



**Musau v Mutata & another (Environment & Land Case E102 of 2021)
[2023] KEMC 109 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEMC 109 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
ENVIRONMENT & LAND CASE E102 OF 2021
CN ONDIEKI, PM
NOVEMBER 23, 2023**

BETWEEN

JOHNSON MUNYAO MUSAU PLAINTIFF

AND

MUTUNGA MUTATA 1ST DEFENDANT

MULI MUTATA 2ND DEFENDANT

JUDGMENT

1. A registered proprietor of a parcel of land is the absolute and indefeasible owner thereof, subject only to encumbrances, easements, restrictions, wayleaves, airways, restrictions, conditions contained or endorsed on the certificate, overriding interest and matrimonial rights and and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved by the opposing party. In that position, the registered proprietor enjoys proprietary rights including the right to possession and the right to admit or licence any person thereinto. In this connection, any person who unlawfully, without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on that land without the consent of the proprietor commits trespass.
2. Adverse possession is one of the exceptional circumstances of land acquisition. It falls under the cluster of (unregistered) overriding interests to which any registered land is subject. It is a prescriptive right, culminating from the combined legal effect of sections 7, 13, 17 and 38 of the *Limitation of Actions Act*. The way to adverse possession is paved when a person takes possession of land of another without force or stealth or licence/consent of the title holder; openly or publicly asserting rights over it; and the title holder omits or neglects to take action against the adverse possessor - in assertion of his title - for an uninterrupted period of twelve (12) years. The acquisition can only be actualized through a Court action.



Part II: The Plaintiff's Case

3. Vide a Plaint dated 6th October 2021 and filed on 8th October 2021, the Plaintiff brought this action against the Defendants seeking Judgment for: (1) An order of injunction restraining the Defendants, their agents, workers, servants or anybody howsoever claiming under them from trespassing, remaining on, cultivating or in any other manner dealing with L.R. No. Mitaboni/Mutituni/1823. (2) An eviction of the Defendants from L.R. No. Mitaboni/Mutituni/1823. (3) Costs and interest of the suit. (4) Any other relief which this Court deems fit and just to grant.
4. The Plaintiff claims that he is the registered proprietor of the parcel of land known as Mitaboni/Mutituni/1823 (hereinafter "the suit property") and in this connection, entitled to possession thereof. The Plaintiff avers that in or about 2012, the Defendants wrongfully entered and took possession of the suit property thereby trespassing. The Plaintiff avers that the Defendants have since committed acts of wastage and destruction by inter alia, uprooting trees. The Plaintiff claims that the Defendants do have any proprietary interest on the suit property and that they have refused to vacate despite numerous demands and warnings issued by the Plaintiff. The Plaintiff thus claims that he has been deprived of his right to use and enjoy quiet possession of the suit property and thereby suffered loss and damage.
5. In his Reply to the Amended Joint Statement of Defence and Counterclaim dated 2nd June 2023, the Plaintiff denies the averments of the Defendants chiefly regarding adverse possession.
6. At the hearing of the Plaintiff's case, the Plaintiff (PW1) adopted his witness statement dated 6th October 2021 and filed together with the said Plaint, as his evidence-in-chief. In his said statement, the Plaintiff largely rehashes the facts averred in the Plaint. In addition, PW1 states that he bought Mitaboni/Mutituni/1823 (the suit property) and Mitaboni/Mutituni/2424 from one Ngii Kasyoka (deceased) and David Kasyoka in 1990. The Plaintiff further states that he paid the full purchase price for the two parcels of land and secured transfer thereof to his name. The Plaintiff testified that it is not true that the grandfather and father of the Defendants were buried there. He testified that it was the Defendants' mother who was buried there with the Plaintiff's consent, referring to the Defendants' list of documents serial 4. He testified that they have never challenged the title. In buttressing his claim, the Plaintiff exhibited the following documents: (i) demand letter as the Plaintiff's Exhibit 1; (ii) title deed over the suit property as the Plaintiff's Exhibit 2; (iii) an official search over the suit property as the Plaintiff's Exhibit 3; and (iv) the surveyor's report dated 16th May 2012 as the Plaintiff's Exhibit 4.
7. In cross-examination, the Plaintiff stated that he bought the land from Ngii Kasyoka at a purchase price of Kshs. 200,000. He stated that he did not have the sale agreement in Court. He stated that the sale agreement was done by retired Justice Makau when he was practicing as an advocate. He stated that he paid the purchase price through the said retired Justice Makau. He stated that there was an LCB consent. He stated that he secured a title to the suit property in 1994. He stated that he secured services of a surveyor to identify to the parties the boundaries between the Defendants' land and his suit property. He stated that their mother was buried on the property when the area chief requested him to consent. He admitted that there was a case and Ngii Kasyoki won the case. He stated that he was not aware of any caution. He stated that there are houses of the Defendants on the suit property.
8. In re-examination, PW1 stated that the caution was lifted by a Court order as indicated in the green card.
9. PW2, David Kasyoka, adopted his witness statement dated 6th October 2021 and filed together with the Plaint, as his evidence-in-chief. In his said statement, PW2 states that his mother, Ngii Kasyoka, was the registered proprietor of the suit property and she sold the suit property to the Plaintiff in 1990. He states that the Defendants have no claim of right whatsoever over the suit property. He



states that in November 1988, the husband of Muniyiva Matata one Matata Mutua passed way, and a dispute arose on where he should be buried. He states that the dispute was resolved by the then Chief of Mutituni Location who pleaded with Ngii Kasyoka, PW2's mother, to permit burial on the suit property on humanitarian grounds. He states that the Chief then wrote a letter dated 3rd November 1988 warning the 2nd Defendant against carrying out any activity on the suit property. PW2 finally states that the Defendants' step-mother, one Nthike Mutua, sued his mother, Ngii Kasyoka in Civil Suit Machakos PMCC Number 81 of 1988 and the suit was dismissed, and order of eviction issued against the said Nthike Mutua. He stated that the Defendants' father had sold his whole parcel land which was bordering the suit property. He stated that because they had no land, the chief permitted burial of their father on the suit property on compassionate grounds.

