



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL SUIT NO. 40 OF 2008**

**SAMUEL KATANA NZUNGA**

**& 102 OTHERS .....PLAINTIFFS**

**=VERSUS=**

**SALIM ABDALLA BAKSHWEIN**

**ALI ABDALLA BAKSHWEIN.....DEFENDANTS**

**JUDGMENT**

**THE PLEADINGS**

1. On 20th June, 2008 the 103 plaintiffs herein filed their Originating Summons under Section 38 of the Limitation of Actions Act and order XXVI Rule 3 (D) of the old Civil Procedure Rules. The Originating Summons has two key prayers;

***“1. That the plaintiffs are entitled to be declared as proprietors of their respective plots within PORTION NO. 120 MALINDI TITLE NO. LT. 27 FOLIO 374 FILE 3520 which they have acquired by adverse possession, having lived on and worked the same for over 12 years since late 1950's and used it peacefully and without any interference from the defendants and their predecessors.***

***2. THAT the plaintiffs are entitled to be registered and issued with certificates of title over the same in the place of the defendants/respondents.”***

2. It is based on the Supporting Affidavit of Emmanuel Mlewa Mkare (3rd plaintiff), sworn on behalf of all the plaintiffs, and annexures thereto being **EMM 1 – 5**. The subject matter of the Originating Summons is a land parcel situate in Ganda, Kisima cha Magogo Malindi District, measuring 359.91 acres being land portion No. 120 registered under the Land Titles Act (hereafter the suit property). As at 7th April 2008, the land was registered under two joint proprietors: **Salim Abdalla Bakshuwein** and **Ali Abdalla Bakshuwein**, the defendants herein.
3. The plaintiffs assert that prior to the defendants father's alleged acquisition of the suit property in 1955, the plaintiffs' forefathers and later the present plaintiffs (now totaling 350 families), had long been in occupation thereof, having settled on the said land, cultivated the same and remained in peaceful possession. That the defendants have not shown any interest in utilizing the land in any way hence the plaintiffs' present claim in adverse possession.
4. On 4/8/08 the 1st defendant, Salim Abdalla Bakshuwein filed a Replying Affidavit on behalf of

the defendants. In the said Affidavit the defendants attack the Originating Summons on legal and factual grounds. The main one relating to the former being that the suit is *Res Judicata*. The defendants confirmed that their late father Abdalla Salim Bakshuwein bought a portion of the suit property in 1955, while the remaining part making up the entire parcel was acquired by the defendants in 1972 (necessary indentures annexed as **SAB 1**). That they planted trees and developed the property. The defendants deny the plaintiff's claims to the property on the basis on adverse possession.

5. The defendants dispute the plaintiffs' claim to have no other home, and in particular, attach a copy of a search certificate as evidence that the 1st plaintiff owns 12 acres of land at Gede, namely, GEDE/MIJOMBONI/598. It is also pointed out that the plaintiffs No. 1, 2, 3, 27, 33, 40, 74, 75, 76 and 91 were also plaintiffs in a similar suit in respect of the same property, viz, Mombasa **HCCC MISC. NO. 71 (OS) of 1989, Samuel Katana Nzuga & 19 Others vs Salim Abdalla Bakshuwein & Another**, (hereinafter the Mombasa suit) which suit was dismissed on 4th May, 2005. And further, that the present suit is a continuation of the same claim to the suit property.
6. The defendants also filed a Supplementary and a Further supplementary Affidavit annexing over 63 pages of documentary evidence. On the basis of these annexures, the defendants asserted that the present suit is an abuse of the court process and that the Plaintiffs are not entitled to the orders they seek.
7. Pursuant to directions given by Omondi J on 10/9/08, the Originating Summons and Replying Affidavits were deemed as plaint and defence statement respectively. It was further agreed to proceed by way of *viva voce* evidence. Several interlocutory applications followed, chief among them one giving rise to a consent order restraining the plaintiffs from “*entering, selling, constructing, ... or in any manner interfering with the suit property.*”
8. On 5th November, 2010 the Defendants brought a counter claim for:

***“Vacant possession of plot Number 120 Group 4848 Malindi, File Number LT. 27 FOLIO 374 FILE 3520 Measuring 359.91 acres and eviction of the Plaintiffs by the court Bailiff therefrom forthwith with the officer-in-charge of police ..... and the officer-in-charge of Administration Police, Malindi keeping the peace.”***

No defence or objection was raised thereto by the plaintiffs until the hearing had closed.

### **THE TRIAL**

9. Hearing eventually commenced on 13/6/11 before Omondi J, starting with a scene visit. Three witnesses had been called by the plaintiffs by 31/10/11, when I took over the matter upon the transfer of Omondi J. In total, the plaintiffs called seven witnesses. On behalf of the defendants, the 1st defendant and James Maina Muhoro (DW1 and 2 respectively) testified. Submissions were filed on 4/12/12 just before the Christmas vacation and the judgment was set for 21/2/13. That was however not to be as the trial judge was away from duty due to the calendar of the Judges and Magistrates Vetting Board, before which she was obligated to appear. The court diary has been subsequently disrupted further by election petitions which the Constitution mandates be given priority. I apologise unreservedly to the parties concerned for the long delay in delivering this judgment.

### **THE PLAINTIFFS' CASE**

10. Through pleadings, evidence and submissions the Plaintiffs' case is as follows. The suit property is registered in the names of the defendants. The Plaintiffs' parents before them and later themselves have occupied and cultivated the suit property long before the father of the two defendants Salim Abdalla Bakshuwein (hereafter senior Bakshuwein) acquired the property in 1955. Their contention is that the occupation had been uninterrupted until the senior Bakshuwein

died in 1970. That the defendants thereafter commenced a campaign, sometimes ruthless, in a bid to evict the plaintiffs from the suit property.

11. Thus in 1989 some of the present Plaintiffs namely, the 1st, 2nd (also PW5), 3rd (also PW3), 33rd (also PW4), 40th, 44th (also PW6), 74th, 75th, 76th (also PW2) and 91st together with 14 others instituted the Mombasa suit against the two defendants. The key prayer in that suit was:

**“a) THAT the applicants be declared to have become entitled by virtue of adverse possession of 12 years ALL THAT piece of land containing 359.91 acres of the suit land registered under the Land Titles Act (Cap 282, Laws of Kenya) in the name of ALIM ABDALLA BAKSHUWEIN AND ALI ABDALLA BAKSHUWEIN and confirmed in title No. 120 Group 4848 and situate at Ganda Kisima Cha Magogo, Malindi Sub- District” (sic).**

12. In May 2005, that suit was dismissed by Maraga J, as he then was, for want of prosecution. PW1 to 7 testified that they were born on plot 120 in 1937, 1948, 1962, 1958, 1951, 1962 and 1940 respectively, have lived and cultivated continuously on the land and know of no other home. They asserted that over the years, they openly buried many of their deceased relatives on the suit property, and that during his life-time the senior Bakshuwein never served them with quit notices.

13. PW1-5 claim varying acreage of the suit property, that is, 10, 32, 20, 10 and 25 acres respectively, upon which they claim to have planted mango and cashew nut trees over the years, in addition to growing seasonal crops. Concerning the circumstances of their occupation of the land, PW1, PW2 and PW7 stated that they were tenants of the senior Bakshuwein to whom they paid rent or ijara and that trouble began soon after his death in 1970, when, they refused to continue making payments to his heirs, the defendants.

14. The evidence of the remaining plaintiffs' witnesses while confirming the alleged long occupation of the land introduced different facts on the aspect of the conditions of occupation: Whether or not any fee was paid for the occupation, and if such fee consisted of rent (ijara) or tax to senior Bakshuwein or the Sultan of Zanzibar, and the period when fee was applicable. Although the accounts vary somewhat, it is evident that there have been violent confrontations especially since the 1980s with regard to the tussle over the suit property, involving the occupants on the one hand and the defendants or their agents on the other.

