



**Mreko v Sillas (Environmental and Land Originating Summons  
E009 of 2024) [2025] KEELC 5844 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5844 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2024**

**LL NAIKUNI, J**

**JUNE 26, 2025**

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF: LAND PARCEL NUMBER KWALE/NG'OMBENI ADJ/714**

**AND**

**IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION**

**BETWEEN**

**HAMADI MOHAMED MREKO ..... APPLICANT**

**AND**

**DAVID KATISO SILLAS ..... RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement by this Honourable Court pertains to the suit instituted by the Applicant - Hamadi Mohamed Mreko against the Respondent David Katiso Sillas by way of Certificate of Urgency, Notice of Motion and Originating Summons/ Plaint on the 14<sup>th</sup> August, 2024. The Originating summons were premised under the provision of Sections 7 and 38 of the *Limitation of Actions Act*, Cap. 22 and Order 37 Rule 7 of the Civil Procedure Rules, 2010.
2. Upon filling and service of the afore - stated Originating Summons/Plaint through the Substituted means under the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010 pursuant to attaining the leave of Court. It was done by publishing an advertisement in "The Daily Nation" newspaper, one with wide national circulation, the edition of 27<sup>th</sup> November, 2024 he Defendant/Respondent as shown in the contents of the 5 Paragraphed Affidavit of Service sworn by M/s. Leonida Atieno Ogoti, an Advocate of this Honourable Court dated 13<sup>th</sup> January, 2025 thereof. Despite of the service, and



upon of the expiration of the stipulated period the Defendant, never entered appearance nor responded to the Plaintiff's claim as required by law under the provision of Order 7, 11 and 37 of the Civil Procedure Rules, 2010.

3. On 23<sup>rd</sup> January, 2025, as part of the Pre – Trial Conference, directions having been taken under the provision of Orders 11, 37 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010 and upon confirming that all parties had complied, the Honourable Court set down the matter for hearing on 17<sup>th</sup> March, 2025. The Plaintiff called PW - 1 on the same day to testify and support its case. Further, on 30<sup>th</sup> October, 2023 the matter was set for further hearing on 21<sup>st</sup> February, 2024.

## II. The Applicant's case

4. From the filed pleadings, the Applicant sought to be declared owners of the suit land by way of Land adverse possession. This was to be done through the determination of the following questions:-
  - a. Whether the Applicant has been in open, continuous, uninterrupted and notorious possession of the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA for a period exceeding 12 years since the year 2000.
  - b. Whether the Respondent's title to the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA has become extinguished upon expiry of 12 years from the time the Applicant went into possession of the said land in the year 2000.
  - c. Whether the Applicant has now acquired title to the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA by virtue of adverse possession.
  - d. Whether the registration of David Katiso Sillas as the proprietor of entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA should be cancelled and the Applicant be registered as the proprietor.
  - e. Who should pay the costs of this suit.
5. The Applicant sought the following orders:-
  - a. A Declaration be and is hereby made that the Applicant has been in open, continuous, uninterrupted and notorious possession of the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA for a period exceeding 12 years since the year 2000.
  - b. That the rights of David Katiso Sillas over the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA got extinguished by adverse possession upon the expiry of 12 years from the date the Applicant came into possession in the year 2000.
  - c. The Applicant has now acquired title to the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA by virtue of adverse possession.
  - d. That the Respondent be perpetually barred from taking and or using the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA which the Applicant has been in possession of from the year 2000 to date.
  - e. That the Applicant be registered as the proprietor of the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA.
  - f. That the Respondent do execute all the relevant documents to facilitate the transfer of the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA into



the name of the Applicant and that in default, the Deputy Registrar, Environment and Land Court do execute the same in place of the Respondent.

