



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 232 OF 2006 (O.S)**

**GLADYS WANJIKU NDIRANGU.....1<sup>ST</sup> PLAINTIFF**

**DUNCAN NDIRANGU KIHUHA.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**MAGADI SODA COMPANY LIMITED.....DEFENDANT**

**THE TOWN COUNCIL OF KAJIADO...1<sup>ST</sup> INTERESTED PARTY**

**PATRICK KORES.....2<sup>ND</sup> INTERESTED PARTY**

**ALEX CHAU KAMAU.....3<sup>RD</sup> INTERESTED PARTY**

**DANIEL TIMAYIO NKARU.....4<sup>TH</sup> INTERESTED PARTY**

**FRANCIS MUTUA KIMEU.....5<sup>TH</sup> INTERESTED PARTY**

**JUDITH K. WAMBUA.....6<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

**The plaintiffs' case.**

The plaintiffs brought this suit against the defendant by way of an Originating Summons dated 9<sup>th</sup> March, 2006. The Originating Summons was amended on 16<sup>th</sup> March, 2012 to add the 1<sup>st</sup> to 6<sup>th</sup> interested parties to the suit. In the amended Originating Summons dated 15<sup>th</sup> March, 2012, the plaintiffs sought the following orders;

- 1) That the plaintiffs are entitled to be registered as the proprietors of their respective portions of all that parcel of land known as L.R 2836 situated at Kajiado under section 33 of the Limitation of Actions Act, Cap. 22 Laws of Kenya on the ground that the plaintiffs have individually, openly, peacefully and as a right been in possession and occupation of the above mentioned parcel of land measuring 3 acres for a period of over 12 years immediately preceding the presentation of this Originating Summons in court.
- 2) That the defendant's title to the said parcel of land has been extinguished under section 17 of the Limitation of Actions Act Cap. 22 of the Laws of Kenya.
- 3) That the plaintiffs be registered as proprietors of the said parcel of land known as L.R 2836 situated at Kajiado under section 38 of the Limitation of Action Act Cap. 22 Laws of Kenya in place of the defendant.
- 4) That this Honourable court be pleased to give an order directed at all the interested parties whether acting by themselves, their agents or servants not to interfere with the plaintiffs' quite enjoyment of the said parcel of land known as L.R 2836 situated at Kajiado (hereinafter referred to only as "the suit property") and for them to desist from destroying the fence and developments on the said parcel of land until further orders of this court.

The application was brought on the grounds set out on the face thereof and on the affidavit and supplementary affidavit of the 1<sup>st</sup> plaintiff, Gladys Wanjiku Ndirangu sworn on 9<sup>th</sup> March, 2006 and 21<sup>st</sup> June, 2012 respectively. The plaintiffs who were a husband and wife contended that together with their family, they had occupied the suit property exclusively and peacefully without any interference from 1975. The plaintiffs contended that they had acquired the suit property which measures 3 acres by adverse possession and as such were entitled to

be registered as the proprietors thereof in place of the defendant. The plaintiffs averred that they had developed the suit property with both temporary and permanent structures. The plaintiffs averred that the 1<sup>st</sup> interested party had illegally entered the suit property which belonged to the defendant and purported to subdivide and allocate portions thereof to the interested parties. The plaintiffs averred that the interested parties had commenced construction of temporary structures on the suit property and were engaged on acts of harassment against the plaintiffs and members of their family. The plaintiffs averred that the interested parties had destroyed a perimeter fence around the suit property so that they could gain access to the same.

#### The defendant's case.

The Originating Summons was opposed by the defendant through replying affidavits sworn by Michael Kori and John Gathura Kabera on 12<sup>th</sup> May, 2006 on 24<sup>th</sup> May, 2007. The defendant admitted that it was the registered owner of the suit property. The defendant averred that it was also the registered proprietor of another parcel of land situated adjacent to the suit property known as L.R No. 2341. The defendant averred that the plaintiffs had not established that they had been in open and uninterrupted possession of the suit property for a period of not less than 12 years to be entitled to acquire the suit property by adverse possession. The defendant averred that if the plaintiffs had been in possession of the suit property as alleged, the said possession was at all material times based on deliberate concealment or was a consequence of a mistake. The defendant averred further that if indeed the plaintiffs had been adversely in possession of the suit property for the alleged period, they had been in possession of only a portion of the property and not the entire 3 acres. The defendant averred that a survey that it carried out on the suit property on 15<sup>th</sup> May, 2007 revealed that the plaintiff was in occupation of only a small portion of the suit property measuring 0.7 acres. The defendant averred that the Originating Summons lacked substance, was bad in law and amounted to an abuse of the court process.

