REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC NO. 293 OF 2016 (OS)

DANIEL TOKALI & 9 OTHERS ……..... PLAINTIFFS

VERSUS

EVANGELLA KOMIS & ANOTHERS ……..... DEFENDANTS

JUDGMENT

ORIGINATING SUMMONS

1. In the Originating Summons dated 23rd April 2010, the plaintiffs seek the following orders:
    a. Declaration that the plaintiffs have become entitled by way of adverse position to the title in all those parcels of land known as Kilifi/Kijipwa/372 and 373 and 374 original plot number 41 Kijipwa;
    b. A declaration that the plaintiffs be registered as proprietors in common road number Kilifi/Kijipwa/372 and 373 and 374 original plot number 41 Kijipwa;
    c. A declaration that the commissioner of Lands through Mombasa District Registrar of Titles do register the plaintiffs as proprietors of land parcels Kilifi/Kijipwa/372 and 373 and 374 original plot number 41 Kijipwa.

2. The plaintiffs alleged in their Originating Summons that they and their families and forefathers have been in possession of the suit property for more than 12 years without any interruption by the defendant. They claim

that their occupation and possession of the suit property has been open continuous and uninterrupted and has been adverse to the rights of the defendants. They aver that they should be registered as the proprietors in common of the suit land in place of the defendants.

3. The Originating Summons is supported by the sworn affidavit of David Chigiri, the 3rd plaintiff, Goodluck Mbaga the 7th plaintiff and Daniel Tokali the 1st Plaintiff.

DEFENCE

4. The defendants' defence was filed on 9th July 2010. The defendant faulted the filing of one suit in respect of a claim for adverse possession in respect of different plots owned by different individuals and also claimed that the plaintiffs have not specified which portion they occupy in the **3** properties mentioned in the Originating Summons; that the plaintiffs were served with a letter dated 12th April 2010 requiring them to vacate the suit premises, and some of the occupants did vacate, which was before the present suit was filed, and that letter was an interruption of the period of limitation.

COUNTERCLAIM

5. In their counterclaim, the defendants state that the plaintiffs have unlawfully occupied the suit lands; that on 28th February 2010 the convened a meeting with the plaintiffs for the plaintiffs to indicate when

they would vacate the suit premises. Some of the plaintiffs indicated that they were ready to vacate the suit premises; that the suit property was initially known as plot number 41 but over time the 2nd defendant subdivide the same property into 9 plots and sold 6 of the plots and was left holding plot numbers 372, 373 and 374 of which she transferred plot number 372 to the 1st defendant; that the subdivisions and the obtaining of the appropriate Land Control Board consents and physical presence of the surveyor, and the survey exercise done to place the beacons on the ground and the fact that the 6 plots have been sold by the 2nd defendant meant that purchasers would be visiting the suit property for viewing from time to time; that those transactions took place between 1990 and 1993 and none of the defendants were squatting on the property by then. The defendants seek an order that the plaintiffs be ordered to vacate the suit premises.

REPLY TO DEFENCE AND DEFENCE TO COUNTERCLAIM

6. This pleading was filed on 17th August 2010. The plaintiffs in the main suit opposed the counterclaim and reiterated the matters in their plaint and maintained that the defendants' title deeds carved out of plot number 41 have been extinguished by virtue of the doctrine of adverse possession. They also stated that they now claim the portions of land which each one of them occupies out of the entire portion comprising the 3 registered parcels. They denied any communications with the defendants or any

agreement to vacate the suit premises. They pointed out that the defendants had denied knowledge of the whereabouts of the plaintiffs and that they had sought service by substituted means. The denied that the defendants visited the suit premises or that they were subject to any subdivision sale or transfer regarding the suit property among other transactions. They averred that the defendants have admitted that the plaintiffs have constructed houses on the suit land and connected piped water thereon.

EVIDENCE

7. Hearing *de novo* began on 25th of October 2023. Hearing began with the evidence of the counterclaimants owing to the fact that the order dismissing the plaintiff's claim had not been set aside. This anomaly was later corrected and the plaintiffs gave their evidence but after the counterclaimants gave theirs.

Defendant's evidence.

8. **PW1 Anastasia Wamuyu Thiongo** testified and adopted her witness statement dated 17th January 2023 as her evidence-in-chief and produced documents in her bundle of documents filed on 18th January 2023, and she was then cross-examined by Mr Maithya.
9. Her evidence is that she is registered owner of plot numbers 373 and 374 measuring 1.214 and 1.232 hectare respectively while the 1st plaintiff is

