

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

LAND CAUSE NO. 6 OF 2021 (OS)

**IN THE MATTER OF: THE LAND ACT NO.6 OF 2012 LAWS
OF KEMDAAUA LAND REGISTRATION
OF TITLES ACT (NO.1 OF 2012 AND
REGISTRATION OF TITLES ACT (CAP
281)(REPEALED)THE REGISTERED
LAND ACT (CAP 300)(REPEALFD)**

AND

**IN THE MATTER OF: FREEHOLD INTEREST IN PARCEL OF
LAND/PLOT NUMBER 1298 KINANGO
“A” ADJUDICATION SECTION**

AND

**IN THE MATTER OF: LIMITATION OF ACTION (CAP 22)
LAWS OF KENYA**

BETWEEN

HARRISON MULEWA KAVITI.....

PLAINTIFF

VERSUS

JULIUS WAMBUA MDACHI.....
DEFENDANT

JUDGEMENT

I. Preliminaries

1. The Judgement by this Honourable Court pertains to a Civil Suit institute by *Harrison Mulewa Kaviti*, the Plaintiff herein, who instituted by way of Originating Summons dated 22nd July 2019 and filed at Mombasa on 23rd July, 2019. Later on, the suit was transferred to Kwale and registered as ELC No. 6 of 2021. It was against *Julius Wambua Mdachi*, the Defendant/Respondent herein. The Summons was premised under the provision of Sections 37 and 38 of the Limitation of Actions Act, Cap. 22 Laws of Kenya, Order 37 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. Essentially, the Plaintiff claims entitlement to land parcel Kinango "A" Adjudication Section, Plot No. 1298, measuring approximately 12 hectares, by way of Land adverse possession.
3. Upon effecting service, the Defendant opposed the claim through a Replying Affidavit sworn on 8th November 2023, a

Defence, and written submissions filed on 24th February 2025 in compliance with the Provision of Order 11 of the Civil Procedure Rules, 2010.

II. Court Directions before Hearing

4. On 8th July, 2025, upon compliance with the Pre-trial directions under the provision of Order 11 of the Civil Procedure Rules, 2010, directions on how to dispose off the Originating Summons were taken pursuant to the provision of Order 37 Rules, 16 & 18 of the Civil Procedure Rules, 2010. The Originating Summons was converted to a Plaint; the Supporting Affidavit and the annexures to Witness statement and Plaintiff's Exhibits; the Replying Affidavit to a Defence and witness statement. It was directed that the matter proceeds on to hearing by way of adducing "**Viva Voce**" evidence on 8th July, 2025.
5. Subsequently, the Plaintiff testified and called witnesses in support of his claim. The Defendant similarly testified and produced documents in opposition on the same day.

III. The Plaintiff's Case

6. From the filed pleadings the Plaintiff claimed that the registered owner of the suit property herein, being plot no. 1298 Kinango

“A” Adjudication Section (Hereinafter referred to as the “Suit Property”) JULIUS WAMBUA MDACHI (Attached in the supporting affidavit a copy of a letter from the Lands and Physical Planning confirming the said ownership to the above effect marked as “HMK - 1”). He averred as follows that:-

a) He had resided on the suit property for over 12 years.

b) Indeed he had lived on the said plot uninterrupted for his whole life as he was born there and it was in excess of 50 years and he did not know any other home besides the said Plot where he had a home together with his old mother and siblings with their families.

c) There were now people who were encroaching onto the said property and challenging that he was not the registered owner.

d) Since his parent’s entry more than sixty years ago and further his occupation and

stay on the plot had been openly and continuous and uninterruptedly and exclusively and above all adverse to the registered owner.

e) He was entitled to be registered as the owner of the suit property by way of adverse possession. Having stayed or occupied the plot for well over 12 years and having met or fulfilled all requirements of adverse possession, he was entitled under the provisions of Section 38 of the Limitation of Actions Act to seek for Orders of Adverse Possession against the Defendant herein.

f) He had erected structures on the said plot and also had his home, his siblings and his now very old mother on the same premises and planted crops for subsistence and a means of eking out a living.

g) He was entitled to orders of adverse possession in respect of Plot No.1298 Kinango "A" Adjudication Section, the suit premises herein.

h) The Plaintiff reiterated the fact that he together with his family did not know any other place as residence except the suit premises herein.

7. The Plaintiff relied on the following questions for determination:-

- a. Had the Plaintiff and his family been in uninterrupted, continuous and peaceful occupation and/or possession of the suit property for more than 12 years?**
- b. Was the Plaintiff entitled to the approximately 12 hectares by way of adverse possession of all that property described as KINANGO "A" ADJUDICATION SECTION PARCEL NO. 1298 of the suit property in the names of JULUIS WAMBUA MDACHI.**
- c. Whether the possession and occupation by the plaintiff of the suit property constitutes overriding interests in terms of the provisions of Section 30 of the registered land Act Cap.300 Laws of Kenya?**
- d. Whether damages was adequate remedies to the plaintiff and or whether compensation to the plaintiff by the defendant is a viable remedy?**
- e. Was the Plaintiff entitled to be registered as owner of the 12 hectares or thereabout in the names of the defendant?**

- f. Whether a permanent injunction order be issued against the defendant by themselves, servants, agents or authorized Independent contractors NOT to demolish or destroy the plaintiff houses built on the suit property or evict the plaintiff from the suit land?
- g. Was Plaintiff entitled to costs of the suit?
8. The Plaintiff prayed for Judgement to be entered against the Defendant as follows:-
- (a) ***THAT the Plaintiff be registered as proprietors in common of approximately 12 hectares portion of land comprised in the Parcel No. 1298 Kinango 'A' Adjudication section in the name of JULIUS WAMBUA MDACHI..***
- (b) ***THAT the Defendant, his servants, agents and or any other authorized independent contractor be restrained by a permanent injunction from entering the suit land or parcel no.1298 Kinango "A" Adjudication Section or demolishing the plaintiff's houses structures and/or properties thereon and/or evicting the plaintiff his family and/or relatives or in any manner whatsoever interfering with the Plaintiff's peaceful occupation and enjoyment of the suit land;***
- (c) ***THAT the Defendant, his servants, agents and or any other authorized independent contractor be restrained by a permanent injunction from entering the suit land or parcel no.1298 Kinango "A" Adjudication Section or demolishing the plaintiff's houses structures and/or properties thereon and/or evicting the plaintiff his family and/or relatives or in any manner whatsoever interfering with the Plaintiff's peaceful occupation and enjoyment of the suit land.***
- (d) ***THAT costs of this application be provided for.***

A. Opening Remarks by Counsel to the Plaintiff

9. On 8th July, 2025, the Plaintiff's advocate Mr. Magolo Advocate made the following brief opening remarks.
10. The case was one of claim for Land Adverse Possession. The Plaintiff have lived on the suit land continually and without any interruption for over 12 years. They have buried all their relatives in the suit land he would be calling one witness.

B. Examination in Chief of PW -1 by Mr. Magolo Advocate

11. PW - 1 testified and sworn in Swahili. He identified himself as HARRISON MUGENA KAVITI, a Citizen of Kenya and holder of the national identity card bearing all the particulars as indicated to Court during the hearing. He was the Plaintiff in this case. He was a father. He knew the Defendant who was a distant relative. He recorded a supporting affidavit and witness statement dated 22nd July, 2019 as evidence in support of this case. They filed documents dated 22nd July, 2019 which he produced as Plaintiff Exhibit 1 to 3. His claim was that the Defendant used documents during the demarcation to lie and fraudulently acquire it.

12. According to the witness the land was No. 1298 – it was given to them through inheritance from their parents. This from the year 1985. It had been 40 years on the day of his testimony. He resided there. They had cemeteries for their children and their mother on the land. For instance - M/s Mbaika Karithi a.k.a Mbaika Munyuki Mungati, his mother recorded a witness statement before she died. The Defendant was the owner of Plot No. 1297 registered to Julius Wambua Mdachi. However he was now registered in the names of the suit known as 1297; from the documents by the Defendant being a letter dated 14th May, 2024 and the Plaintiff's documents dated 10th June, 2019, by the Senior Director of Land Adjudication and Settlement.
13. PW - 1 told the court that it indicated that the suit plot was Julius Wambua Mdachi. He could never reside on the land. He delivered the land officials using the RULING by the District Officer. according to the said Ruling his land was 1297 and the Court proceedings.