#### The interested parties' case.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties opposed the Originating Summons through a replying affidavit sworn by Kenneth Ombogo Arang'a on 22<sup>nd</sup> May, 2012. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties denied that the plaintiffs were in occupation of the suit property. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties averred that the parcel of land that was occupied by the plaintiffs and the suit property were separate and distinct parcels of land. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties averred that the parcel of land that was occupied by the plaintiffs belonged to the 1<sup>st</sup> interested party and not to the defendant. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties averred that the plaintiffs had never lived on the suit property as alleged but had been occupying a portion of the 1<sup>st</sup> interested party's land measuring 3.7 acres on which they had constructed semi-permanent structures. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties averred that the plaintiff had earlier filed a suit namely Nairobi HCCC No. 1054 of 2004 which was dismissed after which they filed another suit in the High Court at Machakos namely, Machakos HCCC No. 326 of 2011 which was withdrawn. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties averred that all these suits were on the same subject matter. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties averred that the plaintiffs' conduct amounted to an abuse of court process and was intended to frustrate the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties who were at all material times ready to defend themselves in the said suits. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties averred that the 1<sup>st</sup> interested party acted within its power in issuing allotment letters to the interested parties.

There is no evidence on record that the 4<sup>th</sup> and 5<sup>th</sup> interested parties filed a response to the Originating Summons. The 6<sup>th</sup> interested party opposed the Originating Summons through a replying affidavit sworn on 3<sup>rd</sup> July, 2013. The 6<sup>th</sup> interested party averred that the plaintiffs had brought two previous suits against her one of which was dismissed while the other one was withdrawn by the plaintiffs. The 6<sup>th</sup> interested party averred that whereas the plaintiffs were claiming ownership of the suit property by adverse possession, the 6<sup>th</sup> interested party had been allocated the same. The 6<sup>th</sup> interested party averred that she had no claim over the suit property and that the parcel of land that was allocated to her in 2001 was plot No. Q/Kajiado Hill Estate. The 6<sup>th</sup> interested party averred that the plaintiffs were only occupying a portion of the suit property. The 6<sup>th</sup> interested party averred that the plaintiffs' suit was an abuse of the court process, *res judicata* and time barred.

The Originating Summons was heard through oral evidence. At the trial, the 1<sup>st</sup> plaintiff, Gladys Wanjiku Ndirangu (PW1) gave evidence for the plaintiffs. She told the court how the 2<sup>nd</sup> plaintiff and she acquired the suit property in 1975 and the developments and other activities that they had carried out on the suit property over a period in excess of over 35 years that they had occupied the property. She stated that a part from sometimes in 1995/1996 when the defendant was fencing its adjacent parcel of land when it asked her to move her gate which she did, they had never had any dispute with the defendant. The 1<sup>st</sup> plaintiff told the court that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties entered the suit property in 2003 and started putting up structures thereon claiming that the same had been allocated to them by the 1<sup>st</sup> interested party in 2001. She stated that attempts to stop the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties' activities on the suit property did not succeed as they had the support of the 1<sup>st</sup> interested party. She stated that following the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties' entry onto the suit property, she started making inquiries regarding the ownership of the suit property. She stated that her inquiries led her to discover that the suit property was owned by the defendant. It was following that discovery that the 2<sup>nd</sup> plaintiff and she filed this suit on the advice of their advocates. She stated that she had occupied the suit property openly and peacefully for uninterrupted period of over 12 years. She stated that during the entire period, the defendant was friendly and that it was the 4<sup>th</sup> to 6<sup>th</sup> interested parties who had been interfering with their occupation of the property. She stated that the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were employees of the 1<sup>st</sup> interested party. The 1<sup>st</sup> plaintiff stated that the suit property measured 3 acres and that she was using the entire parcel of land. On the defendant's contention that she was using only a portion of the suit property measuring about ½ of an acre, she stated that she was using the entire parcel of land before the entry into the land by the 4<sup>th</sup> to 6<sup>th</sup> interested parties. In cross-examination, the 1<sup>st</sup> plaintiff stated that it was until 2006 that she came to know that the suit property was owned by the defendant. She stated that her claim was based on adverse possession and not on the letter of allotment that had been issued to her in respect of the suit property.

