

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 133 OF 2015**

1. ALI MOHAMED MUSA
2. ALEX MASA GWEDE
3. GEORGE OKUMU WANYAMA
4. TUKU KADZOYO TUKU
5. CHARLES RAMA AMOS
6. RASHID NASORO GANZORI
7. MOHAMED

**MVOO**

**MUSA.....PLAINTIFFS**

*(Suing on their own behalf and on behalf of Mwakirunge residents upon the suit property/Plot No. CR. 345 numbering 366 individuals)*

**- VERSUS -**

1. MAHMOOD HASSAM
2. JAFFER KASSAM
3. ESMAIL KASSAM
4. MUSA KASSAM
5. ESSAK

**KASSAM.....**

**DEFENDANTS**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement by this Honourable Court pertains to a civil suit on a claim instituted by *Ali Mohamed Musa, George Okumu Wanyama, Tuku Kadzoyo Tuku, Charles Rama Amos, Rashid Nasoro G*

*anzori and Mohamed Mvoo Musa Suing on their own behalf and on behalf of Mwakirunge residing upon the suit property/Plot No. CR. 345 numbering 366 individuals whose names appear in the schedule of list of members attached in the Originating summons)* the Plaintiffs herein. The suit was against *Mahmood Hassan, Jaffer Kassam, Esmail Kassam, Musa Kassam and Essak Kassam*, the Defendants herein by way of Originating Summons on the 12<sup>th</sup> June, 2015 filed on the same day premised under the provision of Sections 37 and 38 of the Limitation of Actions Act, Cap. 22, Order 37 Rule 7(1) and (2) of the Civil Procedure Rules, 2010 and all the provisions of the law under the New Land Act No. 6 of 2012 and Land Registration Act No. 3 of 2012 all of the Laws of Kenya.

2. Upon filling and service of the Originating Summons all the Defendants/Respondents responded through an Amended Statement of Defence and a Counter - Claim dated 18<sup>th</sup> April, 2024.
3. It is instructive to note that in the course of this proceedings, and upon the request by parties the Honourable Court conducted a site visit ("***Locus in Quo***") under the provision of Order 18 Rule 11 of the Civil procedure Rules, 2010. Subsequently, the Honorable Court

prepared a report and for ease of reference has been reproduced as part of this Judgement hereof.

## **II. Court directions before the hearing**

4. Accordingly, pursuant to the directions provided under Order 37 Rules, 13, 16 and 18 of the Civil Procedure Rules, 2010, the Originating Summons were converted to Plaint, the Applicants to Plaintiffs, the Respondents to Defendants and the Supporting and Replying Affidavits to statements by witness and the annexures as List of documents to be relied on by parties as their exhibits. The matter was fixed for hearing by adducing of "**Viva Voce**" evidence hereof.
5. After confirming that the Plaintiffs had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 14<sup>th</sup> October, 2022. The Plaintiffs/ Applicants called their witnesses and closed their case on 11<sup>th</sup> December, 2024 and the Defendants called their witnesses on 11<sup>th</sup> December, 2024 and marked their cases closed.

## **III. The Plaintiffs' case**

6. The Plaintiffs claimed that adverse possession against the Defendants on the following questions: -

- a. Have the Plaintiffs been in uninterrupted continued possession of the suit property for more than 12 years?***
- b. Are the Plaintiffs entitled to adverse possession of the suit property?***
- c. Are the Plaintiffs entitled to be registered as the owners of the suit property?***
- d. Whether the possession and occupation by the Plaintiffs constitutes an overriding interest in terms of the provisions of the Registered Land Act 2012 or Section 30 of the Registered Land Act Cap 300 Laws of Kenya?***
- e. Whether damages are an adequate remedy to the plaintiffs and/or whether compensation to the Plaintiffs by the Defendants is a viable remedy?***
- f. Whether a permanent injunctive order can be issued against the Defendants; by themselves, their servants, agents and or whomsoever not to demolish the structures built on the suit property and/or to evict the Plaintiffs from the suit property.***

7. The Plaintiffs prayed for the following orders: -

- a. The Plaintiffs be declared, by virtue of the concept of adverse possession as owners and proprietors of all that parcel of land known as Plot Number 324/III/MN - CR 345 measuring 60.0 acres or thereabouts.
- b. The District Lands Registrar Mombasa be ordered to register the Plaintiffs as proprietors in Common of all that parcel of land known as PLOT NUMBER 324/III/MN CR. NO. 345 measuring approximately 60.0 acres.

- c. The defendants, their servants, agents and/or whomsoever be restrained by an order of permanent injunction from accessing, entering and/or interfering with the suit property and/or in any manner adversely interfering with the interests of the plaintiff in so far as their quiet, peaceful occupation and enjoyment of the property is concerned.
- d. Costs of the suit be provided for.
8. The Original Summons was based on the following grounds on the face of it and those of the 9 paragraphed supporting affidavit sworn by ALEX MASA GWEDE, the 1<sup>st</sup> Plaintiff/ Applicant with authority to swear the Affidavit marked as "A" sworn on the same day with the Originating summons where the Affiant averred:-
- a) The Plaintiffs in this suit are the duly elected officials of Mwakirunge Self Help Group which comprises of 366 members. they brought this suit in a representative capacity on behalf of the vast membership of 366 person attached to the schedule in the originating summons filed herewith.
- b) The Defendants herein Mahmood Hassam, Jaffer Kassam, Esmail Kassam, Musa Kassam, Essak Kassam were the duly registered owners of all that parcel of land known as Plot No 324/II/MN CR. 345 registered in the Mombasa District Lands Registry measuring approximately 60.0 acres. Annexed in the affidavit and marked as B(i) & (ii) are copies of certificate of title and postal search respectively.

- c) The Affiant was born in the year 1979 and had since 1985 resided there. He had not known any land other than the said parcel of land. His father Musa Dzuya, 60 years old informed him that he had been residing on the suit land since the year 1985.
- d) He had established a homestead on the farm where he resided, he had resided there with his parents together with his siblings on the suit property since he was young. Annexed in the affidavit copies of the photographs indicating their houses and marked as "C".
- e) Further, his co - Plaintiffs and the vast members informed him that they had also occupied portions of the said parcel of land known as Plot No. 324/III/MN CR No. 345 continuously and without interruption for well over 40 years. Some of the members of the group were old enough to be the Affiant's grandparents and the copies of their identity cards attached to the Originating summons would attest to this fact.
- f) Their occupation of the parcel of land had been peaceful and uninterrupted and they now claim to be entitled to ownership under the concept of adverse possession.
- g) Throughout his entire stay there, he had never met the Defendants, neither had he seen them there engaging in any activities on the parcel of land and they stayed on the parcel of land free without any permission or payment of any rent, licence fees or whatsoever and they now claimed to be entitled to the land by way of adverse possession.

