



REPUBLIC OF KENYA



KENYA LAW

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**Chogo & 6 others v Torun & 7 others (Miscellaneous Civil Application
134 of 2013) [2025] KEELC 4836 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 134 OF 2013**

LL NAIKUNI, J

JUNE 27, 2025

BETWEEN

**KAZUNGU MOLI CHOGO 1ST PLAINTIFF
CHANGAWA MOLI CHOGO 2ND PLAINTIFF
SHABAN BAKARI MOLI 3RD PLAINTIFF
SAMMY KEAH MOLI 4TH PLAINTIFF
KADZITU MOLI CHOGO 5TH PLAINTIFF
RAMADHAN RANDU MOLI 6TH PLAINTIFF
MWENDA KAHINDI MOLI 7TH PLAINTIFF**

AND

**PERIHAN TORUN 1ST RESPONDENT
CEMALET'TIN KANI TORUN 2ND RESPONDENT
FEISAL HASSAN SHERMAN 3RD RESPONDENT
AMIR ALI SWALEH 4TH RESPONDENT
AFRICAN UNIVERSITY TRUST OF KENYA 5TH RESPONDENT
MOHAMED YUSUF HAJI 6TH RESPONDENT
THE ZAYED BIN SULTAN AL NAHYAN 7TH RESPONDENT
CHARITABLE & HUMANITARIAN FOUNDATION 8TH RESPONDENT**



JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to the suit instituted by Kazungu Moli Chogo, Changawa Moli Chogo, Shaban Bakari Moli, Sammy Keah Moli, Kadzitu Moli Chogo, Ramadhan Randu Moli and Mwenda Kahindi Moli the Plaintiffs/Applicants herein against Perihan Torun, Camelettin Kani Torun, Feisal Hassan Sherman, Amir Ali Swaleh [all sued as Trustees of African University Trust of Kenya], African University of Trust of Kenya, Mohamed Yusuf Haji and the Zayed Bin Sultan Al Nahyan Charitable & Humanitarian Foundation, the Defendants/Respondents herein. The suit was by way of Originating Summons on the 27th June, 2013 filed on the same day premised under the provision of Order 37 Rule 7 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act Cap. 22 of the Laws of Kenya.
2. Upon service of the Originating Summons, the Defendants/ Respondents, the 1st, 2nd, 4th and 7th Respondent while opposing it, filed replies vide a Replying Affidavit sworn 28th March, 2023 and 22nd July, 2013 respectively.
3. It is instructive to note that, during the pendency of the proceedings, the parties requested that there be a site visit [“Locus in Quo”] be conducted pursuant to the provision of Order 18 Rule 11 of the Civil Procedure Rules, 2010. Pursuant to that, on 9th February, 2024 the Honourable Court did oblige and prepared a report which has been attached to this Judgement for ease of reference hereof.

II. Court directions before the hearing

4. After confirming that the Plaintiffs had complied with Order 11 of taking directions under the provision Order 37 Rules 16 & 18 of the Civil Procedure Rules 2010. On 28th March, 2023, the Honourable Court set the hearing date. Significantly, at the very onset, it will be noted that despite of service the 6th Defendant/Respondent never entered appearance nor filed any Defence taking therefore the claim against him went uncontroverted and unopposed. Additionally, the 1st, 2nd, 3rd, 4th 5th and 7th Defendants/Respondents as would have been expected never filed any Counter – Claim against the claim lodged by the Plaintiff/Applicants herein on land adverse possession as required by the provision of Order 7 Rule 3 of the Civil Procedure Rules, 2010.
5. Pursuant to this, the Plaintiffs/Applicants called their witnesses being PW – 1, 2, 3, 4 and 5 who after testifying closed their case on 28th October, 2024. Thereafter, the Defendants called their witnesses and marked their cases closed.

III. The Plaintiffs/Applicants’ case

6. From the filed pleadings and the testimony adduced, the Plaintiffs/Applicants claimed to be entitled to the Parcel of Land known as Plot Number MN/I/5141 CR Number 29112 by virtue of Land Adverse Possession and for determination of the following questions:
 - a. Whether the Applicants are entitled to the Parcel of Land Known as Plot Number MN/I/5141 by virtue of Adverse Possession.
 - b. Whether the Applicants are entitled to be duly registered as Joint Proprietors of Plot Number MN/1/5141.
 - c. Whether the Respondents have any right to the said Land.



- d. Whether the Applicants are entitled to costs of this Summons.
7. The Original Summons was based on the grounds, testimonial facts and the averments made under the 16 Paragraphed supporting affidavit sworn by Kazungu Moli Chogo, the 1st Plaintiff/Applicant. He averred that:-
- a. The Applicants were the Children of the late Moli Chogo who died in 1993 and was buried on his Land where the Applicants stay and which is comprised in the piece or parcel of Land now known as L.R. No. MN/I/5141 measuring approximately 84 Acres or thereabout [Hereinafter called the “Suit Land”].
 - b. The suit land was situated in Majaoni Area of Mombasa County and was presently inhabited, occupied and developed by the Late Mzee Moli Chogo’s family.
 - c. All the Applicants herein were born and had grown up and lived on the suit land all their lives.
 - d. They had constructed their residences and carried out various farming activities on the Suit Land and had planted coconut, mangoes and cashew nut trees and rear livestock.
 - e. They had been in continuous and uninterrupted occupation of the suit land for over forty [4] years.
 - f. The said suit land was also occupied by their forefathers who died and were buried on the Land.
 - g. Sometimes in the year 2008, they heard that part of the suit land had been mysteriously registered in the name of one Mr. Mohammed Yusuf Haji [Hereinafter referred to as “Mr. Haji”] but they were unable to confirm the same.
 - h. They later established that the suit land had been secretly transferred to Zayed Bin Sultan Al Nahyan Charitable & Humanitarian foundation and later leased to the African University Trust of Kenya while they were in full and uninterrupted occupation.
 - i. The Respondents were now threatening to evict they and/or interfere with their lawful occupation and ownership of the Land and had started constructing a perimeter wall and threatening occupants of the Land with eviction Notices. Annexed in the affidavit were true copies of some of the Notices marked as “KMC-1”.
 - j. They were apprehensive that unless the Respondents were restrained by an order of this Honourable Court, the Respondents would unlawfully evict them.
 - k. Having occupied the suit property for Over forty [40] Years, they were legally and constitutionally entitled to be declared as the owners of the land by virtue of the doctrine of Adverse Possession since their occupation was clearly defined. It and had been open, continuous and uninterrupted for more than Forty [40] years, which entitled them to be declared and be registered as owners of the Suit Land.
 - l. Their occupation of and right to be declared and be registered as owners of the suit land was only clearly guaranteed by *the Constitution*.
 - m. In the circumstances, the deponent beseeched this Honourable Court to declare that they were entitled to that piece or parcel of Land known as MN/1/5141 by virtue of Adverse Possession and that the Registrar of Titles be directed to issue them with a Title to the Suit Land.
 - n. There had been no previous proceedings neither were there any proceedings pending in any court between the parties concerning the same subject matter.



8. The Plaintiffs/ Applicants called PW - 1 and PW - 2 on 4th June, 2024 and who testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Mutubia Advocate.

9. PW - 1 was sworn and testified in Swahili language. He identified himself as Kazungu Muli Chongo, a citizen of Kenya and with all the particulars as indicated in the national identity card shown to Court. He resided in Majaoni. He confirmed to know Kangali Choli and Chiangara Moli Chogo who were his nephews. His brother was called Keya Moli who was deceased; Kazito Moli Chogo was his younger brother and Ramadhani Randu Moli was his nephew. Mwenda Kahindi Moli was also his younger brother. They were in Court for the land dispute. The land was situated at Utange, Shanzu- the witness did not have the number of the land. According to him the land was 84 acres and it belonged to Moli Chogo who was his father – deceased. He was buried in this land. He attended his advocate's officer i.e. 1983 – he signed an Affidavit dated 27th June, 2013 in the supporting affidavit of the originating summons.
10. The land was registered in the names of Moli Chogo. But it was for the family. The witness informed the court that they had sued Mr. Haji. He was born on the land at Majaoni. They were in occupation of the suit land. There were conducting farming whereby coconuts, mangoes, cashew nuts were on the land. Additionally, they reared livestock. There were some settlements, where people were living. His father was buried on that land where he had resided. After sometime, one Mr. Haji, came when he was a Provincial Administrator at the Coast. He used to claim the land was his land. He was the one who removed them from the land took them. By then he was a young man by then.
11. PW - 1 stated that the supplementary affidavit sworn on 23rd August, 2013 his name was there. After he was given the land, he never constructed. He claimed the land was his. He never did anything on it. He never constructed. PW - 1 stated that Mr. Haji offered to give them some portion of the land [measuring 5 acres] so as to enable him own the rest of the remaining portion of the land [79 acres]. They did not have the title to the land.

B. Cross Examination of PW - 1 by Mr. Karina Advocate.

12. PW - 1 confirmed the suit land measured approximately 84 acres. They had not occupied the whole of it. He had not produced any documents to show his relationship with the other Plaintiffs neither had he produced any document to prove that Moli Chogo was his father. There had been nothing to show that they were living on the land. There was no water there hence no bills payable. There were Semi Permanent houses on the land. He lived there, having been given 5 acres by Mr. Haji. From the time Yusuf Haji had permitted him to occupy the 5 acres, he had had peaceful occupation. He cultivated maize, coconuts, mangoes, and reared livestock on the suit land.
13. PW - 1 stated that he also sold the farm products. He did not have any proof of where he sold them. Sometimes he sold them right from his land; there were no 5 permanent houses. On the side of Mr. Haji, there were some structures owned by the Arabs. These structures were outside the 5 acres.

C. Cross Examination PW-1 by Mr. Khatib Advocate.

14. PW - 1 confirmed that according to his national Identity Card, he was born in Kikambala – Mtwapa, Kilifi District. His identity card showed that he was in fact born in Majaoni. He appeared in court because he wanted the land [which Yusuf Haji had taken from him and his family] to be returned to them. His father had died in the year 1993. However, as recorded in his statement, he could not recall with certainty the exact year of his father's death.



15. Yusuf Haji had granted the claimant's family 5 acres during the lifetime of his father, Moli Chogo. Moli Chogo had attempted litigation to contest this arrangement but was unsuccessful. Notably, Yusuf Haji's entire property was encircled by a perimeter wall, with the exception of the claimant's 5-acre parcel. Subsequently, an Arab investor constructed a university adjacent to their land. Moli Chogo had agreed to the 5-acre grant under coercion. The claimant's parcel bordered the land of Mr. Karisa Maitha. However, Mr. Maitha had died by the time the claimant sought to notify him of the dispute.
16. PW - 1 refuted allegations that his late father, Moli Chogo, had no conflict with Yusuf Haji. He affirmed that he and his family continuously cultivated the land. Changawa Moli Chogo and Sammy Koech Moli resided on the property, as did the claimant's brother. The 6th and 7th Plaintiffs, however, were not currently residing on the land.

D. Re - Examination of PW - 1 by Mr. Mutubia Advocate

17. PW - 1 confirmed that the university had been constructed on the disputed land. Yusuf Haji had forcibly relocated his operations onto the claimant's parcel without any formal agreement. Accompanied by police, he compelled the claimant's family to vacate. Trenches were subsequently dug around their property. Though Yusuf Haji presented a title deed, it was allegedly fabricated. Critically, he had never provided the claimant with formal documentation for the 5 -acres grant.
18. PW - 1 testified that his Identity Card was not his first; it had been replaced during President Moi's era, superseding an older version he previously held. Throughout the dispute, police and private Arab security forces maintained rotating shifts on the land—purportedly guarding it against his family despite their physical occupation. Critically, numerous ancestral graves existed on the property, cementing his lineage's historical connection to the parcel.
19. The witness stated that African University Trust of Kenya [AUTK] had been established as a university and was designated a public utility. The land dispute originated when AUTK developed a predatory interest in the claimant's property, seeking to expropriate it for institutional gain. Despite its public mandate, AUTK operated contrary to communal welfare, thereby instigating the conflict.
20. The Plaintiffs called PW - 2 on 14th October, 2024 who told the court that: -

D. Examination in Chief of PW - 2 by Mr. Mutubia Advocate.

21. PW - 2 was sworn and testified in Swahili language. He identified himself as being Kadzitu Moli Chogoa citizen of Kenya bearing all the particulars as indicated in the national identity card shown to Court during the hearing. He resided at Majaoni and worked as a farmer. He was born in the year 1966 at Majaoni, Kilifi District. This case concerned ancestral land [Parcel 5141/MN/1], previously referenced in his late father's witness statement dated 12th February 2016. When his father, Moli Chogo Mwaure [deceased] passed on, he was buried on the disputed land. All the Plaintiffs comprised his immediate family:
 - a. 1st Plaintiff: His elder brother.
 - b. 2nd Plaintiff: His younger brother.
 - c. 3rd Plaintiff: His nephew [son of the 1st Plaintiff].
 - d. 4th Plaintiff: His nephew [son of the 2nd Plaintiff].
 - e. 5th Plaintiff: Himself.
 - f. 6th Plaintiff: Deceased sister-in-law [widow of his elder brother, who died in the year 1986].



