



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 670 OF 2015**

**IN THE MATTER OF; ORDER 37 RULE (1) (2) & (3) OF THE CIVIL PROCEDURE RULES**

**&**

**IN THE MATTER OF; SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

**&**

**IN THE MATTER OF CERTIFICATE OF TITLE NUMBER 209/2378 PUMWANI, NAIROBI REGISTERED UNDER THE REGISTRATION OF TITLES ACT, CAP 281 (NOW REPEALED)**

**&**

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED TITLE OVER PART OF THE SAID LAND MEASURING 100 FT BY 100FT BY ADVERSE POSSESSION (IN WHICH LAND THEY PUT UP AN 8 ROOMED HOUSE ABOUT 80 YEARS AGO)**

**BETWEEN**

**HASSAN SWALEH MOHSIN.....1<sup>ST</sup> PLAINTIFF**

**SAID SWALEH MOHSIN.....2<sup>ND</sup> PLAINTIFF**

**GHALIB SWALEH MOHSIN.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**ABDUL KARURI (Sued on their individual capacities).....1<sup>ST</sup> DEFENDANT**

**ABDALLAH IDDI (and for and on behalf of Pumwani Riyadha).....2<sup>ND</sup> DEFENDANT**

**ISSA MOHAMED KILUME (Mosque committee by virtue of being its officials)...3<sup>RD</sup> DEFENDANT**

**PUMWANI RIYADHA MOSQUE COMMITTEE.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiffs herein have jointly and/or severally filed and/or lodged the Originating Summons dated 13<sup>th</sup> of July 2015 and in respect of which same have sought the following Reliefs;

*i. The Honorable Court be pleased to make a Declaration that the Plaintiffs are the proprietors of the space of land measuring 100ft by 100ft comprising parcel of Land Number L.R. NO. 209/2378, Pumwani, Nairobi, specifically where the 8 roomed house the Plaintiffs entire family has been living in since 1938 is situated.*

ii. *The Honorable Court be pleased to make a Declaration that the Plaintiffs are entitled to be registered as the owners of the said space of land measuring 100ft by 100ft within L.R. NO. 209/2378, Pumwani, Nairobi.*

iii. *The Honorable Court be pleased to make a Declaration that the said 100ft by 100ft parcel of land out of L.R. NO 209/2378, Pumwani, Nairobi, has been acquired by the Plaintiffs by way of Adverse possession and an Order consequently be issued to the Land Registrar, Nairobi, to supervise the identification, survey and subdivision of the said portion of land, and to have same registered in the name of the Plaintiffs as the owners.*

iv. *The Honorable Court be pleased to issue a Permanent injunction restraining the Defendants jointly and/or severally, their agents, representatives, employees and/or servants from interfering with the Plaintiffs peaceful enjoyment of the said portion of land situate on L.R. NO. 209/2378, Pumwani, Nairobi, and from dealing with the same in any way whatsoever.*

v. *The Honorable Court be pleased to grant an order against the Defendants for the compensation of the Plaintiffs in terms of special, general and aggravated/exemplary damages arising out of the trespass and demolition by the Defendants of the 8 roomed house put up in L.R. NO 209/2378, Pumwani, Nairobi, and in which the Plaintiffs and their entire family have been residing since 1936.*

vi. *The Honorable Court be pleased to make an order that it would deem fit and justifiable in the circumstances of this matter so that the ends of justice are met.*

vii. *The Honorable Court be pleased to order the Defendants to meet the costs of this suit.*

2. The Originating Summons herein has not captured and/or enumerated any grounds at the foot thereof, but, nevertheless, same is expressed to be founded on three Affidavits, namely the Affidavits of Hassan Swaleh Mohsin, Said Swaleh Mohsin and Ghalib Swaleh Mohsin, respectively, who are the Plaintiffs herein.

3. Following the filing and service of the subject Originating Summons, the Defendants herein proceeded to and indeed entered appearance and also filed a Replying Affidavit, both of which were filed on the 3<sup>rd</sup> of August 2015, respectively.

#### **DEPOSITIONS BY THE PARTIES**

##### **The Plaintiffs Case**

4. Pursuant to the Supporting Affidavit sworn on the 13<sup>th</sup> of July 2015, the 1<sup>st</sup> Plaintiff herein averred that same was born in the year 1941, to the late Swaleh Mohsin and the late Mrs. Amina Ahmed Saraffudin, at Pumwani Area, within the city of Nairobi.