9. The Plaintiffs called PW - 1 on 14<sup>th</sup> March, 2024 at 1.30 pm wherein the witness told the court that: -

**A. Examination in Chief of PW - 1 by M/s. Barayan Advocate.**

10. PW - 1 was sworn and testified in Swahili language. He was called ALEX GWEDE MASA, a citizen of Kenya and a holder of the national identity card bearing all the particulars as indicated in the national identity card shown to Court. He recorded and adopted his witness stamen herein. He testified that he resided at Mwakirunge at Bamburi. He was a driver by profession and the 2<sup>nd</sup> Plaintiff herein. He told the court that they started residing on the land from the year 1985 with his father. They had resided there with their relatives. They found nobody on the suit land. They would be cultivating from the year 1985. They resided there until the year 2014 by the Defendants. They would have their houses demolished and eviction by police officers. They decided to file cases for land adverse possession. They conducted official searches of the suit land. They relied on:

a) Authority to plead – Plaintiff Exhibit 1

- b) Photographs (4) Plaintiff (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) and (l) (12) MFI 2
- c) Copy of official search dated 13<sup>th</sup> February, 2015 - Plaintiff Exhibit -3.
- d) Certificate of ownership/Title - Plaintiff Exhibit 4.

**B. Cross examination of PW - 1 by Mr. Achoka Advocate.**

11. PW - 1 stated that they got onto the suit land in the year 1985. He recalled his father Mr. Masa Gwede who informed him that the land was for his grandfather called Gwende Vyani. He was born on that land and he was in court representing other. They were born there of different families. The land was being cultivated and had several construction structures - semi permanent - Swahili houses and permanent houses. Some of the houses were still there.
12. PW - 1 told the court that he had brought a Certificate of Title LR No. 819/II/MN - it showed the registered owner was Mohamed Kassam, Jafer Kassam, Islamic Kassam, Musa Kassam, Essak Kassam on Entry No. 21 dated 10<sup>th</sup> June, 1994. They knew this from the official search. They knew the land was owned by the Colonial Government. They did the official search conducted 13<sup>th</sup>

February, 2015 and its from that time they came to know it was for the Defendants. Then they decided to sue them. The Defendants knew that the Plaintiffs were living there, they had their plot adjacent to theirs. They had been there from the time he was born. He was not aware they gave them any permission allowing them to reside there.

13. PW - 1 reiterated that there had been no land dispute between them and theirs. The land dispute started in the year 2014. That was when they started demolishing their houses and threatening them with eviction. They reported to the police at Bamburi Kiembeni. Before the land dispute in year 2014 they never sat with them to discuss the matter. They denied that they entered into the land by illegal and wrongful ways. It was them who were getting into the land illegally. They needed to be granted land through Land Adverse possession. At the moment to his testimony there was nothing going on due to the Court order - Order of status quo. They had never moved out of the land. They resided on the adjacent land.

**C. Cross Examination of PW - 1 by Mr. Sitonik Advocate.**

14. PW - 1 confirmed that he had been given authority to plead on behalf of the 5 Plaintiffs. Paragraph 2 of the Supporting Affidavit indicated that he was an official of Mwakirunge Self Help Group, its registered. They had a certificate of incorporation. He had a document to show that he was an official of the Self Help Group. He was asking to be given ownership of land CR 324/II/MN. The witness had produced an official search - Plaintiff Exhibit No. 3 - Land Registrar indicated its sub - divided but he was not aware of the sub - division.
15. On being referred to the Certificate of Title Deed, the witness stated that he wanted to be granted the Plot No. 819. He denied the finding in the further affidavit sworn on 10<sup>th</sup> September, 2018 - it was his signature. From Paragraph 9 - the photographs there were from Plot No. 819. With reference to paragraph 18 the witness indicated there was no one in the land in the year 2013. His father was Masa Gwende. His uncle was Musa Nzuia; he was still alive on the day of his testimony.
16. PW - 1 reiterated that from his identification card he was born on 15<sup>th</sup> October, 1973. He was born in Kwale. The land was in Bamburi. They had built permanent houses but they were

demolished. They filed these complaints in court. He had been arrested arraigned and charges were preferred in court in Shanzu for the offence of unlawful entry and trespass alongside forceful detainer under the provision of Section 90 (1) of the Penal Code Cap. 63 of the Laws of Kenya in 2018 Criminal Case 332/2018 and 333/2018 and 1038/2018. The complainant was the father of Musa Kassam. The witness was arrested alongside others in July 2018 and in September, 2018 when he swore an Affidavit.

17. On 11<sup>th</sup> December, 2024 the Plaintiffs case was marked as closed.

#### **IV. The Defendants' case**

18. The Defendants' responded to the Originating summons which were converted into Plaint and Defence and Counter - Claim on the Defendants averred as follows:

a) Save as hereinafter specifically admitted, the Defendants herein denied each and every allegation of fact contained in the Originating Summons now Plaint the same were set forth verbatim and traversed seriatim.

b) The Defendants were and still are the registered proprietors in fee simple of all that parcel of land known as Plot No. 819/II/MN measuring approximately 314.0 hectares acres or thereabouts.

c) On or about 11<sup>th</sup> July, 1997, the Defendants jointly acquired their suit property from their father vide a transfer from

Hussein Dairy Limited where their father was a director/shareholder and continued to expand the dairy farming business on their suit property.

- d) The Defendants asserted that they had been and still were in exclusive possession of the suit property by themselves and through their company Hussein Dairy Limited.
- e) The Defendants averred that their grandfather as well as father continually used the suit - premises and constructed permanent structures some which were over 50 years old.
- f) The Defendants averred that together with their predecessor in title they had been in continued occupation since 1960's undertaking:-
  - (i) Dairy Farming business currently with over 1, 000 herds of cattle.
  - (ii) Pastures and cattle watering reserves.
  - (iii) Road transport with garages and vehicle parking yard facilities on the suit premises. Horticultural farming and poultry keeping on the suit premise.
  - (iv) Staff quarters on the suit property for the employees
- g) The Defendants in further response to the originating summons averred that the Plaintiffs were not in occupation of the Defendants' property.
- h) The Defendants further averred that the Plaintiffs had no legal and/ or equitable right over the suit property.
- i) In as far as the title annexed by the Plaintiffs (CR. NO. 30411 (Sub - division No. 817 (Original Number 324/2))I) was

concerned, the Defendants averred that they were not the registered owners of the said title as at the time the instant suit was filed on 12<sup>th</sup> June 2015.

