

REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CIVIL SUIT NO. E036 OF 2022

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP
22 LAWS OF KENYA**

AND

**IN THE MATTER OF: TITLE NUMBER C.R: 2006 PLOT NO.
MN/II/80**

BETWEEN

BLYTHON TOLE MWASI

KASHAM MWAMBI MUGANGA

CHRISTOPHER MUTUCHI LUTIEL

MWANAISHA HASSAN INGAKULE

SALIM SEIF SALIM

EVANS CHIMBERO CHILUMO

GILBERT KUCHACHA MUNGA

ALFRED MALIDZO MWARUWA

MWANAJUMA SAID SALIMU

DAVID MWANYONYO GARI

JAMES MWANGUDZA BULUSHI

YUSUF MZEE BAYA

SAMUEL MWANGI KIBE

RADHIA HASSAN AHMED

MWASAHA BANDA KAYI.....PLAINTIFFS

- VERSUS -

SHEHA KHAMISI SALIM

HASSAN ABDALLA

SAID.....DEFENDANTS

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to the Civil Suit instituted by *Blython Tole Mwasi, Kasham Mwambi Muganga, Christopher Mutuchi Lutiel, Mwanaisha Hassan Ingakule, Salim Seif Salim, Evans Chimbero Chilumo, Gilbert Kuchacha Munga, Alfred Malidzo Mwaruwa, Mwanajuma Said Salimu, David Mwanyonyo Gari, James Mwangudza Bulushi, Yusuf Mzee Baya, Samuel Mwangi Kibe, Radhia Hassan Ahmed, and Mwasaha Banda Kayi*, the Plaintiffs/Applicants herein, against *Sheha Khamisi Salim and Hassan Abdalla Said*, the Defendants/Respondents herein. It was by way of an Originating Summons dated 6th April 2022 filed in Court and amended on 18th March, 2024. 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. Upon effecting service, the 1st and 2nd Defendants opposed the claim through a Replying Affidavit sworn on 5th May 2022, annexures thereto, and written submissions filed in compliance with the provisions of Order 11 of the Civil Procedure Rules, 2010. The Defendants maintain that the suit property is consecrated as Wakf land, that the Plaintiffs are

mere tenants in arrears of rent, and that the land adverse possession could not accrue against Wakf property.

II. Court Directions before Hearing

3. Upon perusal of the pleadings and interlocutory applications, this Honourable Court directed that the Plaintiffs/Applicants be granted leave of fourteen (14) days to file and serve the Amended Originating Summons dated 6th April 2022, together with two additional witness statements and a supplementary list of documents in support of their case.
4. The Defendants/Respondents were correspondingly granted fourteen (14) days to file and serve any further documents arising from the Amended Originating Summons.
5. The Court further ordered that the matter be mentioned on 27th May 2024 for purposes of confirming compliance with the filing directions and thereafter fixed for full hearing on 3rd July 2024. The Plaintiffs were directed to pay Court adjournment fees of Kenya Shillings Three Thousand (Kshs. 3,000/-) before the next mention date.
6. Upon compliance with pre-trial directions under Order 11 of the Civil Procedure Rules, the matter proceeded to hearing on 3rd July 2025. The Plaintiffs testified and called witnesses in support of their claim, while the Defendants similarly testified and produced documents in opposition on 13th November, 2024.

III. The Plaintiff's Case

7. From the filed pleadings the Plaintiffs claimed the entire TITLE NUMBER C.R:2006 PLOT NO.MN/II/80 (Hereinafter referred to

as “The Suit Land”). By this summons Plaintiffs claims the following orders:-

a. A declaration that the Plaintiffs are the rightful owners of Title No. C.R 2006 Plot No.MN/II/80, measuring approximately 5.50 Acres issued that they presently occupy having obviated the same by way of adverse possession;

b. An order directing the Land Registrar, Mombasa to cancel and or extinguish Defendants ownership registration and issue Title on register Title No. C.R 2006 Plot No. MN/II/80 in the name of the Plaintiffs.

c. That the Honourable Court be pleased to direct that the order herein shall be an instrument of transfer of ownership of Title No. C.R 2006 Plot No. MN/II/80 from the Defendant to the Plaintiff.

d. A permanent injunction restraining the 1st and 2nd Defendants, whether by themselves, their servants, agents, employees, and /or anyone acting on their authority, from entering, interfering with the Applicants quiet possession and enjoyment, occupation and possession otherwise dealing, entering, remaining, trespassing or any other manner interfering with all that parcel of land known as TITLE NUMBER C.R:2006PLOT NO.MN/II/80 in any manner whatsoever.

e. Any order of costs and other incidentals to this suit.

8. The summons were supported by the 15 Paragraphed supporting Affidavit of Blython Tole, the 1st Plaintiff herein in the authority of the 2nd to the 15th Plaintiffs sworn on the same day; wherein the Affiant averred that:-

(a) he was the 1st Plaintiff herein and thus had authority to swear the affidavit, having been authorized by the 2nd to 15th Plaintiffs on their behalf and on his own to bring the

suit on adverse possession against the Defendants, who were the registered owners of the suit property by transmission. He annexed a copy of the authority marked as "BTM-1."

- (b) he came into occupation of all that parcel of land known as Title No. C.R. 2006 Plot No. MN/II/80, measuring approximately 5.50 acres, about forty (40) years ago, and during that time maintained peaceful, open, and continuous possession of the suit property to the exclusion of the Defendants at all material times. He annexed photographs showing the residential houses marked "BTM-2."
- (c) his entry and/or existence on the suit parcel was at all times peaceful, open, and devoid of the registered owners' permission and/or consent, and that the subsequent occupation and possession had for over twelve (12) years been continuous, public, hostile, and adverse to the registered owner.
- (d) since occupation he had continually resided on and possessed the suit property together with his family.
- (e) in the course of his effective occupation and control, he made extensive developments, built permanent houses, and established homes which demonstrated intention to possess (*animus possidendi*) the property to the exclusion of the Defendants.
- (f) ultimately the true position obtaining on the suit premises was that his entire family, children, and grandchildren had been residing and/or living on the suit premises, being Title No. C.R. 2006 Plot No. MN/II/80, and had lived and/or stayed peacefully on the suit premises for over twelve (12) years, during which permanent residences and/or homes were established.
- (g) he was aware that the registered owners of the suit property were the Defendants, Sheha Khamisi Salim and Hassan Abdalla Said, by transmission. He annexed a copy of a postal search/certificate of title marked as "BTM-3."

- (h) he had been advised by his advocate, which advice he verily believed to be true, that time started running in his favour from the year 1999 when the cause of action arose. At that time, he stopped paying ground rent, which event was hostile and adverse against the Defendants' title. He and the other Plaintiffs did not vacate the suit property and had since the year 1999 been in continuous, open, uninterrupted possession and occupation of the suit property to the exclusion of the Defendants.
- (i) his occupation had not been subject to any objection or dispute. Notably, the Defendants acquiesced to the state of affairs, which demonstrated cessation of his permissive possession in the year 1999. From that year, time started running in his favour and was not barred in any way by the registered owners.
- (j) he had been advised by his advocate, which advice he verily believed to be true, that the summons were taken pursuant to the provision Section 38(1) of the Limitation of Actions Act, Cap. 22, to pray for this Honourable Court to declare him and the other Plaintiffs the rightful owners of the suit property by prescription.
- (k) he prayed for this Honourable Court to make the following orders:
- i) A declaration that the Plaintiffs were the rightful owners of Title No. C.R. 2006 Plot No. MN/II/80, measuring approximately 5.50 acres, having acquired the same by way of adverse possession.
 - ii) An order directing the Land Registrar, Mombasa, to cancel and/or extinguish the Defendants' ownership registration and issue title in the Plaintiffs' names.
 - iii) That the Honourable Court be pleased to direct that the order herein shall be an instrument of transfer of ownership of Title No. C.R. 2006 Plot No. MN/II/80 from the Defendants to the Plaintiffs.
 - iv) A permanent injunction restraining the Defendants, whether by themselves, their servants, agents,

employees, and/or anyone acting on their authority, from interfering with the Plaintiffs' quiet possession and enjoyment of the suit property.

v) Any order of costs and other incidentals to the suit.