the registered owner of plot number 372 measuring 2.023 hectares. She produced the titles thereto as evidence. They said parcels were created as a result of subdivision of plot number 41 into 9 new subdivisions following authorization survey subdivision and sale. Out of the 9 plots she sold for value plot numbers 372,375, 376, 377, 378, 379, and 380 and delivered vacant possession to the 1st plaintiff and other third parties. At the time of subdivision and disposal, the suit lands were vacant. There was thus no objection to subdivision or sale. Kairo Enterprises Limited, acting as her agent entered into an agreement with several persons who were found illegally encroaching on plot number 41 without her consent whereby it was agreed that they would vacate the land where upon she was to pay fair reimbursement for loss and damage to the said squatters. Following that agreement and payment, they vacated. None of the present plaintiffs in the main suit were present in **1989** when all those events took place. Survey and subdivision of plot number 41 was conducted between 1990 to 1993. By 2006, the 2nd defendant was still attempting to sell plots number 372, 373 and 374 which were vacant. In 2009 the 1st defendant donated a Power of Attorney to the 2nd defendant of parcel number 372 and evaluation was conducted for the purpose of evaluating stamp duty payable upon purchase. The plot was vacant by then. In 2010, the 2nd defendant instructed his agent to commence steps for the plaintiffs to vacate the illegally occupied parts of plot number 372, 373, and 374 and the agent held meeting with squatters on the land and

it was agreed that the squatters would vacate upon payment of compensation which agreement the squatters reneged upon. A demand letter was then issued by her advocate dated 12th April 2010 upon receipt of which the plaintiffs filed the present suit claiming ownership of the land by way of adverse possession, which they are alleged to have lackadaisically prosecuted over time to the extent that it was at one time dismissed for want of prosecution. Despite a court order issued by this suit barring any new development over the suit parcels, the Plaintiffs have continued to illegally develop parts of the said property without any development permits being obtained as stipulated under the law. She denied that the plaintiffs had ever dispossessed the defendants of the suit land for the statutorily required continuous and uninterrupted period of 12 years. She accuses the plaintiffs of being professional squatters who took advantage of her periodic absence from the country while abroad in 2010 to occupy part of the land.

10. On cross-examination, she stated that she applied for the suit land from the Settlement Fund Trustees. She admitted that John Thiongo Mwaura, her late husband, was a former civil servant. She was allocated 20 acres. The allocation was done in the 1980s and 1990s. The land was vacant as at the time of allocation. She stated that there are now relatively new houses on the land.

11. **PW2, Lawi Kaume,** testified and adopted his witness statement dated 16th January 2023 and produced several photographs as exhibits.

His evidence is that he acted as an agent of the 2nd defendant in respect of parcel numbers 373 and 374 and as a donee of Power of Attorney over parcel number 372. He visited the suit land in 2019 for the purposes of taking photographs.

PLAINTIFFS' EVIDENCE

12. **DW1, David Chigiri,** the 3rd plaintiff, testified on 25th October 2023 and adopted his witness statement dated 26th May 2021. He stated he is a businessman resident at Kikambala in Kilifi; that he stays in **Plot Number 41** in the Kijipwa Scheme. He was born in 1973 on the suit land where he then lived with his parents. The suit land is part of the larger Kijipwa Settlement scheme. He has never seen the 2nd defendant on the suit land and the 2nd defendant does not have any structures on the suit land. The plots are not fenced. He has planted trees on the land. His plot has 3 large mango trees and coconut trees. He has a family and a four-bedroom house. He has remained on the suit land for over 48 years, undisturbed.

13. On cross-examination, he stated that his structures on the suit land have no planning permission. He claimed that the government revoked the suit titles in 2022.

14. **DW2, Daniel Tokali,** testified on 5th March 2025 and adopted the contents of his witness statement dated 23rd June 2021 as well as an affidavit sworn on 23rd April 2010 by, among others, himself, as his evidence-in-chief and produced some documents as exhibits. His

evidence is that he brought this case on behalf of others who gave him written authority alongside David Chigiri, DW1. He stated that he has resided on plot number 375 for more than 50 years. He has built a house for his family on the suit land. He produced a letter from the Chief of Mtwapa, dated 25th March 1991 as evidence. (Page 6 of bundle). He also produced a letter dated 22nd February 1982 written to the then President of the Republic of Kenya by one Washington Mbaga who is said to be the father to Goodluck Mbaga the 7th plaintiff and who was allegedly in occupation of the suit land. He has planted an assortment of fruit trees which are now mature. He has never faced interference or disturbance from anyone while living on the suit land. The adjudication process found him on the suit land and he has been waiting to be issued with title to date. In 1992 someone came and informed him that the land belongs to a Mr Mwaura and that his wife, the 2nd defendant, had taken it over. In the same year there was an eviction attempt and part of the land that he had occupied was fenced off. He admitted that he did not have any evidence that he was one the members of Mapandeni Squatters group. He stated that the eviction attempt stopped when the squatters went to the Chief's Office. However later on someone else came and attempted to evict DW2. He stated that he was removed from plot number 375 and relocated to plot number 373 and was never compensated.

15. Upon further cross-examination by Mr Amakobe, he stated that the relocation to plot number is 373 occurred in 1992.

16. Upon cross-examination by Mr Amakobe, the witness stated that he lives on plot no 373; he admitted that there is a discrepancy of 30 years between his evidence and the statement of the chief in his letter as to the number of years he has allegedly lived on the suit premises; that in the 1960s he was not on the suit land; that he had not brought the list of persons alleged by the letter dated 22/2/1982 as being on the suit land; that he has no evidence that the government accepted the squatters' request or that any survey was done pursuant to that request; that he does not have any evidence that he was a member of the group known as the Mapandeni Squatters; that he came to know of the owner of the land in 1992; that there was an attempt to evict the squatters which was stopped by the Chief's intervention; that government vehicles were involved in the eviction exercise; that later there was an eviction attempt in 1999 and he reported to the District Officer and the District Officer instructed him to remain on the land; that even after 1999, someone came again and attempted to evict him.

