits notably in H.C.C.C No. 781 of 2014, H.C.C.C No. 487 of 2010 and H.C.C.C No. 170 of 2010 and the issues are the res judicata. I have perused the availed copies of the rulings/orders in the said suits and I am persuaded the applicants have been parties in those suits albeit under varying names Twiga Estate Squatters Society, which has brought the instant application was only registered in 2011 meaning its members variously belonged to the other groups variously described as Twiga men and women group, Twiga Estate Squatters Society and Twiga Squatters Estate do not accept the groups are separate and distinct so as to have separate identities. The persons who have variously brought suits claiming adverse possession must be the same persons who claim to have occupied the land.

My view is that to allow the applicants to be enjoined in this suite would be to sanction flagrant abuse of the court process. Indeed, if I allow the present applicant there is nothing to prevent the faction of the same group under any of the several names from making a similar application. I decline to allow the applicant to be enjoined as a party in the proceedings and accordingly order the proposed interested parties application 20th September 2013 dismissed with costs to the Plaintiff and 1st Respondent who opposed the application.”

According to the Defendant this ruling is significant in that it determined:

- a. That the issues raised by the plaintiffs were res judicata as they had been addressed in the following cases between substantially the same parties.H.C.C.C No. 781 of 2014H.C.C.C No. 487 of 2010 andH.C.C.C No. 170 of 2010
 - a. That the Plaintiffs herein were parties in the different cases albeit in different titles and
 - b. The Plaintiffs conduct of filing different cases was an abuse of the court process.



54. It was also submitted that the plaintiffs filed C.A No. 23 of 2015 in the Court of Appeal which was eventually dismissed on 27th April 2018. All these decisions are produced in the defendant's bundle of documents and are also reported in the Kenya law. The Court of Appeal having upheld the position taken by Justice Mutungi the determinations thereof are binding on this honourable court on the doctrine of stare decisis.
55. It was also submitted that the Plaintiff's suit is defective for failure to join Karume Investments Limited or James Karume as a party to the suit. Reliance was placed on the cases of Matiba vs Attorney General (1998) 1EA 192 and Logistics Link Limited vs Yalelo (U) Limited & Another (Civil Suit E067 of 2021 (2023) KEHC (KLR) (3rd July 2023) Ruling.
56. It was further submitted that the ingredients of adverse possession have not been proved. The Plaintiffs' entry to the suit land was with the consent of the registered owner, the occupation of the land was not adverse. The right to housing and subsistence farming ended once one's employment was terminated. The Plaintiffs' members were unable to individually identify each of the Plaintiff's claim to their plot. The occupation has not been open continuous and uninterrupted.
57. The court was urged to dismiss the suit with costs.

Analysis and Determination

58. Having considered the pleadings of the parties together with the oral and documentary evidence tendered by the witnesses herein and the respective written submissions that have been filed, this court proceeds to address itself on the following issues in respect to this suit:-
 - i. Whether the Plaintiffs claim herein has been previously/conclusively determined.
 - ii. Whether the Plaintiffs have established and or proven a claim for adverse possession.
 - iii. Whether the Plaintiffs are entitled to the reliefs sought.

Issue No. 1

Whether the Plaintiffs claim has been previously conclusively determined

59. It was contended by the Defendant that the issues raised in the Plaintiffs claim has been conclusively determined in several other cases a position which was refuted by the Plaintiffs.
60. Before I address this issue it is worth noting that the said issue was equally considered by my brother Justice Okong'o vide his ruling delivered on 11th December 2015 in respect to the Defendant's application dated 5th February 2014 where the court dismissed the said application and held that it was not clear and obvious if the Plaintiffs' suit is res judicata and as to whether the same is res judicata, it is only fair that the said issue be determined during trial.
61. The doctrine of res judicata, I must say, is a well-trodden path. There are plenty of decisions on the doctrine of res judicata from the superior courts of this country.
62. Odunga, J (as he then was) in the case of Gladys Nduku Nthuki – vs- Letshengo Kenya Ltd (2022) eKLR, elaborated in great details, the meaning of the doctrine of res judicata. The statutory basis of res judicata is Section 7 of the *Civil Procedure Act* which prohibits courts from trying any a suit or issue in which the matter directly and substantively in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

63. The learned Judge referred to a number of decided cases in his exposition. Explaining the rationale of the doctrine, he referred to the Court of Appeal decision in *IEBC – VS- Maina Kiai & 5 others* (2017) eKLR, where the court stated that;

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

64. Justice Odunga noted that the Court of Appeal in the *Maina Kiai* case had quoted with approval the Indian case of *Lal Chand – vs- Randha Kishan* Air 1977 SC 789 that had discussed the rationale of *res judicata* in the following words;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

65. Also cited was the decision in the case of *Lotta – vs- Tanaki* (2003) 2 EA 356, where the court was of the view that;

“.....its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit. The scheme of Section 9 (of the Civil Procedure Code of 1966) therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. the conditions are;

The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. The former suit must have been between the same parties or privies claiming under them;

The parties must have litigated under the same title in the former suit;

The court which decided the former suit must have been competent to try the subsequent suit,

and

The matter in issue must have been heard and finally determined in the former suit.”



