



REPUBLIC OF KENYA



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**Durahard Limited v Mbarak & 3 others (Environment and Land Case
E043 of 2023) [2026] KEELC 1144 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 1144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E043 OF 2023**

YM ANGIMA, J

FEBRUARY 26, 2026

BETWEEN

DURAHARD LIMITED PLAINTIFF

AND

SALIM MBARAK 1ST DEFENDANT

ABDALLA MAGRAM 2ND DEFENDANT

MOHAMED FAHIYE 3RD DEFENDANT

SALIM MBARAK 4TH DEFENDANT

JUDGMENT

A. Plaintiff's claim

1. By a plaint dated 11.05.2023 the plaintiff sued the defendants seeking the following reliefs;
 - a. A declaration that the plaintiff is the registered and absolute owner of the suit property known as plot No. 1241/I/MN.
 - b. A permanent injunction to issue against the defendants/respondents either by themselves, their employees, servants and/or agents, from preventing the plaintiff from constructing a perimeter wall on the suit property.
 - c. The plaintiff be granted vacant possession of the suit property by the eviction of the defendants from the suit property known as Plot No. 1241/I/MN.
 - d. Any other relief and/or remedy the court will find just, fit and expedient to grant in the circumstances of this case.
 - e. Costs of this suit.



2. The plaintiff pleaded that at all material times it was the registered proprietor of Plot No.1241/I/MN (the suit property). The plaintiff pleaded that when it purchased the suit property in 1997 the defendants were already in occupation as tenants who had houses without land but had refused to pay any rent since 1997.
3. It was the plaintiff's case that in violation of its proprietary rights over the suit property the defendants had, inter alia, constructed additional structures, opened an access road through the suit property and invited third parties to build additional structures thereon.
4. It was the plaintiff's pleading that the defendants were trespassers on the suit property and that they had refused to vacate despite issuance of a demand and notice of intention to sue, thereby rendering the instant suit necessary.

B. Defendants' response

5. The record shows that only the 2nd and 4th defendants filed a response to the suit. They filed a defence and counter-claim dated 14.07.2025.
6. By their defence, the 2nd and 4th defendants (the defendants) pleaded that the plaintiff's claim was statute barred under the *Limitation of Actions Act* (Cap 22). They also pleaded that they had been in continuous, exclusive and uninterrupted possession of the suit property for such a long period of time as to be entitled to adverse possession of the portions occupied.
7. The defendants further pleaded that the plaintiff's claim was the subject of previous proceedings in Mombasa ELC No. 128 of 2010 in which its counter-claim was struck out. It was also pleaded upon the striking out of the said counter-claim the plaintiff had filed a notice of appeal in respect thereof which was still active.
8. By their counterclaim, the defendants reiterated the contents of the defence and pleaded that they had acquired adverse possession of the portions of the suit property in their occupation under the provisions of the *Limitation of Actions Act* (Cap 22). As a result, they prayed for dismissal of the plaintiff's claim and for an order vesting upon them the portions of the suit property in their occupation pursuant to Section 38 (1) of the Limitations of Actions Act.

C. Plaintiff's rejoinder

9. The plaintiff filed a reply to defence and defence to counter-claim dated 28.07.2025. By its reply, it joined issue with the defendants upon their defence. The plaintiff maintained that it was the registered owner of the suit property and that the previous suit was no bar to the instant suit for recovery of the property. It was pleaded that the defendants' occupation was not exclusive, uninterrupted or peaceful.
10. By its defence to counter-claim, the plaintiff denied all the factual allegations in support of the claim for adverse possession. It was pleaded that the defendants had not satisfied the legal ingredients of adverse possession. It was further pleaded that the defendants had at all material times acknowledged the plaintiff's title to the suit property.

D. Trial of the action

11. At the trial hereof the plaintiff called one witness, Mukesh Chandra Shah, and closed its case. He adopted the contents of his witness statement dated 16.09.2025 as his evidence in chief and produced the documents in the plaintiff's list of documents as exhibits. The gist of the plaintiff's evidence was that it was the registered owner of the suit property hence entitled to immediate possession and enjoyment thereof.



12. The 2nd and 4th defendants testified at the trial on their own behalf. They adopted the contents of their respective witness statements as their evidence and produced the documents in their list of documents as exhibits. Their case was that they had been in open, continuous, exclusive and interrupted possession of portions of the suit property hence they have become entitled thereto on account of the doctrine of adverse possession.

E. Directions on submissions

13. Upon conclusion of the hearing the parties were granted timelines within which to file and exchange their respective written submissions. The record shows that the plaintiff filed submissions dated 17.12.2025 whereas the defendants filed submissions dated 17.01.2026.