C. Cross Examination of PW - 1 M/s. Kimani Advocate.

14. PW - 1 confirmed that he inherited the land from his forefathers. It was ancestral land. He got the land in August 1985. He was born in 1960 – by the time he was getting the land he was 21

years old. He confirmed that he knew Esther Mdachi - the Defendants mother and his aunties. Mr. Kisilu Musili was his uncle on his paternal side; M/s Kariithi was PW 1's mother. He confirmed that there had been a land dispute between Esther Mudachi Kisilu Musili and in 1986; it was about boundaries; from that case for parcel 1297 Esther was granted the land. In 1988, the suit was lodged in court and it was decided that Esther Mathenge Mudachi was the owner.

15. PW - 1 further reiterated that in the year 1994, they were ordered evicted but they never did go to date. Sometimes back, there was a court case for trespass whereby he was confined for breach of Court order. He stayed behind bars for three days. Later on the officers from the forest came to assess the destruction of the trees by themselves. On 8th November, 2016, Mr. Maundu Kariithi was alleged to have written a letter to the Ministry of Lands. The witness did not know about it. After the decision of the land adjudication committee dated 25th June, 2024 which ruled the land belonged to the defence and which he preferred an appeal before the Land adjudication Board on 31st January, 2019.

16. PW - 1 stated that on 25th February, 2019 the Board ruled in favour of the Defendant. Upon the death of his mother on 5th August, 2019, the witness never forced to bury her on the land. There was no letter written to the chief to that effect. In his case that he had lived on the land for 40 years continuously and without any interruption and he had used it openly. Julius (the Defendant) had never persecuted him from using it. Julius was cultivating on part of the land.

17. PW - 1 testified that the Defendant, Julius Wambua Mdachi used fraudulent means to acquire the suit land, referred to the pleadings but he had not pleaded fraud. He had not brought any evidence of fraud. He had not brought any documents to show dispute.

D.Re - Examination of the PW - 1 by Mr. Magolo Advocate.

18. PW -1 reiterated that the order by the District Officer referred to Plot No. 1297. The decision by the Committee and Board was for Plot No. 1297. He never used any force to bury his mother on the land as alleged.

19. The Plaintiff closed their case through the Counsel Mr. Magolo Advocate on 8th July, 2025.

IV. The Defendant's Case

20. The Defendant opposed the Pleading by the Plaintiff through his Replying Affidavit which was later converted into a defence dated 8th November, 2023 where he deponed as follows: -

- (a) The Defendant had been served with an application for adverse possession and swore the affidavit in response to that application.
- (b) The Defendant's mother (now deceased) had won her first legal battle against the Applicant's mother (deceased) in which the then Principal Magistrate Hon. S.O. Oguk entered judgment in her favour on 16th May 1988 in Land Award No. 61 of 1987. Annexed was a copy of the proceedings and Judgment marked as "JWM - 1" the same was produced as an exhibit in the matter.
- (c) Upon seeking review of the Judgment of the court, the Applicant's application was dismissed as it was found to be unmerited.
- (d) On 7th December, 1989, the Defendant's mother wrote a letter requesting the Principal Magistrate to give directions on when the Judgment debtor (the Applicant's mother)

should give vacant possession of the suit property as ordered. Annexed was a copy of the letter marked as “JWM - 2”.

(e) Sometime in 1992, the eviction exercise was carried out by the Court bailiff. Annexed was a copy of the letter dated 25th January 1993 marked as “JWM - 3”.

(f) Despite the Applicant and his family being evicted procedurally and in utter disobedience of court orders, the Applicant forcefully trespassed into the suit property and started to build permanent structures. Criminal Case Number 229 of 1993 was registered against the Applicant for the trespass.

(g) For his contempt, the Defendant’s mother approached the court with contempt proceedings against the Applicant and the Honourable Court issued a contempt of court order dated 17th November 1994. Annexed was a copy of the order dated that same day and marked as “JWM - 4”.

(h) On 13th October 2014, the Executive Land Officer, Kinango “A” Adjudication Section, while acting for the Land Adjudication and Settlement Officer, reiterated the events

and the position of the office. Annexed was the letter marked as “JWM - 5”.

- (i) Sometimes in the year 2015, the Applicant cut down 793 trees which the Defendant had planted in the suit land and the Kenya Forest Service Kinango Sub-County Forest Extension Officer confirmed the damage and its cost estimated at a sum of Kenya Shillings Seven Hundred and Ninety Three Thousand (Kshs. 793,000/-) vide a letter dated 16th September 2015, which the Applicant was supposed to compensate the Defendant and his family for. Annexed was a copy of the letter marked as “JWM - 6”.
- (j) In the year 2017, the Applicant returned when the Defendant’s mother had passed on and upon realizing that the Adjudication Office had registered the Defendant’s name in the place of his mother, lodged a dispute before the Land Adjudication Committee in Kinango Sub - County, but the Defendant was successful. However, the issuance of the title was stalled because of the unending and unwarranted complaints by the Applicant, this application being the most recent.

- (k) In the year 2019, the Applicant forcefully buried his mother on the suit land, an action which even the area chief was displeased with and thus wrote a letter of protest and information. Annexed was a copy of the letter dated 8th August, 2019 marked as “JWM - 7”.
- (l) The Defendant and his family had always been in occupation of the subject property since time immemorial.
- (m) It was untrue that the Applicants had been in occupation of the suit property as stated in the application.
- (n) There had been force and/ or persuasion in possession and occupation of the land parcel by the Applicant, thus they should not have been allowed to evict the Defendant who resided on the piece of land.
- (o) The images annexed by the Applicant were selective, repetitive and some animated and thus were not representation of what was on the ground.
- (p) The Applicant’s claim had not met the threshold for the granting of the prayers sought and thus had to fail.

(q) The Applicant had not been enjoying quiet, uninterrupted possession of the suit property as the parties had been in constant loggerheads over trespass.

(r) It was in the interest of justice and fairness that the adverse possession application be dismissed with costs to the Defendant.

A. Opening remarks by the Defendant's counsel

21. On 8th July, 2025, the Defendant's Counsel, M/s Kimani made the following opening remarks. The Learned Counsel stated that her client, the Defendant was the legally and absolute registered owner to all that parcel of land known as Plot No. 1298. They would adduce evidence to prove this fact having acquired it through the Land Adjudication process.
22. However, he never had title as the DLAO was awaiting for the outcome of the going on land dispute before the court.
23. The Defendant disputed the Plaintiff's claim of Land Adverse Possession. The Plaintiff had raised objection. It was dismissed. The Plaintiff never utilized the opportunity to gain the land through preferring an appeal before the Minister as was

required under the provision of Section 29 of Cap. 284. He was indolent and Equity cannot aid the Indolent. That was all.

24. On 8th July, 2025 Defendant's witness - DW - 1 testified as follows:-

A. Examination in Chief of DW - 1 by M/s Kimani

Advocate.

25. DW - 1 testified and sworn in the Kiswahili language. He was born in Kinango within the County of Kwale. He was a Volunteer Health Worker. On 9th November, 2023 he swore a replying affidavit and list of documents dated 24th February, 2023. There were attached Seven (7) annexures marked as "JWM - 1 to 7" now Produced as Defendant Exhibit 1 to 7 in that order.

26. The witness told the court that he was in court having been sued by the Plaintiff over all that parcel of land known as Plot No. 1298. DW - 1 informed Court that the Plaintiff came from a place called Puma to settle on the land in the year 1986. They were three of them 3. That is the Plaintiff, their Mother and his brother. Immediately, the Defendant's mother - Esther Muthenge Mudachi lodged a complaint to the village elder. The Village elder came to the land with the elders. They adjudicated

and eventually decided that the land it belonged to the Defendant's mother - M/s. Mudachi. They were not contended. They decided to lodge an objection in form of a complaint to the Sub - Chief. Equally, the sub - chief visited the land and decided that the land belonged to M/s. Mudachi.

27. DW - 1 told the court, not being satisfied, the Plaintiff preferred a complaint to the Chief. The Chief heard the case and later on decided that the land belonged to the Kisili family and not the Defendant's mother. The Defendant lodged a complaint before the District Officer. Unfortunately, the DO never decided the dispute. As a result, the matter was referred and was decided at Chief Magistrate Mombasa - "**PMCC Land Award No. 61 of 1987 - Esther Mulenji - Versus - Kisili Musili**" whereby on 16th May, 1988, the Award by the Elders which was in favour of Esther was adopted. Esther was given the land by Court but they refused to leave the land.