10. In cross-examination, PW2 stated that the Defendants' mother was buried on their side of the land. He stated that there was a sale agreement between his mother and the Plaintiff. He stated that their father was buried there because his house still stood on the suit property. He stated that the Defendants have their houses on the suit property.
11. In his written Submissions dated 7th August 2023 and filed on 10th August 2023, learned Counsel Mr. Mutinda instructed by the Firm of Mulwa & Mulwa Advocates representing the Plaintiff, proposes three issues for determination as follows: (i) Whether the Plaintiff is the registered and lawful owner of the parcel of land known as L.R. No. Mitaboni/Mutituni/1823; and (ii) whether the Defendants have acquired the ownership of the Land by of Adverse Possession.
12. Relating to the question whether the Plaintiff is the registered and lawful owner of the parcel of land known as L.R. No. Mitaboni/Mutituni/1823, it is submitted that the Plaintiff has proved on a balance of probabilities that he is the legal and registered of the suit parcel of land, having demonstrated that he bought the same from one Ngii Kasyoka (deceased) who duly transferred it into his name. It is submitted that the Green Card over the said parcel of land indicates that the said Ngii Kasyoka was the registered owner of the suit parcel of land as from 20th August 1984 and the position remained the same until she transferred the same to the Plaintiff on 19th September 1990. It is submitted that the Title Deed, the Certificate of Official Search from the Land Registry and the Green Card clearly demonstrate that the Plaintiff is the owner of the suit property. Reliance is placed on sections 24 (a) and 26 of the [Land Registration Act](#), No. 3 of 2012.
13. In this connection, it is submitted that the Defendants did not prove any of the two exceptions and in the circumstances, the Plaintiff remains the absolute owner of the suit property with exclusive rights thereto. It is further submitted that the Defendants failed to prove the claim of fraud, placing reliance upon Dr Joseph N.K Arap Ngok vs. Justice Moiyo Ole Keiwua & 5 Others CA No. 60 of 1997; Kiplangat Shelisheli Mutarakwa vs. Joseph Rotich Kones [2018] eKLR; and Margaret Njeri Wachira v Eliud Waweru Njenga [2018] eKLR, to fortify this proposition.
14. Relating to the question whether the Defendants have acquired the ownership of the Land by of Adverse Possession, it is submitted that section 38 (1) of the [Limitation of Actions Act](#) outs the jurisdiction of this Court from determining a claim anchored on adverse possession. It is reasoned that jurisdiction lies in the superior Court charged with determining environment and land matters as envisaged under Article 162 (2)(b) of [the Constitution](#). It is further submitted that Order 37, Rule 7 of the Civil Procedure Rule provides that "An application under section 38 of the [Limitation of Actions Act](#) shall be made by originating summons." In this regard, it is submitted that the Defendants having approached the Court via a Counterclaim for prayer for adverse possession of land, the same is defective.



15. In the alternative, it is urged that the Defendants have failed to make a case for adverse possession citing the Court of Appeal holding in *Mate Gitabi v. Jane Kabubu Muga & Others* (Nyeri Civil Appeal No. 43 of 2015 (Unreported) as quoted in approval in the annexed case of *Joseph Kithinji M'Eringo & another v. Christine N. Mbiti* [2021] eKLR), where the elements of adverse possession were laid down. In this regard, it is submitted that the Defendants' claim to have been in occupation of the land since 1958 and 1964 respectively was not established, having failed to bring any other witness apart from the 1st Defendant to corroborate this evidence. It is thus submitted that it remained the 1st Defendant's word against the Plaintiff's word. In this connection, it is submitted that the Plaintiff and the Defendants confirmed that the suit property has had disputes since 1970s and the matter has been in different Courts and quasi-judicial bodies. It is submitted that the Plaintiff has tried several times to have the Defendants leave his land but in vain and he wrote them a Demand Letter dated 25th September 2012 (Pexh No. 1) to vacate the suit land, but they adamantly declined to do so. It is submitted that the Machakos County Surveyor also visited the land on 15th May 2012, and he states in his report (PExh. No. 4) that he found some strangers who were claiming that the land is theirs but with no documents to prove the same. It is thus urged that this is a clear indication to show that the Plaintiff has several times tried to have the Defendants vacate the land, but the Defendants have trespassed and occupied the same by force. It is submitted that the Defendants are trying to grab the Plaintiff's land and as per the above stated authority, one cannot claim ownership of land by adverse possession if you are possessing the same by force.
16. On the front of the period of occupation, it is urged that the Defendants cannot claim to have uninterrupted 12 years in possession of the suit land. It is argued that the dispute on the issue of possession of the land has been there since 1980s between Ngii Kasyoka and the Defendants' father and between the Plaintiff and the Defendants herein and that the Plaintiff raised the issue of ownership of the subject land via the demand letter and the surveyor's report. It is urged that it is now 11 years since 2012 when the demand letter was sent to the Defendants and the surveyor's report prepared. It is submitted that the Defendants filed their Counterclaim on 8th May 2023, but the Defendants failed to show how they have been in uninterrupted possession of the parcel of land for 12 years. They have not satisfied this ground. In this respect, reliance is placed upon *Mombasa Teachers Co-operative Savings & Credit Society Limited vs. Robert Muhambi Katana & 15 others* [2018] eKLR.
17. Finally, the Plaintiff urges this Court to dismiss the defence and Counterclaim with costs.

Part III: The Defendant's Case

18. In their Amended Joint Statement of Defence and Counterclaim dated 8th May 2023 and filed on 11th May 2023, the Defendants denied every material averment in the Plaintiff.
19. In their said Amended Counterclaim, the Defendants claim that they are sibling and son of the late Mutata Mutua who died in 1988 and that they are grandchildren of Mutua Mweu (deceased). They aver that the suit property is part of the ancestral land, which was handed down from Mweu Nthuli, their great grandfather. They aver that their great grandfather, grandfather and father were buried on the suit property. They aver that they were born on the suit property in 1958 and 1964 respectively and they were raised on the suit property. They aver that they have permanently settled on the suit property. They aver that the suit property was subject of land adjudication process which initially comprised plot numbers 1811 and 1824. They aver that the suit property was subject of litigation in Machakos Magistrates' Court Civil Case Number L23 of 1980 between Ngii Kasyoka vs. Mutata Mutua & Munguti Mutua, and a decision was rendered on 30th June 1983 in favour of Ngii Kasyoka. They aver further that the suit property was subject of litigation in Machakos Magistrates' Court Civil



Case Number L4 of 1982 between Mutata Mutua & Munguti Mutua vs. Ngii Kasyoki, and a decision was rendered on 30th June 1983 in favour of their father.

