



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

CASE NO. 228 OF 2012

DR. PATRICK MARAI MUNGAI

BISHOP JOHN ITHONGEKE

REV. MARK MUGEKENYI (suing as officials of

GOSPEL EVANGELISTIC CHURCH OF KENYA)..... PLAINTIFFS

VERSUS

AFRISON EXPORT IMPORT LTD.....1ST DEFENDANT

HUELANDS LIMITED..... 2ND DEFENDANT

AND

OFFICIAL RECEIVER AND PROVINCIAL LIQUIDATOR

CONTINENTAL CREDIT FINANCE LIMITED.....INTERESTED PARTY

J U D G M E N T

1. The applicant, **Gospel Evangelistic Church of Kenya**, acting through its officials commenced the instant suit by way of Originating Summons under Sections 37 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya and Order XXXVI Rule 3(d) (repealed) now Order 37 Rule 7 of the Civil Procedure Rules and seeks the following orders:

1. A declaration that the plaintiff is entitled to be registered forthwith as owners of 1.8acres out of LR No. 7879/4 which the plaintiff has been in adverse possession since 1993 to date for more than 12 (twelve) years immediately preceding the presentation of this suit and, on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendants or its predecessors in the above title and that the Defendants' title to parcel LR No. 7879/4 has been extinguished in favour of the plaintiff under Section 37 and 38 of the Limitation of Actions Act laws of Kenya.

2. That LR No. 7879/4 be subdivided and 1.8acres be excised from LR No. 7879/4 and be vested/transferred in the plaintiff.

3. An order for permanent injunction be issued restraining the Defendants, their employees, servants, agents, or any person claiming through him from evicting the plaintiff from the

parcel of land measuring 1.8acres within LR No. 7879/4 (suit land) or from fencing the suit land or interfering with the plaintiff possession of the same or alienating, transferring, disposing and/or dealing with the suit land any manner whatsoever.

4. An order for costs and interest thereon of this suit.

2. The Originating Summons was predicated and premised on the grounds set out in the application and the affidavit sworn in support by Dr. Patrick Marai Mungai, the applicant's overseer dated 2nd May 2012. The applicant's claimed to have adversely occupied and possessed a portion of land parcel **LR No. 7879/4** measuring 1.8acres since 1993 and contended by reason therefore the Defendants title to the portion of land had become extinguished in favour of the Plaintiffs and that the Plaintiffs had by virtue of Section 37 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya become entitled to be registered as the owner thereof. The Plaintiffs averred that the Defendants vide a letter dated 17th October 1985 gifted the Plaintiffs a portion measuring 1.8acres (0.7359) out of the Defendants land parcel **LR No. 7879/4** to enable the Plaintiffs to develop a church and other amenities associated with the church. The Plaintiffs took occupation and possession of the portion, fenced it off and commenced carrying on church activities thereon including building a sanctuary for worship and starting a nursery school.

3. The Plaintiffs averred that the Defendants' intention was to absolutely gift the said portion of 1.8acres to them and without any conditions. The Plaintiffs stated that indeed the Defendants commenced the process of subdivision with a view of processing the Plaintiffs' title for the 1.8acres. However, the Plaintiffs stated that before the Defendants could complete the processing of the title in favour of the Plaintiffs, they had a change of heart as in 1993 the Defendants' directors and the official Receiver required that the Plaintiffs vacate from the land as they (Defendants) had other plans respecting the land including the portion that the church occupied. The Plaintiffs however did not vacate from the land and continued in possession and effected developments on the portion of 1.8acres which included construction of a semi permanent church building, a nursery school, planted trees and constructed a permanent perimeter fence around the 1.8acres. The Plaintiffs averred that they had peacefully and quietly enjoyed uninterrupted possession until 2012 when the Defendants sought to forcibly enter onto the land and remove them which acts prompted the institution of the present suit.

4. The Defendants filed a replying affidavit sworn by Geoffrey Mutisya on 16th July 2012 in opposition to the Plaintiffs originating summons and the application for interlocutory application for injunction. The Defendants admitted that the Plaintiffs approached their agent, Drive in Estate Developers Ltd, to be permitted to develop and construct a church on an acre of the property **LR No. 7879/4** in October 1985. The Plaintiffs were permitted to take possession but the Defendants averred that it was on terms that the Plaintiffs would pay kshs.15,000,000/= as consideration. The Defendants stated that the Plaintiffs failed to honour the terms of the agreement and hence their continued occupation of the portion of land was unlawful. The Defendants stated the Plaintiffs are trespassers and cannot lay claim to the land as adverse possessors.