- g. That the Respondent to pay the costs of this suit.
6. The Originating summons was based on the grounds on the face of it and those of the twenty (20) Paragraphed Affidavit of Hamad Mohamed Mreko sworn and dated on 14<sup>th</sup> August, 2024 and the four (4) annexures marked as Exhibit Numbers “HM - 1 to HM - 4” annexed thereto. The Plaintiff deponed as follows: -
- a. His true place of abode was in Ng’ombeni within Kwale County.
  - b. The entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA belonged to my grandfather Hamisi Mreko (deceased) before and after demarcation.
  - c. Prior to his death, his grandfather Hamisi Mreko (deceased) cultivated the entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA for many years.
  - d. At the time of demarcation, the then Chief, Ng’ombeni Location, one Bakari Mgumi illegally caused his name to be recorded in the adjudication records as the owner of the entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA. Annexed in the affidavit and marked as “HMM – 1” was a copy of the adjudication records dated 22<sup>nd</sup> April, 2024).
  - e. His family’s efforts to have the entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA be recorded in his grandfather’s name Hamisi Mreko were in vain.
  - f. The land dispute between his family and the then Chief, Ng’ombeni Location, one Bakari Mgumi over the entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA resulted into chaos leading to the death of the said Bakari Magumi and the consequent conviction of murder and imprisonment of one of my uncles Suleiman Mwinyi Hamisi Mreko who also later died while serving his sentence.
  - g. As a result of the death of Bakari Mgumi, the adjudication records were never corrected to read my grandfather’s name Hamisi Mreko (deceased). However, his family continued to cultivate the entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA.
  - h. His family later learnt that Bakari Mgumi transferred the entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA to the Respondent herein. Annexed in the affidavit and marked as “HMM – 2” was a copy of Certificate of Official Search and the certified true copy of the green card).
  - i. Neither Bakari Mgumi nor the Respondent herein were ever in possession of the entire land parcel number Kwale/Ng’ombeni ADJ/714 measuring approximately 4.8 HA.
  - j. In the year 2000, he moved into the land parcel number Kwale/Ng’ombeni ADJ/714 and had been openly cultivating and living thereon quietly and peacefully without interference from the Respondent or any other person.
  - k. In the year 2000 he built a semi – permanent 3 bedroom house on the land parcel number Kwale/Ng’ombeni ADJ/714 and later a permanent 4 bedroom house.



- l. He had planted trees, cultivated crops such as maize and lived openly, notoriously, quietly and peacefully on the entire land parcel number KWALE/ NG'OMBENI ADJ/714 since the year 2000, a period exceeding 12 years with his wife and five children.
  - m. His five children were between 9 and 24 years and were all born and raised on land parcel number Kwale/ Ng'ombeni ADJ/714.
  - n. He annexed in the affidavit and marked as "HMM – 3" was photographs showing the entire land parcel number Kwale/ Ng'ombeni ADJ/714 and his houses, trees and crops thereon.
  - o. The Respondent had all along been aware of his father's claim over the entire land parcel number Kwale/ Ng'ombeni ADJ/714 but had never taken any adverse step to disturb his occupation and use thereof.
  - p. All his friends, neighbours, relatives and the local administration knew that the entire land parcel number Kwale/ Ng'ombeni ADJ/714 belonged to him to the exclusion of everybody else.
  - q. Recently his lawyers on record on 8<sup>th</sup> May, 2024 wrote to the Chief, Ng'ombeni Location, requesting for information pertaining the history of ownership of land parcel number Kwale/ Ng'ombeni ADJ/714 to assist them in advising him. However, the said Chief has been reluctant to assist. Annexed in the affidavit and marked as "HMM – 4" was the letter dated 8<sup>th</sup> May, 2024.
  - r. The affidavit was in support of the prayers in the originating summons filed herewith.
7. On 23<sup>rd</sup> January, 2025 at 2 pm, the Plaintiff/Applicant called PW - 1, PW - 2 and PW - 3 and they testified as follows:-