5. It is further averred that the said Swaleh Mohsin and his wife entered upon and commenced occupation of a portion of what is now the suit property in year 1936.

6. It is further averred that the said Swaleh Mohsin, now deceased, proceeded to and constructed an 8 roomed house within a portion of the suit property on or about the year 1936, and that same lived and/or resided therein, together with his wife, namely, Mrs. Saraffudin Mohsin, up to and including his death.

7. On the other hand, it is further averred that after the construction of the 8 roomed house, the late Swaleh Mohsin commenced to pay the sum of Kshs. 2 to the Mosque on account of rent, pertaining to and/or concerning the house where the late Swaleh Mohsin was residing together with his family.

8. It is further averred that the payment of the rent went on, but somehow stopped. Nevertheless, the Plaintiffs aver that even despite the non-payment of rent, same have remained in occupation of the 8 roomed house.

9. On this account, the 1<sup>st</sup> Plaintiff has averred that the duration of occupation and/or possession of the 8 roomed house, which sits on the portion measuring 100ft by 100ft, has been adverse to the rights and/or interests of the Respondents.

10. Be that as it may, the 1<sup>st</sup> Plaintiff has further averred that on or about June 2015, fire broke out at Gikomba Area, which spread to and engulfed the 8 roomed house, culminating into the destruction of the said house.

11. Owing to the fire outbreak and the destruction of the 8 roomed house, the Plaintiffs herein were forced to vacate the suit premises and are currently living elsewhere other than on the suit property.

12. It was the Plaintiffs further averment that after the fire outbreak, which affected the 8 roomed house, the Respondents herein hired and sent goons, who demolished and destroyed the remnants of the 8 roomed house. In this regard, the 8 roomed house, in respect of which the Plaintiffs hitherto resided, is no longer in existence.

13. On the other hand, the 1<sup>ST</sup> Plaintiff further averred that the family of Swaleh Mohsin, now deceased, have lived in the said house for a period of 80 years uninterrupted and without any issue and we, by right have lived in the said place as our own for which I [1<sup>ST</sup> Plaintiff] pray that the claim set out by myself herein, together with the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, be granted, as we are the head of our family as existing now.

14. In short, the 1<sup>st</sup> Plaintiff/Applicant, whose Affidavit has been adopted by the rest of the Plaintiffs, have thus sought for the entry of judgment on account of the Doctrine of Adverse possession.

### **The Respondents Case**

15. The Respondents herein responded and/or reacted to the Originating Summons by way of a Replying Affidavit sworn on the 29<sup>th</sup> of July 2015, deposed to by one Abdul Karuri, who is the 1<sup>st</sup> Defendant/Respondent herein.

16. First and foremost, the 1<sup>st</sup> Defendant/Respondent avers that the 4<sup>th</sup> Respondent is the legal and registered owner of all that parcel of land, otherwise known as L.R. NO. 209/2378/1, which is situate within Nairobi City.

17. It is the 1<sup>st</sup> Defendant/Respondent's further averment that the Defendants/Respondents are not aware of, or conversant with the property known as L.R. NO. 209/2378, which is being claimed by the Plaintiffs.

18. On the other hand, the 1<sup>st</sup> Defendant/Respondent has averred that the family of the Plaintiffs herein, including the late Swaleh Mohsin, lived and/or occupied the 8 roomed house, standing next to the 4<sup>th</sup> Defendant/Respondent's mosque, but that their occupation was premised on the existence of a tenant/landlord relationship.

19. Besides, the 1<sup>st</sup> Defendant/Respondent has averred that the family of the Plaintiffs/Applicants have been paying rent to the 4<sup>th</sup> Defendant and the payments were acknowledged and confirmed by the Plaintiffs vide their own Advocate's letter dated 3<sup>rd</sup> October 2012, which has been exhibited as annexure **AK3** to the Replying Affidavit.

20. Other than the foregoing, the 1<sup>st</sup> Defendant/Respondent has averred that the suit property having been destroyed by the fire out break was thereafter pulled down and demolished by the Defendants and thus the Plaintiffs Ceased to occupy and/or reside in the suit property in the month of June 2015, long before the filing of the subject suit.