(l) he was aware the Defendants would suffer no prejudice if the Honourable Court granted the orders sought.

(m) he was also aware the cause of action arose in Mombasa within the jurisdiction of this Court.

(n) he made the affidavit in support of the application herein.

9. The Plaintiffs responded to the Replying Affidavit by the Defendants through a 15 paragraphed affidavit sworn by Blython Tole Mwasi who averred that:-

a. he was the 1st Plaintiff herein and thus had authority to swear the affidavit, having been authorized by the 2nd to 15th Plaintiffs on their behalf and on his own. He stated that he was well versed with the facts and issues herein, hence competent to swear the affidavit.

b. he had read and understood, and where necessary had his advocate explain, the contents of the Replying Affidavit dated 5th May 2022 filed by the Defendants, Sheha Khamis Salim and Hassan Abdalla Said, together with the annexures thereto, and wished to respond accordingly.

c. in response to Paragraphs 3 and 4 of the Defendants' affidavit, that the Defendants' property did not qualify as Wakf property as it was tainted with irregularities. He stated that:

a) The suit property was not registered with the Wakf Commissioners under Cap 109 and therefore did not constitute Wakf. Failure to register per the law rendered the Wakf invalid.

b) All Wakf properties were collated in the Attorney General's Task Force Report dated 1st May 2017, and the suit property was not among the registered Wakfs. He annexed the report marked as "BTM - 1."

- c) The Wakf Commissioners Act, Cap. 109, came into effect on 8th June 1951, yet the alleged Wakf Deed was registered in July 1954, outside the statutory period.
- d) The Act required mandatory registration of all Wakf under provision of Section 10 (1), which was not complied with.
- e) All Wakf, whether private or public, had to be administered under the provision of Cap. 109.
- f) Sections 3 and 10 required registration within two months after execution, which was not done, rendering the Wakf invalid and void ab initio.
- g) The non - registration of the suit property was open to question.
- d. The Lands Office did not administer or manage Wakf properties and was not the statutory repository of Wakf records. Only the Wakf Commissioners could verify registration, and they confirmed that Plot No. CR 2006/80 Section II/MN was not registered with them.
- e. The failure to register the property as required under the provision of Cap. 109 was an erratic calculation to avoid taxation, amounting to a criminal offence under the provision of Section 10 of Cap. 109.
- f. the Defendants could not claim protection under the Wakf Commissioners Act when they themselves had failed to register the property as such.
- g. as a result of these omissions, adverse possession could accrue since the parcel was effectively deconsecrated for Wakf use.
- h. in response to Paragraph 6 of the Defendants' affidavit, that the Plaintiffs were tenants at will before the year 1999. They stopped paying rent around 1999, thereby determining the tenancy. The Defendants' cause of action to repossess the land and claim arrears arose but was not pursued within the statutory period. The Plaintiffs' cause of action in adverse possession arose upon determination of the tenancy and time began to run uninterrupted until completion of the twelve (12) year limitation period.

- i. in response to Paragraph 7, that during their subsistence on the suit property, the Plaintiffs made extensive developments, including operating businesses and collecting rents. He annexed receipts marked as "BTM - 1."
 - j. in response to Paragraph 8, that being owners by adverse possession, the claim of rent arrears of more than 23 years was not only doubtful but illegal. He stated that under the Limitation of Actions Act, a cause of action to recover rent dies after six (6) years, hence the Defendants were time-barred from distress.
 - k. in response to Paragraph 9, that the Plaintiffs had since 1999 been in continuous, open, and uninterrupted occupation and possession of the suit property, and had even acted as landlords to other tenants, thereby demonstrating effective occupation exclusive of the registered owners.
 - l. upon completion of the open, notorious, and uninterrupted twelve (12) year period, the Plaintiffs became owners by way of adverse possession.
 - m. he had been advised by his advocate, which advice he believed to be true, that upon completion of the statutory period, the Plaintiffs were essentially owners and any dealings thereafter were subject to overriding interests.
 - n. anyone who satisfied the elements of adverse possession could move the Court to vindicate his rights to proprietorship, and the Plaintiffs had done so herein.
10. The Plaintiffs filed a 15th Paragraphed Supplementary Affidavit sworn by Blython Tole Mwasi, who deponed that:-
- i. he was the Plaintiff herein and thus had authority to swear the affidavit, having been authorized by fifteen (15) Plaintiffs on their behalf and on his own. He stated that he was well versed with the facts and issues herein, hence competent to swear the affidavit.
 - ii. he had been advised by his advocate, which advice he held to be true, that the suit property was not Wakf

within the meaning of the Wakf Commissioners Act for the following reasons:

- a. The Wakf Commissioners Act, Cap. 109, came into effect on 8th June 1951, yet the alleged Wakf deed was registered by the settler on 19th July 1954 and entered in the Land Registry on 17th August 1954.
 - b. The impugned Wakf fell squarely under the dictates of Cap. 109, which required mandatory registration of all Wakf under Section 10(1).
 - c. All Wakf, whether private or public, had to be administered under Cap. 109.
 - d. Sections 3 and 10 required registration within two months after execution, which was not done, rendering the Wakf invalid and void ab initio.
 - e. The fact of non-registration of the suit property under Cap 109 was not open to question.
- iii. he had been advised by his advocate, whose advice he believed to be true, that the suit property was not registered with the Wakf Commissioners under Cap. 109 and therefore did not constitute Wakf. Failure to register per the law rendered the Wakf invalid.
 - iv. all Wakf properties were collated in the Attorney General's Task Force Report dated 1st May 2017, and the suit property was not among the registered Wakfs. He annexed the report marked as "BTM - 1."
 - v. he had been advised by his advocate, which advice he believed to be true, that the Lands Office did not administer or manage Wakf properties and was not the statutory repository of Wakf records. Only the Wakf Commissioners could verify registration under Section 10 of Cap. 109.
 - vi. one of the Plaintiffs had requested confirmation from the Wakf Commissioners, who through their secretariat confirmed that Plot No. CR 2006/80 Section II/MN was not registered with them. He annexed a letter dated 30th May 2019 marked as "BTM - 2."
 - vii. alongside the other Plaintiffs, had developed permanent residences and operational kiosks, and had dwelt on the

suit property for a period in excess of twelve (12) years. They stopped paying ground rent around the year 1999, which act was adverse and hostile to the Defendants' title, and continued to stay openly and notoriously without interference since then.