20. They aver, therefore, that Ngii Kasyoki was not the proprietor of the suit property, and she could not thus pass good title to the Plaintiff and therefore the same was registered fraudulently in the name of the Plaintiff. The particulars of fraud include that the Plaintiff misrepresented that he had bought it from Ngii and registered the said property without proper documentation.
21. In the alternative, the Defendants aver that they have lived in the property for over 40 years without the permission of the Plaintiff and thus entitled to an order of adverse possession. In this connection, the Defendants seek Judgment for: (aa) A permanent injunction restraining the Plaintiff either by himself or his agents, servants and surrogates or any other person or persons acting or purporting to act at the behest of the Plaintiff from interfering with the Defendants right of occupation and use of the title number Mitaboni/Mutituni/1823. (bb) A declaration that the Defendants are the legal owners of the suit land having acquired by way of adverse possession. (bbb) An order of cancellation of the registration of title number Mitaboni/Mutituni/1823 in favour of the Defendants and substitution thereof with the Defendants as the lawful and rightful owners of the said title. (bbbb) An order directing the Land Registrar Machakos to rectify the RLA register or any other germane land register currently in force to give effect to prayer (bbb) above. (c) Costs of the suit and Counterclaim.
22. At the hearing of the Defendants' case, the 1st Defendant adopted his witness statement dated 8th May 2023, as his evidence-in-chief. In his said statement, the 1st Defendant largely rehashes the facts as averred in the Defence and Counterclaim. In addition, the 1st Defendant states that the second is his brother and they are both sons of the late Mutata Mutua who was the owner of plot 1811 in Mitaboni Mutituni, having inherited it from the late father Mutua Kisenge wa Mweu. He states that in 1978, Ngii Kasyoka and her son David Kasyoka filed a case in the Land Adjudication Office, Objection Number 291, where it was decided that each should settle his/her own side of the land. He states that in 1980, Ngii Kasyoka filed a case against the late Mutata Mutua and his brother Munguti in Machakos Civil Case Number L23 of 1980 and Judgment was entered in favour of Munguti Mutua in respect to plot number 1824 now known as Mitaboni/Mutituni/2424. It is stated that in 1982, the late Mutata Mutua filed an appeal against the Judgment, Civil Appeal Number L4 of 1982. He states that on 30th June 1983, the Court referred the matter to elders who decided that the late Mutata Mutua was the rightful owner of plot 1811, now known as Mitaboni/Mutituni/1823. It is stated that the Court adopted the ruling of the elders as its Judgment. In buttressing their Defence and Counterclaim, the 1st Defendant exhibited the following documents: (i) authority to plead as the Defendants' Exhibit 1; (ii) a copy of the title as the Defendants' Exhibit 2; (iii) a copy of the green card as the Defendants' Exhibit 3; (iv) copies of proceedings of SRMCC Appeal Number L4 of 1982 as the Defendants' Exhibit 4; (v) photographs as the Defendants' Exhibit 5; and (vi) a certificate of production of electronic evidence as the Defendants' Exhibit 6.
23. In cross-examination, the 1st Defendant stated that the DO decided that the suit property belonged to his late father. The 1st Defendant stated that the decision bears the particulars of the land which was under dispute. He stated that his father and grandfather were buried in the suit property. The 1st Defendant stated that he was aware that Ngii Kasyoka was registered as the proprietor. He stated that he was not aware that Ngii had transferred to the Plaintiff herein in 1994. He admitted that no succession was done when his grandfather and father died. He stated that he is not an administrator of the estate of his late father. He stated that he had evidence of fraud on the part of the Plaintiff. He stated that he was not aware whether Ngii appealed against the decision or not.
24. In re-examination, DW1 stated that he was not aware of any appeal against his late father.



25. In his written Submissions dated 24th August 2023 and filed on even date, learned Counsel Mr. Langalanga instructed by the Firm of Langalanga & Company Advocates representing the Defendants, has proposed three issues for determination as follows: (i) whether the Plaintiff has proved his case as per the required standard on balance of probabilities; (ii) whether the Defendants have made a case for adverse possession to warrant rectification of the register by cancellation of the Plaintiff's name as the registered proprietor of the suit property and including the Defendants as the registered proprietors; and (iii) costs.
26. Regarding the question on whether the Plaintiff has proved his case as per the required standard on balance of probabilities, it is submitted that the Plaintiff has failed to reach the standard of proof. In this connection, it is submitted that the Plaintiff failed to exhibit the sale agreement; evidence of payment; transfer documents, and consent from the LCB. For the Defendants, it is submitted that the title to the suit property was thus acquired unprocedurally, placing reliance upon Esther Njiru & another vs. Leonard Gatie [2014] eKLR; and Dima Management Limited vs. County Government of Mombasa, Supreme Court Petition Number 8 (E010) of 2021, on circumstances when the sanctity of title cannot be upheld.
27. On the question whether the Defendants have made a case for adverse possession to warrant rectification of the register by cancellation of the Plaintiff's name as the registered proprietor of the suit property and including the Defendants as the registered proprietors, it is submitted that all the elements necessary for an order of adverse possession have been met by the Defendants, arguing that they have been in occupation for approximately 60 years peacefully, openly and continuously and even buried their kin on the property. Reliance is placed upon section 7 of the Limitation of Actions Act and Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui [2017] eKLR.
28. Finally, the Defendants urge this Court to dismiss the claim with costs.

Part Iv: Issues For Determination

29. Commending themselves for determination - gleaned from the Plaint; the Amended Statement of Defence and Counterclaim; the Reply to the Amended Statement of Defence and Counterclaim; and the rival written Submissions - are six questions framed as follows:
 - i. First, whether on a preponderance of probabilities, the Plaintiff has proved that he is the bona fide owner of the parcel of land known as Mitaboni/Mutituni/1823 (hereinafter "the suit property").
 - ii. Second, whether on a preponderance of probability, the Plaintiff has proved that the Defendants have trespassed to the suit property.
 - iii. Third, whether this Court has jurisdiction to hear and determine claims on adverse possession.
 - iv. Fourth, whether the procedure adopted by the Defendants of filing a Counterclaim instead of an Originating Summons is fatally defective.
 - v. Fifth, whether on a preponderance of probability, the Defendants have made a case for adverse possession.
 - vi. Sixth, which party should bear the costs of this suit?

Part V: Analysis of the Law; Examination of facts; Evaluation Of Evidence And Determination

30. This Court now embarks on analysis, interrogation, assessment and evaluation of each of the five questions, seriatim.



(i) Whether, on a preponderance of probability, the Plaintiff has proved that he is the bona fide owner of the parcel of land known as Mitaboni/Mutituni/1823 (hereinafter “the suit property”)

31. To succeed in an action for trespass, first, the onus is on the Plaintiff to prove on a balance of probabilities that (s)he is either the bona fide owner or proprietor of the suit property or that (s)he is in or entitled to immediate possession of the suit of the suit property or both; and second, that the sued party has intruded and/or occupied and/or remained in the suit property without any justifiable cause. In *M’Mukanya vs. M’Mbijiwe* (1984) KLR 761, Kneller JA (as he then was) laid the ingredients of trespass in the following words: “The only issue in this second appeal is whether or not the Magistrate and the judge erred in law in finding M’Mukanya and Nyamu were trespassers? M’Mbijiwe could, and may be should, have asked for a declaratory judgment but he brought an action of trespass to land to determine the title to the large plot 58 in this market. He has to prove on the balance of probabilities M’Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M’Mbijiwe must prove he, and not M’Mukanya and Nyamu, had the right to immediate and exclusive possession of it which is different from ownership.”
32. Similarly, in the Court of Appeal decision in *Charles Ogejo Ochieng v Geoffrey Okumu* [1995] eKLR, Tunoi, Akiwumi & Lakha, JJA (as they then were) took a view that “Trespass is an injury to the possessory right, and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it, or a person who is deemed to have possession at the time of the trespass.” See also *Moya Drift Farm Ltd vs. Theuri* [1973] 1 EA 114, per Sir William Duffus P, Spry VP and Lutta JA (as they then were); *Ashby v White* [1703] 2 Ld Raynd 938; *Basely v Clarkson* [1682] 3 Lev 37; *Hewlitt vs. Bickerton* [1947] CLC 10504; *Conway vs. Wimpey & Co (No 2)*, [1951] 2 KB 266; and *PME & another v PNE* [2019] eKLR.

