

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 109 OF 2010

STEPHEN SAFARI & 171 OTHERS.....

PLAINTIFFS

-VERSUS-

GURAMIT SINGH KANDOLT & 3 OTHERS.....

DEFENDANTS

JUDGMENT

I. Preliminaries

1. The Judgement by this Honourable Court pertains to a civil suit which was commenced by way of an Originating Summons dated 16th April 2010. It was filed under the provision of Section 38 of the Limitation of Actions Act, Cap 22, and Order 37 Rule 7 of the Civil Procedure Rules, 2010. The Plaintiffs, numbering 172, sought for a declaration that they had acquired title to approximately 55.0 acres of the land originally known as Plot No. 350/II/MN (Hereinafter referred to as "The Suit Property) by way of a claim of land through adverse possession. They prayed for an order that they be registered as the legal and absolute proprietors of the said land in place of the registered owner(s).
2. It is instructive to note that during the proceedings of this case, in July, 2010, this Honourable Court did conduct a site visit ("*Locus in Quo*") and a report was prepared and shared accordingly. It made its own observations thereof. This Court

has considered them critically upon penning down this Judgement thereof.

II. Court Directions before the hearing

3. The 2nd Defendant, *Bamburi Wananchi SACCO Society*, was joined as a party to these proceedings by an order of this court (M. Ibrahim, J.) issued on 13th September 2010. By the same order, directions were taken pursuant to the provision of Order 37 Rules 13, 16 and 18 of the Civil Procedure Rules, 2010 whereby the Originating Summons was converted into a Plaint, the Replying Affidavits were deemed to be Defences, the Applicants to Plaintiffs and the Respondents to Defendants; List of Documents and Witness Statements.
4. Thereafter confirming that the Plaintiffs had complied with Order 11 of the Civil Procedure Rules 2010, the matter was set for hearing on diverse dates. Each of the parties - the Plaintiffs, the Defendants and the Interested Parties called their witnesses and closed their cases accordingly.

III. The Plaintiffs' case

5. The Plaintiffs claimed that being entitled to the suit property - the 55 acres of land being Plot No. 350/I/MN against the Defendants/ Respondents through land adverse possession on the following questions:-

- a) ***Whether the Plaintiffs/Applicants were entitled to be declared as the proprietors of 55 acres of land on Plot No. 350/1/MN which they have acquired by adverse possession after staying and/or occupying and/or residing on the plot for over 12 years?***

b) Whether the Plaintiffs/Applicants were entitled to be registered as the owners of Plot No. 350/I/MN and be issued with certificates of titles?

c) Whether the Plaintiffs/ Applicants were entitled to the costs of the suit?

6. The Original Summons was based on the following grounds on the face of it and those of the 13 Paragraphed supporting affidavit sworn by STEPHEN SAFARI, the 1st Plaintiff. He had the authority to swear the Affidavit marked as "SS - 1". It was sworn on the same day with the Originating summons. He averred as follows: -

a. The subject matter of this suit was in respect of a parcel of land, known as Plot No. 350/I/MN, registered in the names of the Defendant herein, which they had occupied and/or stayed thereon and/or resided on the same for over 12 years without the permission and/or consent and/or authority from the Defendant. Annexed in the affidavit was a copy of a postal search marked as "SS - 2".

b. They entered the above said plot at different times, but the last lot entered the Plot in 1997 without anybody's or the Defendants' permission and/ or consent and their stay and/or occupation on the plot had been continuously, openly, adequately and uninterruptedly and above all adverse to the title of the Defendant herein.

c. The Affiant personally entered the suit premises in the year 1970's while others entered the said property in the year 1980s and the last lot before and/ or in the year 1997.

d. When they entered the Plot they constructed permanent houses and started subsistence farming as well as planting different plants and/ or trees. However, some houses were unlawfully demolished by Bamburi Sacco, while purporting to

be the owners of the Plot, an act that did not stop time from running in their favour.

- e. The Defendant herein had been discontinued of his possession of the suit premises, and/or dispossessed of the same by the Plaintiffs herein including the Affiant being one of the conditions for the sought for prayers herein.
- f. The law assists the vigilant but not the indolent and that the Defendant having been indolent on his right of ownership of the plot for over 12 years, the law could not assist him secure back his plot as the same had already been acquired by the Plaintiffs herein by way of adverse possession, a fact that was well within the Defendant's knowledge.
- g. Further to the above, the Defendant had never constructed a building or a structure on the suit property, which was a clear indication that the Defendant discontinued his possession of the Plot in their favour, while on their part they had fully developed the suit premises.
- h. Having occupied the Plot for over 12 years without the Defendant's permission and/ or consent and/or authority and since their occupation of the same had been openly and/or adequately and/or continuously and/ or exclusively and their possession of the plot being adequate in continuity and publicity, they had undoubtedly acquired ownership of the entire plot being Plot No. 350/I/MN by way of adverse possession.
- i. They had truly stayed and/or occupied the suit property for over 12 years and had never been threatened with eviction by the Defendant/ Respondent herein, despite the fact that their intentions ever since they entered the suit property had

always been to acquire the entire plot by way of adverse possession.

- j. The Affiant resided on Plot No. 350/I/MN and he had never known of any other place as permanent residence except the suit property and thus he had nowhere to reside except the suit property where he had resided and/ or occupied and/ or resided without the Defendant's permission and/ or consent and/ or authority, openly and/ or continuously and/ or uninterruptedly and/or adequately and/ or exclusively and/ or adversely to the title of the registered owner, the Defendant herein. Similarly the other Plaintiffs/ Applicants resided and/or occupied the suit premises for over 12 years, they too deserved the orders of Adverse Possession.
- k. The Affidavit was in support of the fact that they had acquired ownership of Plot No. 350/II/MN, by way of Adverse possession under the provision of Section 38 of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya.

7. On 30th July, 2012 the Plaintiffs called PW - 1 who told the court that: -

A. Examination in Chief of PW - 1 by Mr. Kenga Advocate

8. PW - 1 testified under oath and Swahili language. He identified himself as STEPHEN SAFARI KIRO, a Citizen of Kenya, holding the national identity card bearing all the particulars as indicated on the national identity card shown to Court. He resided in Utange within Kisauni on Plot No. 350 SEC 2 MN NORTH from the year 1971. Prior to that he was a residence of Kongowea and later at Bamburi. Part of the land was bushy and another part under cultivation. The land was 55 acres. After discussion with his friends, he chose a place to reside and use. These friends included Mr. Kalume Machuku Kazungu

Kenga (dead) Tizi Bongo (dead), there were others, many but he could not recall their names. He cleared the bush on his portion and he started cultivating. This was during the short rains - in the year 1971. He continued to farm and he grew trees, mangoes and coconuts. There was a shortage of water, so he dug a well in the year 1976. At all these times he resided on the land. The witness told the court that he built a food store and later a house. This was in the years 1974 and 1975. Currently he had 8 houses and a cow shed. He resided on the suit land with his wife and six children, his sister and his daughter in law. He lost two children who he buried on that land.

9. PW - 1 testified that his plot was about 10 acres. In the year 1995 he was sued by Bamburi Sacco. The case delayed considerably; through the law firm of Messers. Khaminwa and Khaminwa Advocates, he learnt that the land was registered in the name of Gurmit Singh - he had certified a copy of the title. See entry no 36 on 27th March, 1974. He also saw entry No. 41 - which was a transfer to Bamburi Sacco but this was cancelled - extract of title - "PMFI - 1". He also carried out an official search, certificate of search dated 26th October, 2009 - see details therein the owner was Gurmit Singh. The search was marked as "PMFI - 2".
10. The witness told the court that he had carried out a search earlier on 21st October, 2003, the land was for Gurmit Singh - search marked as "PMF - 13". They were quite a number of people residing and using that land. There were about 50 families, but the population was about 15 people. He had a list of people occupying the land (list Plaintiff Exhibit No. 4) most were farmers. The occupants had structures, their homes. Save

for the suit filed in the year 1995, their stay was peaceful. From his testimony, it was in the year 2008 that problems arose. Some people invaded the land, demolished houses and burnt others. When they went to the police for help they demanded for ownership and so they got no help.

11. PW - 1 told the court that he had visited the Municipal Council of Mombasa. He had confirmed that the land was still one unit. He had a rates statement from the council dated 8th June, 2010 owner Gurmit Singh. He had a recent statement of 30th July, 2012 still in the name of Gurmit Singh. The outstanding rates over a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000.00/=). Demand was marked as "PMF - 1's" "a" and "PMF1 - "b". Gurmit Singh was the Defendant. They were unable to trace him and so they served him by way of substituted means vide advertisement published on the local dailies of wide national circulation - "**The Daily Nation**" edition of 12th August, 2010. Despite of this, he never appeared. Extract of newspaper was produced as Plaintiff Exhibit Number 6. He had copies of summons to enter appearance, pleadings in civil suit 783/95 (Mombasa CMCC) - "PMFI - 7". That suit was pending. Although the Plaintiffs therein had displayed titles to the sub - plots, the witness knew that the plot/land was still one piece. (Shown list 14 of the 2nd Defendant's list of documents). He saw an agreement duly entered between Gurmit Singh Kandult & Bamburi Sacco. He did not agree with it (shown annexure 2 to affidavit of John Kimbi sworn on 29th June, 2010 - of the approved Part Development (PDP) physical plan.
12. PW - 1 stated that this was not approved plan - it looked incomplete. The Plan was produced as Plaintiff Exhibit Number

8. According to PW - 1, the Plan was not authentic. The claims by 3rd - 25th were not true. He had also learnt that Defendants claimed 15 acres. When shown the Replying Affidavit sworn by Mohamed Hatimy, the 4th Defendant herein dated 17th September, 2010, the witness told the court that he saw the title to Plot No. 6155 (W/S No. 350/ 135) transferred on 19th July, 2010 to Hatimy Group Limited. The witness told the court that annexed as "MMH - 1" - this was a letter of consent, he noted that there were some alteration on the numbers. The signature on the alternation appeared different from that of the Chairman of the board. They took this document to a document examiner. See their request to the Director of CID Nairobi. The request was to compare signatures against the alteration and that of the chairman. They got the report. It indicated that the signatures did not agree. The Letter (Plaintiff Exhibit Numbers 9), report was marked as "PMF1 - 10" and the Consent was "PMFI - 11". PW - 1 told the court that he occupied the land in the year 1971.

13. In the year 1980 another group joined them. They came in the year 1990. However, after 1997 none joined them. Once an order of injunction was granted by this Court people stopped building. There was a mosque built on the land, built by Red Cross for purposes enabling the Somali refugees to worship. The refugees stayed on this very land with them temporarily for 5 years. The mosque was built after Red Cross had built a refugee camp. PW - 1 had never seen Gurmit Singh. He knew Tamana, he was a Provincial Agricultural Officer. He did not know him as an attorney of Gurmit Singh Kandolt. He advised on farming on the same land. He did this with his officers. The witness sought the orders in the originating summons. He had

resided without any interruption and continuously for a long duration. He claimed 10 acres. The other Plaintiffs knew their acreage and location on the land. They all agreed. Once given the land, there shall be no disagreement between the Plaintiffs.

14. When recalled he told the court that recorded a statement dated 14th December, 2016 and filed in Court on the same date, He filed an authority from his Co - Plaintiffs authorising him to testify on their behalf. The statement and authority were adopted as evidence in chief.

B. Cross examination of PW - 1 by Mr. Mutugi Advocate.

15. PW - 1 occupied the land in August 1970. This was Plot Number 330. He was the owner of 5 acre adjoining Plot No. 350 which he bought from Caroline Lukas. This was 5.96 acres and described it as plot no 353/II/MN Shown PMFI 7. He stated so in that civil suit. Plot no. 353 touched onto Plot No. 350. He was a squatter on Plot No. 350 but he was not landless. When shown the contents of the Defence at paragraph 3(ii) the witness stated that the same was not true. He built/dug the borehole. When he built his house, no survey had been done between Plot Nos. 350 and 353. He did discuss this with Bamburi Sacco. He built his house in the year 1975 which was something he could discuss with Bamburi Sacco. But the Sacco called him to discuss this. The witness confirmed that when he built the house there had been no formal survey.
16. When shown the Defence, the contents of Paragraph 3 (ii) - the witness did not agree with this. He used to work at Bamburi Cement from the years 1954 - 1981. He was at this time an employee of Bamburi. He was in Stores and was a founder member of Bamburi Sacco but he was involved for only one (1) year. After the witness left he did not associate with them any

more. He knew that Bamburi Sacco claimed to have bought the land in the year 1982 but he was not involved. He accepted that he had agreed with Bamburi Sacco Co on swapping a portion of land from Plot No. 353 for the area he had built his house on Plot No. 350. The witness knew very well that Plot No. 350 did not belong to them. He was present during the court site visit. Amongst the Plaintiff and the persons on whose behalf this suit was brought none had permanent structures.

17. At the time of court visit (July 2010) the houses were under construction. He saw the photocopies of the Deputy Registrar's report. When shown photograph No 40 - this was Plot No. 350 shown Photograph 28 - he knew this beacon (350). Save for him, the others did not have permanent houses. On these photographs none of the houses were more than three years old. According to him, "PMFI - 2" was an official search. This was done by Safari Kombe. He was alone when he did this. The witness did not know the officer of lands who served Safari Kombe. He did not know who signed the official search. It was dated 26th October, 2009 shown on page 3 of the Replying Affidavit and he stated that he saw Plot No. 6037 (Nos 350/17) Sec 11 MN - the original number was Plot No. 350. This search was dated 11th February, 2010. This searches after "PMFI - 2" showed the owner as being Alexander Mwora. The signatures on the two searches appeared different.

18. The witness told the court that the other searches were done on 21st February, 2011 on Plot 6022/II/MN - Bamburi Sacco 25th February, 2011 - 6134/II/MN - Bamburi Sacco. From the searches it appeared that Plot No. 350 was sub - divided into two. This was not true. When shown page 11 of the Defendant's documents and entry 41 - PW - 1 noted that the

cancelled transfer was on 24th July, 2003. The witness told the court that there was no date of cancellation - nor the name of Land Registrar who signed it. He discovered the cancellation in the year 2003 and he was given copy of title.

19. When shown "PMFI - 5A" and "PMFI - 5B", the witness told the court that he saw the address there it was 88474 Mombasa. He did not know the address of Bamburi Sacco. Before the year 1995 there was communication between Bamburi Sacco and himself over this land. It was true the Civil Suit No. 785/95 was pending. It was true that the suit was for his eviction and damages. There were criminal cases on trespass where the accused persons were some of the claimants here. When shown Plaintiff Exhibit No. 8 the witness stated that he saw the name of P. M Kasyi (Licenced Surveyor). Authentication was signed. He also saw that sub - division were from numbers 6022 - 9155. There was no folio no 235 and register no 43.
20. He recalled that this was the second time he was being asked these questions. It was about 5 years since he had first testified. He recalled the court visited the site and took photographs. They were at pages 214 - 234 in the 2nd Defendant's bundle of documents. The witness confirmed that these photographs showed the position at the time the Court visited. He did not have a photograph of a house that the court photographed. The witness was sued by Bamburi Sacco in the year 1995 in Mombasa SRMCC 785 of 1995. The Sacco wanted him to be evicted from the portion he had trespassed on. He was represented by Mr. Khaminwa Advocate in that case.
21. The witness denied the Sacco's claim and stated he had not trespassed. In his defence he stated that if he had trespassed in the Sacco's land, he would give them an equivalent portion.

Somali refugees were away from where he was and the borehole was far. He was aware of the existence of a criminal case that was pending before Court. His Plot was No. 353 and was about 56.9 acres. He had constructed his house in Plot No. 350 and not Plot No. 353. He bought Plot No. 353 from one Caroline Lucas.

22. The witness told the court that they entered into a written agreement. He had the authority filed on 14th December, 2016. This case was filed in the year 2010 but the authority was given in the year 2016 by all the Plaintiffs. When shown the application dated 18th September, 2014 at paragraph 1 of the grounds by the 2nd Plaintiff, the witness told the court that he knew Kalume Machaku, the 2nd Plaintiff who had applied to be struck out of the proceedings.
23. PW - 1 reiterated that he did not see Machaku signing the authority. When he came to that land, the witness was told it belonged to Mr. Kidevu. When he filed this suit, it belonged to Gurmit Singh, the 1st Defendant. Among the people in Court were working with him at Bamburi Cement Co. Ltd. He did not know if they were members of the Sacco. From the items numbers 20 - 208 of the 2nd Defendants bundle of documents showed Certificate of Titles. He did not accept that title as his search showed the owner as Gurmit Singh.

C. Cross examination of PW - 1 by Mr. Mwakireti Advocate.

24. PW - 1 confirmed they had filed a suit in respect of Plot No. 350. He recalled surveyors went to that land sometime. He did not know that there was sub - division that was carried out and title deeds issued. He was shown the 2nd Defendant's bundle of documents which contained title deeds. Beside Plot No. 350

which he claimed, he owned Plot No. 353 which he had a title deed. He bought Plot No. 353 around the year 1965 - 1969. He had worked with Bamburi Cement Company Limited.

25. The witness worked with Bamburi Cement company limited from the year 1959 upto 1982. He was a member of Bamburi Sacco, the 2nd Defendant. He was involved in Sacco affairs. By the time he ceased being a member, the Sacco had not bought land. The witness did not know when the Sacco bought that plot because he was no longer a member.
26. The witness told the court that he recalled that the court went to the suit land in July 2010 and prepared a report. Photographs were taken on fresh constructions that were undertaken. The new constructions were for people whose houses had been demolished. He had no recollection on when people started occupying the land but recalled some people came less than three years to his testimony.
27. PW - 1 reiterated to the court that he owned Plot No. 353. In his affidavit sworn on 16th April, 2010, he stated that he had no other place to live except Plot No. 350. He had Plot No. 353 but had no capacity to build a house in it. He came to learn of the registered owner of Plot No. 350 in the year 1995. He found it was in the name of Gurmit Singh Kandolt. He had no official search for the year 1995. He had a search for the year 2003 which he made. The search was marked as No. 3 in his list of documents and it was owing Commissioner of Income Tax. The witness had resided there since the year 1971. He did the search in the year 2003. He had resided there for 30 years but he did not file a suit until seven years later after the search in the year 2010.

28. The witness told the court that he did not know if titles had been issued in the year 2004 when shown the certificates of title at page 20 onwards. He went further to state that it showed they were registered on 1st November, 2004. When shown the supporting affidavit to the originating summons annexure marked as "SS - 2", the witness told the court that he was not the one who applied for the search neither did he know the person who did it. In the year 2010 when the court came to the site, his house was not photographed. He did not complain that his house was not photographed. He had not heard anybody complain that his/her house was not photographed. Some houses were demolished in the year 2008. They never filed any complaint/case over the demolition in the year 2008 neither did they sue the Defendants or any other person for that matter.

D. Cross examination of PW - 1 by M/s. Wambani Advocate.

29. PW - 1 confirmed that he entered the land in the year 1971. He did not buy it. He mentioned three (3) people who were his friends but there were many people. When he entered the land, he was told the plot belonged to Mr. Kidevu. Before he was sued, he never went anywhere. He was charged in the year 1995 for trespass. He was not disturbed again until the year 2008. He was not asked if he owned the land. He did not know who else claimed ownership of that land.

30. PW - 1 stated that he wrote a witness statement dated 14th December, 2016; he prayed for the Court to adopt the contents of that statement. He dug a borehole in Plot No. 350 and constructed it in phases. He had no documents such as receipts to support his allegations. They were asked in the year

1991 by the government to give room to Somali refugees. They remained for about 5 years. The chief of the area was the one who asked them to vacate to give room. The refugees were many. There was a mosque that was built by the Red Cross. He was not aware that the 26th Defendant put up the mosque. When their houses were demolished in the year 2008, they did not report to the police. He buried two of his children in that plot. If this court came to his portion, he could have shown them the grave.

31. The witness told the court that he did not know if there were other graveyards in other homesteads. In the year 2008 their houses were demolished and burnt. There was no demolition in the year 1980. He could not know how many acres each Plaintiff owned.

E. Cross examination of PW - 1 by the 28th Defendant.

32. PW - 1 stated that he resided in that land before he purchased Plot No. 353 in the year 1975. Surveyors came and showed him the boundaries of Plot No. 353. He cultivated the plot as he resided in Plot No. 350. He had never been asked to vacate Plot No. 350 which was about 55 acres but he owned about 10 acres. He had not seen the 28th Defendant in the past. The witness knew Mzee Kalume who reared cattle. He did not know if the 28th Defendant had purchased the land as he was not told. In the year 2009, there were many people in that land and the list was before court and he was one of them. If the 28th Defendant were cultivating and leaving, the witness did not see him.

33. When shown the certificate of title, the witness told the court that it showed a transfer to Bamburi Sacco but it was cancelled. The transfer was made on 8th March, 1982 to

Bamburi Wananchi Co - operative Savings and Credit Society Ltd. Entry no 38 was for Gurmit Singh Kandult and Entry no 39 was income tax charge dated 24th August, 1982. He did his search in the years 2003. In the year 2003, the search showed it was still in the name of Gurmit Singh.

34. The witness told the Court that it was not true that he bought incomplete documents. The houses were demolished in the year 2008. Before then they were living in peace. They were very many. When shown the sub - division map, the witness told the court that it was Plot No. 350 and the subsequent sub - divisions. He did not agree that Plot No. 350 was no longer in existence. The search could have shown the sub-divisions. When shown the certificate of title in name of Samuel Odhiambo Odera dated 1st November, 2004, the witness told the court that it showed various sub - divisions.
35. PW - 1 told the court when shown original Certificate of Title in name of Bamburi Wananchi Sacco Society Limited that it meant when one had such a certificate of title one was the registered proprietor. When shown the letter dated 24th February, 2014 from the Law firm of Messrs. Munyithya Mutugi Umara & Muzna Company Advocates to the Minister, Land & Physical Planning, the witness told the court that it was not true that other Plaintiffs came after the Court's visit in the year 2010. He confirmed, the Court made a visit to the site. When shown document in the list originating summons no. 46 of 2014. He knew Kalume Machaku Mavuo. It was not true that they were claiming land in which other people already had title documents.