66. The decision of the former East African Court of Appeal in *Gurbachan Singh Kalsi –Yowani Ekori Civil Appeal NO.62 of 1958*, that was also cited by Odunga J, addressed a critical aspect in the application of the doctrine of *res judicata*. The court held that;

“Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter[s] which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

67. Odunga J, expounded further on the application of the doctrine of *res judicata* and affirmed that the mere addition of parties in a subsequent suit does not necessarily render the doctrine inapplicable since a party cannot escape it by simply undertaking a cosmetic surgery to his pleadings. He stated that;

“If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under the explanation to Section 7 of the CPA, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.”

68. In the instant case, the court has observed the following in respect to the cases referred to by the Defendant, HCCC No. 781 of 2004, ELC No. 20 of 2010, ELC No. 170 of 2010, ELC No. 487 of 2010, ELC No. 57 of 2012, H.C Petition No. 144 of 2012 and H.C Petition No. 592 of 2013 were filed by various parties at various times and that the reliefs sought were equally diverse.

69. The said cases were not considered by way of evidence and no hearings were undertaken. The parties too are not entirely similar in all the said cases and as such it is the finding of this court that the Plaintiffs claim before this court has not been previously and conclusively determined and hence the said claim is properly before this court. The same is not *res judicata*.

Issue No. (ii)

Whether the Plaintiff has established and or proved a claim of adverse possession

70. The Plaintiff claim proprietorship of the suit property by way of adverse possession.

71. It is a cardinal principle of law that he who alleges must prove. This position is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*. The said Sections of the *Evidence Act* provides as follows:

“

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

And Sections 109 and 112 of the same Act states as follows:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

72. The court will be so guided. From the evidence that was tendered herein by all the six (6) witnesses who testified on behalf of the Plaintiff, it was stated that they have been residing in the suit properties for several years some stating that they were born and brought up in the suit property. The Plaintiff's witnesses also testified that they were evicted from the property on 20th December 2012 and their structures demolished.

73. It is trite law that by virtue of Section 7 and 38 of the *Limitation of Actions Act*, a claim for adverse possession can only lie once an individual has been on the property for the statutory period of 12 years.

74. In the case of *Wambugu =Versus= Njuguna (1983) KLR 173* the court held that adverse possession contemplates two concepts:

“ Possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed claimant has proved that he or she has been in possession for the requisite number of years.

A person who claims adverse possession must inter alia show:-

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

75. The Defendant argued that the Originating Summons ought to be on the basis that it offends the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules. The Rule provides:-

“ The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

76. In submitting on this issue, Counsel for the Plaintiff's submitted that they had attached extracts of title in the Plaintiff's bundle of documents which had been produced in evidence.

77. On this particular issue, the court has considered the evidence adduced, the Plaintiff's witnesses relied and produced in evidence extract of the titles to the properties which were seen at pages 281 to 293 of the Plaintiff's bundle of documents that was produced in evidence. There was no objection from the defendant in respect to the same. From the same documents LR No. 9313 (Original No. 4728/2) measuring approximately 339 acres showed that the same was originally registered under the names of