15. Parties made written submissions at the close of the hearing. Briefly, the Plaintiffs submitted under several heads but did not cite any legal authorities. It was contended that the Plaintiffs have established open, peaceful, exclusive and uninterrupted possession of the suit property for a period of more than 12 years. Regarding the defendants' counterclaim, the plaintiffs argued that the same was time-barred and filed without leave of the court. In what appeared a stand-alone submission the plaintiffs' counsel finally challenged the validity of the defendants' title by stating *inter alia* that:

**“DW1 (Ist Defendant) was unable to explain to court how the suit property came into their family. To worsen the whole issue, even the indenture produced in court on behalf of the Defendant is not signed” (sic).”**

### **THE DEFENDANTS' CASE**

16. The defendants asserted that a portion of the land was acquired by their father, senior Bakshuwein in the 1950s and the rest by themselves in the 1970s. DW1 testified that their father leased out the land to different lessees who paid rent/ijara to be allowed to farm the land. The said rent was allegedly collected on his behalf by 3 agents – Omar Manoo, Yusuf Mahmood and Abdalla Shebe, in default of which no farming was allowed.

17. In the 1960s many people forced their way into the land, giving rise to cases against the

trespassers, but, with the death of the senior Bakshuwein in 1970, many lessees refused to pay rent. Efforts made by way of court cases and through the local administration to oust the defaulters, in some instances resulted in violence. And though the defendants kept cattle on the farm the occupants continued to use the land, eventually filing a suit in Mombasa in 1989.

18. For their part, the defendants argued that the purported rights claimed by the plaintiffs have to be reckoned against the date of the commencement of the Limitation of Actions Act in 1967. That any claims going beyond the commencement date and premised upon the occupation and possession by deceased parents or grand parents are not tenable, and especially since, no letters of administration were tendered by any of the claimants. To this end, the case of **TROUISTIK UNION INTERNATIONAL & ANOTHER -VS- MBEYU & ANOTHER (1993) KLR 230** was cited.

19. Regarding the question whether a right of adverse possession has matured in favor of the plaintiffs, the defendants based their submissions on the dictum of the Court of Appeal in **KASUVE -VS- MWAANI INVESTMENT LIMITED & 4 OTHERS (2004) IKLR 184** to the effect that:

***“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 and 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.”***

20. It was contended that given the dates of birth of the plaintiffs' witnesses, only PW1 could have been an adult (18 years) in 1955 when the senior Bakshuwein acquired the property. That there is evidence that subsequently the claimants were paying rent to the new owner before defaulting altogether. That, there were many arrests, interventions by the local administration, civil cases and criminal prosecution including HCC MOMBASA 71/89, forceful evictions of the occupants, violent confrontations leading to loss of life as well as destruction of their crops by the Bakshuweins. The defendants assert that these events are admitted by the Plaintiffs' witnesses. It was therefore contended that in light of the said evidence the “occupation/possession of the suit land by the plaintiffs was not as of right and exclusive but rather permissive....”.

21. Citing the decision of the Court of Appeal in **Wanje -vs- Saikwa (No. 2) [1984] KLR 284**, the Defendants submitted that the Plaintiffs having been tenants of the senior Bakshuwein were in possession with his consent and had never dispossessed him or taken hostile possession of the suit property. It was pointed out that the defendants had developed a cattle dip, water tanks and sheds in addition to keeping herds of cattle on the land which, on many occasions caused damage to the Plaintiffs' crops.

### **COMMON GROUND**

22. This dispute goes back a long way in history. It is common ground that the suit property is currently registered in the names of the defendants, both scions and heirs of the late senior Bakshuwein. It is also common ground that the said senior Bakshuwein asserted claims of ownership over the suit property since 1955. It does appear though from the evidence that the entire parcel was acquired through two transactions. The contestants appear to make no distinction however and seemed to regard the entire land as one parcel measuring 359.91 acres. And in terms of the law of limitation, change of ownership of land does not stop the running of time.

23. The first transaction is exhibited in the indenture executed on 9th August 1955 between Hamed Suleiman Hamed El busaid described as an ***“Arab landlord of Mombasa in the Kenya Protectorate”*** (Vendor) and Abdalla Salim Bakshuwein ***“an Arab landlord in Malindi in the Kenya Protectorate (the Purchaser)”*** in respect of the ***“undivided one third share in ALL THAT piece or parcel of land containing 359.91 acres...known as Plot No. 120 situate at Malindi in***

***Seyidie Province of Kenya Protectorate.....”***

24. According to the indenture the vendor had himself acquired the 1/3 share the previous year from one **JOKHA BINTI HAMED** vide indenture of conveyance dated 29/11/1954 and registered in Mombasa in volume L.T. 27 Folio 374/4. (See annexure **EMM3** to the affidavit of Emmanuel Mlewa Mkare in support of the Originating Summons.)
25. The second transaction is captured in annexure **SAB1** to the Replying Affidavit of the defendants filed on 4th August 2008. The annexure is an indenture whose specific date of execution in April 1972 is illegible. The same is said to be between **FATMA SEIF HAMID EL BUSAIDY** (as the vendor and also the administratrix of the estate of **SEIF BIN HAMID EL-BUSAIDY** aka **SEFF BIN HAMID** “who died on 10th day of July, 1958 in Zanzibar” - the registered proprietor of the apparently remaining “two thirds undivided share in Plot No. 120 Malindi District.” The purchasers are the two defendants herein. On the face of it the indenture was registered at the Mombasa Registry on 3/12/76.
26. Thus a postal search by the plaintiffs (**EMM5**) dated 7th April, 2008 indicates that the defendants are the registered owners of the freehold interest in the entire parcel No. 120 Malindi measuring 359.91 acres. At some point during the trial, it did appear as though the plaintiffs were casting aspersions on the manner by which the defendants came into ownership, but, there is no dispute that some of the plaintiffs herein have in the past been engaged in different legal proceedings with the senior Bakshuwein and his heirs, the defendants herein, over the persistent occupation and use of the suit property by the said plaintiffs.
27. The most outstanding of these proceedings is the Mombasa suit which was a claim based on adverse possession, and pitted the present 1st, (now deceased), 2nd, 3rd, 27th, 33rd, 40th, 44th, 74th, 75th, 76th and 91st plaintiffs against the defendants. That suit was on the application of the defendants dismissed and a final decree issued on 4th May 2005.
28. During the pendency of the said suit (16 years) the defendants admittedly made no effort to remove the Plaintiffs, citing a court order to that effect. As soon as the suit was dismissed, the defendants made a new attempt to assert their title which, resulted in violent incidents on the suit property on 19th November, 2005 and on 27/1/2006. During the latter incident one of the defendants, Said Abdalla Bakshuwein was attacked and his vehicle set ablaze. He sustained severe burns. As a result, criminal charges were brought against the 2nd Plaintiff (son of the 1st deceased Plaintiff) and several others leading to convictions. About 2½ years later the present Originating summons was filed by the Plaintiffs.

**THE LAW ON ADVERSE POSSESSION**

29. This being a claim in adverse possession brought under Section 38 of the Limitation of Actions Act, which came into operation on 1st December 1967, I find it apposite to restate the background to the Act and claims of this nature. Especially, because Mr Mogaka, counsel for the Defendants has argued that the **“the purported rights over the subject suit land should be considered taking into account circumstances prevailing .....effective the statute commencement date and not otherwise.”** Evidently, the Act had not yet come into operation in 1955 when the senior Bakshuwein acquired an interest in the suit property.
30. The concept of adverse possession has its origin in the English common law and developed at a time when title to land was rooted in the physical sustained possession or occupation of the land. This practice became law in England when the Limitations Act of 1623 was passed. The Act barred the owner holding the legal or paper title from recovering possession of the subject land after a certain (arbitrary) period of time. The limitation period is therefore the basis of a claim in adverse possession.
31. Hence adverse possession as a legal concept draws its principles from the historical importance of

physical, factual possession of land, over documentary proof that, while conferring legal title does not directly imply that the owner will act on it. Thus the doctrine is a combination of common law (nature of possession) and statute (duration of possession). The latter concept did not exist in the English Common Law.