Determination

33. It was common ground – having been admitted by the Defendants – the fact that the suit property was and is still registered in the name of the Plaintiff.
34. In their Counterclaim, the Defendants have attacked the title on grounds that the Plaintiff obtained it unprocedurally and fraudulently.
35. In that context, the Torrens System of land registration now adopted in Kenya imported the principle of sanctity of title – now housed in section 26(1) of the [Land Registration Act](#) - renders the registered proprietor the absolute and indefeasible owner thereof, subject only to such encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved. See also *Breskvar v Wall* [1971] 126 CLR, per Barwick CJ; *Gibbs v Messer* (1891) AC 254; *David Peterson Kiengo & 2 Others vs. Kariuki Thuo* [2012] eKLR, per Prof. Ngugi, J.; *Joseph N.K. Arap Ng’ok v Moijo Ole Keiwua & 4 others* [1997] eKLR, per Tunoi, Shah and Pall, JJA (as they then were); *Charles Karathe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others* [2013] eKLR, per Onyango Otieno, JA (as he then was), Gatembu and Mohammed, JJA; *Hannah Wangui Ithebu & Other vs. Joel Nguigi Magu* [2005] eKLR, per Visram, J. (as he then was); *Nairobi Permanent Markets Society & other eleven vs. Salima Enterprises and NCC Appeal No. 185 of 1997*; *Dinshaw Byramjee & Sons Ltd v A.G. of Kenya* [1966] E.A. 198; *Frazer v Walker* [1967] 649 ALL E.R.; *Shimoni Resort v Registrar of Titles & 5 others* [2016] eKLR (per Okongó, J); *Njilux Motors Ltd v KP&L & Another Civil Appeal Number 206 of 1998*; *Russel & Co. Ltd vs. Commercial Bank of*



Africa Ltd (1986) KLR 633; and Wreck Motors Enterprises v Commissioner of Lands Nairobi, Civil Appeal Number 71 of 1997 (Unreported).

36. Having considered the Plaintiff's evidence and chiefly the title deed (exhibited as the Plaintiff's Exhibit 2), this Court, in accord with section 26 of the Land Registration Act, 2012, infers a rebuttable presumption in favour of the Plaintiff that the said title deed is prima facie evidence that the Plaintiff is the absolute and indefeasible owner of the suit property. In that regard, it is the finding of this Court that the Plaintiff discharged his burden of proof. In this connection, the evidential burden shifted to the Defendants to prove that the said title is defeasible on account of having been acquired unprocedurally and fraudulently, as asserted by the Defendants.
37. Whereas this Court finds the Plaintiff's compelling in this regard, this Court finds the Defendants' evidence unfortified. Considering the standard of evidence required to prove fraud, which should be above balance of probabilities but below proof beyond reasonable doubt, the assertions are unsupported by evidence which can muster this threshold.
38. The foregoing reasons yield a conclusion that the Plaintiff has, on a preponderance of probabilities, established that he is the bona fide owner of the suit property.

(ii) Whether on a preponderance of probability, the Plaintiff has proved that the Defendants have trespassed to the suit property

39. Further to demonstrating that the Plaintiff is either the bona fide owner or proprietor or entitled to immediate possession thereof, to succeed in an action for trespass, the Plaintiff has to prove trespass. And once a person proves that (s)he is the bona fide owner or proprietor of a parcel of land, then subject to the encumbrances; easements; wayleaves; airways; restrictions; conditions contained or endorsed in the certificate; overriding interests and matrimonial rights, the proprietor attains proprietary rights including the right to admit or licence any person thereunto. See section 25 read with sections 7(4) (c); 26; 36(10); 47; 56(2); 62; 67; 76; 77; 78; 94; 98; 99; 100 and 104 of the Land Registration Act. See also sections 20; 21; 23; 24; 26; 28; 32; 35; 36; 133C (6); 143; 144 and 148 of the Land Act. See also the Wayleaves Act.
40. The Trespass Act, Cap 294 of the Laws of Kenya, does not directly define trespass. The general meaning of trespass can be gathered from sections 3; 4; 5; 6 and 8 of the Trespass Act. Gathering from the said sections, it amounts to trespass if any person, unlawfully, without a reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on that land without the consent of the proprietor. The term "occupier" as applied in the Trespass Act means the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively. And "private land" as applied by the Trespass Act means land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or land in respect of which a claim to an estate in fee, or to a lease, has been made but disallowed or refused; or cultivated land or enclosed land; or any forest area; or railway land.
41. Further, the general meaning thereof can be gleaned from section 152A of the Land Act which prohibits unlawful occupation of land by providing that "A person shall not unlawfully occupy private, community or public land." In addition, the general meaning of trespass to land according to Clerk & Lindsell on Torts, 18th Edition, at page 923, is "any unjustifiable intrusion by one person upon the land in the possession of another."