28. Further in 1991, Esther went back to court and sought for eviction orders and the brother and Kisili left. Despite of them briefly vacating the land they forcefully trespassed back and started constructing permanent structures on it. An order was issued through a Criminal case number 229 of 1995 to have the

three arrested and subjected to civil jail. In the year 2014, the land adjudication process started before that there had been any number. They all participated and he was given Plot number 1298. He was there. He complained by raising an objection to the committee and the board and the board gave them the land in year 1991.

29. With reference to the letter dated 16th September, 2015, the witness told the court that it made reference to the destruction of trees i.e. 793 by the Plaintiff. The damage on the destruction of the trees was confirmed by the Kenya Forest Service Kinango Sub - County Forest extension Officer. He was condemned to pay for the damage caused for a sum of Kenya Shillings Seven Ninety Three Thousand (Kshs.793,000/-). DW - 1 inherited the land from his father-MUDACHI WA MBILU.

30. According to DW - 1 the land was theirs having been born there - on Plot No. 1298. The Plaintiff was not being truthful as there had been disputes on the land on it for 40 years. With reference to paragraph 13 he indicated that it was the year 2019. When the Plaintiff's mother died, the Plaintiff forcefully buried her on the land and the chief wrote a letter dated 8th August, 2019 (which the witness referred to).

31. The witness urged the Court to decide this case which had taken so long. He had been prevented from acquiring his title because of the Plaintiff's interference.

B. Cross Examination of DW-1 by Mr. Magolo Advocate: -

32. DW - 1 reiterated that when the Plaintiff forcefully tried to bury their mother, he went to the police who referred him to the D.O. and then to the chief. DW - 1 argued that he was the owner of Plot No. 1297 where his brother resided. He had the title deed to it and he resided on Plot No. 1297. He told the court that he was also the owner of Plot No. 1298 although he did not reside in it. Currently, it was the Plaintiff who resided on No. 1298 though evicted vide the objection and acquisition of Plot No. 1297 from his forefathers.

33. According to the witness it was the ancestral people that got into the Plot No. 1298 in the year 1996. Plot No. 1298 was his and its ancestors. His father was Mudachi Wa Mbili. He died in the year 1946. DW - 1 had sisters but no brothers. They had no inheritance rights. In the subsequent disputes, his father had participated before his demise. It was his mother who fought over and then the Defendant. After the death of his father and

his mother they never applied for Grant of Letters of Adjudication.

34. With reference to the Court order in Misc Application No. 42 of 1994 of 17th November, 1994 - the official stamp was unclear; the proceedings for the land committee and board bore the official stamp.

C. Re - examination of DW - 1 by M/s. Kimani Advocate.

35. DW - 1 confirmed that with reference to Court order in Misc Application No. 42 of 1994 - the Deputy Registrar had signed it bore an official stamp. With reference to the decision by land committee dated 25th June, 2014 bore a stamp as certified copy of District Land Adjudication.

36. With reference to the objection dated 31st January, 2019, the witness told the court that the same bore a stamp and signature and decision of 25th February, 2019 which bore signatures. The witness told the court that he was the owner of Plot No. 1298 and 1297. He never applied for Grant Letters of Adjudication as no one raised any objection on law he attended the Plot No. 1298.

37. The Defendant closed his case on 8th July, 2025 through their legal counsel M/s Kimani Advocate.

V. Submissions

38. Upon the closure of the Plaintiff's and the Defendant's cases on 8th July, 2025, the Honorable Court directed that all parties file and exchange their Written Submissions within the given and stipulated time frame. Thereafter, on 22nd September, 2025 the parties confirmed compliance. Thus, the Honorable Court reserved a date to deliver its Judgment on notice accordingly.

A) The Written Submissions by the Plaintiff

39. The Plaintiff through the Law firm of Messrs. J.O. Magolo & Company Advocates filed their written submissions dated 7th August, 2021. Mr. Paul Magolo Advocate commenced the submissions by stating that the Plaintiff herein filed a suit against the Defendant herein seeking the above cited orders. The suit was Defended by way of a Replying Affidavit sworn by the Defendant.

40. On the background, the Learned Counsel submitted that the registered owner of the suit property herein, being plot no.1298 Kinango "A" Adjudication Section was the Defendant, Julius

Wambua Mdachi. The Plaintiff and his family had lived on the said plot uninterrupted since time immemorial and they did not know any other home besides the said plot where they had lived. This was since the Plaintiff's parent's entry onto the land more than sixty (60) years ago. Further, the Plaintiff's occupation and stay on the plot had been openly and continuous and interrupted above all adverse to the registered owner. Therefore, the Plaintiff was entitled to be registered as the owner of the suit property by way of Adverse possession. Having stayed or occupied the plot for well over 12 years and having met and fulfilled the all requirements of adverse possession. The Plaintiff had erected structures on the said plot and also had buried parents and relatives on that parcel of land.

41. Further the Learned Counsel submitted that since the plaintiff's parent's entry more than sixty (60) years ago, and further, the Plaintiff's occupation and stay on the plot has been openly and continuous and interrupted above all adverse to the registered owner. The Honourable Court would realize that the livelihood of these innocent family of the Plaintiff depend on the ancestral land. Their ancestors lived there, and they have nowhere. The Constitution of Kenya at Article 26 provides as follows;

‘(1) Every person has the right to life.’

42. According to the Learned Counsel, the Constitution guarantees everyone the enjoyment of right to life, which includes protection of one's means of livelihood, as stated in the case of:- **“Peter K. Waweru - Versus - Republic, High Court Misc. Civil Application No. 118 of 2004”**, in this regard. Further, the Defendants herein were seeking protection of the right to continue living in their ancestral land. The Defendants right to have a home or is a basic need which falls within the meaning of the right to life.

43. The Constitution at Article 40 provides as follows:-

‘40. Protection of right to property

(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’

44. Although the Plaintiff's family herein never held titles to the land they were occupying, having lived there for all their lives and having established their homes there, they had an interest in the land which the court should protect.

45. The Learned Counsel asked the court to be guided by the decision of Justice P. Nyamweya in the case of **“Joseph Letuya &**

21 others - Versus - Attorney General & 5 others [2014] eKLR", where she was faced with a case of similar facts and stated as follows:-

".....that the right to life includes the right to livelihood and have relied on the definition of the right to life given in Peter K. Waweru-v- Republic, High Court Misc. Civil Application No. 118 of 2004, reported in (2006) 1 KLR (E&L)677 at 691. Honourable Justices Nyamu J. (as he then was), Ibrahim J. (as he then was) and Emukule J. found as follows with regard to the meaning of the right to life under section 71 of the Constitution,

"We have added the dictionary meaning of life which gives life a wider meaning, including its attachment to the environment. Thus a development that threatens life is not a sustainable and ought to be halted. In Environmental law, life must have this expanded meaning.

The UN Conference on the Human Environment, 1972, that is the seminal Stockholm Declaration noted that the environment was 'essential to...the enjoyment of basic rights-even the right to life itself Principle 1 asserts that:

'Man has the fundamental right to freedom equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'

Closer home-Article 24 of the African Charter of Human and Peoples Rights 1981 provided as under:

'All peoples shall have the right to a general satisfactory environment favorable to their development'

principle 1 has a declaration in these terms:

'... human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive

life in harmony with nature.’ “The applicants also relied on the expansive definition given to the right to life by the Supreme Court of Pakistan in its decision in Zia-v-Wapda PLD (1994) SC 693 that was cited in Peter K. Waweru - Versus - Republic (supra). The Supreme Court of Pakistan stated as follows with respect to the provisions of section 9 of the Pakistan Constitution that no person shall be deprived of life or liberty except in accordance with the law:

In addition, the United Nations Human Rights Committee in its General Comment 6 on the right to life adopted on 27 July 1982 observed that the right to life enunciated in the first paragraph of Article 6 of the International Covenant on Civil and Political Rights has been too often narrowly interpreted. It stated that the expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

This court recognizes that the right to livelihood neither has an established definition nor recognition as a human right at the national or international level.

However, the right to a livelihood is a concept that is increasingly being discussed in the context of human rights. This concept has mention in various international human rights treaties which are now part of Kenyan law by virtue of Article 2(6)of the Kenyan Constitution. Article 25 of the Universal Declaration of Human Rights (UHDR) does mention livelihood in relation to social security and states that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food...and the right to security in the event of

unemployment, sickness, disability widowhood, old age or other lack of livelihood in circumstances beyond his control.....”