21. Be that as it may, the 1<sup>st</sup> Defendant/Respondent avers that as tenants, whose occupation was founded on permission, consent, license and/or generally agreement, the Plaintiffs herein cannot stake a claim based on Adverse possession.

### **EVIDENCE DURING THE TRIAL**

#### **Plaintiffs Evidence**

22. The subject matter came up for hearing on the 6<sup>th</sup> of October 2021, on which date, the 1<sup>st</sup> Plaintiff herein testified as PW1 and besides, same adopted the contents of the Supporting Affidavit sworn on 13<sup>th</sup> of July 2015, the witness statement dated 15<sup>th</sup> July 2021 and also produced the various documents contained at the foot of the list of documents dated the 15<sup>th</sup> of July 2021.

23. On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs herein also testified and adopted their respective witness statements and besides, same adopted the evidence of the 1<sup>st</sup> Plaintiff.

24. Suffice it to note, that during the evidence of the 1<sup>st</sup> Plaintiff herein, same reiterated the contents of the Supporting Affidavit, details whereof I have alluded to herein before.

#### **Defendants Evidence**

25. Despite having been served with the Hearing Notice pertaining to and/or concerning the subject matter, the Defendants herein did not attend Court on the scheduled date. Consequently, the Defendants neither tendered any evidence nor cross examined the Plaintiffs.

### **SUBMISSIONS BY THE PARTIES**

26. Following the close of the Plaintiffs case, the Court directed that the parties herein do proceed to and file written submissions.

27. Pursuant to and in line with the directions of the Honorable Court, the Plaintiffs herein proceeded to and filed their written submissions on the 14<sup>th</sup> of October 2021, in respect of which the Plaintiffs have highlighted the basis of the claim for Adverse possession.

28. In particular, it is the Plaintiffs submission that having been in occupation and remained in occupation of the suit property since 1936, the family of the Plaintiffs, have thus acquired Adverse possession and are therefore entitled to the Reliefs sought.

29. On the other hand, the Plaintiffs have also highlighted the issue that as a result of the demolition of the 8 roomed house by the Defendants and as a result of the Plaintiffs Eviction from the suit property, the Defendants should be condemned to pay Kshs. 2,000,000 on account of trespass to the suit property.

30. Finally, the Plaintiffs herein have also claimed payment of Kshs. 500,000 as aggravated Damages against the Defendants for taking the law unto their own hands.

31. Despite the fact that the Defendants herein were similarly served with the Mention Notice to enable same to appear and/or file written submissions, none was indeed filed. Consequently, the only submissions on record are those of the Plaintiffs.

### **ISSUES FOR DETERMINATION**

32. Having reviewed, examined and/or considered the totality of the pleadings, Affidavits and Documents filed by the Plaintiffs herein as well as the written submissions dated the 14<sup>th</sup> of October 2021, and also upon considering the Replying Affidavit and the annexed document attached thereto, which were filed by the Defendants, and which no doubt forms part of the Record, it is my humble view that the following issues arise for determination;

- i. Whether the subject claim has been made on behalf of the Estate of Swaleh Mohsin, now deceased, and if so, whether the Plaintiffs have the requisite locus standi.*
- ii. Whether the Plaintiffs entry onto, occupation of and continued usage of the 8 roomed house was with the permission, consent and/or authority of the Defendants, or whether same was adverse to the interests of the Defendants.*
- iii. Whether the Plaintiffs have since been Evicted from the suit property, and if so, whether occupation has been terminated.*
- iv. Whether the Plaintiffs herein can claim and/or be entitled to payment of General Damages as well as Aggravated Damages, either as sought for or at all.*

### **ANALYSIS AND DETERMINATION**

#### **Issue Number One**

**Whether the subject claim has been made on behalf of the Estate of Swaleh Mohsin, now deceased, and if so, whether the Plaintiffs have the requisite locus standi.**

33. The Plaintiffs herein both in the Supporting Affidavit, the written statements as well as the evidence tendered before the Court, have traced their entry upon and occupation of the 8 roomed house, situated on the suit property, to the year 1936, when Swaleh Mohsin, now deceased, is said to have entered upon the suit property.

34. On the other hand, the Plaintiffs herein have also stated that the 8 roomed house, which was previously standing on the suit property, was actually constructed by Swaleh Mohsin, now deceased.