F. Re - Examination of PW - 1 by Mr. Kenga Advocate.

36. PW - 1 confirmed that it was not true that they had lived only for 3 years in the year 2010. When the court visited the site, some houses were new because they were being constructed after the demolition. Those whose houses were demolished had never vacated from the land. He entered that land in the year 1971. He was told the land belonged to Mr. Kidevu. He had not seen Mr. Kidevu to date. He was sued by the Sacco.
37. PW - 1 told the court that the 1st document showed entry numbers 37, 38, 40 then 11 which did not make sense at all. In his list of documents, the last entry was No. 41. This was a true copy of the original. It was certified on 30th November, 2010, the sum of Kshs 500/- was paid for the certification. The 2nd Defendant's list page 11 end with Entry No. 41. It was same as his, though his was certified. When shown page 10 of the Plaintiff's list of documents, the witness told the court that the search showed Gurmit Singh. He did the search on 21st October, 2003. He did not do the search at page 9 which was made on 26th October, 2009. He still maintained the land was in the name of Gurmit Singh as at the year 2010. At page 16 of the list of documents, No. 172 was Kalume Machaku Mavuo.
38. The witness told the court that he was not present when Kalume Machaku Mavuo signed. Houses were demolished in the year 2008. His was not demolished (when shown page 21 of the Plaintiffs bundles documents - after which the witness read the Plaint). He did not know the outcome of the civil case - CMCC No. 783 of 1995 when shown the transfer on page 14. The transfer was for 8/11 of the property and it did not tally with the one by the 28th Defendant. They prayed to be registered as owners of the suit land as per their filed pleadings.

39. The Plaintiffs called PW - 2 who testified as follows: -

A. Examination in Chief of PW - 2 by Mr. Kenga Advocate.

40. PW - 2 was sworn and he testified in English language. He was called EMMANUEL KENGA. He was a retired Assistant Commissioner of Police and a Forensic document examiner of more than 26 years experience in the field. He retired on 4th March, 2015 and currently did private practice in document examination. He had his initial training at CID headquarters laboratories Nairobi and also went to Israel for training and also Lyon in France. On 21st September, 2010 he received some documents from Messrs. William Kenga & Company Advocates requesting for examination of documents as follows.

41. There was a document being of a Letter of Consent dated 2nd April, 1982. Through the letter, he was requested to examine the same documents on the signatures indicated by red arrows and shown by letters (a) and (b) in the said documents. The second mandate was to examine some areas indicated by blue arrows in the document. He did the analysis and compared the signatures shown in red arrows and noted the following;

a) The signatures were not similar and were written by different authors.

b) The areas shown with blue arrows had evidence of alteration and overwriting, figure (2) was altered to read figure (3). Therefore, he prepared a report, signed it on 24th September, 2010 and wished to produce it as evidence in this case.

42. The alteration was on figure 2 and another which was meant to read 5 but the initial figure was not clear. He produced the report as an exhibit. It was Plaintiff Exhibit Number 10 and the

Letter of Consent dated 2nd April, 1982 as Plaintiff Exhibit No. 11.

B. Cross examination of PW - 2 by Mr Mutugi Advocate.

43. PW - 2 confirmed that the instructions came to him when he was in charge of the service. He retired in the year 2015. He did not receive any instructions if there was a report of fraud or not. The instructions came from Messrs. William Kenya & Co. Advocates. He could not recall any Occurrence Book presented to him in regard to the Letter of Consent. The letter of consent he received was a photocopy. Even the second was a photocopy. The report he made was based on the copies he received.

44. The questioned documents were copies. His mandate was to compare the signatures marked "A" and "B". He did not receive any original. Individual characteristics of one's signature may change due to sickness, alcohol or drugs but the individual characteristics would remain. At the bottom of the document were the names M.A.L Indiazi, chairman. Same to the second document.

C. Cross examination of PW - 2 by Mr. Mwakireti Advocate.

45. The witness stated that he did not have documents showing his training. There was evidence of alternations and overwriting. He had no knowledge of the purposes of the alternation. He was a Assistant Commissioner of Police while making the report. It was not his mandate to take any step other than to prepare his report. His mandate was to examine the documents and prepare his report. It was not his duty to investigate any crime committed. The name of Indiazi was

indicated as the chairman. He did not know him. He did not seek any information from him.

46. PW - 2 told the court that he was aware that the letter of consent came from the minutes. Below the signature of Indiazzi, they had Min. 13/ 82. He did not request for the minutes. He never got any specimen signature from Mr. Indiazzi.

D. Cross examination of PW - 2 by M/s. Wambani Advocate.

47. PW - 2 confirmed that he had 26 years' experience in document examination. He was not aware that someone's temperament could affect over signature. In his entire service in the police, he had never been accused of any impropriety. The question he had was to compare the two signatures. He did not find it necessary to recommend any investigation of forgery. The witness did his report as per the letter of request.

E. Cross examination of PW - 2 by the 28th Defendant.

48. The witness stated that forensic science was also an art and involved handwriting and signatures. He had all his documents of qualifications but he had not carried them. He examined the two signatures marked as "A" and "B" and arrived at his report. He established that there was an alteration. When a document was altered, that was a forgery.

F. Re - examination of PW - 2 by Mr. Kenga Advocate.

49. PW - 2 reiterated that individual characteristics remained in one's signature. There could be changes in ones signature due to alcohol, sickness drugs, old age etc but the characteristics will remain. The alternations were done purposely. His mandate was only to compare the signatures marked in arrows "A" and "B".

50. The Plaintiffs called PW - 3 on the same day who testified as follows: -

A. Examination in Chief of PW - 3 by Mr Kenga Advocate.

51. PW - 3 was sworn and testified in the English language. He was called ROY BONGO, a Citizen of Kenya holding a national identity card bearing all the particulars as indicated in Court. He resided in Plot No. 350 MN. He had recorded a witness statement on 26th July, 2012 and he adopted the same as his evidence in Court. He confirmed getting a true extract of title from lands office dated 30th November, 2010 and he was the one who went to get the certified copy (MFI - 1). He had the official search dated 26th October, 2009 (MFI - 2). He was the one who obtained the search. The third (3rd) was also a search dated 21st October, 2003. It was for Plot No. 350. He did it himself and he obtained the copies of rates certificates from the Municipal Council of Mombasa. The first (1st) was dated 8th June, 2010.

52. As per the statement, the owner of the suit land was the 1st Defendant, Gurmit Singh Kaudolt. The second was dated 30th July, 2012 and the owner was same Gurmit Singh Kandolt. The witness was the one who collected the statement and he produced them as exhibits. The documents were marked as MFI Nos. 5 and 6 respectively.

B. Cross examination of PW - 3 by Mr Mutugi Advocate.

53. PW - 3 reiterated that he was born in the year 1960. He entered this plot in the year 1979. By that time he was 19 years old. He did not have his identity card in court but he had an abstract which did not show his date of birth. By 1979, he had completed his primary school education. He had not obtained the national identity Card. He came to stay with his

grandfather. His grandfather died in the year 1986. By the time he died, he had put up a structure. The witness recalled the court visit to the suit land. He recalled photographs were taken on the site when shown the 2nd Defendants list of documents pages 214 onwards.

54. According to the witness his house was the one at the bottom of page 217. Some walls were still open. He told the court to take photographs of other houses but they refused to take photographs of several houses that were complete. He heard PW - 1 testify. It was not true that he said some of them had stayed for less than a year. He resided there for about 31 years. He had not taken any step for those years. He was aware there were cases in Court. One was where Stephen Safari was sued, "**CMCC No. 783 of 1995 Bamburi Wananchi Sacco - Versus- Stephen Safari**".
55. The witness told the court that when he learnt that there was case against Stephen he did nothing. He could not recall him telling the court he had this own land. He did not tell the Court that he drilled a borehole. He was not among those arrested for trespass. He was there at the time. The witness had seen the documents by the 2nd Defendant. At page 3 was the certificate of postal search was for Plot No. 6037 (Original No. 350/ 17) Sec II MN in the name of Alexander Mwoya.
56. According to the witness page 4 was 6022/II/MN in name of Bamburi Wananchi Sacco Society Limited. Page 5 was 6134/11/MN in name of Bamburi Wananchi Sacco. He had not heard that Bamburi Sacco had been sued. At Page 14 was a sale agreement from Gurmit Singh Kandolt to Bamburi Wananchi Co - operative Saving and Limited. He had never worked with Bamburi Cement. He had seen the people on

Court. He only saw them in Court and believed they were stealing the Plot from them.

C. Cross examination of PW - 3 by Mwakireti Advocate.

57. PW - 3 told the Court that he resided there with his grandfather; their home was in Kaloleni. He did not take out the Grant Letter of Administration in respect to the estate of his late grandfather. In his statement, he had stated that his grandfather, the late Mzee Tezi Bongo used to tell him that one Mr. Kidevu was the genuine owner of the suit land. Thus, they grew up knowing that Mr. Kidevu as the true owner. In the year 2008, their houses were demolished for the third time.
58. They went to complain at the police. He was not permitted to record a statement. They did not file any case against the people who demolished. They only filed this case. He did not know that Plot no. 350 was no longer in existence. The witness conducted an official search in the year 2012 which showed that the suit land was in the name of Gurmit Singh Kandolt. It confirmed the information he was shown - the Certificate of Title (on page 3) of 3rd & 11th Defendants list of documents filed on 29th November, 2016.
59. The witness told the court that, there was a sub-division in name of Albert Mwambomu. He transferred it to Felix Msabaa Kimbio. The bill from the municipal council was in the name of Felix Msabaa Kimbio. At page 110 of the 2nd Defendant's documents were the certificate of title for Plot no sub - division 6081 (original 350/61) in name of John Kimbo Msabaa. It was dated 2004.

D. Cross examination of PW - 3 by Ms. Wambani Advocate.

60. PW - 3 told the court that he had resided on the suit land since the year 1979. He had never seen Mr. Kidevu. He did not carry out a search for all that time while living with his grandfather. They were being demolished on several occasions but they never left. In 1990s, the Barawa community came and settled there. They were sold for by Hon. Maitha, the then Member of Parliament for Kisauni Constituency. He had no evidence to show that it was the government who brought them. The Barawa community left. The mosque they built was still there.
61. The witness saw the report made by the court. It stated that some houses were empty. The witness even buried his child there but the court did not take a photograph of the said graveyard. He had never complained but was complaining through his testimony. The demolitions were done on several occasions. The demolitions were done by Bamburi Sacco. The Plot measured approximately 55 acres. They were about 300 in number. What made them do a search was the frequent demolitions by Bamburi Sacco.

E. Cross examination of PW - 3 by the 28th Defendant.

62. When shown the 28th Defendant's list of documents, the witness could see copy of title document. He could not tell if he had seen these documents before. He entered that Plot in the year 1989. He could see entry no 32. It was a transfer to Timothy Chidzengo Joseph Ramtu. He did not know that Mr. Ramtu was Chairman of Bamburi Cement Limited. From the documents, the land was transferred to Mr Ramtu. Entry no 37 was a charge. Entry no. 38 was a Special Power of Attorney dated 3rd June, 1981. Entry no. 39 was a Discharge of Charge. Entry no. 41 was transfer to Bamburi Sacco Society but it was cancelled.

63. The witness was not aware of the cancellation of the mother title giving room to the new title numbers. She was not aware that Plot No. 350 was closed/cancelled because it was sub - divided. When shown the original Certificate of Titles, he stated that CR No. 38422 in the name of Bamburi Wananchi Sacco. It showed original 350/74. The second one was CR 38424 in name of Samuel Odhiambo Odera original 350/77. He could not tell which part 1 live in that map. He carried out search over Plot No. 350/MN. The witness knew there was archives. It was not true that his search was based on documents in the archives. Shown Page 215 of the 2nd Defendant's documents, the witness testified that he could see a beacon for Plot no. 350.

F. Re - examination of PW - 3 by Mr. Kenga Advocate.

64. PW - 3 reiterated that the map was not registered nor signed. He could not tell where it came from. It could not be sub - division of Plot No. 350. He had no knowledge where the same came from. The search he did showed that the owner as Gurmit Singh Kandolt. He had seen the transfer to Bamburi Sacco. It was also written across it as - cancelled. His grandfather was welcomed by Kidevu and it was him that showed the witness where to settle. When the court took photos, he tried telling them to take some houses.

65. The Plaintiffs called PW - 4 who testified as follows: -

A. Examination in Chief of PW - 4 by Mr. Kenga Advocate.

66. PW - 4 was sworn and testified in English language. She was called JOSEPHINE MUNYASIA RAMA. She was and worked as the Land Registrar - Mombasa. Her P/No. was 2015000316. She was in court pursuant to the summons by Court. She had both the title parcel and correspondence file. She was referred to

the list of documents dated 13th December, 2012 and filed on 7th February, 2013 - part of it was the same as theirs as the one shown Entry No. 42 was missing for entry the same as theirs as the one shown Entry No. 42 was missing for Entry No. 36 indicating owner GULMIT SINGH KANDOLA and the Entry No. 42 shown owner as GULMIT SINGH KANDOLA. The parcel title and the certified were admitted and produced as Plaintiff Exhibit.1 (a).

B. Cross Examination of PW - 4 by Mr. Mutugi Advocate and the Court:-

67. PW - 4 told the court that the owner of the land was GURMIT SINGH KANDOLA; Entry no. 41 - transfer was to Bamburi Wananchi Co - operative Savings & Credit Society ideally from Mr. Gurmit Singh Kandola. She saw the 3 stamps of cancellation of this Entry. She did not see or know the reason for the cancellation. Before any cancellation is effected, there are normally several reasons for it to take place. There was no notice issued to Bamburi Wananchi Co-operatives Savings & Credit Society. There was no court order.
68. The cancellation could only be done by the Land Registrar if it was not signed. If the entry was signed it had to be by court. The entry of No. 41 had not been signed neither was it registered - date 24th July, 2003. Entry No. 42 was done for the subdivision of 6155 on 21st October, 2009. The original was issued to Bamburi. The title was Plot No. 350/17 which embarked from Entry No. 38 CR No. 138 to Samuel Odera. There were 133 titles being sub-division of the main parcel. The sub-division was legal. The cancellation might have been done wrongfully as there were notices issued to the owners.

C. Cross Examination of PW - 4 by Mr. Gikandi Advocate.

69. PW - 4 confirmed that there was an official search of 55 acres belonging to GURMIT SINGH KANDORA it was closed on sub-division. The official search reflected the original information even after the sub-division but creating the new parcels. The parcels belonged to Gurmit Singh Kandola as the original and it was sub-divided to 133 parcels. The parcels were to be in the names of Gurmit Singh Kandola.
70. The sub-division went to the names of the original owner first, but if it was the transfer it was indicated. With reference to the Certificate of title No. CR. 46565, the witness told the court that it was for GURMIT SINGH KANDOLA for 15 acres. It appeared on entry No. 42 on the mother title.
71. According to her Entry No. 2 of CR 46565, there was a transfer to HATIMI Group Limited which occurred on 19th July, 2010. She confirmed that the land did belong to GURMIT SINGH KANDOLA. She stated that the land belonged to GURMIT SINGH KANDOLA due to sub-division. This title had been closed for sub-division which did not disclose the information of the sub-division - 133 parcels. She only brought to court this record - she did not have the 133 sub - divisions. Entry No. 42 appeared on the clients title brought back upon the closure. The copy which had no entry 42 was a file copy. She issued an official search in the year 2018.
72. According to PW - 4, Mr. Gurmit Singh Kandola, had the ownership to the sub-divided parcels. He returned the original title to the Land Registry upon sub-division i.e. close of the sub - divisions whatsoever. And of the subsequent titles were in his name. He may claim ownership.

D. Cross Examination of PW - 4 by Mr. Charles Kambo.

73. PW - 4 told the Court that Entry No.37 was charges to Algaman Bank N.V. He borrowed. Entry No. 38 - he donated the special Power of Attorney dated 3rd June, 1981 to Perminder Singh Tamana on behalf of Gurmit Singh. Entry No. 39 - Income Tax dated 24th August, 1982 of a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/-). Bamburi did comply by paying stamp duty. There was an official search for the year 2018 and there was an official on 7th December, 2018. The parcels for 134 existed. They should be there because there was sub-division. The one that was available was for HATIM Group Limited. The search of 7th December, 2018 showed the Land belonged to GURMIT SINGH KANDOLA. The parcel No. 350 was the mother title - creating separate.

74. The witness told the court that she had no title in her name as she bought her land from one SAMUEL ADHIAMBO ODERA pursuant to the sale agreement dated 17th December, 2004.

E. Re - Examination of PW - 4 by Mr. Kenga Advocate.

75. According to PW - 4, Hatimi Group Limited became owner on 19th July, 2020 after the case was filed. As at April 2010 when the case was filed the suit land belonged to GURMIT SINGH KANDOLA. Upon the sub-division they registered the certificate of sub-division in the title. The entry No. 42 was upon the close of sub-division. She remained with 15 acres which was not clear he transferred to HATIMY. There was no proof of the transfer to Bamburi Wanainchi Co - operative Savings & Credit Society. There should have been in the title. It appeared that the land had a direct transfer from GURMIT SINGH KANDOLA.

76. With reference to the transfer - item No. 6, PW - 4 told the court that the transfer was dated 17th August, 1989, it was a transfer and not a sale agreement. It was not registered. She

confirmed for one to acquire title or land the transfer should be registered - Bamburi Wanainchi Co - operative Society should have been having them in their possession. She told the court that Entry No. 41 was on the cancellation and no reason was given. Hatimi acquired 15 acres. She could not tell what happened to the 40 acres.

77. The Plaintiffs through their Counsel Mr. Kenga Advocate marked their case closed on 23rd May, 2022.

The Defendants' response

78. The Defendants called their first witness on 24th May, 2022 who testified as follows: -

A. Examination in Chief of Defendant Witness DW - 1 by Mr. Mutugi Advocate.

79. DW - 1 was sworn and testified in English language. She was called ANASTACIA CHERONO CHESIMET, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court. She resided in Bamburi estate and was unemployed. She used to work for Bamburi Cement and the Bamburi Wananchi which was a registered Company. She recorded a statement dated 12th September, 2016 filed on 12th December, 2016. In a nutshell she had been attending court - Plot 350/12/MN, still existed. It was sub-divided into small plots - registered in GURMIT SINGH KANDOLA, there was a transfer.

80. She had the original transfer form for GURMIT SINGH KANDOLA, was done on 17th August, 1989. The duty was paid for it, there were copies of the cheques - for Kenya Shillings Eighty Five Thousand Three Fourty Three Hundred (Kshs. 85,343/-) for income tax dated 22nd October, 1987, they conducted the surveys by Kassim Surveyor. He did the sub -

division and they came up of the title - she had 4 out of 133 title. The four were:-

- a. CR 1267/43 6062;
- b. 6063/2.
- c. 6034/Orig. 350/114/2MN).
- d. 6126 (Orig. 350/105/2MN).

81. The witness told the court that all were in the names of BAMBURI WANANCHI SACCO the others were for the individuals -

- (i) 11781 (Orig. 350).
- (ii) 6097/350/67 Malindi North.

82. After the surveyor finalized he gave them a map for the area to show that the sub-division was conducted and achieved. This map showed there were 133 portions dated 9th February, 2004. They were given beacon numbers 9th February, 2004 and the portion that remained for 15 acres for HATIMY Group Limited there was a map dated 9th February, 2004. She was aware of the suit in Court. She did not know Mr. Stephen Safari personally but she knew he was a former employee of Bamburi Cement. He was an owner of Land Plot No. 353. He encroached onto the land of BAMBURI Wananchi Sacco. This was stated in the civil case of CMCC No. 783/1995. He was charged for trespass and he was ordered to vacate. In the year 2010 Mr. Alexander Mwora told them that people had encroached into their land. They reported the matter to the chief. There was a letter to that effect. The owner of this land was for the members of Bamburi Wananchi Sacco. She recalled the court visiting the site and 63 photographs taken. Defendant - Exhibits - Photographs marked as G-1 to 63 in the Supplementary Affidavit.

83. The money used to purchase the land was from the savings. The purpose for the purchase of the land was for it to be used for building their houses. Before the land was bought, due diligence was conducted. It was only Stephen Safari who had already been there - with 3 houses. The massive occupation occurred in year 2010. By the time the court visited there were no permanent houses. Indeed, the photographs showed houses being built hurriedly, she confirmed these people were doing this to lay a claim on the land. They would have liked the Court to help them get back their land.
84. The massive invasion was in the year 2010. This triggered the court to conduct the visit and hence took the photos. The Plot No. 353 was still for Stephen Safari but he encroached.

B. Cross Examination of Cherono by Mr. Kenga Advocate.

85. M/s. Cherono told the court that they joined the matter. They never sued i.e. Bamburi Wananchi Credit they bought the land in the year 1982. From her statement she had not joined the company. She did not have the sale agreement that they bought land in the year 1982 i.e. they bought the entire land - 55 acres. The Sale Agreement was available but not in Court. They bought it for a sum of Kenya Shillings One Million Eight Hundred Thousand (Kshs. 1,800,000/-). They did not transfer the land - Plot No. 350 to the Bamburi Wananchi. Instead, they transferred to the registered members.
86. According to her it was sub - divided and transferred to members when it was in the names of Gurmit Singh Kandola. But the remainder were transferred to Bamburi Wananchi Co - Operative Sacco. Bamburi Wananchi Sacco never became the registered owner of Plot No. 350 as it was still in the name of Gurmit Singh Kandola. They bought the land from Gurmit Singh

Kandola. The transfers to the individuals were done - a few to individuals and Bamburi Sacco.

87. DW - 1 told the court that after purchasing the land from Gurmit Singh Kandola it was transferred to Bamburi Sacco. There are transfer documents. Transfer dated 6th September, 1989 was registered in the land offices. The transfer did not contain any signature by the Land Registrar nor stamp duty paid. The transfer was signed by PERMINDER SINGH TAMANA as Attorney of GURMIT SINGH KANDOLA P/A Registration as CR 1267/38 passport No. C 586158 A. The same was franked. They paid Stamp duty of Kenya Shillings Eighty Five Thousand Three Fourty Three Hundred (Kshs. 85,343/- on 19th October, 1987 and the cheque was issued. The transfer was dated 17th August, 1989 - Stamp Duty was paid 2 years before the transfer.
88. From the extract of the titles there was Entry No. 41 showed there was transfer to Bamburi Wanainchi but it was CANCELLED. From the transfer it showed only a fraction of the land was transferred and not the entire. It was not true that had it not been transferred, they could have bought the whole parcel of the land - measuring 55 acres. Hence the sale agreement was for 55 acres but the transfer was for a fraction of the land.
89. The witness told the court that she was not aware how the 15 acres went to Hatimy Group Limited. All the 133 sub title they bore the number 350/43 while others 350/38 hence they did vary. The Letter of Allotment was dated 12th September, 1994 issued to Bamburi the Applicant 350/2 to Plot No. 64. He was shown a map with many sub - divisions. They were done on 9th February, 2004 - the plots for 133 and Hatim Group Limited

were done at the same time - i.e. the applicant was Bamburi Sacco.