17. **DW3, Goodluck Mbaga,** testified orally and adopted his witness statements filed on 11th September 2023 and 20th January 2023 and the contents of the affidavit filed with the OS. He also produced documents as exhibits. His evidence is that he is **38** and he lives on plot number 372 which used to be part of plot number 41 Kijipwa Settlement Scheme which was a subdivision of plot number 285/III/4/MN which used to be Crown Land. He and his siblings were brought up on that land. His father

planted trees on the land including the first casuarina trees in the area. His family dwelling neighboured a Mr Chigiri, Mr Deche, a Mr Mwanyonyo, a Mr Karima and a Mr Karisa Tokali. His father was not allocated land and never got a title deed. He alleged that it was impossible for the allottees to access the land due to the indigenous peoples' occupation thereof. His predecessors stayed on the suit land and his father wrote a letter dated 22nd February 1982 to former President Moi 1982. Plot number 285 had about 450 squatters on it. PW3 was living thereon with his parents. Some people were allocated 2.5 acres while others missed out on allocations. Plot number 41 was allocated to the 2nd defendant though it had been given to one John Thiongo Mwaura. The 2nd defendant came to the land and found people cultivating it. According to him, the land is inheritance from her husband. DW3 has a house on the suit land. The house has a water connection. No one has ever attempted to evict him from the land. He has planted trees there on. He has never seen the 2nd defendant on the suit land. However, he is aware that she sold some of the land to third parties.

18. Upon cross-examination by Mr Amakobe, DW3 stated that he lives on a portion of about 2 acres on plot number 372. He stated that the land is ancestral but he had no Grant of Letters of administration to his late father’s estate. He also stated that he has come on a claim of adverse possession. He has no evidence that he made an application for land to

the SFT. He had no documents prove there is a water connection to me to his dwelling.

19. Upon re-examination by Mr Maithya, he did not have any evidence that he is the son of Washington Mbaga. He however admitted that the 2nd defendant had purchased her land from SFT.

SUBMISSIONS.

20. The plaintiffs filed submissions dated 6th June 2025 while the defendants filed submissions dated 13th May 2025.

21. I have considered the said submissions during the preparation of the present judgment.

Plaintiff's Submissions

22. The plaintiff referred to **Gachuma Gacheru Versus Maina Kabuchwa 2016 eKLR** for the fact that adverse possession is a fact to be observed upon the land and not to be seen on the title. Counsel also cited Sections 7, Section 38 as well as the renowned case of **Mtana Lewa Versus Kahindi Ngala Mwagandi 2015 eKLR**. He reviewed the principles of adverse possession in **Stephen Mwangi Gatunge Versus Edwin Onesmus Wanjau Suing in Her Capacity as The Administrator of the Estate of Kimingi Wariera Deceased and of Mwangi Kimingi Deceased 2022 K E E L C 127 KLR** and submitted that the plaintiffs qualify for orders of adverse possession, submitting that

they had met the 4 principles in the last case cited here in above. He stated that it is not in dispute that the plaintiffs are in possession of the suit land and had produced photographs of developments thereon, as evidence of occupation which was not rebutted by the defendants. That the defendants' pleadings confirm that the plaintiffs are in occupation of the suit property since they seek an eviction order against them. The defendants have never exercised in a possession of the land and never produced in a proof of occupation. The history of the land was given by the plaintiffs and it is showed how they acquired the land as long ago as 1963; that the 7th plaintiff's father had written letters requesting the government to settle the local inhabitants dated 22nd February 1982; that a letter dated 25th March 1991 issued by the Office of the President through the Chief's Office recognized the 1st plaintiff to have been in possession of plot number 41; that the letter dated 21st July 1999 written by the District Officer Kikambala confirmed that there were squatters on the suit land; that the plaintiff's documentary evidence was not rebutted by any documentary evidence from the defendant hence they had proved occupation of the suit land from as early as **1982** before the land was surveyed as the Kijipwa Settlement Scheme. Counsel submitted that the plaintiffs have shown photographs of the occupation of the suit properties to the extent of building permanent houses and installing water and electricity connections and that they have been occupying the suit properties openly continuously, without force, without secrecy and

without license or permission, which evidence the defendants have not rebutted.

23. Regarding whether the defendants have proved the counterclaim, he submitted that the defendants have not proved that they were part of the squatter group who are living on plot number 385/III/MN so as to be entitled to allocation of the land; that the 2nd defendant admitted to being the wife of John's Thiongo Mwaura, a former senior government official who was among those allocated land within Kijipwa Scheme, and who displaced some of the people already in occupation; that the defendants have not given any evidence of occupation or use of the land and they do not have any structures on the land, nor have they ever made any attempt to take possession of the suit properties since 1987. The plaintiff's counsel cited **James Peter Mbandi Versus Kumbao Gorda and 71 Others - Malindi ELC 65 Of 2011** and stated that in that case the court dismissed the suit after it was established that the locals were in occupation where before the plaintiff was allocated the land. He submitted that the court should not aid the defendants' cause as it is founded on illegalities.