- j) The Defendants had long sold and transferred that property to Bandari Investments Company Limited on 8<sup>th</sup> October 2012.
- k) The confusion was caused by the registrar of titles, one Mr. Dj Safari vide a search issued on 13<sup>th</sup> February, 2015 to the Plaintiffs which erroneously showed the Defendants as registered owners instead of the then registered owners: Bandari Investments Company Limited.
- l) The Plaintiffs herein did not disclose any cause of action against the Defendants whatsoever in as far as the suit property remains CR No. 30411 [Sub - division No. 817 (Original Number 324/2)].
- m) The Defendants averred that in any event, they did not own Plot No. 324/III/MN CR. No. 345 which forms the crux of the Plaintiffs' pleadings and further averred that the said Plot No. 324/III/MN CR. No. 345 does not exist owing to subdivision as stated in the Plaintiffs' search dated 13<sup>th</sup> February 2015.
- n) The Defendants averred that Plaintiffs' suit is vexatious and lacked merit because the Plaintiffs have annexed a copy of the title to CR No. 30411 [Subdivision No. 817 (Original Number 324/2)], extensively pleaded entitlement to Plot No. 324/III/ MN CR. No. 345 yet claimed to be in occupation of L.R. No. 819/II/MN.

- o) The Defendants averred that there was a pending adverse possession claim in respect of L.R. NO. 819/II/MN before Justice N. Matheka in **“MOMBASA ELC 301 of 2015; Martin Chiponda & 866 Others - Versus - Mahmood Kassam & 15 others”**.
9. The Defendants reiterated the contents of Paragraphs 1 to 17 of the amended Defence and claim and proceeded to counterclaim as follows:
- a. The Defendants were not the registered proprietors of the title annexed to the Plaintiffs’ summons.
  - b. The Plaintiffs’ suit was based upon CR NO. 30411 [Subdivision No. 817 (Original Number 324/2)] as per the annexed certificate of title.
  - c. On 18<sup>th</sup> December 2013, the Defendants charged their property L.R. NO.819/II/MN to Gulf African Bank Limited, which charge could only have been prepared and registered upon the conduct of due diligence including the appointment of valuers to value and inspect the property which showed the property was not occupied by squatters.
  - d. Equally on 2<sup>nd</sup> October, 2014, the Court in the case of: **“Mombasa ELC 298 of 2013 - Muhambi Kalinga & Others - Versus - Mahmood Kassam & Others”**, where L.R NO. 819/II/MN was the suit property and subject of an adverse possession claim, conducted a site visit where it established that;
    - a) Only eight houses: 3 under construction were in the suit land; and

- b) There were no squatters except the 8 (eight) houses; under construction.
- e. The site visits conducted on 20<sup>th</sup> August, 2021 and 15<sup>th</sup> March, 2024 were done on the wrong land that was L.R. No. 819/II/MN (owned by the Defendants) and not CR NO. 30411 [Subdivision No. 817 (Original Number 324/2)] or Plot No. 324/III/MN CR. No. 345 (suit property) creating a wrong impression that L.R NO. 819/II/MN was the land the Plaintiffs have sued on.
- f. Particularly, the site visit conducted on 20<sup>th</sup> August 2021 created a bad expectation on the illegal invaders that L.R. NO. 819/II/MN was available for occupation.
- g. The Defendants therefore averred that any subsequent entry into the suit property by the Plaintiffs by themselves, their servants, agents, relatives, assigns, proxies, employees or any other person claiming through them on L.R NO.819/II/MN was after 2014.
- h. The Defendants accordingly aver that the site visits conducted on 20<sup>th</sup> August 2021 and 15<sup>th</sup> March 2024 could only reveal the status of occupation on L.R NO.819/II/MN, post - 2014.
- i. Post - 2014, the Plaintiffs, though suing on CR NO. 30411 [Sub - division No.817 (Original Number 324/21)], started indiscriminately invading upon L.R. NO. 819/II/MN, which plots coincide each other, through wanton violence and intimidation.

- j. Before the hostile and unrelenting invasion, L.R. NO. 819/II/MN was exclusively occupied by the Defendants who conducted a dairy business going by Hussein Dairy Limited until as recent as 2015.
- k. The Defendants averred that the violent, sporadic and unrelentless trespass and invasion by the Plaintiffs and their agents has over the years interrupted and consequently brought to a halt the Defendants' business once booming dairy, poultry and horticultural farming on L.R. NO. 819/II/MN.
- l. The Defendants had over the years documented the constant illegal invasions and on countless times reported these invasions to policing authorities but their attempts to recover vacant possession of L.R. NO. 819/II/MN has proved futile.
- m. This had been harder because the invaders constantly kept on changing by selling portions of the land to unsuspecting third parties and proxies who in turn use violence to not only invade but also asserts their illegitimate purchasers' interests as against the Defendants.
- n. The alleged squatters would be arrested, charged, chased and their temporary illegal structures demolished and they would move onto the neighboring plots and the cycle continued for many years after 2014.
- o. Any occupation by the Plaintiffs, which they denied completely, and or their proxies on Plot 819/II/MN have been through force and violence leaving a trail of damage occasioned by violent and illegal invasions perpetrated by the Plaintiffs and/or their proxies even as recent as 6<sup>th</sup> April 2024

on the Defendants' property CR NO. 30412 [Subdivision No. 819 (Original Number 330/2)].

- p. The Defendants averred that due to the unlawful acts of the Plaintiffs, the Defendants had been unable to put their land to any gainful use.
- q. The Defendants were therefore entitled to general damages for trespass onto their land known as L.R. NO. 819/II/MN and for loss of its use for the period of subsistence of this suit.
10. The Defendants prayed that the Plaintiffs' suit be struck out or dismissed with costs and Judgment be entered for the Defendants pursuant to the counterclaim against the Plaintiffs as follow:-

- i. A declaration that the suit property is CR NO. 30411 [Subdivision No. 817(Original Number 324/2)] as per the annexed extract of title.*
- ii. A declaration that the Defendants are not the legal and bona fide owners of all that parcel of land known as CR NO. 30411 [Subdivision No.817 (Original N umber 324/2)] having transferred the same to Bandari Investment Company Limited on 8<sup>th</sup> October 2012.*
- iii. A declaration that the Defendants are the legal and bona fide owners of all that parcel of land known as Plot No. 819/II/MN.*
- iv. The Plaintiffs and/or their agents, servants or other persons claiming through them be and are hereby ordered to vacate and deliver vacant possession of Plot No. 819/II/MN to the Defendants within 30 days from the date of service of the resultant decree upon them.*
- v. In default, an order of eviction issues for removal of the Plaintiffs and/or their servants or other persons claiming through them from Plot No. 819/II/MN and demolition of any*

**offending structures under supervision of the Officer Commanding Kiembeni Police Station or other law enforcement under the National Police Service.**

**vi. A permanent injunction restraining the Plaintiffs by themselves, their servants, agents, relatives, assigns, proxies, employees or any other person through them from trespassing into, encroaching upon, wasting, cultivating, building structures thereon, alienating or otherwise interferring with and/ or in any other manner dealing with the Defendants' land known as Plot No. 819/II/MN.**

**vii. General damages for trespass.**

**viii. Costs of the Suit and counterclaim.**

19. The Defendants' advocate Mr. Mutugi Advocate had the following opening remarks: -

**A. Opening Remarks**

20. The Defendants were the legal owners of Plot No. 819 and the Defence would be demonstrating that as far as October 2014 in a separate matter the court had conducted a site visit on the suit land which is Plot No. 819 and there were no squatters. Hence the squatters must have come on the land from the year 2014 and hence it had a bearing to time limitation i.e time started running.