46. Justice P. Nyamweya went further to state as follows:-

“.....this Court finds that the Applicants' livelihood is directly dependent on forest resources and the health of forest ecosystems for their livelihoods, and to this extent that they depend on the Mau forest to sustain their ways of life as well as their cultural and ethnic identity. The Applicants' right to life and socio-economic rights are consequently defined and dependant upon their continued access to the Mau Forest and should be protected to this extent.....

.....This court has found that the rights to life, dignity and the economic, political and social rights guaranteed by the Constitution in reality exist to ensure that the livelihood of the Applicants and apply in relation to the Applicants' access to the forest lands they occupy. It is also not disputed that there have been allocations of land occupied by the Applicants in the Mau Forest to other persons by the 2nd, 4th and 6th Respondents.....

This court is also guided in this respect by several multilateral environmental agreements which now shape the strategies and approaches by governments in relation to the environment and development, including forest policy. These include the Rio Declaration on Environment and Development and Agenda 21 which are widely accepted sources of international customary environmental law. Principle 22 of the Rio Declaration on Environment and Development provides that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States are encouraged to recognize

and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. Chapter 26 of Agenda 21 is likewise dedicated to strengthening the role of indigenous communities in sustainable development..”.....In the light of these findings it is apparent that there were significant irregularities committed during the allocations made after the 2001 forest excisions of Mau Forest, which included the allocations made with respect to the land occupied by the Applicants. This court cannot therefore uphold the legality of the said allocations.”

47. The Learned Counsel submitted that before the Honourable Court was a similar scenario where allocations had been made to non-residents irregularly, complaints had been made to the Lands Commission and the same should not be used to evict residents from their ancestral lands and their livelihood.

48. In conclusion, the Learned Counsel submitted that may it therefore please the Honourable Court to allow the suit and order that a title deed be issued in the name of the Plaintiff.

B) The Written Submissions by the Defendant

49. The Defendant through the firm of Messrs. Chimera, Kamotho & Company Advocates LLP filed his written submissions dated 28th August, 2025. M/s. Kimani Advocate submitted that these were the Defendant’s written submissions in opposition to the Plaintiff.

dated 22nd July 2019. In opposition to the Plaintiff, they filed the Defence dated 8th November 2023 which they relied upon in these submissions. The Defendant thus relied on the following pleadings lodged before this Court:

- a. The Defence dated 8th November 2023;
- b. The List of Documents dated 24th February 2025;
- c. These submissions; and
- d. The list and bundle of authorities submitted alongside these submissions

50. On the background, the Learned Counsel submitted that vide the Originating Summons dated 22nd July 2019 and the Supporting Affidavit of even date, the Plaintiff herein instituted this suit seeking inter alia that he was entitled to orders of Land Adverse possession in respect to Plot No. 1298 Kinango "A" Adjudication Section. Consequently, the Defendant filed the Replying Affidavit dated 8th November 2023 and the list of documents dated 24th February 2025. Vide the provision of Order 37 Rule 7 of the Civil Procedure Rules, 2010 the Originating Summons dated 22nd July, 2019 was converted to a Plaintiff and the Replying Affidavit dated 8th November, 2023 was converted into the Defence and pleadings treated as evidence.

51. According to the Learned Counsel, the Plaintiff's case was that the Plaintiff (PW - 1) testified in Court that, he was related to the Defendant by virtue of them being distant relatives. That he owned Plot No. 1298 Kinango "A" Adjudication Section through inheritance from his parents. It was his testimony in chief that he was born and raised on the suit property and hence the suit property being ancestral property. The Plaintiff further testified that the Defendant was registered as the owner of the suit property fraudulently. That the Defendant never resided on the suit property and he used documents to misrepresent/confuse land officials to have the same registered in his name.

52. In cross examination, the Plaintiff confirmed that the suit property was ancestral land and further stated that he was aware that the Defendant was registered proprietor in the year 2014. The Plaintiff further confirmed that there have been numerous interferences/disputes of ownership of the suit property between the Plaintiff and the Defendant, to wit;

a. In the year 1987-1994, there was a land dispute over the suit property between the Defendant's mother, Esther Muthenji, the Plaintiff and the Plaintiff's relatives, where the land was

awarded to the Defendant's mother as evidenced by Defendant Exhibit Numbers 1,2,3,4,5 and 6.

- b. On 25th June 2014, there was a dispute between the parties before the adjudication committee where the Defendant was declared the owner of the property as evidenced by the Defendant Exhibit No. 7;
- c. On 16th September 2015, the Defendant lodged a complaint against the Plaintiff at the Kinango Sub County Forest Extension Service after the Plaintiff cleared trees worth Kenya Shillings Seven Hundred and Ninety Three Thousand (Kshs. 793,000.00/=) as evidenced by the Defendant Exhibit No. 9;
- d. On the same date - 16th September 2015, the Defendant lodged a complaint at the District land adjudication and settlement office against the Plaintiff for clearing the suit property forcefully as evidenced by the letter dated 16th September as evidenced by Defendant Exhibit No. 9;
- e. On 8th November 2016, the Plaintiff lodged a complaint against the Defendant at the Land Adjudication and

Settlement Office for forcefully entering into the Plaintiff's land which is evidenced by Defendant Exhibit No. 10;

f. On 31st January 2019, there were was a dispute between the parties before the land adjudication arbitration board where the arbitration board declared the Plaintiff as the owner of the property as evidenced by the Defendant Exhibit No. 11; and

g. On 8th August 2019, the Plaintiff lodged a complaint against the Defendant at the Chief's office Kinango for forcefully burying his mother at the suit property as evidenced by the Defendant Exhibit No. 12.

53. Additionally, the Plaintiff confirmed that eviction of the Plaintiff's family was conducted in the year 1992 and as a result of contempt of the Court orders he was imprisoned for 6 months. The Plaintiff further confirmed that the Defendant has always cultivated and claimed ownership the suit property publicly and that he had not produced before this Honourable Court any evidence showing continuous, uninterrupted and peaceful occupation.

54. The Learned Counsel submitted on the Defendant's case that the Defendant in his sworn testimony stated that he is the legal owner of the suit property by virtue of the same being adjudicated to him as evidenced by the Defendant Exhibit No. 15. The Plaintiff stated that his mother, Esther Muthenji (deceased), in the year 1988 to the year 1994 instituted civil proceedings against the Plaintiff's family which led to the eviction of the Plaintiff's family from the suit property. That despite this eviction exercise being conducted the Plaintiff trespassed into the suit property.

55. In the year 2014 during the adjudication exercise, dispute arose as to ownership of the land between the parties which prompted the Plaintiff to institute the land adjudication proceedings before the land adjudication committee where the committee delivered the decision that the land should remain demarcated to the Defendant. Unsatisfied by this decision, the Plaintiff appealed before the land adjudication board who upheld the land adjudication committee's decision.

56. It was the Defendant's sworn testimony that the Plaintiff's allegations were unfounded for reasons that the Plaintiff had not

been in open, continuous, notorious and uninterrupted occupation by virtue of the following:

- i. In the year 1987-1994, there was a land dispute over the suit property between the Defendant's mother, Esther Muthenji, the Plaintiff and the Plaintiff's relatives, where the land was awarded to the Defendant's mother as evidenced by the Defendant Exhibit Numbers 1,2,3,4,5 and 6.
- ii. On 25th June 2014, there was a dispute between the parties before the adjudication committee where the Defendant was declared the owner of the property as evidenced by the Defendant Exhibit No. 7;
- iii. On 16th September 2015, the Defendant lodged a complaint against the Plaintiff at the Kinango Sub County Forest Extension Service after the Plaintiff cleared trees worth a sum of worth Kenya Shillings Seven Hundred and Ninety Three Thousand (Kshs.793,000.00/=) as evidenced by the Defendant Exhibit Number 9;
- iv. On 16th September 2015, the Defendant lodged a complaint at the District Land Adjudication and Settlement

office against the Plaintiff for clearing the suit property forcefully as evidenced by the letter dated 16th September as evidenced by Defendant Exhibit Number 9;

- v. On 8th November 2016, the Plaintiff lodged a complaint against the Defendant at the Land Adjudication and Settlement Office for forcefully entering into the Plaintiff's land which is evidenced by the Defendant Exhibit Number 10;
- vi. On 31st January 2019, there was a dispute between the parties before the land adjudication arbitration board where the arbitration board declared the Plaintiff as the owner of the property as evidenced by the Defendant Exhibit No. 11; and
- vii. On 8th August 2019, the Plaintiff lodged a complaint against the Defendant at the Chief's office Kinango for forcefully burying his mother at the suit property as evidenced by the Defendant Exhibit No. 12.