22. PW - 2 stated that he had a statement dated 12th February, 2024 which he adopted as his evidence in chief.

B. Cross Examination of PW - 2 by Mr. Karina Advocate.

23. PW - 2 reiterated that the disputed land comprised 84 acres. The five [5] Plaintiffs had filed suit seeking collective entitlement to 84 acres of this parcel. The witness attended Utange Primary School during his youth — a period when few educational institutions existed in the area. Presently, numerous schools operated on or near the disputed land, reflecting its developed value and the community’s growth his family had historically contributed to.
24. Further the Witness told the court that he lacked formal documentation proving his attendance at Utange Primary School. He similarly possessed no records of his children’s seeking education at Nyameleta and Majiwa Primary Schools. He utilized electricity and water services at his residence but held no utility bills or connection certificates. He sourced domestic water through informal arrangements with neighbors. The witness told the court that he occupied a semi-permanent dwelling situated within the disputed land parcel [5141/MN/1], constituting his primary evidence of physical possession.
25. PW - 2 stated that he never got any approval from any authority for the construction of his residential house. He did not have any receipts for the materials he used in building his property. The witness wanted the court to issue orders that protected their rights. They came to know that the 6th Defendant prepared a certificate of title from the year 2008. They had sold the land to the 7th Defendant, who subsequently leased it to the 1st –5th Defendants. The witness cultivated maize, cassava, mango, and coconut trees and raised livestock on the land for decades, though formal documentation was deliberately withheld from his family. All the Plaintiffs herein were his blood relatives; witnesses were co-occupying relatives as no outsiders resided on the land. The witness told the court that the Chief would be summoned as a witness despite not being sued. The witness’ children lacked national identity cards — further proof of systemic exclusion. According to him there was a structure of a university but the same was not completed; the said university had encroached on their land.

C. Cross Examination of PW - 2 by M/s. Mohamed Advocate.

26. PW - 2 reiterated that he and his family physically occupied the entirety of the 84 acre parcel, which remained undeveloped by permanent structures. He was born in the year 1966, he had resided on the land continuously since birth. They discovered in or around 2008 that the 6th Defendant fraudulently registered title to the land. They made diligent efforts to locate the 6th Defendant to challenge the registration but were unsuccessful. His late father, Moli Chogo Mwaure, was neither a caretaker nor agent for any third party. Instead, he held the land ancestrally as proprietor.
27. The witness told the court that his National Identity Card, issued in Likoni, reflected Majaoni as his place of birth. Likoni served solely as his administrative center for ID processing during the 1990s while he resided and worked there temporarily. The witness had never established permanent residence in Likoni. For 40 continuous years [1984–2024], he had lived exclusively at Utange within the disputed land parcel — physically occupying it through cultivation and ancestral ties.
28. The witness told the court that his advocate exhibited a Certificate of Title allegedly covering the suit land, issued on an unrecalled date to the 6th Defendant. The 6th Defendant acquired this title unlawfully through a purported Judgment of the National Land Commission [Hereinafter referred to as “The NLC”] — a process never disclosed to the claimant’s family despite their open occupation. Though



third parties [e.g., churches] occupied portions of the land, only the 7 Plaintiffs instituted suit to reclaim their ancestral rights. They had authority to file the suit.

D. Re - Examination of PW - 2 by Mr. Mutubia Advocate.

29. PW - 2 confirmed that they resided on the land as Moli's family alone. The Church and the business were constructed by the Molu Family.
30. The Plaintiffs also called PW - 3 who testified as follows:-

A. Examination in Chief of PW - 3 by Mr. Mutubia Advocate.

31. PW - 3 testified under oath and in Swahili language. He identified herself as Mariam Ibrahim Karisa, a Citizen of Kenya bearing all the particulars as indicated from the national identity card shown to Court during the hearing. She was born in the year 1950. She attained her name she upon marriage. Her maiden name was Kangowa Moli. The witness affirmed that the current suit arose solely from the unlawful dispossession of her family's land. She knew the land was rightfully hers by birthright, having been born on it and occupied it continuously until marriage. Her father, the original proprietor, died and was buried on the suit land — cementing their generational claim. As the 4th born child, she outlived all siblings except three: Kazungu, Changawa, and Shabran, who remained on the land until their deaths. She relocated from the land only after marriage, never abandoning her proprietary interest. She told the court that she thumb printed on the statement dated 16th November, 2018.

B. Cross Examination of PW - 3 by Mr. Karina Advocate.

32. The witness confirmed knowing her Advocate and his law firm, where this statement was recorded. Being illiterate, she affixed her thumbprint to the statement. She vacated the suit land after her marriage [she could not recall the exact year]. Her father was deceased and he had been buried there on one part of the land occupied while the other part vacant. According to her testimony, she now resided in Mtwapa.

C. Cross Examination of PW - 3 by M/s. Mohamed Advocate.

33. PW - 3 confirmed that she knew the history of the land. She did not know the identities of the people who had invaded the land. She was a farmer. After leaving the suit land, she had left behind Kazungu, Changawa, Shaban, and Kadzito [the male relatives] residing on the land. There were also females residing on the land; Shaban was her uncle. The Defendants were sued for invading the land. She had not been present during the invasion.
34. The Plaintiffs called PW - 4 who testified as follows: -

A. Examination in Chief of PW - 4 bby Mr. Mutubia Advocate.

35. PW - 4 testified under oath and in Swahili language. He was called Saidi Moli Chogoh, a citizen of Kenya bearing all the particulars as indicated in the national identity card shown to Court. He was born on 2nd January, 1969. He resided at Utange – Majaoni on his land. He lived on their family land. It had been their father's land. He was called Moli Chogo Mwaure. He was now deceased. They were in court due to the construction of the University. According to the witness, the African University Trust was using force to occupy and construct the buildings there. The 1st, 2nd, 4th and 7th Plaintiffs were his brothers while the 3rd Plaintiff was his nephew. Both were deceased and had been buried at Majaoni. He had recorded a statement on 16th November, 2016 which he relied on as his evidence. It had the number of the land. The same was adopted as his evidence in chief.



B. Cross Examination of PW - 4 by Mr. Karina Advocate.

36. PW - 4 requested that the court allowed the owners of the land to have their rights. The land was theirs, but they were removed from it at gunpoint. However, they did not have a report to that effect. He studied at Utange Primary School. He had the Leaving Certificate, but it was not in court. The last time they had buried a person there was April 2023. He could not remember the name of the said person. They were given a burial permit. He stated he undertook cultivation and kept livestock for substantive farming. He had constructed a permanent home with the approval of authorities. He did not have any documents of his children's schooling.

C. Cross Examination of PW - 4 by M/s. Mohamed Advocate.

37. PW - 4 stated he did not possess any proof to show the land belonged to his fathers. He saw the construction of the perimeter wall. There was tight security. He had not brought any other person to court as neighbors.

D. Re-examination of PW - 4 by Mr. Mutubia Advocate.

38. PW - 4 confirmed that it was the police officers who threatened them. Therefore it became difficult to report the incident to the same police force. The land measured 84 acres and was not sub-divided. They had been given 5 acres set aside for the family—that was where the homestead was located—while they used the remaining 79 acres for grazing purposes. The 5 acres had been allocated to them by the 6th Defendant, and they accepted it under duress at gunpoint. The remaining 79 acres they used for grazing had been given to them by their father; that portion was where the University stood. However, at that time, they were not cultivating the land.
39. On 28th October, 2024, the Plaintiffs called PW - 5 who told the court that: -

A. Examination in Chief of PW - 5 by Mr. Mutubia Advocate.

40. PW - 5 testified under oath and in English language. He was called Bronson Hare Chogo a citizen of Kenya with all the particulars as indicated from the national identity card shown to Court during the hearing. He was born in the year 1976 – thus 50 years old. He resided in Majaoni in Utange within Kisauni Sub – County Mombasa. He did small businesses. The witness told the court that he was related to the Plaintiffs, who were his paternal uncles and other relatives. They were brothers to his father. He resided on Plot No. 5141/II/MN Majaoni, which was ancestral family land. He had lived on the land for over 20 years, where he farmed and cultivated crops for domestic subsistence use only. He occupied a house on the property.
41. Initially, the dwelling had been semi-permanent, but he had since constructed a permanent one. They were in court because Hon. Haji — a former influential Provincial Commissioner of Coast—had allegedly taken their land, illegally obtained its title deed, and forcibly removed them from it. He had filed a statement dated 7th May 2024, which he wished to adopt and entirely rely upon.
42. Further the witness filed documents by the Plaintiffs dated 2nd March, 2016 and filed in court on 4th March, 2016; the documents were: -
- a. The Grant C.R. No. 29112 for Plot No. MN/I/5141 it was given to Mr. Haji – Marked as Plaintiff Exhibit No.1.
 - b. A set of Photographs on the residence and crops marked as Plaintiff Exhibit No. 2.



- c. A copy of the Eviction Notices issued by the Municipal Council of the Land Owners – marked as Plaintiff Exhibit Nos. 3.
43. On being referred to the Plaintiff's documents dated 11th October, 2024 these were as follows: -
- a. Item No. 1 copies of the records showing some neighbors who would approach our family for cultivation from years 2018 – Plaintiff Exhibit No. 4
 - b. Referred to the set of Photographs Items No. 2, 3 and 4 – Marked as MFI – 5 [a] [b] and [c]. They were photographs on the invasion by Mr. Haji and destruction of our homesteads using the DC and PC, Police, Chiefs.
 - c. Item No. 5 were a set of Photographs of the graves on the land showing the burial site of 41 family members on the suit land – “MFI – 6”
 - d. A list of Names of the family members buried on the land – Plaintiff Exhibit No. 7.
 - e. Notices evictions from the Land by the Municipal Council of Mombasa Plaintiff Exhibit No. 8
 - f. A copy of the court order staying the evictions and demolition of the family houses – Plaintiff Exhibit No. 9.
 - g. A Copy of the title deed and the Deed Plan for illegally issued to Haji – Plaintiff Exhibit No. 10.
44. The witness produced Plaintiff Exhibit No. 11 the copy of the lease pages 52 to 58 Clause 2[d] and Plaintiff Exhibit No. 12 the Sale Agreement. A letter authored by Mr. Haji which confirmed that his family had occupied the suit land for over 20 years. He stated that there were people who faced arrest when they raised complaints about police brutalities to IPOA. They had filed a claim of historical injustices before the NLC on 22nd December 2016. The filing resulted from their dispossession; they had initially filed suit in court, where they secured an injunction order.
45. However, when they realized no assistance was forthcoming—as police officers were stationed on their land—they lodged a complaint with the NLC. The Commission subsequently made a determination in their favor, documented in Plaintiff Exhibit No. 13: The Kenya Gazette. MFI numbers 1 – 14 [a], [b], and [c] were the photographs. They depicted individuals alleged to be goons, and a police station had been established within the land.
46. PW - 5 had reviewed the Defence by the African University Trust of Kenya and noted their lease was illegal. There had been no defence filed by Mr. Haji [who was now deceased]. His family had occupied the land before Haji illegally acquired it. Mr. Haji was not their neighbor; he had served as Provincial Commissioner and originated from Ijara Constituency. They questioned why they should receive only 5 acres of their own land.
47. It was the prayer by PW – 5 that the court does nullify the title deed allegedly issued to Mr. Haji and re - issue it to them as ancestral landowners. They had occupied the land since before colonial times. The Defendants had repeatedly attempted to remove them using police force, leveraging the Provincial Commissioner's authority. They demanded the return of their entire ancestral land. The African University Trust arrived on the land in the year 2012, issuing eviction notices. In the year 2014, they attempted forcible removal through the O.C.P.D. Kisauni, deploying police water cannons. Despite of these efforts, they failed to evict the family.



B. Cross Examination of PW - 5 by Mr. Karina Advocate.

48. PW - 5 confirmed that they had filed the case at Municipal Court No. 54 and secured an injunction order. He could not recall the last court date and stated he was unaware of Judicial Review No. 103/2012 or its dismissal with costs. If dismissed with costs, he maintained it must have been without merit.
49. PW - 5 asserted that Mr. Haji's title deed was fraudulent and urged its cancellation. Though not a Plaintiff but a witness, he had filed complaints and advocated for the title's cancellation and re-issuance of it to the Plaintiffs [his uncles]. He clarified he never authorized them to file on his behalf. Police harassment and brutality occurred, with P3 forms withheld intentionally. They had not sued the Attorney General despite liability. The NLC addressed Alternative Justice Resolution but did not cancel the title in the year 2019. Their NLC complaint preceded this pending case.
50. On being referred to a letter dated 11th May 2012 by Yusuf Haji, which acknowledged granting the Chogo family 5 acres of land—later fenced by them. He further cited Paragraph 3[d] of the African University Trust lease, noting no names of squatters were attached to it despite their occupation. While he was not born on the land, his father had been. He resided there continuously as ancestral property.
51. The witness was referred to page 30 of the 1st to 5th Defendants' documents dated 9th September, 2017. He confirmed that that it was his signature on the sale agreement but clarified it served as a "Special Vehicle Purpose" solely to secure approvals. It documented receipt of a sum of Kenya Shillings One Hundred Thousand [Kshs. 100,000/=] for residential development [with electricity access], though he did not produce the construction approvals; the property was residential and there was electricity. He had not produced the electricity bills. His children attended Majaoni Primary School. He could not produce any report form.
52. PW - 5 stated that he cultivated portions of the land but did not produce diagrams of cultivated areas nor submit any to court. He maintained there was no inherent objection to Yusuf Haji owning land—only to his unlawful acquisition of property belonging to ancestral owners. Approximately seven years earlier, he travelled to Nairobi to meet Mr. Haji by then an elected Senator for Garissa at the Senate. At that time, although the ownership of the land had been transferred to Zayed Bin Sultan Al Nahyan, but he still approached Mr. Haji as "the 1st Registered Owner". Mr. Haji sounded helpless as he had already transferred the land. Though residing on part of the property, he filed independent claims before the court. His testimony aimed to secure his uncles' [the Plaintiffs] ownership rights. He saw no necessity to join their suit and filed no documents proving their familial relationship.
53. According to the witness, the African University Trust constructed facilities on the land despite knowing it belonged to ancestral owners. They had removed them and cut out their cultivation. They demanded the immediate eviction of the African University Trust from the land and restoration of full title to the ancestral owners. They stipulated that the title deed was illegal but they needed it cancelled and it be registered to themselves. With reference to the originating summons and the prayers were for the title; they sued them as they assumed they were registered. The title deed should come to them clean. They wanted the name of the tenant to be removed from the title deed and it be reversed back to them.