#### **A. Examination in Chief of PW – 1 by Ms. Ogotti Advocate**

8. PW – 1 testified and was sworn on oath in Kiswahili language. He introduced himself as Hamad Mohamed Mreko a citizen of Kenya bearing all the particulars as indicated in the national identity showed to Court during the hearing of the case. He told the court that he was a fisherman and they occupied the land – Kwale/ Ng'ombeni ADJ/714 making 4.8 HA. He wanted the name of David Katiko Sillas to be removed from the requisite and it be registered in the Plaintiff's names. The witness further told the court that the land was their as they used to go to the land as young people. He resided on the land and he had been on the land from the year 2000; he resided on the land with his family; their forefathers used to cultivate on the land cassava, maize and coconut. By then the land was in the name of Hamisi; the land was sold to David Katiko Sillas by the Chief.
9. PW 1 told the court that he had constructed one permanent house – 4 bedrooms where he resided with his family. He had planted mangoes, coconuts, cassava and maize. His neighbours were two the Chairman Mwinyi Kombo and the Primary School. They had an official search to the land. They were 7 people in the land. It was 12 acres – although their forefathers lived there but when they died they were buried elsewhere. There was evidence that they resided there. The chief was Mweme Buni sold the land to David Katiko Sillas. His uncle stabbed the chief and he died. All along they thought the land was their until they started receiving letters and the witness decided to file the case.
10. PW - 1 stated that he recorded his witness statement dated 14<sup>th</sup> August, 2024 which he adopted as his evidence in chief. With reference to the supporting affidavit together with the annexures and the list of documents dated the same date as produced as Plaintiff's exhibit 1 to 6. The witness urged the Court to grant him the title deed and to behave in the names of David Silas be extinguished with costs.



#### **A. Examination in Chief of PW - 2 by Ms. Ogotti Advocate.**

11. PW - 2 testified and was sworn on oath in Swahili language. He was called Mrabu Mreko Badigo. He told the court that he was born on 1957. He resided at Ng'ombeni, Kiteje and he understood that he was in Court to tender evidence to do with the suit land – Kwale/Ng'ombeni Adjudication/714 – the land was for his father Hamisi Mreko; he died and was buried on his other land. The land was not for Hamadi Mohamed. But recently the Chief called Bakari Ngumi, sold the land to David Katiko Sillas. The Chief died. David Katiko was never seen anywhere around the land.
12. PW 2 told the court that the Plaintiff was the son to his father i.e. Nephew. His brother was called Mohamed; their father was called Hamisi. They were four (4) from their household he never asked on the land. Hamadi Mreko resided on the land. He has lived there for close to 25 years now. He cultivates the land. He has constructed a permanent house and he has a semi-permanent house for kitchen.
13. The witness told the court that he lived on the land with his family. There was a school which was in the neighbourhood and the chairman. On 14<sup>th</sup> August, 2024 he recorded his witness statement and he adopted the same as his evidence in chief.

#### **A. Examination in Chief of PW – 3 by Ms. Ogotti Advocate.**

14. PW - 3 gave a sworn testimony in Swahili language under oath. He was called Mwinyi Kombo Omari Mwafungiza a citizen of Kenya with all the particulars as indicated from the national identity card as shown to court during the hearing. He resided at Kiteje Village, Ng'ombeni Kwale. On 14<sup>th</sup> August, 2024, he recorded the witness statement which he adopted as his evidence in chief. He was a village chairman for 10 years and he was in court to tender evidence. He resided near the Primary School. The land neighbouring his own. He had known and PW - 1 reside on the land for over 15 years. He resided there with his wife and children. PW - 1 cultivated mangoes, cassava and coconut trees. He was surprised the Chinese wanted to use the land and when they conducted the search they found that the land was registered in the name of David Katiko Sillas – the Defendant. They came to know that the land would be used by the Mreko family for cultivation – Suleiman and Hamisi Mreko were the family members. Initially the land was for Suleiman Mreko and Hamisi Mreko; but later on there was a dispute between the Mreko family and the Chief Bakari Ngumi-hence Hamadi Mreko who was the son to Hamisi Mreko.
15. On 17<sup>th</sup> March, 2025, the Plaintiff/Applicant closed his case through his advocate Ms. Ogotti.

#### **III. Submissions**

16. On 17<sup>th</sup> March, 2025, immediately after the closure of the Plaintiff's case, the Honorable Court directed the parties to canvass the originating summons through written submissions. Unfortunately, by the time the Court was penning down the Judgement it had not managed to access the written Submission from neither the Judiciary CTS Portal nor the Environment & land Court Registry at Kwale. Therefore, it proceeded to render its Judgement on its own merit on .....accordingly.

#### **IV. Analysis and Determination**

17. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, made by the Plaintiff and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.