5. The Official Receiver and Provisional Liquidator, Continental Credit Finance Ltd applied and was granted leave to be enjoined to the suit as an interested party. The interested party filed a replying affidavit sworn by Patrick Thoithi Kanyuira dated 27th March 2015. The interested party vide the replying affidavit deponed that Continental Credit Finance Company Limited (in liquidation) had extended a credit facility to the Defendants of kshs.21,000,000/= which the Defendants failed to pay resulting in Continental Credit Finance taking possession of the property **LR No. 7879/4** to safeguard their interest. The interested party like the Defendants averred that the Plaintiffs had taken possession of the portion of land without fulfilling the conditions in regard to which their approval to enter the land was given by the Defendants. The interested party asserted that the Plaintiffs' occupation of the land constituted trespass as they had entered the land with the consent of the Defendants pursuant to an agreement which they failed to perform. They denied the Plaintiffs possession and occupation could constitute adverse possession as pleaded by the Plaintiffs.

6. The suit was initially part heard by me on 12th February 2015. I was serving at the Milimani Law Courts ELC before I was transferred to Kisii ELC. On 9th February 2016 the parties appeared before Gitumbi, J. and indicated they wished the hearing of the case to commence denovo.

7. On 26th November 2018 when I was scheduled to do a service week at Milimani ELC, Nairobi the matter was listed before me for hearing and the hearing commenced denovo. The Plaintiffs 3 witnesses testified in support of the Plaintiffs case. The 1st and 2nd Defendants offered no evidence and elected to rely on the evidence on record. One Patrick Thoithi Kanyuira testified for the interested party.

The Evidence of the Parties;

8. The Plaintiffs' witnesses testified by way of adoption of their witness statements and oral evidence and were subjected to cross examination. The three witnesses Dr. Patrick Marai Mungai (PW1), Bishop John Ngunjiri Ithondeka (PW2) and Bishop Shem Nzioka (PW3) are officials of Gospel Evangelistic Church of Kenya and basically gave similar evidence relating to how they got to occupy and possess a portion of land parcel **LR No. 7879/4** measuring approximately 1.8acres.

9. Dr. Patrick Marai Mungai (PW1) testified that he was the National overseer of their church and that in 1984 he learnt that Mr. Francis Mburu, a director of the Defendants was subdividing their land at Kasarani Off Outering Road and they approached him to allocate them a plot to develop a church and a school. He stated they made a formal request in writing vide a letter dated 4th July 1984 exhibited at page 44 of Plaintiffs bundle of documents. The following was the content of the letter.

RE: APPLICATION FOR A CHURCH PLOT

Dear Sir,

As per our discussion in your office, we hereby apply for a church plot in Phase II of your beautiful Estate. We plan to build a church, a community school where the youth can learn various trades, and a nursery school.

The Donors are from various fields. The developers are Gospel Evangelistic Association in whose name the plot will be. Thank you so much for all the help you have given us.

May God bless you so much.

Yours faithfully,

Rev. Philip Karanja

General Secretary

10. The witness stated that their request was granted and that Drive in Estate Developers Ltd who were the agents of the 1st and 2nd Defendants on 24th January 1985 wrote to M/s Kamwere & Associates who were the surveyor's confirming the allocation of the plot to the church. The content of the letter of 24th January 1985 exhibited at page 45 of the Plaintiffs bundle was as follows:-

Dear Sirs,

Further to our discussion with you, these are the church gentlemen we discussed. We have allocated social services and nursery school plot to them without any conditions.

We want the total documents for the social services plots and nursery school to go direct to them. We have not asked for any payment for this property, we are offering free of charge to the church.

Yours faithfully,

Francis Mburu

11. The witness testified that the plot allocated to them was delineated on the ground though final approval of the subdivisional scheme was for various reasons as captured in the various correspondences exhibited at pages 46 - 53 of the Plaintiffs bundle of documents not completed. There was correspondence both from the Defendants, Ministry of Lands and Settlement, and the Nairobi City Commission affirming the allocation and delineation of a portion of 1.8acres in favour of the Plaintiffs out of the Defendants land parcel **LR No. 7879/4** and all that remained was the formalization and regularization of the subdivision to enable a title to be issued to the Plaintiffs.