21. The Defendants would also call the land surveyor who would make a distinction of the discrepancies on the plots - No. 819 and 324 their Counterclaim only sought eviction orders.

22. On 11<sup>th</sup> December, 2024 at 11.30 am the Defendants called their 1<sup>st</sup> witness DW 1 who told the court that: -

**B. Examination in Chief of DW - 1 by Mr. Mutugi Advocate.**

23. DW - 1 was sworn and testified in both Swahili & English languages. He was called MAHMOOD HASSAMI MIYANJI, a Citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court. He had authority to plead on behalf of the other Defendants. They were in court for ownership of Plot No. 819. He recorded a witness statement dated 18<sup>th</sup> April, 2024, which he adopted as his evidence. He filed a defence list of 9 documents dated 18<sup>th</sup> April, 2024. The Defendants Advocate forego Document number 5 in the list and produced as Defendants Exhibit No. 1 to 8. With reference to Exhibit No. 4 on page No. 48 which was the case HCCC (Mbsa) No. 498/2013 (OS) it touched on the Plot No. 819/II/MN.

24. On being referred to page 118 the witness told the court that it was Ruling of the KLR of HCCC No. 298 of 2013. With reference to

page 120 at Paragraph 10 (the highlighted part) referred to by the witness who read it loudly - Ruling of 31<sup>st</sup> January, 2019 following a site visit conducted by the Court. There were only 8 houses - 3 under construction. The witness confirmed that the suit premises/ land was No. 819. The suit was dismissed. He had seen the Plaintiff's property; they were claiming Plot No. 317. It belonged to Bandari SACCO they owned the said property before Plot No. 317 but they sold it to Bandari.

25. DW - 1 reiterated that there was a transfer form to that effect. The two (2) Plots no. 317 and 819 do border each other. They urged the court to have the Plot No. 819 to be given to them and the squatters to be evicted from the land. He stated that the Defendants had really suffered for many years arising from the illegal invasion by the Plaintiffs onto their land.

**C. Cross Examination of DW - 1 by Mr. Waziri Advocate.**

26. DW - 1 stated that he had not produced the identity card for the other Defendants. He represented them from the authority to plead. There were 8 houses belonging to the invaders and not squatters. Squatters were people who had been living on the land. While the invaders got there while they were already in

occupation. With reference to the document - the witness told the court that Certificate of title - page under RTA which gave in ownership to the land i.e. for Plot No. 819 - 314 acres. The witness did not know the 8 Plaintiffs. He did not know whether they were the ones owning the houses on the land or not.

**D. Cross examinationn of DW - 1 by Mr. Obara Advocate.**

27. On being referred to Page 48 of the Plaintiffs bundles - the witness confirmed that in the Civil case HCCC No. 298 of 2013 - the Plaintiffs there were very different from the ones in this case. Hence the Judgment in the said case of 298/2003 never mentioned the current Plaintiffs. There were 8 houses - inhabited by human beings. It was not him who constructed the said houses. He did not know whether the houses belonged to the Plaintiffs or other persons. The witness wanted the 6 people to be removed from the Land of LR. No. 819. The Judgment in 298 of 2013 was for the 5 people he did not know whether the houses belonging to them.

**E. Re - Examination of DW - 1 by Mr. Mutugi Advocate.**

28. With reference to OS No. 298 of 2015 at page 48, the witness reiterated that he got it from Court. He participated in the case

having been sued as the 1<sup>st</sup> Defendant. With reference to the site visit of 2<sup>nd</sup> October, 2014, there were 8 houses – 3 were under construction. The witness stated that he would like the 8 Plaintiffs to leave the land for them as they had bought it.

29. The Defendants called DW - 2 on the same day where the witness stated that: -

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

30. DW - 2 was sworn and he testified under oath in English language. He identified himself as JAMES GITONGA. He was a Land Surveyor. He was aware of the issues in the case. He was contacted by the Defendants and he verified the same. The witness was to go and identify Plot No. 819 and to distinguish it with the other parcels of land known as Plot No. 817 and 324 and he did a report dated 16<sup>th</sup> April, 2024 at page 106. These plots were different. Referred to O.S. by Plaintiffs is Plot No. 324/II/MN – the title annexed to it is Plot No. 817. There was a relationship between 324 and 817 which was initially plot No. 324. When the Deed Plan was prepared for Plot No. 324 there was a re-survey which generated No. 817 while Plot No. 330 became Plot No. 819.

**B. Cross examination of DW - 2 by Mr. Waziri Advocate.**

31. The witness told the court that he was a court approved Assistant Land Surveyor to Mr. Mwanyungu - a Licensed Land Surveyor. He stated that he was not a Licensed Surveyor. Plot No. 324 were on Section II his report assisted the court as the plots No. 324 and Plot 819 were different. He was not aware of Plot No. 324/III/MN.

**C. Cross examination of DW - 2 by Mr. Obara Advocate.**

32. DW - 2 confirmed that he went to the land and he found some structures - permanent and semi - permanent. He did not know who put up the said strictures there. Neither for how long they were there.

**D. Re - examination of DW - 2 by Mr. Mutugi Advocate.**

33. DW - 2 reiterated with reference to the Supporting Affidavit of Alex Masa Gwede - on the O.S. of the Plaintiff's document was Plot No. 324/II/MN and elsewhere on page 2 Plot No. 324/III/MN of the pleadings. His instructions were to confirm Plot No. 819 and Plot No. 324/II/MN.

34. The Defendants closed their case through the Legal Counsel Mr. Mutugi Advocate on 11<sup>th</sup> December, 2024.

**V. Submissions**

35. On 11<sup>th</sup> December, 2024 after the Plaintiffs and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Unfortunately, by time of penning down this Judgement, the Honourable Court had not been able to access the submissions by any of the parties herein filed in the Judiciary CTS portal nor the ELC Registry whatsoever. Pursuant to that the Honourable court reserved a date to deliver its Judgement on its own merit accordingly.

## **VI. Analysis and Determination**

36. I have keenly assessed the filed pleadings by all the Plaintiff and Defendants herein, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

37. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (4) issues for its determination. These are: -

***a) Whether the Plaintiffs have properly identified the suit property and sued the correct registered proprietor(s)?***

***b) Whether the Plaintiffs have proved, on a balance of probabilities, that their possession of the suit property has been open,***

***notorious, continuous, and exclusive for a period exceeding 12 years, thereby acquiring title by adverse possession?***

***c) Whether the Defendants' Counterclaim is merited***

***d) Who shall bear the costs of the suit and the counterclaim.***

**ISSUE No. a). Whether the Plaintiffs have properly identified the suit property and sued the correct registered proprietor(s).**

**The Site Visit Report.**

38. As already indicated above, the Honourable Court after conducting the site visit, prepared and shared the report with the parties. Below is the said report re - produced verbatim.