The defendant called two witnesses, John Gathura Kibera (DW1) and Walter Opop (DW2). DW1 told the court that he was the human resource manager of the defendant. He told the court that the defendant had two parcels of land; the one on which they were undertaking mining activities and the suit property. He stated that the suit property was adjacent to the parcel of land on which the defendant was undertaking mining activities. DW1 stated that the plaintiff was not entitled to the suit property. He stated that the suit property was leased to

the defendant by the government for a term of 99 years with effect from 1<sup>st</sup> November, 1924 for European settlement. He stated that when the title of the suit property got lost, the defendant applied for a provisional title in 1995 and the same was issued to the defendant in 1996. He stated that no objection was raised to the defendant's application for a provisional title aforesaid. He stated that the suit property was not fenced and that its boundaries were also not marked. He stated that at all material times, the plaintiffs were good neighbours of the defendant and that it was after they filed this suit that the defendant came to know that the plaintiffs had a claim over the suit property. DW1 told the court that the defendant could not tell whether the plaintiffs were on the defendant's land or not. He stated that it was after the filing of this suit that the defendant conducted a survey that revealed that the plaintiffs were occupying its land. DW1 stated that until the present suit was filed, the defendant knew that it owned the suit property but did not know its location. He stated that the defendant was not aware that the suit property was occupied by other people. He stated after surveying the suit property, the defendant realised that the plaintiff was occupying a portion of the suit property measuring about ½ of an acre. He denied that the plaintiffs were occupying the entire parcel of land measuring 3 acres. He stated that the plaintiffs had at one time claimed the suit property on the basis of a purported letter of allotment and had even contended that they were occupying land measuring 4.6 acres. DW1 stated that neither the plaintiffs nor the interested parties had any interest in the suit property. He stated that the interested parties were beneficiaries of irregular allocation of the suit property.

In cross-examination, DW1 reiterated that the defendant was not aware that the plaintiffs were occupying its property until the time the plaintiffs brought this suit. He admitted that the defendant had not put the suit property into any use but denied that the defendant had abandoned the property. In examination by the court, DW1 stated that he did not know when the plaintiffs entered the suit property and that he noticed their presence in 1995. He stated that as at 1995 only the plaintiffs and the 5<sup>th</sup> interested party were occupying the suit property.

The evidence of Walter Opap (DW2) was limited to the identification of a sketch map at page 16 of the defendant's bundle of documents that had been produced as part of D-Exh. 1. DW2 told the court that he prepared the sketch map in May, 2007. In cross examination, he stated that the purpose of the sketch map was to confirm the measurements of the parcels of land that were in dispute.

Kenneth Ombogo Aranga (IP1) gave evidence on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties. He adopted his witness statement that was filed in court on 9<sup>th</sup> May, 2016 as part of his evidence in chief. He told the court that he was a legal officer with the County Government of Kajiado and that before then, he served as a Town clerk with the Town Council of Kajiado. He told the court that the suit property belonged to the defendant and that the 1<sup>st</sup> interested party owned the parcel of land adjacent to the suit property. He stated that he was not aware why the 1<sup>st</sup> interested party was joined in the suit as a party. He stated that the plaintiff was occupying a small portion of the land owned by the 1<sup>st</sup> interested party. He stated that the 1<sup>st</sup> interested party had allocated its land adjacent to the suit property to individuals who had applied for the same. He stated that the 1<sup>st</sup> interested party had no dispute with the defendant in respect to the suit property. In cross-examination, he stated among others that the 4<sup>th</sup> to 6<sup>th</sup> interested parties were in occupation of the 1<sup>st</sup> interested parties' land.

Next to give evidence was the 4<sup>th</sup> interested party, Daniel Timayio Ole Nkaru (4<sup>th</sup> IP). 4<sup>th</sup> IP told the court that he applied to the Town Council of Kajiado to be allocated land. He stated that his application was approved and he was allocated plot No. Z44/Kajiado Hill on 8<sup>th</sup> November, 2000. He told the court that he had no interest in the suit property being claimed by the plaintiffs. He produced a copy of his letter of allotment as an exhibit. He stated that he was in occupation of the parcel of land that was allocated to him and that he had built a permanent latrine thereon.

The 5<sup>th</sup> interested party, Francis Mutua Kimeu (5<sup>th</sup> IP) gave evidence next. The 5<sup>th</sup> interested party was the husband of the 6<sup>th</sup> interested party, Judith Wambua. The 5<sup>th</sup> I.P told the court that he was also known as Komu. He stated that in 2000, a survey was carried out in respect of land owned by Kenya Railways and the defendant in Magadi. He stated that after the survey, the defendant fenced off all its land. He told the court that after the fencing that was done by the defendant, the 1<sup>st</sup> interested party started subdividing its land and they made a request to the 1<sup>st</sup> interested party to be allocated land which request was granted. He stated that his friend, one Jackson Kago Nailole and the 6<sup>th</sup> interested party were allocated plot No. Q/Kajiado Hill Estate on 2<sup>nd</sup> February, 2001. He produced the allotment letter dated 2<sup>nd</sup> February, 2001 as an exhibit. He stated that they had erected mabati houses on the said plot and that that the defendant had never made any complaint against them verbally or in writing in respect thereof. He stated that it was after they started fencing their plot that he received a complaint from the 1<sup>st</sup> plaintiff claiming that the plot they were occupying was hers. He stated that the plaintiffs were residing between 80 to 100 meters from their plot No. Q/Kajiado Hill Estate. He stated that the plaintiffs had filed an earlier suit against them that was dismissed and that, a second suit against them by the plaintiffs was withdrawn. He stated that they were joined in this suit unlawfully since adverse possession claim does not lie against them.