32. The doctrine of adverse possession alongside other common law doctrines was applied to the Kenya legal system since the days of the Kenya Colony and Protectorate under British rule. What is doubtful though is whether 'natives', as locals were then pejoratively called, could successfully bring a claim of adverse possession over land outside the areas reserved for them under the Crown Lands Ordinance of 1902. The rights of Africans to any land outside the special areas reserved for them were extinguished by the 1939 Trust Lands Ordinance.
33. Therefore, in the period between 1902 (or 1939) and 1963 at independence, it seems unlikely that any African could successfully bring a claim for adverse possession particularly regarding land registered in the names of a non-African, in this case an "Arab landlord" (see **Gathure v Beverley (1965) EA** and **Kimani Ruchine & Anor V Swift Rutherford Co. Ltd and Another (1970-80 IKLR 1977** and **Tayebali Adamji Alibhai vs Abdulhussein Adamji Alibhai [1938]5 EACA 1.**
34. Until 1967 when the present Limitation of Actions Act was passed, the Indian Limitation Act of 1877 formed part of the written law and governed the general position regarding limitation ( See **Pim -vs- Morton (1976 – 80) IKLR 963** and Section 3 of the Judicature Act of August 1967). The position was no different in the then Tanganyika Trust Territory to which the doctrine of adverse possession was extended and the limitation period prescribed by the Indian Limitation Act as applied (see **Ahmed Abdul Karim and another -vs- Member for land and Mines and Another (1958) EA 436**).
35. The Indian Limitation Act was applied by the East Africa Order in Council of 1897 and the Kenya Colony Order in Council of 1921. The latter Order in Council provided *inter alia*:

***“4. - (1) There shall be a Court of Record styled His Majesty's Supreme Court of Kenya (in this Order referred to as “The Supreme Court”) with full jurisdiction, civil and criminal, over all persons and over all matters in the Colony.***

***Subject to the other provisions of this Order, such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony at the date of the commencement of this Order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th day of August, 1897, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction and authorities at that date save in so far as the Civil Procedure and Penal Codes of India and the other Indian Acts in force as aforesaid and the said common law doctrines of equity and the statutes of general application and the said powers, procedure and practice may at any time before the commencement of this Order have been or hereafter may be modified, amended or replaced by other provisions in lieu thereof by or under the authority of any Order of His Majesty in Council, or by any Ordinance or Ordinances for the time being in force in the Colony.***

***Provided always that the said common law doctrines of equity and the statutes of general application shall be in force in the Colony so far only as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary.”***

As far as the protectorate was concerned (the jurisdiction under which Malindi fell) British rule was

applied through the 1895 agreement between the British Government and the Sultan of Zanzibar.

36. The Indian Limitation Act was repealed by the present Limitation of Actions Act (See **Pim v Morton** above). Thus it is not accurate to suggest that prior to December 1967, there was no provision for acquisition of title by a possessor through adverse possession. There was no void. A plain reading of section 45 of the current Act dispels such a notion. Section 45(1) states:-

***“Section 45 (1) Subject to subsection (2) the period of Limitation for a cause of action which arose before the commencement of this act shall, if it has not then already ended, end at the time when it would have ended apart from this act, or at the time when it would have ended if this act had at all material times been in force, whichever is later.”***

37. Evidently, therefore the Act was intended to have retrospective effect, concerning certain accruing or accrued causes of action preceding its coming into effect. At the same time, Section 44 of the Act preserved actions already commenced under previous repealed legislation before the commencement of this Act, while barring the revival of causes of action already barred by such preceding legislation. In my considered view however, the present case does not turn on this point.

38. Although the English statutes of Limitation have since undergone various changes resting with the Limitation Act of 1980, in Kenya as in England, the 19th century position has basically been retained: at the end of the limitation period, both the right of action to recover land and the original owner's title are automatically extinguished. This is the essence of Section 7 and 17 of the current Limitation of Actions Act. It is worthy of note that there are important similarities between the said act and the 1980 English Limitations Act. For example, Sections 7, 9, 13 and 17 of the former compare well with Section 15, schedule I, Schedule II and Section 17 respectively of the English Limitation Act of 1980.

39. Under English Law however, a distinction is made concerning registered land: recent changes in land law (Land Registration Act) have removed the provision for automatic extinction of the owner's title and right of recovery at the end of the Limitation period in respect of registered land, replacing it with an early warning system. Thus the doctrine has been somewhat pared down. Because in England and the commonwealth as in Kenya, there has been growing public disquiet concerning the 'justice' of the application of the 'medieval' concept of adverse possession vis-a-vis the protection of a registered owner under the Torrens System.

40. The recent English legal saga in **J.A. Pye (Oxford) Ltd vs Graham [2003]1 AC419** demonstrates this tension. The dispute went all the way to the European Court of Human Rights where Pye, the registered owner, argued that the doctrine of adverse possession constituted a deprivation of its right to enjoy interest in its land, in breach of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although the First Instance Chamber found for Pye, the Grand Chamber overturned the decision: **JA Pye (Oxford) Ltd v United Kingdom (2008) 46 EHRR 1083**. Similarly, it is expected that the doctrine will be equally challenged in Kenyan courts especially in light of the Constitution promulgated in 2010, heralding an expansion of human rights and fundamental freedoms.

41. Section 38(I) of the Limitations of Actions Act upon which this suit is premised is in the following terms:

***“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.”***

42. Beyond prescribing the limitation period, the Act does not expressly define “adverse possession”

as a term. Section 13(I) provides that a right of action in recovery of land

***“does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this act referred to as adverse possession)...”***

Fortunately, there is a considerable wealth of decided local and English cases on the question of what the doctrine entails and how a claimant establishes a proper case under the Act.

### **THE DISPUTED ISSUES**

43. Although they did not cite any legal authorities to support their submissions, the plaintiffs posed four issues which on the face of it were deemed to encompass the legal threshold in proof of adverse possession to the suit property. The issues can be restated in one sentence whose reference point is occupation: whether the plaintiffs have been in uninterrupted, peaceful, open, disputed (hostile) occupation and use of the suit property for a period of more than 12 years. For their part, the defendants relied on two authorities constituting the *locus classicus* on the question of adverse possession. These are **Kasuve and Wanje** both decisions of the Court of Appeal.

44. In the former and latest of the two decisions, the Court of Appeal held *inter alia* that “*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 and 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.*” The **Wanje** (no. 2) case emphasized the aspects of dispossession or discontinued possession by the owner, thus defined acts constituting dispossession, and held *inter alia*, that a person occupying another person's land with the latter's consent cannot be said to be in adverse possession. For the reason that he has not dispossessed the owner.

45. In order to assert a right to rely on the relevant limitation statute, a claimant has to demonstrate adverse possession over the land, comprising of two broad common law elements: the fact of single exclusive physical possession accompanied by the *animus possidendi* (an intention to possess the land to the exclusion of all other persons, including the owner). The intention must be manifested unequivocally, not necessarily in a hostile manner, to indicate an intention to dispossess the owner. Thus any form of acknowledgement of the true owner's title will operate to negative such intention (see **Megarry & Wade, The Law of Real Property; 6th Edn Sweet & Maxwell.**)

### **ISSUES FOR DETERMINATION**

46. The court must determine whether the plaintiffs herein have demonstrated peaceful, open, exclusive possession of the suit property, as of right without interruption for a period of more than 12 years, either having dispossessed the owner or by the owner discontinuing possession on his own volition. **Blacks Law Dictionary 9th Edition** defines adverse possession as:

***“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive hostile, open and notorious.”***

The term dispossession is defined as “*deprivation of, or eviction from, rightful possession of property; the wrongful taking or withholding of possession of land from the person lawfully entitled to it*”.

47. And in the case of **Wambugu v Njuguna (1983) KLR 172** the Court of Appeal stated that in order to acquire land by virtue of the statute of limitation, the claimant must show that the owner has lost his right to the land upon being dispossessed or by the owner discontinuing possession by his volition.

The Court of Appeal stated in that case:

***“Where the claimant is in exclusive possession of the land with leave and licence of the appellant (Owner) in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist”.***

(See also **Buckinghamshire County Council v Moran [1990]ch.623**)

48.The case of **Wambugu** was recently cited with approval by the Court of Appeal in the case of **Malcom Bell v Daniel Toroitich Arap Moi & Another [2012] eKLR.** Briefly in the latter case, the appellant who had inherited the suit land measuring about 100acres from his father brought a suit seeking, *inter alia*, a perpetual injunction and an order for eviction against the respondents. In response, one of the respondents filed a counter claim for adverse possession on the basis that the said respondent had been in continuous and uninterrupted possession of the suit land thereby acquiring title to the same; and that the appellant's claim was time-barred. The High Court found in favor of the respondents.

49.On appeal, the Court of Appeal held that a claim in adverse possession could not be sustained as the trial court had overlooked the circumstances in which the respondents came into possession – namely, through the permission of the deceased father of the appellant. The court also restated the position that the burden of proof lies with the person asserting adverse possession.