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**SITE VISIT REPORT AT NGUUTATU ON 15<sup>TH</sup> MARCH, 2024 AT 11.00 A.M.**

**I. Introduction**

1. The site was situated at Kiembeni, Nguu Tatu of Mwembelegeza location within the Constituency of Kisauni. It is close to 20 kilometers from the Main Centre business district (CBD) of Mombasa. It is along the Mombasa - Malindi road.
2. The team arrived at the site area close to 12.15pm. There close to 60 people already gathered for the site visit. Eventually, they kept increasing to almost 120 people who joined the proceedings. The session was commenced by a word of prayer led an Imam who was one of participants.

3. Thereafter, the Judge elaborately informed the team the purpose of the visit which was pursuant to a Court order and hence it was a Court session and need to be accorded all the decorum and respect of a Court of Law. Briefly, after spelling out the purpose of the visit, he provided the procedure to be followed as clearly stipulated herein below.

## **II. Coram for the Court**

1. Hon. Justice L.L. Naikuni – Judge ELC No. 3, Mombasa.
2. M/s. Firdaus Mbula – The Court Assistant.
3. Mr. George Omondi – Bodyguard/Usher.
4. John Mwaniki – The Driver.

## **III. The Plaintiffs**

1. Mr. Fred Adhoch – The Advocate for the Plaintiffs.
2. Ali Mohamed Musa – 1<sup>st</sup> Plaintiff.
3. Alex Gwede Masa – 2<sup>nd</sup> Plaintiff.
4. George Okumu – 3<sup>rd</sup> Plaintiff.
5. Tuku Kadzoyo Tuku – 6<sup>th</sup> Plaintiff.
6. Kahindi Kalume.
7. Jacob Onyango.
8. Saidi Chenje.
9. Ruben Mureithi.
10. Abdullatif Yusu.
11. Idi Moto.
12. Isa Mwaduga.
13. Zablou Chango.
14. Tchisenga Mwasonga.
15. Juma Ruwa Kazungu.
16. Amos Kazungu.
17. Kombo Athman Kombo.

18. Sudi Kombo Athmani.
19. Mila Anduku.
20. Saidi Ali Mwadziwe.
21. Swaleh Mangali.
22. Abdalla Nasib.
23. Alfred Odero.
24. Chirume Mjibu.
25. Ramadhan Saha
26. Omar Mkura.
27. Fadhili Chigamba.
28. Santa Lena.
29. Dickson Zero.
30. Yaa Kazungu.
31. Dickson Runya.
32. Rama Zitu.
33. Mohamed Bakari.
34. Alfau Babu.
35. Dennis Kazungu.
36. Ismail Jingo.
37. Seif Njuguna Abdalla.
38. Siraj Mohamed.
39. Zachariah Rashid.
40. Juma Bakari.
41. Kasim Athmani.
42. Afua Hamadi.
43. Kenga Muhambi – Assistant Village elder
44. Maganzi Ngoro Maganzi – Village Elder
45. Johnson Kazungu.
46. Issa Yunus.
47. Mohamed Wanje.

#### **IV. The Defendants**

1. Mr. Mutugi Titus – An Advocate for the Defendants.

2. Musa Kassam – 4<sup>th</sup> Defendant.
3. Gabriel Peter – An employee of the Defendant.

(Hereinafter referred to as **“The Team”**)

#### **V. The Security Operatives from Chasimba Police Station**

1. Sergeant Serengo Aggrey.
2. PC. Kagia.
3. PC. Bitange Ndemu.
4. PC. Evans Kosgei.
5. Charles Otieno.
6. Ferdinand Mutua.
7. Lucy Uchi.
8. Francis Ndungu.

#### **VI. The Purpose for the Visit.**

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

**Power to court to inspect;**

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

While Order 40 Rule 10 (1) (a) provided *to wit*: -

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

**(a) Make an order for .....Inspection of any property which is the subject matter to which any question may arise therein.**

#### **IV. The Procedure**

7. By consensus of the parties, it was agreed that Site Visit be conducted led by two representatives from both the Plaintiffs and the Defendants respectively. The

team agreed to rely on the Survey Plan - FR. No. 135/14, 159/22, 17,94. The actual parcel of land was known as MN/II/819/214216 - measuring 97.005 Ha (approximately 239.699 acres) and MN/II/14220 - (819/6) - measuring 24.28 HA (approximately 59.995 acres).

8. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities on the ground to enable the Court in making a fair, just and equitable decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.
9. Additionally, the Honourable Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
10. Further, the parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media.

## **VII. The Observations**

11. *From the visit, the team were able to make and arrive at the following general observations. These were:-*

### **a) The location:**

- The site was on all that parcel of land was based on the Survey Plan - FR. No. 135/14, 159/22, 17,94. The actual parcel of land was known as MN/II/819/214216 - measuring 97.005 Ha (approximately 239.699 acres)

and MN/II/14220 - (819/6) - measuring 24.28 HA (approximately 59.995 acres).

- The Land Surveyor informed team that all that parcel of land known as 1819/2 was sub - divided into 4 parcels. All of them were loosely known as **“Kwa Hussein Dairy”** - which the team learnt that this term was associated with the former owner of the land - Mr. Hussein - and who was well known within the area for his penchant of livestock keeping and particularly dairy cattle.

**b) A 2<sup>nd</sup> site Visit:-**

- It was noted that this was a 2<sup>nd</sup> site visit. Earlier on there had been a Site visit conducted by the Deputy Registrar of the Environment & land Court Mombasa and Report was prepared and filed.
- It was reported that a Land Surveyor had conducted a survey but no report had been filed as required by law.

**c) The main Nguu Tatu tarmac road:**

- On the main suit land, there existed a main tarmac road dividing the land into two portions. Across the tarmac road, on the right hand side coming from the direction of the Kiembeni police station, there were permanent and semi-permanent houses. It had a population of close to 300 inhabitants.
- There was a huge Kenya Power and Lighting Company, power supply station with various transformers and other implements mounted thereof. Further, there was Haller Park and the Bandari Sacco 67 acres land with a well built perimeter wall in the neighbors hood.

d) **The Population:**

- On the left hand side of the tarmac road from the Kiembeni police station, the place was densely populated. There were people residing in the parcel. They occupied both sides of the main well constructed tarmac road leading to a place known as Nguu tatu (the Giriama for a place of three hills). They claimed to be entitled to a portion of 60 acres which they had occupied for a long period of time with their families.
- There numerous semi and permanent residential structures of close to 100 of them. They were built without any proper plan. There were no proper access routes provided nor any amenities. There were some commercial premises selling retail commodities to serve the population. It was replica of a slum dwelling.
- The Defendant – Mr. Musa claimed that Plaintiffs never resided in the suit land. However, the Plaintiff – George Okumu and Tom Kenga insisted that they resided on it. They pointed out at their semi – permanent structures.
- The team noted that there were three ( 3 ) Mosques constructed at different points of the suit land.
- The team noted the presence of a huge wet land (Swamps). There were also cattle – livestock keeping.
- There were several houses under construction – both new and old houses. At the same time, we noted there were several demolitions having taken place from the visible debris scattered all over. The team was informed that the forceful demolitions were caused by the Defendants of the Plaintiffs houses.