12. The witness stated that they entered and took possession of the plot as delineated in 1985 and constructed temporary structures thereon awaiting the issuance of title to enable them to construct permanent buildings. He stated in his evidence in chief that:-

“Since 1985 we have been in possession of the suit premises. We carry on services thereon and we have a running school. We are now constructing a permanent church and we have a hospital on site. The registered owners as per the search was Afrison Export Import Ltd and Huelands Ltd. Drive Estate Developers Ltd were acting as agents of the Defendants.”

13. The witness further explained that the Official Receiver for Continental Credit Finance came into the scene in 1993 and as they held a charge over the land owned by the Defendants they were insisting that the Plaintiffs pay for the portion of 1.8acres at market value. The Plaintiffs did not accept that since the Defendants had made a donation of the land free of any conditions and there was no expectation that there was to be any payment whatsoever by the Plaintiffs. The witness denied that the letters attached to the replying affidavit of Mr. Geoffrey Mutisya, a director of 1st and 2nd Defendants, indicating the allocation was for 1 acre and that the Plaintiffs were required to pay consideration for the plot were ever received by the Plaintiffs. The witness stated the letters dated 5th September 1985, 18th November 1985, 23rd January 1986 and 3rd December 1986 though addressed to the plaintiff were never received by them.

14. In response to the Interested Party's replying affidavit the witness denied that they occupied the suit premises in breach of any agreement conditions and further denied their possession of the land was as trespassers. The witness reiterated that the occupation of the land was initially with the permission of the Defendants. The Plaintiffs have never been sued by the Defendants for the recovery of the land ever since they entered into possession. The witness stated that in 1986 they fenced the plot with posts and barbed wire but they later put a permanent perimeter fence. The witness stated that the Defendants have never served them with a Notice to Vacate from the portion of 1.8acres that they have occupied since 1985.

15. Bishop John Ngunjiri Ithondeka and Bishop Shem Nzioki testified as PW2 and PW3 respectively. Their evidence was simply that the plaintiff church has occupied and possessed the suit land peacefully and quietly since being allocated the land by the Defendants in 1985. They affirmed the Plaintiffs have a church that has stood on the property since the 1980s and that there are other developments that the Plaintiffs have effected on the land. They stated that the possession had been peaceful, continuous and was uninterrupted.

16. Patrick Thoithi Kanyuira testified on behalf of the interested party. He stated the Defendants had been advanced a sum of kshs. 21Million in 1981 by Continental Finance Ltd which they did not pay. The Official Receiver of Continental Credit Finance Ltd by virtue of the charge/ mortgage that had been registered against the land LR No. **7879/4** to secure the borrowing by the Defendants had an interest over the land. The witness relied on his witness statement and replying affidavit as his evidence. In the statement and replying affidavit he stated that in 1985 the Defendants had sought permission from the interested party to sell to the plaintiff a portion of the mortgaged property which the interested party consented to subject to payment of kshs. 15,000,000/= . The witness stated this sum was not paid and thus the plaintiff unlawfully took possession of the suit land. It was his position that the Plaintiffs have been

in possession of the suit land as trespassers since they failed to honour the terms of the agreement with the Defendants.

17. The plaintiff and the 1st defendant filed their final written submissions on 27th February 2019. No submissions were filed on behalf of the 2nd defendant and the interested party.

Analysis and Determination:

18. I have carefully perused the pleadings and the record and I have given due consideration to the evidence adduced and the law. The issues that emerge for determination in the suit are:-

(i) Whether the Defendants were the registered owners of the suit land?

(ii) Whether the plaintiff had locus to institute suit against the Defendants.

(iii) Whether the Plaintiffs were in possession of a portion of 1.8acres out of LR No. 7879/4 and if so whether such possession was adverse to the rights and interests of the registered owner?

(iv) Whether the Plaintiffs had adversely possessed the suit land for a period in excess of 12 years prior to filing the suit, and if so, whether the Defendants title to the land and the mortgagor's rights over the suit land had been extinguished?

(v) What reliefs and/or orders should the court make?

19. On the first issue there was indeed no dispute that the 1st and 2nd Defendants were the registered owners of **LR No. 7879/4**. A copy of a duly certified search of the title was annexed to the affidavit sworn by Dr. Patrick Marai Mungai on 2nd May 2012 in support of the originating summons. Under entry No. 1 in the register of the title made on 30th December 1981 a conveyance dated 29th December 1981 from Joreth Limited as vendor was registered in favour of Afrison Export Import Limited and Huelands Limited as tenants in common in equal shares of 96acres of land reference No. 7879/4 in the City of Nairobi for the consideration of kshs.14,000,000/=. On the said date (30th December 1981) a mortgage dated 29th December 1981 to Continental Credit Finance Limited for kshs. 21,000,000/= was registered against the title as entry No. 2.