57. The Defendant further testified that he acquired the property legally and followed due process in having the property

demarcated in his name. The Defendant prayed that the Court dismisses the Plaintiffs case and rested his case.

58. The Learned Counsel relied on the following three (3) issues for determination. Firstly, on analysis of issues and whether the Plaintiff has shown that he acquired the property by adverse possession. The Learned Counsel submitted that the Applicant's claim is for adverse possession. Adverse possession means a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner as provided for under the provisions of Sections 7, 13 and 38 of the Limitation of Actions Act Cap. 22. In the case of **“Amoni & 20 others - Versus - Guhad & another (Environment & Land Case 1357 of 2014)[2023] KEELC 360(KLR) (26 January 2023) (Judgment)”** the Court relied on the case of **“Mate Gitabi - Versus - Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR”**, where the Court stated as follows: -

“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 secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of

the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario."

59. Similarly, in the case of:- ***"Mwita & another (Suing as Administrators of the Estate of Mwita Kerario-Deceased) - Versus - Nyamohanga & another (Sued as Administrators of the Estate of Nyamohanga Kerario Deceased) (Environment and Land Originating Summons 66 of 2021) [2024] KEELC 554 (KLR) (6 February 2024) (Judgment)"*** the Court relied on ***"Mbira - Versus - Gachuhi,(2002) IEALR 137"*** to reiterate the law and requirements for adverse possession where it was held that: -

".....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 statutory prescribed period without interruption...."

60. The Court of Appeal in the case of:- ***"Kuria Kiarie & 2 others - Versus - Sammy Magera[2018] KECA 467 (KLR)"*** relied on the case of ***"Mtana Lewa - Versus - Kahindi Ngala Mwangandi [2015] eKLR"*** where Makhandia, JA. summarized the doctrine 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 or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

“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.”

61. Further, in the Court of Appeal in **“Titus Mutuku Kasuve - Versus - Mwaani Investments Limited & 4 others (2004) 1KLR 184”**, the Court of Appeal restated what a plaintiff in a claim for Adverse Possession has to prove:-

“In order to be entitled to land by Adverse possession, the claimant must prove that he has been in exclusive possession of the land openly. They should have been habitants as of right without interruption for a period of 12 years. This could be either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

62. In the present case, the Learned Counsel submitted that the Plaintiff pleaded and stated in his testimony in Court that he was born and raised on the suit property and it is in excess of 50 years as evidenced by the Supporting Affidavit dated 22nd July, 2019 sworn by the Plaintiff and the Witness Statement of

even date. He further stated that the land was ancestral property by virtue of his parent's entry into the land more than 60 years ago. It is the Defendant's humble submission that the Plaintiff cannot claim adverse possession if he claims that the land he is occupying is his ancestral property.

63. The Learned Counsel submitted that they were fortified by the Kisumu Court of Appeal case of **“Richard Wefwafwa Songoi - Versus - Ben Munyifwa Songoi [2020] KECA 942 (KLR)”** where the Court quoted with authority the case of **“Haro Yonda Juaje - Versus - Sadaka Dzenzo Mbauro & Kenya Commercial Bank,(2014) eKLR”** where it was stated:

“One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and that the registered owner has never been in possession of such land.”

64. The Plaintiff testified under oath that there was dispute between his parents and the Defendants parents between the year 1988 to the year 1994. He further stated that there were land adjudication proceedings between himself and the Defendant on 25th June 2014 and 31st January 2019.

65. It was the Learned Counsel's submission that from the civil proceedings instituted by the Plaintiff's mother in 1988 culminating to the Court Order dated 17th November 1994 in which the Plaintiff is a Respondent, it had been brought to the Defendants attention that the suit property was disputed. Vide the letter dated 9th July 1992 (Defendant Exhibit No. 4) it is evident that the Defendant's mother did not acquiesce to the Plaintiff's possession of the suit property. Further, in the year 2014 and 2015 the Defendant further asserted his rights over the property before the land adjudication committee and the land adjudication board. From the evidence adduced in Court, time had been interrupted when the 1988 suit was filed and when the arbitration proceedings were filed and therefore the Plaintiff's claim for adverse possession cannot hold.

66. The Learned Counsel submitted that they were fortified by the Court of Appeal decision in ***“Wilson Kazungu Katana & 101 others - Versus - Salim Abdalla Bakshwein & another [2015] KECA 728 (KLR)”*** where the Court held thus: -

“This concept of adverse possession has been the subject of many discourses and decisions of this Court....the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in

exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.”

67. It was the Plaintiff's evidence in chief that the Defendant has never been in possession of the suit property. That the Defendant's property was Plot No. 1297 and not the suit property. It was their humble submission that the non-use of the property by the Defendant even for a long period of time will not affect his title. The Learned Counsel reiterated that adverse possession was a hostile possession by clearly asserting hostile title in denial of the title of the true owner which must start with a wrongful dispossession of the rightful owner and not whether or not the Plaintiff has proved that he has been in possession for the requisite number of years.

68. They were guided by the case of ***“Mwangangi (Suing as the legal representative of the Estate of William Mwangangi Kirima) - Versus - M'Mutua (Environment & Land Case E006 of 2020)[2023] KEELC 18499 (KLR) (5 July 2023)”*** which cited ***“Alfred Welimo - Versus - Mulaa Sumba Barasa CA No 186 of 2011”*** where the Court of Appeal expressed itself thus:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it, for as Robert Megarry aptly observed in his Megarry's Manual of the Law of property, 5th edition page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So, the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu Scheme by and of itself does not established adverse possession. The abandonment of possession must be complied with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”

69. It is trite from the adverse possession principles that the onus lies on the person claiming title by adverse possession to prove the essential elements before an order is granted in his or her favour. It was evident from the evidence tendered in Court that the Defendant challenged and controverted the Plaintiff's testimony. It was clear from the Defendant's case that the Plaintiff failed to establish on a balance of probability that he is entitled to the suit property through the principles of adverse possession as laid out in the case of ***“Richard Wefwafwa Songoi - Versus - Ben Munyifwa Songoi (Supra)”*** which stated that:

“A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession.**
- (b) what was the nature of his possession?**
- (c) whether the fact of his possession was known to the other party.**
- (d) for how long his possession has continued and**
- (e) that the possession was open and undisturbed for the requisite 12 years.”**

70. The Learned Counsel submitted that the Plaintiff further alleged that the Defendant acquired the suit property through fraud and illegalities. To this extent we submit that it is trite that fraud is a serious charge which must be pleaded and strictly proved. It was evident that the Plaintiff failed to plead, particularize and or strictly prove the fraud allegations against the Defendant and therefore the allegations must fall.

71. In the upshot, the Learned Counsel submitted that the Plaintiff failed to adduce cogent evidence of open, interrupted, notorious and peaceful occupation through occupying the land without the consent of the Defendant and therefore his entitlement to the suit property by adverse possession had not crystallized.

72. Secondly, on whether the Applicant was entitled to the orders sought. The Learned Counsel submitted that it is trite that the burden of proof is placed on the person alleging the occurrence of an event and where evidence has been adduced to challenge

the allegations, the standard of proof must be met. It was their humble submission that the record shows that: -

- i. the suit property was always under constant challenge by the Defendant and his family;
- ii. the Plaintiff's entry into the suit property was through his parents who had no proprietary interest in the suit property; and
- iii. it was clear from the record that there has never been wrongful dispossession of the Defendant's title.

73. Finally, on the issue of who should bear costs. The Learned Counsel submitted that the general rule was that costs follow the events and that the successful party would be awarded costs unless the Court for good reason orders otherwise. They referred this Honourable Court to section 27 of the Civil Procedure Act, Cap. 21 which provides for costs as follows: -

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and

the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.” Emphasis theirs)

74. The position of costs as above referred is settled in Kenya's jurisprudence as articulated in various cases by courts. For instance, in the case of **“Republic - Versus - Rosemary Wairimu Munene, Ex Parte Applicant Ihururu Dairy Farmers Co-operatives Society Ltd, Judicial Review No.6 of 2014”** which was cited with approval in the case of **“Cecilia Karuru Ngayu - Versus - Barclays Bank of Kenya & another (2016) eKLR”** the Court held as follows with regard to costs:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

75. They prayed that costs be awarded to the Defendant.

76. In conclusion, the Learned Counsel held that based on the above analysis, authorities cited, and various reasons elucidated in these submissions, they submitted that the

Plaintiff had not demonstrated his case to the requisite stand of proof to warrant the orders sought. The Plaintiff dated 22nd July 2019 should thus be dismissed with costs to the Defendant.