- There was a presence of 10 Giriama graveyards within the place but without any identification or grave plaques.
- At an exclusive point of the land, there was what the people called **“Nyumba ya gorofa”** - Office. It was found in a carefully selected and hilly place with such a nice and serene view point of the while of the suit land. The place was a well kept and neat compound with several permanent structures. It was surrounded by a well built perimeter wall, a metal gate and guard house.
- There were an assorted of used and old trucks of lorries and other vehicular items such as trailers parked within the compound.
- There was a well built garage for the repairs and parking of the fleet of trucks.
- There was a Crusher but which was no longer operational.
- The team learnt was owned and managed by the Defendants. There were close to 15 to 20 employees undertaking different daily chores within the compound. There were a few servant quarters within the place.

### **VIII. Directions**

Towards the conclusion of the site visit, the Judge provided the team with the following directions. These were:

- a) **THAT the Draft Site visit report to be prepared within the next two ( 2 ) weeks and shared with the parties for their final input thereof.**
- b) **THAT both parties to be at liberty to engage their own independent Land Surveyors to further undertake the land surveying exercise and file their reports before the hearing date.**

c) **THAT** there shall be a mention of the matter on 17<sup>th</sup> April, 2024 for conducting the final Pre - Trial conference in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010 and further direction.

d) **THAT** there shall be a hearing of the suit on 15<sup>th</sup> May, 2024

e) **THAT** in the meantime, both parties to co - exist in peace and tranquility as they awaited the hearing and final determination of the matter.

There being no further business, the site visit ended at 12.38 P.M with a word of prayers.

**SITE VISIT REPORT PREPARED, DATED, SIGNED AND FILED AT MOMBASA ON THIS.....17<sup>TH</sup> .....DAY OF.....APRIL.....2024**

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

39. Under this sub - heading the principle is trite that a party seeking a legal right must clearly and precisely identify the subject matter of their claim. In the context of adverse possession, the claimant must unequivocally identify the land they allege to have possessed and prove who the registered proprietor was during the 12-year period of alleged adverse possession.

40. The evidence before this court reveals a profound and fatal confusion regarding the identity of the suit property. The Originating Summons and the supporting affidavit of PW - 1 refer to "Plot Number 324/III/MN - CR 345". However, the title deed annexed thereto (Plaintiff Exhibit 4) is for CR No. 30411 [Sub - division No. 817 (Original Number 324/2)]. The testimony of DW - 2, the land surveyor, which was not controverted, clarified that the original Plot No. 324 was re-surveyed and subdivided, giving rise to new numbers, including Plot No. 817 and Plot No. 819.
41. Crucially, DW - 1 produced evidence demonstrating that the Defendants had transferred Plot No. 817 (the very land in their annexed title) to Bandari Investments Company Limited on 8<sup>th</sup> October 2012. This was years before the institution of this suit in June 2015. Section 24(a) of the Land Registration Act, 2012 provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land. Upon transfer, Bandari Investments Company Limited became the absolute proprietor.
42. The Plaintiffs sued the Defendants based on an official search from February 2015, which they now admit was erroneous. A

claim for adverse possession is in rem against the land and must be brought against the person who was the registered proprietor during the requisite period. By suing the Defendants for a property they had already sold, the Plaintiffs sued the wrong parties in respect of that parcel. This fundamental error is sufficient to dispose of the claim as originally framed. As was held in the case of ***“Samuel Kihamba - Versus - Mary Mbaisi [2015] eKLR”***, ***“a claim for adverse possession cannot be sustained against a person who is not the registered proprietor of the suit land at the time of filing the suit.”***

43. During the proceedings, the Plaintiffs' claim appeared to shift towards L.R. No. 819/II/MN, which the Defendants undisputedly own. However, this parcel was not the subject of the Originating Summons. It is trite law under the provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010 which provides that a party is bound by their pleadings. Just like a court cannot re - write a contract, it cannot grant relief over a property not properly pleaded in the originating process. On this stand alone aspect, the suit ought to collapse. Therefore, the Plaintiffs' claim, fails on this preliminary point of misidentification of the suit property and the parties sued.

**ISSUE No. b). Whether the Plaintiffs have proved, on a balance of probabilities, that their possession of the suit property has been open, notorious, continuous, and exclusive for a period exceeding 12 years, thereby acquiring title by adverse possession**

44. Under this sub - heading, the Honourable Court has deciphered the foundation of any suit especially one concerning land, is the precise and consistent identification of the subject matter. The law is clear that a party must describe the property they claim with certainty. In ***“Gabriel Mbui - Versus - Mukinda Maranya [1993] eKLR”***, the court emphasized that ***“the identity of the land must be proved and it must be clear.”*** Notwithstanding the above finding, I will proceed to analyze the merits of the adverse possession claim. The legal framework for adverse possession in Kenya is anchored in Section 7 of the Limitation of Actions Act, which extinguishes the title of a proprietor upon the lapse of 12 years, and the provision of Sections 37 and 38, which allow a person in adverse possession to apply to be registered as the owner.
45. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The

doctrine is anchored on the provision of Sections 7, 13 and 38 of the Limitation of Actions Act. Section 7 provides that:-

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

46. Section 13 of the Limitation of Actions Act provides:

**(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.**

**(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.**

**(3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.**

47. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the Limitation of Actions Act and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides;

**(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land**  
**(2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.**

48. And Order 37 Civil Procedure Rules provides:

**“(1) An Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons**  
**(2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”**

49. Article 162(2) of the Constitution of Kenya 2010, Section 13 of the Environment and Land Court Act and Section 38 of the Limitation of actions Act confer jurisdiction on this court to handle claims premised on adverse possession.

50. Applying these principles to the present case, the Plaintiffs' evidence falls short. First, on the balance of probabilities, the evidence presented by the Defendants is more compelling regarding the timeline of occupation. The site visit report from ELC No. 298 of 2013 (Defence Exhibit 4), conducted in October 2014, is particularly damning to the Plaintiffs' case. This report,

from a different suit over the same L.R. No. 819/II/MN, found only eight houses, three of which were under construction. This is irreconcilable with the Plaintiffs' assertion of a settled community of hundreds of people residing there since 1985.

51. In the case:- ***“Kimani Ruchure - Versus - Swift Rutherfords & Co. Ltd [1980]KLR 10”*** Kneller J held that:

***“the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario [no force, no secrecy, no persuasion].”***

52. Similarly, in the case of:- ***“Gabriel Mbui - Versus - Mukindia Maranya [1993] eKLR”*** adverse possession was defined as:-

***“.....the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it.”***

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

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

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

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

***“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under***

***whom he claims for the statutorily prescribed period without interruption...”***

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

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

***g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.***

56. Therefore, to determine whether the Plaintiffs/ Applicants' rights accrued the Court will seek to answer the following:-

- i. How did the Applicant take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of his possession and occupation?
- iv. How long has the Applicant been in possession?

57. Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve [12] years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

58. In the case of:- ***“Wilson Kazungu Katana & 101 others - Versus - Salim Abdalla (2015) eKLR”***, the Court of Appeal stated:

***“In order to acquire by statute of limitations a 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. A person who occupies another’s persons land with that person’s consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. ...In other words his entry must be adverse to the title of the owner of the land. ...Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession..... The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this court in the case of Githu - Versus - Ndele (1984) KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”***

59. For possession to be adverse it must be actual, open, notorious, regular continuously uninterrupted, hostile, and exclusively occupied without any form of permission from the rightful owner for a statutory period of twelve years. In the case of ***“Joseph***

**Macharia Mwangi - Versus - Jonah Kabiru [2008] eKLR**", the applicant filed suit alleging to have acquired 3 acres out of 5.1 acres of the title. The court [Kasango J] was not persuaded that he had put forth sufficient evidence of what he was in occupation of. It was held as follows:

***"It was essential in the Plaintiff's claim for him to state in the evidence the exact or definite and distinct land he was claiming out of the five acres of the suit property. Such identification is an integral part of proving a claim for adverse possession. Although in his originating summons plaintiff said he occupied 2 acres, in oral evidence he said that he did not know the exact acres he cultivated but he knew it was bigger than Defendant's. The Plaintiff's claim for that reason does fail."***

60. In the case of ***"Titus Mutuku Kasuve - Versus - Mwaani Investments & 4 Others, Court of Appeal at Nairobi, Civil Appeal No. 25 of 2002 [2004] eKLR"***, the appellant had filed an originating summons claiming two portions of land measuring 40 acres and 20 acres respectively by way of adverse possession. His suit was dismissed. The Court of Appeal upheld the dismissal, the claim for 20 acres being premature, and the claim for 40 acres being unmaintainable, inter alia for reason that the appellant had not proved exclusive possession of ***"any definite and distinct land ascertained to be 40 acres"***.

61. This court finds that the Defendants have successfully demonstrated that any significant use, title and occupation of their land, L.R. No. 819/II/MN, by the Plaintiffs or persons associated with them, began in or after 2014. From 2014 to the filing of this suit in 2015, or even to the date of testimony in 2024, the period of alleged possession falls far short of the statutory 12-year requirement. Furthermore, the nature of the possession, as described by the Defendants and supported by the criminal charges against PW1, suggests that the entry was not peaceful but was characterized by force and violence, which negates a key requirement for adverse possession. The Court of Appeal in ***"Githu - Versus - Ndeete [1984] KLR 776"*** held that possession must be peaceful and not contentious. For these reasons, even if the Plaintiffs had correctly identified L.R. No. 819/II/MN as the suit property, their claim for adverse possession would still fail for lack of proof of continuous, peaceful and uninterrupted possession for 12 years.

**ISSUE No. c). Whether the Defendants' Counterclaim has merit.**

62. Under this subtitle, the Defendants have sought to be declared as the registered owners of the suit property. We examine the ownership of the suit property. The law provides under the provision of Section 26 of the Land Registration Act, No. 3 of 2012 thus:-

**“The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner”**

63. From the facts of the case, having found that the Defendants are the legitimate registered proprietors of L.R. No. 819/II/MN and that the Plaintiffs have failed to prove any right over it, the Defendants' Counterclaim succeeds. The provision of Section 24 of the Land Registration Act, 2012 confers an indefeasible title upon the registered proprietor. Section 25 protects that title against any other interests except those listed, and adverse possession that has not yet been recognized by a court order is not an overriding interest under Section 28. The Defendants' title is therefore entitled to protection. The evidence, including the testimony of DW1 and the surveyor's report, establishes that the

Plaintiffs are in unlawful occupation of the Defendants' land. This constitutes trespass.

64. To that extent and scope of the Defendants rights it is imperative to take cognizance of the provisions of Sections 24 (b), 25 and 26 of the Land Registration Act, 2012. For convenience, the provisions of Section 24(a) are reproduced as hereunder;

**24. Interest conferred by registration Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

65. Section 25 provides for the rights of such a proprietor and states that;

**“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

66. The provision of Section 152A of the Land Act No. 6 of 2012 prohibits unlawful occupation of land and states that **“A person shall not unlawfully occupy private, community or public land.”**

67. I have previously stated in **“Mwenye & 5 others - Versus - Tsama & 3 others [2025] KEELC 152 (KLR)”** where the Court opined that: -

***“65. The above rights, interests and privileges accorded to a registered proprietor of land apply to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in this case having established that they are the proprietors of the suit properties. For the reasons tendered herein above, the Counter claim by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants succeeds.”***

68. On the issue of damage for Loss of use of the property and/ or damages for trespass; Section 24 (a) of the Land Registration Act No. 2 of 2012 provides for the interests a person acquires upon registration of land and states:-

**“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and”**

69. The above rights, interests and privileges accorded to a registered proprietor of land apply to the Defendants in this case having established that they are the proprietors of the suit properties. Black’s Law Dictionary 10<sup>th</sup> Edition at pg. 1642 defines trespass as unlawful acts committed against the person or property of another especially wrongful entry of another's land.

70. The provision of Section 3 (1) of the Trespass Act, Cap. 294 provides that:

**“Any person who 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, private land without the consent of the occupier thereof shall be guilty of an offence.”**

71. The Defendants' case and evidence was that the Plaintiffs invaded the suit parcels of land. As stated earlier, the Plaintiffs did not offer any evidence to justify their claim of the ownership of the land and/ or the claim that they acquired the land by way of adverse possession. The Court thus finds that the Plaintiffs acts of residing on the suit property without the consent of the Defendants and failure to give back possession and cease their encroachment amounts to trespass and was unlawful interference with the rights of ownership and possession of the Defendants respective parcels of land.

72. The Court of Appeal dealt exhaustively with considerations for the award of general and compensatory damages. In the case of ***“Kenya Power & Lighting Company Ltd - Versus - Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment)”*** where the Court stated as follows;

***The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:***

***i) Harlburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to***

*nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.*

- ii) Duncan Nderitu Ndegwa - Versus - Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.*
- iii) Philip Ayaya Aluchio - Versus - Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the Plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.*
- iv) Ephantus Mwangi & Another - Versus - Duncan Mwangi [1981 - 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence. b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension*

*of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.*

- v) *Kiambu Dairy, Farmers Co-operative Society Limited - Versus - Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.*
- vi) *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited - Versus - Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;(b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass."*

73. Be that as it may and having determined that the Defendants are the rightful owners of the suit property, I find that the Defendants have proved their claim sufficiently and are entitled to vacant possession. The prayers for eviction and a permanent injunction are granted as they are necessary to give effect to the Defendants' proprietary rights.