- viii. later in September 2021, the Defendants clandestinely procured the services of Sure Auctioneers, sought to distress movable goods from the Plaintiffs' parcel of land, and even advertised for sale of a Swahili house with seven rooms in a daily newspaper of wide circulation. He annexed the advertisement marked as "BTM - 3."
- ix. upon completion of the open, notorious, and uninterrupted twelve (12) year period, he was in principle an owner by way of adverse possession. He demonstrated this by having tenants at the exclusion of the registered owners. He annexed rent receipts marked as "BTM - 4."
- x. the Defendants had already invited Airtel Corporation to install fibre and network towers on the property despite interim court orders and pendency of the application. He annexed photographs marked as "BTM - 5."
- xi. he had been advised by his advocate, which advice he believed to be true, that upon completion of the mandatory twelve (12) year limitation period for adverse possession, the Plaintiffs were essentially owners and any dealings thereafter were subject to overriding interests.
- xii. the Defendants, having failed to register the property under Cap. 109, were estopped from claiming privileges under the provision of Section 10 of the Act.
- xiii. he had been advised by his advocate, which advice he believed to be true, that the Defendants were statutorily time-barred from distressing for rent after six (6) years under the provision of Section 8 of the Limitation of Actions Act, Cap. 22. Having lost their right to distress, any such exercise was wrongful and illegal from the onset.

- xiv. besides extensive development, the Plaintiffs had begun renting out premises to their own tenants, which act was hostile to the registered owners' title. He annexed receipts of rent payments marked as "BTM - 6."
11. The Plaintiff's advocate Mr. Nyanje Advocate had the following opening remarks on 3rd July, 2025: -

A. Opening Remarks by Counsel to the Plaintiff

12. It was stated that the case concerned of Land Adverse Possession and the cause of action was against the 1st and 2nd Defendants who were the registered owners to the suit property.
13. The Counsel informed Court that the Plaintiffs entered and occupied the parcel over 40 years ago in the years 1980, 1999 and 2001 and had stopped paying ground rent, which acts as adverse to the owner from the year 1999, it was noted that they occupied the land uninterruptedly and that time started running from the year 1999 and 2001 for time of the Plaintiff and went on for 12 years ending in 2013, hence from the year 2014 the land became the property for the Plaintiffs and that the Defendants were only holding it as Trustee.
14. The attention of Honourable Court was brought to the fact that the Plaintiff had developed the land with permanent structures with their family. They held that it was formed as WAKF property. It was held that the Plaintiff would demonstrate had never been registered as such under WAKF Commission. It was stated that the Plaintiff had written a letter to WAKF Commission of whether the property formed

part of the WAKF Commission and the response was that the property was not part of WAKF Commission.

15. However, surprisingly the Defendants wrote a letter to WAKF Commission and the status had changed and that the property was under the WAKF Commission. It was stated that they would be seeking to summon the Officers to appear in Court to adduce evidence and would be seeking for the reliefs as sought from the pleadings.
16. The Plaintiffs called their first witness on 3rd July, 2024 who testified as follows:-

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

17. PW - 1 testified and sworn in Swahili language. He was called BLYHTON TOLE MWASI, a citizen of Kenya and holder of the national identity bearing all the particulars as shown to Court. He was born in the year 1945 in Taita District and indicated that he resided at Makande and had previously been a primary school teacher. He indicated that on 15th March, 2024 he had recorded a Witness Statement and filed 15 documents which were adopted as Plaintiffs' Exhibit No. 1 to 15.
18. PW - 1 explained that he had entered the land at Kisauni in 1976 and constructed a house. He further stated that he wanted to live there but he could not get a title deed hence left the property to the tenants as he continued living at Makande. He indicated that he stopped paying ground rent in 1999 and had never been interrupted thereafter by the tenants who were occupying the house. He urged Court to

give him a title deed where his house semi- permanent house stood.

C. Cross Examination of PW - 1 Mr. Hassan Advocate.

19. PW - 1 confirmed that he got to the land in year 1976 and stopped paying ground rent in the year 1999 . He indicated that the owner of the land had agreed to sell the land to him initially at Kshs. 50/- later for Kshs. 1,800/- He clarified that despite not being on lease he was compelled to be paying ground rent from the years 1976 to 1999. He explained that he refused to be paying the ground rent because he saw he was getting at a loss and the Government indicated they never recognized him and had no title or documents to show that the property was registered in his name.
20. PW - 1 added that after constructing the structure from the years 1976 to 1977 he lived there then he left it to the tenants. He mentioned that he represented the other Plaintiffs. He stated that he knew Mr. Kasham Mwamba Muganga, the 2nd Plaintiff but did not know when the others got to the suit land nor when they stopped paying ground rent. He confirmed that his house had ten (10) rooms but he was unaware of its size.

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

21. PW - 1 reiterated that he bought the land for a Purchase Price of a sum of Kenya Shillings One Thousand Eight Hundred (Kshs. 1,800/-) but had continued paying ground rent even after payment. He indicated that despite of all this he never got land registered in his name and that the 10 rooms were used for rental purposes.

22. The Plaintiffs through a hybrid virtual session called PW - 2 who testified as follows: -

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

23. PW - 2 was sworn and testified in Kiswahili language. She was called MWANAISHA HASSAN INGAKULE, a citizen of Kenya and holder of the national identity card bearing the particulars as shown to Court. She was born in the year 1953 and the place of issue of the ID was in Kwale. She indicated that on 13th July, 2023 she recorded her Witness Statement and adopted it as her evidence in chief.

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

24. PW - 2 explained that she started living on the land in year 1979 with her husband. She got onto the land with permission by the deceased Abdalla Hassan. She clarified that the deceased was the father of the 2nd Defendant and the husband to the 1st Defendant.

25. She further stated that the deceased was the one who permitted her husband and herself to construct structure on the land. She explained that they got there as the tenants and they used to pay the ground rents but later stopped after a long period of occupation. She emphasized that they stopped paying the ground rents as they had been there for a long time believing to that after twelve (12) years one would be allocated the land. She acknowledged hearing this from media other people. She indicated that they stopped paying rent in year 2019.

26. PW - 2 admitted that the land did not belong to her and that she had not purchased it and was unsure whether her husband had. She confirmed she still resided there with six (6) tenants paying a sum of Kenya Shillings One Thousand Five Hundred (Kshs. 1,500/-) per month while ground rent had been Kshs. 250/-. She indicated willingness to comply if ordered to pay rent.

C. Re - examination of PW - 2 by Mr. Nyanje Advocate.

27. PW - 2 clarified that she got onto the land in the year 1973 and stopped paying ground rent in August 2001 (Referred to 3rd Paragraph of her Statement). She also stated that she had no involvement in the relationship between the deceased and 1st and 2nd Defendants and therefore would not know what they had agreed.

28. The Plaintiffs called PW - 3 who testified Virtually that:

A. Examination in chief of PW - 3 by Mr. Nyange

Advocate:-

29. PW - 3 testified on oath in Swahili language. He was called SAMUEL MWANGI KIBE, a citizen of Kenya and holder of the national identity card bearing the particulars as shown to Court during the hearing. He was born in the year 1953. He indicated that on 13th July, 2023 he recorded his Witness Statement and requested for the same to be adopt.

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

30. PW - 3 explained that he entered to the land in the year 1980 with permission by mzee Dalla. He stated that he came to know their relationship later and clarified that he got on the land as a tenant and indicated that he used to pay ground

rent. Mzee allowed/ gave him permission to construct a permanent structure and stopped paying rent in the year 1999.