Defendants' Submissions.

24. The defendants' Counsel on the other hand identified the following as issues for determination in the suit:

a. Which parties are before the court;

b. Which title is the plaintiff's adverse possession claim in respect of?
c. Whether the plaintiffs have proved their claim of adverse possession?
d. Whether the defendants have proved their counterclaim dated 9th July 2010?
e. Who should meet the cost of the suit and counterclaim?

25. Regarding the first issue concerning parties before the court, Counsel submitted that the affidavit to which Authority to Act dated is defective and in contravention of the provisions of **Order 19 Rules 3 4** and **5** of the **CPR.** Secondly, after the Chamber Summons dated 23rd April 2010 was granted on 30th April 2010, to date there is no evidence on the court record that such measures as contemplated under provisions of **Order 1 rule 8** of the Civil Procedure Rules and as ordered by the court on 30th April 2010, including service by substituted service were undertaken by the plaintiffs so as to comply with the requirement for institution of a representative suit. Counsel stated that as it stands, they are only **10** plaintiffs before court who are seeking land by way of adverse possession in common and not all those plaintiffs had tendered their testimony in court.

26. Regarding the second issue, it was submitted by Counsel that pursuant to the provisions of **Section 38** as read with **Order 37 Rules 72** of the Civil Procedure Rules 2010 the plaintiff’s claim against the defendants in respect of titles for land parcels number 372, 373 and 374, and the other subdivisions of plot number 41 were disposed to third parties who remain in possession to date.

27. As to whether the adverse possession claim has been proved, Counsel relied on **Mtana Lewa Versus Kahindi Ngala Mwagandi 2015 eKLR** and reviewed the evidence given by the witnesses as follows: DW1, the 3rd plaintiff testified that he was born and lived on plot number 41 with his parents for years but his evidence of occupation of plot number 41 was not in court. DW2, the 1st plaintiff stated that he had lived his entire life on plot number 375 and was moved to plot number 373 after being evicted, and he discovered in 1992 that plot number 373 was being claimed by the 2nd defendant. DW3 claimed that he had lived on plot number 372 with his parents and the land was ancestral; that DW3 had never seen the owner of the land and had never applied to the SFT for allocation. Counsel submitted that the 2nd, 4th ,5th ,6th ,7th 8th ,9th and 10th plaintiffs did not tender any testimony in court in respect of their claim so as to enable testing of the same by the defendants by way of cross-examination; that therefore, it is clear that despite the claim being under adverse possession, the plaintiffs' claims appear contradictory with some of the plaintiffs claiming under their parents' rights of occupation, while others are unaware of the defendants' ownership, and still others claiming that there was fraud in acquisition of the suit land by the defendants, but these being mutually exclusive claims unsustainable in the same suit, applying the judgment in **Haro Yonda Juaje Versus Sadaka Zengo Mbauro,** the claim cannot be granted.

28. Counsel also submitted that there is no evidence demonstrating circumstances under which the plaintiffs are purported to have dispossessed the defendants of the suit premises; that the assumption that the plaintiffs were unaware of the owners of the suit properties and the claims over ancestral family rights negates *animus possidendi* which is a crucial element in advance possession, and in fact any adverse possession claim founded upon such as assertions was defeated *ab initio,* and the plaintiffs' claim must thus fail.

29. Counsel submitted further that though the plaintiffs claim that they took possession of the suit properties over 40 years ago and that their rights to the land had crystallized prior to the purchase of the suit properties by the defendant, a charge registered in favor of SFT on **18th March 1982** and the certificate Of Outright Purchase and the Discharge Of Charge interrupted the sequence of events, and the land was vested in the 2nd defendant free of all encumbrances; that the statutory period could only start running after the land was transferred to the 2nd defendant from the SFT and not before, and any occupation of the land before the discharge in **1991** is immaterial in proving adverse possession; that if the plaintiffs had an issue with the transfer or discharge, they should have sued the SFT, which was not done. Counsel equated SFT land to government land, to which no claims of adverse possession could accrue and added that even if such time started running after transfer to the 2nd defendant, it was interrupted by the acts of the 2nd defendant of

taking possession, conducting survey and subdivision and disposing of the persons of land to third parties between 1991 and 1993. Counsel submitted that the plaintiffs had admitted at the trial that they faced eviction in the years 1992 and 1999 and that they only returned to the suit property upon the sanction of the Chief and the District Officer Kilifi; that the 2nd defendant through an agent had tried to dispose of the plots number 373 and 374, and on several occasions between 2004 - 2006 the suit properties were vacant; that in 2010, an agreement was reached between the 2nd defendant and the squatters, some of whom included the claimants herein, with regard to compensation for vacating the occupied portions, but the squatters later reneged on that agreement. In summary, counsel submitted that all the foregoing is evidence that the plaintiffs have never had peaceful, continuous and an interrupted possession of the suit premises as claimed. Citing **Mombasa Teachers Cooperative Savings and Credit Cooperative Society Limited Versus Robert Muhambi Katana and 15 Others 2018 eKLR,** counsel submitted that besides, there is no evidence demonstrating specific occupation of the plaintiffs on the suit premises, the plots being distinct properties with distinct ownership; that all that was claimed by the plaintiffs was ownership in common; consequently, the court, perchance if it were to find that suit is merited under adverse possession, would not know which portion of land to give to who.