35. At any rate, the Plaintiffs have averred that the family of Swaleh Mohsin have lived thereon and even after the death of Swaleh Mohsin, the Plaintiffs have remained in occupation. For clarity, it is the Plaintiffs position that they have lived thereon for more than 80 years and their living thereon, has been in a manner that connotes that the said property is their own.

36. Finally, and most importantly, the Plaintiffs have contended that having lived on the portion of the suit property for more than 80 years, the portion thereof, which is better described as the 8 roomed house, should be decreed to be transferred and registered in the Plaintiffs names because they are the head of their family, namely, the family of Swaleh Mohsin, now deceased.

37. It is apparent that the subject claim by and/or on behalf of the Plaintiffs, which traces itself to 1936, is predicated on the entry upon and usage of a portion of the suit property by Swaleh Mohsin, now deceased.

38. In any event, the basis and/or foundation of the Plaintiffs claim is more amplified by the contents of Paragraph 18 of the Supporting Affidavit sworn on the 13<sup>th</sup> of July 2015. Clearly, the claim has been made on behalf of the estate of Swaleh Mohsin.

39. Having made and/or mounted the suit for and on behalf of the estate of Swaleh Mohsin, the question then that arises is whether the Plaintiffs herein are seized and/or possessed of the requisite capacity to commence, maintain and/or sustain the subject proceedings albeit without the grant of Letters of Administration.

40. In an endeavor to unlock this question, the starting point is reference to the provision of **Section 82 of the Law of Succession Act** which provides as hereunder;

#### **“82. Powers of personal representatives**

*Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*

*(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—*

*(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so*

purchased; and

(ii) no immovable property shall be sold before confirmation of the grant; CAP. 160 Law of Succession [Rev. 2017] 32

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy; (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.”

41. My reading of the foregoing provisions leads me to the inescapable position that prior to and/or before a suit can be commenced for and on behalf of the estate of a deceased, the person intending to commence or file the suit, must seek for and obtain grant of Letters of Administration.

42. On the other hand, it is also apparent from the construction of the foregoing position, that it is only the Grant of Letters of Administration that confers capacity to the bearer of such grant to commence any proceedings on behalf of the deceased's estate.

43. In any event, the authority arising from the Grant of Letters of Administration can only accrue from the date of issuance onwards.

44. In respect of the subject matter, even though the Plaintiffs have implored the Court to direct the registration of the portion of the suit property, to and or in their favor as the heads of Swaleh Mohsin family, same have not exhibited a copy of the Grant of Letters of Administration, which in my humble view would be the only Document to imbue the Plaintiffs with such Headship, as claimed.

45. In the absence of letters of administration, which have not been alluded to and/or addressed by the Plaintiffs, the suit herein which is predicated on the basis of the actions of the deceased cannot be sustained and/or maintained. In this regard, it is my humble finding that the Plaintiffs are devoid of the requisite *locus standi*.

46. In support of the foregoing finding, I can do no better than to rehash the Ageless observation by the Court of Appeal in the case of **Virginia Edith Wambui Otieno vs Joash Ochieng Ouko [1987] eKLR** whereby the Honorable Court stated as hereunder;

*“But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the Law of Succession Act provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq). But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent (see Ingall v Moran [1944] 1 KB, and the case which follow namely Burns v Campbell [1952] KB 15). This doctrine is as old as Wankford v Wankford [1702] where Powys J said:*

*‘but an administrator cannot act before letters of administration granted to him.’*

47. On the other hand, the position that was underscored in the foregoing Decision, **Virginia Edith Wamboi (Supra)**, was also emphasized in the later decision in the case of **Trouistik International Ltd vs Jane Mbeyu & Another [1993] eKLR** where the Honorable Court stated as hereunder;

*“The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception.”*

48. Arising from the foregoing position, it is my humble finding and holding that the claim by the Plaintiffs herein which derives color from the actions and activities of the deceased, is incompetent and thus legally untenable.

## **Issue Number Two**

**Whether the Plaintiffs entry onto, occupation of and continued usage of the 8 roomed house was with the permission, consent and/or**

**authority of the Defendants, or whether same was adverse to the interests of the Defendants.**

49. By their own admission, the Plaintiffs herein have confirmed that upon entry and occupation of the house standing on the suit property, the late Swaleh Mohsin, paid rent of Kshs. 2 to the 4<sup>th</sup> Defendant herein.