C. Cross Examination of PW - 5 by Mr. Khatib Advocate.

54. PW - 5 reiterated that he was born in Ganze, though his year 1993 Identity Card erroneously listed Dungicha as his birthplace. His father was Chogo Hare Ruwa. The claimants comprised the family of Moli Chogo's descendants: Kazungu Moli Chogo, Changawa Moli Chogo, Shaban Bakari Moli,



Sammy Keah Moli, Kadzitu Moli Chogo, Ramadhan Randu Moli, and Mwenda Kahindi Moli. There was nothing to show his connection with them. He had brought the land and executed a sale agreement so that he could be given approval to construct the house. This was ancestral land, and at the same time, they were claiming it based on the land Adverse Possession, as they had been living on it continuously for over 12 years. There was no proof of this.

55. On being referred to the title deed issued to Mr. Haji by the Government on 2nd December, 1996. Before that period it belonged to the family. It's the Government that gave him the land. The title to the land was illegal as it never considered their interest. Yusuf Haji sold the land to the 7th Defendant. When the court visited the land there was a perimeter boundary wall was constructed by Mr. Haji in the year 1990s. It was sold to the 7th Defendant – on 30th April 2002 the wall was a milestone on the land. They had complained about the occupation but never pursued legal action. The occupants refused to vacate, forcing the family into a compromised position. He relocated to the land in the year 2000. Moli Chogo died in the year 1992 and the head of the family was the 1st Plaintiff.
56. PW - 5 reiterated that the boundary wall was constructed in year 2004. He could have raised objections to its construction but did not. He referenced a letter from Yusuf Haji offering to allocate 5 acres to the Chogo family and Fred Mae. However, they had not joined Mr. Fred Mae in the suit. Fred Mae was their neighbor; his house remained intact during the disputes. They came to court claiming rights through Adverse Possession. He knew Onesmus Mang'aro, who was a member of their clan. Pauline owned a house on the land but was not a relative of Moli Chogo. Mr. Maurice Ochieng had constructed a structure there after discussing the matter with their elders.
57. The witness told the court that there were big story buildings on the land and whom they did not know, people had shops and hardware but they were given by the elders. The Plaintiffs had little control over the land.

D. Re - Examination of PW - 5 by Mr. Mutubia Advocate.

58. PW - 5 confirmed that Mr. Mohamed Yusuf Haji was a powerful figure at the Coast, serving as Chairman of Land Affairs. He had demanded their compliance through local chiefs and issued a letter. When the perimeter wall was constructed, police had forcibly removed the elders, preventing any challenge. They were unaware of Yusuf Haji's land acquisition and never knew their ancestral land had been designated government property. Fred Mae was aware of the suit but had not been joined; they had not barred his participation, and the case was public knowledge. He visited the Municipal Council seeking construction approval. Mr. Baraza directed him to the Council's Advocates, who advised executing a sale agreement solely to secure permits. During a meeting with Mr. Haji [who even bought him tea], they offered to assist him in reimbursing to the purchaser of the purported costs for the purchase of the land. Mr. Haji denied selling the land, claiming he had only funded backfilling works. They held no documented proof of ancestral. Fred Mae was aware of the suit. They had not prevented him from joining the case, and he knew about the proceedings as they were public record.
59. PW - 5 told the court that he went to the Municipal Council seeking approval to build his house. He approached Mr. Baraza, who directed him to the Council's Advocates. They advised him to execute a sale agreement solely to secure construction permits. He subsequently approached Mr. Haji, who bought him tea. During this meeting, they asked Mr. Haji to accept reimbursement for funds he allegedly spent to acquire the land. Mr. Haji denied purchasing the land, claiming he had only expended money to backfill the property. They held no documentary proof of ancestral ownership. He stated that if the land were restored to them, they would determine its future use through negotiations.
60. The Plaintiffs through their Legal Counsel Mr. Mutubia closed their.



IV. The 1st to 5th Defendants/Respondents response

61. The 1st to 5th Defendants/Respondents opposed the Originating summons through a 15 Paragraphed Replying Affidavit sworn by Lucas Cosmas Fondo, the “3rd Defendant” herein on 20th March, 2023 who averred that: -
- a. The African University Trust of Kenya was the registered Lessee of Plot No. MN/I/5141, the suit property herein.
 - b. On 9th September, 2002, the suit property was transferred to the Zayed Foundation, the 7th Respondent herein from the predecessor in title was Mr. Haji, the 6th Respondent herein. Annexed in the affidavit and marked as ‘L - 2’ was a copy of the Grant No. CR. 29112.
 - c. Subsequently, On 1st January, 2012 Zayed Foundation leased the suit property to African University Trust of Kenya the interested party herein. Annexed and marked ‘L-3’ a copy of the lease dated 13th April, 2012.
 - d. The Applicants were guilty of material non – disclosure because, at the Ex - Parte hearing of the Notice of Motion application dated 27th June, 2013 failed to disclose that: -
 - i. The Applicants by themselves and/or through their Advocate on record Mr. Godfrey Mutubia were aware of other proceedings in case of: “High Court Misc. Civil Application No. 103 of 2012, Mombasa, R v Municipal Council of Mombasa Ex - Parte Bronson Chogo and Others”. The JR application was between the other purported squatters and the 1st - 5th Defendants over the same suit property
 - ii. The applicants herein and the Ex- Parte applicants in the foresaid JR application are the same, represent the same parties or claim under the same title.
 - iii. The advocate on record for the applicants herein, Mr. Mutubia was also acting for the Ex - Parte applicants in the JR application.
 - iv. The allegations at Paragraph 15 of the Notice of Motion application to the effect that there have been no previous proceedings nor any pending proceedings over the same subject matter are thus blatantly false.
 - v. The applicants failed to disclose that eviction notices were issued were issued way back on 25th June, 2006 and not 24th May, 2013 as pretended in the Notice of Motion application filed on 27th June, 2013. Annexed and marked as ‘L - 4’ was a copy of the notice dated 25th June, 2006.
 - vi. Several other eviction notices had been issued to the applicants which they have neglected and/or refused to comply with. Annexed and marked as ‘L - 5’ was a bundle of eviction notices issued to the applicants.
 - vii. The applicants failed to disclose that they had negotiated with the 1st - 5th Defendants, exchanged correspondence from 2010 and agreed to vacate the suit property. Annexed and marked as ‘L - 6’ was a bundle of correspondences between the applicants and the 1st - 5th Respondents.
 - viii. The applicants failed to disclose an agreement dated 29th February, 2012 between the 5th Applicant on behalf of the Chogo - Moli family and the 1st - 5th Defendants. Annexed and marked as ‘L - 7’ was a copy of the agreement.



- ix. The rest of the other applicants had similarly entered into agreements with the 1st -5th Respondents. Annexed and marked as 'L - 8' were copies of the said the agreements.
 - x. Under the agreement the said 5th applicant acknowledged the 1st -5th Defendants ownership of the suit property and agreed to vacate in return for an ex-gratia payment of a sum of Kenya Shillings Seven Seventy Nine Thousand Nine Eighty Hundred [Kshs. 779,980/-].
 - e. After invading the land, the Applicants had conned members of the public of huge sums of money by purporting to sell portions of the suit property to unsuspecting members of the public. In particular, the 5th Applicant purported to sell a portion of the suit property to Bronson Hare Chogo. Annexed and marked as 'L - 9' was a copy of the agreement dated 25th June, 2006.
 - f. The said Applicants were not squatters on the land as at the year 2002 and only purported to buy a portion of the land between years 2006 and 2010.
 - g. Consequently, the Applicants had no title to, and or equitable interests or any other interest at all over the said property.
 - h. The University was heavily prejudiced by the Ex - Parte orders obtained by the applicants because:-
 - 1. The order had the effect of protecting the illegal and criminal activities of the Ex - Parte applicants on the University's land.
 - 2. The University being a party directly affected by the order had not been heard in reply to the application.
 - 3. The University was unable to construct the campus as scheduled.
 - i. The Applicants were opportunistic/commercial/professional squatters who had recently invaded the Defendants land with the sole objective of arm twisting the Respondents into paying an undeserved compensation before the Defendants can develop their land with the intended construction of a university.
 - j. The Court was duty bound to discharge/vacate Ex - Parte orders obtained by material non-disclosure.
 - k. The Certificate of Urgency and the Ex - Parte orders sought and obtained are an abuse of the court process because the applicants did not serve the pleadings or the Ex - Parte order made on 28th June, 2013 until after the expiry of 3 days on 8th July, 2013 contrary to Order 40 Rule 4 [3] of the Civil Procedure Rules, 2010. Annexed and marked as 'L - 10' was a copy of the documents stamped as received on 8th July, 2013.
 - l. Consequently, the Application by the Applicants was a blatant abuse of the Honourable Court's process.
62. On 11th November, 2024, the Learned Counsel Karina to the 1st to 5th Defendants made the following opening remarks. He stated that the Defendants' case concerned a 60 - year lease terms and conditions stipulated thereof granted for the construction of the African University Trust. He informed Court that the Applicants in the Originating Summons had entered the suit land with express permission



of the 6th Respondent and occupied 5 acres under this arrangement. Given these facts, he argued that the Applicants had no valid claim to justify being granted the suit land by way of Land Adverse Possession. It was the Counsel's assertion that they sought the court's permission to proceed with the construction and operations of the university. He affirmed that the Defendants filed no Counter – Claim on the basis that they held only Lease tenancy [reversionary] rights over the suit land. He indicated the Defendants would be summoning adequate witnesses who will testify orally and also produce tangible documentary evidence in support of their case. In the final analysis, the Counsel urged Court to dismiss the suit and with costs awarded to the Defendants. That was all.

63. The 1st to 5th Defendant called their first witness who told the court that:

A. Examination in Chief of DW - 1 by Mr. Karina Advocate.

64. DW - 1 testified under oath and in English language. He identified himself as being Lucas Cosmas Fondoa citizen of Kenya with all the particulars as indicated from the national identity card shown to Court. He was born in the year 1977 and resided in Majaoni, Kisauni Mombasa. He was a Trustee of the African University Trust, the 5th Defendant herein. He had filed the following documents and which he wished to rely on: A Replying Affidavit dated 28th March 2023; A bundle of 14 documents attached to the affidavit [1st Defendant's 1-14] dated 9th September, 2017; A supplementary list of documents dated 27th March 2023 containing the 1st Defendant's Exhibit number 15.
65. According to the witness the land was situated at Utange Majaoni, Mombasa County. At the time of testimony, possession was held by the African University Trust under a 60-year lease agreement. Before that, it belonged to Mr. Mohammed Yusuf Haji who sold it to the 7th Respondent. The 7th Respondent leased the land to African University for 60 years from 2012. 5 acres was set aside to the Moli family and the remainder of 79 acres to the African Trust University. The Moli family were given permission by the 7th Respondent. They were only given 5 acres. The land was sold to the 7th Respondent in year 2002 by Mr. Mohammed Yusuf Haji. The suit was filed in the year 2013. By the time the Applicants were coming to court Mr. Haji was not the registered owner.
66. The witness was aware of Case No. 103/2012 between the Town Clerk, Mombasa and Morris Ochieng [and others]. They had gone to the Municipal Council seeking for approval to construct houses. They could not be granted approval for lack of the proof of ownership. There was only one title deed. It had never been sub – divided. He did not see any name of Chogo. It was Morris Ochieng and Pauline. There had been several correspondences [page 12] by African University. It was No. 17 – where the name Chogo was seen there. The university was complaining of illegal occupation by the trespassers, letter dated 17th June, 2022 – Page 17. The African University was re-affirming the issuance of the 5 acres given to them by the 7th Respondent.
67. The sale agreement for land for a sum of Kenya Two Fifty Thousand [Kshs. 250,000/-] by Bronson Chogo. He was not a family member but a person buying for value. They had not completed the construction of the University due to the interference by the Applicant. The project was funded by local Philanthropist and well-wishers from Turkey. It's been 14 years since they stalled. They urged court to disallow the prayers and let them use 5 acres as allocated to them.
68. DW - 1 testified that on the allegation of the illegality of the acquisition of the title deed by Mr. Haji. On the claim made at the NLC. The Defendants appeared the sessions whereby they raised an objection to the effect that the issues before it were the same before this court. Thus, it was a parallel proceeding going on in ELC. No. 134 of 2013 [OS]. In November, 2023, the objection was allowed. The NLC directed that the matter before this Court be allowed to proceed and they recused themselves. Further,



he was aware of Judicial Review No. 52 of 2022 whereby the NLC responded by stating that there were no proceedings.