90. With reference to the Criminal case where Stephen Safari was ordered to move out of the. She had not seen the verdict. There was no evidence to show that Mr. Stephen Safari was asked to move out of the suit land. They hired a Land Surveyor to do the sub - divide the land - creating 15 acres and 40 acres. She did not have answer on where he got the authority from she did not agree they bought 40 acres; they bought 55 acres.
91. With reference to paragraphs 13 and 14 of the Counter - Claim, the witness told the court that she said there were people who were arrested in Criminal Case No. 1154 of 2009 and were found guilty. The decision of the Court she was acquitted under the provision Section 210 of the Criminal Procedure Rules. She was not present during the site visit by Court and hence it would be difficult where they photographed. Mr. Stephen Safari had his land 353. It was adjacent to 350. When they brought had there was encroachment by Mr. Stephen Safari, they bought in year 1982 but they took him to court in the year 2009. It was only Stephen Safari who had a permanent structure when they bought it and when the court visited the land.
92. According to her, part of his structure was out of the land. The minutes dated 14th October, 1982 and held 40 acres, 15 acres to remaining to the owner. They had never been sued by Hatimy Group Limited over the land.

C. Re - Examination by DW - 1 by Mr. Mutugi Advocate.

93. The witness told the court that the land was transferred to Bamburi Wanainchi Sacco on 17th August, 1989. It was then

transferred to members. Hence it was not correct to say that it came from Gurmit Singh Kandola. There was an Advocate called C. Gor. Advocate who acted for both the Vendor and Purchasers; the Advocate was given the documents. The surveyor was instructed by the advocate. He was called Francis Kassinyi. Unfortunately, he died. They got the title deeds from the surveyor. The property never came from Gurmit Singh to members but from the Gurmit Singh Kandola to Bamburi to members.

94. DW - 1 told the court that the technical aspect of the process was by the Advocate and surveyor. He did not know how Hatim Group Limited got the 15 acres. He was available to testify. With reference to the cheques, the witness told the court that the first (1st) cheque dated 19th October, 1987 for Kshs. 85,343/- income tax; the second (2nd) cheque was dated 27th November, 1989 for a sum of Kenya Shillings One Hundred and Eight Thousand (Kshs. 108,000/-). Entry No. 39 they correlated to the second (2nd) Cheque and transfer Income Tax Commission for Stamp Duty. Entry No. 41 - Cancellation.

- It did not show the name of the Land Registrar. There was no signature nor number of the Land Registration; the date 24th July, 2003 was when the entry was recorded. The witness was not an expert in the serial number.

- There were minutes of 14th October, 1982.

- The minute of 14th September, 1982 for balloting.

95. With reference to page 250 of the bundle, the witness told the court that Sub-division was done in the year 2004. They purchased 40 acres from the record, and it was sub-divided

into 133 portions. Titles were issued out. Plot No. 350 in the name of Gurmit Singh did not exist.

96. The case here was for Land Adverse Possession against Gurmit Singh and not Bamburi Wanainchi Co - operative - should any relief gotten, Bamburi would suffer hence the reason they were joined. She knew Stephen Safari was an employee of Bamburi. She had not been given share. The case 783/1985. On being referred to the Criminal Case. She confirmed she had her own land Plot No. 353. They were close to each other her land was 6 acres. Apart from suing Stephen Safari, there were others who were sued for trespass. He was aware of these cases but he never testified. Mr. Alexander Maora was the Chairman of the invasion and he reported the matter. He testified on their behalf. They were misled by the police on the hearing of the matter.
97. The witness told the court that the criminal case No. 1154/2009 the 5 pages - proceedings and ruling of 14th December, 2022 produced by consent. With reference to the originating summons filed on 16th April, 2010 and the prayers sought, the witness told the court that the Plot No. 350 did not exist. The 171 did not exist either and the persons claiming it had not been on the suit land for 12 years. From the photographs there were no structures for 10 years.
98. The witness confirmed that she knew the map drawn using the Geographical Information System (GIS). The plots showed the foot path. There was indication of buildings in February 2008.
99. The 2nd Defendant called their second witness on the same day who testified that: -

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

100. DW - 2 testified under oath and in Swahili language. He was called ALEXANDER MWENDWA MWORIA, a citizen of Kenya a holder of the national identity card bearing the information as shown to Court. He resided at Kisauni - Mtopanga. He was employed in the year 1979 at Bamburi Cement Company. He recorded a statement on 12th August, 2011 which he filed in court on 8th September, 2015 and he adopted as part of his evidence in chief. In year 1982, there was a meeting for Co-operative, Chairman - Mr. Rapheal Thiaka brought an issue. They were with the personal Director - James Kimanathi - Bamburi Cement would have liked to assist when they retired - the company would assist in building houses where they would go upon retire. They were to get land, they moved to look for land. By good luck Stephen Safari was one of them - called Safari who was an employee. He took them to see the land. They went with the Chairman.

101. DW - 2 told the court that Remida Singh Tamaha had a Power of Attorney by Gurmit Singh Kandola to sale the land. They found the land was 350/MN/11. They came back to Bamburi Cement and hence they decided to remit the money to the Bamburi Sacco - in 1982 and they were being deducted from their salary as shown by his monthly salary pay slip, they found that the land was good and there was no one occupying it. Stephen Safari was outside.

102. The witness identified a surveyor called Kasona Surveyor. There was a map, it took a period for it to be complete due to Government Bureaucracy. They even fenced it. It was at that point they were called by the Locational chief and informed that there were people getting into the land. They went and found 5 people who were armed with machetes. It was the year

2009. They showed the names of those present and in occupation. They were given a letter by the chief - dated 18th December, 2017 confirming the people who were attempting to enter the suit land. Some of them were arrested and they were arraigned in court in Criminal Case 1154/2009.

103. After sub-division of the land, they found that Stephen Safari was outside. He had 6 acres. They filed a case No. 793/1995. They were given their own Title deed each. His title deed was for Plot No. 6037 which was on page 48 of the Defendant's bundle. So they moved onto the land. After the Civil Case was filed, the court directed that there be a site visit by Justice Mohamed Ibrahim. On 2nd July, 2010 there was a site visit. It was conducted by SPM- Mutende. There were photos and the witness was present.

104. DW - 2 stated that the persons disobeyed the court order and Mr. Kenga filed a Notice of Motion application for contempt for the people who were constructing illegal structures. After he got the title deed, he was not able to take possession due to fracas - but some took over. In year 2004 there were no people on entry No. 41 of the mother title. There were no cancellations. They saw it here in court. The Land Surveyor - Kasina died. As far as he was concerned there was no Plot No. 350. It was sub - divided to 133 parcels.

B. Cross Examination of DW - 2 by Mr. Kenga Advocate.

105. DW - 2 testified that he never recorded that they were taken by Remunda Signh Tamman. From his statement he wanted Bamburi Sacco to be registered. There was proof that they bought land - it was from the transfer documents. It was for 40 acres Entry 41 - transfer was from Bamburi Wananchi Sacco - the acreage was not mentioned. He did not have any

court order that allegedly asked Safari to leave/evicted from the land. With reference to his land; the land was sub - division no. 6037 Sub. CR No. 1267/43.

106. The witness told the court that the case was dismissed as it was stated that they were late in coming. All of them i.e. the title were sub-division CR. No. 1267/43. They were given Letters of Allotment by Bamburi Wananchi Sacco in the year 1994 after they had done balloting and surveying. When they went there for the 1st time there was nobody but they had no proof. The Notice of Motion application dated 7th June, 2010 at pages 1 and 2 showed blank on the first page of the title deed.

107. DW - 2 told the court from the photographs there were new structures - but there were permanent structures were for Stephen Safari and his livestock stalls. They went to the land with Hatim - who had 15 acres. When they came to Court they knew Hatim had 15 acres. They were fenced but they removed them. He confirmed that an official search was available for Plot No. 350. He got his plot from Bamburi Sacco then to him. It was not from Gurmit Singh Kandola. They saw the surveyor Kasina. He indicated HCCC No. 125 of 2010 Page 33 - Paragraph 14. He did not agree that their title deed plan and survey had an issue. Hence, that was why the title deed had a problem.

C. Cross Examination of DW - 2 Mr. Kabebe Advocate.

108. DW - 2 confirmed that they went to check the land with Hatimy. He had 15 acres. There were squatters from the year 2010. There was a mosque.

D. Cross Examination of DW - 2 by Mr. Okanga Advocate.

109. DW - 2 stated that he may not exactly know who was Hatimy. In 1982, it was when they went together they all looked alike. He knew Permuder Singh Tamana, they had never seen the need to call him. He was alive. He had never seen a copy of the Power of Attorney that it would help them. They assumed Hatim had bought land. Hatim had kept refugees on his land. They were from Somalia. The land had people on it. It was being built.

E. Cross Examination of DW - 2 by Mr. Charles Kombo.

110. DW - 2 testified that after everyone got a ballot/slot then they would be given the Letter of Allotment. There was a valuation dated 12th March, 2018 from the County Government of Mombasa showed its his names. His parcel No. 6037. The list of all the members from the Co - operative, his name was there. The property for Plot No. 320 were brought in the year 1982. From the mother title, the signatures in Plot No. 312 and 350 was one. The mother title deed measured 55.275 acres while Mr. Kenga said its 55.00 acres.

111. On being referred to the GS Map dated February 2008, the witness told the court that the same showed all the allottee i.e. 133 including Mr. Alexander and the portions for Hatim of 15 acres. He said Safari - only got into their portion by ½ acre and his land is 6 acres.

112. DW 2 was stepped down on 7th November, 2022 and he was called on 8th November, 2022.

F. Re - Examination of DW - 2 by Mr. Mutugi Advocate.

113. DW - 2 reiterated that he was asked on the CR No. from the new title deeds. On being referred to the Defendant's bundle from page 20 - 2008. He saw the serial No. 388817, 38555 e.t.c on the titles. meaning each title deed had its own serial

number. Each title had a Deed Plan. They bought 3 plots - (a) Plot No. 350, (b) Plot No. 312 and (c) Plot No. 392. After he bought the plot, he took his worker on the land but he was chased away. When they took Kasim - Survey to Court HCCC. No. 125/2010, they filed this case. They had an Advocate Gor who was deceased. They were never given the Power of Attorney. Steven Safari was a store keeper for Bamburi Cement. They were the original members. He had 6 acres and an acre onto their land. Hence he was not a squatter but he held them in claiming the land.

114. The Defendants called DW - 3 who testified as follows: -

A. Examination in Chief of DW - 3 by Mr. Mutugi Advocate.

115. DW - 3 testified under oath and in English language. He was called JOHN KIMBIO MSABAA, a citizen of Kenya with a national identity card bearing the particulars as shown to Court. He was a technician and he had joined 1978 to 2006. He recorded his witness statement on 24th November, 2016 and filed in Court on 29th November, 2016 which the witness adopted as his evidence in chief. He had filed a list of 5 documents: -

- (a) Copies of 3rd Defendant titles.
- (b) Copy of sale agreement 15th August, 2009.
- (c) Transaction dated 1st September, 2009.
- (d) Copy of 11th Defendant's title - Felix Musamba Kimbio.
- (e) Copy of Rates Payment request and statements.

116. The witness produced these documents as "DW - 3 Exhibit Numbers 1 to 5". The witness also had the original title deeds for:-

- (i) Title No. CR. 38448 Plot 6193.
- (ii) Title No. CR. 38409.

(iii) Title No. CR. 38308.

117. The witness told the court that he was the Chairman of Bamburi Wananchi Sacco from the years 1998 to 2006. When the land was being bought he was informed. They would hold meetings. He found the sub - division was being done by Kassim Surveyor. In the year 2002, the Deed Plans were made, and the Titles were processed and acquired. He participated in the acquisition of Title Deed. Kassim and Malembeka were the land Surveyors. They met the Director of Survey. They were assisted and the Deed Plans were made, as the layouts were ready. They left the Director of Surveyor to Kassim. They took the documents to the Land Registrar, Mombasa.

118. DW - 3 told the court that the mother title was sub - divided into 133 Plots. There were roads, church e.t.c. being public utilities. They got offices to process the title deed. They spoke with Kassim who picked up the 133 title deeds. They surrendered the original title deed No. 350/ MN/ I Section to the Land Registry. The last entry on the original title deed No. 350/ MN/ I Section - the last entry on the original title (page 6 of the bundle). He never got to pick it again. His plots were: -

- a) Land Reference No. (with reference to the above) (Page 11 of the Bundle. Entry No. 41 showed the title were cancelled but when they surrendered it they were not cancelled.

119. They were never served with Notice for the cancellation. He had never been asked to return the title on grounds of it having had any problem. The documents were in serial form - Felix Msabaki Mbio he was being asked to pay rates - 2022 and he was given accumulated rates from year January 2011 to August for Felix. He had used one of his title - No. 6042 for

collateral from CFC Bank. He was involved in the site visit by Court on 2nd July, 2010. It was on this material day that they started building structures.

120. DW - 3 stated that the suit was filed in the year 2009; immediately they entered the land. Right now they had built all over. There were no more roads as they had occupied all over the land. When he got his title deed he started building on his land, but they even built on his plot. It was from there that the witness decided to go to the police. They were referred to court. On being referred to Mr. Stephen Safari's statement, the witness told the court that it stated that there was no house that was new on the land. He was 69 years old. He was to build a house for his family. They refuted the claim for land adverse possession which according to the witness was not sustainable. They bought land through rightful means.

B. Cross Examination of DW - 3 by Mr. Kenga Advocate.

121. DW - 3 stated he joined himself in the case. He was never sued. He wanted his fundamental right over his land. He wanted the person who had occupied his land to vacate it. He had never seen the official search for 26th October, 2009. He confirmed that it indicated the owner of the land was Gurmit Singh Kandola. He got his title deed in 1st November, 2004 - Land Reference No. 350 was 55 acres. Bamburi Sacco bought 40 acres. There was sub-division from 55 acres. He had no evidence of these facts here in Court. They took them. They were never given a title deed for the 40 acres in the name of Bamburi Sacco.

122. The witness further stated that it was reflected in Entry 41 of the title. It showed them having gotten the entire land i.e. 55

acres and not just 40 acres. At the time of the transfer of the title deed he was not there.

123. The witness told the court that Hatim Group Limited should have bought from them. In the year 2008 there were demolitions of the structures but the one for Steven Safari were never involved. By the year 2008, he was not in the office. He built his structures in the year 2009. But it was invaded. The demolitions was done in year 2008 with the authority of the leadership of that Board of the SACCO. He did not have that authority here. In the year 2006, he left office after there was a committee to take care of the land. There were no invaders by the year 2006. There were 3 parcels of land -dated 7th June, 2010 page 22 to 136

(a) CR 38355 for Bamburi Wananchi Sacco Society Ltd. CR 1267/43

124. On being referred to the title on Plaintiffs documents, the witness told the court that it did not have entry No. 43. With reference to page 128 out of the many title deeds all apart from 3 had stroke/ 43. The three had /38. From the original title deed, Entry No. 38 referred to a Special Power of Attorney from Gurmit Singh Kandola donated to Parmader Singh Tamana. He had no proof that he took vacant possession. Although the Donee built a fence but it was demolished. He did not know Hatimy. He only saw the name Hatimy from the records. The record indicated that the land was bought under the due process and stamp duty was paid and conducted to sub - division. Taxes were paid before they bought the land according to the evidence of Cherono - DW - 1.

C. Cross Examination of DW - 3 by Mr. Okanga Advocate.

125. DW - 3 told the court that they took office from the year 1998. By then they had the title for Plot No. 350. They kept a copy of the title. The entry No. 41 was not cancelled. Everything was alright, without cancellation. As officials, they had neither met nor sat down with Gurmit Singh Kandola and Parmader Singh Tamana. They had not met Hatimy Group Limited. He had not been able to take possession of the land due to the invaders. He had not built anything on the land. The land measured 55.04 acres. They bought 40 acres as 15 acres belonging to Hatimy. He did not know about the cancellation. He did not know whether the cancellation was because they had transferred the entire land to the Bamburi Wananchi Sacco. However, what hurt more was the fact that all their plans included the access road had been taken away and structures constructed. The portion that Stephen Safari took was still intact. He used it for his livestock keeping.

D. Cross Examination of DW - 3 Mr. Kabebe Advocate.

126. The witness reiterated not knowing Mr. Hatimy. He had never met him apart from here in court. He confirmed that from the record, Hatimy Group Limited acquired 15 acres. It was his testimony that they had no issue with him. DW - 3 was not land surveyor. Instead, he was a maintenance technician. The Bamburi Wananchi Sacco. They had advocates. According to him, there was no good cause to have met Mr. Gurmit Singh Kandola nor Parmdas Singh Tamana as they had already engaged their Advocates for this land transactions.

E. Cross Examination of DW - 3 by Mr. Charles Kambo.

127. DW - 3 confirmed that after he was granted finance by the Sacco, there was a check off system for the recovery of the money lent to them from the SACCO. There was a stipulated

period for the recovery of the finances. From the legal aspects there was 2/3 take home. Some SACCOs recovered their finances for a period of 5 to 6 years. Even upon being lent the monies, the SACCO would not lent more money until one has cleared the 1st loan unless one's salary had been increased. This explained the long period to settle the loan.

128. On being referred to a sale agreement dated 17th December, 2004, the witness told the court that he could not buy land if there were people in it.

129. The Defendants called DW - 4 who testified as follows: -

A. Examination in Chief of DW - 4 by Mr. Mutugi Advocate:

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130. DW - 4 was sworn and testified in English language. He was called DENNIS MALEMBEKA KATUGA. He was a registered and qualified Land Surveyor for 30 years. He graduated from the University of Nairobi. He was engaged by the Sacco to undertake the Land Surveying exercise for them with a view of processing the title deeds for their registered members. He executed the task with diligence and prepared a report dated 7th November, 2022 which he produced as Land Surveyor Report filed on 8th November, 2022. The witness interacted with late Mr. Francis Munave Kasiyi, a licensed surveyor. He had given the process and laws used. He was aware that the title deeds were issued. He was aware that the title deed were issued from Plot No. 350 which had been sub - divided into 133 Plots. Procedurally, upon the sub - division, the original title deed should be surrendered.

B. Cross Examination of DW - 4 by Mr. Kenga Advocate.

131. DW - 4 confirmed that as per his report he never undertook any role of the surveyor work and sub - division work. This was

because all of these works were done by a land Surveyor Mr. Francis Munuve Kasianyi. He received a copy of the Plot No. 350 - CR 1267. From Entry No. 41 it showed that the land was transferred to Bamburi Wananchi Sacco. There was no signature and hence from the look of things it was cancelled before the transfer had been done to them.

132. The witness stressed that due to the cancellation on Entry No. 41, it appeared that the transfer to Bamburi Wananchi Sacco Limited was not complete. The acreage for Plot No. 350 was 55 acres. As per the Entry 41, the Sacco had taken the entire parcel of land. He was not involved with the purchase process nor its terms and conditions including the price. From the conclusion made in the survey report, which the witness was referred to he stated that it was not in order that a person would have bought 50 acres but got transferred to 55 acres. From the report he could not confirm.

133. DW - 4 confirmed that Bamburi Wananchi could have acquired the 55 acres. Therefore, ideally every person who purported to have acquired the land, ought to have done so from Bamburi Wananchi Sacco. There was no prescribed application for the sub - division. There was no certificate for the sub - division. This was fatal to the whole process. From his report, he referred to minutes but he never saw any minutes. On being referred to the Defendant's bundle on page 20, he confirmed the last part of the CR/43 were related. He never saw the original title no. Plot No. 350. The certificate of titles issued showed Entry No. 43 of CR 1267 of Plot 350. It implied there were registrations after Entry No. 43.

134. The witness in an attempt to answer the question of where Entry No. 42 and 43 were, he stated that when the land was

sub-divided the tile was closed for sub - division. Entry No. 41 was what was transferred to Bamburi Wananchi Sacco. Entry 41 was about ownership. Entry No. 42 - issued CR. No. 46565 in respect of sub-division 6155 (Original 350/135 dated 2nd October, 2009 which ideally gave title to Hatimy Group Limited. Entry No. 42 - was a sub-division i.e. one which they had done. He wondered why this was done without the entry of closure of the sub-division which should have been the case. For the benefit of doubt, the Entry No. 43 was the one that had given birth to the 133 parcels emanating from the Plot 350. According to DW - 4 this entry should have been reflected in the title deed.

135. There were 3 parcels for Entry No. 38. It was on pages 128 and 129 of the application dated 7th June, 2010. The Entry No. 38 would have been a typographical error - i.e. Entry No. 38 related to the Power of Attorney. From the Certificate of Title, the witness could confirm that the process of the sub - division upto the preparation of Deed Plan was correct. This was until at the registration point. There may have been some errors that did occur.

136. On being referred to Clause 1, the witness confirmed that there must be ownership of the land to either Bamburi Wananchi Sacco Limited or Gurmit Singh Kandota. At that time, as surveyors, it was not necessary to question of ownership. He did not undertake nor prepare the surveying report. He only assisted in the sub - division of the Plot No. 350. He was assisting the surveyor - Francis Munure Kassinyi, a License Surveyor. Unfortunately, the witness confirmed he never mentioned anywhere he assisted Mr. Kasiyi.

C. Cross Examination of DW - 4 by Mr. Kabebe Advocate.

137. DW - 4 confirmed that he was a Land Surveyor. He did not deal with registration of land. It was him who did the said report while making reference to paragraphs 1 and 2 of the report. He told the court that at paragraphs 1 to 11 was not what should have happened and paragraphs 1 to 5; he saw these documents. Plot No. 350 - sub - divided into 134 parcels and Plots No. MNB/11/6022 to MN/11/6155.

D.Re - Examination of DW - 4 by Mr. Mutugi Advocate.

138. DW - 4 reiterated that he had not been shown the original title here nor anywhere. The certified copy of the title deed had Entry No. 41. He confirmed that the Deed Plans were issued by the Director of Surveyor. They were authentic. The witness was never given any letter for the cancellation. The same would go to Mr. Francis Kalaya, the main Land Surveyor.

139. On 8th November, 2022, the 2nd Defendant through their counsel on record Mr. Mutugi Advocate marked their case closed.

IV. The 28th Defendant's case

140. The 28th Defendant acting in person, offered to render his own testimony as follows:-

A. Examination in Chief of the 28th Defendant by Mr. Wamae.

141. The 28th Defendant as a witness was sworn and testified in Swahili language. He identified himself as CHARLES KAMBO WAMAE, a citizen of Kenya and holding a national identity card bearing all the particulars as shown to Court during the hearing hereof. He recorded and signed a witness statement dated 15th November, 2022. He adopted and relied on it as his evidence in chief in support of his case. He also filed a list of

nineteen (19) documents dated 9th September, 2016 out of which seven (7) were produced as the 28th Defendant's Exhibit 1 to 7. Further, he filed a 2nd List documents dated 23rd March, 2020 (6) documents total (23) documents. Thus, in total, the 28th Defendant produced 28th Defendant Exhibits numbers 1 to 23 in that order.