50.Reiterating the holding in the case of **Samuel Miki Waweru v Jane Njeri Richu CA No. 122 of 2001 (UR)** the court said:

***“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 vs Kilipal [1975]EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of Sisto Wambugu vs Kamau Njuguna [1982 – 88]I KLR (172)....seems to be that a purchaser of land under a contract of sale in possession of the land with the permission of the vendor (can lay a claim for possession of such land) only after the period of the validity of the contract unless and until the contract has been repudiated...adverse possession starts from the date of the termination of the contract.”***

The foregoing is essentially the dictum in the **Wanje (2)** case which the defendants herein relied on.

51.The facts herein have some parallels with those in the **Malcom** case even though the roles of the parties are reversed. With regard to the question whether the defendant had been dispossessed of the suit land, whereupon the plaintiff sustained peaceful exclusive possession over the limitation period, the plaintiff's evidence presents some difficulty. According to one of the witnesses, PW1, who was aged 75, at the time of hearing, the plaintiffs' parents and forefathers had occupied and cultivated the land even before it was acquired by the Senior Bakshwein in 1955. He claimed the senior Bakshwein never stated that the land belonged to him or demanded they vacate.

52.Now, as submitted by the defence this witness was only 18 years old as at 1955 but claimed to have built his first house in 1948 (at age of 12). Obviously he brings the suit in his own behalf and not as a legal representative of his father, hence the alleged building of a house could have been his earliest adverse act. Naturally his earliest claim to adverse possession could only be in the year 1955 or after 1970 upon the demise of the senior Bakshwein. From his evidence and that of PW2 however the latter date appears the more possible.

53.PW1 said that the mango and cashew nut trees were planted by his father and that the Bakshweins were resisted when they attempted to harvest them. He further stated that he had no problem with

the senior Bakshwein “*but the children are the ones who tried to harass us*”. He claimed that the defendants only commenced claims to the land upon the death of their father (1970). However, during cross-examination the witness stated:

***“The late mzee (senior) Bakshwein used to receive rent from us because he said the portion of land belonged to him. After (he) died we continued paying rent to Salim (1st defendant) then we stopped because he did not have any documents to prove he owned the land. Changawa Majengo Thoya was my brother, he died in 1957. OK. When he died I was not at home, I was away from home for about 25 years when I went to work in Hola and I lived in Hola for 25 years...”***

***Changawa and others filed HCC 71 of 1989 (Mombasa suit)”***

The witness confirmed that he was among the twenty people who filed that suit and that he had moved as a young child with his parents into the land from a place called Garashi.

54. He also confirmed that at one time the defendants evicted the plaintiff's families from the land, hence the decision to file the 1989 case in Mombasa. PW1 went on to state that “*After the case was filed in Mombasa calm returned in the area*” a confirmation of the restraining order alleged by the defendants. During re-examination he confirmed payment of rent to the defendants' father.

55. The ijara/rent arrangement was echoed in the defence evidence (DW1). DW1 stated that the family fought off invaders since 1960s through court cases. He told the court that his father had agents who collected ijara or rent – on his behalf from those who farmed the land. That the lessees would not be allowed to farm if they defaulted in payment of rent. That the lessees only grew subsistence crops. DW1 further stated:

***“Our father died in 1970 and some lessees started defaulting in paying ijara. We then demanded they stop farming...we would remove defaulters...some...forced their way back”***

56. It is admitted on both sides that in a vicious fight on the land in 1980-about ten years since the death of senior Bakshwein - two workers of Bakshuwein were killed together with a child and one alleged “squatter named Chenye Dzombo.” PW1 is the oldest witness called by the plaintiffs. PW2 was born in 1948 (64 years old at the time of the trial.) He was therefore only 7 years old when the senior Bakshuwein acquired the land in 1955. He claimed to have built his home (supposed act of possession) in 1951 or 1959 (when he was under 12 years of age).

57. He also stated that his parents lived on the suit land before him and that following the death of the senior Bakshuwein, when he was about 30 years of age, he was served by the 1st defendant with a notice to vacate. That would be around 1978. He refused and was arrested and charged. He also claimed that while his father lived, he occupied the land for a total of 70 years but the senior Bakshuwein never claimed to own the land. He however, went on to state:

***“Yes my father paid rent to Bakshuwein for about 20 years. Then after senior Bakshuwein died we stopped because his children (Defendants) did not have title. My family has never been evicted from the land. Our crops were attached by the Bakshuwein (family). They raided our cashewnut trees, forcefully harvested and carried away the crops ... my uncle's ... house was demolished.”***

He asserted like PW1 that a portion of the land used by the Bakshuweins was sold to them by a local (KARISA GUNGA).

58. In the course of cross-examination the witness revised the age of his first construction of a house to 32 years. He also confirmed that he witnessed rent being paid by his father to senior

Bakshuwein until he was about 30 years old. That would be until 1978. He admitted to have been arrested and charged in 1979 for forcible detainer and continued to state:

***“The Bakshweins have constantly harassed us over...the land and the District Officer had to come to our rescue by saying they ought to show the title deed. The Defendants have harassed us every year. When the Defendants failed to show the title deed we stopped paying rent. Yes we used to pay rent to their father.....yes I am aware of the water tank, it was forcefully built by SALIM BAKSHUWEIN on our land.”***

59. When questioned concerning a group of recent invaders to space fronting his home the witness replied:

***“Yes I confirm .....strangers (who) erected structures and Bakshuwein came to court and obtained orders to evict the invaders. He used (police) to evict the invaders. He claimed the land was his. I did not chase away these people (invaders). I did not bother about them...(because) that was up to them, if they had a chance to get land, so be it ...”***

60. This attitude clearly negates his *animus possidendi* regarding the property he claims to be in his exclusive possession. The witness further admitted that in the past he and his brothers had approached the 1st Defendant and sought compensation for their trees and were paid but later refused to vacate the land as agreed.

***“Yes I had admitted that the land belonged to Bakshuwein and all that we wanted with my brothers was compensation then we would vacate.....(we) are on the land by virtue of our father's earlier occupation.”***

In Re-examination he was to state:

***“During the patriarch's (senior Bakshuwein) life everyone paid rent and if one failed then they would not be allowed to cultivate and if they (did), he would bring police to arrest. Two years after Bakshuwein senior died, Salim began causing trouble...”***  
(emphasis added)

61. The latter statement is supported by the affidavit deposition by Samuel Katana (1st plaintiff herein) in support of the Mombasa suit as regards the year when real trouble started. However the said affidavit by Katana goes on to state that, since 1955 when senior Bakshuwein entered the land and demanded rent, the claimants had adamantly refused to pay as they did not recognise him as owner. There is no reference therein to payment of personal tax either to the sultan or through senior Bakshuwein asserted by the next witness and others.

62. When the third plaintiff and witness took the stand, the narrative appears to have changed. This witness (PW3) was born in 1962 and was aged 50 years at the time of the trial. He made what appeared to be astounding claims as follows:

***“During my father's lifespan (1st plaintiff herein and deponent of supporting affidavit to the Mombasa suit) he had no problem with senior Bakshuwein .... he moved into the land during the reign of the Arab Sultan of Zanzibar...the Arabs had taken the 10 mile coastal strip and every indigenous person had to pay rent which went to the Sultan. Bakshuwein was an agent of the Sultan of Zanzibar and he used to collect rent on behalf of the Sultan. The Arabs were not paying rent because they were the masters. It was during the period of SLAVE TRADE. ....the Arabs would collect Giriama people and use them as SLAVES. The rent had no relation to the land, it was known as IJARA (Personal Tax) which was payable to the Sultan.....by the time I was born the Personal Tax (Ijara) .....was no longer being paid to the Arab rulers.”***  
(emphasis added)