The 6<sup>th</sup> interested party, Judith Wambua (6<sup>th</sup> IP) testified that the 5<sup>th</sup> IP was her husband and that they were allotted plot No. Q/Kajiado Hill Estate in 2001 by Kajiado Town council. She stated that they were in occupation of the said parcel of land and were paying rates for the same. She told the court that they were not occupying land belonging to the plaintiffs and that they were not neighbours to the plaintiffs. She urged the court to determine the dispute with finality since they had been sued in several courts on the same issue.

#### Submissions.

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiffs filed submissions and supplementary submissions on 30<sup>th</sup> January, 2020 and 30<sup>th</sup> June, 2020 respectively. The defendant filed its submissions on 17<sup>th</sup> June, 2020 while the 5<sup>th</sup> and 6<sup>th</sup> interested parties filed their submissions on 20<sup>th</sup> February, 2020.

#### The plaintiffs' submissions.

The plaintiffs made submissions on a number of issues. On whether the plaintiffs were in occupation of the suit property and for how long, the plaintiffs submitted that their several averments that they had occupied the suit property for 35 years were uncontroverted. The plaintiffs submitted that the 1<sup>st</sup> interested party failed in its attempt to place the location of the portion of land occupied by the plaintiffs on the 1<sup>st</sup> interested party's land. On whether the defendant was the registered owner of the suit property, the plaintiffs submitted that the issue was not

in dispute.

On whether the defendant was aware that the plaintiffs were in occupation of the suit property, the plaintiffs submitted that that was the case. The plaintiffs submitted that they were neighbours to the defendant and that from the activities that they had carried out on the suit property, the defendant could not feign ignorance of their occupation. In support of this submission, the plaintiffs relied on Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016]eKLR. The plaintiffs submitted that they had been in open and notorious possession of the suit property and that the defendant could not fail to notice their occupation.

On whether the plaintiffs were in adverse possession of the entire land measuring 3 acres comprised in L.R No. 2836, the plaintiffs submitted that they had proved that they had occupied the whole land. The plaintiffs submitted that they led evidence that they had fenced the whole land, constructed a home on the same, cultivated and grazed their animals on the remainder since 1975. On whether the interested parties should be on the suit property, the plaintiffs submitted that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties were wrongly on the suit property since their alleged interests were derived from the 1<sup>st</sup> interested party which had renounced any claim over the suit property.

On whether the plaintiffs had asserted rights over the suit property, the plaintiffs submitted that the plaintiffs' open, continuous and hostile possession of the suit property had not been broken since 1975. The plaintiffs submitted further that the defendant had admitted that the plaintiff had a homestead on the suit property. The plaintiffs submitted that they had proved the elements of adverse possession to warrant the grant of the prayers sought in the Originating Summons.

#### The defendant's submissions.

Like the plaintiff, the defendant also framed a number of issues that it submitted on. The defendant cited Wanyoike Gathure v Beverly [1956] E.A 514, Wambugu v Njuguna [1983] KLR 172, Kweyu v Omutut [1990] KLR and Mbira v Gachuhi [2002]1 E.A137 and submitted that a person claiming land by adverse possession has to prove; continuous possession of the property for a period of 12 years, open and uninterrupted use of the property, dispossession or discontinuance of possession by the title holder and exclusive use of the property. The defendant submitted that plaintiffs had not proved that they had been in continuous and uninterrupted possession of the suit property for over 12 years. The defendant submitted that the evidence adduced by the plaintiffs did not support their claim that they had occupied the suit property since 1975. The defendant submitted that it appeared that the plaintiffs resided somewhere else known as Majengo C before moving to the suit property in 1995/1996.

On whether the plaintiffs had open and uninterrupted use of the suit property for the statutory period, the defendant relied Koech Kangongo v Chebii Yego[2018]eKLR, and submitted that the plaintiffs' occupation of the suit property had not been open, notorious and with the knowledge of the defendant. The defendant submitted that the plaintiffs had not met the threshold of open and uninterrupted use. The defendant submitted that the defendant did not know that the plaintiffs were on the suit property and the plaintiffs had no knowledge of the defendant's right of ownership of the suit property. The defendant submitted that the defendant thought all along that the plaintiffs were residing on their own land. The defendant submitted that the plaintiffs held themselves out all along as the registered owners of the suit property. The defendant submitted that adverse possession cannot arise where there had been deliberate concealment and/or fraudulent conduct by the adverse possessor. In support of this submission, the defendant cited Gabriel Mbui v Mukindia Maranya [1993] eKLR. The defendant submitted further that from the evidence on record, the plaintiffs did not know that the defendant was the owner of the suit property and the defendant did not know that the plaintiffs were not the owners of the suit property until 2006 when the plaintiffs brought this suit. The defendant submitted that in the circumstances, computation of time for the purposes of adverse possession could only start from 2006 and not before. In support of this submission, the defendants relied on Titus Kigoro Munyi v Peter Mburu Kimani [2015]eKLR where the court held that computation of time for the purposes of adverse possession could only start when there is actual or constructive knowledge by the registered proprietor that a third party claiming adverse possession is in possession of the suit property.