142. The witness told the court that in the year 2004, he bought two plots from Utange. The first one was sold to him by Mr. Mark Opando while the second one was by Mr. Samwuel Odhiambo Odera. They used to work together with the said Vendors at Bamburi Cement Limited. He produced two Sale Agreements for the said transactions dated 12th October, 2004 and 17th December, 2004 respectively. He was given Letters of Allotment indicating how they had gotten the two plots. He paid a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) for 1st parcel and Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) for the 2nd parcel. Unfortunately, the transfers had not been done to his names as yet.

143. The witness stated that he started undertaking intensive cultivation on the two parcels of land. He planted trees - called Green Venture, green grams, cassava and maize. He occupied these plots. However, when he had been away at Nairobi on leave on coming back he found people had already invaded and constructed on the two parcels of land. They had uprooted all the plantations. He called the officials of the Bamburi Wanainchi Co - operative SACCO to find out what had been going on. They indicated they would follow up the matter. They lodged a complaint with Chief dated 24th September, 2009.

144. The witness told the court that he had now added papers as allowed by Court. He added:-

(a) Minutes of 16th July, 2011 for owners of Plots and Bamburi Wananchi SACCO

(b) A Letter dated 22nd June, 2017 to Deputy Commissioner – Kisauni (DCC) and

(c) The others contained in my further statement of 31st January, 2024. The further statement and the documents of 31st January, 2024 were adopted.

145. The witness told the court that on 16th July, 2001, there was a meeting between Bamburi Wananchi Sacco and the Land Owners. He asked why he could construct on the plots. He was informed that there was a court order to that effect. He was informed that the DCC there were people building on his land yet there was a court order. He had attached photographs to this effect pages 18 showed the photographs of the construction – on 18th December, 2011 they even put a gate. It showed that they have ben constructing despite of the court order.

146. The witness went further to state that the second letter showed there was session showing the ownership of the land on 9th June, 2023 there was another meeting. From the official search dated 9th June, 2023 showed the land belonged to Bamburi Wananchi Sacco Society Ltd and had not been claimed by anyone. He went to Nairobi and he got RIM Map from the Director of Surveyor of Kenya – dated 23rd August, 2023, it showed how the plots had been sub – divided and the allocation of the plots.

147. The witness prayed that the Court to give them back their land. He also prayed to be allowed to file a Counter claim as for the past 13 years he had really suffered. According to the witness, the intruders had no documents for having occupied

his land. He went to the Municipal Council Mombasa. They gave the witness a Map - dated February 2008. It showed that the land had been vacant and unoccupied. The witness produced it - there had been no trees. The map showed there were 133 plots and one plot was big. They refused the witness access to his land. He knew them though he had not sued them. He believed he was the owner of the two plots with 2 titles. He produced the original of CR No. 38424 from Samwel Odhiambo Odera. However, it was never got to be transferred to himself as he was caught up by the land dispute on 25th February, 2006. He was issued with a letter by SACCO that land was his.

148. The witness told the Court that the title for the 2nd parcel - CR No. 38422 - in the names of Bamburi Wananchi Sacco Society Ltd was with his Advocate. He had started the process of transferring it to a 3rd party. It had not been transferred to his names as yet. But he had a letter dated 17th February, 2006 indicating that it was his land and which he had acknowledged receipt of the original. He had suffered for a long time - for over 12 years. He was now allowed to get access to the two parcels. His prayers were to remove the people/invaders from his land and eventually to have the two parcels of land be given back to him - restitution. There be a declaration that he was the registered and legal owner to the two parcels of land thereof.

B. Cross Examination of 28th Defendant by Mr. Kenga Advocate.

149. The witness stated that he joined himself in this suit as an Interested Party. Later on he was declared the 28th Defendant. He planted trees and found people carrying iron sheets to

build on his land. Although the witness took photographs, he had nothing to prove that the said the destruction actually took place as alleged. He could not tell who were on his land. He knew of Joyce Kenga but she resided on another piece of land. There was one person on each of his land. They had constructed a perimeter wall. He took photographs. He feared them as they would attack him.

150. With reference to the Letter of Allotment, it was for Mr. Mark Omondi. He had a title deed but it was with his Advocate Kamonde. They agreed with Bamburi SACCO he would get a direct transfer of the plots to his names. The sale agreement between him and Mr. Mark Opondo had not been registered at the Registration of Documents. Taking that he used to cultivate the land hence it would be Agricultural Land. There were no industries there. It was a residential land. It was dated 2004.

151. The witness told the court that the second plot - CR. 38424 was in the name of Mr. Samwell Odhiambo Odera. He had not done the transfer due to both the land dispute and financial difficulties. The witness informed Court that he was holding the original titles. He had taken a loan. The sale agreement was for Plot No. 28 an internal number by the SACCO. The two plots were not yet registered in his names and the agreements did not refer to these plots. His plots were invaded in the year 2009 he never lodged a complaint. The witness knew the beacons. He had a map - GPS from the Mombasa Municipal Council - Geographical Information System. There were no explanations on whether the houses were shown on the map.

152. From the RIM, the witness confirmed that the beacons were not visible but may be using a phone. The plot was for Bamburi Wananchi SACCO and Hatimy. With reference to Page

27 the witness stated that he did not know Mr. Hatimy. According to the witness at page 8 paragraph PLOGM 04/2011 of the Minutes of 16th July, 2011. He could not confirm that the SACCO from Bamburi SACCO.

C. Cross Examination of 28th Defendant by Mr. Okanga Advocate.

153. The witness reiterated that there was nothing to show that the plots were in his names. He joined himself in the case. He was dependent on the sale agreements to confer ownership. One showed he was buying portion of land No. 25 and 28. He was in possession of the title deed. He did not know who was on the land as he feared for his life. The witness did not have any agriculture report to show the alleged destruction of the Plantation.

154. The witness stated that he got the MAP from Survey of Kenya. The map bore the official stamp. It was not clear whether it was certified as true copy of the original. He bought the land from Bamburi Sacco. His understanding was that his plots was derived from the 40 acres and not 55 acres. He had seen Mr. Hatimy in Court. He could not say whether he was after his plots. What he knew was that he went to collect the original title deed and which he had.

D. Cross Examination of 28th Defendant by Mr. Mutugi Advocate.

155. The witness stated that they invaded his land in year 2009. The case number was 2010. It was not 12 years as required by the law. He had heard that there were photographs taken during the site visit by Court. On being referred to the GIS Map, it indicated there had been only one house on the land by then. That was the structure for Mr. Stephen Safari – Plot No. 331.

There had never been any case challenging the title deed. All the titles were valid and intact.

156. On being referred to a court order on page 17, the witness told the court that it was on 24th September, 2013 – the case was filed in year 2010. It was 2 years after the case was filed. The Plaintiffs were represented. He had shown court suing photographs that construction of the structures despite the court orders.

E. Cross Examination of 28th Defendant by Mr. Kabebe Advocate.

157. The witness met the 26th Defendant – Mr. Hatimy in court, the 26th Defendant's court was elsewhere. From the GIS Map, it showed buildings – i.e. from the legends.

158. The witness informed Court that he bought these two (2) plots in the year 2004. By then he was a member of the SACCO. The parcel of land already had beacons. By the year 2004, the plot was vacant. He was the only one cultivating the land. He had never seen any documents filed against Hatimy by the SACCO. The claim by the Plaintiff was for land adverse possession and he had refuted.

159. The witness stated that he was aware that there was a Deputy Registrar – Mutende who had conducted a site visit and prepared a the report with photographs of the constructions having taken place on the land. He had never heard of any person filing to set aside the site visit report. With reference to the court order of 16th September, 2013 – by Justice Mukunya – the said order had never been complied todate by the Plaintiffs. The Plaintiffs had continued to disregard court order as demonstrated from the photographs indicating ongoing construction. He had not been able to file proceedings for

contempt as there was an order by Court for parties to desist from filing further interlocutory application to allow the hearing of the case. The order was 26th May, 2022 by this Court. He had not seen any documents produced by the Plaintiffs on the apportionment of the land.

F. Cross Examination of 28th Defendant by Mr. Konde Advocate.

160. The witness confirmed that from these transactions he had official receipts but he did not have them in court. He could not get Mr. Kamonde Advocate to testify on his behalf as he died and also the witness had no money to give them. Bamburi Sacco were in court to support his case.

161. The witness told the court that he never filed any contempt proceedings for the alleged breach of Court order. Regarding the MAP, he had not summoned an officer to produce the MAP. The witness had a claim against the Plaintiff they need to give him back his two plots.

G. Re - Examination of 28th Defendant by Mr. Wamae.

162. The witness told the court that he could not transfer the land because there was a court order. He could not afford the costs the Advocates from Kamonde to testify on the 2nd title deed. The GIP Map had legend an indication there were no houses then apart from that of Mr. Stephen Safari.

163. The witness told the court that from the MAP, he could show the beacon from devices and phones. He was informed that the official stamp on the RIM Map was sufficient and if any doubt the officers may be summoned. The Plaintiffs did not have a proper planning - they had constructed structures without plans and amenities as in the slums - no access road e.t.c.

164. The 28th Defendant marked their case closed on 26th February, 2024.

The 26th Defendant's case

165. The 26th Defendant called his first witness on 26th February, 2024 who testified that: -

A. Examination in Chief of 26th Defendant by Mr. Gikandi Advocate.

166. The 26th Defendant was sworn and he testified in Swahili language. He was called ABDULREHMAN MOHAMED MOHAMED, a citizen of Kenya holding the national identity card bearing all the particulars as shown to Court. He resided in Kizingo and was a business man. He was a director of Hatimy Ltd. He swore a witness statement which he wished to rely on as his evidence in chief and in support of his case. Further, he also had a Replying Affidavit sworn by Mr. Mohamed Mohamed Hatimy (Deceased). He was his brother. Additionally, he had filed a List of documents (10 of them) dated 24th May, 2022 which he produced and marked as 26th Defendant- Exhibit Numbers 1 to 10 in the Original Certificate of title shown to Court. He was referred to the transfer - from for L.R. No. 350 - after the sub - division it was dissolved and he acquired - parcel No. 350. The said parcel was sub - divided into 2 portions (a) 6055 (5.586 HA) to Hatimy Group Limited and (b) 6056.

167. They bought the portion from Parmader Singh Tamana. He had the Power of Attorney donated by Gurmit Singh Kandola they had a transfer - 26th Defendant Exhibit 4 and eventually got the title. By this time the land was vacant. In the year 1991 - 1992; they offered to the refugees to reside on it. They had a letter of recommendation from United Nations High Commission for Refugees (UNHCR). It was until the year 2001

when the refugees left. They continued using it as an orphanage and Mosque. There was no one on the land. This case was filed in the year 2010. There was an official search which confirmed this position. See 26th Defendant defence exhibit No. 2.

168. The witness told the court that it was in the year 2013, that people started illegally encroaching and/or trespassing onto the land referred to Defence Exhibit 8. This was a Land Valuer's report. It stated that the rest of the land was vacant. It had some permanent structure, mosque but there were no squatters. The owner occupied - he was aware of the site visit on 2nd July, 2010 by the Court and the Report held that it was vacant. There were newly constructed and were still under construction. He had been paying rates. There was a time the National Land Commission came to the land and ordered that people vacate the land. See 26th Defendant Exhibit Number 3. In September 2010, the officials came and valued the land for purposes of paying stamp duty.

169. The claim by the Plaintiffs was refuted. It was false. They occupied there for over 12 years. They had been removing them, but they had been constructing up to today.

B. Cross Examination of the 26th Defendant by Mr. Kenga Advocate.

170. According to the witness, the late Mr. Mohamed Mohamed Hatimy was once a nominated Councilor. This was in the year 2009 and later on became a nominated MCA. The squatters occupied out land in the year 1992 and 1993. He confirmed there were 3 camps for the squatters - at Majaoni, Dispensary - referred to the appreciation letter by UNHCR. It did not mention the plot number. He was referred to the Valuation

Report for the year 2011. By then the case had already commenced. According to the site visit report by the Deputy Registrar and the Court Order - the Deputy Registrar was ordered to take photographs of the whole parcel but only took photographs of some of the parts of the land.

171. The witness told the court that he did not have the sale agreement here in Court. He had not produced it. According to him, after the death of his brother, there were several documents which got misplaced. He was the one who filed all the documents. His brother died 4 years ago. On the transfer of the land only the transfer forms existed. He was referred to the LCB Letter of Consent dated 2nd April, 1982 from Gurmit Singh Kandol to the Directors of Hatimy Group Limited. The transfers was done/ registered on 19th July, 2010 which was close to 27 years - they were not aware of the limitation period of 3 months as stipulated by the provision of Section 8 of the Land Control Act, Cap. 302. The documents were misplaced. He was not there by then. He did not have the approval from the Municipal Council for the sub - division into two portions. What he had was the Deep Plan.

172. He was referred to the MAP of the area produced by the 28th Defendant - Mr. Wamae. It showed that the land had a few structures on it. This was mainly for Stephen Safari, the 1st Plaintiff. The witness told the court that perhaps the others were for the SACCO. It was Mr. Kamana who signed for the approval for the sub - division. He did not have application which was done by Mr. Kamana. The land was theirs. The cancellation and invasion on the documents was because of the typographical errors on the documents. The squatters started getting into the land from the year 2013. He was

joined in the case. It was for parcel No. 350 his land had been evaded.

173. He was further referred to the Kenya Gazette. It was for Plot No. 350 and not Plot 6/55/II/MN. He sought to be joined in this suit. It was done as per the Court order of 12th July, 2020 by Justice Ibrahim. It was from this that an advertisement was published in the local dailies. The order was issued on 2nd August, 2020. It was from this that he applied to be joined in the matter. By this time his perimeter wall had been demolished. They applied for injunction orders.

C. Cross Examination of the 26th Defendant by Mr. Okanga Advocate.

174. The 26th Defendant as a witness stated that he feared for his life. He was apprehensive that the Court would give the whole land to the Plaintiff. Hence he sought to be joined in the matter. He was referred to the transfer of October 2016. He confirmed that it was done by Tamara Singh. There was the L.C.B Letter of Consent done in the year 1982; Tamara Singh had the Power of Attorney. The transfer was with Mr. Tamara who was the seller of the land to the 26th Defendant. He was a Chairman of the Mombasa Law Society (M.L.S) but later on he went back to Europe. The land transaction was done by Mr. Mohamed Mohamed Hatimy. The witness was a spectator. The transfer bore the official stamp of Moses Mwakisha Advocate. It did not state that he certified and witnessed the signatures of the parties. Mr. Tamara comes to Kenya every year. There was a Power of Attorney. However, the witness admitted that the said Power of Attorney did not consist the documents produced by the 26th Defendant.

D. Cross Examination of the 26th Defendant by Mr. Konde Advocate.

175. The witness confirmed that he bought land from Mr. Taman in the year 1982. However from his statement, it stated that they bought the land from Gurmit Singh Kandola. The land measured 55 acres i.e. No. 350. From the transfer the land was for Kshs. 375/=, it was done before an Advocate. According to the witness, one could transfer land even before buying. There were people invading their land. They reported the matter to the police and they were arrested and charged for trespass. He did not have the list. With reference to the NLC Letter, the witness stated that it did not mention anybody's name, there was a meeting between NLC and Plaintiffs. But they never attended the meeting. He was not aware whether NLC had been constituted by the year 2016, they had the power to evict the people. He did not know why they failed to vacate the land. They proceeded on with NLC and court at the same time hoping to getting justice. Hatimy Group Limited had several parcels of land.

176. The witness told the court that the letter by UNHCR did not indicate the plot number. He did not have photographs of the refugees nor the tented camps used by the Refugees. The witness was 62 years old. By the year 1982 he was approximately 20 years old but he did not have photographs. The Refugees who were mainly from Somalia - Borana, were there from the year 1992 to 1997.

E. Cross Examination of the 26th Defendant by Mr. Mutugi Advocate.

177. The witness recalled when the Land Surveyor - Mr. Dennis Malembeka appeared in Court. With reference to the 2nd

Defendant's document by Mr. Malembeka stated that there was the sub - division of Plot No. 350 from 6022 to 6055 inclusive of his was Plot No. 6155. The sub-division of 350 was done at once from the year 2001 to 2004. They had their own independent land surveyor. He recalled DR. Mutende visiting the land and there were photographs (reference to the photographs dated 2nd July, 2010). The structures were newly constructed. There were not completed. The case was filed in the year 2010.

178. According to the witness he had not seen any photographs shown by the Plaintiff on the status of the land. He knew Mr. Safari very well. He knew he had 6 acres. He was the 1st Plaintiff but he had his own land. As far as he was concerned Plot No. 350 did not exist anymore after the sub - division and hence surrendered for closure. Even at the land registry the land did not exist. Bamburi SACCO were buying land known as 8/11 which measured 55 acres.

F. Re - Examination of the 26th Defendant by Mr. Gikandi Advocate.

179. He was referred to the transfer form and photographs of Mr. Tamana and the signature of Mr. Moses Mwakisha Advocate. The witness told the court that he witnessed the signature. Mr. Mwakisha Advocate had never reported at the L.S.K. The end product of the transaction was the title deed for No. 6155/II/MN and CR 45565. There had never been any complaint lodged to this transaction. The mother title was Plot No. 350. When they saw the issue published in the Gazette on Plot No. 350 they got concerned and decided to apply to be joined in this suit. He had never heard of any complaint lodged against the officers who undertook the land survey process.

180. He was further referred to the document by the 28th Defendant. The witness told the court that the mother title was Plot No. 350 - Entry No. 8 was on Special Power of Attorney whereby Gurmit Singh Kandola donated the Power to Tamana Singh. Entry No. 41 showed the mother title No. 350 was dissolved and further sub-division of 6029 to 6055 created. The Refugees came from Banao in Somalia due to the perennial internal wars in the Republic of Somalia. There were four (4) Refugee camps in Mombasa.

181. The refugees occupied only one plot. They were given a Certificate of appreciation by UNHCR - it was for Plot No. 6155. Their family paid Kshs. 375/= in the year 1982. It was a lot of money i.e. 40 years ago. The transfer process. There had never been any complaint on the transfer process. The title was stamped by the Land Registrar and hence the Stamp Duty was paid. He had never been sued. He came to court out of fear and being apprehensive of losing their land from a hard earned resources and cause by professional squatters.

182. On 16th October, 2024, the 26th Defendant applied in Court and was granted leave to re - call the Land Registrar, Mombasa to once more tender evidence on some few critical issues. She testified as follows:-

G. Examination in Chief of the Land Registrar by Mr. Gikandi Advocate.

183. The witness testified under oath and in English language. She was called SHEILA MARAMBU SOITA. She was a Land Registrar at Mombasa. She had been summoned to tender evidence on some critical issues in addition to what her Colleague - M/s. Josephine Rama had already testified in the same matter. It was in connection with all that parcel of land known as Plot

No. 350. She had the original Certificate of Title with her for all that parcel of land known as Land Reference No. 350/2 measuring 55 acres. The original owner/ 1st allottee of the parcel was ALIBHAI ISMAIL & J. Company Entry No. 36 – was a Transfer to Gurmit Singh Kandola. Entry No. 42 – was for a sub - division to No. 6155 – measuring – 5.586 HA by the registered owner. From the parcel file she got a search issued on 7th December, 2018 by Mr. Mwangi – it showed the owner was Gurmit Singh Kandola and its closed for sub -division. Going by the search it showed Plot No. 350 was closed on sub – division.

184. The title deed was up to Entry No. 42 as the last entry. This was an original title deed. It was issued 21st October, 2009. On 19th July, 2020 the property was transferred to Hatimy Group Limited. She had seen the transfer documents. The parcel had already been transferred.

185. The witness told the Court that going by the Original title it was closed upon sub – division and the title surrendered to land office. Parcel No. 350/11 was closed. There could be some entry that were not there. She proceeded to produce the original documents (a) title and official search i.e. certificate of postal search dated 7th December, 2018.

H. Cross Examination of the Land Registrar by Mr. Mutugi Advocate.

186. The Land Registrar confirmed that the moment a title had been closed for sub – division, if a search was done it would show the last owner as it did not exist. A search was conducted on the new numbers. From the documents she had – she saw from the Archives there were several title deeds. E.g. sub-division No. 6134 in the name of Bamburi Wananchi SACCO,

among others and that was what she had in her possession today.

187. On being referred to LR No. 6134, the witness told the court that the same was issued on 7th February, 2005. The cancellation "CLOSED" meant it was closed for sub - division hence parcel No. 350 did not exist.

I. Cross Examination of the Land Registrar by Mr. Kenga Advocate.

188. The witness told the court that the search was for 7th December, 2018, which was close to 8 years after the case was filed. Under this Land regime all the entry were entered on the title and the names were entered. She did not know who did the name of the persons i.e. it must be minuted. She based her assumption/conclusion that there were other entries entered. The Land Registrar would only provide information based the Entries on the title. With reference to the title by Josephine Rama; the witness stated that entry No. 41 showed transfer to Bamburi Wananchi Sacco. With reference to Land Reference No. 6134/38 showed its entry was No. 38 - Yet the Entry No. 38 showed it was GULMIT SINGH KANDOLA for instance for HATIMY Group Title CR. No. 1267/42 an indication it's from Entry No. 42.

189. The witness told the court that from the bundle by land registry was CR. No. 1267/44 (Entry No. 44 did not exist). She confirmed that all their parcels of land must come from the Entry No. of the title. She believed it could have been a typographical error. She was not there when it was prepared. There could not be two (2) title deeds from the same parcels - there were two titles - 1267/ 44 and 1267/42.

J. Cross examination of the Land Registrar by Mr. Charles Wanyoike Wamae.

190. The witness clarified that the search would be done from their title deed, Mr. Charles' title appeared genuine. The title was from the Deed Plan. When the title deed were brought they had a "H" book where entries were entered of the new title deed. After the registration of the title deed there was a dispatch register.

K. Re - Examination of the Land Registrar by Mr. Gikandi Advocate.

191. The witness stated that the original documents and search. They were closed - the titles had been surrendered they entered the title number stoke the Entry Number.

The Interested Parties' case

192. The Interested Parties called their first witness on 24th May, 2022 who testified as followed: -

A. Examination in Chief of IPW - 1 by Mr. Okanga and Kenga Advocates.

193. IPW - 1 testified under oath and in Swahili language. She was called JOYCE RIZIKI KENGA, a citizen of kenya and holder of the national identity card bearing all the particulars as shown to Court. She resided in Utange - Bamburi and that she was a business lady. She recorded a statement dated 2nd November, 2019 which she admitted and adopted as her evidence in chief. She was an occupier of land Plot No. 350/Section. She knew Hatimy Group Ltd from the year 2013, when he asked them to be evicted from it. They demanded 15 acres. She

knew Bamburi Wananchi were also claiming land. They demanded they vacate it. She was in occupation of the land with a permanent house, trees, water, business, and electricity. It was full of people and it was where she called home. She urged the protection by court. The claim by Hatimy that they had Mosques there was untrue. This was because the Mosque were built by UNHCR. The land was full. The CR 350/Section MN - from No. Entry 41 - Plaintiff Exhibit 1 extract of the title. The other extract produced. Entry 42 did not provide Hatimy Group Limited. From their Replying Affidavit - 1267/42 shown as their title. This was not the same as what was a title extract in Entry 42.