63. At the time of the trial this witness had been charged with the attempted murder of one of the Bakshuwein's sons named Abdalla, in 2006 on the farm. His father (1st plaintiff) before him had also been charged for trespass in Criminal Case No 1588 of 1987, the complainant being the 1st Defendant herein. PW3 said he has never been ordered to leave the land even though he built his first house in 1986 (three years before the Mombasa suit of 1989 where he was the 19th plaintiff).
64. He too stated in cross-examination that he claimed the suit land by virtue of his father's previous occupation thereof, even though the father's claim herein is technically abated as no substitution has been done since his death in 2009. He claimed then and in re-examination that the suit in Mombasa was a representative suit on behalf of the 103 current plaintiffs herein. He confirmed that what he told the court about payment of tax by his father (1st plaintiff herein) was what he heard from him.
65. Notably, the affidavit of his father in support of the Mombasa suit does not contain such assertions. It refers to demands by senior Bakshwein for land rent. PW3 is the one who swore the Supporting Affidavit to the present claim on behalf of other claimants. He also admitted that until 2010 the Defendants grazed their cattle on the suit land (a part of his father's complaint in the affidavit to the Mombasa suit), and that they had a cattle dip inside a fenced portion. This admission as well as the existence of prosecutions and cases brought by the defendants prior to this suit is in stark contradiction to the assertions of peaceful possession contained in his affidavit supporting the originating summons.
66. Like PW1 & PW2 the witness also indicated that his sons were some of the plaintiffs herein, seeking their respective portions of land. He was unable to state the exact location and acreage of the claimed portions – whether in plot 120 or 121, insisting however that the claim is for the entire portion i.e 359 acres. He disagreed with the evidence of PW1 and PW2 regarding which claimant occupied which portion. Regarding the question of rent (ijara) referred to by the said witnesses he said: “(it) cannot be rent for land use. I disagree. My father told me it was personal tax”.
67. He concluded on an emotional note by stating that the plaintiffs occupied the land “peacefully” but the “*problem arose because my father was well exposed being a civil servant and he opposed the Bakshuwein family who are Arabs and still have a slave/master mentality towards the Giriama community – they do not believe the Giriama slave should own any property.*” Pausing here, it is remarkable that while this witness asserted “*peaceful and rent free*” possession, the deponent to the affidavit supporting the Mombasa suit and the 1st plaintiff herein assert the contrary. Yet the latter is the father of the said witness and through whom he brings his claims.
68. In re-examination, PW3 dismissed as irrelevant and otiose the sketch plan prepared by the plaintiffs in respect of the Mombasa case, while maintaining that ijara (rent) was tax to the sultan, citing receipts in his annexures. The receipts on the face of it are in respect of payment of personal tax under Ordinance No. 28 of 1957 in the “Colony and Protectorate of Kenya” and not to the Sultan of Zanzibar.
69. The above allegation (about tax payment to the Sultan) is a historical impossibility in light of the agreement of 1895 by which the Sultan relinquished control of the 10 mile coastal strip (protectorate) to the British. The agreement provided *inter alia*

**“AGREEMENT BETWEEN GREAT BRITAIN AND ZANZIBAR RESPECTING THE POSSESSIONS OF THE SULTAN OF ZANZIBAR ON THE MAINLAND AND ADJACENT ISLANDS, EXCLUSIVE OF ZANZIBAR AND PEMBA-SIGNED AT ZANZIBAR, 14TH DECEMBER, 1895.**

***Zanzibar Possessions on Mainland and Islands, exclusive of Zanzibar and Pemba, to be administered by British Government.***

***His Highness Seyyid Hamed bin Thwain, Sultan of Zanzibar, agrees for himself, his***

***heirs and successors, that as regards his possessions on the mainland and adjacent islands, exclusive of Zanzibar and Pemba, the administration shall be entrusted to officers appointed direct by Her Britannic Majesty's Government to whom alone they shall be responsible.***

***These officers shall have full Powers in regard to executive and judicial administration, the levy of taxes, duties, and tolls, and the regulation of trade and commerce. They shall have control over public lands, forts, and buildings, over all roads, railways, waterways, telegraphs and other means of communication, and shall regulate questions affecting lands and minerals. All custom duties, taxes, and dues shall be accounted for to, and shall be expended by, Her Britannic Majesty's Government.”***

70. PW4, born in 1958 gave evidence similar to that of PW3 in asserting his claim to the land and disputing the 1989 suit sketch plan of the plaintiffs' occupation. Surprisingly he denied any harassment of the occupants by the defendants or the keeping of cattle on the land by the defendants as asserted by PW3 and the affidavit of the 1st plaintiff herein, filed in the Mombasa suit. The witness vehemently denied that he was Changawa Thoya, Plaintiff No. 17 in the Mombasa suit even though he admitted he was the son of Thoya Mwanyale. Despite stating that he he did not know the said Changawa Thoya, he was at pains to point out what he claimed to be the correct location of Changawa Thoya's portion on the 1989 sketch plan. His denials appear doubtful, to my mind, and it is not difficult to imagine the real motivation.
71. PW5 is also the son of the 1st Plaintiff herein, now deceased since 2009, and a brother of PW3 (Mkare). He is a retired teacher. He was born in 1951. His claim, it was evident, is derived from his father (1st plaintiff herein) whose suit is abated. He too claimed that in 1961 senior Bakshuwein demanded they pay tax to him and not the Sultan of Zanzibar as the land was his. After independence all was calm until 1986 when the 1st defendant sued for trespass in Civil case 1941/86.
72. However, according to his father's affidavit in the Mombasa originating summons, since 1972 to the date of that suit (1989), the defendants had grazed cattle on the land destroying crops and stripping the trees. PW5 produced the ruling in criminal case no. 105 of 1987 wherein his father was acquitted on trespass charges. This aspect is contained in the father's affidavit in the Mombasa case.
73. PW5 testified that in 1989 before the District officer, the plaintiffs having filed the Mombasa suit disputed the title of the 1st defendant. He said the plaintiffs in the Mombasa suit were representatives of other occupants on plot 120 and 121 and that there are now 350 families at the former plot. He admitted that his father owned other land in Mijomboni where he was buried. This witness, like PW3, and in contrast to the evidence PW1 and PW2 also claimed to have lived “peacefully” on the land until 2005 when Said Abdalla Bakshwein began staking his claim on the land although he never asked him to vacate.
74. He denied having been charged for forcible detainer or trespass, or that his father was ever jailed for an offence in connection with the land. He conceded the existence of a cattle dip on a fenced portion of the land where cattle, (presumably the defendant's) were brought from Ganda for pasture. He confirmed that some fenced off 30 acres of the suit land was allegedly sold to one Roberto Bosco. According to PW1 and PW2 this land was sold by the defendants.
75. During Cross-examination PW5 confirmed that his father (1st plaintiff herein) was charged in court in 1986, but released whereupon the matter was referred to the District officer. He also agreed that in the 1980s the defendants damaged trees on the suit land by peeling off barks and though he admitted that the search certificate attached to the plaintiff's supporting affidavit indicated that the suit land was registered in defendant's names, he maintained that “the land is not registered in the names of the defendants”.

76. He was shown and identified annexures by the defence documenting several court proceedings emanating from the dispute, including:

Warrant directed at a bailiff for the eviction of Kahindi Charo, Changawa Thoya (PW4) and a consent in District Magistrate's Civil Case No. 347 of 1977 by Said Saro (another deceased claimant) who in the year 1978 bound himself to vacate the land, as well as the witness' (his) father's letter in 1985 indicating readiness to purchase the land, since 1972, from the defendants.

77. He confirmed that the plaintiff No. 18 Elizabeth Kadzo lives in Kisumu Ndogo (not on the suit land) while Plaintiff No. 27 herein – Sulubu Ngoro is the one who sold land to the plaintiff No. 30 herein – Chivatsi Chai. He did not know the whereabouts of Plaintiff 78 – Kaingu Katana. He too admitted that the defendants had constructed and fenced off an area where they put up a cattle dip, a water tank and other structures, on the suit land.

78. And further that he was convicted and jailed for one year concerning a criminal case No. 444 of 2006 R v Wilson Kazungu Katana & 3 others where one Said Abdalla Bakshwein was the complainant regarding an incident on the land, on 19th November, 2005. In re-examination he put the date of destruction of crops by the defendants as 1987 while his father's affidavit referred to 1972 onwards. The implications of the contents of the letter by PW5's father in 1985 on PW5's claim will be discussed shortly.

79. PW6 was born about 1962. He based his claim mainly on his deceased father, Said Saro's occupation of the land. He stated, like PW3 that his father and grandfather had paid 'tax' to the Sultan of Zanzibar. But according to him, the defendants' family only staked a claim to the land after independence, contrary to the supporting affidavit herein and in the Mombasa suit. He said the defendants had no title documents. He however confirmed that many residents of the land had been prosecuted before the courts but denied they had ever been ordered to leave the land, as all the cases brought by the defendants allegedly failed.