50. It is further confirmed by the Plaintiffs that the payments of the rents was variously made and/or paid from time to time, but later on, the Plaintiffs allege that they stopped paying the said rent and that to date the Plaintiffs do not pay any rent and have not paid same for many years now.

51. It is also imperative to note, that the Plaintiffs have adduced before the Honorable Court a copy of the Rent book showing that same had been paying rents to and in favor of the 4<sup>th</sup> Defendant.

52. Indeed, the copies of the Rent book relates to various dates, but same confirms that there existed a tenant and landlord relationship between the Plaintiffs late father and the 4<sup>th</sup> Defendant.

53. On the other hand, it is also important to recall that on the 3<sup>rd</sup> of October 2012, the Plaintiffs herein, on behalf of the estate of Swaleh Mohsin, instructed the law firm of M/S Soita & Saende And Company Advocates, who wrote a letter to the 4<sup>th</sup> Defendants herein whereby same restated the existence of a tenant/landlord relationship and similarly protested sharp increase of rent from Kshs. 500 to Kshs. 19,000 only as pertains to and/or concerned a single-family unit.

54. Confronted with the letter under reference, the Plaintiffs herein alleged in the statement dated 15<sup>th</sup> July 2021, that same did not instruct the said Advocate to write and state that same were tenants in the premises. For clarity, the Plaintiffs attempted to run away from the explicit contents of the letter under reference.

55. Suffice it to say, that no complaint was ever made and/or mounted against the firm of M/s Soita & Saende And Company Advocates, for having written the letter on behalf of the Plaintiffs herein and on behalf of the estate of Swaleh Mohsin, albeit without instructions.

56. In this regard, the attempt by the Plaintiffs to distance themselves from the contents of the letter under reference are clearly misguided.

57. Nevertheless, the Plaintiffs having admitted that same were tenants of the 4<sup>th</sup> Defendant and having been paying rent, it is apparent and evident that the Plaintiffs occupation, which traces its roots to one Swaleh Mohsin, now deceased, was premised on the consent, permission and/or license by the 4<sup>th</sup> Defendant.

58. In any event, even though the Plaintiffs have averred that same stopped paying rent and have not paid same for so long, there is no evidence in terms of a letter whereby the Plaintiffs are now telling the Defendants that henceforth we have stopped being your tenants and are now laying a claim or occupying the 8 roomed house as trespassers, to warrant their occupation being hostile to the rights and/or interests of the 4<sup>th</sup> Defendant.

59. In my humble view, a person who enters and occupies the premises of another on the basis of consent, license, permission or lease, cannot stake a claim for adverse possession which is primarily anchored on adverse occupation (hostility to the owner of the land) and dispossession of the title holder.

60. Clearly in respect of the subject matter, the occupation, possession and use of the 8 roomed house, by the Plaintiffs father and by extension the Plaintiffs herein, was never meant to dispossess and/or deprive the 4<sup>th</sup> Defendant of her entitlement to the suit property.

61. In support of the foregoing submissions, I take guidance from the decision in the case of **Wambugu vs Njuguna [1983] KLR 172**, where the Court of Appeal held as hereunder;

*“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.”*

62. For further emphasis, the position by the Court in the case of **Wambugu vs Njuguna (Supra)**, was reiterated in the case of **Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001**, where the Court of Appeal delivered the following dictum:

*“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in **Jandu v Kirpal [1975] EA 225** possession does not become adverse before the end of the period for which permission to occupy has been granted.”*

**Issue Number Three**

**Whether the Plaintiffs have since been evicted from the suit property, and if so, whether occupation has been terminated.**

63. The Plaintiffs herein have acknowledged and/or admitted that they occupied the 8 roomed house, standing on the suit property, up to and including the 23<sup>rd</sup> of June 2015, when the subject house, was burnt down as a result of a fire outbreak that occurred at Gikomba Market, within the city of Nairobi.

64. On the other hand, the Plaintiffs have similarly acknowledged and admitted that after the 8 roomed house was razed down by fire, in their own words, the Defendants herein hired goons who proceeded to and demolished the remnants of the subject house and thereafter took away all the building materials, which were on site.

65. Despite the foregoing, the Plaintiffs have further confirmed that it is the Defendants who are now exclusively in possession and use of the subject portion of the suit property, wherein the 8 roomed house hitherto stood.