30. Regarding whether the defence had proved the counterclaim, it was submitted at they had; that they have proved that they are the registered owners. The plaintiffs having failed to prove their adverse possession claim, they evidently have continued to be arbitrary and unlawfully in occupation of the suit premises to the detriment of the defendant and contrary to the provisions of **Article 40** of the Constitution; so, the defendants' title is protected under provisions of **Section 24, 25** and **26** of the Land Registration Act as per the decision in **Dr Joseph Arap Ngok Versus Justice Mojo Ole Keiwua & 5 Others 1997 eKLR**. Counsel pointed out that evidence has been brought of the Plaintiffs illegal occupation of the suit premises. The defendants prayed that the plaintiffs' suit be dismissed and the counterclaim be allowed.

ANALYSIS AND DETERMINATION.

31. The issues arising for determination in the present suit are as follows:

a. **Were the legal provisions with regard to representative suits complied with and if not, is the omission fatal to the plaintiffs' claim?**
b. **Is the suit fatally defective for the reason that numerous persons are claiming adverse possession over several distinct titles without disclosing the title they are in occupation of and the extent?**
c. **If the answers to (a) and (b) are in the negative, have the plaintiffs proved their claim of adverse possession?**
d. **Does the defendant's counterclaim have merit?**
e. **Who should meet the costs of the suit and the counterclaim?**

32. The provisions with regard to representative suits are embodied in order which states as follows:

33. The plaintiffs filed an application dated 23/4/2010 and the orders dated 30/4/2010 emanating from that application can be found in the file. They are as follows:

> **2. The applicants herein be and are granted leave to institute a representative suit for and on behalf of all those people occupying and residing on parcels of land known as Kilifi/Kijipwa/372, Kilifi/Kijipwa 373 and Kilifi/Kijipwa 374 (original Plot No.41 Kijipwa;)**
> **3. That leave be and is here by granted for substituted service to the respondents and the interested parties by way of advertisement through a local daily newspaper;**

34. The main issue that arises is whether the interested parties were served as ordered by court.

35. After that application and order were made, the defendants in the main suit filed their Notice of Appointment of advocates on 17/6/2010. They later on filed their Memorandum of Appearance and thereafter, Defence and Counterclaim dated 9/7/2010 followed. It would appear then that the filing of this defence obviated the need to serve the defendants by way of an advertisement in the daily press. However, it did not vacate the need to serve the interested parties with the suit pleadings through the press, yet one of the grounds relied on in the application dated 23/4/2010 and which led to the order to serve interested parties was framed as follows:

> "**2**. **That due to the enormous number of the people involved in this suit it may neither be possible to include all of them in the suit as plaintiffs nor for each and every one of them to file individual suit as each and every one of them wishes to commence proceedings for adverse possession;**
> **3. That all the people who reside on their above mentioned property have the same interest in this land. (sic) And that**

they are many others who may have some interest in the property unknown to the applicants.
4. It is through advertisement that the plaintiffs/applicants have recourse to justice and through which all interested parties can be made to have notice of the suit."

36. I have perused the file record and I have not seen any press advertisement serving all the interested parties with notice of this suit or documents as ordered on 30/4/2010. In fact, vide a notice dated 19/8/2010, the defendants, apparently forgetting that they have to serve the interested parties, invited the plaintiffs for fixing of a hearing date. Also, vide an application dated 8/9/2010 the plaintiffs' advocate applied formally for directions in court on the basis that all the necessary procedures have been complied with and the named parties had filed their pleadings. Throughout the suit proceedings there is no evidence that other persons save the plaintiffs in the main suit were served by the plaintiffs. No witness from outside the plaintiffs' circle testified. I am therefore persuaded that the plaintiffs in the main suit never complied with the order dated 30/4/2010.

37. **Order 1 Rule 1 CPR** is to the effect that all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

38. **Order 1 Rule 8 CPR** provides as follows:

“8. One person may sue or defend on behalf of all in same interest [Order 1, rule 8]
(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.”

39. The service of process having been ignored, neglected or forgotten by the plaintiffs, then the present suit cannot be categorized among the species of representative suits. However, this court is alive to the provisions of **Order 1 Rule 9 CPR** which states as follows:

“9. Misjoinder and non-joinder [Order 1, rule 9]
No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

40. The conclusion of this court on the issue discussed above is that the plaintiffs are not in the present suit in any representative capacity and are only urging their own claim and it will henceforth be treated as such.