31. PW - 3 indicated that from there onwards there was no one to pay the ground rent. He expressed his unwillingness to pay rent currently due to the lapse of time but acknowledged that the land did not belong to him and that he sought allocation. Further he explained that if he was to be told to pay rent he would have a problem as he wanted to be allocated the title. He stated that there are tenants there and his children collected the rent. He said that there is his child who lives there. He stated that he do not live there anymore. He used to pay Kenya Shillings two Hundred (Kshs. 200/-) per month but it went up to Kenya Shillings Three Hundred (Kshs. 300/-).
32. The Plaintiff closed their case through the Counsel Mr. Nyanje Advocate on 13th November, 2024 however, he noted that he had 3 Plaintiffs who had jumped bail and decided to act in person. One of them was present but stated that two (2) Plaintiffs were away for being unwell.
33. The Court invoking the Provision of Section 173 (i) of the Evidence Act Cap 80 of Laws of Kenya proceeded to seek information from out of the person who were Plaintiffs in the case but decided to act in person pursuant to the provision of Order 9 Rule 8 of the Civil Procedure Rules, 2010.

A. Examination in Chief of PW - 4 who was acting in person:-

34. PW - 4 was sworn and she testified in Swahili. She was called **RADHIA HASSAN AHMED**, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown

to Court during the hearing of the case. She was the 14th Plaintiff but now acting in person. She lived in Kiembeni Mombasa as a housewife. Further she indicated that she was a tenant on the suit land and that she got there in the year 1999 under the permission of Mama Sheha the 1st Defendant. She would pay a sum of Kenya Shillings Three Hundred (Kshs. 300/=) per month but It went up to Kenya Shillings Seven Hundred (Kshs. 700/=) per month and now she do not live there. She clarified that she had a brother and tenants who pay her. She chose to withdraw from the case when her husband became ill and since the land was not theirs they decided not to continue forcing or compelling with them on the ground rent.

B. Clarification of the 14th Plaintiff:-

35. PW - 4 stated that she was the 14th Plaintiff. She clarified that for her to act in person she was beseeched by her husband. They agreed with the Defendants and continued to pay the rent for the land. She pointed out that she did not have any rent, receipts and that she had recorded consent and decided to the withdraw from the case.
36. The Plaintiffs called PW - 5 (the 8th Plaintiff) who testified as follows:-

A. Examination in Chief of PW - 5

37. PW - 5 was sworn and he testified in Swahili language. He was called ALFRED MALIDZO MWARUWA, a citizen of Kenya and holder of the national identity card bearing the particulars as shown to Court during the hearing of the case. He resided at Kisauni, Magogani in the County of Mombasa

and that he was a casual laborer and a businessman. He stated that he had filed a Notice to act in person dated 11th June, 2024 and a consent dated 25th June, 2024. He confirmed being a tenant to the landlord one Mr. Hassan Dala for many years. He indicated having been paying rent for Kenya Shillings Seven Hundred (Kshs. 700/-) per month and clarified that he still lived there and paid the rent. He confirmed that he had no receipts for it.

38. PW - 5 stated that he did not know why he had sued the Defendant. He said that he had filed a consent dated 25th June, 2024 against the Defendant and that he was not compelled nor coerced to sign the consent to withdraw the case and did not wish to be paid any costs.

39. The Plaintiffs called the 15th Plaintiff as PW - 6 who testified that:-

A. Examination in chief of PW - 6

40. PW - 6 was sworn and she testified in Swahili language. She was called MWASAHA RANDA KAYI, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court during the hearing of the case. She resided at Kisauni and Chonyi. She stated that he had a house at Kisauni where she used to live up to the year 2020. Further, she said that he had a house at Kisauni but he had sub-leased it at Kenya Shillings Three Thousand (Kshs. 3,000/-) Per month. She stated that she paid the Landlord Mr. Hassan Dala Kenya Shillings Seven Hundred (Kshs. 700/-). She confirmed to have been paying this for the past 5 years.

41. PW - 6 stated that he was in Court as he was notified that he was to vacate the land. Being the 15th Plaintiff they had been

told to submit the name. He confirmed that he had filed a consent to withdraw the case and that he was never forced nor coerced. He indicated that he would not demand for costs.

IV. The Defendants' Case

42. The Defendant opposed the Pleadings by the Plaintiffs through a joint 19th paragraphed Replying Affidavit sworn by *Sheha Khamis Salim* and *Hassan Abdalla Said* who deponed as follows: -

- (a) The Defendants averred that they were the 1st and 2nd Defendants in the suit, well conversant with the facts, and hence competent to swear the affidavit.
- (b) The Defendants averred that the suit property was consecrated as a Wakf by the registered proprietor, Mwanakomwinyi Binti Mwinyi, on 19th July 1954, and the same was registered against the title on 17th August 1954. They annexed copies of the Wakf Deed, Title Deed, and official search marked as "A," "B," and "C."
- (c) The Defendants averred that subsequently, upon the death of the settlor of the Wakf, they proceeded to court to obtain orders allowing them, together with other family members, to become trustees of the Wakf properties in Kadhi's Court Succession Case No. E160 of 2021, which was registered as entry number 13 in the Title Deed. They annexed a copy of the court orders marked as "D."
- (d) The Defendants averred that there were a total of eight trustees of the Wakf. However, the Plaintiffs sued only the two of them, as they were the individuals on the ground dealing with the property and rent collection.

- (e) The Defendants averred that they had always been the parties paying for the county rates, annexing receipts marked as "E."
- (f) The Defendants averred, in reply to paragraph 2 of the supporting affidavit, that the 1st Plaintiff together with the other Plaintiffs were authorized and allowed to enter onto the suit property by the various trustees of the Wakf and to own houses without land on the suit property.
- (g) The Defendants averred further that there were a total of 82 tenants on the suit property, 79 of whom owned residential houses and three kiosks. Out of the 82 tenants, only 15 had come to court to claim adverse possession. They annexed a list of tenants marked as "F."
- (h) The Defendants averred, in reply to paragraph 3 of the supporting affidavit, that the Plaintiffs were their tenants and had been paying rent to them. They annexed receipts for various tenants over different years marked as "G."
- (i) The Defendants averred that they had approached tenants who proved difficult and refused to pay rent through various forums, and therefore such tenants could not claim to have been in peaceful, open occupation of the suit property without their authority.
- (j) The Defendants averred that they had appeared before the area chief on several occasions with some of the tenants for dispute resolution regarding non-payment of rent. They annexed communications from the area chief marked as "H."
- (k) The Defendants averred that throughout the engagements, the question of adverse possession never arose, as discussions were always centered on how rent arrears would be paid.
- (l) The Defendants averred that the issue of non-payment of rent had been escalated to the County Government of

Mombasa and the National Land Commission. They annexed letters marked as “I” and “J.”

- (m) The Defendants averred that as a result of non-payment of rent, their advocates had written to the Plaintiffs seeking payment, and the Plaintiffs had responded to the said letters. They annexed the correspondence marked as “K.”
- (n) The Defendants averred that some Plaintiffs responded positively, signed acknowledgements and undertakings confirming they were in rent arrears, and agreed to pay in installments. Some even made payments at their advocates’ offices. They annexed acknowledgements and receipts marked as “L.”
- (o) The Defendants averred that for non-responsive Plaintiffs, they proceeded to levy distress against tenants who failed to pay rent. They annexed letters of instruction, proclamations, and auctioneers’ confirmations marked as “M,” “N,” and “O.”
- (p) The Defendants averred that they had always been active proprietors of the suit property and also lived on the property.
- (q) The Defendants averred that even in complaints filed at the National Land Commission, the Plaintiffs recognized that they had been paying rent and never made claims for adverse possession. They annexed a copy of the complaint marked “P.”
- (r) The Defendants averred, upon advice of their advocates, that the Plaintiffs could not be granted adverse possession orders over property consecrated as Wakf land.