66. In short, the Plaintiffs by themselves have acknowledged and/or confirmed that same were effectively and eventually evicted from the suit property. Consequently, same are no longer in occupation of the suit property and thus, possession has since been interrupted, nay terminated.

67. The question that then arises is whether a person who is no longer in possession can lay a claim for Adverse possession, which is primarily premised on continuity and publicity in occupation of the suit property.

68. In my humble view, once the Plaintiffs moved out of the suit property or better still were evicted from the suit property, the doctrine of *Nec vi nec clam nec precario*, Ceases to exist and thus a claim for adverse possession dissipates.

69. In the premises, it is my finding and holding that if the Plaintiffs were ever in adverse occupation of the suit property, then such occupation was effectively and eventually terminated and a claim for adverse possession can no longer be pursued *ex post facto*.

70. In support of the foregoing observation, I can do no better than to restate the law as was held by the Court of Appeal in the case of **Njuguna Ndatho & Another vs Masai Itumo & Another [2002] eKLR** where the Court observed as hereunder;

*"The passage from Cheshire's Modern Law of Real property to which Potter JA made reference in Githua v Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says -*

*"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. **Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.** The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land."*

*I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by **Potter JA in Githu v Ndeete**, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by **Kneller JA in Muthoni v Wanduru** does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. An on this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed."*

#### **Issue Number Four**

**Whether the Plaintiffs herein can claim and/or be entitled to payment of general damages as well as aggravated damages, either as sought for or at all.**

71. Originating Summons like the one beforehand, are specifically provided for and same are meant to address and/or deal with short and straight-forward disputes, which do not entail elaborate, drawn out and/or complex matters.

72. In any event, situations where Originating Summons can be filed and/or lodged are statutorily circumscribed and even the nature of reliefs that can be granted, are specifically enumerated under the provisions of **Order 37 of the Civil Procedure Rules**.

73. Suffice it to say, that under the provision of **Order 37 of the Civil Procedure Rules** which deal with suits by Originating Summons, there is nowhere that it stipulates that Originating Summons can anchor a claim for General, Aggravated and/or Exemplary Damages, whatsoever.

74. In my humble view, a suit where a claimant desires to pursue a claim for general, aggravated and exemplary damages, can only be commenced by way of a Plaint, Counter-claim and lately, vide a Constitutional Petition founded on the provisions of **Article 23 of the Constitution, 2010**.

75. Be that as it may, the Plaintiffs herein have sought for payment of General, Aggravated and Exemplary damages and have gone ahead to quantify the awards under the aforesaid headings as hereunder;

a) Kshs. 2,000,000 - General damages

b) Kshs. 500,000 – Aggravated damages

76. In my humble view, the claim for such Reliefs cannot be agitated and/or ventilated on the basis of Originating Summons. In this regard, the aforesaid reliefs are legally untenable.

77. In support of the foregoing submission, I beg to echo the Decision of the Court of Appeal in the case of **Kenya Commercial Bank Ltd vs Osede [1986] eKLR** where the Court of Appeal held as hereunder;

*“Had it not been for the point of jurisdiction to award damages, the Judge in my view delivered a very good judgment, fully sensitive to the rights of the parties and to the issues before him; and, as I have said, his mind was never directed to this question, as it should have been. The Bank’s conduct has to my mind been shown in a most unmeritorious light, and the Judge’s finding that it did not have sufficient regard to the chargor’s interests on the sale is certainly arguable.*

*Nevertheless, believing as I do that there was no power to award damages on this originating summons, I would allow the Bank’s appeal on that ground, with the result that the other questions raised, such as the measure of damages, do not now fall to be decided.”*

78. Taking into account the foregoing decision, I am afraid the claim for General, Aggravated and Exemplary Damages, is unrealistic, misconceived and thus untenable.

#### **FINAL DISPOSITION**

79. From what I have endeavored to explain herein before, it is now obvious that the Originating Summons dated 13<sup>th</sup> of July 2015, is for Dismissal.

80. In the premises, the Originating Summons be and is hereby Dismissed.

81. As pertains to costs, I direct that either party shall bear their own costs, given that the Defendants herein, neither participated nor filed any written submissions.

82. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula      Court Assistant**

Ms Okoth H/b for Mr. Sumba for the Plaintiffs.

N/A for the Respondents.