41. Regarding the issue of whether or not the suit is fatally defective for the reason that numerous persons are claiming adverse possession over several distinct titles and without disclosing the title they are in occupation of and the extent of such occupation, this court has on perusing the evidence presented found as follows: that the matter indeed

involves several properties claimed by the plaintiffs under the doctrine of adverse possession. Those properties are plots nos **372,373** and **374**. There are therefore **10** plaintiffs in this case and **3** plots. It is the opinion of this court that each claim by each plaintiff ought to be in respect of a particular title. The court cannot know which title any of the plaintiffs is claiming under unless it is specified. Specification requires to be made in the pleading. The pleading herein is the Originating Summons. The relevant portions of that Originating Summons read that the plaintiffs, all named expressly, have become entitled by way of adverse possession to the suit titles, and that a declaration be issued to the effect that they be registered as owners thereof. Firstly, this kind of drafting of the prayers ignores the fact that the plaintiffs had disclosed to the court that there were other persons on the land. Secondly, they do not state which plot or plots among the three named in the suit they are each in occupation of. Thirdly, they do not state the extent of their occupation.

42. Parties are bound by their pleadings. Pleadings and evidence adduced are interdependent when it comes to a resolution of litigation. Pleadings circumscribe the scope of evidence that can be adduced in a case. All evidence that does not support a pleading is irrelevant and must be disregarded by court. This has serious implications for this case. An order issued positively granting those prayers as framed would ignore the application made at the commencement of the suit expressing the plaintiffs' knowledge that that there are other persons not named as

parties who are resident on the land. Secondly, a practical difficulty would arise, for instance, if the 2nd plaintiff has not specified in the pleadings that he resides on a portion straddling all the three plots in question, then, it is impossible for this court to find any nexus between his evidence and any of the three plots named in the Originating Summons. If any of the plaintiffs has failed to plead specifically that they are resident on only one plot which they identify by number, and the pleading is that the plaintiffs are claiming a declaration that they co-own the three plots under the doctrine, then he can not be allowed to adduce evidence in respect of only one plot among the three the evidence of DW2, Daniel Tokali who has expressed that he is in occupation of plot no 373, does not therefore redeem his case in this suit owing to the framing of the prayers. The situation would have been otherwise had the prayers tallied with his evidence. Secondary to that impossibility, all the plaintiffs cannot, owing to the nature of their pleading and prayers, be able to establish the size of land that each has occupied.

43. The issue at hand may appear trivial but considering that the plaintiffs are merely **10** and they had earlier on sought and obtained leave to represent others in the suit, it can not be ignored. Distribution of the land would become a problem in the future and would saddle our justice system with numerous claims as seen in **Maneno & 3 others v Ibrahim & 3 others [2025] KEELC 18436 (KLR).** The court in that case stated as follows:

“This court notes that the present matter is not a dispute between a decree holder and a judgment creditor but a struggle amongst the decree holders, where some are alleging fraud and breach of trust in the manner in which the others who were bestowed with leadership responsibilities are dealing with the fruits of their judgment. It also includes a claim against the Land Registrar for alleged breach of statutory duty. There are clearly solid causes of action independent from the cause of action in the former suit which are outlined in the plaint herein and which require to be dealt with by way of calling of evidence from the parties.”

44. In **Otieno v Odote & another [2023] KEELC 20622 (KLR)** the court found that the plaintiff was consistent that she had bought three quarters of an acre from the registered owner’s father before the land was disposed of to the defendant in that case and upheld her claim. She was the sole claimant in the case and such a conclusion by the court would not have presented any difficulty at the execution stage.

45. In **Chigamba & 2 others v Noormohamed & 8 others [2022] KECA 535 (KLR)** the Court of Appeal upheld the ELC’s finding that the claimants had failed to place evidence before it of the sizes of land that they were claiming under adverse possession. The court in that case stated as follows:

“19. As indicated before, it is settled that the nature of physical possession required to be demonstrated by an adverse possessor is complete and exclusive physical control over the subject land for the requisite period of twelve years. This requirement was confirmed by the decisions in Buckinghamshire CC vs Moran (1990) Ch 623 and JA Pye (Oxford) Ltd vs Graham (2003) 1 AC 419, in addition to the possession being open, peaceful and adverse, that is not by consent of the true owner. The elements required to be proved in this regard are explained in the text by Kevin Gray and Susan Francis Gray on Elements of Land Law, 5th Edition at page 1184 -1185:

"The factum or corpus of possession required to be shown by the successful squatter necessarily involves evidence of complete and exclusive physical control over the land claimed. The duration of the squatter's occupation, its exclusivity and the acts of user relied upon must normally be verifiable by a physical survey of the land. Adverse possession may be asserted in respect of only part of the land titled in the paper owner, the latter remaining in effective possession of the remainder of his land. Provided that the squatter is in exclusive factual possession of an identifiable portion of the land, it is irrelevant but the owner of the paper title has not been wholly dispossessed"

20. It is thus our conclusion that the evidence adduced by the Appellants in this regard did not demonstrate and prove to the required standard the duration of their possession, the identifiable portions of land that they each possessed in terms of location and size, nor exclusivity of possession of the land they claimed, arising from insufficient evidence and inconsistencies and contradictions in their evidence as regards each of these elements. It is also notable that from the evidence adduced, some of the alleged possessors of the suit property did enter into agreements with the 4th Respondent to be allocated certain plots, including PW1 as evidenced by his testimony, and their possession cannot therefore be said to be adverse. The findings by the ELC that the Appellants did not prove the elements of adverse possession were therefore not in error."