43. The Defendant’s counsel, Mr. Hassan had the following opening remarks on 2nd December, 2024:-

A. Opening remarks by the Defendant’s counsel

44. The Learned Counsel stated that the Defence case was all about the Defendants who were Trustees of WAKF which were

the proprietor to the suit property. He stated that the Plaintiffs were tenants and were required to pay ground rent. Previously there had been issues on the payment of ground rent. It was only up to the year of 2020 when the ground rent had accumulated to high levels that caused the Defendants the need to levy distress and hence the claim for adverse possession was misplaced.

45. He stated that he would be calling audience that this was WAKF and thus the claim of Land Adverse Possession was not sustainable. It would noted that the tenants were paying ground rent whatsoever.
46. The Defendant called their witness on 2nd December, 2024 Defendants' witness DW - 1 testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Hassan Advocate.

47. DW - 1 testified and sworn in the Kiswahili language. He was called HASSAN ABDALLA SAIDI, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court during the hearing of the case. He explained that he was an Administration Police at Critical Police KRA and a Trustee to the WAKF Commission of Kenya and the 2nd Defendant. He indicated that he swore an affidavit dated 5th May, 2022 and wished the same to be adopted as his evidence in chief.
48. DW - 1 stated that he had also attached 16 documents as annexures being Defendants' Exhibit numbers 1 to 16. Further he had also filed thirteen (13) documents dated 14th October, 2023 being Defendants Exhibits numbers 17 to 29

and finally had again filed further further 6 documents dated 24th May, 2024 being Defendants Exhibits 30 to 34. The letter dated 22nd May, 2024 by the CEO of the Wakf Commission of Kenya on 17th January, 2025 was marked for identification as MFD - I - 36.

B. Cross Examination of DW - 1 by Mr. Nyange Advocate.

49. DW - 1 confirmed to be the legal owner/trustee of the suit property. And said it was true that the Plaintiffs had built on the land. The structures were not permanent. He referred to the bundle of photographs on the Plaintiffs Document particularly the one on page 16 stating it was not permanent and that it was built using building block and iron sheets. He confirmed that they were twenty four (24) structures and which were semi-permanent.
50. DW - 1 referred to Page 18 and confirmed they were not permanent structure. He could not see clearly the material used but said they were constructed with mud and iron sheet. He confirmed that he did not know how long the Plaintiffs had lived on the land but knew them very well as they chat all the time and even paid rents to them. The Plaintiff had been paying ground rent to them. He referred to the Defendant Exhibit 17 to 29.
51. DW - 1 pointed out that he was aware of the demand letter by the Advocate for the Defendant for the payment of the outstanding rent and referred to letter dated 14th September, 2021 and 3rd December, 2021 written to Swaleh Said Salim for rental arrears from 1/2001 to 12/2021 and the letter to Samuel Kibe. He emphasized that he had demanded for rent

from January 2001 to December 2022 and 3rd letter dated 30th August, 2024 - 1st December, 2024 by the Plaintiff demanded for rent from 2001.

52. DW - 1 confirmed to have the receipts for the year 2007 having received rent from the Plaintiffs where he had paid and was issued for 2007 being the arrears of the outstanding rent. He also acknowledged that from years 1999 to 2013 he had always caused the Plaintiffs to vacate where there even existed a Civil Case. From the year 1999 to 2013 they had gave clients notices to terminate the tenancy of the Plaintiff. He referred to the letter dated 30th May, 2019 by WAKF Commission of Kenya and indicated that he was aware of it and that it was allocated by WAKF Commission of Kenya and registered.
53. DW - 1 stated that he had the application to WAKF Commission of Kenya but didn't have it as it was kept by his grandmother and said that the agreement had not been sanctioned by WAKF Commission of Kenya. He noted that from the years 1999 to 2013 he have evicted some of the people from the land through the village elder, for instance Mr. Kashem Mwambi who had a tea structure. He stated that he gave a copy of the title of WAKF property in the year 1954 where he paid a sum of Kenya Shillings Eleven Thousand (Kshs. 11,000/-) but had no receipts.

C. Re - examination of DW - 1 by Mr. Hassan Advocate.

54. DW - 1 stated that the suit land was for his grandmother who later registered it with the WAKF Commission of Kenya. He indicated they had inherited the land as the Trustees of WAKF

Commission of Kenya where his mother was also a Trustee. He confirmed the Plaintiff got onto the land as tenants and as per the permission of his grandmother his mother and himself. He confirmed to have sued Mr. Salim Said though he had paid rent regularly including the arrears.

55. On 17th January, 2025 the Defendants called DW - 2 who testified that:-

A. Examination in Chief of DW - 2 by Mr. Hassan Advocate.

56. DW - 2 was sworn and testified in English language. He was called DR. IBRAHIM HALUSHI BULUSHI, a citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court during the hearing of the case. He worked for WAKF Commission of Kenya being the current secretary of WAKF Commission. He confirmed that he was there to produce a letter dated 22nd May 2024 by WAKF Commission of Kenya which was addressed to M/s. N. A Ali Advocates.

57. DW - 2 stated that the content of the letter was on the information and acknowledged that WAKF Commission of Kenya was the registered with them. That he was to re - confirm that the WAKF was registered but originally they had stated that it had not been registered. He confirmed that the register now confirmed that. DW - 2 wished to have the letter produced as Defendant Exhibit Number 5.

B. Cross examination of DW - 2 by Mr. Nyange Advocate.

58. DW - 2 confirmed that he was the Secretary of WAKF Commission of Kenya and his Employer was WAKF

Commission of Kenya. It was the Commissioners who signed his letter of contract for Employment. He noted that he was employed on contract basis in the year 2019 for 3 years and hence his contract expired by the Commissioners

59. The letter was dated 22nd May, 2024 and referred to a number of letters he signed on 21st May, 2024 which was a response to a letter by Advocate N. A. Ali Advocates dated 12th March, 2024 and after ten (10) days he responded.
60. DW - 2 confirmed that on 30th May, 2019 Plaintiff Exhibit Number 4 letter from WAKF Commission of Kenya he had indicated that the property was not registered by WAKF Commission of Kenya on 11th February, 2022; Plaintiff Exhibit Number 16 by Advocate List of further documents. He stated that on 2nd July, 2024 was stamped by WAKF Commission of Kenya on 14th February, 2022.
61. DW - 2 confirmed the letter and indicated that it was registered and that errors also happens in a big office. He further stated that it was in the year 2019 and there was no case in Court but when he responded there was a case in Court. He noted that he wrote a letter of apology to N. A Ali Advocates for the anomaly and further stated that they have audited report of all the WAKF Commission of Kenya in office. He supported the position that the Suit property was registered.

C. Re - examination of DW - 2 by Mr. Hassan Advocate.

62. DW - 2 admitted that WAKF Commission of Kenya was a public office and Commissioners and himself were officers. The information that was produced was in office and there data and files. At first he agree he had said that it was not

registered but later on confirmed that it was registered and that was very normal depending on the availability of information.

63. The Defendants marked their case closed through their counsel Mr. Hassan Advocate on 17th January, 2025.

V. Submissions

64. Upon the closure of the Plaintiff's and the Defendant's cases on 17th January, 2025, the Honorable Court directed that all parties file and exchange their Written Submissions within the given and stipulated time frame. Thereafter, upon full compliance the Honorable Court reserved a date to deliver its Judgment on notice accordingly.