On dispossession or discontinuance of possession by the title holder, the defendant submitted that the plaintiffs had failed to discharge their burden of proof of dispossession or discontinuance of possession. The defendant relied on Gabriel Mbui v Mukindia Maranya (supra) for the definition of what constitutes dispossession and discontinuance of possession. The defendant submitted that the plaintiffs failed to prove that they dispossessed the defendant of the suit property or that the defendant discontinued its possession.

On whether the plaintiffs had exclusive use of the suit property, the defendant submitted that that was not the case. The defendant submitted that the evidence on record showed that the plaintiffs were using only a small portion of the suit property and that as far back as 2004, there were already competing claims over the suit property by the interested parties. The defendant submitted that in the circumstances, the plaintiffs were not in exclusive use of the suit property.

The defendant submitted further that in any event, the plaintiffs would not be entitled to the entire land measuring 3 acres comprised in the suit property. The defendant submitted that the evidence before the court that was not rebutted showed that the plaintiffs occupied a portion of the suit property measuring 0.7 acres only.

On whether the interested parties had any legal rights over the suit property, the defendant submitted that they had none. The defendant submitted that the suit property belonged to the defendant and as such the same could not be alienated by the 1<sup>st</sup> interested party to the other interested parties. The defendant urged the court to reject the interested parties claims over the suit property.

In conclusion, the defendant submitted that the plaintiffs had failed to prove their case against the defendant and urged the court to dismiss the claim with costs. The defendant urged the court further to issue orders in its favour to secure its rights of ownership over the suit property.

#### The 5<sup>th</sup> and 6<sup>th</sup> interested parties' submissions.

In their submissions, the 5<sup>th</sup> and 6<sup>th</sup> interested parties submitted that they had no claim over the suit property. The 5<sup>th</sup> and 6<sup>th</sup> interested parties submitted that they occupied a parcel of land known as Q/Kajiado Hill side which was allocated to them by the 1<sup>st</sup> interested party. The 5<sup>th</sup> and 6<sup>th</sup> interested parties submitted that this being a suit for adverse possession, they were improperly joined in the same. The 5<sup>th</sup> and 6<sup>th</sup> interested parties submitted that as interested parties, they were mere observers in the suit. The 5<sup>th</sup> and 6<sup>th</sup> interested parties submitted that since they were not the owners of the suit property, a claim for adverse possession could not lie against them. The 5<sup>th</sup> and 6<sup>th</sup> interested parties urged the court to dismiss the plaintiffs claim against them with costs.

#### Issues for determination.

From the pleadings, the following in my view are the issues that arise for determination in this suit;

1. Whether the plaintiffs have acquired the suit property or any part thereof by adverse possession.
2. Whether the plaintiffs are entitled to the reliefs sought against the defendant and the interested parties.
3. Whether the defendant is entitled to any relief against the plaintiffs and the interested parties.
4. Who should bear the costs of the suit?

#### Determination.

##### Whether the plaintiffs have acquired the suit property or any part thereof by adverse possession.

In Gabriel Mbui v Mukindia Maranya (supra) that was cited by the plaintiffs in their submissions, the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

- 1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.**
- 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.**
- 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.**
- 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.**
- 6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.**
- 7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.**
- 8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.**
- 9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.**
- 10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.**

In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

**“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion) .....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”**

In Wambugu v Njuguna (supra) the court stated as follows:

**“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”**

The burden was on the plaintiffs to establish the elements of adverse possession set out above. On the issue of possession, it was not disputed that the plaintiffs were in possession of the suit property as at the time of filing this suit. What was disputed was the duration of the plaintiffs' occupation and whether the plaintiffs occupied the entire land or only a portion thereof. As I have mentioned earlier in this judgment, the plaintiffs claimed that they entered the suit property in 1975 and as such they had occupied the suit property for 31 years as at the time of bringing this suit. I have carefully considered the evidence placed before the court by the plaintiffs in proof of the duration of their occupation of the suit property prior to the filing of this suit. On this issue, the plaintiffs produced in evidence among others, copies of; a letter from the 1<sup>st</sup> plaintiff's former employer, a receipt for the deposit that was paid by the 2<sup>nd</sup> plaintiff for water connection, water bills, quotation for the supply of eggs to Kajiado District Hospital, payment voucher for the eggs supplied, children's school leaving certificates, a birth certificate for one of the children and the 1<sup>st</sup> plaintiff's employment contract. From my analysis of all these documents, none placed the plaintiffs on the suit property in 1975. The 1<sup>st</sup> plaintiff's letter of employment is dated 5th January, 1987. The letter from the 1<sup>st</sup> plaintiff's former employer states that the 1<sup>st</sup> plaintiff started working on 1<sup>st</sup> October, 1979 and that she used to reside at a place known as Majengo C adjacent to Kajiado Railway Station. The School Leaving Certificates for the plaintiffs' children show that one of the children was admitted to Kajiado Hill Academy in 1991 in class 2 while the other was admitted to the same school in 1992 in class 6. The birth certificate for one of the children that was produced in evidence shows that the child was born in 1979 in Kajiado Township. The quotation for the eggs, supply and payment were all done in 1984. The water connection was undertaken in 1981. There is no reference to the suit property in any of these documents. The receipt for the deposit that was paid for the water connection shows that the water was being supplied to the plaintiffs at Majengo C. The plaintiffs contended in their submissions that the area where the suit property is situated is known as Majengo C. The defendant submitted to the contrary. The 4<sup>th</sup> interested party who told the court that he had known the plaintiffs for a very long time testified in cross-examination by the plaintiff's advocate that the 1<sup>st</sup> plaintiff used to be a nurse while the 2<sup>nd</sup> plaintiff used to be a teacher and that when he first knew the plaintiffs, they were staying inside the Technical School. He stated that from the Technical School, the plaintiffs went to stay in Majengo and that it was from Majengo that the plaintiffs moved to the land owned by the defendant where they were engaged in poultry farming and subsequently to the 1<sup>st</sup> interested party's land. The 4<sup>th</sup> interested party did not tell the court in which year the plaintiffs moved to what it termed the defendant's land.

From the material before the court, I am in agreement with the plaintiffs that the suit property is situated in an area known as Majengo C. No evidence was placed before the court showing that Majengo C and the suit property are separate and distinct places. From the evidence on record, water was connected to the plaintiffs' premises at Majengo C which I have held to be the suit property in 1981. The evidence before the court shows that the plaintiffs were paying for water connected to the suit property as at the time they brought this suit in 2006. From the evidence placed before the court relating to water connection and supply to the suit property, the earliest the plaintiffs would have occupied the suit property would be 1981. Although the defendant denied that the plaintiffs entered the suit property in 1975 as they had claimed, the defendant's witnesses did not tell the court when the plaintiffs entered the suit property according to them. The evidence tendered by DW1 was to the effect that he came into contact with the plaintiffs for the first time in 1995 when the defendant was fencing its parcel of land adjacent to the suit property. It is my finding from the evidence on record that the plaintiffs entered the suit property in 1981. Having occupied the suit property in 1981, the plaintiffs had been in occupation of the property for 25 years as at the time they brought these proceedings.

On the issue as to whether the plaintiffs occupied the entire land comprised in the suit property, I am not satisfied from the evidence on record that that was the case. In her evidence, the 1<sup>st</sup> plaintiff told the court that she was shown the suit property by an agricultural officer in 1975. She stated that the land she was shown was large and had no marked boundaries. It cannot be said therefore that the plaintiffs were occupying land measuring 3 acres from 1975. The land they were shown was neither measured nor surveyed when they took possession. A Valuation Report dated 25<sup>th</sup> July, 2007 that was produced by the plaintiffs in evidence had put the area occupied by the plaintiffs at 4.6 acres. In the report the valuer stated that the plaintiffs had "excess land" measuring about 1.6 acres. The said valuer stated further that the land that was occupied by the plaintiffs comprised of the plaintiff's homestead, area under cultivation and an "open grazing". The valuer observed in the report that the plaintiffs were not keeping any cattle at the time of the valuation. The plaintiffs led evidence that they had fenced the entire land comprised in the suit property. It is not clear whether they fenced 3 acres or 4.6 acres of land. I am not satisfied from the evidence on record that the plaintiffs had occupied the entire land comprised in the suit property from 1975 as they have claimed. A survey that was conducted by the defendant in May, 2007 two months before the plaintiffs valuer inspected the suit property in July, 2007 for the purposes of his report indicated that the plaintiffs were occupying a portion of the suit property measuring 0.7 acres (approximately 0.283 hectares) only which comprised of the plaintiffs' homestead and garden. The plaintiffs took issue with the survey that was carried out by the defendant and contended that it was not prepared by a qualified surveyor. These concerns by the plaintiffs were in my view answered adequately by DW2 who prepared the drawing that was produced in evidence by the defendant. I wish to point out that even the measurements that were contained in the plaintiff's valuation report that I have referred to earlier were not taken by a registered surveyor.