B. Cross Examination of IPW - 1 by Mr. Mutugi Advocate.

194. IPW - 1 testified that she got the land in the year 1997. She was 41 years old at the time of her testimony. It meant that she came to the land at the age of 15 - 16 years with her parents. She was aware when the court visited the land. Her father was there. It was on 2nd July, 2010. She did not have the photographs of her house taken by the CM. (She referred to the bundle of photographs to confirm whether her house belonged to hers). There were no photographs that showed her house was there on that day. She was there when the court visited the land. She never raised her hand to have her land and house's photographed. She filed another case No. ELC. 91/2019 - which she was claiming share of 350/land, she joined this case in November 2018.

195. IPW - 1 stated that No. 25 was his name. She was sued in this case by Mr. Kenga Advocate for being in breach of a court order. It was for the application for contempt of court - proceedings to build yet there was a court order dated 12th

July, 2010. She was arrested for trespass. She knew Stephen Safari, she knew he had her Plot No. 353/MN. Thus he was not a landless person.

C. Cross Examination of IPW - 1 by Mr. Gikandi

Advocate.

196. On being referred to the site visit report of 2nd July, 2010. IPW 1 told the court that she was shown photographs numbers 37, 38, 39, 40, 41, 23, 26, 33, 22, 17, 61 being houses being newly built. From no. 53 were photos she printed. Of the houses on photos No. 7, 9, 14, 13, 51, 52, 34, 34, 35, 44, 47 none was hers. She stated that the house that had been built were demolished. She had built a house in the years 2001/2002. She could not be given approvals for the building as she never had a title deed. By that time it was in the name of Gurmit Singh Kandola. There were 730 families occupying the land. They all had the land in different sizes "60 x 57".
197. According to her everyone had their size; she knew the land belonged to GURMIT SINGH KANDOLA. In that case; she would be ready to leave the land. She had never conducted an official search against her land. She was shown the title for Hatimy Group Limited. She went to check on this parcel. She was given an official search for Plot No. 350. She had never done any search for 350 nor Hatimy. The Official search for Land Reference No. 350 had been sub - divided and closed.
198. IPW - 1 testified that Mr. Hatimy, the National Land Commission wrote a letter indicating that there be a stoppage of any activities of the land i.e. written Kandolta Self Help Group. They were a family and they could not have the courage to institute claiming for land adverse possession for a

portion “60 x 57” – they all occupied a portion of 15 acres, his father grew the trees – mango trees.

D. Cross Examination of IPW - 1 by Mr. Charles Kambo.

199. IPW - 1 reiterated that she built a house in the year 2002. While being shown a map of 2008 – the map showed the houses constructed on the land. They belonged to Mr. Karume. The map showed several plots. From the Plot No. 350 there were dots.

200. With reference to the County Government valuation dated 12th August, 2018, the witness told the court that – it was in the name of Alexander Mwara. The map was prepared by the County Government. With reference to people who bought land there No. 13, the witness told the court that it was for Alex Mwora. They applied for plots No. 350.

E. Re - Examination of IPW - 1 by Mr. Okanga Advocate.

201. IPW - 1 confirmed that she did not have a building plan. She could not get one as she had no title deed to the land. Hatimi had sued her for trespassing and not for building without a plan. She was released under the provision of Section 210 of the Criminal Procedure Code. The court visited only a small part of the land measuring 4 acres. It never visited the whole parcel. She never disobeyed a court order. The contempt came after the demolition; they could not kill each other as everyone knew their place. The 15 acres was full.

202. The Interested Parties closed their case on 24th May, 2022 through their legal counsel Mr. Okanga Advocate. At this juncture, therefore all parties closed their case.

V. Submissions

203. On 16th October, 2024 upon the Closure of the case by the Plaintiffs, the Defendants, the parties acting in person and the

Interested Parties, the Honourable Court to expressed its gratitude to Mr. Kenga, Mr. Mutugi, Mr. Gikandi, Mr. Okanga, Mr. Kabebe, Konde Advocates and Mr. Charles Wamae in the manner in which they conducted the case with high level of professionalism, devotion, dedication and diligence.

204. Subsequently, it directed that the parties file their written submission within stipulated timelines. Pursuant to that on 9th December, 2024, the Honourable Court reserved a Judgment date on notice. Eventually it was delivered on 7th November, 2025 accordingly

A. The Written Submissions by the Plaintiffs.

205. The Plaintiffs through the Law firm of Messrs. Kenga & Company Advocates filed their written submissions dated 20th January, 2025. Mr. Kenga Advocate commenced his submission by providing a brief background of the matter herein. The Learned Counsel submitted that the Plaintiffs' suit filed vide an Originating Summons dated 16th April, 2010 was meritorious and the same should be allowed with costs. On the other hand, the Defendants' allegations through their Replying affidavits that the suit premises, being Plot No. 350/11/MN was sub - divided, creating new portions of land should be disregarded for want of evidence and/or ownership.

206. The Learned Counsel averred that the Plaintiffs herein filed this suit on 16th April, 2010 vide the aforementioned Originating Summons, seeking for orders of land adverse possession against the 1st Defendant in respect of Plot No. 350/II/MN, the suit premises herein. Upon service of Originating Summons on the 1st Defendant, being the registered owner of the suit premises, through substituted way under the provision of Order 5 Rule 17 of the Rules,

advertisement in the daily Nation Newspaper of 12th August, 2010 as ordered by the Court, he failed to enter appearance and file a defence. (Reference was made to Plaintiff Exhibit Numbers 6 which was an extract of the said newspaper).

207. According to the Learned Counsel, the other Defendants in the matter were not sued by the Plaintiffs per se. However, instead they got enjoined into the suit through their respective formal applications. For the 2nd Defendant, it was enjoined onto the suit upon its application dated 7th June, 2010. The 3rd to 25th Defendants were enjoined onto the suit upon their joint application of 29th June, 2010. The 26th Defendant was enjoined onto the suit upon its application dated 16th August, 2010. The 27th Defendant was enjoined onto the suit upon his application dated 28th April, 2011 while the 28th Defendant was enjoined onto the suit upon his application dated 17th May, 2016. Flowing from the above, the 2nd to 28th Defendants ought to prove why they considered themselves as interested parties in the suit in view of the fact that the Plaintiffs' suit was only against the 1st Defendant and also in respect of Plot No.350/11/MN, being the suit premises herein.

208. On the evidence adduced. The Learned Counsel asserted that the Plaintiffs through the 1st Plaintiff with the authority of his Co-Plaintiffs, on 31st July, 2012 testified in the matter as PW - 1. He adopted his statement dated 18th June, 2012 and produced a handwritten list of the Plaintiffs' names dated 8th April, 2010 as Plaintiff Exhibit Number 4 and a copy of a newspaper advertisement dated 12th August, 2010 to confirm service of the pleadings on the 1st Defendant as Plaintiff Exhibit Number 6. The other documents itemized in the

Plaintiffs' List of Documents dated 13th December, 2012 were marked for identification, save for the authority letter dated 8th April, 2010 which was produced by consent on 19th June, 2017 upon a recall of the 1st Plaintiff.

209. The 2nd witness to testify in the matter was PW - 2. He Mr. Emmanuel Kenga who testified on 6th November, 2017. This witness testified as an expert witness. He was a forensic document examiner. His testimony was based on a letter dated 21st September, 2010 which had sought for examination of questioned signatures appearing on a Land Control Board Consent dated 2nd April, 1982. The report on the examination which is dated 24th September, 2010 and which confirmed an element of forgery was produced as Plaintiff Exhibit Number 10 with the Land Control Board Consent dated 2nd April, 1992 produced as Plaintiff Exhibit Number 11. It should be noted that the 26th Defendant relied on the forged Land Control Board Consent in claiming ownership of an alleged portion of land created purportedly from the suit premises.

210. The Learned Counsel submitted that the 3rd Witness in the matter was one Mr. Roy Bongo who testified as PW - 3 on the same day, the 6th day of November, 2017. He adopted his statement dated 26th July, 2012 and sought to produce a certified extract of the title of the suit premises dated (certified) 30th November, 2010 (MFI-1). He also sought to produce certified copies of certificates of postal searches dated 26th October, 2009 and 21st October, 2003 as exhibits in the matter. These documents were itemized as Nos. 1 to 3, respectively in the Plaintiffs' List of documents dated 13th December, 2012. However, due to an objection from the Defendants, the documents were not produced, though the

witness confirmed as being the one who procured the same from the Lands Registry.

211. The Learned Counsel submitted that attempts were made on two occasions to summons the Lands Registrar, Mombasa to appear and produce the aforementioned documents but for unknown reasons he could not honour the summons. Fortunately, when the matter proceeded before the Honourable Court, the Plaintiffs managed to secure the attendance of another Land Registrar by the name of Josephine Munyazi Rama who on 31st July, 2012 testified as DW - 4. Upon receipt and/ or service of witness summons dated 12th May, 2022.
212. The said witness produced two certified extracts of the title, one being the document which had been marked as PMFI - I in the Plaintiffs' List of Documents dated 13th December, 2012 and the other one being a copy of an extract of the title of the suit premises held at the Lands Registry which had an extra entry, being entry No. 42, indicating that sub - division No. 6155, allegedly created from the suit premises as entry No.42. As per the evidence of the witness and the documentary evidence tendered by all parties in the matter, entry No. 41 never existed, yet it was the same entry relied on by the 2nd to 25th and 28th Defendants to lay a claim on the suit premises.
213. For avoidance of doubt, the witness confirmed that vide entry No.36 of the extract of title, the registered owner was indicated as the 1st Defendant. There was an attempt by the 2nd Defendant to have the entire parcel of land transferred to it. This evidence was captured in the certified extract of the title produced as Pex-1. The same evidence appears in the

certificate of title held by the Land registry and produced alongside Plaintiff Exhibit Number 1 by the witness.

214. According to the Learned Counsel, the witness confirmed that Entry No. 41 in the Certificate of Title was cancelled. Similarly, the entry was never signed, meaning that it never went through. It was also her evidence that the 1st Defendant never signed any transfer instrument. Further, the witness said she was not aware of any sub-divisions created from the suit premises. She could not also comment on the alleged map sheet creating the alleged sub-divisions. More importantly, she said that a search of a parcel of land can be issued even when there is a sub-division but such information is ordinarily captured in the search and finally, her evidence was that there was no evidence of transfer(s) of the alleged sub-divisions to the 2nd Defendant or any of its shareholders or 3rd parties who may happen to have been purchasers of the alleged sub-divisions. Needless to say, the witness confirmed that unless a transfer is registered, there is no way a title can be acquired. Ordinarily, the Land Registry retains a registered copy, being the same document, the witness produced alongside Plaintiff Exhibit Number 1. Further, the witness said that a certificate of sub-division from the Municipal Council of Mombasa and now the County Government of Mombasa was mandatory for the purported sub-divisions to have any legal life. She ended by saying and/or confirming that the Land Registry had no evidence of any sub-divisions, created from the suit premises. With her evidence, the Plaintiffs closed their case.

215. The Learned Counsel submitted that upon closure of the Plaintiffs' case, the interested parties led by Joyce Riziki

testified in support of their case on 24th May, 2022, after which the 2nd Defendant's case commenced through the testimony of one Anastasia Cheronno who testified as DW - 1 on the same day the interested parties testified and closed their case. The interested parties' evidence was in respect of the alleged portion of land purportedly registered in the name of the 26th Defendant, being 15 acres of the suit premises, measuring approximately 55 acres.

216. The 2nd Defendant's witness, namely Anastacia Cheronno adopted her statement dated 12th August, 2011. She produced a copy of the title deed of the suit premises as Defendant Exhibit No. 1, which was not different from the certified copy of the title produced by the Plaintiffs as Plaintiff Exhibit No. 1. She equally produced an alleged master plan showing existence of the alleged subdivisions as Defendant Exhibit No. 2. Strangely, the witness produced a document allegedly to be a transfer dated 17th August, 1989, claiming to have transferred an 8/11 undivided share of the suit premises to the 2nd Defendant. This document was produced as Defendant Exhibit No. 3 and it was their submissions that the alleged transfer document was not registered as required in law and incapable of transferring any interest in land as it was not a transfer instrument.

217. Equally, other than producing the alleged transfer document, there was a mention of a Master Plan which was produced as Defendant Exhibit No. 2 but the following issues were never addressed:

- (i) The absence of a certificate of sub-divisions.
- (ii) The absence of a Land Control Board Consent for the sub-divisions.

(iii) The transfer instruments of the alleged sub-divisions to either the 2nd Defendant as the alleged purchaser or the shareholders of the 2nd Defendants' company or 3rd parties who may have purchased the portions of land from the 2nd Defendant or the shareholders.

(iv) A separate and/or different title deed or certificate of title for the 40 acres allegedly bought by the 2nd Defendant.

218. According to the Learned Counsel, two scenarios were always mandatory whenever a sale of a parcel of land was concerned and moreover when two persons or entities were purchasing land. In the present case, if the 2nd to 26th Defendants were purchasing the suit premises from the 1st Defendant, they should have had a valid sale agreement(s). Thereafter, the suit premises were sub-divided into two portions of land where the 2nd Defendant acquired 40 acres upon a transfer of the said portion of land and the 26th Defendant acquired 15 acres upon execution of a sale agreement and a transfer of the same. These mandatory provisions were never complied with, essentially meaning that there was an aborted land grabbing.

219. The biggest question that remained unanswered was, who sanctioned the purported sub-divisions of the suit premises as any exercise or process of sub-division was ordinarily sanctioned by the registered owner. If the 2nd to 26th Defendants never appeared anywhere as the registered owners, how was the sub-division of the suit premises done if it was not corruption or land grabbing. Notably, the witness confirmed that as of the year 1989, the 1st Plaintiff was already in occupation of the suit premises. This was during cross-examination on 24th May, 2022.

220. It should be remembered that the extract of the title does not show whether the suit premises was transferred to the 2nd to 25th and 27th Defendants, neither was there any indication that as of 16th April, 2010 when the suit was filed, the land had been transferred to said Defendants, noting that the purported transfer of the portion of land in favour of the 26th Defendants, though appearing as such, there was no evidence of any transfer(s) of the suit premises to the Defendants herein. On 7th November, 2022, the 3rd Defendant by the name of Alexander Mwova testified as DW - 2. He adopted his witness statement dated 12th August, 2011 and went ahead to allege that he joined the 2nd Defendant as a member in the year 1979 who subsequently bought the suit premises from the 1st Defendant and proceeded to process title deeds from the suit premises numbering 133 portions of land, after which members were issued with allotments letters upon payment of requisite registration fees. Despite the above, his evidence was that the land remained vacant.

221. The 3rd witness in the matter was John Kimbio, the 8th Defendant who testified as DW - 3 on 8th November, 2022 by adopting his statement of 24th November, 2016. He confirmed that he was the Chairman of the 2nd Defendant and followed up on the issue of the processing of the title documents till they were issued. The witness confirmed that they had a tendency of demolishing the Plaintiffs houses on the suit property with the assistance of the police. He therefore confirmed that the allegations on invasion and/or trespassing onto the suit premises in the year 2010 were false as the Plaintiffs were already in physical possession and/or occupation of the suit premises in the years 2009 and 2010, a

departure from the falsehoods made by the other witnesses in the matter.

222. According to the Learned Counsel, when faced with the possibility of there having been fraud on the part of the Defendants, the 2nd Defendant summoned a Land Surveyor by the name of Dennis Malembeka who on 8th November, 2022 testified as DW - 4. The witness produced a surveyors report dated 7th November, 2022 to allegedly confirm that the transfer and registration processes were above board. The witness upon giving evidence in chief was unable to answer any questions regarding the legitimacy and legality of the alleged portions of land created from the suit premises.
223. He also confirmed that all the sub - divisions allegedly owned by the 2nd to 25th, 27th and 28th Defendants did not originate from the mother title deed or suit premises. Plot No. 350. He also confirmed or admitted that all mandatory requirements for a successful transfer and/or registration of the alleged sub-plots were not complied with and no wonder, the alleged sub-divisions did not originate from any entry in the mother title document produced as Plaintiff Exhibit No. 1. The 2nd, 3rd to 25th Defendants' case was thereafter closed.
224. The Learned Counsel further submitted that the 26th Defendant on 14th July, 2023 testified in the matter as DW - 5. The 28th Defendant also testified on the same day as DW - 6 but was recalled at his own request on 26th February, 2024. The evidence of DW - 5, Abdulrahman Mohamed Hatimy was that he was relying on the affidavit of Mohamed Hatimy dated 27th September, 2010 who was deceased.
225. According to the Learned Counsel, it was worth noting that the said witness did not produce a Certificate of Incorporation

of the 26th Defendant's Company, neither was there a CR - 12 form from the Registrar of the Companies produced to confirm the particulars of directorship of the company. This was very crucial in light of the fact that the 26th Defendant, Hatimy Group Limited was never sued in the matter. More importantly the alleged Certificate of Title and search certificate indicated that the purported portion of land owned by the same Company was Plot No.6155/II/MN but the said Defendant's List of documents and the witness statement made a mention of Hatimy Group of Companies. The question was, was the court dealing with different companies. The law required that for the alleged Abdulrahman Hatimy to have any locus standi in the matter, he should have brought evidence linking himself with the Company. Equally, the late Mohamed M Hatimy having deponed to be a director of the Defendant's Company should have attached evidence of the existence of the Company and the relationship with the Company. Otherwise busy bodies would be coming to Court claiming to be so and so, yet they are not. The 26th Defendant's failure to comply with such mandatory provisions of law on evidence renders its claim or allegation unmerited.

226. Similarly, the 26th Defendant had no evidence to prove purchase of a portion of land on the suit premises, save for a transfer instrument dated 16th October, 2009 which was allegedly registered and transferred to it on 19th July, 2010, three months after the suit had been filed. There is no doubt therefore that the postal search dated 26th October, 2009 produced alongside the certified extract of the title as Plaintiff Exhibit No. 1 reflected the true position on ownership of the suit premises.

227. On the part of the 27th Defendant, his advocate, Mr. Asige on 17th February, 2022 stated that his client was no longer interested in the matter and thus would not be participating in the proceedings. On the part of the 28th Defendant who testified as DW - 6 on 14th July, 2023 and 26th February, 2024, his evidence was that he purchased two portions of land on the suit premises which were yet to be transferred in his favour.
228. When the Defendants realized that the evidence on ownership tendered by the Land Registrar, one Josephine Mnyazi Rama (PW - 4) and the Land Surveyor one Dennis Malembekeka (DW - 4) was not going to work in their favour, they sought for summons for another Land Registrar to appear in court and despite objection from the Plaintiffs, one Sheila Soita, a Land Registrar from the Mombasa Land Registry testified as DW - 7 on 16th October, 2024.
229. The said Lands Registrar, though brought another Certificate of Title which was not different from what was produced by PW - 4, had the endorsement of the word cancellation which she admitted that it had no connection with closure for sub - division. In fact, it was an attempt by the said Land Registrar to assist the Defendants in the matter because she brought a search to allegedly confirm the existence of a sub - divisions created from the suit premises, confirming that the suit premises was closed for sub - divisions, yet such information is ordinarily contained in a Certificate of Title but not a search certificate. Her evidence was therefore not useful to the Defendants, which was definitely expected. Based on the above, the Defendants were and/or are not necessary parties in the suit. Therefore they did not deserve any consideration,

the consequence of which is to determine the merits of the Plaintiffs case as against the 1st Defendant, noting that their claim is unchallenged as the 1st Defendant, though served never participated in the matter.

230. On the law and analysis. The Learned Counsel submitted that before going into the merits of the Plaintiffs' case as against the 1st Defendant, they wished to argue and submit on the demerits of the 2nd to 28th Defendants' claim in the matter. Section 107 of the Evidence Act (Cap 80), Laws of Kenya places the burden of proof on any person alleging the existence of a fact. The 2nd to 28th Defendants claim to be the registered owners of portions of land allegedly created from the suit premises, being Plot No. 350/II/MN situate at Utange within Mombasa County.

231. The provision of Section 17 of the Limitation of Actions Act, Cap. 22, Laws of Kenya extinguishes the title of a registered owner whose land has been occupied by an adverse possessor. As per the said provision, the adverse possessor is already the owner of the land so occupied or possessed only that he or she lacks paper ownership documents. Applying the said provision to Section 116 of the Evidence Act, the 2nd to 8th Defendants were required to prove that the Plaintiffs who are in occupation of the suit premises are not owners of the land, though without paper ownership documents, which they were now asking the Court to issue in their favour.

232. The Learned Counsel submitted to the court that the 2nd Defendant claimed to have bought the suit premises from the 1st Defendant on 17th August, 1989 and proceeded to produce an alleged transfer document of even date as Defendant Exhibit No. 6. Its assertion through the pleadings and

testimony by one Anastasia Cheronno (DW - 1) was that it bought the entire parcel of land and that was the reason entry No. 41 of the extract of the title shows the 2nd Defendant as the owner of the suit premises, though cancelled.

233. The 2nd Defendant's witness was cornered with questions as to whether it owns a portion of land on the suit premises or the whole of it. She had no answers as the copies of certificates of titles allegedly created from the suit premises did not reveal to have originated from any entry in the certified extract of the title. The 2nd to 25th, 27th and 28th Defendants' titles were indicated to have originated from entry No. 43 but the certified extract of the title produced as Plaintiff Exhibit No. 1 by the Land Registrar never had such an entry and that was why the Land Registrars, PW - 4 and DW - 7 were unable to confirm the origin of the alleged Title Deeds held by the said Defendants.

234. According to the Learned Counsel, it should be noted that for the 2nd Defendant to successfully claim that it bought the suit premises or a portion thereof, there should have been a sale agreement and a transfer instrument registered at the Land Registry in the manner provided in law. Under the then applicable Act, which was the Land Titles Act , Cap. 282, Laws of Kenya, the 2nd Defendant, if it purchased the entire parcel of land should have transferred the entire suit premises into its name, which could have been Entry No. 41 in the extract of title but as per the evidence of the Land Registrar, one Josephine Mnyazi Rama (PW - 4), the said transfer never went through as it was not signed, clearly showing that the endorsement was in error and correctly so, because the 2nd Defendant allegedly bought a portion of land on the suit

premises, being 8/11 undivided share of the suit premises. Therefore, such entry could not have existed.