18. From the pleadings filed, evidence adduced by and on behalf of the Plaintiff the issue that arises for this court's determination is whether or not the Plaintiff has acquired title to the suit land by operation of the doctrine of adverse possession.
19. Where a Defendant fails to adduce evidence in support of the Defence and fails to attend court to prosecute the case, the Plaintiff's evidence escapes the possibility of being controverted by defence evidence. It escapes the scrutiny of cross-examination by the Defendant. It therefore stands unchallenged and uncontroverted. However, the Plaintiff does not escape "the burden and standard of proof" which he has to satisfy and discharge in accordance with the law in order for his claim to succeed.
20. The provision of Section 107 (1) of the Evidence Act, Cap. 80 provides that: -

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
21. The provision of Section 108 provides:

"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."
22. And the provision of Section 109 provides:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person."
23. I make reference to the case of "Charter House Bank Limited (Under Statutory management – Versus - Frank N. Kamau [2016] eKLR" the court of appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that: -

"we would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified."
24. For the Honourable Court to arrive at a reasonable, fair and Equitable decision, it has crafted three (3) key issues for its determination. These are:-
  - a. Whether the Plaintiff has shown (on the balance of probability) that he acquired the property by way of land adverse possession?
  - b. Whether or not the Plaintiff is entitled to the prayers in the originating summons/ plaint.
  - c. Who will bear the costs of the suit.



**Issue No. a). Whether the Plaintiff has shown (on the balance of probability) that he acquired the property by way of land adverse possession.**

25. The main substratum in this matter is singular in nature. Whether the Plaintiffs are entitled to ownership and/or proprietary rights in terms of prescriptive right by way of Land Adverse Possessions as stipulated by law. In order to fairly tackle the issue, it will be inevitable to avoid extrapolating the detailed legal expose on the subject matter. The law in respect to adverse possession is now settled. The law on adverse possession is provided for under the [Limitation of Actions Act](#), Cap. 22. The provision Section 7 of the Act provides:

“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. Section 13

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes 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”.

Additionally, the provision of Section 13 on the other hand provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor 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.

While the provision of Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Finally the provision of Section 38 states:-

38.



- (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.

From the above provisions of the law of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under Article 40 of *the Constitution* of Kenya becomes extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.

26. The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under the provision of Section 38 of the *Limitation of Actions Act*, Cap. 22 by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. I take notice that this was exactly what the Plaintiff herein did in the instant suit. Under the provision of Article 162 (2) (b) 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 the Environment and Land Court as to handle claims premised on adverse possession.
27. It should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title, where the land is yet to be registered, it cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim.
28. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under the provision of Article 24. “Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. 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 owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:

“7



- (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.
- (3) The Court shall direct on whom and in what manner the summons shall be served.”

29. In the case of “Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasised the important 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 belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. 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. See the case of:- “Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005,” where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.
30. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.

In the case of: “Kimani Ruchine – Versus - Swift Rutherford & Co. Limited (1980) KLR it was stated on this point that:-

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario ..... 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 purpose or by any endeavours to interrupt it or by any recurrent consideration; See the case of:- “Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J.”

In Teresa Wachuka Gachira (Supra), a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. This Court, on appeal found that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”



31. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of “Maweu – Versus - Liu Ranching and Farming Cooperative Society 1985 KLR 430” where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”

32. Now applying these principles to the instant case, the main issue is whether the Plaintiff proved adverse possession? From the evidence adduced, the Plaintiff has lived from 2000; he resided on the land with his family; their forefathers used to cultivate on the land cassava, maize and coconut. By then the land was in the name of Hamisi; the land was sold to David Katiko Sillas by the Chief. The witnesses then invited the Honourable Court to find in their favour that they had acquired the suit land by way of proscriptive rights and should therefore be registered as the owners of the suit land as prayed for in their Originating Summon. PW - 2 testified and was sworn on oath in Swahili language. He told the court that he was born on 1957. He resided at Ng’ombeni, Kiteje and he understood that he was in Court to tender evidence to do with the suit land – Kwale/Ng’ombeni Adjudication/714 – the land was for his father Hamisi Mreko; he died and was buried on his other land. The land was not for Hamadi Mohamed. But recently the Chief called Bakari Ngumi, sold the land to David Katiko Sillas. The Chief died. David Katiko was never seen anywhere around the land.

33. The Court fully concurs with the Learned Counsel for the Plaintiff that it was trite law that whoever alleges must prove based on the provisions of Sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya. deed, the Plaintiff with accordance to section 7 and 13 of the *Limitation of Actions Act* have provided sufficient evidence that the suit land was registered in the Defendant’s name and he had not been on the suit property for more than 12 years. The Plaintiff had had a peaceful, uninterrupted, continuous and open possession of the suit land without the consent or authority of the Registered Owner the Defendant as per the Green card and the Certificate of Official search marked as Pex 1 and 2.