80. Clearly, that is not an accurate statement in light of proceedings identified by PW5 and others. Despite his allegation that a member of the Bakshwein family Hemed ordered him at gun point to leave the land, PW6 went on to state that *“We have not been bothered by anyone over a long period before this case. Otherwise we would have moved.”* That they used the land without let or hindrance. He later admitted to have been charged and convicted regarding the incident with Hemed. Later during cross-examination he was to state:

***“I am aware the Bakshwein family attempted to throw us out many times even destroyed our crops, stripped barks from trees to kill them. It has been a long struggle....some elders said they paid a fee to senior Bakshwein. His sons were not accommodating...even tried to strip barks to evict us. Yes, once there was a bad incident in which Said Bakshwein was set on fire. Yes, there is a cattle dip on the land and tanks. They belong to the Bakshwein and they were used by their cattle.....has always been disputes and incidents over the land....”***

81. When shown a list of persons attending a meeting on 31/10/05 before the District Officer concerning the present land dispute, he confirmed that his name was on the list, but denied attending. Regarding the sketch plan drawn in respect of the Mombasa suit he identified at least five plots (5, 4, 14, 19 and 20) as held by his family members. However he immediately proceeded to dispute the location of the plots allegedly owned by Emmanuel Mlewa (PW3) and Ali Said as shown in the plan.

82. Andau Kalama (PW7) the second oldest witness at 72 years of age testified like PW2 – 6 to have been born on the land as his late father. He asserted, for the first time that plot No. 120 was used by Arabs to keep captured slaves before they were sold. He said the claimants and their ancestors were on the land way before the Bakshweins made claims to it just before independence (not in 1955 as per the affidavit evidence of the 1st plaintiff and supporting affidavit in Mombasa case.)

That the Bakshweins did not want them to use the trees or to harvest crops. He too said that the Bakshuwein family owns other large pieces of land in Malindi.

83. He denied to have signed a document at pg 22 of the defence annexures, which is dated 25th April, 2000 by which he agreed not to enter or farm on the suit land until the determination, presumably, of the Mombasa case. He also denied evidence of other trespass proceedings shown him and the allegation that the Bakshuwein cattle were grazed on the shambas routinely destroying crops, in contrast to the affidavit evidence of the 1st plaintiff herein in the Mombasa case. But he accepted that the Bakshuwein cattle were grazed on the farm until 2010, in a fenced area on the suit land.

84. PW7 also said that in the 1980s the Bakshuwein family destroyed crops and stripped tree barks. He confirmed the 1981 fatal fight on the land when a resident called Dzombo Chenye died alongside 2 workers of Bakshuwein and a child, and the incident when Abdalla Bakshuwein was set alight on the farm. He too said that his forefathers paid “*ijara*” as rent for land before independence to senior Bakshuwein out of fear of the penalty which was imprisonment.

85. He denied that defaulters on the Bakshuwein land were evicted and their crops destroyed. In re-examination he explained that *ijara* was rent or tax paid by forefathers (but not his own father) to one Omar Manoo at plot No. 120 but that it stopped before the colonial period ended. That in default of payment of rent the defaulters would be jailed for six months. Regarding the response of the Defendants to their occupation of the land the witness stated:

***“I do not agree that we have been restrained by the Bakshuwein from using the land. Not true they have pestered us for along time over this land. Ijara had no receipt. Liwali Hassan sat in this court. He was the administrator ...based here. When a Giriama was brought (before him) for defaulting to pay rent he would be jailed for six months. The Giriama has suffered oppression for a long time.”*** (words underlined for emphasis)

86. The defence evidence is primarily a confirmation that the struggle over the suit land started in 1960s, accentuating in the period after the death of the senior Bakshwein and that it has been marked by physical violence, evictions, court proceedings both civil and criminal as the defendants resisted the alleged “squatters”. That in the midst of it, the defendants reared cattle on the land, and further, that during the subsistence of the Mombasa case the defendants were ordered not to interfere with the occupants. Upon the case being dismissed a fresh round of violence erupted in 2006 resulting in grave injuries upon the 2nd defendant as he attempted to carry out some work on the farm.

87. Meanwhile other new entrants seemingly made their way into the land as “squatters” or purported purchasers. DW1 claimed during cross-examination that the present plaintiffs moved into the land between 1989 and 2005, not an altogether accurate assertion as some of the plaintiffs herein were also plaintiffs in the Mombasa case. He said the defendants have grazed their cattle on different portions of the land through rotation. That there exists on the land a cattle dip and tanks etc. covering 3 – 5 acres. DW2 is one of the Government administrative officers who handled the present dispute in the period between 1985 – 1988 and had occasion to attempt to enforce court orders against Katana Mkalakaya and Samuel Katana (1st Plaintiff and father to 2nd & 3rd Plaintiffs, PW3 and PW5).

88. In the foregoing analysis, I have deliberately set out the evidence as fully as possible to highlight the two issues upon which in my view this case turns: Whether the plaintiffs having dispossessed the defendants continued to exercise exclusive and peaceful possession over all that piece of land known as plot 120 Malindi measuring 359 acres for an uninterrupted period of over 12 years.

89. So far as the Plaintiffs and/or their forefathers are concerned it is not certain from the evidence whether they remained on the land cultivating it on the basis of payment of *ijara* or rent to the

senior Bakshuwein. PW1, 2 and 7 said so while other witnesses gave different accounts.

90. What is the meaning of *ijarah*? According to Muhammad Maulana Taqi Usman, a former Judge of the Pakistan Supreme Court and an expert scholar in the fields of Islamic jurisprudence (*fiqh*):

***“Ijarah is a term of Islamic fiqh. Lexically, it means 'to give something on rent'. In Islamic jurisprudence, the term ijarah is used for two different situations...to employ the services of a person on wages given to him as a consideration ...The second type of ijarah relates to the usufructs of assets and properties...Ijarah in this sense means “to transfer the usufruct of a particular property to another person in exchange for rent claimed from him”. In this case, the term 'ijarah' is analogous to the English term “leasing” ...the corpus of the property remains in the ownership of the transferor, but only its usufruct i.e the right to use it, is transferred to the lessee*** (see “An Introduction to Islamic Finance by Mufti Muhamad Taqi Usman p.110 available online at [www.kantakji.com](http://www.kantakji.com))

91. This definition, appears to convey a similar concept of *ijara* as described by PW1, PW2 and PW7 as well as DW1 – land leased for rent, rather than a form of personal tax to the sultan of Zanzibar as suggested by other witnesses. From the evidence on record, it seems that a loose usage of the word *ijarah* had developed among the local people whereby both the lease and rent were generally referred to as *ijarah*. I find that *ijarah* in this case was rent payable for use of land and not tax to the sultan.

92. Whatever the case, it is common ground that upon the demise of the senior Bakshuwein in 1970, and certainly from 1972 onwards, vide PW2's evidence, and affidavit of 1st plaintiff in the Mombasa suit, there was general default. The year 1972 also happens to be the year when the defendants purchased the 2/3 remaining portion. Hence in my considered view from about 1972 or even 1973 onwards the plaintiffs could be said to have been in possession of the land without the permission of the owners, and by 1989 some of them considered that their right of action under Section 38 of the Limitation of Actions Act had matured.

93. The Plaintiffs have in the course of the trial repeatedly stated that the plaintiffs in the initial suit in Mombasa Miscellaneous Application No. 71/89 were in fact representatives of the 103 plaintiffs herein. It could well be. As demonstrated by the evidence of PW1-7, many of the present plaintiffs are related as father and son or as siblings. Even the names of the plaintiffs suggest possible family relationships between the 103 plaintiffs herein. There is not enough material however exhibited to enable me confirm or reject the assertion that the Mombasa suit was filed as a representative suit. In this case however, it is deponed in the supporting affidavit that 350 families constituting the plaintiffs and their families live on the suit land at present.

94. Be that as it may, it is agreed that the Mombasa suit was dismissed at the instance of the defendants. While my predecessor Omondi J. held in a ruling herein that such dismissal did not render the present suit *res judicata*, the defendants avow that during the pendency of the said suit they were barred from evicting the plaintiffs. In my considered view, if this position is correct, and it was not contested by the plaintiffs, it would seem that during the period of 16 years when the Mombasa suit was pending in court, the plaintiffs occupied the land without let or hindrance from the defendants, on account of the said order. Did time run during that period? I think not, for two reasons. Firstly, there was apparently a court order restraining the defendants' hand and secondly, the suit terminated in favor of the defendants albeit not on the substance. In a sense such possession was with the “permission” of the court hence not adverse.