A) The Written Submissions by the Plaintiff

65. The Plaintiffs through the Law firm of Messrs. K. Lughanje & Company Advocates filed their written undated submissions. Mr. Nyanje Advocate commenced the submissions by stating that the court, pursuant to the court directions of 17th January, 2025 the Plaintiff advocate wished to submit as follows;

66. Vide an amended Originating summons dated 18th March, 2024, the Plaintiff sought for the above stated orders. The suit was vide a Replying Affidavit dated 5th May 2022 together with annexures thereto.

67. On the background of the facts, the Learned Counsel submitted that the Plaintiffs' claim against the Defendants was for the land adverse possession, having entered into the suit property and stayed therein for over forty (40) years. Their stay had been based on an oral agreement where rent

was to be paid monthly. In the years 1999 and 2001, the Plaintiffs stopped paying rent and erected further structures, renting out their premises. Their cause of action crystallized at that point, having stayed for more than twelve (12) years peacefully, uninterrupted, and adverse to the registered owners.

68. The Learned Counsel relied on the following three (3) issues crystallized for determination. Firstly, on whether they had acquired title to the suit land by operation of the doctrine of adverse possession. The Learned Counsel averred that the Plaintiffs had acquired possession of their suit property through the doctrine of adverse possession. The ingredients of the said doctrine were enunciated in the case of **“Mtana Lewa - Versus - Kahindi Ngala Mwangandi [2015] eKLR”** where the Court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

69. The Learned Counsel opined that the Plaintiffs had satisfied all the limbs aforementioned in the above case law to establish a case of adverse possession as demonstrated herein. He held that for 12 years uninterrupted occupation

period the Plaintiffs during trial demonstrated that they, and their families exclusively lived in the suit property. The Plaintiffs produced photographs as Plaintiff Exhibit No. 1, receipts for rental income by their tenants being Plaintiff Exhibit No. 6, the Chiefs letter as Plaintiff Exhibit No. 8 to this effect. The assertion of occupation has not been denied by the Defendants. The Defendants contest that they occupied the parcel and have been on rental arrears variedly from between the years 1999 - 2002 to date which further confirms that indeed the Plaintiffs had since been in occupation in excess of the period of 12 years.

70. During the Plaintiffs' stay, the Defendants neither interfered nor interrupted with their occupation. Interruption had been held by courts to mean taking of legal proceedings against trespassers. To support them on this legal issue, the Counsel relied on the decision of the Court of Appeal in the case of:- ***“Malindi Civil Appeal No. 29 of 2016: - Peter Kamau Njau - Versus - Emmanuel Charo Tinga [2016] eKLR”*** where the Court held:

“in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.”

71. Further, they cited the decision of the Court of Appeal in the case of:- ***“Civil Appeal No. 121 of 2006; - Benson Mukuwa Wachira - Versus - Assumption Sisters of Nairobi Registered Trustees [2016] eKLR”*** which affirmed the sentiments of the Court in the case of:- ***“Amos Weru Murigu - Versus - Marata Wangari Kambi & Another”*** where the Court held:

“.....as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the Chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”

72. In the present case, the Defendants did not institute a suit against the Plaintiffs at any time within the two (2) decades that they occupied the suit land. From the record, there was no empirical evidence to this effect had been proffered. The Plaintiffs stay had been established as having surpassed the 12 years contemplated in the statute of Limitations of Actions Act, Cap. 22 under the provision of Sections 7 and 13, which stay had been peaceful and uninterrupted.
73. Secondly, on the occupation/ possession and usage. The Learned Counsel submitted that the Plaintiffs have demonstrated that their possession and occupation was open and their usage was exclusive to the Defendants. Further they have not been remitting the ground rents from the year 1999 whilst other Plaintiff cause of action arose around the year 2001 when they last made their last payments. The act of the Plaintiffs' decision to stop paying ground rent and subsequently renting out their premises to third parties demonstrated possession/occupation and usage exclusive to

the Defendants. This is one of the ingredients of adverse possession established, to wit, *animus possidendi*.

74. The Plaintiffs' maintained that their possession was both actual and constructive. That some possessed by themselves and others possessed through the existence of their own tenants, family relatives and/or licensees. The Court of Appeal in the case of:- ***“Samuel Kihamba - Versus - Mary Mbaisi [2015] eKLR”*** quoted with approval the dicta in ***“Peter Mbiru Michuki - Versus - Samuel Mugo Michuki [2014] eKLR”***, at para 27 asserting as follows: -

“Possession of land or any property for that matter need not be actual and physical; possession can also be constructive. In the instant case, the record shows that the Plaintiff entered the suit property in 1964; constructed a house thereon in 1970 and put his elder brother to live in the house and the Plaintiff together with his wife occasionally visited and lived in the house. These facts on record not only prove actual possession but also constitute constructive possession of the suit property by the Plaintiff. The elder brother of the Plaintiff was in possession of the suit property by license and permission of the plaintiff. In law, actual possession of any property by a licensee is constructive possession thereof by the licensor.”

75. They asked this Honourable Court to be guided by the decision in the case of:- ***“Maweu - Versus - Liu Ranching and Farming Cooperative Society 1985 KLR 430”*** it was stated that:-

“.....to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession

claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

76. They submitted that the act of stopping to pay the ground rent and asserting ownership by way of renting the premises to 3rd parties during the material time was an act showing adversity/hostile to the registered owner. PW - 3 went further and established a primary school on the suit property. The Plaintiffs acted inconsistent to the registered owners of the title; these acts of asserting exclusive control and ownership were made publicly, without violence and or persuasion and the Defendants acquiesced to the state of affairs.
77. They asked this Honourable Court to be guided by the decision of ***“James Maina Kinya - Versus - Geral Kwendaka (2018) eKLR”***, the court held that: -

“The fact that the Plaintiff has extensively developed the suit property is a demonstration of animus possidendi, (intention to possess) to the exclusion of the defendant. He is also using or occupying the land in contrast to the title (hostile) usage to the right of the title own (Defendant). The open continuous and hostile occupation has not been broken from 1983, a period in excess of 12 years. It has been admitted by the Defendant that the Plaintiff collects rent from the property and has excluded him from possession. This demonstrates exclusive control of the suit property by the Plaintiff which is an essential ingredient in establishing adverse possession.”

78. They submitted such an action is hostile enough to usurp the authority of the registered owners and the resultant Plaintiffs stay was non permissive. They relied on the case of

“Munyaka Kuna Company Limited - Versus - Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased) (2018) eKLR”, where the Court declared as follows:

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“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (nec vi nec clam nec precario), for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

79. They submitted that the Plaintiff had established and proved all the limbs of adverse possession and their case is merited.
80. On whether or not adverse possession claim can accrue from a permissive entry. The Learned Counsel submitted that the relationship between the Plaintiffs and the Defendant prior to the stopping of payment of ground rent was landlord and tenant which was periodic. Upon the failure of paying monthly rents from the year 2001 to some the legal relationship ceased to exist. The relationship was a monthly periodic tenancy, within the meaning of Section 106 of the Transfer of Properties Act, 1882 (Revised 2010).
81. Under the provision of Section 106 of the TPA which was then applicable, a notice to terminate tenancy needed not to be formal or written, for instance in the case of ***“Abdukrazak Khalifa Salimu - Versus - Harun Rashid Khator & 2 others [2018]***

eKLR” at Paragraphs 23 - 25 of the Judgement a communication by the landlord to a third party directing him not to accept payment of the rent sufficed an intention to terminate the tenancy along with the prolonged non - payment of the rent.