34. In the case of “Samuel Miki Waweru – Versus - Jane Njeru Richu, Civil Appeal No. 122 of 2001”, the Court of Appeal delivered the following dictum:

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

35. Additionally, in the case of “Wambugu – Versus - Njuguna (1983) KLR 172” the Court held:-

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

36. In the case of “Public Trustee – Versus – Wanduru”, Madan J A stated as follows; -

“.... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of



the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

37. In the case of “M’ikiara M’rinkanya & Another – Versus -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.’

38. The Court of Appeal in “Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi – Versus - Ben Munyifwa Songoi [2020] eKLR” opined that a person claiming adverse possession must establish the following

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

39. In the case of “Kasuve – Versus - Mwaani Investments Limited & 4 others 1 KLR 184”, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

40. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. Therefore, I reiterate it is the view of the Court that the right to Adverse Possession accrued and vested in the Plaintiff as at 2000 by 2024 he had actually acquired title by adverse possession. There is no evidence that the Defendant ever retook possession of the suit land nor that he successfully removed or ousted the Plaintiff from the possession of the suit land after obtained his title as per the Green card and the Certificate of Official search marked as Pex 1 and 2. The subsequent



cases I have cited above are not helpful either in assisting the Defendant to assert title to the suit land because title by way of Adverse Possession had accrued and vested in favour of the Plaintiff.

41. The Plaintiff led evidence that practiced farming and cultivated the same on the suit land as though it was as of right. In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law.
42. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts ‘Kweyu – Versus - Omuto, CA Civ Appeal 8 of 1990 (as yet unreported)’. Undoubtedly that this Court is satisfied that the Plaintiffs have proved Adverse Possession and her case is for granting. The title of the suit land is being held in trust for the Plaintiff.

**Issue No. b: Whether or not the Plaintiff is entitled to the prayers in the originating summons/plaint.**

43. Under this sub title, the Honourable Court shall examine whether or not the Plaintiff is entitled to the prayers in the originating summons/Plaint. The burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher. The burden squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. This Honourable Court finds that the Plaintiff had made out a case for adverse possession and had proved he had been in possession of the suit property for over 12 years.

**Issue No. c). Who bears the costs of the suit**

44. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that a party is granted at the conclusion of any legal process 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”.

45. The provision of Section 27 of the *Civil Procedure Act*, Cap, 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* 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.”

46. 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, 2<sup>nd</sup> 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. The order as to costs as provided for under Section 27 remains at the discretion of the court.

47. 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 the case of: “Morgan Air Cargo Limited – Versus - Everest 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.”

48. In this case, as this Honourable Court has opined above, the Plaintiffs have proved their claim against the Defendant herein and therefore shall have the costs of the suit.

## V. Conclusion and Disposition

49. 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 Plaintiff has established their case against the Defendant herein. For avoidance of doubt, Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiff as per the Plaint dated 14<sup>th</sup> August, 2024.
- b. That a Declaration be and is hereby made that the Applicant has been in open, continuous, uninterrupted and notorious possession of the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA for a period exceeding 12 years since the year 2000.
- c. That an order do and hereby issued that the rights of David Katiso Sillas over the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA got extinguished by adverse possession upon the expiry of 12 years from the date the Applicant came into possession in the year 2000.
- d. That an order that the Applicant has now acquired title to the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA by virtue of adverse possession.
- e. That an order do and hereby issues that the Respondent be perpetually barred from taking and or using the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA which the Applicant has been in possession of from the year 2000 to date.
- f. That this Honourable Court do issue an order that the Applicant be registered as the proprietor of the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA.
- g. That the Respondent do execute all the relevant documents to facilitate the transfer of the entire land parcel number Kwale/Ng'ombeni ADJ/714 measuring approximately 4.8 HA into



the name of the Applicant and that in default, the Deputy Registrar, Environment and Land Court do execute the same in place of the Respondent.

- h. That the costs of the suit shall be in favour of the Plaintiff.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JUNE, 2025.**

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

Judgement delivered in the presence of:

- a. Mr. Daniel Disi, the Court Assistant.  
b. M/s. Kimani Advocate for the Plaintiff.  
c. No appearance for the Defendant.