95. I have seen several English and local authorities that suggest, and correctly in my view, that a second suit by a paper title owner does not stop the running of the limitation period where the first suit was dismissed for want of prosecution for example, (see **Markfield Investments Ltd -vs- Evans (2001) IWL R 1321**, or failed for want of jurisdiction (see **Gatimu Kinguru v Muya Gathangi KLR 1986-80 Pg 317.**) Conversely, it would fall to reason that a claimant who went to

- court asserting his right to have matured under Section 38 of the Limitation of Actions Act, and whose first suit has been previously dismissed for want of prosecution, would not benefit from his own default by which a suit lay unprosecuted for 16 years, while he enjoyed orders favorable to him.
96. But, and I consider this to be the basis of the decision of my predecessor, with the present suit having been allowed to proceed, such a claimant is entitled to rely on the period prior to the first writ, when his right allegedly matured. Such a claimant as the plaintiffs are in this case, cannot however rely on the three year period between the dismissal of the first suit and the year the present suit was filed (2005 and 2008) in continuation of the first period. Perhaps, only as a second cycle of the limitation period, albeit in this case it is inchoate. In an ideal setting the plaintiffs were better off reinstating the dismissed suit rather than bringing a fresh action.
97. Having therefore excluded the period of the pendency of the Mombasa suit and after its dismissal (and the second writ), we are left with the period prior to 1989 when the Mombasa suit was filed. As I have indicated, it does seem that until independence, there was possibly no legal room for the maintaining of a claim such as this by local people against the registered title held by the so-called "Arab landlords". Thus for the plaintiffs to succeed, they cannot rely on any adverse possession of their fathers or their forefathers who at any rate, on the face of it, paid rent to the said landlords in exchange for the use of the land, until about 1970.
98. Hence, the plaintiffs would have to prove adverse possession since 1972 when, admittedly, the defendants commenced a robust assertion of their title while the plaintiffs or their fathers allegedly resisted them. Once the plaintiffs or their fathers stopped paying rent, their tenancy was deemed as periodic in nature to determine after one year, and it matters not in the circumstances of this case if that occurred in 1972 or 1973. Thus the law existing prior to independence and the described circumstances of occupation of the suit land by the plaintiffs in my considered view, dictates that the only material period to be reckoned is between 1972 or (1973) and 1989, as far as the limitation period in Section 7 of the Limitation of Actions Act is concerned.
99. That period is about 16 years, at the minimum. The court must consider whether during that period the plaintiff had peaceful, exclusive, uninterrupted possession. The *animus possidendi* - intention to possess – which is a critical ingredient of adverse possession must be unequivocal such that if the possessor acknowledges the owner's title before the limitation period has matured, the running of the period will be interrupted. Equally the period is interrupted if the paper title owner resumes possession in time. Thereafter, the limitation period can only begin to run afresh if he parts with it again. This possession however must be more than a mere formal entry according to section 15 of the Limitation of Actions Act (see also **Randall vs Stevens (1853) 118 ER 907 and Worssam V Vandenbraden (1868) 17 WR 53**).
100. While it is admitted that there have been numerous civil and criminal proceedings against the claimants brought by the defendants over the years, some of the prosecutions were unsuccessful eg. Criminal cases no 1941 of 1986 and no. 1058/87 for trespass contrary to section 5(1) of the Trespass Act brought against Samuel Katana and Changawa Thoya, and Case no. 1958 of 1987 against Samuel Katana (some of the claimants herein).
101. However in **(Malindi) District Magistrate's Court civil case no. 176 of 1977 Ahmed Bakshwein v Kahindi Charo & Changawa Thoya** a warrant was issued to the bailiff to remove the defendants from the suit property. The warrant is dated 31st January 1978. And even though the plaintiffs herein pointed out at the trial that the property was according to the warrant decreed to Ahmed Aziz, Nyange Simba & Ngumboa Kadeke there is no evidence to clarify the role of the said third parties in the matter or the present suit. It was also asserted by the plaintiffs that the warrants were not executed. Changawa Thoya was a plaintiff in Mombasa suit which the claimants herein say was a representative suit brought on behalf of the 103 claimants herein. I believe the said Changawa Thoya is the same person as Stephen Changawa, PW4 herein, and the results of the 1977 suit might explain his vehement denial at the trial of the name Changawa

Thoya.

102. Clearly, by January, 1978, the said Changawa Thoya had been ordered out of the suit land through a court process. So that if the adverse period in his case had started to run in 1972 or 1973 he had only done six years by 1978. And once ordered out time began to run afresh in 1978, even with regard to the period provided for execution of judgments. Thus by 1989 he would have occupied the suit land for only 11 years if at all.

103. Similarly, **Civil suit 347 of 1977, Salim A. S. Bakshwein vs Said Saro** was determined by a consent that the defendant and his family would vacate the “*shamba of the plaintiff plot no. 120 and give vacant possession by 30th November, 1977.*” The period was later extended to March 1978 by a further consent on 14th February, 1978. Said Saro was the father of Hassan Said Saro (PW6 and plaintiff No. 44 herein). PW6, born in 1962, said he “took over” the claim from his father when the latter died. PW6 would not have been an adult in 1978 when the consent was extended but even if he was, his claim could only run parallel to his father's possession as claimed, from 1978 to the filing of the suit in Mombasa, in which he says his father and brother Hussein Saro (10th plaintiff therein) were involved.

104. More significantly, in the same year (1978) PW2 (plaintiff no. 76 herein), Gia Katana and Sirya Thoya (plaintiff no. 75 and 86 herein) as well as the said Said Saro executed a document in the following terms:

“*Sisi Gia Katana, Kazungu Katana, Sirya Toya na watu wa nyumbani mwetu tutaondoka ndani ya shamba ya Bwana Salim Abdalla Bakshweni, plot no. 120 Maziwani Malindi tarehe 31st March 1978 bila kukosa kama tulivyopatana hivi leo. Tutaondoa nyumba zetu zote ndani ya muda huo ...(dated 14th February, 1978)*”.

105. Translated into English, the above document is an agreement binding the three plaintiffs and their families to vacate the defendant's property by 31st March 1978. This document in my view, contains a clear acknowledgement of the defendant's title to the suit land, in terms of Section 23(1) a(i) of the Limitation of Actions Act, and a negation of the *animus possidendi* on the part of the three signatories. PW2 admitted that he and his brothers subsequently refused to remove themselves despite being compensated by the defendants for their cashewnut trees. Hence time for them could only start running upon the expiry of the notice in March or April, 1978. That is not all. PW2 said in cross-examination that he never bothered to remove invaders who had set up on his land recently. He indicated that he was indifferent to their attempt to acquire the land.

106. In a letter written by Samuel Katana, (1st plaintiff and father of PW3 and PW5 herein), Said Saro and; Joseph Kalenga on 23rd September, 1985 to the Provincial Commissioner, Coast Province, which PW5 identified, the authors firstly assert that plots 120 and 121 Malindi are the property of Salim Bakshwein (1st Defendant). The letter goes on to complain against the defendants' workers for allegedly continually destroying the claimants' cashewnut trees as well as other crops by the said defendant's cattle. Finally, the authors express the desire to purchase the two land parcels, and refer to similar overtures made to the owners since 1972, which were allegedly rejected.

107. Even in the suit filed in Mombasa some of the plaintiffs e.g Chuma Wanje (14th plaintiff) withdrew the claim upon being “fully compensated for ...35 cashewnut trees and four mango trees situated on plot 120 Malindi.” Therefore if indeed the persons above (in Mombasa suit) were representatives of other claimants, including the claimants herein or persons through whom the claims are made, it is difficult to see how this present claim can be based on their alleged adverse possession prior to the Mombasa suit. For instance, as late as 1985 the 1st plaintiff through whom PW3 and PW5 are admittedly basing their claim conceded to the defendant's title to the suit land. Therefore PW3 and PW5 must prove adverse possession from 1985 when the fresh period would naturally have started to run. These witnesses were adamant that their claim is based on their late father's adverse possession of the land. This is also true of the claim by PW6 and his brothers.

108. There are several correspondences from the provincial administration supporting the evidence on both sides that, this dispute has been brought before several administrators at different times. While a mere demand by the paper title owner may not suffice to interrupt the running of the limitation period (see **Randall vs Stevenson Supra**) this evidence of persistent disputing, as well as the admitted violence in 1980 when three adults and one child died in clashes over the land tends to negate the allegations that the plaintiffs' occupation has been peaceful. PW1, PW2 and 6 gave graphic evidence of the hostile and sometimes violent engagements between the claimants and the defendants. The culmination was the 2006 attack in which one of the defendants was set alight by some of the claimants, who were subsequently charged with serious criminal offences, including attempted murder. Thus the occupation by the claimants has been anything but peaceful, and neither has it been exclusive.