F. Issues for determination

14. The court has perused the pleadings, evidence and documents on record. The court is of the view that the key issues for determination herein are the following;
- a. Whether the plaintiff had proved its claim against the defendants.
 - b. Whether the defendants have proved their counter-claim against the plaintiff.
 - c. Whether the plaintiff is entitled to the reliefs sought in the suit.
 - d. Whether the defendants are entitled to their reliefs sought in the counter-claim.
 - e. Who shall bear costs of the action.

G. Analysis and determination

Whether the plaintiff has proved its claim against the defendants

15. The court has considered the material and submissions on record on this issue. Whereas the plaintiff submitted that it had proved its claim against the defendants the latter submitted that the plaintiff's claim was time-barred under Section 7 of the *Limitation of Actions Act*. There is no doubt from the material on record that the plaintiff is the registered proprietor of the suit property. It produced a certificate of title to demonstrate its ownership. In fact, the defendants did not seriously contest the plaintiff's ownership. They did not claim to be the legitimate owners of the suit property. Their defence was that the plaintiff's action for recovery of the property was time-barred.
16. The court takes the view that a registered proprietor would ordinarily be entitled to immediate possession and enjoyment of his property unless his right to recovery is statute-barred or on account of some lawful justification or excuse. In this case, the defendants pleaded that the plaintiff's action for recovery of the suit property was statute barred under Section 7 of *Limitation of Actions Act*. The said Section stipulates as follows;
- “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.”
17. According to the plaintiff's pleadings and evidence at the trial, it bought the suit property in 1997 while the defendants were still in occupation as owners of houses without land. It was the plaintiff's evidence that the defendants have never paid any rent since 1997 and that they had ignored notices to vacate the suit property. In fact, the plaintiff considered the defendants to be trespassers on the suit property.



18. The court is of the view that at the earliest the plaintiff's cause of action to possession of the suit property occurred in 1997 when it bought the property. The court is not satisfied that there was any lease or tenancy relationship among the parties either in 1997 or at any given time afterwards. It is, therefore, the opinion of the court that the limitation period expired in 2009 or thereabouts hence by the time the plaintiff filed the instant suit its right of action had already been extinguished by operation of law.

Whether the defendants have proved their counter-claim against the plaintiff

19. The 2nd and 4th defendants pleaded and testified that they had been in open, continuous, exclusive and uninterrupted possession and occupation of certain portions of the suit property in consequence whereof they were entitled to adverse possession thereof. They produced a copy of a surveyor's report which identified the portions they were occupying. The defendants denied that they were the plaintiff's tenants or lessees stating that they were not even aware of the plaintiff's existence until 2010 when it filed the earlier suit referred to in the pleadings.

20. In its plaint, the plaintiff pleaded that the defendants had violated its property rights by inter alia, erecting additional structures; allowing an access road through the property; and inviting third parties to occupy and erect structures thereon without its knowledge and consent. It would appear that the plaintiff has previously made some efforts to evict the defendants from the suit property without success.

21. The elements of adverse possession were summarized in the case of *Kasuve vs Mwaani Investments Ltd & 4 Others* [2004] 1 KLR 184 as follows;

“...and 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 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”

22. Similarly, in the case of *Chevron (K) Limited –vs- Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

23. There is no dispute that the 2nd and 4th defendants entered the suit property before the plaintiff purchased the same in 1997. There is no dispute that they have been in open, continuous and exclusive possession of the portions they occupy. The court is satisfied that they have been in occupation without



- the consent of the plaintiff and that the plaintiff's efforts to have them vacate over the years did not bear fruit.
24. The court is of the view that by erecting additional structures; creating an access road; and inviting third parties to build and occupy portions of the suit property the 2nd and 4th defendants' actions were clearly inconsistent with the plaintiff's title and the purpose for which it intended to use the suit property. There was a demonstration of animus possidendi by their conduct. They also refused to recognize the plaintiff's title by refusing to pay any rent or rates since 1997.
25. The plaintiff submitted that the defendants' occupation was not without interruption since there is a time they were issued with notices to vacate by auctioneers and the defunct Municipal Council of Mombasa. It has been held that a trespasser's possession is deemed to have been interrupted only where the owner makes a peaceful and effective entry into the property or where he initiates legal proceedings to vindicate his property rights.
26. In the case of *Githu vs Ndeete* [1984] KLR 776 at page 780. It was held, inter alia, that;
- “...time ceased to run under the *Limitation of Actions Act* either when the owner asserts his rights 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; se *Chesire's Modern Law of Real Property*, 11th Edition at page 894. In my view, the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.....”
27. The court is thus satisfied that the 2nd and 4th defendants have adequately demonstrated the elements of adverse possession and that their possession was not legally interrupted before expiry of the limitation period. In his plaint, the plaintiff made reference to *Mombasa ELC No.121 of 2020- Juma Khamis & Others vs Mukesh Shah & Others*. However, there was no demonstration that the plaintiff was a party thereto and in what capacity it participated in the proceedings.
28. The pleadings in that suit were not produced by the parties and neither was the final result of the action. It was not even clear if the plaintiff had filed a counter-claim in the suit and, if so, how it ultimately determined. As indicated before, the plaintiff's right of action expired in 2009 hence any claim or counter-claim filed thereafter would be statute barred. As a result, the court is satisfied that the 2nd and 4th defendants have proved their counter-claim for adverse possession in respect of the portions they occupy as depicted in the surveyor's report dated 14.11.2024.