74. As was held in the case of ***“Duncan Nderitu Ndegwa - Versus - Kenya Pipeline Company limited & another [2013] eKLR”*** -

**“damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.”**

75. The court is required to consider such evidence as would show the state of the land prior to the trespass and after and the amount of compensation that would adequately put the Defendants in the position they were in prior to the trespass. An evaluation of case law shows as follows in relation to compensation for trespass to land;

- i. ***“Philip Ayaya Aluchio - Versus - Crispinus Ngayo [2014] eKLR”*** where the defendant had erected a house on the Plaintiffs land the court observed that ***“The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”*** The court awarded a nominal sum of Kshs. 100,000/- for trespass.
- ii. In the case of ***“Nakuru Industries Limited - Versus - S S Mehta & Sons [2016] eKLR”*** the court having considered the findings in ***“Philip Ayaya Aluchio (supra)”*** awarded general damages in the sum of Kshs 500,000 and stated;

***“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However as I have found the defendants did***

***trespass onto the plaintiff's land and conduct some excavation. For this reason I award the defendant damages in the amount of Kshs. 500,000/= (five hundred thousand only)".***

iii. In the case of ***"Johnson Mainga Mogaka - Versus - Kenya Power and Lighting Company [2021] eKLR"*** the court considered the above two cases ***"Philip Ayaya Aluchio (supra)"*** stated that;

***"Being duly guided by the above decisions, I award the Defendant damages in the sum of Kshs. 1,100,000/= (One million, one hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full."***

iv. The court of appeal in ***"Kenya Power & Lighting Company Ltd v Ringera & 2 others (supra)"*** made the following final orders;

***a) The award of damages for continuous trespass allowed by the trial court at Kshs. 2,000,000.00 for Eunice and Kshs.4, 000,000.00 for George and Ellah is confirmed.***

***b) The award of compensatory damages awarded to the respondents by the trial court is set aside and substituted with an award of Kshs. 6,000,000.00 for Eunice and Kshs. 12,000,000.00 for George and Ellah.***

76. On the claim for general damages for trespass, while the Defendants have proven trespass, they did not lead specific evidence quantifying the monetary loss suffered. In such circumstances, the court awards nominal general damages to vindicate the infringement of the Defendant' proprietary rights.

For this reason I award the Defendants a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) as general damages for trespass.

77. In sum total the Defendants counterclaim is found to be merited and the same is allowed as prayed at the foot of the Counter - claim.

**ISSUE No. d). Who bears the costs of the Plaint and Counter - Claim**

78. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR*** and ***“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR***, the court stated that costs follow the event as a well-established

legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

79. In ***“Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another - Versus - Mutula Kilonzo & 2 others [2013] eKLR”*** quoted the case of ***“Levben Products - Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227”*** the Court held;

***“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp - Versus - Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”***

80. In the present case, for the fact that the Plaintiffs have not proved their claim; the Defendants shall have the costs of the suit by virtue of the Originating Summons/ Plaint dated 12<sup>th</sup> June, 2015. Further being that the Defendants have proved their claim as per their Amended counter claim dated 18<sup>th</sup> April, 2024, the costs of the same are hereby awarded to them.

## **I. Conclusion and Disposition**

81. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiffs have failed to establish their case against the Defendants. Thus, for avoidance of doubt, the Court proceeds to make the following specific orders:-

- (a) **THAT Judgment be and is hereby entered in favour of the Defendants in respect to the Amended Statement of Defence and Counter - claim dated 18<sup>th</sup> April, 2024 with costs.**
- (b) **THAT the Plaintiffs claim in respect to the Originating Summons/Plaint dated 12<sup>th</sup> June, 2015 be and is hereby found to have no merit and hence it is dismissed with costs.**
- (c) **THAT a declaration do and is hereby issued that that the suit property is CR NO. 30411 [Sub - division No. 817(Original Number 324/2)] remain registered owners of the said suit land as per the annexed extract of title.**
- (d) **THAT a declaration do and is hereby issued that the Defendants are the legal and bona fide owners of all that parcel of land known as CR. NO. 30411 [Subdivision No.817 (Original Number 324/2)] having transferred the same to Bandari Investment Company Limited on 8<sup>th</sup> October 2012.**
- (e) **THAT a declaration do and is hereby issued that the Defendants are the absolute and indefeasible**

registered proprietors of all that parcel of land known as L.R. No. 819/II/MN.

- (f) **THAT** a permanent injunction do and is hereby issued restraining the Plaintiffs, by themselves, their servants, agents, relatives, assigns, proxies, employees or any other person claiming through them from trespassing into, encroaching upon, cultivating, constructing on, alienating, or in any other manner whatsoever interfering with the Defendants' quiet possession and use of the land known as L.R. NO. 819/II/MN.
- (g) **THAT** unless otherwise stated, pursuant to the provision of Section 152E of the Land Act, No. 6 of 2012, the Plaintiffs and all those claiming under them are hereby ordered to peacefully and legally vacate and deliver vacant possession of the land known as L.R. NO. 819/II/MN to the Defendants **WITHIN NINETY (90) DAYS** from the date of the delivery of this Judgment hereof.
- (h) **THAT** in the event of default of Order (g) above, an eviction order shall issue against the Plaintiffs and/or their servants, agents, or any other person claiming under them from L.R. NO. 819/II/MN, to be enforced by the Officer Commanding Station (OCS) of the Kiembeni Police Station and or any other law enforcement under the National Police Service that the OCS Kiembeni may need assistance from.
- (i) **THAT** the Defendants are hereby awarded General damages for trespass to land which this Honourable Court has assessed at Kenya Shillings Five Million (Kshs.5,000,000/-)

**(j) THAT the Defendants shall have the costs of the suit by virtue of the Originating Summons/ Plaint dated 12<sup>th</sup> June, 2015. Further being that the Defendants have proved their claim as per their Amended counter claim dated 18<sup>th</sup> April, 2024, the costs of the suit shall be and are hereby awarded to them.**

**IT IS SO ORDERED ACCORDINGLY**  
**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....7<sup>TH</sup> ..**  
**.....DAY OF .....NOVEMBER.....2025.**

.....  
**HON. MR. JUSTICE L.L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT**  
**MOMBASA**

**Judgement delivered in the presence of: -**

- a) M/s. Firdaus Mbula - the Court Assistant.
- b) Mr. Obara Advocate for the 1<sup>st</sup> Plaintiff.
- c) M/s. Khadija Advocate for the 2<sup>nd</sup>, 6<sup>th</sup> & 7<sup>th</sup> Plaintiffs.
- d) Mr. Otieno Advocate holding brief for Mr. Adhoch Advocate for the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Plaintiffs.
- e) Mr. Mutugi Advocate for the Defendants and Plaintiffs in the Counter - Claim.