109. The Court of Appeal in **Francis Gicheru Karini vs Peter Njoroge Mairu (Civil Appeal No. 293 of 2002 (NRB) UR)** - approved the High Court decision in **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

***“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, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration”***

110. In an earlier English decision which I consider relevant and persuasive in relation to this dispute – **Powell v Mc Farlane (1979)38 P & CR 451 at pp 452 and 470-471** the court defined the requirement of factual possession in claims of adverse possession as follows:

***“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitutes a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...Everything must depend on the circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have expected to deal with it and no one else has done so.”*** (emphasis added)

111. What then are the circumstances of this case? It is true that some of the claimants' deceased relatives are buried on the land even though certain key claimants in this case e.g PW3's and PW5's father were buried elsewhere. The defendants asserted that their faith (Islam) forbids the faithful from denying a place of burial even to a stranger. The land in question is 359 odd acres, apparently arable and suitable for agriculture and cattle rearing. The plaintiffs assert, and it is evident that they used the land to farm and also build homes thereon. The defendants kept cattle on the land hence the plaintiff's complaints that the cattle constantly destroyed their crops and that their trees were destroyed by the defendants' workers.

112. The claimants admitted that the defendants all along kept cattle on the farm until 2010, had “forcefully” constructed water tanks and a cattle dip and other structures on the farm (see also PW3 and PW6). The complaint letter of 1985 by Samwel Katana and others clearly points to the problem caused by the marauding cattle to the claimants' crops and the willful destruction of the cashew nut trees on the instructions of the defendants in 1985. According to PW1, 2 and 6 the only period of calm was during the pendency of the suit in Mombasa. From the plaintiff's evidence it is therefore not possible to state categorically that the defendants were ever dispossessed or abandoned the land and that the claimants did take exclusive peaceful, possession accompanied by the necessary *mens rea* of the suit land.

## CONCLUSION

113. On a careful analysis of the evidence on record, one can hardly say that the requirement to prove peaceful and exclusive possession after dispossession of the owners have been fulfilled in this case. What there seems to have been is a long drawn out, even violent struggle and concurrent use of the land between the defendants and persistent “trespassers” or “squatters,” including the plaintiffs. While PW1 – 7 gave evidence apparently on behalf of all the 103 claimants, there is no way of telling whether each of the claimants' circumstances of claim are similar to those of the witnesses, and/or how much land they assert to possess either directly or indirectly. In court PW1 to PW4 claimed 10, 32, 20, 10, 25 acres respectively while PW6 and 7 did not indicate any acreage. It does not appear that these pieces were ever measured or surveyed or that they are clearly defined.
114. Furthermore some of the claimants e.g plaintiff no. 12 and 84 are minors aged 13 and 14 years, according to PW3. PW3 stated that when the initial sketch plan representing occupation was drawn, the claimants had believed parcels no. 120 and 121 are to be one land parcel. Subsequently, no further plan was drawn although PW3 said that other claimants e.g his own son Harrison Mlewa (Plaintiff 16) had since come up. He said he and six brothers are plaintiffs herein each claiming in his own right.
115. A casual look at the plaint would suggest that other claimants are equally related as they bear similar apparent family names. This renders the claim by the entire group rather amorphous and confusing, (See **Kimani Ruchine & Anor vs Swift, Rutherford & Co. & Anor, Supra**): who is claiming for whom, through who? Is it siblings/families claiming in their own right or through fathers and grandparents? Still, there were contradictions regarding which portions were occupied by which family, and different witnesses had different views about the original and only occupation sketch plan drawn prior to filing the 1989 suit in Mombasa.
116. Although it is possible for the adverse possessor to successfully claim a portion of a larger whole, the former must be specifically identifiable (see **Gatimu Kinguru v Muya Gathangi (1976 – 1980)1 KLR 317**). From the record of the scene visit and the trial, it is not possible to accurately tell what specific portion is possessed by which claimant(s) and how so. PW3 upon being pressed on this matter said that the plaintiffs claimed the entire 359.91 acres in adverse possession. Even if the plaintiffs' claim were found to be proved, on what basis would the entire land parcel be distributed among the claimants? A court of law would be loath to issuing orders that are certain to cause fresh friction between the claimants themselves and possible breach of peace. The scenario is not remote given the emotions displayed in this case. In conclusion, the nature of the plaintiffs evidence is such that it fails to establish their case on a balance of probabilities.
117. Regarding the defendants' counterclaim, I have already noted that no defence or objection was raised thereto until the final submissions. The plaintiffs contended that:

**“The defendants filed a counterclaim which counterclaim is bad in law for failing to seek leave of the court to file it out of time the same being statutory time barred.”**  
(sic)

118. Section 7 of the Limitation of Actions Act is in the following terms:

***“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”***

The period of limitation is reckoned “from the date on which the right of action accrued ...” To understand this phrase, it is necessary to read Section 13 (1) and (2) of the Act which states:

***“(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 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.”***

119. The right of action accrues when dispossession has occurred and the land falls into the possession of the adverse possessor. This is the interpretation given by English courts to the English equivalent of Section 13(1) and (2) above – See (**Buckinghamshire County Council v Moran supra**). Under common law adverse possession is more than a mere physical possession for a certain period (see **Powell v Mc Farlane**). As reviewed case law demonstrates in this case, whether a party has become entitled under Section 38 of the Limitation of Actions Act, is a matter of fact. Equally, the date of accrual of the right of action by the paper title owner is a matter of fact. The onus lies with the claimant to bring his case within the provisions of Section 38 as read with Section 7 and 13 of the Limitation of Actions Act and the relevant case law.

120. In my considered opinion, the plaintiffs have failed to do so. Thus, as a matter of fact it cannot be said that the Defendants have lost their right to bring an action (counterclaim). It would have been prudent for the plaintiffs to answer the counterclaim and raise objections earlier to enable the court make a determination. Because of their failure to do so, the counterclaim remained on record unchallenged.

In retrospect, perhaps that enabled the court to view the counterclaim in perspective of the entire case, and to determine the issue upon proven facts that would not have been available earlier. Regrettably, the plaintiff's feeble protest came too late.

121. I have also mulled over another important question. In light of the court's findings on the plaintiffs' case, what would be the net result if the counter claim is ignored? The court having dismissed the plaintiff's suit would not have determined the matter with finality. The defendants would have had to commence fresh action to obtain the orders now sought in the counterclaim. Thus to rest this old dispute merely with the dismissal of the plaintiffs' suit amounts to a Pyrrhic victory for the defendants.

122. In the proven circumstances of this case, I find that the counterclaim cannot be wished away, and must, in light of the dismissal of the plaintiff's case be allowed. Due to the protracted nature of this dispute I would order that parties bear their own costs.

123. Mindful too of the large number of plaintiffs, I direct that the order requiring them to give vacant possession will take effect upon the expiry of (6) six months from today's date. This grace period will enable them to make necessary arrangements, and is conditional upon the plaintiffs keeping the peace and not putting up any new constructions or dealing with the suit property in any manner prejudicial to the defendants' title. For this purpose, the latest report of the survey of the suit premises, filed on 20th November, 2012 pursuant to the order issued by this court on 24th October, 2012, will be deemed to represent the true current status on the ground.

124. Finally, let me state that as I make these orders I am fully conscious of the tensions surrounding land issues in this region and the related grievances concerning “historical injustices” often raised by the local people. The court is not indifferent to these matters. However, these injustices must be addressed in a manner that upholds the rule of law under the Constitution so that every citizen's rights and freedoms are respected. That is the price to be paid for living in a democratic country under the rule of Law.

125. Furthermore, I note that the National Land Commission has now commenced its work in earnest. Hopefully, the Commission will provide permanent solutions to hitherto intractable land disputes in this region, some of which appear to defy conventional dispute resolution mechanisms. Once more, I regret the long delay in the preparation of this judgment and do appreciate the patience shown by the parties and their respective counsel.

Delivered and signed at Malindi this **3rd** day of **October, 2013** in the presence of Mr. Kilonzo holding brief for Mr. Mogaka for the defendants.

Ms. Mwanja holding brief for Mr. Otara for the plaintiffs.

Court clerk - Furaha

**C. W. Meoli**

**JUDGE**

**MISS MWANIA**

I apply for a copy of proceedings.

**C. W. MEOLI - J**

**COURT**

Proceedings to be provided.

**C. W. MEOLI - J**