Whether the plaintiff is entitled to the reliefs sought in the suit

29. The court has found that although the plaintiff is the registered owner of the suit property it's right to sue for recovery of the portions occupied by the defendants is statute barred under Section 7 of the *Limitation of Actions Act*. As such, the plaintiff is not entitled to the reliefs sought in the suit, or any one of them.

Whether the defendants are entitled to the reliefs sought in the counter-claim

30. The court has found and held that the 2nd and 4th defendants have demonstrated their counter-claim for adverse possession. The court is thus of the view that they are entitled to some relief. However, they did not in their counter-claim give particulars of the size or acreage of land they wanted to be vested in them. They simply relied upon the surveyor's report for that purpose. They did not specifically seek to be registered as proprietors of the portions they occupy. The report shows that the 2nd defendant occupies approximately 0.1666ha whereas the 4th defendant occupies about 0.134 ha.



31. The defendants have, however referred, the court to the Court of Appeal decision in Gulam Maria Noordin vs Charo Karisa [2015] eKLR whereby the court held as follows;

“24 When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent’s occupation of the suit property was adverse to that of the appellant; and that the latter’s title was so extinguished. By Section 3(2) of *Appellate Jurisdiction Act* we order the appellant do transfer the suit property to the respondent at the latter’s expense within 30 days from the date hereof failing which the Deputy Registrar, High Court, Malindi will execute on behalf of the appellant all the necessary transfer documents.”

32. The court is satisfied that the 2nd and 4th defendants are not disentitled from appropriate remedies on account of inelegant drafting of their counter-claim. The court is still empowered to grant the appropriate remedies which naturally flow from the success of their counter-claim. As a result, the court is inclined to grant them the relevant declaration and order for their registration as proprietors of the respective portions they occupy.

Who shall bear the costs of the action

33. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. Although the plaintiff has failed to prove its claim against the defendants and although the 2nd and 4th defendants have succeeded in their counter-claim, the court is of the view that each party should bear their own costs of the action. The defendants have occupied and enjoyed the plaintiff’s property for very many years free of charge. They should forgo their costs of the action.

H. Conclusion and disposal orders

34. The upshot of the foregoing is that the court finds and holds that the plaintiff has failed to prove its claim against the 2nd and 4th defendants. The court also finds and holds that the latter have adequately proved their counter-claim for adverse possession. As a consequence, the court makes the following orders for disposal of the suit and the counter-claim;

- a. The plaintiff’s suit against all the defendants is hereby dismissed.
- b. The 2nd and 4th defendants counter-claim is hereby allowed in the following terms;
 - i. A declaration be and is hereby made that the 2nd defendant has become entitled to be registered as proprietor of a portion of 0.16688ha out of the Plot No. 1241/I/MN in his occupation on account of the doctrine of adverse possession.
 - ii. A declaration be and is hereby made that the 4th defendant is entitled to be registered as proprietor of the portion of 0.1314ha out of plot No. 1241/I/MN in his occupation on account of the doctrine of adverse possession.
 - iii. The land registrar, Mombasa shall cause the 2nd defendant to be registered as proprietor of the portion of 0.16688 ha out of plot No. 1241/I/MN.



- iv. The land registrar, Mombasa shall cause the 4th defendant to be registered as proprietor of the portion of 0.1314 ha out of plot No. 1241/I/MN.
- c. Each party shall bear its own costs of both the suit and counter-claim.

It is so decided.

JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 26TH DAY OF FEBRUARY, 2026.

.....

Y. M. ANGIMA

JUDGE

In the presence

Gillian Court Assistant

Mr. Bunde for the plaintiff

Mr. Mwakisha for 2nd and 4th defendants

No appearance for the 1st and 3rd defendants