B. Cross Examination of DW-1 by Mr. Khatib Advocate.

69. DW - 1 confirmed they were the lawful lessees of the suit property under a 60 - year lease agreement. The entire parcel was enclosed by a perimeter wall since 2012 – they found part of it and they continued to improve it. By then the Applicant were on 5 acres. They were all on one section of the 5 acres. They never evicted them forcefully from the 5 acres nor 84 as they were never in occupation. The witness stated that he was present during the site visit. The 5 acres was out of the Perimeter wall – near the road. They did not have title for the 5 acres. The title deed was one. He confirmed that he was a resident of Majaoni. He was born there. He had never encountered Bronson's parents in the community. He had no prior knowledge of Harry Chogo's existence. Both Harry Chogo and Bronson were subsequent purchasers from the 5-acres parcel.

C. Cross Examination of DW - 1 by Mr. Mutubia Advocate.

70. DW - 1 stated that he was a holder of the Power of Attorney – dated 20th July, 2020. The Trustee were Mr. Amir Ali Swaleh and Mr. Feisal Ali Shamari and the names Lucas Fondo and Ahmed Amer Ahmed at Donees were not the named trustees. He had a document approving him as a trustee but he had not filed it in Court. The witness confirmed his Power of Attorney specifically authorized him to provide testimony in these proceedings. He was born in Majaoni and so was his father. At the time of his birth, the Moli Chogo family maintained possession of the land under Title No. MN/I/5141. It was only this single title that existed for the property. The witness established that when Mr. Haji first appeared in the year 2012, the Moli family was actively residing on the land as caretakers.
71. DW - 1 told the court that he first became aware of the Moli Chogo family when he was five [5] years old [that must have been in the year 1982]. At that time, the land in question had been vacant prior to their occupation. The 5 acre portion was separated from other sections by Cabro paving works. These paving works were recently installed. They never bought the land. The land belonged to the Government. Initially they were squatters. There was a case of National Land Commission and Yusuf Haji and Moli Kazungu - filed in 2017, he had no idea whether the African University were part of the case.
72. DW - 1 was not aware upon the expiry of the Lease, for the African University it would revert to the 7th Respondent. They had an agreement between the Plaintiff and African University allocating them 5 acres. The 7th Respondent had already allocated them the 5 acres. The Plaintiffs never signed an agreement to that effect for being allocated the 5 acres. They were given 5 acres as the caretakers. The witness knew Mr. Haji as being the Provincial Commissioner at the Coast Province under the old Constitution of Kenya. He did not know if he was a powerful person in the Government of Kenya.
73. DW - 1 told the court that the university was in existence. He had never heard of Utange Langan. The African University Trust held a valid lease for 84 acres of the subject property. The Defendants had undertaken to allocate 5 acres to the Plaintiffs. On being referred to the to the Judgement by the National Land Commission, the witness confirmed that he had not heard of anyone arrested for forgery.
74. He had 5 or more criminal and court cases for trespass of the Plaintiffs – Complaints at Kiembeni Police Station which were during the pendency of the hearing of these cases. The cases were pending in Kiembeni Police Station. They never used force but if the police did their work it did not mean they



had used force. They had 9 guards, if anyone came there they would be arrested. They had fulfilled all the conditions on the lease.

D. Re - Examination of DW - 1 by Mr. Karina Advocate.

75. On being to the Power of Attorney, the witness told the court that this suit was part of the TOR. It was the Plaintiffs and not the University who sued Mr. Haji at the National Land Commission. . With reference to the lease – where Yusuf Haji said he had already allocated the Moli – 5 acres. The Moli Family wanted to have the whole of 84 acres. On the lease agreement between the University and the 7th Respondent their capacity – the Lessee. They never required the Plaintiff. They could not sign the agreement with the Plaintiffs. On 28th May, 2023 is when he signed the Affidavit. They could not create an agreement with the Plaintiffs. It was the 7th Respondent to do that.
76. The 1st to 5th Defendants through their advocate, Mr. Karina marked their case closed on 11th November, 2024.

V. The 7th Defendant/ Respondent’s response

77. The 7th Defendant/Respondent responded to the Originating summons through a 15 Paragraphed Replying Affidavit sworn by Mir Khan, the director in the 7th Defendant/ Respondent herein on 22nd July, 2013 where the Deponent averred: -
- a. Vide an agreement dated 18th July, 2002 they acquired the Parcel of land known as C.R. No. MN/I/5141 from the 6th Respondent. [Annexed in the affidavit was a copy of the said agreement of sale marked as “MK – 1”].
 - b. They had leased at pepper corn rent the said property to 5th Respondent who was establishing an University therein which University shall be very beneficial to the society and the County at large.
 - c. The said property was to be initially purchased by Mombasa Islamic University.
 - d. The said property was to be initially purchased by Mombasa Islamic University.
 - e. Mombasa Islamic University conducted a survey report in the year 2004 and in the said report there was no indication that the Applicants were in possession of the said property. Annexed in the affidavit was a copy of the said report marked as “MK – 2”].
 - f. The Applicants were misleading this Honourable Court when they claimed to be in occupation of the said property for over 40 years.
 - g. The Applicants were not occupying the said property in a hostile and or adverse manner and for a long period to warrant the extinguishment of the 9th Respondent’s title.
 - h. The Applicants had agreed to be settled on a portion of the Plot No. MN/I/5141 that shall measure approximately 5 acres.
 - i. The Applicant were therefore only entitled to a portion of the parcel of land No. MN/I/5141.
 - j. The Applicant could not suffer irreparable damage as they are not in possession of the said property to grant them title and further they have been granted a portion of it.
 - k. If the establishment of the University is further delayed, the donor of the project should reconsider putting up the University in another Country and that shall be a loss to the Society and Country at large.



- l. The Applicant could not acquire the property by virtue of land adverse possession they had not been in occupation of the property.
 - m. The Applicant by the Applicants should thus fail and be dismissed with costs.
78. The Learned Counsel for the 7th Respondent, Mr. Khatib had the following opening remarks. He asserted that the 7th Defendant/ Respondent was Charity Establishment in Kenya and sponsored by Zayed Bin Sultan foundation. They had an orphanage at Bombolulu. In year 2000, Muslim leaders in Mombasa wanted to establish a University. They identified the land. They approached the foundation to acquire the land for them for this purpose. Mr. Haji who happened to have the land was approached. He was the legal owner. It was agreed that once the University was established they would own the land. The sale agreement was between Mr. Haji and the Foundation. Further, it was agreed that 5 acres was to be set aside to the Plaintiffs. Thereafter the property was fenced using perimeter wall in the year 2004/2005 and 5 acres was set aside for the Plaintiffs' family. There had been no problem between the Foundation and the Plaintiffs to date.
79. The Learned Counsel told the court that it was in year 2012 that the 5th Defendant approached the Foundation for the construction of the University. However, it was when the 5th Defendant moved to the site that problem started. There was some misconception that big money was coming in. The 7th Defendant had always been ready and willing to excise the 5 acres for the Moli family. The 79 acres had always been in the hands of the 7th Defendant, his clients. That was all.
80. The 7th Defendant/ Respondent called its first witness DW - 2 who testified as follows: -

A. Examination in Chief of DW - 2 by Mr. Khatib Advocate.

81. DW - 2 testified under oath and in English language. He was called ABU BAKAR HASSAN DINDIA a citizen of Kenya with all the particulars as indicated in the national identity card shown to court during the hearing. He was born on 14th April, 1978. He resided in Bombolulu and had recorded a statement on 28th February, 2022. They had filed 7 documents which he produced as 7th Defendant Exhibit numbers 1 to 7. With reference to the sale agreement duly executed between Mr. Haji and the 7th Defendant at paragraph [c], the witness told the court that the Vendor had agreed to donate 5 acres to the squatters and 3 ½ to Fred Mayo. With reference to the letter dated 2nd November, 2011 by Yusuf Haji to the 7th Defendant – 5 acres of the land outside the wall to the Moli Family in 2011 and 3 ½ to Fred Mayo. The land was not ancestral land, they were ready and willing to excise the 5 acres to the Moli family. He was aware of the NLC case. It directed that the NLC had no jurisdiction.

B. Cross Examination of DW-2 by Mr. Karina Advocate.

82. DW - 2 in reference to the letter by Mr. Haji dated 2nd November, 2011 confirmed that there was a gentleman's agreement to give the Moli Family land.

C. Cross Examination of DW - 2 by Mr. Mutubia Mr. Haji.

83. Before the appointment of a director of the 7th Defendant, the witness reiterated that he was working as a Principal of the Secondary School for the 7th Defendant. He was a Deputy Director. He came to work for the Foundation after the suit had been filed. He knew they acquired it as a grant. He was a senior personality.
84. Nobody was a powerful person than *the constitution*. They undertook a search and found that Mr. Haji had legally acquired and owned the land. He might not be privy to the acquisition of the land.



They had documents of the land acquisition from the year 1996. They only brought the sale agreement which they thought was adequate and relevant to the case. They undertook the due diligence when they acquired the land. They found that it was vacant. He did not know who was the owner of the land was. It belonged to the government. From the letters by Mr. Haji – 5 acres and 3 ½ acres hence 8 ½ acres remaining 75 acres for the foundation. They had not offered it as yet. Their vision was to have the university constructed as per the founder’s desire. The university did not have a charter but it had a building.

D. Re - Examination of DW - 2 by Mr. Khatib Advocate.

85. DW - 2 reiterated that by the time the 7th Defendant was getting there, there was no complaint. The dreams by the 7th Defendant was to have the University there but here was a demand for the whole land. They were willing and ready to give the 5 acres and the 3 ½ acres.
86. The 7th Defendant through their Learned Counsel, Mr. Khatib marked their case closed on 11th November, 2024.

VI. Submissions

87. On 11th November, 2024, immediately after the closure of the case by both Plaintiffs/Applicants and the Defendants/Respondents, the Honorable Court directed the parties to canvass the originating summons dated 27th June, 2013 through written submissions. All parties obliged.
88. Thereafter, the Honorable Court reserved a date for delivery of Judgement on 27th June, 2025 accordingly.

A. The Written Submissions by the Plaintiffs/Applicants.

89. The Plaintiffs/Applicants through the Law firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed their written submissions dated 20th January, 2025. Mr. Mutubia Advocate commenced his submission by the Learned Counsel recounting on a detailed background of the matter. He submitted that they had proved their case on the required standard of proof and were entitled to the Orders sought in the Originating Summons dated 27th June, 2013 as Supported by the attached Supporting Affidavits, Witness Statements and evidence tendered at the trial and during the site visit that was conducted by this Honourable Court on 9th February, 2024.
90. According to the Learned Counsel, the Defendants were duly served and entered appearance and filed Affidavits where after the Plaintiffs filed the Supplementary Affidavit sworn by Kazungu Moli Chogo on 23rd July, 2013 and a Further Supplementary Affidavit by the same deponent sworn on 23rd August, 2013 and filed on the same date which annexed a copy of Title. The 6th Defendant who was the allottee and registered owner of the suit land appointed M/s. Nabhan Swaleh Advocate to act for him on 4th December, 2013 but failed to file any defence or substantive defence against the Plaintiffs suit.
91. On the Plaintiffs case, the Learned Counsel averred that the Plaintiffs filed suit seeking orders under the provision of Section 38 of the *Limitation of Actions Act* Cap 22 that they be declared to have acquired ownership rights of the land known as Title No.5141/I/MN situated at Utange Area of Kisauni Sub-County by virtue of the doctrine of land adverse possession and that they had openly, continuously and for an uninterrupted period occupied the suit land for over forty [40] Years and that the registered owner had lost his right, if any, over the land. In the alternative, the Plaintiffs sought to have the Title held by the 6th Defendant declared as null and void in line with the decision by the National Land Commission’s Historical Land Injustice Committee dated 7th February, 2019 which



declared the allocation of the land and issuance of the title to the 6th Defendant was illegal and that the Plaintiffs herein were the lawful and bona fide owners of the land.