46. **Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others [2018] eKLR**, (Court of Appeal) held as follows:

"Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR this Court observed: -

> **"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 vs. 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.""**

47. It is the opinion of this court that where there are numerous claimants seeking declaration of ownership under the doctrine, it should not be difficult to realize that they can not, like a *solo* claimant, be arbitrarily deemed to be seeking ownership of the entire parcel of land or all the portions of land. In the application of the rule that a person must specify the area claimed to the present case in the present case, an absurd result may ensue, as seen above, perchance the plaintiffs are granted prayers declaring that they own the three land parcels in common. In that case it would be unclear how the person who is resident on plot no 372 would be considered a co-owner alongside the person resident on plot no 373 or 374. Consequently, it is the finding of this court that the pleadings from the plaintiffs are not sufficient for the purpose of laying a claim of adverse possession.

48. The answers to issues no **(a)** and **(b)** are in the negative and ought to be sufficient to dispose of this suit without addressing issue no **(c)**. However perchance the court is wrong on the two issues above, it is necessary to examine whether there is evidence that would have otherwise proved adverse possession.

49. The plaintiffs have pleaded that the suit plots are legally owned by the defendants. The ingredients of adverse possession are that claimant under the doctrine must demonstrate that he has dispossessed the registered title holder of his land for a period of not less than **12** years, that his possession of the land *was nec vi, nec clam, nec precario*, that is to say, without force, without secrecy and without permission. Permission in this case would have to be from the legal title holder. There must be a clear intention to hold the land as owner to the exclusion of the registered owner.

50. **M'Riria & 5 others v Muthomi [2025] KECA 951 (KLR)** quoted **Ndolo v Kitutu & 8 others (Civil Appeal 394 of 2018) [2022] KECA 1289 (KLR) (18 November 2022) (Judgment)** held that:

> **"For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted use of the land. The physical fact of exclusive possession and the *animus possidendi* to hold as owner to the exclusion to the actual owner are important factors in a claim for adverse possession. The principles stated in the above holding are also encapsulated in the local legislation referred to elsewhere in this judgment. The direct import of these two provisions is, firstly, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued, which is the date of dispossession. Secondly, after the expiration of the said twelve years the title of the registered owner shall be extinguished. Thirdly, the person in adverse possession is entitled to a title by possession."**

51. Samuel **Kihamba v Mary Mbaisi [2015] eKLR** held as follows:

> **"Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. <u>There must be an apparent dispossession of the land from the land owner.</u> These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. <u>The additional requirement is that of *animus possidendi*, or intention to have the land."</u>**

52. Can the present plaintiffs be held to have satisfied these requirements of adverse possession?

53. The most basic of the requirements is proof of dispossession for a period of not less than **12** years. The plaintiffs gave evidence that they have been on the land for periods exceeding **12** years. The 1st plaintiff gave evidence that he has been on plot no 373 for about 50 years, the 3rd plaintiff that he has been resident on plot no Plot Number 41 for about 48 years, and the 7th plaintiff stated that he has been in occupation of a portion of plot no 372 for about 38 years, having allegedly been brought up on that land with his siblings.

54. The one outstanding feature of the plaintiffs' suit is that all the witnesses gave evidence to support the claim that they were in occupation of the land as ancestral land many decades before the 2nd defendant obtained title to it. They adduced evidence of their

predecessors writing to the President and other persons in authority seeking to have the land as theirs. And this is where they went wrong. A claim under ancestral ownership of the land can not co-exist with a claim for ownership under the doctrine of adverse possession. The claimant under the doctrine must unreservedly admit unflawed title on the part of the registered owner before they become eligible for consideration under the doctrine of adverse possession. It is not for a court of law to sequestrate the claim under the adverse possession doctrine from any other claim it has been welded to by pleadings and selectively determine it; that would amount to ignoring a major legal principle that requires that the title be recognized by the claimant under the doctrine. It is needless therefore to belabour the fact that disregarding the inclusion of an ancestral claim challenging the integrity of the said title while determining a claim of adverse possession would be against that existing legal principle in our jurisprudence.

55. In their evidence the plaintiffs repeatedly cast their eyes backwards to the glorious past when they occupied the suit land under the false impression that it was their ancestral land. That impression is manifestly wrong because all evidence they produced disclosed that the land was government land by then, which the government finally assigned to the SFT for distribution to squatters. It is unfortunate that the plaintiffs entertained all these thoughts despite the legal position being that prescriptive rights can not accrue as against the government in Kenyan

law. their pleading however spoke little of the ancestral nature of the land. Based on the principle only that evidence can only be admissible which goes to proving the statements in the pleadings, and bearing in mind that the plaintiffs' claim in the Originating Summons not premised on the ancestral nature of the land but on adverse possession, this court must disregard all evidence of the ancestral nature of the land.