235. As the 2nd Defendant was alleged to have bought the aforementioned undivided share which translates to 40 acres since the entire suit premises measures approximately 55 acres, the portion of land purchased should have been curved out and a title deed procured either in the name of the 2nd Defendant upon registration of a transfer under the provision of Section 57 of the Land Titles Act as non-registration makes the transfer instrument void as provided under Section 58, thereof.

236. The Learned Counsel submitted that there was no transfer instrument executed by the 1st and 2nd Defendants, either for the transfer of the alleged portion of land or the entire suit premises. In fact, the alleged transfer dated 17th August, 1989 was nothing but an agreement but assuming that it is a transfer (which isn't) for argument sake, it was not registered as required under the Act as the stamp endorsed on the said transfer document relates to documents registerable under the Registration of Documents Act which was not applicable to transfer instruments requiring registration under the Act. This was line with Section 83 of the Land Titles Act.

237. The provision of Section 26 of the Land Act mandates the Recorder of titles who is a Land Registrar to keep a register and Photostat copies of all Certificates of Titles under the Act while Section 29, thereof deems every Certificate of title marked by the Registrar of titles with the number of folio and volume embodied in the register as registered. It is the number of folio and volume embodied in the register which is indicated in any subsequent procured title whenever there is

a subdivision. Section 66 of the Land Titles Act allows registration of a document in respect of a immovable property which consist of undivided share like the purported transfer document produced by the 2nd Defendant. It was therefore clear that if the said document had been registered under the Land Titles Act as mandatorily required in law, the alleged Defendants' titles would have been generated from the suit title and assigned a particular entry number, which also would appear in the certificate of title of the suit premises.

238. Looking at the sub - division map produced by the 2nd Defendant, which was not approved by the Director of Surveys as required under Section 65 of the Land Titles Act, the same showed that the alleged sub - divisions were emanating from entry No. 43 of the certified extract of the title. As stated above, such entry is non - existing.

239. The Learned Counsel turning to the 26th Defendant's claim submitted that he purported to own Plot No. 6155/II/MN, allegedly created from the suit premises upon the questionable sub - divisions, the Certificate of title produced by the said Defendant as Defendant Exhibit No. 1 was allegedly transferred to it on 19th July, 2010, three months after the suit had been filed. No wonder, the postal search dated 26th October, 2009 and which was produced as part of Plaintiff Exhibit No. 1 by the Plaintiffs indicated the owner of the suit land to be the 1st Defendant.

240. Eventually the 26th Defendant's title was premised on a Land Control Board Consent (Plaintiff Exhibit No. 10) which was invalid at the time of registration of the transfer instrument. The consent was allegedly made on 2nd April, 1982 while the transfer instrument was registered on 19th July, 2010, which

was 28 years upon grant of such consent. The provision of Section 6 as read with Section 8 of the Land Control Act, Cap. 302, Laws of Kenya, makes such a transaction illegal and/or unlawful and a nullity, unless there was an extension of the expired period of 6 months by the Court. No wonder, the 26th Defendant chose not produce the said consent, which it had used in its application for joinder of parties dated 16th August, 2010. The said Consent was also a subject of examination by the Forensic Document Examiner (PW - 2), who returned a verdict of forgery. The 26th Defendant's Certificate of Title, though shown to have originated from the suit title document as Entry No. 42 lacked authenticity for breach of mandatory provisions of law as above submitted and as the Court could not sanction an illegality it ought not to stand as a genuine land ownership document.

241. According to the Learned Counsel it was worth noting that other than the illegality talked of herein, the 26th Defendant being a corporate body should have proved its legal existence and directorship through production of a Certificate of Incorporation or registration as well as a CR - 12 form from the Registrar of Companies. This was vital because the 26th Defendant was never sued in the matter but got enjoined through its purported Directors who failed to establish or prove their relationship with the 26th Defendant's company. The purported directors of the 26th Defendant therefore lack the capacity to represent the Company.

242. Based on the foregoing, the 2nd to 28th Defendants had failed to prove the existence of any sub-divisions on the suit premises and therefore the Plaintiffs' suit should be allowed for the following reasons. The Plaintiffs, as per their evidence

have lived and/or occupied and/or resided on the suit premises for over the statutory period of 12 years, continuously and/or uninterruptedly and/or openly and/or peacefully and/or exclusively and adversely to the title of the registered owner, the 1st Defendant herein. Their entry onto the suit land was also peaceful and without permission. In support of the above arguments, we rely on the findings in the famous case of **“Njuguna Ndatho - Versus - Masai Itumu & 2 others, being Civil Appeal No.231 of 1999”**, which other than the variation on the procedure of commencing suits for adverse possession, is still a well-reasoned judgment, based on sound principles on matters touching on the threshold, required for a grant of adverse possession orders.

243. Another very similar case to the present one was the case of **“Kirimo Shutu and 6 Others - Versus - Godfrey Karume, being Civil Appeal No. 85 of 2015 (Malindi)”** where the Learned Judges awarded a parcel of land to the Appellants by stating the following: -

“According to the Respondent the land was vacant in 1986 and he utilised it between that year and 1990. In 2002 or 2003 he learnt of its invasion by the Appellants. He explained that he was involved in a road accident in 1986 and had to travel to France where he remained for some time undergoing treatment. Although the Respondent argued that the Appellants were not on the suit property between 1986 and 2001 or 2003 we think, from the totality of the evidence that we have reproduced earlier, that Mzee Shutu & 39;s family had all along been on the property. Instead we are convinced that after his registration as the lawful owner of the suit property, the Respondent took no action to recover it from the Appellants. All the letters written before 2003 that we have alluded to regarding the whole parcel occupied

by Mzee Shutu's family including the suit property, confirm that the Respondent did not take any steps to reclaim it or to assert his right as the true owner. The letters were concerned more with the Shutu family than with the Respondent. Indeed, no reference, even once, was made of him in any of them."

244. Eventually, the Learned Judges rendered themselves as hereunder: -

"For all these reasons we come to the conclusion that the learned Judge failed to adequately evaluate the evidence before him, in the manner we have done with the result that he arrived at a wrong conclusion that the Appellants were not entitled to claim ownership of the suit property by statute of limitation and conversely by declaring the Respondent the lawful owner. We, accordingly allow the appeal with costs. Pursuant to the provisions of Section 3(2) of the Appellate Jurisdiction Act as read with Section 38 of the Limitation of Actions Act it is ordered that the appellants be registered as the proprietors of the portions of the suit property which they occupy."

245. The Learned Counsel submitted that it had always been argued that land title holders should be protected by virtue of the provision of Section 25 of the Land Registration Act but the same law also recognizes adverse possessors as lawful owners of any parcel of land so occupied and/or possessed in so long as the provisions of Section 7 as read with Section 17 of the Limitation of actions Act are applicable. Section 28 (h) of the Land Registration Act, No. 3 of 2012 provides for prescription as one of the methods of acquiring land based on long occupation and/or possession. This provision therefore complements the provisions on Limitation under the Limitation of Actions Act. In the **"Chevron (K) Limited - Versus - Harrison Charo wa Shutu, being Civil Appeal No. 17 of 2016**

(Malindi)”, the Learned Judges also awarded the Respondent the suit premises therein upon conviction the Appellant had slept on its right of ownership. Still in the said authority, the learned judges reminded themselves (Page 6, thereof on the rationale of the procedure of acquiring land by adverse possession as explained in a passage from the decision of **“Adnam - Versus - Earl of Sandwich (1877) 2 QB 485”**,

“The legitimate object of all statutes of limitation is in no doubt to quiet long Continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

246. The Learned Counsel submitted that there was an argument that the Plaintiffs were trespassers on the suit premises but such an issue was addressed in the **“Chevron (K) Limited Case”** where the Learned Judges dealt with the issue of trespassers and stated as follows on page 6, thereof: -

“It was the Appellant's contention that the learned Judge wholly misunderstood its case by basing his decision on the doctrine of adverse possession while the claim was premised on the tort of trespass to land; that the issue before the trial court was simply whether the respondent entered on the suit premises without its permission. We think it is futile to draw such a distinction. Sections 13 and 38 of the Limitation of Actions Act, respectively simply recognize “some person in whose favour the period of limitation can run” and “where a person claims to have become entitled by adverse possession to land.....” Invariably all cases of adverse possession arise

from claims to recover land from persons regarded as trespassers.

247. It had been proved that the suit premises was never subdivided through the production of certified extract of the title and a postal search, jointly produced as Plaintiff Exhibit No. 1 and further that the registered owner of the suit premises is the 1st Defendant who never defended the suit, the Plaintiffs' suit should be allowed.

248. In conclusion, the Learned Counsel urged the Honourable Court to be guided by the evidence tendered herein and any applicable laws and the various Authorities available (including the above) in allowing the Plaintiffs' suit with costs.

B. The Written Submissions by the 2nd Defendant

249. The 2nd Defendant through the Law firm of Messrs. Muniyithya, Mutugi, Umara & Muzna Co. Advocates, filed their written submissions dated 21st December, 2024. Mr. Mutugi Advocate, like his colleague for the Plaintiff, he commenced by providing a brief background of the case. The Learned Counsel stated that the following were submissions of the 2nd Defendant in relation to the main suit. This suit was filed on 16th April 2010 vide Originating Summons dated 16th April 2010 against the 1st Defendant herein. The 2nd Defendant filed a Chamber Summons dated 7th June 2010 seeking to be joined as the 2nd Defendant. The application was allowed. By the Order of Justice Mohamed Ibrahim (as he then was) issued on 13th September 2010, the originating summons were converted to a Plaint and the Replying Affidavits thereof to defences.

250. The 2nd Defendant according to the Learned Counsel would submitted on two issues. Firstly, whether the Plaintiffs had acquired the suit property by adverse possession. The

Learned Counsel submitted that the law on adverse possession was well documented and settled. The essential requirement that an applicant must meet in order to succeed in an application for adverse possession have been discussed by the courts on numerous occasions. The Court of Appeal in **“Ernest Wesonga Kweyu - Versus - Kweyu Omuto [1990] KECA 63 (KLR)”** stated that:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous when such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (colour of title is that which a title in appearance, but not in reality). Adverse possession is made out by the co-existence of two distinct ingredients, the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (‘claim or colour of title’) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously.”

251. Justice Gicheru in case of:- **“Kweyu - Versus - Omato (supra)”** was clear that in a claim of adverse possession, possession must be proved as a fact, mere assumption of exclusive possession, however long it is should not hold in a Court of law. The Plaintiff’s first witness, PW-1 Stephen Safari, testified on 31st July 2012 and on 19th June 2017. It should be noted that PW-1 completely failed to prove that the Plaintiffs are in active possession of the suit property. PW-1's testimony was purely on his own claim on the land and not the interests of the other plaintiffs as asserted in his written witness statements. Therefore, the Plaintiffs who did not testify constructively failed to prove their cases. He referred Court to the provision of Section 109 of the Evidence Act.

252. It was PW - 1’s testimony that he moved to the suit property in year 1971. When he was cross-examined on 19th June 2017, he stated that he bought Plot 353/II/MN which was adjacent to the suit property in 1960s. When counsel for the 2nd Defendant inquired about the position of plot 353/II/MN in relation to the plot No. 350/II/MN, it was PW - 1’s testimony that the two properties share a boundary, he further went on to state that he is landless on plot No. 350/II/MN but a registered owner to the next Plot No. 353/II/MN. The 1st Plaintiff had a permanent residence in Plot Number 353/II/MN which was next to the suit property which according to his testimony was built in the year 1975. The question that arises the was; could the 1st Plaintiff then claim to be landless on one property when he was in fact in possession of another property exactly next to the suit property. The PW - 1’s the registered owner of plot 353/II/MN and for which he had a title deed. There was absolutely no evidence adduced by the

Plaintiffs confirming the actual possession of the suit property acclaimed. There was no survey report, no photographs to suggest they were inhabitants of the land they claim to claim.

253. According to the Learned Counsel, the Plaintiff had failed to provide evidence and back their claim of peaceful, open and continuous possession as suggested in the well settled principle that a party claiming adverse possession should prove that he has possession '*nec vi, nec clam, nec precario*'. They could not claim to have lived peacefully, in an open manner and continuous for a period of 12 years. The report by the Court of the site visit done on 2nd July 2010 by Her Ladyship Justice Mutende, the then Deputy Registrar, was clear that as of 2nd July 2010, the semi-constructed mud houses on the suit property were all clearly under construction. There was no credibility and enough evidence that there was any kind of permanent settlement on the suit property.

254. It was strange that not even one of the Plaintiffs had a permanent structure on the suit property despite purporting to have stayed on the property for more than 12 years as claimed. The testimony of PW - 1 confirming that not even one of the Plaintiffs had a permanent structure is clear enough evidence that the land has always been vacant. The tradition in the coastal region was that the property of such acreage, which was not owned by members of the same family, would have at least a place of worship, a school and several power connections. These essentials were clearly missing. Justice Ibrahim ordered the status quo to be maintained, since then, there had been no sign of children playing, no sign of 150 families on the suit as stated by PW - 1

neither was there signs of the 300 families as claimed by the PW - 3.

255. PW-3, the 5th Plaintiff testified on 6th November, 2017. The witness claimed that his grandfather was given permission to stay on the land by a Mr. Kidevu, the owner of the property, as claimed by his grandfather. The grandfather was known by the name Tenzi Bongo, one of the two friends PW 1 claimed to have entered the suit property together with. It should be noted that PW - 3 neither had the identity of this Mr. Bongo neither did he have certificate of confirmation of grant. It should therefore be considered that the person by the name Mr. Tenzi Bongo is a character created by the Plaintiffs to try and mislead this court.

256. According to the Learned Counsel, it is trite law that the Plaintiffs must demonstrate, inter alia, that their occupation of the land was without permission or licence. PW - 2's testimony was that his grandfather informed him that the owner of the suit property was a Mr. Kidevu. This particular Plaintiff could not therefore assert any claim to the suit property as adverse possessor because his occupation was as a result of the permission of the land owner, and hence remained in occupation of the suit property with permission of the land owner. An adverse possessor must be in exclusive possession of the suit property without acknowledging the land owner's title or recognizing any other person's interest.

257. The element of permissive possession was well explained in *"Gabriel Mbui - Versus - Mukindia Maranya (1993) eKLR"*, where Justice Kuloba had this to say: -

"(3) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without

permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with leave of the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land...where possession was consensual or contractual in its inception, it cannot be called 'adverse'. Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken... The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also, in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as "hostile" possession, to emphasize that "hostility" is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile.

Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (Cobb - Versus - Lane [1952] 1 All E R 1199; Denning. MR, in Wallis's Cayton Bay Holiday Camp Limited - Versus - Shell-Mex and B P Ltd [1974] 3All ER 575 at p 580;Chanan Singh, J, Jandu - Versus - Kirpal and another (1975)EA 225 at pp 233, 234, 237; Madan, J (as he then was),in Gatimu Kinguru - Versus - Muya Gathangi, 1[1976] Kenya L R 253, at pp 257,258);”

258. The Learned Counsel submitted that it was a well known fact that time cannot begin to run even if the purported permission/ contract/ licence became null and void by operation of law, the time to claim adverse possession starts to run when the permissions initially granted to occupy the land was expressly revoked.”

259. According to the Learned Counsel PW - 3 confirmed during his testimony that he was removed from the suit property on several occasions. In the case of: **“Mtana Lewa - Versus - Kahindi Ngala Mwangandi (2015) eKLR”**, the Court of Appeal (Makhandia JA) stated as follows: -

“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 not 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.”

260. The fact that PW - 3, the 5th Plaintiff herein was removed on several occasions from the suit property was a clear indication

that possession of the adverse possessor was by force or stealth in clear departure of what the Court of Appeal in "**Mtana Lewa case (supra)**" envisioned. The Land Registrar was also summoned, and she appeared as PW - 5 on 23rd May 2022. It was PW - 5's testimony, on cross-examination by Counsel for the 2nd Defendant that the original title for plot 350/II/MN was sub - divided and a total of 134 titles were issued to the 2nd Defendant herein on February 2005 and confirmed the titles were authentic. The Land Registrar also confirmed that Plot No.350/II/MN was the original plot which was later sub-divided into the stated 134 plots and that all 134 plots have titles. The Land Registrar further confirmed that sub - division was done procedurally and still in record as no one has challenged the said entries. The court also heard the testimony of another Land Registrar who testified on 16th October, 2024 after the court ordered for a recall of the Land Registrar. This witness Sheila Soita reiterated that the original title for Plot 350/II/MN was subdivided and thus the same does not exist. She confirmed that 134 new title deeds were issued in the year 2005 and the mother title deed surrendered for cancellation.

261. According to the Learned Counsel it was crystal clear that the Plaintiff's adverse possession claim was premised on a non - existent title deed. The Plaintiffs could not now change their case and start questioning the subdivision yet there was no issue raised by the original owner who properly transferred the suit land to the 2nd Defendant upon sale. Upon cross examination by the Learned Counsel for the 26th Defendant, PW - 5 confirmed that search can indeed be done on a closed title. It was her testimony that Plot No. 350/II/MN was

extinguished but its history still survives thus the reason why search could be done on the said property.

262. Upon intervention/examination by the court, the expert witness confirmed that Gurmit Singh, the 1st Defendant was the owner of the original title. PW - 5 confirmed that the 2nd Defendant herein complied with the requirement of getting titles and indeed acquired good title. On 8th November, 2022, the 2nd Defendant's witness Alexander Mwova, DW - 2, testified. He confirmed that a 134 certificates of title had been issued to the 2nd Defendant and that 350/II/MN was no longer existent. He referred to the 2nd Defendant's bundle of documents on the titles appearing from pages 20 to page 208. The witness also confirmed that during the court site visit in the year 2010, which he was present, confirmed that the suit property was vacant and that only three mud structures were under construction. DW - 2 was cross-examined by the Counsel for the Plaintiffs and confirmed that he was a landowner of three (3) plots in the suit property.

263. This evidence was also buttressed by the evidence of Charles Kambo Wamae the interested party who produced in court the area valuation map by the Mombasa municipality dated February 2008 which was at the time of the inception of the case. This map was the 28th Defendant Exhibit No. 8 for the Interested Party. The map showed clearly that there were no structures in the land in the year 2008 contrary to averment by the Plaintiffs that they were in occupation for over 12 years by the time the case was filed. The map also clearly showed the sub - divisions which were already there in the year 2008.

264. DW - 2 also confirmed that in year 2006 when he stepped down as the chairman of the 2nd Defendant, the suit property

was vacant. At the time, DW - 2 testified that the suit property was fenced but later found out that the fence had been demolished. It was a clear indication that the owner of the land was hell bent on keeping intruders out of the property and in no way abandoned the property. DW - 4 was a Land Surveyor. The witness testified that 134 titles were eventually issued to the 2nd Defendant and therefore the title under the name of the 1st defendant extinguished. He confirmed that the mother title was surrendered to the land registry for cancellation upon closure of the mother title.

265. Secondly, whether the Plaintiffs were entitled to be registered as owners of the suit property. According to the Learned Counsel it was important to note that the Plaintiffs had failed to show to this court their exact location on the suit property. It was clear that no party in this case, not the Defendants and neither does the court know the exact portion the 172 Plaintiffs would occupy. The Court in the case of:- ***“Wilson Kazungu Katana & 101 Others - Versus - Salim Abdalla Bakshwein & Another [2015] eKLR”*** the Court observed as follows: -

“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.” [Emphasis theirs]

266. The Learned Counsel submitted that it was clear that the Plaintiffs had failed in their duty to prove what they alleged.

Having failed to point this Court to the exact portion of the land they wished to be allowed to possess, this Court could not therefore be invited to allocate land. They were guided by the decision in the case of:- **“Titus Mutuku Kasuve - Versus - Mwaani Investment Limited & 4 Others [2004] eKLR”**, where the Court had this to say:-

“The burden was on the appellant to produce the certified extracts of title in respect of the suit properties. In the absence of the extracts of title the affidavit evidence of George Matata Ndolo that the suit lands are encumbered and therefore not free for alienation has not been refuted. Moreover; the appellant did not prove the location of the distinct portion of the land he is claiming or its acreage. He does not say whether the portion he is claiming was comprised in the original title LR No 1756 or LR No 1757. He does not further say whether the portion of the land he is claiming is comprised in now LR No 1757/5, 1757/6, 1756/7 or 1756/8. Evidently, two original titles LR Nos 1756 and 1757 comprising of Mwani Ranch and even the four sub - divisions are expansive and it is difficult to locate the portion claimed by the appellant. There is no evidence that the alleged forty acres were surveyed, demarcated and excised from the expansive ranch. In paragraph 4 of the supporting affidavit the Appellant deposes that he and other people have been in possession of the forty and twenty acres thereby implying that he is not in exclusive possession of the land he claims. In the circumstances, there was no concrete evidence that appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres.”

267. In conclusion, the Learned Counsel submitted that the Plaintiffs had not on a balance of probability established that they meet the threshold for the grant of adverse possession. They prayed that this suit be dismissed with costs.

C. The Written Submissions by the Interested Party

268. The Interested Parties through the Interested Party filed his written submissions dated 6th January, 2025 where he commenced his submissions by stating that the matter herein was commenced by the Plaintiffs vide an Originating Summons filed in 2010 seeking to acquire the suit property by way of adverse possession. The suit was actively defended by several defendants as well as the Interested Party. As an Interested Party having acquired ownership interests to two subdivisions of the suit property by virtue of being a bona fide purchaser for value - for the first parcel from one Mr. Opondo Mark Ngoha and for the second parcel from one Mr. Samuel Odhiambo Odera, who are also Defendants falling under the umbrella of the 2nd Defendant, the Interested Party moved this Honourable Court vide a Notice of Motion application dated 17th May, 2016 seeking to be enjoined as an Interested Party and the said orders were granted.

269. Being a claim for adverse possession, the Learned Counsel submitted that the concept of adverse possession had been explored in multiple cases with essentials being laid down in various cases including but not limited to the following;

270. In the case of ***“Murang'a ELC NO. E007 OF 2021 (OS) Mwangi Gatunge - Versus - Edwin Onesmus Wanjau (Suing In Her Capacity as The Stephen Administrator of the Estates Of Kimingi Wariera (Deceased) and Of Mwangi Kimingi(Deceased)”***, the Honourable Court referring to several decisions observed as follows:-

“Wambugu - Versus - Njuguna [19831 KLR 172, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner that owner must have lost his right

to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Limitation of Actions Act gives authority to the claimant to apply to court for orders of adverse possession. Set the findings of the Court in Malindi App No. 56 of 2014 Mtana Lewa - Versus - Kahindi Ngala Mwangandi [2015] eKLR where it held;

“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 nor 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.”

271. 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...”