20. Neither the Defendants nor the interested party contested the fact that the Defendants were the registered owners of **LR No. 7879/4** or that the portion that the plaintiffs occupied was part of that land.

21. On the second issue whether or not the plaintiff had the locus to institute this suit against the Defendants only arose during the cross examination of the Plaintiffs witnesses. At the time of filing the suit, the Plaintiffs were clear that they were suing as officials of Gospel Evangelistic Church of Kenya. When PW1 was cross examined he asserted that Gospel Evangelistic Church of Kenya was registered although no copy of the registration certificate was filed in court. In re-examination he stated there had never been any denial that they were officials of the plaintiff and neither had any issue arisen as to whether their church was registered.

22. The replying affidavit sworn by Geoffrey Mutisya on 16th July 2012 in response to the affidavit in support of the originating summons sworn by PW1 did not raise issue of the Plaintiff being registered. The Defendants acknowledged having dealt with the Plaintiff and indeed on the basis of all the correspondence exchanged the Defendants and all the other agencies, were dealing with the Plaintiff as an association which was represented by its officials. The Plaintiff dealt with the Defendants as an association and the defendant accepted that as the situation. The fact that the plaintiff omitted to file a certificate of registration in my view cannot be fatal. The Plaintiff, it was clear, was dealing with the Defendants as an association and it was equally clear to the Defendants that they were dealing with an association.

23. There is no proof that “**Gospel Evangelistic Church of Kenya**” is not registered as an association and in the premises having regard to the fact that both the Plaintiffs and the Defendants dealt with each other on the basis the Plaintiffs had capacity, I would have no basis to find that the Plaintiffs lacked the capacity to institute the present suit.

24. On the third issue whether the Plaintiffs were in possession of the suit land and whether the possession was adverse there was concurrence that the Plaintiff had been in occupation and in possession of the portion of land since 1986 or thereabouts. The real issue is whether such possession had been with permission of the Defendants or it has been adverse. Even on this issue there is convergence on the fact that initially in 1985 the Defendants permitted the Plaintiffs to occupy and take possession of some portion of land in **LR No. 7879/4**. However, that is where the agreement ceases as issues immediately arose. Questions arose whether the Plaintiffs were permitted to occupy 1 acre or 1.8acres and further whether the Plaintiffs were allocated the portion of land as a gift and/or donation, and/or whether the allocation was on terms that the Plaintiffs would pay for the land.

25. The Plaintiffs contend they made a request to be allocated a plot to build a church for worship and to develop a community school and they stated they were allocated a portion of 1.8acres free of any cost and without any conditions. The Defendants for their part averred that the Plaintiffs had to pay market value for the plot as the property was charged and the chargee expected to be paid the value of the plot. There was no formal agreement entered into between the parties respecting the allocation though there was an exchange of correspondences.

26. The Plaintiffs made the initial request by letter dated 4th July 1984 which was acted upon and the Defendants authorized the surveyors who were preparing the subdivision scheme vide letter dated 24th January 1985 to note the social services and nursery school plot had been allocated to the Plaintiffs free of charge (both letters reproduced earlier in this judgment). The Defendants in their letter dated 17th October 1985 to the Chief Planning Officer, Nairobi City Commission (exhibited at page 19 of the Plaintiffs bundle) confirmed they had approved and given the Plaintiffs a plot measuring 0.7359Ha (1.8acres) approximately. The letter was in the following terms:-

The Chief Planning Officer

Nairobi City Commission

Dear Sir,

PROPOSED SUBDIVISION FOR CHURCH PLOT OF GOSPEL EVANGELISTIC ASSOCIATION (0.7359Ha) FROM LR NO. 13421/646 DRIVE IN ESTATE PHASE II

The board of Directors of Drive in Estate Developers have approved and given a plot to the above church as edged in red on the part development plan which is enclosed of 0.7359Ha. (1.8acres) approximately.

It is purely for construction of the church as contained in the application letter of October 7th 1985, signed by Rev. Philip Karanja for Gospel Evangelistic Association.

The remaining area LR No. 13421/646 of 10.894Ha. is earmarked for a Housing Estate and all its new plots together with the above one will be serviced as per your requirements.

I now wish to submit for your approval the attached copies of the proposed subdivision plan.

The church would appreciate your earliest approval to facilitate development of above plot which is for public utilities, and finally issue of titles.