42. Besides, the scholarly text of the learned authors Clerk & Lindsell on Torts, 18th Edition, at Paragraph 18-01, defines trespass to mean “Any unjustifiable intrusion by one person upon land in possession of another.”
43. In *La Nyavu Gardens Limited vs. Wilson Munguti Mbithi alias Kavuti & 2 others* [2012] eKLR, Makhandia, J. took a view that any unauthorized entry into another person’s land constitutes trespass.
44. Originally trespass *quare clausum fregit* in Latin, trespass is a Latin terminology which loosely means ‘why he broke the close’ but now anglicized. Henry Black, in his magnum opus work known as *The Black’s Law Dictionary*, 8th Edition, at page 173 defines it as follows: “...1. A person’s unlawful entry on another’s land that is visibly enclosed. This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another’s unlawful entry on one’s land that is visibly enclosed...”
45. Besides, there is another typology of trespass, *eiusdem generis*, known trespass *ab initio*. This arises when a person was granted access to land but abused the right in which case the trespass is deemed to run from the date the trespasser was allowed access. In *The Six Carpenters’ Case* [1572] 77 ER 695, six carpenters entered a tavern and served wine for which they paid. They were afterwards, at their request, served bread and more wine, which they refused to pay for. An action for trespassing was brought against them. It was held that when an entry, authority or licence is given to anyone by the law and he abuses it, he shall be trespasser *ab initio*, but not where entry, authority or licence is given by the party. The elements of a trespass *ab initio* are: (a) the authority abused must be an authority granted by law and not by an individual; and (b) there must be some positive act of misconduct, and not a mere omission or neglect of duty. In *McGuire vs. United States*, 273 U.S. 95 (U.S. 1927), a search warrant was issued to revenue agent officers to enter and search the premises possessed by McGuire. The officers acting under the warrant searched the premises, discovering several gallons of intoxicating liquor which they seized. They destroyed the liquor without the Court order or other legal authority except one quart of whisky, which they retained as evidence. The Court held that the officers by destroying the seized liquor became trespassers *ab initio*. Thus, they lost the protection and authority conferred upon them by the Warrant of Search. In the USA, the tort of trespass *ab initio* has been held in the following decisions also: *Sheftall v Zipperer*, 133 Ga. 488 (Ga. 1909); *Louisville & N. R. Co. v Barte*, 204 Ala. 539 (Ala. 1920); *Brite v Pfeil*, 334 S.W.2d 596 (Tex. Civ. App. San Antonio 1960); *Tubbs v Tukey*, 57 Mass. 438 (Mass. 1849); and *Gibson v Holmes*, 78 Vt. 110 (Vt. 1905). Locally, see *George Mburu Koigi v Francis Kienjeku Koigi* [2006] eKLR.
46. What are the ingredients of trespass? There is no statutory clarity on the ingredients of trespass. According to the said *Black’s Law Dictionary*, 8th Edition, at page 173, the tort of trespass has two ingredients as follows: (a) entering upon land in the possession of another; (b) remaining on the land or placing or projecting any object upon it. Therefore, in instances where the Plaintiff is entitled to possession only, but the Plaintiff is not the owner thereof, trespass in this context is a violation of the right to possession, the Plaintiff should prove on a balance of probabilities two ingredients. First, that the Defendant entered the suit property while it was in possession of the Plaintiff. Second, that the Plaintiff had the right to immediate possession. In this connection, in *M’Mukanya vs. M’Mbijiwe* (1984) KLR 761, Kneller JA (as he then was) laid the ingredients of trespass in the following words: “... He has to prove on the balance of probabilities M’Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M’Mbijiwe must prove he, and not M’Mukanya and Nyamu, had the right to immediate and exclusive possession of it which is different from ownership.”



47. However, in instances where the Plaintiff is the owner, trespass in this context is the violation to the right to ownership and in this case, possession is irrelevant. If possession was to be asserted in such a case, then the principle of indefeasibility of title will be defeated since an owner who does not occupy his property will be dispossessed thereby. In *Moya Drift Farm Ltd vs. Theuri* (1973) 1 EA 114, the Appellant sued the Respondent claiming that it was the registered owner of certain land on which the Respondent was trespassing and who had refused the Appellant entry. The Appellant claimed eviction and a perpetual injunction restraining trespass by the Respondent. At the trial Court (High Court), Miller, J. held that although the Appellant was the registered owner of the suit property, the Appellant had failed to prove that it was in possession of the suit property and thus the claim of trespass was unsustainable. The Appellant proffered an appeal to the Court of Appeal contending that possession was unnecessary in view of the Registration of Titles Act. Sir William Duffus P, Spry VP and Lutta JA (as they then were) held that the Appellant was the absolute and indefeasible owner of the land and was entitled to take proceedings in trespass and in the context of a dispute between neighbouring landowners, a perpetual injunction would be granted. Spry VP (as he then was) had this to say in his leading Judgment and Sir William Duffus P (as he then was) & Lutta, J.A. concurred: “These remarks appear to have arisen from a submission by the Advocate for the Respondent in the High Court before evidence was called, that no cause of action was shown in the Plaint as amended, because the Appellant company had to show that at the time of the “alleged act” it was in lawful occupation, which was not the case, as according to the Plaint the alleged wrong was in August 1966, while the Appellant company obtained title to the land in October 1967... The Plaint recites the Respondent’s entry on the land in 1966, but it is quite clear, reading the Plaint as a whole, that it is complaining of a continuing trespass and relates to the period from 25 October 1967, when the Appellant company informed the Respondent that it was the registered owner of the land and ordered him to vacate it, to the filing of the suit. As regards the present proceedings, the date of the Respondent’s entry on the land is immaterial, since it was before the Appellant company had any interest in it, but if the Appellant company is correct in its submission that the Respondent entered as a trespasser, he continued to be such, since it is not suggested that he acquired any lawful title or right to the land... I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has taken physical possession.”
48. For a richer and vibrant contextualization of the elements of trespass, a few prototypes can suffice. The tort of trespassing to land is actionable per se (meaning that it is actionable notwithstanding absence of actual loss or damage or harm). For this proposition, see *Ashby vs. White* (1703) 2 Ld Raynd 938. However, it must be proved that the intrusion was voluntary or negligent. It amounts to trespass if when mowing your land, you heap grass by mistake on the Plaintiffs adjoining land. See *Basely vs. Clarkson* (1682) 3 Lev 37. It amounts to trespass if you enter another’s land to repair your own buildings. See *Hewlitt vs. Bickerton* (1947) CLC 10504. Knowledge or lack of knowledge that you’re a trespasser is immaterial. Negligence may count in this case. See *Conway vs. Wimpey & Co* (No 2), (1951) 2 KB 266). After divorce, although not registered as the proprietor, a former spouse cannot be liable of trespass since she holds an interest in matrimonial property. See *PME & another vs. PNE* (2019) eKLR.
49. In support of this averment, the Plaintiff adduced oral evidence to the effect that the Defendants have without colour of right or reasonable or justifiable cause, illegally entered the suit property, erected dwelling houses where their families live and that they till the suit property and that they so remain



to the present day. The Defendants did not deny this fact and in fact, confirmed that their dwelling houses indeed stand on the suit property and their families till and live on the suit property.

50. This Court thus concludes that the Plaintiff has proved - on a preponderance of probabilities - that the Defendants have trespassed to the suit property.

(iii) Whether this Court has jurisdiction to hear and determine claims on adverse possession

51. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit, consider and determine a legal matter on an area of responsibility defined by *the Constitution* and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of *the Constitution* of Kenya and those set out under section 3 of the *Judicature Act*. See the locus classicus on this subject namely the Court of Appeal decision in Owners of Motor Vessel “Lillian S” vs. Caltex Oil (K) Ltd [1989] KLR 1, per Nyarangi, JA.
52. Jurisdiction is not a mere procedural technicality. It flows from either *the Constitution* or legislation or both. See the Supreme Court decisions in Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; and In the Matter of Interim Independent Electoral Commission [2011] eKLR.
53. Since Jurisdiction is everything, the Court must inquire into its jurisdiction before Judgement is rendered. Without it, a Court has no power to make one more step and should instead down tools in respect of the matter before it, the moment it holds the view that it lacks it. See the said Owners of Motor Vessel “Lillian S” case.
54. Article 2(2) of *the Constitution* provides that no person may claim or exercise State authority except as authorised under this Constitution. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred either by statute or legislation of both, but not by implication. Power should not be expanded through judicial craft. See Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Warburton v Loveland [1831] 2 DOW & CL. (HL) at 489; Lall v Jeyppee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.
55. Article 162 of *the Constitution* enshrines the system of Courts in Kenya. Article 162(4) of *the Constitution* provides that subordinate Courts are the Courts established under article 169 of *the Constitution* or alternatively, those Courts established by Parliament in accordance with Article 169.
56. Article 169 sets out the subordinate Courts referred to in Article 162(4) thereof. In particular, Article 169(1)(a) establishes Magistrates Courts. Unlike superior Courts whose jurisdiction is primarily set out in *the Constitution* and other ancillary jurisdiction found in legislation like the *Judicature Act*, in the case of Magistrates’ Courts, *the Constitution* has donated the power to define the jurisdiction thereof to Parliament Courtesy of Article 169(2) thereof.
57. In line with the command of Article 169(2) of *the Constitution*, Parliament repealed the *Magistrates’ Courts Act*, Cap 10 of the Laws of Kenya in 2015 and re-enacted it as the *Magistrates’ Courts Act*, 2015. In the said re-enacted Act, the Preamble reads thus “AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of *the Constitution*; to confer jurisdiction, functions and powers



on the Magistrates' Courts; to provide for the procedure of the Magistrates' Courts, and for connected purposes". The pre-ambule clearly indicates that the enactment is to actualize among other intentions, the command of *the Constitution* contained in Article 169 (2) of *the Constitution*. It is in line with that command that Parliament housed the jurisdiction of Magistrates' Courts and sections 6, 7, 8, 9 and 10 of this Act is dedicated to the jurisdiction of Magistrates. Section 9(a) thereof provides for jurisdiction on inter alia environment and land.

58. Whereas section 9(a) and 26 of the Environment and Land Court may not be contentious, section 38(1) of the *Limitation of Actions Act* remained contentious until recently. It provides as follows: "38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land." {Emphasis supplied}
59. The pertinent question germane to the legal challenge raised by learned counsel representing is whether a Magistrate Court has jurisdiction to determine claims of adverse possession. This is not a novel question. It has been tackled by superior Courts.
60. How then have the superior Courts construed section 38(1) of the *Limitation of Actions Act*? It was the principal issue in Patrick Ndegwa Munyua vs. Benjamin Kiiru Mwangi & another [2020] eKLR, where D.O. Ohungo, J. construed – deploying section 7(1) of the Sixth Schedule to *the Constitution* - as modified thereby to read the Environment and Land Court which now encompasses the superior Court and the Magistrates' Court. His Lordship thus held that "23. In view of the foregoing discourse, there are ample reasons based on the express provisions of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015, the principles of interpretation of *the constitution* as well as the principles of *the constitution* such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011 and who has the requisite pecuniary jurisdiction, magistrates' Courts have jurisdiction and power to handle cases involving claims of adverse possession." See also John Omollo Agutu & another vs. Joseph Juma Abondo & another [2021] eKLR, per G.M.A Ong'ondo, J.; Philip Kithaka vs. Mercy Karimi Nyaga [2021] eKLR, per L.N. Mbugua, J.; Jeanbye Mungole Mugesani vs. Filemona Fundi Indira [2020] eKLR, per N.A. Matheka, J., et alia.
61. Vide Gazette Notice No. 11930 of 5th December 2017, this Court was appointed by the Honourable Chief Justice, under section 26 (3) of the *Environment and Land Court Act*, 2011, to preside over cases involving disputes relating to environment and land.
62. This Court thus finds and so holds it has jurisdiction to hear and determine a claim anchored on adverse possession.

(iv) Whether the procedure adopted by the Defendants of filing a Counterclaim instead of an Originating Summons is fatally defective

63. Regarding whether the procedure adopted by the Defendants by filing a Counterclaim instead of an Originating Summons is fatally defective, this Court is of the judicial view, and it so holds that in responding to a Plaintiff, a Defendant cannot file an Originating Summons in answer to a Plaintiff. It would certainly be different if the Defendants were the once who approached this Court for an order or adverse possession.
64. The Defendants cannot thus be faulted for the approach taken. See Order 7 rule 3 of the Civil Procedure Rules.



(v) Whether on a preponderance of probabilities, the Defendants have made a case for adverse possession

65. This is both a question of law and fact. For ease of contextualization, this Court will reproduce sections 7, 9, 13, 17 and 38 of the *Limitation of Actions Act*.
66. Section 7 of the *Limitation of Actions Act* provides that “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
67. Both sections 9 and 13 of the same Act, house the principle of dispossession and discontinuance in adverse possession and when it should be deemed that time starts and/or stops to run. Section 9 thereof states that “(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled [Rev. 2007] Limitation of Actions CAP. 22 9 to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance. (2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death. (3) Where a person brings an action to recover land, being an estate or interest in possession assured otherwise than by will, to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action accrues on the date when the assurance took effect.” Section 13 of the same Act houses the principle of dispossession and discontinuance in adverse possession and when it should be deemed that time starts and/or stops to run. It provides that “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land. (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land. (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”
68. Section 17 of the same Act provides that title is extinguished at the end of the period of limited in section 7 above. It provides that “Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”
69. Finally, section 38 of the same Act provides for the procedure to be adopted when an adverse possessor wishes to be registered as the proprietor of the land adversely possessed. Section 38(1) and (2) of the *Limitation of Actions Act* is germane and it provides that “38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”



70. What interest is conferred by registration? Registration of a person as the proprietor of land vests in the registered person absolute ownership of the subject land together with all rights and privileges belonging or appurtenant thereto. Also, registration of a person as the proprietor of a lease vests in the registered person a leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. See section 24 of the [Land Registration Act](#).
71. What then are the rights of a proprietor? Rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, are not defeasible except as provided the [Land Registration Act](#), subject only to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; such other unregistered liabilities, rights and interests declared by section 28 of the [Land Registration Act](#); and subject to trusteeship. See section 25 of the [Land Registration Act](#). {Underline connotes personal emphasis}.
72. What is the value of a certificate of title? A certificate of title, whether in its original or certified form, shall be taken by all Courts as prima facie evidence that the person named as the proprietor of the subject land is the absolute and indefeasible owner, subject only to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and it shall not be subject to challenge except on ground of fraud or misrepresentation or illegality or that it was obtained unprocedurally or through a corrupt scheme. See section 26 of the [Land Registration Act](#).
73. The law recognizes unregistered rights which can override registered interests in land. And so, any registered land is subject to the following unregistered interests known in law as overriding interests: (i) trusts including customary trusts; (ii) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (iii) natural rights of light, air, water and support; (iv) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (v) charges for unpaid rates and other funds; (vi) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; (vii) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and (viii) any other rights provided under any written law. However, even if they are recognizable even without registration, in certain instances, the Court or Registrar may direct registration of any overriding interest. {Underline connotes personal emphasis}. See section 28 of the [Land Registration Act](#).
74. Adverse possession is one of the exceptional circumstances of land acquisition. It falls under the cluster of (unregistered) overriding interests to which any registered land is subject. See section 28(h) of the [Land Registration Act](#). It is a prescriptive right, culminating from the combined legal effect of sections 7, 9, 13, 17 and 38 of the [Limitation of Actions Act](#). The Court of Appeal has described adverse possession as “The combined effect of the relevant provisions of sections 7, 13 and 17 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.” See Benjamin Kamau Murima & Others vs. Gladys Njeri, Civil Appeal Number 213 of 1996 (UR), which judicial view has been adopted by the Court of Appeal in subsequent cases. See for instance Chandrakant Devraj Shah vs. Alibhai Haji & another [2018] eKLR, per Ouko, Nambuye & Makhandia, JJA; and Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui [2017] eKLR, per Kihara, Waki & Kiage, JJA., et alia.
75. The way to adverse possession is paved when a person takes possession of land of another without force or stealth or licence/consent of the title holder; openly or publicly asserting rights over it; and the title holder omits or neglects to take action against the adverse possessor - in assertion of his title - for