272. The Interested Party relied on the following four (4) issues for determination. Firstly, on how the Applicants took possession of the suit property. The Interested Party submitted that in 2004, he purchased two Plots to wit; Plot Number 25, a quarter of an acre whose title number is CR. 38422 from one MARK OPONDO and Plot Number 28, also a quarter of an acre whose title number is CR. 38424. This was evidenced with the production of IP - Exhibit No. 3, IP - Exhibit No. 4, IP - Exhibit No. 5 and IP - Exhibit No. 6.

273. Thereafter the Interested Party planted trees around the plots which acted as a live fence with intention of farming and/or cultivating on those plots. The Interested Party lawfully and peacefully enjoyed the privileges accruing from the ownership of the two plots. In the course of it in the year 2007 the Interested Party was transferred to Nairobi. Nevertheless he continued farming activities on his said plots and all was well until sometimes in the year 2009 when he visited the plots and he was shocked to find that the Plaintiff's had trespassed and encroached into his plots, destroyed his crops and trees thereon and they were erecting their structures in the shape of small houses.

274. Secondly, on the issue of when the Applicants took possession and occupation of the suit property. The Interested Party

submitted that as aforesaid, it was in the year 2009 that the Interested Party discovered that the Plaintiffs had trespassed on his plots, destroyed his crops and trees thereon and were erecting their structures in the shape of small houses. The Interested Party went and obtained a valuation map for Mombasa Municipality Mainland North for February, 2008 (see IP - Exhibit No. 8). This map shows details of all the structures that were on the parcels of land in the North Coast area which include the suit property as it was in the year 2008.

275. The map showed there were no structures in the land as at February, 2008. Further it also showed all the 133 sub-divisions which resulted from the mother title plot number No. 350/II/M N. The Interested Party also produced the County Government Valuation for Rating issued on 12th March, 2018 (See IPEXh-9). Further to the aforesaid, in 2010 the court conducted a site visit at the suit property and a comprehensive report was prepared to that effect. The site visit report confirms that the structures thereon were new some of which were still wet and there were also some building materials to wit; logs etc in preparation for building and/or construction indicating that constructions were still new and ongoing.

276. The Interested Party submitted that to confirm that the Plaintiffs were not in the suit property anytime earlier than the year 2009 and that they are also professional squatters, a well known concept that has gained notoriety within the Kenyan coastal region in a manner as to deserve to be taken judicial notice of the names of the Plaintiffs herein also appear in other similar proceedings that ran concurrently with the instant suit. These other proceedings were "**MOMBASA ELC NO.**

123 of 2009 and MOMBASA (OS) NO. 46 of 2014” where in they also seek ownership of other different plots claiming to had acquired the same by way of adverse possession which begs the question on whether the same person can have actual possession and occupation of different plots at the same time. See list of residents produced by the Interested Party. The Plaintiffs could best be described as professional land grabbers.

277. PW-1 also confirmed during the hearing thereof that indeed there was a site visit and there were wet structures at that particular time. He also confirmed that some people were less than three years old on the suit property.

278. Thirdly, on whether the possession by the Applicants had been quiet and exclusive, the Interested Party submitted that as soon as the Interested Party discovered that the Plaintiffs had encroached onto his plots, he reported the matter to the Cooperative Sacco through one Margaret Kamau and Alexander Mwova who referred the issue to the area Chief (see IP – Exhibit No. 7).

279. The Interested Party further went and obtained a valuation map for Mombasa Municipality Mainland North for February, 2008 (see IP – Exhibit No. 8) the map showed details of all the structures that were on the parcels of land in the North Coast area which include the suit property as it was in 2008. The map showed there were no structures in the land as at February, 2008. Further it also shows all the 133 sub - divisions which resulted from the mother title Plot Number No. 350/11/MN. The Interested Party also produced the County Government Valuation for Rating issued on 12th March, 2018 (see IP – Exhibit No. 9).

280. The Plaintiffs having invaded the suit property in the year 2009 and filing the instant suit in 2010, shows that this was crafted properly by the Plaintiffs since the Plaintiffs have never been there before. Nevertheless, and without prejudice to the foregoing, the Plaintiffs have never had a quiet possession since the Interested Party has always been a present owner of two sub - divisions of the suit property.
281. The Interested Party submitted that if at all there were occupations or buildings prior to the year 2009, the same could have been captured in the valuation map for Mombasa Municipality Mainland North for February, 2008 (see IP - Exhibit No. 8). Therefore, there was no quiet occupation by the Plaintiffs at all.
282. Finally, on how long the Applicants had been in possession, the Interested Party argued that as afore - stated, it was in the year 2009 that the Interested Party discovered that the Plaintiffs had trespassed on his plots, destroyed his crops and trees thereon and were erecting their structures in the shape of small houses. He went and obtained a valuation map for Mombasa Municipality Mainland North for February, 2008 (see IP - Exhibit No. 8) this map showed details of all the structures that were on the parcels of land in the North Coast area which include the suit property as it was in year 2008.
283. The map shows there were no structures in the land as at February, 2008. Further it also showed all the 133 subdivisions which resulted from the mother title Plot Number 350/1/ MN. The Interested Party also produced the County Government Valuation for Rating issued on 12th March, 2018 (see IPEXh-9).

284. Further to the aforesaid, in the year 2010 the Court conducted a site visit at the suit property and a comprehensive report prepared to that effect that confirmed that the structures thereon were new some of which were still wet and there were also some building materials to wit; logs etc in preparation for building and/or construction indicating that constructions were still new and ongoing. PW - 1 also confirmed during the hearing hereof that indeed there was a site visit by the Court in year 2010 and there were wet structures and also there was grass inside the structures at that particular time. He also confirmed that some people were less than three years old on the suit property.

285. In conclusion, the Interested Party submitted that in view of the afore - stated, the Plaintiffs had not stayed on the suit property for more than a year by the time the instant suit was filed.

VI. Analysis and Determination

286. I have keenly assessed the filed pleadings by all the Plaintiffs, 2nd to 28th Defendants and the Interested Parties herein, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

287. However, its instructive to note that despite of service by substituted means under the provision of Order 5 Rule 17 of the Civil Procedure Rules, the 1st Defendant never entered appearance nor complied with the provision of Orders 7 and 11 of the Rules. Ideally, being a land matter it proceeded as formal proof against the 1st defendant under the provision of Order 10 Rules, 4, 5, 6, 7 and 9 of the Rules thereof. That is to say, where a Defendant fails to adduce evidence in support of the Defence and fails to attend court to prosecute the case,

the Plaintiffs' evidence escapes the possibility of being controverted by defence evidence. It escapes the scrutiny of cross-examination by the Defendant. It therefore stands unchallenged and uncontroverted by the 1st Defendant. However, the Plaintiffs never escape the burden and standard of proof which they have to satisfy and discharge in accordance with the law in order for his claim to succeed.

288. The provision of Section 107 (1) of the Evidence Act, Cap. 80 provides that: -

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

289. Further, the provision of Section 108 provides:-

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

290. And the provision of Section 109 provides:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

291. In the case of ***“Charter House Bank Limited (Under Statutory management - Versus - Frank N. Kamau [2016] eKLR”*** the court of appeal when discussing the burden of proof on the Plaintiff in a situation where the Defendant failed to adduce evidence stated that: -

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the Defendant's failure to call evidence, the court must be satisfied that the Plaintiff has adduced some

credible and believable evidence, which can stand in the absence of rebuttal evidence from the Defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the Plaintiff is not entitled to Judgement merely because the Defendant has not testified”

292. In the present case, the Plaintiff has the burden to adduce some credible and believable evidence to prove on a balance of probabilities, that she has acquired the prescriptive rights. That her possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In the case of:- ***“Kimani Ruchure - Versus - Swift Rutherfords & Co. Limited (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)”

293. In the case of ***“Kirugi and Another - Versus - Kabiya & 3 Others (1987) KLR 347”***, the Court of Appeal held that; -

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

294. Similarly, in the case of ***“Gichinga Kibutha - Versus - Caroline Nduku (2018) eKLR”***, the Court held that; -

“It is not automatic that (in) instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case

however much the opponent has not made a presence in the contest.”

295. In the case of:- **“Samson S. Maitai & Another - Versus - African Safari Club Limited & Another [2010] eKLR”**, Emukule J observed:

-

“..... I have not seen a judicial definition of the phrase ‘Formal Proof’. ‘Formal’ in its ordinary Dictionary meanings - refers to being ‘methodical’ according to rules (of evidence). On the other hand, according to Halsbury’s Laws of England, Vol. 15, para, 260, ‘proof’ is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

296. In the case of:- **“Rosaline Mary Kahumbu - Versus - National Bank of Kenya Limited [2014] eKLR”**, the Court held: -

“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

297. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. From the pleadings filed, evidence adduced and submissions made by and on behalf of the Plaintiffs the issue that arises for this court’s determination is

whether or not the Plaintiffs has acquired title to the suit land by operation of the doctrine of adverse possession.

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

a) Whether the Plaintiffs have been in open, continuous, exclusive and adverse possession of the suit property for the statutory period of 12 years?

b) Whether the Defendants' titles, transfers and sub - divisions extinguished the Plaintiffs' right to occupation?

c) Whether the Plaintiffs are entitled to be registered as proprietors under the provision of Section 38 of the Limitation of Actions Act, Cap. 22?

d) Who shall bear the costs of the suit.

ISSUE No. a). Whether the Plaintiff have been in open, continuous, exclusive and adverse possession of the suit property for the statutory period of 12 years.

299. 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. Luckily, it is not disputed that the main substratum in this case is whether the Plaintiffs herein have a legal, legitimate and sound justification for the claim of the suit land through the doctrine of land adverse possession. In so doing, its trite law that 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. It is extremely gratifying that all the Legal Counsels for all parties have indepth provided a proper expose on the concept in their written submissions.

300. Legally speaking, and to begin with, I will first and foremost, 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.

301. 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, Cap. 22. 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.”

302. The provision of Section 13 of the Limitation of Actions Act, Cap. 22 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.

303. 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.

304. 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.”

305. The provision of 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.

306. The provision of Section 28 (h) of the Registered Land Act, Cap. 300 Laws of Kenya (Now repealed) provides that the rights acquired under limitation laws constitute overriding interests, binding on future proprietors even if unregistered.

307. The Kenyan courts have developed clear criteria, now deeply embedded in jurisprudence: -

- a) **Actual Possession:** The claimant must occupy the land physically, using or developing it as an owner would.
- b) **Continuous and Uninterrupted Possession for 12 Years:** The occupation must persist without significant break, unless the break is minor and short-lived.
- c) **Exclusivity:** The possessor must control the land to the exclusion of the true owner and the public.
- d) **Openness and Notoriety:** Possession cannot be secret or stealthy; it must be so open that the true owner is, or ought to be, aware of the occupancy.
- e) **Adversity/Hostility:** Possession is without the true owner's consent, and is incompatible with the owner's title.
- f) **No Permissive or Consensual Entry:** Entry with the owner's permission (e.g., as a tenant or licensee) is not adverse until consent is effectively withdrawn or expires, at which point the twelve years start running only if no new permission is granted.

308. In Kenya, the doctrine of adverse possession remains one of the most intriguing and misunderstood legal concepts, often leading to intense litigation, especially in land disputes. Rooted in the idea that long, uninterrupted land occupation can override formal title ownership, this doctrine underscores the law's recognition of possession as a basis of ownership, provided it satisfies specific and strict requirements. The doctrine is founded on public policy promoting land use and discouraging neglect.

309. Adverse possession refers to a situation where a person who is not the legal owner of land occupies it openly, continuously,

and exclusively, without the consent of the valid owner, and after a statutory period (12 years in Kenya), may acquire legal ownership of that land. Subsequently, adverse possession allows an individual to claim legal ownership of land through continuous and exclusive occupation for twelve years or more, without permission from the registered owner.

310. A person claiming adverse possession must, in addition to showing continuous and uninterrupted occupation beyond 12 years, **prove non-permissive or non-consensual, actual, open, notorious, exclusive, and adverse use/occupation of the land in question for an uninterrupted period of 12 years** as espoused in the Latin maxim, *nec vi nec clam nec precario* which means **“No force, no secrecy, no permission”**. The occupation must be as of right, open, and without the owner’s consent.

311. The doctrine seeks to strike a balance between promoting certainty in land tenure and penalising landowners who **“sleep on their rights”** in a bid to promote equitable use of finite land resources.

312. In the case of:- **“Wambugu - Versus - Njuguna [1983] KLR 172”**, the Court held that time only begins to run when possession is adverse (i.e., not with permission, nor under a lease or license). Possession must be exclusive, open, and continuous.

313. Further in the case of **“Mtana Lewa - Versus - Kahindi Ngala Mwagandi [2015] eKLR”**, the Court established that the requirement for possession to be **“adequate in continuity, in publicity and in extent to show that the possession is adverse to the title owner.”** Entry by force, concealment, or permission does not amount to adverse possession. The court clarified that adverse possession does not automatically flow from

mere occupation; it must be hostile to the title of the registered owner.

314. 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).”

315. In the case of **“Gabriel Mbuyi - 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.”

316. 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 - Versus - 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 - Versus - 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.'

317. 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...”

318. 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 unambiguously 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**

319. Therefore, to determine whether the 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?**

320. 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

321. From the facts of this case, its not in dispute that the suit property - Plot No. 350/II/MN was legal and absolutely

registered in the names of the 1st Defendant - Gulmit Singh Kandolta. He had a Certificate of Title issued to him under the Land Titles Act, Cap. 281. To satisfy a claim for adverse possession, claimants such as Stephen Safari & 171 Others must prove on the balance of probabilities that they physically possessed at least a determinable portion of the suit land - Plot No. 350/II/MN measuring approximately 55.6 acres or thereabout for a continuous, open, exclusive, and unrestricted period no less than twelve years, and that this possession was “adverse”—not by permission, force, or stealth, but as of right and incompatible with the true owner’s enjoyment.

322. The factual matrix in this matter involves numerous households comprising of the Plaintiffs, the 2nd to 28th Defendants and the Interested parties herein allegedly resident and in possession, potentially as far back as the year 1970s. The courts scrutinize whether the occupation was by permission (for example, as laborers, tenants, or licensees), whether the original entry was consensual (see “**Sisto Wambugu - Versus - Kamau Njuguna**”), and whether any documented or tacit consent ever lapsed or was withdrawn.

323. Applying these legal principles to the present case, on open possession; the Plaintiffs through their witnesses testified that they entered the land in year 1971, cleared bush, cultivated crops, built houses, kept livestock, dug wells, and even buried family members on it. These are overt acts of ownership, visible to the world. In the case of:—“**Mbira - Versus - Gachuhi [2002] 1 EALR 137**” cultivation and construction were held to be sufficient acts of possession. The Plaintiffs’ acts were not clandestine; they were open and notorious.

324. Further the Plaintiffs in their claim proved continuous possession as they remained on the land from the year 1971 to at least 2010 when the suit was filed. As a matter of facts, all the Defendants and in particular the 28th Defendant who even produced a GIS Map admit that the 1st Plaintiff might have been the only one on the suit land and having constructed some structures there. However, with all due respect, this Court will not entirely rely on the report from the site visit conducted by the then Deputy Registrar on 2nd July, 2010, which the Defendants really made a meal out of while making its final decision. To me its just persuasive. I say so for the following reasons. Firstly, the it only covered a small portion of the suit land – covering four acres out of approximately 55.0 acres. Secondly, although it made some useful observations but the Court and parties all seem to have zeroed in on numerous photographs taken of structures which it indicated must have been recently constructed perhaps after the demolition had taken place. In the given circumstances, this Court would find it rather difficult to entirely rely on the outcome of the said site visit. It is instructive to note that even when sued in year 1995 (CMCC 783/95), the Plaintiffs were not evicted from the suit land. They still continued to be in use and occupation of it. The question is therefore was the possession uninterrupted for more than twelve years? The answer is of course to the affirmative because the Defendants never interrupted their stay on the suit property. From their testimony, the 2nd to the 25th Defendants who applied for leave and which was granted to be joined in this suit claim to have bought the land from the one Mr. Parmender Singh Tamana who got the Power of

Attorney donated to him by the 1st Defendants for the benefit of their registered members. Resultantly, through the assistance of their Land Surveyor one Kasina (Deceased) and Mr. Denis Malembeka, who happened to have been assisting the lead Surveyor, the suit was sub - divided into 133 portions and title deeds issued to their members. Hence, their claim was to have the Court declare that they were the absolute and legal registered proprietors to these parcels of land with indefeasible title, interest and right bestowed on them by law. Equally, the 26th Defendant, the Hatimy Group Limited who applied to be joined in this suit for fear and being apprehensive that they would lose the land claims while the 28th Defendant who held two titles and a defence of innocent purchaser for value from two Vendors one Mr. Opondo Mark Ngola and Mr. Samwuel Odhiambo Odera respectively. The Honourable Court will be dealing with the legalities in depth of these land transactions herein below.

325. By and large, to me the Plaintiffs had had uninterrupted occupancy of the suit property for more than 12 years. In the case of: - ***“Githu - Versus - Ndeete [1994] KLR”*** quoted by the Court of Appeal in ***“Kenya Commercial Bank (suing as Administrator of the Estate of Paul Njoroge Muchene) - Versus - Sarah Njeri Muchene”*** the court held that: -

“ time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of actions Act.

A title by adverse possession can be acquired under the Limitation of actions Act to a part of the parcel of land to which the owner holds title.”

326. In the case of:- ***“James Obande Wasui - Versus - Jeremiah Ochwada Musumba [2002] eKLR”*** the court held that as an occupier’s right, adverse possession runs with the land irrespective of change in proprietorship. Under the provision of Section 28 of the Land Registration Act, No. 3 of 2012 as at the time of transfer of the suit land, the land was subject to an overriding interest in the form of rights of adverse possession in favour of the Plaintiff. Section 28 provides:

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

a.

b.

c.

d.

e.

f.

g.

h. Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.

327. Further previously in this Judgment it was opined that for adverse possession to stand, the Plaintiffs must prove exclusive possession. From the evidence adduced by the witnesses by the Plaintiffs, the Plaintiffs occupied defined portions, constructed homes, and cultivated. Although the land was large (55 acres), each Plaintiffs knew their portion. In the case of:- ***“Kweyu - Versus - Omuto [1990] KLR 709”***, the

Court of Appeal held that **exclusivity does not mean absolute exclusion of all others, but possession exercised with the intention to exclude the true owner**. In this instant case, the Plaintiffs' act were inconsistent with the rights of the registered owner.

328. In this Judgment, I have already defined what land adverse possession mean. In this instant case, the Plaintiffs' occupation was without permission. PW - 1 admitted he knew the land was registered in names of the 1st Defendant - Gurmit Singh Kandolt, whom he served with the pleadings by substituted means having been granted leave to do so under the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010 through advertisement in a local daily of wide national circulation. Despite of this, the 1st Defendant never complied with the provisions of Orders 7 of the Rules by entering appearance, filing a Defence nor a Counter - Claim.. through yet he continued to occupy. In the case of:- **"Mtana Lewa - Versus - Kahindi Ngala (Supra)"**, the Court of Appeal clarified that adverse possession arises when occupation is inconsistent with the owner's rights. The Plaintiffs' possession was adverse, not permissive.

329. Finally, the statutory period must be proved. In the instant case, from the years 1971 to 1983, 12 years had lapsed. By then, the registered owner's title was extinguished under Section 17 of the Limitation of Actions Act. Thus, the ostensible subsequent transfers to Bamburi Wanainchi Sacco (1982/2004) and Hatimy Group Limited (2010) could not defeat accrued rights bestowed onto the Plaintiffs herein by law. In the case of:- **"Public Trustee - Versus - Wanduru [1984] KLR 314"**, the court held that a purchaser acquires no better

title than the Vendor if adverse possession had already accrued.

330. I observed and hold that the suit filed in year 1995 did not interrupt time as no eviction occurred. The demolitions in the year 2008 only caused temporary disturbance after which the Plaintiffs rebuilt and remained on the suit land. The ownership of Plot No. 533 by Mr. Stephen Safari was completely irrelevant as the ownership of another parcel does not negate adverse possession over a different land.

331. In the foregoing under this sub - title, the Plaintiffs have demonstrated that they were in open, continuous, exclusive, and adverse possession of the suit property for well over the statutory period of 12 years. By the operation of the provision of Sections 7 and 17 of the Limitation of Actions Act, Cap. 22, I strongly discern that the registered owner's title was extinguished, and the Plaintiffs became entitled to be registered under the provision of Section 38.

ISSUE No. B. Whether the Defendants' titles, transfers and sub - divisions extinguished the Plaintiffs' right to occupation

332. Under this sub title, it rather evident that this is the substrata that the parties spend a sizeable of the litigation in this matter. Therefore, the Court shall by and large extensively examine whether the 2nd to 28th Defendants' Titles, Transfers, and Sub - divisions extinguished the Plaintiffs' Rights. The provisions of Sections 7 and Section 17 of the Limitation of Actions Act, Cap. 22 provide that an action to recover land cannot be brought after 12 years from when the right accrued and that the owner's title is extinguished at the expiration of the limitation period. Section 38 of the Limitation of Actions

Act permits the court to order registration of a person who claims title by adverse possession.

333. Undisputedly, the Certificate of title Deed issued to the 1st Defendant for the suit land was registered under the Land Titles Act, Cap, 282 (now repealed). However, considering that the Act has now been repealed, and based on the saving Clause under Section 107 of the Land Registration Act, No. 3 of 2012, the applicable law is the Lands Registration Act, No. 3 of 2012 and the relevant provisions being Sections 24, 25 and 26 (1) of the LRA , No. 3 of 2012 and the Land Act, No. 6 of 2012. This Legal position finds grounding in the provisions Section 23 (3) (c) of the Interpretation and General Provisions Act, Cap. 2 which provides.

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

This position was upheld in the cases of **“*Samwuel Kamau Macharia & Another - Versus - Kenya Commercial Bank Limited & 2 Others (2012) eKLR*”** and **“*Tukero Ole Kina & Another - Versus - Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR*”**.

334. Having stated that, the provisions of Section 7 of the Land Act No. 6 of 2012 provides the said methods on how titles may be acquired in Kenya.

Section 7 Title to land may be acquired through:-

- i. Allocations;**
- ii. Land Adjudication process;**
- iii. Compulsory acquisition;**
- iv. Prescription;**
- v. Settlement programs;**

- vi. **Transmissions;**
 - vii. **Transfers;**
 - viii. **Long term leases exceeding Twenty one years created out private land; or**
- Any other manner prescribed in the Act of Parliament.**

335. Arising from the above provision of the law, the legal mode and means upon which the Plaintiffs, 1st to 28th Defendants and the Interested Parties acquired their portions of land from the suit land a “*pari materia*” issue in the instant case. Registration and transfers are governed by the registration regime and Land Registry practice which require valid transfer documents, properly stamped instruments, closure of the mother title when subdividing, surrender of the original mother title and lawful entry of new parcel numbers and entries in the register.