Please note that this is a gift to Gospel Evangelistic Association.

Yours faithfully,

FRANCIS MBURU

FOR: DRIVE IN ESTATE DEVELOPERS LTD

Cc: The Commissioner of Lands

Att. Mr. Maina

Lands Office Nairobi

Cc: Rev. Philip Karanja

Gospel Evangelistic Association

P.O Box 52176

NAIROBI

27. It is evident from the said letter that the plot allocated to the Plaintiffs was delineated as stated in the first paragraph of the letter. The last paragraph in the letter makes it clear that the allocation of the plot was a gift to the Gospel Evangelistic Association who are the Plaintiffs in the present suit. On the evidence, I am satisfied the Defendants allocated to the Plaintiffs a portion of 1.8 acres of land and that such allocation was without any conditions. The letters attached to the affidavit of Geoffrey Mutisya indicating the Plaintiffs were allocated one (1) acre and suggesting there was consideration to be paid do not appear to have been genuine and may have been created to enable the Defendants to wriggle out of the commitment they had made to the Plaintiffs. For instance, it is curious that the same Francis Mburu would write the letter dated 5th September 1985 to the Plaintiffs indicating the plot allocated was one (1) acre and suggesting terms would be negotiated (page 76 Plaintiffs bundle) and yet on 17th October 1985 write a letter confirming the allocation was 1.8 acres and that the allocation was a gift. I believed the Plaintiffs when they stated they never received any of the letters that were addressed to them which were attached to the Defendants replying affidavit. These were the same letters the interested party included in their replying affidavit, the production in evidence of which the Plaintiffs objected to successfully.

28. Having found that the Defendants allocated the Plaintiffs a portion of 1.8 acres out of **LR No. 7879/4** and that the Plaintiffs took occupation and possession in 1985, I now consider whether the possession was adverse to the rights and interests of the Defendants and those of the interested party. The Defendants in their replying affidavit indicated that they allowed the plaintiff to take possession of the property but such permission was on the condition that the Plaintiffs paid the purchase price. The Defendants further stated that the Plaintiffs in breach of the condition to pay the purchase price took possession of the property and started effecting developments thereon which prompted the Defendants to warn the Plaintiffs in 1986 that their actions were unlawful and required the Plaintiffs to demolish the illegal structures which they had constructed on the property. In the letter dated 23rd January 1986, exhibited at page 80 of the Plaintiffs bundle the Defendants inter alia wrote to the Plaintiffs thus:-

“...you are kindly requested to demolish all buildings on site as they are not allowed and are illegal buildings. Note that you are building at your own risk as above conditions must be strictly observed...”.

29. The Plaintiffs did not heed the request by the Defendants and continued in possession and constructed further buildings on the property including fencing the property. The occupation and possession of the suit land by the Plaintiffs and the development thereof was inconsistent with the Defendants' rights of ownership. Thus, even if the entry may have been with the permission of the Defendants, the utilization and use that the Plaintiffs put the land was against the Defendants interests. The Defendants have insisted the Plaintiffs never honoured the terms under which they were allocated the land meaning that the

Plaintiffs' occupation and possession became unlawful for failure to meet the terms of allotment.

30. The interested party through the filed replying affidavit and the evidence given in court was categorical that the Plaintiffs were trespassers on the suit land as according to them the Plaintiffs failed to meet the conditions under which they were allowed to enter and occupy the land. The interested party held a mortgage on the property and it was their contention that the rights of the Interested Party could not be subjugated to those of a trespasser. The Interested Party testified that although the Defendants had been advanced the money in 1981 they had never paid the same and therefore the interested party retained interest in the suit property as the Official Receiver and Provisional Liquidator of Continental Credit Finance Limited.

31. The Defendants submitted that to the extent that the entry and possession of the Plaintiffs was with the permission of the Defendants, the possession cannot be adverse. In support of this submission, the Defendants have cited the cases of **Sisto Wambugu -vs- Kamau Njuguna (C.A No. 10 of 1982) [1983] eKLR**, **Wanje -vs- Saikwa (No. 2) [1984] KLR284** and **Janet Kanuthu Kimamo -vs- Symon Gatutu Kimamo [2004]eKLR** . In the case of **Wanje -vs- Saikwa (No. 2)** (supra) cited with approval in **Kimamo -vs- Kimamo (Supra)** the court stated as follows:-

“In order to acquire by statute of limitation land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it, and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

In the case of **Jandu -vs- Kirpal & Another [1975] EA 225, Chanan Singh, J.** stated that in order to prove title by adverse possession:-

“Possession must be adequate in continuity and in extent to show that it is adverse to the owner. It must be actual visible exclusive hostile open and notorious.”