“On the question whether an owner of house without land is entitled to a Notice to terminate the tenancy or permission to own the house without land, we are of the considered view that an owner of house without land is entitled to Notice. This is pursuant to the provisions of Section 106 of the TPA.”

82. The right to terminate a tenancy may be exerted by either party creating the intention to terminate the tenancy. In the instant case, the Plaintiffs made clear to the Defendants that they shall not pay the ground rent and they did not for two decades. They contended that this sufficed as a notice under the then applicable law. That in principle, they were trespassers but the Defendants failed to evict them during their 12 years occupation.

83. They further relied on the English case law of **“Hayword & Another - Versus - Challoner (1967) 3 ALL ER 122”** where Lord Denning M.R held as follows;

“there having been a periodic oral tenancy to the rector as such, he ceased to be tenant when the period covered by the last payment of rent (which was made in 1942) expired and the subsequent possession of the tenant became adverse possession; accordingly, the Plaintiffs right of action to recover the land was barred by Section 9(2) and Section 10(1) of the Limitation Act,1939, by reason of more than twelve years adverse possession”.

84. The Plaintiffs through PW - 1 and PW - 3, during trial equivocally stated that they stopped payment of the ground rent to the Defendants because they believed they had a right of ownership on the suit property. This information was made clear to the Defendants and even prior to the serving the Plaintiffs with demand notices for distress for rent.
85. At the point from which Plaintiffs ceased payment of rent with the intention to own the land, and further acted inconsistent with the use intended by the Defendants, the Plaintiffs occupation on the land became non-permissive, i.e. without permission from the true owner of the land occupied. In essence, the Plaintiffs became trespassers of the suit property but the Defendants failed to evacuate and/or evict them through legal proceedings. The inconsistent acts were made devoid of consent from the Defendants. This Court in the case of **“Wambugu - Versus - Njuguna”** referred, with approval, to the case of **“Wallis Cayton Bay Holiday Camp Ltd - Versus - Shell Mex and B.P. Ltd. [1975] Q.B. 94”** and cited the following passage: -

“The next question therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh - Versus - Jack (1879) 5 Ex D 264) said at 273, that to defeat a title by dispossessing the former owners 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

86. This was further reiterated in the case of **“Wambugu - Versus - Njuguna (1983) KLR 173”**, where it was held that: -

“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of

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

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

87. The Plaintiffs’ assert that they acted in a manner that defeated title of the Defendants’ as registered owners. During the trial, the Plaintiffs’ asserted that they stopped payment of rent to the Defendants, they conducted business in respect to the suit property by way of renting out the same to 3rd parties; they established and registered primary school which cumulatively of all were inconsistent with the enjoyment of the soil and proprietary rights of the registered owner. When time started running, the Plaintiffs’ occupation was open, without force, or secrecy and without license or permission of the land owner.

88. They submitted that the Defendants had satisfied all the limbs necessary for adverse possession.

89. Thirdly, on whether the Defendants can levy distress on the Plaintiffs. They further submitted that the action of levying distress for rent by the Defendants to the Plaintiff, a period in excess of six years is statutorily barred under the provision of Section 8 of the Limitations of Actions Act Cap. 22 which states that:-

“An action may not be brought and distress may not be made, to recover arrears of rent, or damages in respect

thereof, after the end of six years from the date on which the arrears became due.”

90. Secondly, the Plaintiffs maintain that as at the time they asserted not to pay ground rent to the registered owner, the landlord and tenant relationship ceased to exist. The Plaintiffs became trespassers but the Defendants failed to evict them within the 12 years' period when they acquired ownership by way of adverse possession. The Plaintiffs' action of not remitting monthly rent amounted to an implied notice of termination of tenancy, which the Defendants did not eject them or sue them upon such constructive notice to stop time running. As such, the Plaintiffs became trespassers from the year 1999 and others 2001, resulting in them gaining rights to the property by way of prescription.
91. Fourthly, on whether the suit property was wakf. The Learned Counsel submitted that the Wakf Commissioners Act Cap. 109 provides that all Wakf must be registered under the provision of Sections 3 and 10 within 2 months after execution. It is notably, the suit property was not registered according to these mandatory provisions and therefore invalid and void ab initio. The Act came into effect on 8th June, 1951 and the alleged Wakf Deed was apparently registered by the settler with the land registry on 17th August, 1954. The Lands Registry does not administer and manage Wakf properties and is not the statutory repository of Wakf properties and only the Wakf Commissioners who can verify the existence of a registered Wakf registry as provided for under the provision of Section 10 of the Wakf Commissioners Act.

92. On 26th October, 2015 the Attorney General established a taskforce on Wakf Properties. In their report, submitted on 1st May, 2017, it collated all Wakf Properties in existence and the report was produced as Plaintiff Exhibit No. 6. The suit property in question was not part of the Wakf Properties of Kenya in the said report. In the year 2019, before the institution of the present suit, a letter was drawn and received by Dr. Ibrahim Bulushi, the then CEO of the Wakf Commissioners and his response, he did confirm that indeed property was not Wakf.
93. This finding was a substantive statement concerning the status of the suit parcel considering firstly that it was made independently without bias of an impending court case process. Secondly, that in the year 2019 when he wrote the letter, Dr. Bulushi was a substantive officer of the Wakf Commission holding the position of a County Executive Committee. This contradiction authored by Dr. Ibrahim Bulushi in response to the Defendants letter dated 21st March, 2024 who as confirmed in cross examination dated 17th January, 2025 indicated that he was no longer an officer with the Wakf Commission and having been an employee on contract his time with the office lapsed after 3 years after his joining with the commission in 2019.
94. Thus the letter penned by the said witness in response to the Defendants letter has no probative value and should be struck out. The prior letter holds weight and was prima facie genuine as it confirmed that the office of the Wakf Commission had no records of the suit property registered with it.

95. In conclusion, the Learned Counsel submitted that the Plaintiffs had proved its case on a balance of probabilities, it has established that it has stayed in the suit property for over 40 years, a period in excess of the 12 years' statutory time limit and during its occupation, its stay has been peaceful, open and devoid of any interruption from the Defendants who have acquiesced to the state of affairs. During the said periods extensive developments have been undertaken including erection of permanent buildings.
96. They further submitted that the suit property was not one recognized under the Wakf Commissioners Act as evidenced from Dr. Ibrahim Bulushi letter dated 30th May, 2019 and no such evidence was produced to demonstrate otherwise other than a second letter from the said witness, whose tenure in office was illegal to controvert the earlier position. They urged the Honourable Court to find and hold so.

B. The Written Submissions by the Defendants

97. The Defendants filed their Written Submissions dated 25th March, 2025 through the Law firm of Messers. N. A. Ali & Company Advocates. Mr. Hassan Advocate commenced his submissions by providing a detailed background of the matter. He stated that the suit was through an Amended Originating Summons dated the 15th of March 2024, whereby the Plaintiffs inter alia sought for above stated orders. Upon service, the Defendants defended and opposed the suit vide a Replying Affidavit sworn on the 5th May 2022. On 8th May, 2023, the Honorable Court, pursuant to Order 37 Rule 16 issued directions for the hearing of the O.S whereby it

directed that the Affidavits in support of the O.S to be deemed the Plaintiffs' witness statements and the annexures thereto be deemed as the Plaintiff's list of documents.