VI. Analysis & Determination

77. I have keenly considered all the filed pleadings, the evidence adduced by all the summoned witnesses, the documentary evidence, the Written Submissions and the plethora of cited cases by all the Parties, the relevant Provisions of the Constitution of Kenya, 2010 and the Statutes.

78. For this Honorable Court to reach an informed, just, equitable and reasonable decision on the subject matter, it has considered all the issues into the following three (3) sub-headings. These are: -

- a) Whether the Suit instituted by the Plaintiff through the filed Originating Summons/Plaint against the Defendant has any merit whatsoever?***
- b) Whether the Parties herein are entitled to the reliefs sought.***
- c) Who will bear the costs of the suit.***

ISSUE NO. (a) Whether the Suit instituted by the Plaintiff through the filed Originating Summons/Plaint against the Defendant has any merit whatsoever?

79. Under this sub title, the Honourable Court shall examine the Plaintiff/Applicant's case. At the end of this analysis, these questions shall be answered:

- a. **Whether the Plaintiff has proved continuous, open, and uninterrupted occupation of the suit property for a period exceeding 12 years.**
- b. **Whether the Plaintiff's occupation meets the legal threshold for adverse possession under Sections 7, 13, 17, 37, and 38 of the Limitation of Actions Act.**
- c. **Whether the Defendant's title has been extinguished by operation of law.**

80. The burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher. The burden squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. The Applicant is the one who has alleged and must proof. (See ***"Nairobi CoA App No. 95 of 2014 Ruth Wangari Kanyagia - Versus - Josephine Muthoni Kinyanjui [2017] eKLR"***)

81. The doctrine of Land Adverse Possession is one of the ways of land acquisition in Kenya. Just as the Learned Counsel for the Defendant has commendably made valuable efforts on bringing out the legal ratio on the substratum, I will proceed to further highlight some of the statutory provisions that underpin the doctrine as set out under the provision of Order 37 of the Civil Procedure Rules, 2010 and Sections 7, 13 16 & 38 of in the Limitations of Actions Act Cap. 22 and the Land Registration of Act No. 3 of 2012;

82. The provision of Section 7 states 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”

83. Further in Section 13 holds:-

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

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

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

84. Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

85. Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

86. Finally, Section 38 (1) and (2) states:-

“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

87. Under Section 38 of the Limitation of Actions Act (Cap 22, Laws of Kenya), a person who claims land by adverse possession must demonstrate that they have been in:

- a. Actual possession of the land,**
- b. Open and notorious use of the land,**
- c. Exclusive possession (not shared with the true owner or the public),**
- d. Continuous and uninterrupted possession for at least 12 years, and**
- e. That such possession was adverse to the interests of the registered owner**

88. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.

89. The provision of Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

90. The requirements for Adverse Possession in Kenya has also been set out in the case of **“Mbira - Versus - Gachuhi (2002) IEALR 137”** in which the court held that: -

“.....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 statutory prescribed period without interruption....”

91. Likewise, in the case of:- **“Jandu - Versus - Kirplal & Another (1975) EA 225”**, it was held:

“to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious. ”

92. The ingredients were recently discussed by the court of Appeal in the case of **“Mtana Lewa - Versus - Kahindi Ngala Mwangandi (2005) eKLR”** where it was held that: -

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

93. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario,*” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner. This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

94. In the case of:- “***Kasuve - Versus - Mwaani Investments Limited & 4 others 1 KLR 184***”, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

95. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 “***Richard Wefwafwa Songoi - Versus - Ben Munyifwa Songoi [2020] eKLR***” opined that a person claiming adverse possession must establish the following:

(a) On what date he came into possession.

(b) What was the nature of his possession?

(c) Whether the fact of his possession was known to the other party.

(d) For how long his possession has continued and

(e) That the possession was open and undisturbed for the requisite 12 years.

96. Legally speaking, based on the principles of **“the Burden of Proof”** anchored under the provision of Section 107, 108 and 109 of the Evidence Act, Cap. 80, the burden lies squarely with the Plaintiff/ Applicant to establish these elements on a balance of probabilities. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property.

97. The Plaintiff, Harrison Mulewa Kaviti, claimed that he was born on the suit land and had lived there for over 50 years. His family had occupied the land since the years 1960s, treating it as their ancestral home. They moved in from a place called Puma. They had developed the land by building permanent structures, cultivating crops, and burying family members. The Defendant was a stranger who only emerged in recent years and had

never occupied the land. These assertions were supported by a supporting affidavit, witness testimony, and submissions invoking constitutional rights to livelihood and ancestral land.

98. The Defendant, Julius Wambua Mdachi, on the other hand has produced enough documentary evidence – defendant Exhibits 1 to 7 demonstrating clearly that he was allocated the suit land by the Land Adjudication Office. This issue has not been challenged whatsoever. Be that as it may, the Defendant has vehemently rebutted the Plaintiff's assertions and presented a detailed chronology of events that interrupted the Plaintiff's occupation. In 1988, the Defendant's mother obtained judgment in her favour in Land Award No. 61 of 1987 which was adopted by the Principal Magistrate. In the year 1992, the Plaintiff and his family were evicted from the land by court bailiffs but they once more came back to the land. In the year 1993, a criminal case (No. 229 of 1993) was filed against the Plaintiff for trespass. In the year 1994, contempt of court proceedings were instituted against the Plaintiff. In the years 2014, 2015, and 2019, further disputes arose, including destruction of trees a damaged assessed by the Kinango Sub County Forest Extension Service at a sum of Kenya Shillings Seven Hundred and Ninety

Three Thousand (Kshs.793,000.00/=) as evidenced by the Defendant Exhibit Number 9; alleged forceful burial of the Plaintiff's mother on the land, and complaints to the adjudication office and local administration. The Defendant also produced letters from the Land Adjudication Office confirming his registration as proprietor and documentation of the Plaintiff's unsuccessful objections.

99. In the case of ***“Joseph Gahumi Kiritu - Versus - Lawrence Munyambu Kabura CA No 20 OF 1993”*** Justice Kwach JA (as he then was) stated as follows;

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in Githu - Versus - Ndeete is important and deserves to be read in full.Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must either make a peaceable and effective entry, or sue for recovery of the land.” (emphasis is mine).

100. The Court must determine whether the Plaintiff's occupation was peaceful and uninterrupted for a continuous period of 12 years. The evidence shows the Plaintiff's occupation was

interrupted by lawful eviction in year 1992. The Plaintiff's re-entry was met with criminal and civil proceedings, including contempt orders. The Defendant and his family continued to assert ownership and took steps to protect their interest. The Plaintiff's occupation was therefore not exclusive, not peaceful, and not uninterrupted.

101. The Court finds that these events constitute legal and factual interruption of possession. The Plaintiff's re-entry after eviction did not reset the clock for adverse possession, as it was not peaceful or adverse in law.

102. The Plaintiff failed to prove that his occupation of Plot No. 1298 Kinango "A" Adjudication Section was continuous, open, exclusive, and uninterrupted for a period exceeding 12 years. The evidence of eviction, litigation, and persistent disputes negates the essential elements of adverse possession.

103. Accordingly, the issue on whether the Plaintiff proved continuous, open, and uninterrupted occupation of the suit property for a period exceeding 12 years is answered in the negative.

104. On whether the Plaintiff, Harrison Mulewa Kaviti, satisfied the legal requirements for adverse possession under the provision of Sections 7, 13, 17, 37, and 38 of the Limitation of Actions Act (Cap 22, Laws of Kenya) concerning Plot No. 1298 Kinango 'A' Adjudication Section, the Plaintiff claims to have occupied the land for over 50 years, constructed permanent structures, and buried family members there. The Defendant, Julius Wambua Mdachi, counters with evidence of a 1988 judgment in his mother's favour, a 1992 eviction, 1994 contempt proceedings, and subsequent disputes in the years 2014, 2015, and 2019. The core legal question is whether the Plaintiff's occupation was continuous, open, exclusive, adverse, and uninterrupted for the statutory period, and whether the Defendant's actions constituted legal or factual interruption sufficient to defeat the claim.