92. The Plaintiffs relied on the evidence by the Witnesses, the Site Visit conducted by the court and the fact that the 6th Defendant who was a former Powerful Provincial Commissioner in Mombasa during the KANU regime had been unlawfully allocated the Plaintiffs' land and acquired the title over the same by abusing his position. The Plaintiffs further pleaded that there was no evidence of how or when the 6th Defendant applied to be issued with a title or grant to the suit land and that in any event the 6th Defendant was not a resident of the Area had never occupied or taken possession of the land. It was the Plaintiffs case that any subsequent purported lease, sale or transfer of this suit land to the 5th and/or 7th Defendants was null and void on account of lack of a proper root title by the 6th Defendant and the 5th and 7th Defendants had no basis to rely on such leases or transfer to deny the Plaintiffs of their right to the suit land.
93. On the Defendants' case, the Learned Counsel submitted that the 1st to 5th Defendants entered appearance and filed the Replying Affidavit and Witness Statements alleging they were a Chartered university and that they had acquired the suit property from the 7th Defendant on the basis of an alleged lease dated 12th April, 2012 without any consideration flowing from the lessee. Under Clause 3[d] of the lease, the lessee was to relocate "squatters" from the current location to another portion within the premises or the land herein at their own expense which the 5th Defendant breached. The 7th Defendant alleged that they bought the suit land from the 6th Defendant on 18th July, 2002 vide an alleged agreement of sale dated 30th April, 2002 for a consideration of sum of Kenya Shillings Four Million Eight Hundred and Ten Thousand [Kshs. 4,810,000/-].
94. Further the Learned Counsel contended that Clause [a] under special conditions required the Vendor to obtain the Letter of Consent from the Land Control Board, which consent was not obtained or produced. The purported agreement did not provide for Grant of vacant possession of the Land and the Vendor failed to disclose to the purchaser that the land was in fact occupied by the Plaintiffs and the alleged Mombasa Islamic University whose existence was not established or proved could not purport to pass over any rights over the land to the 5th Defendant as alleged.
95. On the evidence the Learned Counsel submitted that the Plaintiffs called a total Five [5] Witnesses as follows;
 - a. PW - 1- Kazungu Moli Chogo.
 - b. PW - 2 - Kadzitu Moli Chogo.
 - c. PW - 3 - Mariam Ibrahim Ngowa aka Kangombe Moli.
 - d. PW - 4 - Saidi Moli Chogo.
 - e. PW - 5 - Bronson Hare Chogo.
96. All the Plaintiffs Witnesses were clear and maintained in their evidence that the suit land. It their ancestral land. That was where they were all born and lived since pre-independence times. The alleged registration of the land in the 6th Defendants name was unlawful and illegal. The Witnesses maintained that 6th Defendant made several false attempts to evict them in the early 1990's using the police and provincial Administration but the Plaintiffs stayed put and resisted the 6th Defendant's attempts. The Plaintiffs maintained that the 6th Defendant never applied to be allocated the suit land. In any event the said land was not available for allocation to the 6th Defendant since the Plaintiffs were in full and



- total occupation. The Plaintiffs maintained that the 6th Defendant never took possession or control of the land and the Plaintiffs had held the land adversely and acquired title thereof.
97. The Learned Counsel submitted that the Plaintiffs Witnesses testified that they started facing tribulations around the year 2012. This was when they learnt that 6th Defendant had purportedly acquired title and transferred the land to the 5th Defendant, where after the 5th Defendant hatched a plot to evict the Plaintiffs using the County Government of Mombasa Officials and the Police in Kisauni. The Plaintiffs' Witnesses gave detailed accounts of how they have endured endless harassment intimidation, unlawful arrests and intimidation from the Defendants and the police at Kisauni who had deployed all manner of state power to unlawfully evict them from their ancestral land. During the site visit the court was shown remnants of demolished houses, cut down trees and crops, houses, cattle and over forty [40] graves belonging to the Plaintiffs' Family Members as proof of continued and uninterrupted occupation of the land and unending terror and destruction perpetuated by the police at the behest of the 5th Defendant in an attempt to evict the Plaintiffs.
98. In support of their case the Plaintiffs produced documents in Support of their case as per the List & Copies of Documents dated 2nd March, 2016 as Exhibit 1 to 3 and the Index of Plaintiffs List & Copies of Documents dated 11th October, 2024 as Exhibit numbers 4 to 13 in which the Plaintiffs demonstrated that the 6th Defendant obtained the impugned title by way of grant dated 9th October 1996 and that the 5th Defendant had made numerous attempts to evict them since the year 2015. The Plaintiffs also attached the copy of the decision by the NLC determining that the land belonged to the Plaintiffs. The Plaintiffs also produced letters by the 6th Defendant admitting that the Plaintiffs were in occupation of the land and were not supposed to be evicted.
99. The Learned Counsel contended that PW - 5 concluded the Plaintiffs evidence by referring to the site visit by the court and pleaded with the court to allow their claim as prayed.
100. On the Defence's case, the Learned Counsel submitted that the 1st to 5th Defendant called DW - 1, one Mr. Lukas Cosmas Fondo who testified and alleged that he was a Trustee of the 5th Defendant and relied on his Affidavit sworn on 8th March, 2023. DW - 1 admitted that the Plaintiffs were his neighbors and had always been in occupation of the suit land. He failed to produce evidence to prove that he was indeed a Trustee or that the 5th Defendant was duly registered as a university in Kenya by the relevant regulatory bodies. He testified that the 5th Defendant acquired a lease over the suit property through a lease dated 13th December, 2012 from the 7th Defendant and alleged that the 6th Defendant had set aside 5 Acres of the land for the Plaintiffs. He alleged that he became a Trustee for the Defendant in the year 2023 long after the present suit had already been filed. He confirmed that when he signed the Replying Affidavit sworn on 28th March, 2023 he was not a Trustee of the 5th Defendant. The Counsel submitted that the said witness lied on oath and his evidence should not be relied upon in this case. PW - 1 alleged that the 6th Defendant had allocated 5 Acres to the Plaintiffs and 3.5 Acres to the caretaker one Mr. Fred Mae but was unable to provide any proof of such allocation.
101. The Learned Counsel opined that the 7th Defendant called Aboubakar Hassan Dindia who alleged that he was a Director of the 7th Defendant. He alleged that the 7th Defendant acquired the suit property vide the Agreement dated 30th April 2002. He produced an undated Letter of Consent which allegedly sought for Change of User of the land from Agricultural to Residential/Commercial but there was no letter of Consent to that effect that sanctioned the transfer of the land from the 6th Defendant to the 7th Defendant. He also produced the letter dated 2nd January, 2011 allegedly allocating 8.5 Acres to the Plaintiffs and FRED MAE respectively.



102. The Learned Counsel relied on the following issues for determination which has been condensed to three issues from a list of 12 issues dated 2nd March, 2016 filed by the Plaintiffs on 4th March, 2016: -
- i. Whether the Plaintiffs had established their claim for title by way of land adverse possession?
 - ii. Whether the 6th Defendant lawfully acquired title to the suit land?
 - iii. Costs?
103. On analysis and adverse possession. The Learned Counsels submitted that there was no dispute that the Plaintiffs had been in occupation of the land for a period of over 12years by the time they filed this suit in the year 2013. Both the Defendant's witnesses - DW - 1 and DW - 2 confirmed that the Plaintiffs family had always been on the land. Hence the alleged half-hearted attempts to induce them by offering them 5 Acres of their own land so as to allow the Defendants to take possession. The 6th Defendant neither filed any reply nor Defence denying the Plaintiffs claim for adverse possession and the Plaintiffs' claim against the said root title owner was not challenged and remained uncontroverted. The court conducted a site Visit. From its Site Visit Report dated 15th March, 2024 it noted as follows:-
- a. There existed permanent and semi-permanent houses;
 - b. There were Churches, Mosque and a Graveyard on the Land;
 - c. There were debris of demolished houses and structures.
104. On the basis of the evidence, the Plaintiffs had established and proved prolonged, notorious and uninterrupted occupation of the land and that the 5th and 7th Defendants had attempted to evict the and Plaintiffs using the Police long after the Plaintiffs had filed their suits. To buttress on this point, the Learned Counsel relied on the case of:- "Mbira v Gachuhi [1987] eKLR", the Court held as follows:-
- “.....a person who seeks to acquire land by a method of adverse possession for the applicable Statutory period must prove non -permissive or non - consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims, for the statutory prescribed period without interruption.....”
105. The Learned Counsel submitted that in the case of:- "Richard Wefwafwa Songoi v Ben Wefwafwa Songoi[2020] eKLR" the Court held as follows:-
- “ 36. For a claim found on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus in exclusion to the actual owner are important factors in a claim for adverse possession.”
106. Based on the evidence on record it was clear that the Plaintiffs had proved their claim for land adverse possession having demonstrated that they occupied the land exclusively for more than Twelve[12] Years from the years 1996 when the 6th Defendant was issued with title up to 2013 when they filed this suit. It was trite that the grant of lease to the 5th and 7th Defendants by the 6th Defendant did not disrupt or interfere with the Plaintiffs claim for adverse possession, noting that the 6th Defendant retained the reversory interest on the land and the subsequent leases have no effected on the Plaintiffs claim against the 6th Defendant.
107. On the historical injustices. The Learned Counsel submitted that in considering the claim and the totality of the evidence placed before the Honourable Court, this Court was empowered under the



provision of Section 13 [1] of the Environment & Land Court [Act, No. 19 of 2011](#) and Articles 159 [2] and 162 [2] [b] of [the constitution](#) to consider the entire claim and provide a justifiable remedy in line with the reasoning of the Court in the case of:- “D.T Dobie & Co. Limited v Joseph Mburia Muchina & Another[1980] eKLR” where Madan J. held that a court seized of such an application should act cautiously and that a Court of Justice should aim at sustaining suit rather than terminating it by summary dismissal. It was now trite that this Honourable Court has the jurisdiction to pronounce itself on matters of historical injustice under the provision of Section 15 [3] [b] of the National Land Commission which permits this Honourable to deal with historical injustices claims. This position was restated in the case of “Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 Others [2018] eKLR” where the court affirmed this Honourable Court Jurisdiction to hear claims on historical land injustices.

108. The Plaintiffs placed before Court sufficient evidence that the 6th Defendant unlawfully and illegally obtained title to the Plaintiffs land by abusing his position as a powerful Provincial Commissioner under the then KANU Regime. The Plaintiffs placed before court the decision by the National Land Commission dated 7th February, 2019 allowing the Plaintiffs' claim and a Gazette Notice demonstrating that the Plaintiffs claim was indeed allowed.
109. This Honourable Court has the Jurisdiction to declare, on the basis of the decision by the NLC, which was never challenged by the Defendants, that the 6th Defendant unlawful acquired title to the Plaintiffs Land and the same ought to revert back the Plaintiffs in line with the decision by the NLC and this Honourable Court's evaluation of the evidence placed before it and the lack of any response or defence by the 6th Defendant and the Site Visit Report. They relied on the decision by the Court of Appeal in the case of:- “Safepak Limited v Henry Wambega & 11 Others [2019] eKLR” where the Court emphasized that this Honourable Court has the powers to consider all the claims placed before it without undue regard to technicalities. Consequently the Plaintiffs submit that the 6th Defendant did not lawfully acquire title to the suit property and his title ought to be nullified and/or revoked.
110. On the Defendants' submissions, the Learned Counsel argued that the 7th Defendant filed written submissions dated 18th December, 2024 alleging that the Plaintiffs had no control of the suit property, contrary to the evidence by the Plaintiffs and the 5th Defendant's witnesses who confirmed that the Plaintiffs had always been in occupation of the property and even erroneously referred to them as “squatters” by the 5th and 7th Defendants. The 7th Defendant alleged that there was no photographic evidence yet the Plaintiffs had placed on record Exhibits 5 and 6 being photographs. The Court also conducted a Site Visit and confirmed the existence of the Plaintiffs' homes and houses on the suit property. The evidence on record was that the boundary wall was constructed while the Plaintiffs were in possession of the land and at no time did the 6th Defendant ever evict the Plaintiffs therefrom. The 7th Defendant could not defend the title issued to the 6th Defendant noting that the 7th Defendant was only granted a lease over the property in the year 2002 and that in any event, they could not purport to litigate on behalf of the 6th Defendant who was the registered owner of the property and who reserved the reversionary interest in the land.
111. In conclusion, the Learned Counsel submitted that based on the pleadings and evidence submitted by the Plaintiffs, it was clear that the Plaintiffs had proved and established that they have consistently and continuously held and retained possession of the suit property and that the 6th Defendant expressly admitted that the Plaintiffs were indeed in occupation. The 6th Defendant never filed Defence or offered any evidence to prove that he ever held actual possession of suit property or that he made any attempts as the registered owner to terminate or interfere with the Plaintiffs' occupation of the suit property at any time.



112. The Plaintiffs also proved that the National Land Commission declaring the 6th Defendant's purported ownership of the land as illegal, null and void ab initio and that the attempted dispossession of the Plaintiffs by the 6th Defendant of their land amounted to Historical Injustice that was corrected by the finding that the land be returned to the Plaintiffs as the bona fide owners. The Learned Counsel humbly submitted that they had established their claim and prayed that the same be allowed.

B. The Written Submissions by the 1st to 5th Defendants/ Respondents

113. The 1st to 5th Defendants/Respondents through the law firm of Messrs. Ndegwa, Muthama, Katisya & Associates Advocates filed their written submissions dated 7th March, 2025. Mr. Karina Advocate commenced their submissions by stating that this was an attempt by the Applicant to acquire title by way of adverse possession on L.R. No. MN/I/5141 despite:-

- a. The entry and stay being consensual to five [5] acres of the suit premises.
- b. Stay on the suit property being with the permission of the 6th Respondent.
- c. No proof in possession of the entire land which has no title.
- d. Possession attempted severally on the 79 acres.
- e. A site visit conducted on 9th February, 2024 which affirmed that the Applicants occupied just five [5] acres of the suit property.

114. On the preliminary issue, the Learned Counsel submitted that the 1st to 5th Respondents contended that the originating summons dated 27th June, 2013 filed on the same day was fatally defective and incurably bad in law since the Applicant did not annex to the Supporting Affidavit a certified extract of the title to the suit property known as L.R. No. MN/I/5141. What the Applicant annexed was a copy of the title deed to the suit property. See page 48-51 of the Index of Plaintiffs' List & Copies of the Documents dated 11th October, 2024.