an uninterrupted period of twelve (12) years. The acquisition can only be actualized through a Court action. See section 38 of the *Limitation of Actions Act*.

76. There are four principal elements of adverse possession namely: (i) taking possession of land without force or stealth or licence/consent of the title holder; (ii) openly or publicly asserting rights over it; (iii) the title holder omits or neglects to take action against the person in assertion of his title; (iv) for an uninterrupted period of twelve (12) years. In *Mtana Lewa vs. Kahindi Ngala Mwangandi* [2015] eKLR, in his leading judgement, Makhandia, JA with Ouko & M’Inoti, JJA concurring laid the elements of adverse in the following rendition: “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
77. Similarly, in *Daniel Kimani Ruchine & Others vs. Swift, Rutherford Co Ltd & another* [1977] eKLR, Kneller, JA. (as he then was) simplified the elements in the following words: “The Plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec plecario* (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration...” See also *Wanyoike Gathure vs. Beverly* [1965] EA 514, per Miles, J.
78. What kind of possession entitles an adverse possessor to an order for adverse possession? The possession which finds favour of the law is that which (i) entry was not consensual; (ii) occupation is open; (iii) occupation is exclusive; (iv) occupation is uninterrupted; and (v) occupation runs without fraud for 12 years. Possession in this context can assume diverse forms including fencing. In *Daniel Kimani Ruchine & Others vs. Swift, Rutherford Co Ltd & another* [1977] eKLR, Kneller, JA. (as he then was) explained that “The Plaintiffs have to show exclusive uninterrupted possession of the land without fraud for twelve years (see sections 7 and 17 of the *Limitation of Actions Act*) ... Possession can take different forms such as fencing or cultivation. It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land, because these are acts which are not inconsistent with the enjoyment of the land by the person seemingly entitled to it. The resources or status of the claimants is not a factor in the correct approach to deciding what constitutes a sufficient degree of sole possession and user. The standard is an objective one and related to the nature and situation of the land. Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time...” Also, speaking to the kind of possession favoured by law in *Loise Nduta Itotia vs. Aziza Said Hamisi* [2020] eKLR, Musinga, Gatembu and Murgor, JJA held that “The above considered together, make it clear that for a claim of adverse possession to succeed it must be demonstrated that the occupation was continuous, open and uninterrupted for a period of 12 years.”
79. The most comprehensive inventory of ingredients of adverse possession was laid down in *Gabriel Mbui vs. Mukindia Maranya* [1993] eKLR, by R.C.N. Kuloba, J. (as he then was) as follows:
- i. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period;
 - ii. 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 (without fraud);



- iii. The occupation must be nonpermissive (without permission from the true owner of the land occupied);
 - iv. The possession must be hostile to true owner and be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people;
 - v. 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 incroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it;
 - vi. 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;
 - vii. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period;
 - viii. 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; and
 - ix. The rightful owner must know that he is ousted. {Underline connotes personal Emphasis}
80. It follows that if the entry was consensual, it will vitiate entitlement to an order for adverse possession. See *Ramco Investment Limited vs. Uni-Drive Theatre Limited* [2018] eKLR, per Waki, Nambuye & Kiage, JJA. See also *Wanje vs. Saikwa* [1984] KLR 284.
81. For purposes of limitation of the period of 12 years, when does time start to run? It begins to run from the time when the owner is not in possession thereof. Possession in this context continued use and enjoyment of the land. In *Daniel Kimani Ruchine & Others vs. Swift, Rutherford Co Ltd & another* [1977] eKLR, Kneller, JA. (as he then was) held that "No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; see sections 9(1) and 13 of the *Limitation of Actions Act*. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (eg if the area is flooded) then dispossession for that period cannot occur..."
82. And when is the limited time of 12 years said to have stopped or interrupted? In *Gulam Miriam Noordin vs. Julius Charo Karisa* [2015] eKLR, Makhandia, Ouko and M'Inoti, JJA cited in approval the observations which were entered in *Joseph Gahumu Kiritu vs. Lawrence Munyambu Kabura*, Civil Appeal No. 20 of 1993 that "Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry onto the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him...He must therefore make a peaceable and effective entry, or sue for recovery of the land".
83. What is the standard of proof? It is the usual standard for civil claims namely a balance of probabilities. See *Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another* [1977] eKLR, Kneller, JA. (as he then was).