105. As I stated initially in this judgment, the doctrine of adverse possession in Kenya is codified primarily in the Limitation of Actions Act (Cap 22), particularly Sections 7, 13, 17, 37, and 38. These sections collectively establish the conditions under which a person may acquire title to land by adverse possession, the

effect of limitation periods, and the procedure for registration of title so acquired.

106. The Plaintiff, Harrison Mulewa Kaviti, asserts that he has occupied Plot No. 1298 Kinango 'A' for over 50 years, constructed permanent structures, and buried family members there. The Defendant, Julius Wambua Mdachi, relies on a 1988 judgment in his mother's favour, a 1992 eviction, 1994 contempt proceedings, and subsequent disputes in 2014, 2015, and 2019.

107. The Plaintiff's claim of actual possession is supported by evidence of long-term residence, construction of permanent structures, cultivation, and burials on the land. Kenyan courts have recognized such acts—especially burials and permanent buildings—as strong evidence of animus possidendi (intention to possess) and factual occupation. In ***“Kipkoech arap Langat - Versus - Kipng’eno arap Laboso [2011] eKLR”***, the court held that building houses, cultivating, and burying family members are clear indicators of possession.

108. However, the Defendant's evidence of a 1992 eviction order and subsequent enforcement raises questions about whether the Plaintiff's possession was continuous and uninterrupted.
109. The Plaintiff's occupation appears to have been open and notorious, given the construction of permanent structures and burials, which are visible and public acts. Courts have held that such acts are sufficient to put the owner and the public on notice of the claimant's assertion of rights.
110. The Plaintiff must show that he possessed the land to the exclusion of the Defendant and the public. The evidence of exclusive residence, cultivation, and control over the land supports this element, unless there is credible evidence that the Defendant or others shared possession or exercised rights over the land during the relevant period.
111. The Possession must be adverse (hostile). This is a critical element. The Plaintiff's occupation must have been without the permission, licence, or consent of the Defendant or his predecessors. If the Plaintiff's occupation was at any time permissive, under a family arrangement, or as a purchaser awaiting completion, time does not run for adverse possession

until such permission or arrangement is expressly or impliedly revoked.

112. The Defendant's reliance on the 1988 judgment and subsequent legal actions suggests that the Plaintiff's occupation was contested and not permissive. However, if the Plaintiff was evicted in 1992 and later re-entered the land, the period of adverse possession would have to be recalculated from the date of re-entry, and any prior period would not count unless there was continuity.

113. On continuous and uninterrupted possession for 12 years which is the contentious issue, the Plaintiff must prove that his occupation was continuous and uninterrupted for at least 12 years immediately preceding the filing of the suit. The Defendant's evidence of a 1992 eviction and 1994 contempt proceedings, as well as disputes in 2014, 2015, and 2019, must be carefully analyzed to determine whether they constituted legal or factual interruption.

114. A Judgment in favour of the Defendant's mother in 1988, followed by a 1992 eviction order and its enforcement, constitutes a clear legal assertion of title and interruption of

possession. If the Plaintiff was physically removed from the land in 1992, any prior period of occupation is extinguished, and a new period would only begin if and when the Plaintiff re-entered the land without permission.

115. The year 1994 contempt proceedings indicate ongoing litigation and contestation of possession. If the Plaintiff was found in contempt for re-entering the land, this suggests that any subsequent occupation was in defiance of court orders, but it does not necessarily restart the clock for adverse possession unless the Plaintiff re-entered and maintained exclusive, open, and adverse possession for a further uninterrupted 12 years.

116. The disputes in the years 2014, 2015, and 2019, if they involved legal proceedings or physical attempts by the Defendant to recover possession, would constitute further interruptions. The courts have held that the institution of legal proceedings, service of eviction notices, or physical re-entry by the owner interrupts the running of time.

117. If the Plaintiff was evicted in the year 1992 and only re-entered (read trespassed) the land at a later date, the period of

adverse possession would begin from the date of re-entry, provided the occupation was adverse, open, exclusive, and uninterrupted. Any subsequent legal action by the Defendant within 12 years of re-entry would interrupt the period and prevent the Plaintiff from acquiring title by adverse possession.

118. Under Kenyan law, time for adverse possession begins to run only when the person against whom the claim is brought becomes the registered proprietor. If the Defendant or his predecessor was not the registered proprietor at the relevant time, time does not run. The Plaintiff must establish when the Defendant or his mother became registered proprietor of Plot No. 1298 Kinango 'A', as this determines when the statutory period could begin.

119. If the Plaintiff's initial occupation was as a purchaser, licensee, or with the consent of the Defendant or his predecessor, time for adverse possession does not begin to run until such permission is revoked and the Plaintiff's occupation becomes adverse. There is no evidence in the record that the Plaintiff's occupation was permissive or under a contractual

arrangement; rather, the Defendant's actions suggest that the Plaintiff was treated as a trespasser.

120. Kenyan courts have recognized that burials on land are strong evidence of intention to possess and continuity of occupation. However, if the Plaintiff was evicted and prevented from accessing the land, subsequent burials would not be possible, and the continuity of possession would be broken.

121. A prior judgment in favour of the Defendant's mother, followed by an eviction order and its enforcement, constitutes a legal interruption of possession. The Plaintiff cannot rely on any period of occupation prior to the eviction, and must establish a new, uninterrupted period of adverse possession thereafter.

122. The Plaintiff bears the burden of proving each element of adverse possession on a balance of probabilities. The Defendant's evidence of legal action, eviction, and ongoing disputes is sufficient to raise a prima facie case of interruption, shifting the evidential burden back to the Plaintiff to prove continuity and exclusivity of possession.

123. Legal interruption occurs when the owner files a suit for recovery of the land, obtains an eviction order, or otherwise

asserts his rights through legal proceedings. The courts have consistently held that the institution of a suit or enforcement of an eviction order stops time from running for adverse possession. Factual interruption occurs when the owner physically re-enters the land, retakes possession, or otherwise excludes the adverse possessor. Mere written notices or demands are insufficient; there must be a clear act of re-entry or legal action.

124. Where the owner interrupts possession by legal or factual means, any prior period of adverse possession is extinguished, and a new period can only begin if the claimant re-enters and maintains adverse possession for a further uninterrupted 12 years. Ugandan and Tanzanian courts have adopted similar principles, requiring that possession be non-permissive, exclusive, and uninterrupted, and that legal or factual assertion of title by the owner interrupts the running of time as seen in the case of ***“Nalwanga - Versus - Kizito (2015) UGHCL”***.

125. The Plaintiff’s claim is undermined by the evidence of legal interruption (1988 judgment, 1992 eviction) and factual interruption (physical removal from the land). Even if the

Plaintiff re-entered the land after the eviction, he would need to prove a further uninterrupted period of at least 12 years of adverse, exclusive, and open possession. The Defendant's evidence of subsequent disputes in 2014, 2015, and 2019 suggests that any such period was interrupted by legal action, preventing the accrual of the statutory period.

126. The Plaintiff must establish the date on which the Defendant or his predecessor became registered proprietor, as time for adverse possession runs only from that date. Official land records and title searches (e.g., via Ardhisasa or the local registry) are critical in determining the relevant dates.

127. Therefore, this Court finds that the Plaintiff, Harrison Mulewa Kaviti, has not met the legal threshold for adverse possession under Sections 7, 13, 17, 37, and 38 of the Limitation of Actions Act (Cap 22, Laws of Kenya) in relation to Plot No. 1298 Kinango 'A' Adjudication Section. The Plaintiff's occupation, while initially open and exclusive, was legally and factually interrupted by the 1988 judgment in favour of the Defendant's mother, the 1992 eviction, and the 1994 contempt proceedings.

128. Any subsequent occupation by the Plaintiff after the 1992 eviction would require a further uninterrupted period of at least 12 years of adverse possession, which is not established on the evidence, given the Defendant's legal actions in the 2014, 2015, and 2019. The Defendant's actions—obtaining a judgment, enforcing an eviction, and initiating further legal proceedings—constituted both legal and factual interruption of the Plaintiff's possession, thereby resetting or extinguishing any period of adverse possession.

129. The Plaintiff has not discharged the burden of proving continuous, exclusive, open, and adverse possession for the statutory period against the registered proprietor. Burials and permanent structures, while strong evidence of possession, do not suffice where the continuity and exclusivity of occupation are broken by legal or factual interruption.