115. Under the provision of Order 37 Rule 7 [2] of the Civil Procedure Rules, 2010, annexing a certified extract of the title was mandatory. Failure to annex the extract rendered the application incompetent. To buttress on this point, the Counsel referred Court to the case of "Teresa Wachuka Gachira v Joseph Mwangi Gachira, Civil Appeal No.325 of 2003", the Court of Appeal emphasized the importance of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belonged to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. The Court held that:- "failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court".

116. This possession had also been replicated in many other decisions. In the case of "ELC NO.35 OF 2018 [OC] Wesley Kipyegon Bor & 8 Others v Richard Pares & 4 Others". At paragraph 16 of the Ruling the Judge held that annexing the extract of the title was mandatory. In support of this possession the Learned Judge cited three other decisions at paragraphs 19, 20 and 21 of the ruling in which both the Court of Appeal and the ELC Court took a common possession that annexing the certified extract of the title was mandatory. The court struck out an application for adverse possession on the ground that no extract of the title had been annexed to the application. They urged the Court to dismiss the application on that account only as the Plaintiffs never complied with the said Rule.

117. On the principles, the Learned Counsel argued that the law on adverse possession had been settled in the following cases. In the case of:- "Civil Appeal 239 of 2002 Francis Gicharu Kariri v Peter Njoroje



Mairu”, the Court of Appeal citing the case of “Kimani Ruchire v Swift Rutherford & Co. Ltd [1980] KLR 10” at pg 16 Letter B, Kneller J [as he then was]said:-

“The Plaintiffs have to prove that they have used this land which they claimed as of right. Nec vi, nec clam, nec precario [No force, no secrecy, no persuasion]. So the Plaintiffs must show that the company had knowledge [or the means of knowing, actual or constructive] of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.”

118. The Learned Counsel relied on the case of “Civil Appeal No.110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi”, where the Court of Appeal citing the case of “Mbira v Gachuhi, [2002] IEALR 137” where it was held that: -

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non - permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

119. Further the Learned Counsel submitted that in the case of “ Civil Appeal No.56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi”, the Court held that: -

“Those strictures are summarized in the Latin maxim, nec vi, nec clam, nec precario, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true other.”

120. On the documents relied on, the Learned Counsel submitted that:-

- a. Replying Affidavit sworn by Lucas Cosmas Fond on 28th March, 2023 and filed on 28th March, 2023.
- b. 1st to 5th Defendant’s List of Documents dated 9th October, 2017 and filed on 9th October, 2017.
- c. 1st to 5th Defendant’s Supplementary List of Documents dated 27th March, 2023 and filed on 28th March, 2023.
- d. Index of Plaintiffs’ List & Copies of the Documents dated 11th October, 2024

121. The Learned Counsel relied on the following issues for determination: -

- a. Whether the 1st - 5th Respondents are the registered owners of the suit property known as LR. No. MN/I/5141.
- b. Whether orders of adverse possession can issue against the 1st -5th Respondents.
- c. Whether the applicant has established a case for adverse possession against the registered owners.
- d. Who should pay the cost.

122. On the argument on each issue and on the issue of whether the 1st – 5th Defendants/ Respondents were the registered owners of the suit property known as L.R. No. MN/I/5141. The Learned Counsel submitted that as demonstrated in the cases above, a claim for adverse possession must be made only against the owners of the title. In the Supporting Affidavit of the 1st Applicant filed in Court on the 27th June, 2013 together with Originating Summons, the Applicant admits at paragraph 9 that;



- a. The 7th Respondent is the registered owner.
 - b. The 5th Respondent is a holder of a Lease of 60 years.
123. A copy of the title at pages 48-49 showed that the 6th Respondent was the original owner. The grant at page 3 of the 1st to 5th Defendant's List of Documents dated 9th October, 2017 and filed on 9th October, 2017 entry No. 2 shows that the property was transferred to the 7th Respondent on the 9th September, 2022. At page 4 of the same document entry No. 3 shows that the property was leased to the 5th Respondent on the 1st January, 2012. A search at page 9 of the Index of Plaintiffs' List & Copies of the Documents dated 11th October, 2024 showed that as at 31st March, 2023 the 7th Respondent was the registered owner.
124. The Learned Counsel argued that the evidence was also corroborated by the evidence of DW - 1 Lucas Cosmas Fond sworn on 28th March, 2023 and filed on 28th March, 2023. See paragraphs 3, 4 and 5. Accordingly, it was clear that 1st to 5th Respondents were not the registered owners of the title. The originating summons dated 27th June, 2013 seeks orders of declaration of title by way of adverse possession. In law this claim can only be claimed as against the registered owner in accordance with Order 37 Rule 7 and Section 38 of the Limitation of Action Act, Cap. 22.
125. On whether orders of adverse possession can be issued against the 1st to 5th Respondents. The Learned Counsel submitted that the orders sought against the 1st to 5th Respondents in the Originating Summons dated 27th June, 2013 and filed on the same day could not be issued as against the 1st to 5th Respondent because:-
- a. The law requires that orders of adverse possession which has the effect of cancelling titles of the registered owners be made as against the owners. They had demonstrated that the 1st to 5th Respondent were not the owners.
 - b. The purported claim of indigenous/native rights over the suit property mischievously mention in the application cannot be determined by way an Originating Summons under Order 7 Rule 7 because it is settled law that an Applicant cannot claim indigenous right in an application for adverse possession. The Court of Appeal in "Civil Appeal No.110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR" citing the case of "Haro Yonda Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank, [2014] eKLR" agreed that one cannot claim indigenous right in an application for adverse possession. At paragraph 23 the Court stated: -

"One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and that the registered owner has never been in possession of such land."
 - c. On whether the Applicant had established a case for adverse possession against the registered owners. The Learned Counsel asserted that: -

No claim for adverse possession while challenging the legal title
126. The Learned Counsel submitted that the Plaintiffs were not entitled to the orders of adverse possession against the title registered in the name of the 7th Defendant because;
- a. The Plaintiff has consistently disputed the registered ownership of the 6th Defendant who was a predecessor in title for the 7th Defendant. The attacks of the title were in paragraphs 8 and 9 of the Affidavit in support of the



originating motion in which the Applicants discrete the legality of the title held by the 6th and 7th Respondents. In the case of: “Hanningtone Oloo Ogumbo v Albert Makau Kyambo & Chief Land Registrar ELC No.46 of 2019 [OS]” the court held that the questions in an adverse possession application is whether the applicant is entitled to the suit property by way of adverse possession and not whether the Defendants fraudulently obtained the title documents. See paragraph 60 of the judgment at paragraph 62 the court held:- “In any event, the Plaintiff cannot claim the suit property by way of adverse possession and in the same breath challenge the 1st Defendant’s title. By the mere fact that the Plaintiffs claiming the suit property by way of adverse possession, he has conceded to the fact that the 1st Defendant is the bona fide registered proprietor of the suit property.”

127. PW – 1 to PW - 4 gave sworn evidence that the 6th Respondent was a very powerful person in government. That he abused his possession to acquire the title to the suit property and therefore the title was not valid. Accordingly, the application which did not concede that the 7th Respondent was the registered owner must fail.

128. The Learned Counsel submitted the area occupied was not pleaded. The Originating Summons dated 27th June, 2013 did not plead the alleged part of the suit property where the Plaintiffs occupy. It was settled law that parties and the court are bound by their pleadings and the court cannot decide on an issue that is not pleaded. Accordingly, though there was evidence that the Plaintiff’s occupy about five [5] acres of the suit property there is no pleading that there would want to be allocated the suit property where they occupy. The net effects of these is that there was no plea before the court to award Plaintiffs the part that they occupy. This position was supported by the holding of the court in the case of in the case of “Chumo Arap Songok v David Keigo Rotich [2006]eKLR” the court held as follows:-

“The late is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce Judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties.”

129. The Learned Counsel told the court that in the case of “Chalicha FCS v Odhiambo & 9 Others [1987] KLR 182”, where the Court held that: -

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

130. According to the Learned Counsel, two cases were cited in the case of “Hanningtone Oloo Ogumbo [Supra]” at paragraphs 58 and 59. On the area occupied not captured in the pleadings or evidence, the Learned Counsel posited that the site visit conducted by Court held on 9th February, 2024 established that the Plaintiffs did not occupy the entire suit property. It was important for the Plaintiff to plead and give evidence of the actual area that they occupied. In this case there was no plea of the actual size or position where the Plaintiff occupy. Again there was no evidence of the actual area where the Plaintiffs reside. Accordingly, the Applicants did not discharge the burden of proving and specifically identifying or even describing the portion, sizes and locations of their respective possession from the large suit premises that they sought to have decreed for them. Failure to do so makes it impossible for



the court to issue a decree for adverse possession for any part of the suit property. In the case of “Githu v Ndele [1984] KLR 776” the Court of Appeal held:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession”.

131. This case is cited in the case of “Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015] eKLR”. This position is also affirmed in the case of “Bendele Gachiri Kamau v Githinji Kariuki Ngondi & 3 Others ELC No. 24 of 2014” where the court held: -

“the evidence adduced by the Plaintiff in my view did not clearly identify the portion they claimed they were in adverse possession of and/or that the occupation constituted adverse possession.”

132. Based on the above findings of law the present claim for adverse possession must fail. The Learned Counsel averred that the native rights never gave rise to adverse possession; the paragraphs 4, 7, 12 and 13 of the Supporting Affidavit of the 1st Applicant filed in Court on 27th June, 2012 the Applicants contended that there were entitled to the suit property since it was their native land and they were claiming based on *the Constitution*. They submitted that adverse possession rights were not applicable on native land. The Court of Appeal in the case:- “Civil Appeal No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR” citing the case of “Haro Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank, [2014] eKLR” agreed that one cannot claim indigenous right in an application for adverse possession. At paragraph 23 the Court stated: -

“One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and that the registered owner has never been in possession of such land.”

133. As a matter of fact, the Applicants had filed a claim before the National Land Commission claiming historical injustice on the suit property in 2017 was a fallacy. This was done despite these proceedings pending before this court. The relevant documents relating to this claim were at pages 106 to 155 of the Index of Plaintiffs’ List & Copies of the Documents dated 11th October, 2024. However, despite these efforts the ELC Court in Judicial Review No. 52 of 2022 in a ruling delivered on 11th December, 2024, ordered that all the disputes in this matter be dealt with in this case.
134. The Learned Counsel on possession acquired by consent submitted that the possession to the suit property was by consent of the 6th Respondent who allocated the Applicants 5 acres of the suit property. The evidence on the consent was at page 68 of the Index of Plaintiffs’ List & Copies of the Documents dated 11th October, 2024. These was via a letter dated 11th May, 2012 in which the 6th Respondent confirmed allocating the Applicants 5 acres of the suit property. The entry and possession having been granted by consent cannot in law be claimed by way of adverse possession.
135. On whether the possession and if it was. The Learned Counsel submitted that the alleged possession by the Applicant had not been peaceful or an interacted, this is so because there has been various court cases both civil and criminal in which the possession had been contested. The evidence of the interruption was contained at pages 70 to 105, 161 to 168 of Index of Plaintiffs’ List & Copies of the



Documents dated 11th October, 2024. Other court cases included JR No.7 of 2016 as consolidated with JR No.8 of 2016 in which the court in the ruling dated 6th April, 2017 found that: -

“The issues of squatters and pending cases are only coming in since the Applicant failed to beat the deadline. I find the issues being raised now to be deliberately brought in with the sole intention of stalling the project.”

136. The Learned Counsel further submitted on the material non – disclosure, the Applicants were guilty of material non – disclosure because at the Ex - Parte hearing of the originating summons dated 27th June, 2013 failed to disclose that: -
- a. The applicants by themselves and/or through their Advocate on record Godfrey Mutubia were aware of other proceedings in “High Court Misc. Civil Application No. 103 of 2012, Mombasa, R v Municipal Council of Mombasa Ex - Parte Bronson Chogo and Others”. The JR application was between the other purported squatters and the 1st to 5th Defendants over the same suit property.
 - b. The applicants herein and the Ex - Parte Applicants in the foresaid JR application were the same, represent the same parties or claim under the same title.
 - c. The Advocate on record for the applicants herein, Mr. Mutubia was also acting for the Ex - Parte applicants in the JR application.
 - d. The allegations at Paragraph 15 of the Notice of Motion application to the effect that there had been no previous proceedings nor any pending proceedings over the same subject matter were thus blatantly false.
 - e. The applicants failed to disclose that eviction notices were issued were issued way back on 25th June, 2006 and not 24th May, 2013 as pretended in the Notice of Motion application filed on 27th June, 2013. The copy of the notice dated 25th June, 2006 was produced as “L – 3” in the 1st to 5th Defendant’s List of Documents dated 9th October, 2017 and filed on 9th October, 2017.
 - f. Several other eviction notices had been issued to the Applicants which they had neglected and/or refused to comply with. The copies of the notices were produced as “L – 4” in the 1st to 5th Defendant’s List of Documents dated 9th October, 2017 and filed on 9th October, 2017.
 - g. The Applicants failed to disclose that they had negotiated with the 1st – 5th Defendants, exchanged correspondence from year 2010 and agreed to vacate the suit property. The bundle of correspondences between the Applicants and the 1st – 5th Respondents were produced as “L – 5” in the 1st to 5th Defendant’s List of Documents dated 9th October, 2017 and filed on 9th October, 2017.
 - h. The applicants failed to disclose an agreement dated 29th February, 2012 between the 5th Applicant on behalf of the Chogo - Moli family and the 1st -5th Defendants. A copy of the agreement was produced as “L – 6” in the 1st to 5th Defendant’s List of Documents dated 9th October, 2017 and filed on 9th October, 2017.
 - i. The rest of the other applicants have similarly entered into agreements with the 1st -5th Respondents. Copies of the agreements were produced as L -7 in the 1st to 5th Defendant’s List of Documents dated 9th October, 2017 and filed on 9th October, 2017.