The burden was upon the plaintiffs to prove that they had occupied the entire land comprised in the suit property. In the absence of convincing evidence that the plaintiffs had occupied the entire parcel of land, I am inclined to accept the evidence adduced by the defendant which showed that the plaintiffs occupied only a small portion of the suit property measuring 0.7 acres on which they had their homestead and a garden. The plaintiffs had contended that the drawing that was produced in court by the defendant which put the size of the land occupied by them at 0.7 acres did not capture the land that was being used by them for grazing. As I have mentioned above, in the valuation report that was produced in evidence by the plaintiffs, the valuer stated that there were no cattle being kept by the plaintiffs as at the time of valuation. The plaintiffs did not produce convincing evidence showing that they used to keep cattle on the suit property and the number of such cattle. The 1<sup>st</sup> plaintiff talked about having competed and won an award in the Nairobi Agricultural Show. The document that was produced in proof of her alleged participation in the Show did not indicate the location where the cattle that were entered in the competition came from. The person that was competing was also indicated as Ndirangu & Co. After considering all the evidence before me, it is my

finding that the plaintiff occupied a portion of the suit property measuring 0.7 acres only.

It was not disputed that the plaintiffs entered the suit property without the defendant's permission and that they believed that they had a right to the property the same having been allegedly given to them by the Agricultural Officer Kajiado District. It was also not disputed that the plaintiffs' occupation of the suit property was intended to keep away not only the owner of the suit property but also third parties. It was also not disputed that the acts that were carried out by the plaintiffs on the portion of the suit property that was under their occupation was inconsistent with the proprietary rights of the defendant over the suit property.

On whether the plaintiffs' occupation of the suit property was visible, open and notorious and gave reasonable notice to the owner of the suit property and the public of their exercise of dominion over the property, I am satisfied that that was the case. The plaintiffs and the defendant argued at length on whether the defendant had notice of the plaintiffs' occupation of the suit property. Both parties submitted several authorities from this court and the Court of Appeal on the issue. I must say that none of the authorities cited had facts similar to the facts of this case. It was not disputed that the defendant owned another parcel of land adjacent to the suit property and that the defendant was aware of the plaintiffs' occupation and activities on the suit property. In its submission, the defendant contended that it did not know that the land that was occupied by the plaintiffs belonged to it until this suit was filed in 2006 and as such it could not be taken to have been aware of the plaintiffs' occupation for the purposes of adverse possession prior to 2006. The defendant contended that it was aware that it owned a property known as L.R No. 2836 (the suit property) but it had no idea where it was situated even though it had applied for a provisional title in respect thereof in 1995. The defendant argued further that even the plaintiffs did not know that they were in occupation of the defendant's land.

In Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees(supra), the Court of Appeal stated that:

**“It is important to point out that in adverse possession, it is the knowledge by the owner of the land that there is a trespasser on his land that counts. There must not have to be a meeting of the minds, that is to say, that the owner knows of the trespasser and the trespasser knows of the owner. As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in adverse possession will run.”**

In the same case, the court went further to state as follows:

**“If there is evidence that the trespasser occupied and carried out activities and/or developments on the land claimed which the world could see and it is shown, for instance that the owner lives near the land claimed or visits the area where it is located, the owner cannot feign ignorance that he does not know of the trespass.”**

In Samuel Kihamba v Mary Mbaisi [2015] eKLR, the Court of Appeal stated that:

**“Open and willing dispossession has been interpreted to mean that the owner has knowledge, whether actual or not, or a means of having that knowledge of the occupation of his or her property by the claimant.”**

This means that even if the defendant is given the benefit of doubt that it was aware of the plaintiffs' occupation of the suit property but it did not know that the property that was occupied by the plaintiffs belonged to it, it cannot escape the fact that it had the means of knowing that the land that was occupied by the plaintiffs was owned by it. The evidence before the court shows that the defendant was aware that it owned the suit property. The defendant filed a notice of change of name against the title of the suit property on 29<sup>th</sup> July, 1983 and again on 26<sup>th</sup> September, 1995. On 30<sup>th</sup> July, 1996, the defendant applied for and was issued with a provisional title in respect of the suit property. With all these actions taken by the defendant to secure its interest in the suit property, the defendant cannot convince this court that it was not aware of the location of the suit property. Even if it was not aware of the location of the suit property, it had means in its possession of knowing the location of the property and of the fact that it was occupied by trespassers. The defendant had a title for the suit property. The title had a deed plan. The deed plan showed clearly even to a lay man the location of the suit property on the ground. I find the case of Titus Kigoro Munyi v Peter Mburu Kimani (supra) that was cited by the defendant on this issue distinguishable. In that case, the title holder was not aware of the adverse possessor's occupation of his land. That is not the case here. The defendant's claim is not that it was not aware of the plaintiffs' occupation but of the fact that the property that was occupied by the plaintiffs belonged to it. Due to the foregoing, it is my finding that the plaintiffs occupied a portion of the suit property with the knowledge of the defendant and that the defendant took no action to assert its right over the property or to eject the plaintiffs from the same.