130. Interestingly, the Learned Counsel for the Plaintiff has drawn the Court's attention into a very interesting jurisprudence and angle while struggling to defend his client. I assumed it was bordering on humanitarian aspect. The Learned Counsel's contention was for the Honourable Court to realize that the

livelihood of these innocent family of the Plaintiff depend on the ancestral land. That their ancestors lived there, and they had nowhere to go to. He invoked the provision of Article 26 of the Constitution of Kenya, 2010 which entitles every person has the right to life. According to the Learned Counsel, the Constitution guarantees everyone the enjoyment of right to life, which includes protection of one's means of livelihood, as stated in the case of:- **“Peter K. Waweru (Supra)**. Further, that the Defendants herein were seeking protection of the right to continue living in their ancestral land. The Defendants right to have a home or is a basic need which falls within the meaning of the right to life. While admitting though the Plaintiff's family herein never held titles to the land they were occupying, having lived there for all their lives and having established their homes there, they had an interest in the land which the court should protect. He asked the court to be guided by the decision of Justice P. Nyamweya in the case of **“Joseph Letuya (Supra)”** where the Court held:-

“.....that the right to life includes the right to livelihood and have relied on the definition of the right to life.....

131. While this Court find these arguments rather persuasive, and legally sound as a Constitutional issue. Unfortunately, in this case where the substratum of this case is of a claim for land Adverse possession, the argument is completely out of context. There is no third way onto it. This is not a Constitution Petition where the Plaintiff is seeking protection and enforcement of the Bill of Rights rights arising from the violation, threat or denial of his fundamental rights including Right to life under Article 26 on Right to Life. I dare say no more.

132. By and large, the Plaintiff's claim for adverse possession must fail. The Defendant's actions constituted effective legal and factual interruption, and the Plaintiff has not established the requisite period of continuous, exclusive, and adverse possession.

133. On the last question as to whether the Defendant's title has been extinguished by operation of law, the Honourable Court dares to state that for a registered owner's title to be extinguished, the claimant must demonstrate continuous,

open, exclusive, and uninterrupted occupation adverse to the owner's rights for at least 12 years.

134. The evidence demonstrates that the Plaintiff's occupation was interrupted by lawful eviction in the year 1992. Any re-entry thereafter amounted to trespass, not adverse possession. The contempt proceedings in the year 1994 and subsequent disputes in the years 2014 to 2019 further confirm that the Defendant and his family continued to assert ownership. The Defendant's mother had already obtained judgment confirming ownership, which negates the Plaintiff's claim of peaceful and exclusive possession. Therefore, the statutory period of 12 years was never satisfied in a manner adverse to the Defendant's rights.

135. The Conclusion and answer to whether the Defendant's title was extinguished by the operation of law is on the negative. The Defendant's title to Plot No. 1298 Kinango "A" Adjudication Section has not been extinguished by operation of law. The Plaintiff's occupation was interrupted by eviction, litigation, and repeated disputes, preventing the accrual of the statutory period required under the Limitation of Actions Act.

The Defendant remains the lawful proprietor of the suit property.

ISSUE NO. (b) Whether the Parties herein are entitled to the reliefs sought.

136. Under this heading, it is a rather straight forward issue. From the above analysis, the Plaintiff, Harrison Mulewa Kaviti, sought:

- a. Registration as proprietor of approximately 12 hectares comprised in Plot No. 1298 Kinango "A" Adjudication Section in place of the Defendant.**
- b. A permanent injunction restraining the Defendant, his servants, agents, or contractors from entering, demolishing structures, evicting, or otherwise interfering with the Plaintiff's occupation.**
- c. Costs of the suit.**

137. The Defendant, Julius Wambua Mdachi, sought:

- a. Dismissal of the Plaintiff's claim for adverse possession.**
- b. Confirmation of his title to Plot No. 1298 Kinango "A" Adjudication Section.**
- c. Costs of the suit.**
- d. Ancillary reliefs including recognition of damages caused by the Plaintiff (e.g., destruction of trees, unlawful burial, trespass).**

138. The Plaintiff's claim was premised on adverse possession. For adverse possession to succeed, the Plaintiff must prove continuous, open, exclusive, and uninterrupted occupation for

at least 12 years adverse to the registered owner's rights. The evidence showed interruptions: eviction in 1992, contempt proceedings in 1994, and subsequent disputes in 2014, 2015, and 2019. These interruptions broke the continuity of possession and negated the requirement of peaceful and uninterrupted occupation. Consequently, the Plaintiff did not meet the threshold for adverse possession under the provision of Sections 7, 13, 17, 37, and 38 of the Limitation of Actions Act. The Plaintiff is therefore not entitled to the reliefs sought.

139. The Defendant produced adequate empirical documentary evidence in form of Defendant Exhibit Numbers 1 to 7 confirming his mother's successful litigation in 1988, lawful eviction in 1992, and subsequent administrative recognition of his ownership. The Defendant consistently asserted ownership and defended his title. The Plaintiff's re-entry after eviction amounted to trespass and did not extinguish the Defendant's title. Accordingly, the Defendant's title remains valid and enforceable. The Defendant is entitled to dismissal of the Plaintiff's claim, confirmation of his ownership, and costs of the suit.

140. In conclusion, under this sub title, the Plaintiff is not entitled to registration as proprietor or to injunctive relief, as his claim of adverse possession fails. The Defendant is entitled to dismissal of the Plaintiff's claim, confirmation of his title to Plot No. 1298 Kinango "A" Adjudication Section, and costs. The Defendant may also pursue ancillary remedies for trespass and damages in appropriate proceedings.

ISSUE No. (c) Who will bear the costs of the Suit

141. It's now well established that the issue of Costs is at the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of Civil Procedure Act provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of "**Jasbir Rai Singh Rai - Versus Tarchalon Singh (2014) eKLR; and the Court RoseMary Wambui Munene - Versus - Ihururu Dairies Co - Operative Limited (2014) eKLR, Kenya Sugar Board - Versus - Ndungu Gathini (2013) eKLR; and Cecilia Nyayo - Versus Barclays Bank of Kenya Limited (2016) eKLR**" where Courts held that:-

“The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

142. In the instant case, the Plaintiff has not been successful in establishing his case, thus, I direct so for the costs of the suit to be borne by the Plaintiff.

VII. Conclusion and disposition

143. Ultimately, upon conducting such an elaborate analysis to the framed issues herein the Honorable Court concludes on preponderances of probabilities that the Plaintiff has not been able to establish the case against the Defendant. For avoidance of doubt, I specifically make the following orders: -

- a) THAT Judgement be and is hereby delivered dismissing the Plaintiff’s case while allowing it in favour of the Defendant in accordance to his Replying affidavit/Defence dated 8th November 2023.**
- b) THAT the Plaintiff’s claim for Land adverse possession over Plot No. 1298 Kinango “A” Adjudication Section be and is hereby dismissed.**
- c) THAT the Plaintiff be and is hereby found to have been a trespasser onto the Suit Property, Plot No. 1298 Kinango “A” Adjudication Section, from the date of his unlawful re-entry after eviction in 1992 to date.**

- d) **THAT** Defendant's title to the suit property be and is hereby confirmed and remains valid and with indefeasible title, rights and interest vested in him under the provision of Sections 24, 25 & 26 of the Land registration Act, No. 3 of 2012.
- e) **THAT** an order of Permanent Injunction do and is hereby issued restraining the Plaintiff, his family members, agents, or representatives from entering, occupying, cultivating, constructing, burying, or in any manner interfering with the Defendant's quiet possession of the suit property.
- f) **THAT** the Defendant be at liberty to pursue appropriate remedies in respect of trespass and damages occasioned by the Plaintiff's unlawful acts including destruction of trees and unauthorized burial, in separate proceedings if so advised.
- g) **THAT** the costs of this suit to be borne by the Plaintiff to be

IT IS ORDERED ACCORDINGLY.

**JUDGEMENT DELIVERED THROUGH MICRO - SOFT TEAMS
VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....
17TH DAY OF.....FEBRUARY..... 2026.**

.....
**HON. JUSTICE L.L. NAIKUNI
ENVIRONMENT & LAND COURT AT
KWALE**

Judgement delivered in the presence of:-

- a) Mr. Daniel Disi, the Court Assistant.
b) Mr. Paul Magolo Advocate for the Plaintiff.
c) M/s. Kimani Advocate for the Defendant.

Judge's Copy