- j. Under the agreement the said Applicant acknowledged the 19.5 Million; Defendants ownership of the suit property and agreed to vacate in return for an ex – gratia payment of a sum of Kenya Shillings Seven Seventy Nine Thousand Nine Eighty hundred [Kshs. 779, 980/-].
137. The Learned Counsel submitted in the issue of inadmissible evidence is that the evidence of the photographs appearing at pages 9 – 33, 70 – 74, 156 – 162 and 165 – 168 being photographs of the vegetation and alleged activities on the suit property was not admissible as electronic evidence since there are not accompanied by a certificate under the provision of Section 106 [b] of the *Evidence Act*, Cap. 80. This so despite the court granting the Applicant leave to file a certificate at the hearing stage.
138. In conclusion, the Learned Counsel submitted in view of the foregoing they urged the Court to dismiss the Originating summons dated 27th June, 2013 and award the 1st – 5th Respondents costs.

VII. Analysis and Determination

139. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submissions, the myriad of cited authorities made by the Plaintiffs, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
140. In this regard, to arrive at an informed, reasonable, Equitable and fair decision, the Honorable Court crafted three [3] salient issues for determination. These were:-
- a. Whether the Plaintiffs had established their case for a claim of the suit land through the Doctrine of Land Adverse possession?
 - b. Whether the Parties herein are entitled to the prayers sought?
 - c. Who meets costs of the suit

IssueNo. A]. Whether the Plaintiffs had established their case for a claim of the suit land through the Doctrine of Land Adverse possession?

The Site Visit Report

141. As indicated above, prior to proceeding on with the analysis of the issues framed herein, the Honourable Court did conduct a site visit and below is its comprehensive report.

Republic Of Kenya

In The Environment And Land Court

At Mombasa

Elc No. 134 Of 2013

Site Visit Report Held At Utange Majaoni On9th February, 2024 at 11.40 a.m.

- I. Preliminaries.
- a. The team arrived at the site at around 11.40am and the visit commenced by a word of prayer led by an elder from the community. The site is situated close to 20 Kilometers within the township of the Main Island of Mombasa at a place called Utange/ Kiembeni Majaoni of the Kisauni Constituency within the County of Mombasa. It was briefed by the Judge on the main purpose of the site visit and the manner in which to conduct themselves.



- b. The Honourable Court has prepared a Site report. It has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

II. Coram

1. Justice Mr. L.L. Naikuni [Judge].
2. M/s. Yumnah – the Court Assistant.
3. Mr. George Omondi – Usher.
4. Mr. John Mwaniki – Assistant.

III. The Plaintiffs

1. Mr. Kadzitu Moli Chogo – 5th Plaintiff.
2. Mr. Sammy Keah Moli – 4th Plaintiff.
3. & 30 Others community members.

IV. The Defendants

1. Mr. Mwai for the 1st – 5th Defendants.
2. Mr. Khatib – the 6th Defendant.
3. Mr. Lucas Fondo – A University representative.
4. Mr. Ahmed Marei – A University representative.
5. Mr. Abubakar Hassan.
6. Several residents from the Majaoni area. [Hereinafter referred to as “The Team”].

V. The Security Operatives.

1. Cpl. Irene Mwendwa.
2. Brian Bitange.
3. Joel Masha.
4. Adan Mohamed.
5. Cyrus Mwanzia.
6. David Mjomba.
7. Crispine Njuki.

VI. The Purpose.

6. The Court informed the team the purpose of the site visit [“Locus in Quo”]. It indicated that this was pursuant to a Court made on 28th March, 2023 in accordance with the provision of Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit: -



Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

While Order 40 Rule 10 [1] [a] provided to wit: -

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit: -

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.

IV. The Procedure

By consensus of the parties, it was agreed that Site Visit be conducted led by duly appointed representatives from both the Plaintiffs and Defendants side. The team agreed to rely on the perimeter wall since there was no Land surveyor present to guide the site visit session. It was agreed that the procedure upon which the site visit was to be as follows:-

- a. The use of a Topographical Map [Survey Plant Electronic] Sheet from the Survey of Kenya described as FR 205/134 dated 27th February, 1991 was used as a guide. It was the survey number 232
- b. The use of the GPS Satellite Google earth images.
- c. Walking a round the whole of the suit land on the ground. In so doing, it would identify the planted beacons hence establishing the boundaries of the suit land.
6. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities on the ground to enable the Court in making a fair, just and equitable decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.
7. Additionally, the Honourable Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
8. Further, the parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media.

VII. Observations

The team made the following observations.

- a. The suit land LR. No. MN/I/5141 CR No. 29112 measures 84.9 – 5 acres. On it there are several structures erected on it. Some of them are permanent and semi permanent in nature. Further, the land has plenty of natural and indigenous trees and other



plantations such as coconut, mangoes trees. We took cognizance that there were some cultivation on subsistence basis.

- b. The Sketch map of the land Majaoni Pri. School Ocean Perimeter wall Msa International university 1541/I/MN Mosque Shimo La Tewa Annex Prison land 5 Acres 1480/I/MN Factory Airtel Shop Feeds Cabro Road
- c. We noticed that the land was surrounded with a well constructed eight [8] foot long concrete perimeter wall. We learnt it was constructed by the African University Trust of Kenya [AUTK] [hereinafter referred to as “The University”]. Strangely, there was no gate apart from one very wide opening which was being used as the entrance point to and outside the land.
- d. Within the surrounded wall there existed a large playing field utilized for games such as football and other sports. Further, there five [5] well constructed concrete story blocks which appeared to be still under construction. The team was informed that built by the University on what they claimed was their land. However, the construction had stalled following a Court order to stop it until the matters were heard and finally determined accordingly.
- e. Right outside the perimeter wall, the team saw various constructions and structures – both permanent and semi permanent in nature including Majaoni Primary school, Shimo La Tewa Prison land where we learnt and observed that they carried out extensive cultivation and other farming activities, a Mosque, Churches e.g. Revival Restoration and Deliverance Church, retail shops, a cabro road, .
- f. The team was informed that the University out of the 85 acres had set aside five [5] acres to be owned and utilized by the by the Chogo Moli’s family and other occupiers whom the family had already sold to according to one Mr. Lucas Fondo a Director of the University. This fact was vigorously disputed by the few members of the family who were present. According to them the whole land out to be ancestral and therefore it was their land for keeps having been illegally and irregularly taken away from them by one Mr. Yusuf Haji, a one time Provincial Commissioner serving at the Coast region. The Honourable Court fore – warned the parties from these line of engagement as they were in form of adducing evidence on the ground which had not been the intention of the site visit conducted by the Honourable Court.
- g. Despite of taking an elaborate walk around the suit land, there were no beacons planted on the suit land. The team speculated there existed one single beacon the Cabroid shop and the Airtel telecommunication shop. Thus, it was difficult to fully appreciate not only the actual measurement of the land but also the exact boundaries of the land.
- h. The team learnt that the Plot was ancestral and was historic. The locals insisted that there were more than 40 graves on the land where their fore fathers were laid to rest. Additionally, according to them there were several structures where they lived in but which were demolished. Although, the Court never got time to reach that part of the land due to its vastness, it could not see the said graveyards nor debris of the demolished structures, Mr. Lucas Fondo never disputed these facts.

VIII. The Conclusion of the Site Visit.

At the conclusion of the site visit, the Honourable Court provided the team with the following directions:-



- a. That all the parties were granted 14 days leave to file and serve any further documents which they wished.
- b. That there be a mention of the matter on for conducting a final Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and for expediency sake a hearing be held on 8th May, 2024.
- c. That the Honourable Court to prepare and supply all the parties with the final Site Visit report accordingly preferably before the hearing date.

There being no other business, the site visit was concluded at 12.45pm by a word of prayer.

The Site Visit Report Dated And Signed At Mombasa This15th Day Of
.....march..... 2024.

.....

Hon. Justice L.L. Naikuni

Environment & Land Court At

Mombasa

142. Under this sub – heading, the Honourable Court has deciphered that the main substratum herein was whether the Plaintiffs/Applicants is entitled to ownership of all that parcel of land known as Plot Number MN/I/5141 CR 29112 which was registered in the name of the 6th Defendant by virtue of land adverse possession. Although the suit was undefended, the Plaintiffs have a duty to formally prove their case on a balance of probabilities as is required by law.
143. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on the provision of Sections 7, 13 and 38 of the Limitation of Actions Act, Cap. 22. Section 7 provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

144. The provision of Section 13 of the Limitation of Actions Act, Cap. 22 provides:

- [1] A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run [which possession is this Act referred to as adverse possession], where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- [2] Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- [3] For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 [3] of this Act, the land in reversion is taken to be adverse possession of the land.



145. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the *Limitation of Actions Act* and Order 37 of the Civil Procedure Rules, 2010. Section 38 [1] provides:-
- [1] Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land
 - [2] An order made under sub-section [1] of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
146. And the provision of Order 37 Civil Procedure Rules, 2010 provides:
- “ [1] An Application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons
 - [2] The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”
147. The provision of Article 162 [2] of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on this court to handle claims premised on adverse possession.
148. In the present case, it was not disputed and as the Plaintiffs aver that they were all the children of the late Moli Chogowho died in the year 1993 and was buried on his Land where the Applicants stay. The place comprised in the piece or parcel of Land now known as L.R. No. MN/I/5141 CR No. 29112 measuring approximately 84 Acres or thereabout. The suit land is situated in Utange, Kiembeni Majaoni Area of the Kisauni Sub – County within the County of Mombasa. It was presently inhabited, occupied and developed by the Late Mzee Moli Chogo’s family. All the Applicants herein were born and have grown up and lived on the suit land all their lives. They had constructed their residences and carry out various farming activities on the Suit Land and have planted coconut, mangoes and cashew nut trees and rear livestock. They had been in continuous and uninterrupted occupation of the suit land for over forty [40] years.
149. In the case:- “Kimani Ruchure v Swift Rutherfords & Co. Ltd [1980]KLR 10” Kneller J held that:
- “ 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 persuasion].”
150. Similarly, in the case of:- “Gabriel Mbui v Mukindia Maranya [1993] eKLR” adverse possession was defined as:-
- “the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”
151. PW - 1 affirmed that he and his family continuously cultivated the land. Changawa Moli Chogo and Sammy Koech Moli resided on the property, as did the claimant’s brother. According to PW - 1 his



father had been buried on the suit land and his relatives. Critically, numerous ancestral graves existed on the property, cementing his lineage's historical connection to the parcel. PW - 2 was sworn and testified in Swahili that he resided at Majaoni and worked as a farmer. He was born in the year 1966 at Majaoni, Kilifi District. This case concerned ancestral land [Parcel 5141/MN/1], previously referenced in his late father's witness statement dated 12th February 2016. His father, Moli Chogo Mwaure [deceased], was buried on the disputed land. The Plaintiffs comprised his immediate family:

- a. 1st Plaintiff: His elder brother.
- b. 2nd Plaintiff: His younger brother.
- c. 3rd Plaintiff: His nephew [son of the 1st Plaintiff]
- d. 4th Plaintiff: His nephew [son of the 2nd Plaintiff]
- e. 5th Plaintiff: Himself
- f. 6th Plaintiff: Deceased sister-in-law [widow of his elder brother, who died in 1986].

152. According to the witness, they lived on this land all this time until sometimes in the year 1996 that one Mr. Haji whom the Plaintiffs witness described as having been an influential Provincial Commissioner for the Coast Province under the old Constitution had forcibly relocated his operations onto the claimant's parcel without any formal agreement. Accompanied by police, he compelled the claimant's family to vacate. Trenches were subsequently dug around their property. Though Haji presented a title deed, it was allegedly fabricated. Critically, he had never provided the claimant with formal documentation for the 5-acre grant. It was their view that the title deed was acquired illegally and irregularly as it was not available for allocation to any individual. They challenged the root and on how he acquired the said title deed yet he was never a resident from the area. The Plaintiffs inquired the failure by Mr. Haji failing to the avail a Letter of Consent from a land Control Board to a parcel of land that was not available for alienation as they already were in its occupation as an ancestral and family land. They testified that they were being referred to as "squatters" yet the land was their. They could not understand how they were being evicted from their own land. To worsen the situation, Mr. Haji vide a letter dated 2nd November, 2011 offered to grant them an excised five [5] acres while leaving the remaining portion of 79 acres to him and subsequently to the 7th Defendant/Respondent. Based on the evidence by the 5th and 7th Defendants some elders from the Muslim community got a vision of establishing a Muslim University and thus proceeded to scout for an appropriate land for the purpose. It was at that point that they approached Mr. Haji and who agreed vide the afore-stated letter to provide his land. On 9th September, 2022, Mr. Haji and the 7th Defendant/Respondent entered into a Sale Agreement for the transfer of the land and whereby under Clause 3 it was agreed that the here would be five [5] acres excised to be allotted to the Plaintiffs. Pursuant to that, the 7th Defendant entered into a 60 years Lease terms and conditions stipulated thereof with the 5th Defendant for the establishment of a Muslim University - AUTK. The witnesses for the Plaintiffs testified that for whatever it was worth, there was no legal basis why they being allocated 5 acres of their own ancestral land. Further, there was separate agreements executed to this effect between them and Mr. Haji and the 7th Defendant. Indeed, they held there was no such legal arrangement between the Defendants and Mr. Fred Mae the Caretaker for allotting him 3.5 acres as promised. To them all these were mere verbal promises.