84. In this case, the Plaintiff asserted that he bought the suit property on 19th September 1990 and successfully transferred in 1994. The Defendants asserted and the assertion was not successfully displaced by the Plaintiff, that the Defendants were born in 1958 and 1962 respectively and that they have since lived and bought up in the suit property. The evidence of both converged at the intersection that the Defendants have without colour of right or reasonable or justifiable cause, been occupying the suit property complete with dwelling houses where their families live and that they have been openly tilling the suit property and that they so remain to the present day.
85. This Court now turns to subject the Defendants' tested evidence to the elements of adverse possession and makes the following findings.
86. First, this Court must determine, at the earliest, whether the statutory period of 12 years, contemplated by section 7 of the *Limitation of Actions Act*, has been met by the Defendants as to extinguish the Plaintiff's title as contemplated by section 17 thereof. For this purpose, time starts to run when dispossession and discontinuance converge as contemplated by sections 9 and 13 of the same Act, afore-discussed. Contrary to the assertions by the Defendants, dispossession and discontinuance cannot be said to have converged upon the dates of birth of the Defendants - 1958 and 1964 respectively – since then, the Plaintiff had not acquired interest in the suit property. In the special circumstances of this case, dispossession and discontinuance converged at the time when the Plaintiff was entitled to take actual possession of the suit property – on 19th September 1990 - but failed in circumstances where the Defendants, to the knowledge of the Plaintiff, were in actual possession thereof. See Daniel Kimani Ruchine & Others vs. Swift, Rutherford Co Ltd & another [1977] eKLR; and Gabriel Mbui vs. Mukindia Maranya [1993] eKLR, discussed herein before.
87. And for purposes of intermission of time, when can it be said that time stopped running? Once again, section 13 of the same Act is germane. In particular, section 13(2) provides for pointers to when time is deemed to stop running. It reads that “(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.” In this connection, it has been enunciated that the running of time is stopped either by taking actual possession or by asserting the owner's right to possession by filing a suit. See Gulam Miriam Noordin vs. Julius Charo Karisa [2015] eKLR; and Joseph Gahumu Kiritu vs. Lawrence Munyambu Kabura, Civil Appeal No. 20 of 1993. For purposes of computation of time, a mere demand letter does not stop time from running. See Mwangi Githu vs. Livingstone Ndeete [1980] eKLR, where K.D. Porter, JA, held and Madan & Law, JJA concurred that: “Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*. The appellant did not assert his right to the whole suit plot until he commenced suit No 1056 of 1976 on April 30, 1976.” This position has been adopted subsequently. See for instance Maweu vs. Kiu Ranching & Farming Cooperative Society Ltd [1985] eKLR, per Hancox, Nyarangi & Platt, JJA; Douglas Mbugua Mungai vs. Harrison Munyi [2019] eKLR, Waki, Nambuye & Murgor, JJA; Robinson Kiplagat Tuwei vs. Felix Kipchoge Limo Langat [2020] eKLR, per Nambuye, Karanja & M'Inoti, JJA; Paul Kamande Gicheha vs. Jacob Kinyua Kiragu [2018] eKLR, per M.C. Oundo, J., paragraph 116, et alia.
88. In this case, although there is no evidence that the Plaintiff took actual possession at any point after purchasing, there is evidence on record that the Plaintiff asserted his right to possession thereof, by filing a suit 8th October 2021 and not 25th September 2012, when a demand letter was addressed to



the Defendants. It follows that time stopped running on 8th October 2021. In computing the period therefore, the time between 19th September 1990 and 8th October 2021, is applicable. The period sums up to 31 years and 20 days. And even if the date when the demand letter was addressed is applied as urged by the Plaintiff, if at all it amounts to assertion of right contemplated by law, the period still sums to about 22 years. It follows that limited to the period acceptable to section 7 of the Limitation of Actions Act for purposes of adverse possession, the Defendants have succeeded.

89. Second, the Defendants have established that they made physical entry and actual possession or occupancy of the suit property for the said period of 22 years and 9 months.
90. Third, the said entry and occupation was made with or maintained under some claim or colour of right under an erroneous strong belief that the Defendants' father was the lawful owner, a claim which asserted in good faith (without fraud).
91. Fourth, having failed to secure permission from the Plaintiff, the occupation and use was nonpermissive.
92. Fifth, having not occupied and/or taken possession the suit property since he bought it and having allowed no other people to occupy the property, the occupation and actual possession is that which can properly so be described as unequivocally exclusive, with an evinced unmistakable animus possidendi (occupation with the clear intention of excluding the owner as well as other people).
93. Sixth, the acts of the Defendants were and remain inconsistent with the Plaintiff's enjoyment of the suit property for purposes for which he intended to use it.
94. Seventh, the possession by the Defendants was known to the Plaintiff, visible, open and notorious, and thus presented the Plaintiff and the community a reasonable notice of the exercise of dominion over the land.
95. Eighth, the possession by the Defendants was certainly continuous, uninterrupted, unbroken, for the necessary statutory period.
96. Ninth, the Plaintiff had all the while an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period, but he did not.
97. Tenth, all the while, the Plaintiff knew that he had been ousted.
98. It is on basis of the foregoing findings which meet the threshold for adverse possession, that the Defendants' Counterclaim for adverse possession has generated persuasion in the mind of this Court.

(vi) Which party should bear the costs of this suit?

99. The law on costs as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See *Morgan Air Cargo Ltd vs. Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See *Rose Kaume & Another vs. Stephen Gitonga Mbaabu & Another* [2016] eKLR, per C. Kariuki, J. How then is this discretion exercised? Discretion is not the same thing as *carte blanche*. Beacons demarcating how discretion is exercised are as follows.
100. First, discretion ought to be exercised with circumspection and judiciously. See *Christopher Kiprotich vs. Daniel Gathua & 5 others* [1976] eKLR; *Mbogo and Another vs. Shah* [1968] EA 93 and *Mohindra vs. Mohindra* (1953) 20 EACA 56; *Sharp vs. Wakefield* [1891] 64 L.T Rep. 180 Ap. Ca.173, per Lord Halsbury L. C.; and *Rooke's case*, 5 Rep. 99b (1598), cited in approval by Mativo, J. in *Republic*



vs. Public Procurement Administrative Review Board & 2 others [2018] eKLR. Second, costs follow the event unless the Court finds a good cause to negate this trajectory. See Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another [2016] eKLR). In this context, the meaning ascribed to the words “costs shall follow the event” is that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J. (as he then was), Judicial Hints on Civil Procedure 2nd edition at page 99; Dipchem East Africa Limited vs. Karutturi Limited (In Receivership) [2015] eKLR, per Gikonyo, J.; Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another (2016) eKLR, per Mativo, J.; and Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ. Third, but closely intertwined with the second is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR, per Odunga, J. Fourth and also closely connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ. Fifth and too connected to the second, third and fourth beacons is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs, or the successful issue was not attracting costs. See Orix Oil (Kenya) Ltd vs. Paul Kabeu & 2 Others (2014) eKLR; and Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR, Gikonyo, J.

101. Upon considering the cause of action and circumstances unique to this case including but not limited to the history of the matter, and especially upon considering that each party had a genuine claim, this Court has found a good cause to depart from the general proposition of the law that costs follow the event.

Part Vi: Disposition

102. Although this Court finds merit in the Plaintiff’s claim to the extent that the Plaintiff is the bona fide owner of the suit property and that the Defendants have been trespassing on the suit property, this Court too finds merit in the Defendants’ Counterclaim for prescriptive rights of adverse possession. Accordingly, Judgment is entered in favour of the Defendants in the following terms:
- i. The Machakos County Land Registrar is hereby ordered to rectify the register of the parcel of land known as Mitaboni/Mutituni/1823 (the suit property), by cancelling the Plaintiff’s name as the registered proprietor thereof and substituting therewith the Defendants’ names as registered proprietor thereof, as tenants in common.
 - ii. A permanent injunction is hereby issued restraining the Plaintiff either by himself or his agents, servants or any other person or persons acting or claiming to act at the behest of the Plaintiff, from interfering with the Plaintiffs’ right of occupation and use of the suit property.
 - iii. Each party shall bear his own costs of the suit and Counterclaim.
103. It is so ordered.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS
23RD DAY NOVEMBER 2023**

.....



C.N. ONDIEKI

Principal Magistrate

Advocate for the Plaintiff:.....

Advocate for the Defendants:.....

Court Assistant:.....