56. Regarding continuous and undisturbed possession by the plaintiffs, it is notable that upon the government stepping in and titling a portion of plot no 258/III/MN in favour of the 2nd defendant, that portion was christened LR No 41, and the 2nd defendant wasted no time in asserting her ownership rights in respect thereof. All evidence of prior occupation by the plaintiffs became irrelevant to the present suit when they admitted titling in her favour. If the plaintiffs were in occupation of the portion of land parcel **LR No 258/III/MN**, a portion of which was subsequently assigned its own boundaries and christened **LR No 41**, then they have failed to explain how the 2nd defendant managed to get onto the land with a surveyor and subdivide it into **9** portions and dispose of **6** portions thereof to third parties as they watched. Evidence of subdivision and disposal of the subdivisions of the land by the 2nd defendant proved that she was exercising her ownership rights in the presence of the plaintiffs, that is, if they were on the land then. Though the 2nd defendant states that they were not on the suit land and that is why she managed to subdivide and sell portions of it, her allegation is also to be taken with a

pinch of salt since there is a letter apparently written by a District Officer reminding her that she had undertaken to provide a **3**-acre portion for squatters which she had not done. That letter is dated 21/7/1999, and it is evident that as at that date there were still squatters on the land. Whether those squatters included the plaintiffs is a different issue altogether. What matters is that if there were any squatters thereon, the 2nd defendant interrupted their stay by subdividing and selling portions thereof without demur, and continued doing so until the last sale was concluded, and it would appear that as at **2006**, **4** years prior to the lodging of the present suit, the plaintiff was still in the process of disposing the remaining portions, and by her evidence, she took prospective purchasers to those plots for viewing; that as at date, the last sale has not been concluded with respect to the plots subject matter of the present suit. There is an express admission by Daniel Tokali, DW2, that he was removed from plot number 375 and relocated to plot number 373 and was never compensated. Unless he recognized the 2nd defendant's valid title to the entire range of subdivisions of plot no 41 effected by the 1st defendant, he could not have agreed to be moved anyhow by the 2nd defendant.

57. Apart from the realized subdivision and sale, PW1 testified that in her exercise of ownership rights, that she had a meeting with the squatters and agreed with them that they would vacate the land by a certain date.

These efforts are clearly borne out in the plaintiffs' evidence for they gave sworn evidence that they had to shift about during the process.

58. PW3 stated that he was moved from plot no 372 to plot no 373. PW3 also stated that there were attempts to evict the squatters which were stopped when the squatters went to the chief's office for help. This is a clear admission that were it not for administrative interventions the plaintiffs would not be dwelling on the land to date.

59. This court is of the considered view that where an admission is made that where claimants seek administrative intervention which halts an eviction as in the present case, after that halted eviction, the claimant's protracted stay on the land, irrespective of length, can not be considered as free of use of force. A landowner can not be blamed for failing to undertake a physical battle against administrators or politicians who halt the eviction of squatters from his or her land. The mere successful intervention by administrators or politicians, whether for maintenance of peace and order or for political expediency, which halts such eviction thus permanently taints the squatters' continued residency on the suit land with the odious contaminant of force that is repulsive to the dictates of protection of individual property rights under **Article 40(1)** of the Constitution, and it disqualifies, as in the present case, the occupying squatters from entitlement under the doctrine of adverse possession. It cannot therefore be stated that the plaintiff's stay on the suit land was

without use of force and this alone disqualifies them from benefiting under the doctrine of adverse possession.

60. In view of the foregoing, the conclusion of this court is that the plaintiffs have not proved their claim under adverse possession and it is for dismissal.

61. On the other hand, and on the basis of the same evidence adduced by the parties, I find that the plaintiffs are in occupation of the suit land and this court having found their claim of adverse possession devoid of merit, they remain mere trespassers thereon who ought to be evicted, and the counterclaim therefore succeeds.

62. The upshot is that I dismiss the claim of adverse possession by the plaintiffs in the main suit vide Originating Summons dated 23/4/2010 and I enter judgment for the defendants on the counterclaim dated **9/7/2010** and I issue the following final orders:

a. The defendants' counterclaim dated 9/7/2010 is allowed;

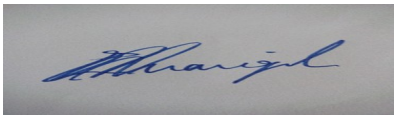
b. The plaintiffs' suit by way of Originating Summons dated 23/4/2020 is hereby dismissed;

c. The defendants in the counterclaim shall remove themselves from plots nos Kilifi/Kijipwa/372, Kilifi/Kijipwa/373 and Kilifi/ Kijipwa/374 within 90 days from the date of this judgment and in default they shall be forcibly evicted therefrom at the instance of the plaintiffs in the counterclaim;

d. The plaintiffs in the main suit shall meet the defendants' costs of the suit and the counterclaim.

It is so ordered.

Dated, signed and delivered at Malindi on this 27th day of January 2026.



MWANGI NJOROGE,

JUDGE, ELC, MALINDI.