153. The 6th and 7th Plaintiffs, however, were not residing on the land at any relevant time. PW - 1 confirmed that the AUTK – the Muslim university had been constructed on the disputed land. From the proceedings, on



154. In the case of “M’ikiara M’rinkanya & Another v Gilbert Kabeere M’mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR”, the Court held that:-

“.....From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan* [1948] 2 All ER 11, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 [4] of the Act would be inconsistent with the law of adverse possession...

..as regard recovery of judgment debts, the construction of Section 4 [4] of the Act by local courts barring recovery after 12 years, is as shown in *Lowsley V Forbes* [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 [4] of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.’

155. Further, in the case “*Mbira v Gachuhi* [2002] 1 EALR 137” the court stated as follows;

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

156. Similarly in the case of “*Gabriel Mbui v Mukindia Maranya* [1993] eKLR” Kuloba enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;

- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
- b. 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.
- c. The occupation of land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupant.
- d. The non-permissive actual possession hostile to the current owner must be un equivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e. The possession by the person seeking to prove title by adviser possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.



- g. 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
157. Therefore, to determine whether the Applicants' rights accrued the Court will seek to answer the following:-
- i. How did the Applicant take possession of the suit property?
 - ii. When did he take possession and occupation of the suit property?
 - iii. What was the nature of his possession and occupation?
 - iv. How long has the Applicant been in possession?
158. Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve [12] years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.
159. On examination of the questions above, PW - 2 stated that he never got any approval from any authority. He did not have any receipts for the materials he used in building his property. The witness wanted the court to issue orders that protected their rights. They came to know that the 6th Defendant prepared a Certificate of title from the year 2008. The had sold the land to the 7th Defendant, who subsequently leased it to the 1st - 5th Defendants. The witness cultivated maize, cassava, mango, and coconut trees and raised livestock on the land for decades, though formal documentation was deliberately withheld from his family. All Plaintiffs were his blood relatives; witnesses were co-occupying relatives as no outsiders resided on the land. The witness told the court that the Chief would be summoned as a witness despite not being sued. The witness' children lacked national identity cards — further proof of systemic exclusion. According to him there was a structure of a university but the same was not completed; the said university had encroached on their land.
160. PW - 2 reiterated that he and his family physically occupied the entirety of the 84-acre parcel, which remained undeveloped by permanent structures. Born in 1966, he had resided on the land continuously since birth. PW - 3 testified under oath and in Swahili that she was born in 1950; she got the name she was using after marriage. Her maiden name was Kangowa Moli – her husband was. The witness affirmed that the current suit arose solely from the unlawful dispossession of her family's land. She knew the land was rightfully hers by birthright, having been born on it and occupied it continuously until marriage. Her father, the original proprietor, died and was buried on the suit land — cementing their generational claim. As the 4th -born child, she outlived all siblings except three: Kazungu, Changawa, and Shabran, who remained on the land until their deaths. She relocated from the land only after marriage, never abandoning her proprietary interest.
161. Further to this, the Plaintiffs submitted that on 7th February, 2019 the NLC Historical Land Injustice Committee delivered a ruling declaring the suit land and the issuance of the title to the 6th Defendant was illegal. They further held that it was the Plaintiffs who were the bona fide owners of the suit land. However, in the course of time, the High Court vide the Judicial Review it held that all matters pertaining to the suit land to be suspended until the issue was heard and finally determination by this Court whatsoever.



162. From the evidence produced by the Plaintiffs; the Plaintiffs had openly, continuously and for an uninterrupted period occupied the suit land for over Forty [40] Years and that the registered owner had lost his right, if any, over the land having been born while their parents resided in the suit property. Significantly, the evidence of DW – 1 was valuable. He testified that he was born in the year 1977 and lived on the suit land all through. It was when he was five [5] years which ought to have been the year 1982 or thereabout that he noted that the Moli Chogo family were living on the suit land. On quick arithmetic, to the date of filing of the case, it would be twenty one [21] years. The suit was filed in year 2013 which makes it 57 and 37 years respectively, from the calculation of the time the Plaintiffs the number of years the Plaintiffs have been in possession of the suit property was more than 12 years.
163. The question is therefore was the possession uninterrupted for more than twelve years? The answer is of course to the affirmative because the Defendants never interrupted the Plaintiff's stay on the suit property until year 2012 when they learnt that 6th Defendant had purportedly acquired title and transferred the land to the 5th Defendant, where after the 5th Defendant hatched a plot to evict the Plaintiffs using the County Government of Mombasa Officials and the Police in Kisauni. The Plaintiffs' Witnesses gave detailed accounts of how they have endured endless harassment intimidation, unlawful arrests and intimidation from the Defendants and the police at Kisauni who have deployed all manner of state power to unlawfully evict them from their ancestral land. During the site visit the court was shown remnants of demolished houses, cut down trees and crops, houses, cattle and over forty [40] graves belonging to the Plaintiffs' Family Members as proof of continued and uninterrupted occupation of the land and unending terror and destruction perpetuated by the police at the behest of the 5th Defendant in an attempt to evict the Plaintiffs. They had had uninterrupted occupancy of the suit property for more than 12 years. In the case of:- "Githu v Ndeete [1994] KLR" quoted by the Court of Appeal in "Kenya Commercial Bank [suing as Administrator of the Estate of Paul Njoroge Muchene] v Sarah Njeri Muchene" the court held that: -

“time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of actions Act.

A title by adverse possession can be acquired under the Limitation of actions Act to a part of the parcel of land to which the owner holds title.”

164. In the case of:- "James Obande Wasui v Jeremiah Ochwada Musumba [2002] eKLR" the court held that as an occupier's right, adverse possession runs with the land irrespective of change in proprietorship. Under the provision of Section 28 of the Land Registration Act, as at the time of transfer of the suit land, the land was subject to an overriding interest in the form of rights of adverse possession in favour of the Plaintiff. Section 28 provides:

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

- a.
- b.
- c.
- d.



- e.
 - f.
 - g.
 - h. Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.
165. On the argument on each issue and on the issue of whether the 1st – 5th Defendants/Respondents were the registered owners of the suit property known as L.R. No. MN/I/5141, the Learned Counsel submitted that as demonstrated in the cases above, a claim for adverse possession must be made only against the owners of the title. In the Supporting Affidavit of the 1st Applicant filed in Court on the 27th June, 2013 together with Originating Summons, the Applicant admits at paragraph 9 that;
- a. The 7th Respondent is the registered owner.
 - b. The 5th Respondent is a holder of a lease of 60 years.
166. At page 4 of the same document entry No. 3 shows that the property was leased to the 5th Respondent on the 1st January, 2012. A search at page 9 of the Index of Plaintiffs' List & Copies of the Documents dated 11th October, 2024 shows that as at 31st March, 2023 the 7th Respondent was the registered owner. The 1st to 5th Defendant/ Respondents averred that the alleged possession by the applicant has not been peaceful or an interacted, this is so because there has been various court cases both civil and criminal in which the possession has been contested. The evidence of the interruption is contained at pages 70 to 105, 161 to 168 of Index of Plaintiffs' List & Copies of the Documents dated 11th October, 2024. Other court cases include JR No.7 of 2016 as consolidated with JR No.8 of 2016 in which the court in the ruling dated 6th April, 2017 found that: -
- “The issues of squatters and pending cases are only coming in since the Applicant failed to beat the deadline. I find the issues being raised now to be deliberately brought in with the sole intention of stalling the project.”
167. I see the Defendants argued a lot of angles to the issue of adverse possession, I previously in this Judgments gave the conditions for a party to be granted orders of adverse possession. On the issue of this matter having been determined and the same concluded; the issues that the Environment and Land Court can handle are not the same as the ones that the NLC handles and the 7th Defendant [DW - 2] told the court that he was aware of the case before the National Land Commission which had directed that it had no jurisdiction to handle the issues that were being raised by the parties. In the current case it cannot be said that the owner asserted his rights when there was a court order preserving the status quo.
168. At the expiration of the twelve [12] years period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See “*Littledale v Liverpool College* [1900]1 Ch.19, 21”.



169. Further their entry into the land was not with force or secrecy and without the permission of the owner. The Plaintiffs have proved that they dispossessed the land from the owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.
170. In the foregoing, it is my finding from the above that the Plaintiffs did satisfy the requirements to be declared in adverse possession as they have demonstrated to have been in actual possession of the land for 12 years. By all means, I discern that the claim by the Plaintiffs therefore succeeds.

Issue No. B]. Whether the Plaintiffs are entitled to the prayers sought

171. The Plaintiffs sought for the ownership and entitlement of the suit property by virtue of adverse possession. Had the Plaintiffs proved the above? My answer is in the affirmative as there has been adequate possession in continuity, in publicity and that it was adverse to the registered owner. I find that the Plaintiffs have succeeded to prove their claim on the suit land and the same is allowed with costs to them.
172. However, taking that the 5th Defendant – the African University through a 60 year Lease between itself and the 7th Defendant and from the evidence and the site visit by Court they have already undertaken elaborate construction of the institution – huge story buildings and a peri – meter wall and a unique one for the public and the Muslim community, I would urge the Plaintiff on humanitarian and being development conscious to consider entering into a new Lease with them terms and conditions to be stipulated thereof. Additionally, as had been proposed by the NLC when the dispute was before it, this is a matter that may be settled through out of court mechanism through Mediation as is enshrined under the provision of Article 159 [2] [c] of *the Constitution* of Kenya, Section 59 A, B, C & D of the *Civil Procedure Act*, Cap. 21 and Section 20 [1] & [2] of the Environment & *Land Act*, No. 2019. Be that as it may, the Honorable Court will leave that at the liberty of the Plaintiff to consider.

Issue No. C]. Who bears the costs of the suit

173. It was now well established that the issue of costs was at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-
- “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

174. The provision of Section 27 [1] of the *Civil Procedure Act*, Cap. 21 provides as follows:-

“[1] Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

175. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla



[supra] at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation.

176. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited v Evrest Enterprises Limited* [2014] eKLR” the court noted that:-

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27[1] of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

177. In this case, as this Honourable Court has opined above, the Plaintiffs have been able to establish their case as prayed. Thus, they shall have the costs of the Originating Summons dated 27th June, 2013 filed on the same day.

VIII. Conclusion and Disposition

178. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Plaintiffs have established their case against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants herein. For avoidance of doubt, the Honourable Court proceeds to make the following specific orders:-

- a. That the suit by the Plaintiffs/Applicants as per the filed Originating Summons dated 27th June, 2013 filed on the same day succeeds in its entirety and is hereby allowed with costs.
- b. That a declaration that the Certificate of Title to all that suit property known as MN/I/5141 CR 29112 situated at Utange area of Kisauni Sub – County of the County of Mombasa registered in the names of the 7th Defendant stands extinguished by virtue of the Doctrine of Land Adverse Possession.
- c. That an order do and is hereby issued that Plaintiffs/ Applicants be registered as the joint proprietors of all that suit property known as MN/I/5141 CR 29112 situated at Utange area of Kisauni Sub – County of the County of Mombasa by virtue of the Doctrine of Land Adverse Possession.
- d. That an order do and is hereby issued directing the Land Registrar to forthwith cancel and / or revoke the Certificate of Title Deed issued to the 7th Defendant/Respondent and rectify the entry on to the Register in connection with and/or pertaining to and relation to all that parcel of land known as Land Reference Numbers MN/I/5141 CR 29112 situated at Utange area of Kisauni Sub – County of the County of Mombasa.
- e. That by invoking the principles of Alternative Dispute Resolution being the Alternative Justice System [AJS] and Court Annexed Mediation [CAM] in tandem and enshrined under the provision of Article 159 [2] [c] of *the Constitution* of Kenya, 2010; Sections 59 A, B, C, D of the *Civil procedure Act*, Cap. 21 and Sections 20 [1] and [2] of the *Environment and Land Court Act*, No. 19 of 2011 the Plaintiffs and the 5th Defendant/Respondent granted 90 days to consider entering into an amicable out of Court solution of finalizing the establishment of the



Muslim University for the for the betterment and/or benefit of public and Muslim community within the Coastal region.

- f. That the costs of the Originating Summons dated 27th June, 2013 filed on the same day to be awarded to the Plaintiffs/Applicants to be borne by the Defendants/Respondents herein jointly and severally.

It is so Ordered Accordingly.

JUDGMENT DELIEVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF JUNE 2025.

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**HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT MOMBASA**

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Mutubia Advocate for the Plaintiffs/Applicants.
- c. Mr. Kongere Advocate for the 1st to 5th Defendants/Respondents.
- d. M/s. Mohammed Advocate for the 6th & 7th Defendants/Respondents.