- Robert Graham Bell in 1958 and later transferred to Karume Investment Limited on 28th June 1974 and subsequently thereafter transferred to the Defendant on 8th August 2003.
78. In respect to L.R No. 9312 (Original No. 4728/1 measuring approximately 268 acres, the same was registered under the names of Robert Graham Bell and later transferred to Karume Investment Limited on 28th June 1974 and subsequently transferred to the Defendant on 8th August 2003. In respect to L.R No. 252, the same was registered under the names of Twiga Limited on 1st January 1963 and later transferred to Karume Investment Limited on 28th June 1974 which parcel was subsequently transferred to the Defendant equally on 28th August 2003. The same was approximately 183 acres.
79. In view of the foregoing, the Defendant's contention that the Plaintiff's suit is fatally defective for lack of an extract of title to the land in question is misplaced and lacks any basis upon which the court can uphold the same.
80. Coming back to the doctrine of adverse possession, the same was aptly defined in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where the Court of Appeal held that:-
- “Adverse possession is essentially a situation where a person takes possession of land and assets rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya is twelve (12) years. The process springs into action essentially by default or in action of the owner. The possession is neither by face of stealth nor under the licence of the owner. It must be adequate in continuity in publicity and in extent to show that possession is adverse to the title owner.”
81. From the above definition, adverse possession can only arise out of non-permissive possession. The element of permissive possession was well explained in *Gabriel Mbui =Versus= Mukindia Maranya* (1993) eKLR where Justice Kuloba had this to say:-
- “(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. It has been held many times that acts done under licence or permitted by, or with love of the owner do not amount to adverse possession and do not give the license or possession as a result of permission given to him by the owner, or if he is in possession as a result of permission given to him by the owner, he is not in adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land...where possession was consensual or contractual in its inception, it cannot be called 'adverse'.
82. In the instant case, it was the evidence and testimony of the Plaintiff's witnesses that they themselves and or their parents came to the property as employees in Twiga Farm which was initially owned by Robert Graham Bell who later transferred it to Karume Investments Limited which property was also later transferred to the Defendant. John Kibaru Mwai who testified as PW1 stated in his evidence in chief that he was an employee at the farm in 1964. He also stated that he married his wife Agnes Wairimu in 1965 who was also working in the farm.
83. PW2 Josephat Mwangi testified that he was born in the farm in 1960 at a time when his parents were working on the said farm. It was also his testimony that he continued staying in the farm while assisting his parents who were working there.



84. David Mwathi Kibe the Treasurer of the Plaintiff who testified as PW3 stated that he was born in the farm in 1952 at a time when the parents were workers at the farm.
85. Nancy Njeri Mwaura who testified as PW5 stated that he was born in the farm at a time when her parents were working on the said farm and she later worked in the said farm until 1989 when she resigned.
86. Joseph Njoroge who testified as PW5 stated that he came to the farm in 1958 as a worker. Salome Mwihaki Njenga the Plaintiff's Chairperson who testified as PW6 stated that she was born in the firm at a time when her father was working in the farm and she also stated that she would assist in the farm during her free time and during the weekends.
87. In view of the foregoing, it is indeed evident that the initial entry of the Plaintiffs to the suit property was indeed permissive with the consent of the initial owner since they were either workers on the farm and or their parents were employees in the said farm. In the case of *Delamere Estates vs Ndungu Njai & Others (2006) eKLR* and *Wellington Lusure Barasa & 75 Others VS Lands Limited & Another (2019) eKLR* it was held that entry on the suit property on account of employment is permissive and cannot be deemed to be adverse to the owner.
88. From the definition of adverse possession given in the *Mtana Lewa* case (Supra), the essential prerequisites of adverse possession are that the possession: -
- i. Must not be by force or stealth.
 - ii. Must not under the licence of the owner.
 - iii. Must be adequate in continuity in publicity and in extent to show that possession is adverse to the title owner.
89. This was also the finding of the Court of Appeal in the case of *Mombasa Teachers Cooperative Savings & Credit Society Limited vs Robert Muhambi Katani & 51 Others (2018) KLR* where the court held that:-
- “ 18. Likewise it is settled that a person seeking to acquire title to land by way of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi ne clam, nec precario*’
90. Similarly, in *Chevron (K) Ltd v Harison Charo Wa Shutu (2016) eKLR*, the court held that whether the possession was adverse for 12 years was a burden imposed by law on the person claiming to prove not only the period but also that his possession was without the true owner's permission.
91. The element of non-permissive possession has been fully discussed herein and it is the finding of this court that the initial entry of the members of the Plaintiffs was by employment as employees and or workers of the farm and as such was with the permission of the initial owner.
92. In view of the foregoing, it is the finding of this court the Plaintiffs have been unable to demonstrate non-permissive entry to the land. It therefore follows that the Plaintiffs claim of adverse possession as against the Defendant fails since the same has not been proven to the required standard.



Issue No. (iii)

Whether the Plaintiffs are entitled to the reliefs sought

93. The Plaintiffs sought for various reliefs as enumerated their Amended Originating Summons, however this court having found that the Plaintiffs have not satisfied the ingredients and or elements to succeed in a claim of adverse possession on account of failing to demonstrate non permissive entry to the property, it is the finding of this court that the reliefs sought are not for granting since the Plaintiffs claim has not been proved to the required standard and this court will proceed to dismiss the suit.
94. On the issue of costs, it is trite law that costs shall follow the events, but it is also noteworthy that this court retains the discretionary rights on award of costs. Considering the circumstances of this case this court directs each party to bear own costs of the suit.

Conclusion

95. In the end, the Amended Originating Summons dated 23rd December 2013 is not merited and the same is dismissed in its entirety with an order that each party do bear own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 31ST JANUARY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Anyoka for the Plaintiffs.

Mr. Mutiso for the Defendant.

Court Assistant: Mary Ngoira.