In the case of **Benjamin Kamau Murima & Others -vs- Gladys Njeri CA No. 213 of 1996 (unreported)** the court stated as follows:-

“In determining whether or not the nature of the actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the said land in the form of permission or agreement or grant, then such occupation is not adverse, but if it is not so ordered then it is adverse.”

32. The Plaintiffs submit that even though the initial entry and possession was with the permission of the Defendants, the possession became hostile after 1986 when the Defendants asserted that the Plaintiffs had to satisfy conditions as to payment of consideration and meet specified development conditions. The Plaintiffs stated that even after the Defendants claimed they were in unlawful possession and therefore trespassers, the Defendants did not take any action to have them removed from the land and it is the Plaintiffs' submission that their possession of the land from 1986 was adverse. They submitted their possession satisfied all the ingredients of being adverse possessors as it was actual open and notorious, exclusive, hostile and was continuous and uninterrupted for a statutory period of 12 years.

33. The Plaintiffs further submitted that the interest the mortgagee may have had on the suit property cannot affect the interest of an adverse possessor who has acquired title by virtue of adverse possession since the interests of a mortgagee are subject to the overriding interests of an adverse possessor whose rights have crystallized. In support of their submissions the Plaintiffs relied on the case of **Benson Mukuwa Wachira -vs- The Assumption Sisters of Nairobi Registered Trustees [2016]eKLR** where the court of Appeal cited with approval the case of **Kipkoeh Arap Langat & Another -vs- Kipgeno Arap Laboso HCCC No. 124 of 2004 (OS) Kericho** where the court held:-

“Where a proprietor charges or mortgages land occupied by a trespasser adversely to the title of the proprietor, regardless of whether the trespasser is aware of such transaction, the act of charging or mortgaging the land does not interrupt time from running in adverse possession. Time for adverse possession continues to run. Such adverse possession is an overriding interest acquired or in the process of being acquired by virtue of Section 38 of the Limitation of Actions Act. It must be noted that where the proprietor transfers land, the act of transfer does not interrupt the running of time in adverse possession. In both cases of transfer and mortgage of land on which a trespasser is in adverse possession, the running of time in adverse possession is not interrupted. As adverse possession is an overriding interest (acquired or in the process of being acquired) under Section 30(f) of the Registered Land Act, Cap 300, the mortgagee or transferee takes subject to such overriding interest.”

34. My view is that the position would not be any different where a mortgagee had mortgaged the property prior to the adverse possessor taking possession. Where an adverse possessor enters into possession of a property that is already mortgaged and adversely possesses the subject land for a period of 12 years, he acquires title to such land by way of adverse possession. The rights and interests of the adverse possessor become overriding interests to the rights of both the registered owner and the Mortgagee. The realization of the security held by the mortgagee under the statutory power of sale in the circumstances outlined above, would in consequence be subject to the overriding interests acquired by the adverse possessor under Section 28(h) of the Land Registration Act 2012. Thus, a Mortgagee and/or Chargee cannot take a mortgage or charge over land and fail to concern themselves with what is happening over the land over time lest they stand the risk that their security could be compromised by the presence of an adverse possessor.

35. In the present suit, there is evidence that the mortgagee became aware of the Plaintiffs entry onto a portion of land they had mortgaged in 1986. The Mortgagee did not enforce its security before the expiry of 12 years of the Plaintiffs’ possession as adverse possessors. The Plaintiffs after the expiry of 12 years from 1986, when their possession became adverse, had acquired title to the portion of 1.8acres by way of adverse possession and the Defendants’ title thereto had become extinguished. The Mortgagee’s mortgage henceforth became subject to the overriding interests of the Plaintiffs as adverse possessors of the suit land.

36. Having regard to the totality of the evidence, I am satisfied and persuaded that the Plaintiffs have proved their case on a balance of probabilities that they have adversely possessed a portion of 1.8acres out of **LR No. 7879/4** registered in the Defendants’ name. I accordingly enter judgment in favour of the Plaintiffs in terms of prayers 1, 2 and 3 of the originating summons. The costs of the suit are awarded to the Plaintiffs as against the Defendants.

37. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the 1st, 2nd and 3rd Plaintiffs

N/A for the 1st and 2nd Defendants

N/A for the Interested Party

Musyoki Court assistant

J. M. MUTUNGI

JUDGE