336. A registered owner's title may be defeated by adverse possession once the statutory period has run and the claimant proves factual possession and intention to possess. A purchaser from a registered owner acquires no better title than the Vendor if, at the time of purchase, the Vendor's title has already been extinguished by operation of limitation. A subsequent transfer or sub - division executed after the accrual of adverse possession cannot defeat the possessory rights accrued before that transfer.

337. The glaring schemes of irregularities in registration, forged or altered instruments, unsigned or cancelled entries and failure to comply with required sub - division formalities undermine the integrity of any transfer relied upon to negate possessory rights.

338. In this instant case, I dare critically assess these facts of the case. I reiterate and from the evidence adduced, the Plaintiffs'

occupation dates to the year 1971 with continuous, open acts of ownership including cultivation, house building, a borehole (1976), livestock keeping and burials. Searches obtained by Plaintiffs (years 2003, 2009, 2010, 2012) repeatedly showed the mother title and entry in the name of the 1st Defendant - Gurmit Singh Kandolt at material times.

339. The 2nd to 28th Defendants claim to be the registered owners of portions of land allegedly created from the suit premises, being Plot No. 350/II/MN situate at Utange within Mombasa County. They assert that the sub - divisions and transfers was based on the doctrine of bona fide innocent purchasers for value without notice. The 2nd Defendant claimed to have bought the suit premises from the 1st Defendant on 17th August, 1989 and proceeded to produce an alleged transfer document of even date as Defendant Exhibit No. 6. Its assertion through the pleadings and testimony by one Anastasia Cherono (DW - 1) was that it bought the entire parcel of land and that was the reason entry No. 41 of the extract of the title shows the 2nd Defendant as the owner of the suit premises, though cancelled.

340. As already stated above, there was a transfer to Bamburi Wananchi Sacco, numerous subsequent Deed Plans and apportionment of 133 sub - parcels created between the years 2001 to 2004 all intended for their registered membership. It will not be lost that there were no Sale Agreements nor transfer documents produced to support this ostensible transaction to this effect. Further, there was later transfer of 15 - acre parcel to Hatimy Group Limited registered in the years 2009/2010 through Mr. Parmender Singh Tamana, the person who held the Power of Attorney donated to him by the

1st Defendant. Additionally, the 28th Defendant purchased two parcels emanating from the alleged sub - division of the mother title - Plot No. 350 from two individuals.

341. On all these legal transactions, the Honourable Court wishes to critically assess them based on the evidence of the illegalities, irregularities and unlawfulness stated out. Legally speaking, I hold that the proprietary rights and the efficacy and effectiveness of registration of titles and land are founded under the provisions of Article 40 of the Constitution of Kenya, 2010, Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. Article 40 of the Constitution. Article 40 of the constitution provides:-

40.(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or.....

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

Section 26 (1) of the Land registration Act, No. 3 of 2012. The provision of Section 26 (1) provides as follows:

“A Certificate of Title issued by the Registrar upon registration shall be taken by all courts as a prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, except on grounds of fraud, misrepresentation, illegality and corrupt scheme.

Section 26(2) provides that

“certified copy of only registered instrument signed by the registrar, shall be received in evidence in the same manner as the original”.

342. Arising from the empirical documentary and oral evidence adduced herein, the Honourable Court strongly hold and is convinced that the transaction upon which the 2nd to 28th Defendants allegedly acquired the certificates of title deeds and thus legal ownership and possession to the suit land was by and large marred by a flurry of irregularities, wrongfulness and illegalities for the following grounds:-

343. Firstly, on the issue of the Certificate of Title Deed by the 1st Defendant. It was registered under the Land Titles Act, Cap, 282. The evidence by one of the two Land Registrars and defence witnesses is extremely credible in this case. They all admitted that the Certificate of Title Deed held by the 1st Defendant only had upto Entry No. 41 as the last one. Indeed, DW - 4, the Land Registrar, M/s Rama held that the transfer to Bamburi SACCO was cancelled or unsigned and therefore was non - existent. There were no other Entries thereafter. Paradoxically, the 2nd to 28th Defendants seem to have mysteriously used a super - imposed Entry No. 42 to cause all the said transactions being the sub - divisions and the subsequent transfers of the land to their memberships. Ideally, the 2nd to 25th, 27th and 28th Defendants' titles were indicated to have originated from Entry No. 43 but the certified extract of the title produced as Plaintiff Exhibit No. 1 by the Land Registrar never had such an entry and that was why the Land Registrars, PW - 4 and DW - 7 were unable to confirm the origin of the alleged Title Deeds held by the said

Defendants. Indeed, I noted that when the 2nd Defendant's witness was asked whether it owned a portion of land on the suit premises or the whole of it, no specific answer emerged. These are not light matters.

344. Secondly, the issue of the alleged sub - division of the mother title - Plot No. 350 into 133 parcels supposedly to the registered members of the 2nd Defendant. As already stated above, the Land Registrars and Mr. Malembeka, the two Land Surveyors in their evidence confirmed that there was closure of the mother title for sub - division created typographical and sequence anomalies. DW - 4 (the Land Surveyor) and other defence witnesses conceded missing or incomplete sub - division certification or defective registration steps. The sub - division and re-registration process relied on by Defendants is procedurally defective on the evidence. The surveyor and other defence witnesses conceded absence of complete sub - division certification, Mutation Form duly executed by the 1st Defendant or Mr. Tamana - as consent by the owners of the land - and that closure entries and parcel creation did not properly appear or were typographical, creating uncertainty in chain of title. Additionally, this being agricultural land, there was no Letter of Consent obtained from the Land Control Board approving the sub - division. A sub - division that was not properly closed, registered and evidenced in the file cannot retroactively revive an owner's title against an adverse possessor who had matured rights prior to the defective acts. The argument that sub -division created fresh registered titles in years 2004-2010 which give transferees superior rights fails because those subdivision entries post-date the Plaintiffs'

accrued possessory rights and because the sub - division process is shown to be defective.

345. Thirdly, the forensic report introduced by Plaintiffs casts direct doubt on the authenticity of a key consent document relied upon by Defendants. It reported alterations, discrepancies and non-matching signatures on consent documents. Where a foundational instrument upon which transfers depend is shown to be altered or suspect, the court must treat subsequent transfers founded on that instrument with caution and may decline to give them effect against competing possessory rights.

346. By operation of the Limitation of Actions Act, the Plaintiffs' possession from the year 1971 matured into potentially extinguishing the registered owner's title by the year 1983. Any transfer executed after 1983 cannot pass a better title than that already extinguished. The Defendants' asserted transfer to Bamburi Wanainchi Sacco (Entry No. 41) was shown on the record to have been cancelled and unsupported by a valid registered instrument on the title. There was no transfer instrument executed by the 1st and 2nd Defendants, either for the transfer of the alleged portion of land or the entire suit premises. In fact, the alleged transfer dated 17th August, 1989 was nothing but an agreement but assuming that it is a transfer for argument sake, it was not registered as required under the Act as the stamp endorsed on the said transfer document relates to documents registerable under the Registration of Documents Act which was not applicable to transfer instruments requiring registration under the Act. This was line with Section 83 of the Land Titles Act.

347. Fourthly, looking at the sub - division map produced by the 2nd Defendant, which was not approved by the Director of Surveys as required under Section 65 of the Land Titles Act, the same showed that the alleged sub - divisions were emanating from entry No. 43 of the certified extract of the title. As stated above, such entry is non - existing.

348. In the case of **“Fredrick Idiama Emojong - Versus - Xepherio Mang'eni Manyaru & 2 others [2021] eKLR”** this court (Justice Anne Omollo) held, *inter alia*, that: -

“12.From the facts present herein, there is no dispute that there was a sub-division carried out on the suit title to create new numbers. That at the time of undertaking the sub - division, the Plaintiff was the registered owner. Lastly, that the said sub- divisions were done by the 1st Defendant and without authority or consent of the Plaintiff. It is the result of the Defendants' actions which the Plaintiff pleads fraud and irregularities that ended in denying him rights over the suit title land.”

Further, in the case of **“Peter Wills O. Simba & another - Versus - Maria Gesare Sagwe & another [2019] eKLR”** this court (Justice Jane Onyango) held, *inter alia*, that: -

“17.On the evidence the court is satisfied the Plaintiffs were the original allottees of Plot No. 27 Nyakoe Market and that the Plaintiffs as the owners did not sanction and/or consent to any sub - division of the same. Therefore the sub - division of the Plot into portions 27A and 27B was unlawfully done.

19. On the basis of the evidence, I am satisfied that the Defendants have failed to demonstrate they had a legal proprietary interest over Plot No. 27 Nyakoe Market. The sub - division and the subsequent transfer of the sub - divisions to the Defendants was unlawful and therefore null and void and of no legal effect. The Defendants are therefore in unlawful and illegal occupation of the Plaintiffs plot and they

ought to vacate. It is my determination that they are trespassers onto the suit property.”

349. Fifthly, the issue of the acquisition of land by the doctrine of innocent bona fide purchaser for value without notice heavily relied upon by the 2nd to 28th Defendants. The Supreme Court of Kenya in **“Dina Management Limited - Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)”** had the following to say on what would make one a bona fide purchaser:-

91. The Court of Appeal in Uganda in Katende - Versus - Haridar & Company Ltd [2008] 2 EA 173, defined a bona fide purchaser for value as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

- 1.he holds a certificate of title;**
- 2.he purchased the property in good faith;**
- 3.he had no knowledge of the fraud;**
- 4.he purchased for valuable consideration;**
- 5.the vendors had apparent valid title;**
- 6.he purchased without notice of any fraud; and**
- 7.he was not party to the fraud.”**

The Supreme Court of Kenya went on to state as follows:-

92. On the same issue, the Court of Appeal in Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:

“.....in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a

legitimate title and thirdly that they paid valuable consideration for the Purchase of the suit property....”

This court (Justice LL. Naikuni) cited the court of Appeal which held in the case of ***“Mwangi James Njehia & Another - Versus - Simon Kamanu, Civil appeal no. 177 of 2019”***: -

“We nonetheless wish to state that the law, including case law, is not static and the above requirement which were entered over twenty (20) years ago cannot be said to have cast in stone. We hold the view that (e) above will need to be revisited and the word "apparent" be done away with altogether. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, in collusion of officers in the land registries, been transplanted at the Lands Office and intending buyers have duped to believe that such documents are genuine and on the basis they have 'Purchased' properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land registries at Nairobi....”

349. Further, the argument that individual purchasers relied on due diligence and Letters of Allotment is undermined by the absence of valid completed registration steps in the Land Registry file and by the Land Registrar’s evidence that the mother title remained closed and that some entries were cancelled or typographical.

350. Purchasers and transferees (including members of Bamburi Wanainchi Sacco and Hatimy Group Limited) cannot be protected if, at the time of their acquisition, the registered

vendor's title had been extinguished by limitation or if the transfer process itself was vitiated by forgery or procedural defect. The record shows that at least some transfers and sub - divisions were completed after Plaintiffs' 12-year period and/or were supported by irregular documentation.

351. The Court also takes note that the Defendants' argument that demolition episodes or criminal proceedings interrupted Plaintiffs' possession is rebutted by evidence that demolitions were temporary, Plaintiffs rebuilt and continued occupation, and that no effective eviction order was executed that would interrupt the running of limitation.

352. The 26th Defendant's which was an incorporated company by limited guarantee claim was anchored on the fact that he owned Plot No. 6155/II/MN, allegedly created from the suit premises upon the questionable sub - divisions. He produced a Certificate of title as 26th Defendant Exhibit No. 1 which was allegedly transferred to it on 19th July, 2010, three months after the suit had been filed. No wonder, the postal search dated 26th October, 2009 and which was produced as part of Plaintiff Exhibit No. 1 by the Plaintiffs indicated the owner of the suit land to be the 1st Defendant. The witness was not able to produce a sale agreement, the transfer documents nor the Power of Attorney by Mr. Tamana. The Honourable Court has been perplexed as to why Mr. Tamana who admittedly was held was an Advocate of the High Court of Kenya, and once a Chairman of the Mombasa Law Society thus such a prominent personality would never have been summoned as an Anchor witness to offer such valuable evidence and mysteries surrounding this substratum. No effort was done at all. Eventually the 26th Defendant's title was premised on a Land

Control Board Consent (Plaintiff Exhibit No. 10) which was invalid at the time of registration of the transfer instrument. The consent was allegedly made on 2nd April, 1982 while the transfer instrument was registered on 19th July, 2010, which was 28 years upon grant of such consent.

353. The provision of Section 6 as read with Section 8 of the Land Control Act, Cap. 302, Laws of Kenya, makes such a transaction illegal and/or unlawful and a nullity, unless there was an extension of the expired period of 6 months by the Court. The Court was not surprised that, the 26th Defendant failed to produce the said consent, which it had used in its application for joinder of parties dated 16th August, 2010. The said Consent was also a subject of examination by the Forensic Document Examiner (PW - 2), who returned a verdict of forgery. The 26th Defendant's Certificate of Title, though shown to have originated from the suit title document as Entry No. 42 lacked authenticity for breach of mandatory provisions of law as above submitted and as the Court could not sanction an illegality it ought not to stand as a genuine land ownership document. Additionally, the 26th Defendant being a corporate body should have proved its legal existence and directorship through of resolution to be joined in the suit, production of a Certificate of Incorporation or registration as well as a CR - 12 form showing the Directors of the Company from the Registrar of Companies. This was significant taking that the 26th Defendant was never sued in the matter but got enjoined through its purported Directors who failed to establish or prove their relationship with the 26th Defendant's company. The purported directors of the 26th Defendant therefore lack the capacity to represent the Company.

354. Based on the foregoing, the 2nd to 28th Defendants had failed to prove the existence of any sub-divisions on the suit premises and therefore the Plaintiffs' suit should be allowed for the following reasons. The Plaintiffs, as per their evidence have lived and/or occupied and/or resided on the suit premises for over the statutory period of 12 years, continuously and/or uninterruptedly and/or openly and/or peacefully and/or exclusively and adversely to the title of the registered owner, the 1st Defendant herein. Their entry onto the suit land was also peaceful and without permission.
355. With regard to the 28th Defendant, would have made an effort to summon the two Vendors to tender evidence on the root of the two titles. None of the two titles were ever transferred to him. The Court holds that these titles emanated from Entry No. 42 which was non-existent as already elaborately stated above.
356. In this case it is noted that title extinguishment precedes subdivision. By 1983, 12 years from PW - 1's 1971 entry had elapsed. Under Sections 7 and 17, the registered owner's title was extinguished. Any subsequent transfer/subdivision could not revive or confer a superior title against the matured possessory rights ("**Mtana Lewa [Supra]**"). Further the change of ownership was immaterial to time; the asserted transfer to Bamburi SACCO, even if regular, would not stop time ("**Githu - Versus - Ndeete [Supra]**"). The record shows it was not regular: Entry 41 was cancelled and unsigned.
357. The defective registration chain undermined the reliance on the title. The Land Registrar's testimony and DW4's concessions on missing subdivision certification, entry-number anomalies (/38 vs /43; missing closure sequence),

and irregular cancellation confirm procedural defects. Where the chain of title is impugned, courts decline to allow defective instruments to defeat matured adverse possession.

358. In conclusion, the Defendants have not discharged the burden of proving a clear, lawful and perfected chain of registered title that would negate the Plaintiffs' matured possessory rights. The record establishes material irregularities in transfers and subdivision entries, forensic evidence of document alteration, and admissions by Land Registry and defence witnesses that transfers were cancelled, unsigned or procedurally defective.

359. Because the Plaintiffs' adverse possession matured by operation of the Limitation of Actions Act before the effective completion of the challenged transfers and sub - divisions, and because the alleged transfers and sub - divisions are shown to be defective, those titles, transfers and subdivisions did not and do not extinguish the Plaintiffs' rights.

360. The Defendants' titles, transfers, and subdivisions did not extinguish the plaintiffs' rights. By operation of Sections 7, 17, and the authorities above, the Plaintiffs' adverse possession matured before the impugned transactions; the chain of title relied upon by Defendants is further undermined by procedural and forensic defects. The Defendants' titles, transfers, and sub - divisions did not extinguish the Plaintiffs' rights.

361. I discern that the court must therefore treat the Defendants' asserted registered interests as incapable of defeating the Plaintiffs' claim to registration under Section 38 of the Limitation of Actions Act, Cap. 22. By operation of the provision of Sections 7 and 17 of the Act, and the authorities above, the claim by the Plaintiffs' on adverse possession

matured before the impugned transactions; the chain of title relied upon by Defendants is further undermined by procedural and forensic defects.

ISSUE No. C. Whether the Plaintiffs are entitled to be registered as proprietors under the provision of Section 38 of the Limitation of Actions Act, Cap. 22?

362. Under this sub - title the Honourable Court notes that Section 38 permits the it to order registration of a person who claims to have become entitled to land by adverse possession once the limitation period has run. The statutory prerequisites are: proof of factual possession; proof of intention to possess (***animus possidendi***); possession that is open, continuous, exclusive and adverse for the statutory period; and that no effective interruption of the running of limitation occurred prior to the expiry of the period. The court must exercise its remedial power under Section 38 where those elements are proved.

363. Adverse possession requires acts consistent with ownership, not furtive or permissive occupation. Time runs despite changes in formal ownership unless there is actual dispossession or a valid process that interrupts limitation. A declared possessory right matured before a transfer defeats subsequent transferee because a purchaser takes no better title than the vendor. Where registration relies on documents that are forged, altered or procedurally defective, the court will not allow those instruments to displace a matured possessory claim.

364. The Plaintiffs bears the legal burden to prove, on a balance of probabilities, the elements of adverse possession and entitlement to registration. Documentary proof of searches, rates records, visible acts on the land, graves and other

enduring works, witness testimony of long continuous occupation and expert evidence impeaching key title documents all go to meet that burden. The Defendant must show a lawful, perfected registered title or effective interruption before the limitation period expired.

365. The Plaintiffs produced consistent testimony that they entered occupation in the year 1971, cleared and cultivated land, built permanent and semi-permanent structures, kept livestock, dug a borehole, and buried members of their families. The Plaintiffs produced official searches and municipal rates entries showing the mother title remained in the name of the registered owner during material periods and demonstrating continuity of possession. The Plaintiffs' possession was open, notorious and exercised with the intention to possess; demolitions and criminal prosecutions in the year 1995 and 2008 were temporary disturbances and did not amount to effective evictions that interrupted limitation. Forensic examination introduced by the Plaintiffs showed alterations and non-matching signatures in a key consent document relied upon by the Defendants, and Land Registry evidence and defence witnesses admitted cancellations, unsigned transfers and procedural defects in the subdivision and transfer chain. Sub - divisions and transfers recorded after the Plaintiffs' twelve-year period were either procedurally defective or executed after the accrual of the Plaintiffs' possessory rights and therefore incapable of defeating those rights.

366. The Plaintiffs have proved, on a balance of probabilities, that they acquired title by adverse possession and satisfy the statutory prerequisites of Section 38. The Court must therefore

order registration. The appropriate orders are: (a) declaration that the Plaintiffs have acquired title to the portions they occupy by adverse possession; (b) an order under Section 38 directing the Land Registrar, Mombasa to register the Plaintiffs as proprietors in respect of those portions in accordance with the Court's determination of the respective shares; and (c) consequential orders cancelling or marking void any later subdivisions or transfers that purport to defeat the Plaintiffs' accrued possessory rights.

ISSUE No. d). Who shall bear the costs of the suit

367. 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.

368. 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 vs 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.”

369. In the present case, for the fact that the Plaintiffs have well established their claim, it follows that they shall have the costs of the suit by virtue of the Originating Summons dated 16th April, 2010.

VII. Conclusion and Disposition

370. This case epitomises the tension between registered title under the Land Registration Act, No. 3 of 2012 and equitable rights under the Limitation of Actions Act, Cap. 22. The Law, however, is clear; where an owner sleeps on his rights and allows others to occupy land openly and continuously for over 12 years, the law protects the possessor. As the Court of Appeal stated in **“Mtana Lewa - Versus - Kahindi Ngala Mwangandi (supra)”**, adverse possession is a doctrine of equity that balances.

371. 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 established their case against the

Defendants. For avoidance of any doubt, the Court proceeds to make the following specific orders:

- (a) **THAT Judgment be and is hereby entered in favour of the Plaintiffs in respect to the Originating Summons dated 16th April, 2010 and hence it is allowed as prayed.**
- (b) **THAT a declaration do and is hereby made that the title of the 1st Defendant, GURMIT SINGH KANDOLT, to all that parcel of land known as PLOT NO. 350/II/MN has been extinguished by virtue of the Plaintiffs' adverse possession for a period exceeding twelve (12) years.**
- (c) **THAT a declaration do and is hereby made that the Plaintiffs are entitled to be registered as the proprietors of the suit property, PLOT NO. 350/II/MN, by virtue of adverse possession.**
- (d) **THAT the Land Registrar, Mombasa County, be and is hereby directed to henceforth cancel the Certificate of Title Deed in the name of GURMIT SINGH KANDOLT for all that parcel of land known as Land Reference Numbers PLOT NO. 350/II/MN and to register the Plaintiffs as the absolute proprietors thereof, subject to a survey to ascertain the exact boundaries and acreage.**
- (e) **THAT there be declaration and order made to the effect that the claims by the 2nd to 28th Defendants and the Interested Parties herein be and are hereby dismissed in their entirety.**
- (f) **THAT an order be made directing there be lawful and no forceful eviction of the 2nd to 28th**

Defendants and the Interested Parties from the suit land pursuant to the provision of Section 152E of the Land Act, No. 6 of 2012 to be applicable in this case.

(g) THAT upon the lapse of this period, the Officer Commanding (In - Charge of) the Police Station (OCS), Bamburi Police Station to ensure full compliance of this orders thereof.

(h) THAT the Plaintiffs are hereby awarded the Costs of the Originating Summons against the 1st Defendant and the 2nd to 28th Defendants, jointly and severally.

IT IS SO ORDERED ACCORDINGLY
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS7THDAY OFNOVEMBER.....2025.

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

Judgement delivered in the presence of: -

- a) M/s. Firdaus Mbula - the Court Assistant.
- b) M/s. Chengo Advocate holding brief for Mr. Kenga Advocate for the Plaintiffs.
- c) Mr. Mutugi Advocate for the 2nd, 3rd to 27th Defendants.
- d) Mr. Kinyanjui Advocate holding brief for Mr. Gikandi Advocate for the 26th Defendant.
- e) Mr. Charles Kabue Wamae - in person - the 28th Defendant.
- f) No appearance for the 1st Defendant.