It was not disputed that the plaintiffs' occupation of the suit property was continuous, uninterrupted and unbroken for the duration of the statutory period. It was also not disputed that the defendant had a right to enter the suit property and recover possession of the same from the plaintiffs. I have held above that the defendant was aware of the plaintiffs' occupation of the suit property and the activities that they were carrying out thereon. It follows therefore that the defendant was aware that it had been dispossessed by the plaintiffs of the suit property. The plaintiffs claimed the entire land comprised in the suit property. I have however made a finding that the plaintiffs are only entitled to a portion of the suit property. That portion is identifiable from the evidence before the court. For the foregoing reasons, it is my finding that the plaintiffs have met the threshold for adverse possession claim but only in respect of a portion of the suit property measuring 0.7 acres.

Whether the plaintiffs are entitled to the reliefs sought against the defendant and the interested parties.

From the findings that I have made above, the plaintiffs are entitled to the reliefs sought against the defendant but limited only to a portion of the suit property measuring 0.7 acres under their actual occupation. As concerns the interested parties, it is not clear why the plaintiffs found it necessary to join them in this suit. This was a claim for adverse possession. The interested parties are not the registered proprietors of the suit property. An adverse possession claim could not lie against them. In any event, the plaintiffs had brought an earlier suit against the interested parties that was dismissed by the court. I have also noted that the reliefs sought against the interested parties in the Originating Summons were interlocutory in nature. I wish to add that from the evidence before the court, the 5<sup>th</sup> and 6<sup>th</sup> interested parties are not

occupying the suit property. The parcel of land that they occupy is some distance from the suit property. There is also no evidence that the 4<sup>th</sup> interested party entered the portion of the suit property measuring 0.7 acres that is in the possession of the plaintiffs. For the foregoing reasons, the plaintiffs are not entitled to any reliefs sought against the interested parties.

Whether the defendant is entitled to any relief against the plaintiffs and the interested parties.

This suit was brought by way of an Originating Summons. During directions, none of the parties applied to the court to treat the Originating Summons as a plaint. The suit therefore proceeded as an ordinary Originating Summons. There was no counter-claim brought by the defendant against the plaintiffs and the interested parties. The defendant is in the circumstances not entitled to any relief against the plaintiffs and the interested parties.

Who should bear the costs of the suit?

Costs are awarded at the discretion of the court. In the circumstances of this case, I am of view that since there is no outright winner as between the plaintiff and the defendant, each should bear its own costs. As between the plaintiffs and the interested parties, this was the third time that the plaintiffs had dragged the interested parties to court. I will condemn the plaintiffs to pay the interested parties' costs.

Conclusion.

In conclusion, I hereby make the following orders;

- 1) That the plaintiffs are entitled to be registered as the proprietors of a portion measuring 0.7 acres of all that parcel of land known as L.R No.2836, I.R No. 3076 situated at Kajiado.
- 2) That the defendant's title to the said portion of all that parcel of land known as L.R No.2836, I.R No. 3076 situated at Kajiado measuring 0.7 acres has been extinguished.
- 3) That the defendant shall cause all that parcel of land known as L.R No.2836, I.R No. 3076 situated at Kajiado to be subdivided within a period of 90 days from the date hereof and shall transfer to the plaintiffs a portion thereof which is occupied by the plaintiffs measuring 0.7 acres which portion the plaintiffs shall hold as leasehold proprietors on the same terms as the head lease held by the defendant for the remainder of the term of the lease unless extended.
- 4) The plaintiffs shall meet the costs of the subdivision and transfer of the said portion of L.R N.2836, I.R No. 3076 situated at Kajiado to the plaintiffs.
- 5) That as between the plaintiffs and the defendant each party shall bear its own costs.
- 6) The plaintiffs' claim against the interested parties is dismissed with costs to the interested parties.

**Dated and Delivered at Nairobi this 17<sup>th</sup> Day of December 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read virtually through Microsoft Teams Video Conferencing platform in the presence of;**

Mr. George Gilbert for the Plaintiffs

Ms. Onyango h/b for Mrs. Wetende for the Defendant

N/A for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties

N/A for the 4<sup>th</sup> interested party

N/A for the 5<sup>th</sup> and 6<sup>th</sup> Defendants

Ms. C. Nyokabi-Court Assistant