98. Similarly, with regards to the Defendant's Replying Affidavit, similar directions were given. The parties thereafter through directions issued on the 25th July 2023 and 13th March 2024, proceeded to file additional list of documents to supplement the annexures to Affidavits deemed to be the initial list of documents. The Plaintiff's case was simply that they initially were Tenants on the subject parcel of land who were paying ground rent as a consideration for their occupation. The Plaintiffs asserted that some of them stopped paying ground rent in year 1999 and some of them stopped paying ground rent in the year 2001. The claim that since then their continued occupation of the land became adverse to the Defendants' ownership thereof and therefore land adverse possession started to accrue in favour of the Plaintiffs. They therefore claimed that the Defendant's title was extinguished pursuant to the provision of Section 38 of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya.

99. On the other hand, the Defendants opposed the above contention and retorted that they were not owners of the suit property but were Trustees of a Wakf whose property was registered under. The Learned Counsel contended that the suit property was a Wakf property consecrated as such by its last owner, Mwanakomwinyi Binti Mwinyi through a Wakf Deed dated the 19th July 1954 and registered against the title on the 17th August, 1954. The Defendants denied that the

Plaintiffs' occupation of the land was such that there was adverse, continuous, open and uninterrupted possession that accrued to adverse possession.

100. The Learned Counsel informed Court that prior to delving into the evidence that was adduced by both parties, it was important to note at this stage that some parties never participated in the proceedings. Some entered into consents with the Defendants and some never participated during trial. The 14th Defendant, Radhia Hassan Ahmed filed a notice to act in person dated the 30th May, 2024 and thereafter filed a consent signed with the Defendants agreeing mark her claim against the Defendant as settled. She came to Court on the 13th November, 2024 and confirmed the above. The 8th Plaintiff, Alfred Malidzo Mwaruwa, also filed a notice to act in person dated the 11th June, 2024 and a consent dated the 25th June, 2024. He also appeared in Court on the 2nd December, 2024. The other one was the 15th Plaintiff, Mwasaha Banda Kayi who filed a notice to act in person and a consent both dated the 14th November, 2024. He appeared in Court on the 2nd November, 2024 to confirm the same. Consequently, pursuant to Order 9 Rule 8 of the Civil Procedure Rules, the 8th, 14th and 15th Plaintiffs elected to act in person and thereafter entered into consents with the Defendants to settle their claim. Their claim therefore terminated on the dates their consents were confirmed and adopted by the Court when they appeared in Court.

VI. Plaintiff's case

101. PW - 1, namely Blython Tole (the 1st Plaintiff) gave evidence

by adopting his witness statement dated the 15th March, 2024. His evidence was basically that he stopped paying ground rent in the year 1999 and has still be on the land ever since hence his claim for adverse possession. He also produced as a bundle the documents in the List of documents dated the 15th March, 2024. During cross-examination, PW - 1 admitted that he came to the land as Tenant with the Landlord then being the 2nd Defendant's father, but he stopped paying ground rent in the year 1999. He said that he stopped paying rent because the 2nd Defendant's father sold to him the land where his house is situated at a sum of Kenya Shillings One Thousand Eight Hundred (Kshs. 1,800/=). He also stated that he stopped paying ground rent because the government informed him that he did not have any proof of ownership of the land. The 1st Plaintiff was also asked whether he was representing other Plaintiffs in the case who were not in Court and which he confirmed he was.

102. However, when asked when the other Plaintiffs came to the land, he stated that he did not know. He was further asked whether he knew the other Plaintiffs in the case, he stated that he did not know them. He was also asked the size of the portion of the suit property which his house is situated, he stated that he did not know. PW - 2, namely Mwanaisa Hassan Ngakule (the 4th Plaintiff) also adopted her witness statement of 15th March, 2024. She stated that they came to the land with her husband in the year 1973 by the permission of the 2nd Defendant's father. She stated that she stopped paying rent in the year September 2001 and

therefore claims adverse possession on that basis. During cross-examination, she admitted that she came to the land by the 2nd Defendant's father's permission and was also permitted to build a semi-permanent house on the land. She stated that she stopped paying rent as she heard on TV that people who lived for long on land never paid rent. She said that she currently did not occupy the land, she had tenants thereon. She also admitted that if the Court ordered her to pay rent, then she was willing to pay. PW - 3, namely Samuel Mwangi Kibe (the 13th Plaintiff), also adopted his witness statement dated the 15th March, 2024. He stated that he is a Tenant on the land and he stopped paying ground rent in the year 1999. During cross-examination, he stated that he was permitted to occupy the land as a Tenant by the 2nd Defendant's father, who also allowed him to build on the land. He said that he stopped paying rent in the year 1999 because no one demanded for it, however, if it was demanded, he would have continued to pay.

VII. The Defence case

103. DW - 1, the 2nd Defendants (Mr. Hassan Abdallah) gave evidence. He adopted the contents of the Replying Affidavit sworn on the 5th May, 2022. He also produced the Annexures to the Replying Affidavit as Defendant Exhibits No. 1 to 16. He also produced the documents in the further list of documents dated 14th October, 2023 which were produced as Defendant's Exhibit Numbers 17 to 29. He further produced documents 1-5 in the further further list of documents as Defendant Exhibits Numbers 30 - 34. It could

be discerned from the Replying Affidavit that the subject property was consecrated as a Wakf by its registered proprietor namely Mwanakomwinyi Binti Mwinyi through a Wakf Deed dated the 19th July, 1954 which was registered against the Title document on the 17th August, 1954 - Entry number 9 (See Annexures A and B of the Replying Affidavit sworn on 5th May, 2022.) It was his further evidence that the Kadhis Court vide "**Succession cause Number E160 of 2021**" vide an order of 30th August, 2021 appointed the Trustees of the Wakf with the 1st and 2nd Defendants being amongst the Trustee (See Annexure D.) The order was registered against the Title as entry number 13. It was his further evidence that the suit property had a total of 82 ground Tenants of whom 79 owned houses and 3 owned kiosks. It was his further evidence that Plaintiffs were Tenants on the ground obligated to pay ground rent. Various channels, including the National Land Commission, County government of Mombasa and the chief had used to try and settle the issue.

104. DW - 1 continued that given that no fruits bore from the discussions, the Defendants demanded for payment of rent. He stated that some of the Plaintiffs agreed to pay rent and signed agreements with the Defendants on payment of the rents in instalments (Annexure L of the Replying Affidavit.) Also, the further list of documents dated the 14th October, 2023 detailed the receipts and agreements for each Plaintiff. These were as follows:

- a) Documents 1 (a)-(e) were receipts for rent payment and an agreement signed between the Defendants and 5th

Defendant, Salim Seif (Pages 1-6 of the List of documents;)

- b) Documents 2 (a)-(d) were receipts for rent payment by the 9th Plaintiff on behalf of the original house owner, Seif Kombe (Pages 7-9);
 - c) Documents 3 (a)-(d) were receipts for rent payment by the 15th Plaintiff, Mwasaha Banda (Pages 10-13);
 - d) Documents 4 (a)-(c) were receipts for rent payment by the 3rd Plaintiff, Christopher Mutuchi Lutiel (Pages 14-17);
 - e) Documents 5 (a)-(d) were receipts for rent payment and an agreement signed between the Defendants and 8th Plaintiff, Alfred Malidzo Mwaruwa (Pages 18-22);
 - f) Documents 6 (a)-(c) were receipts for rent payment by the 2nd Plaintiff, Kashama Mwambi Muganga (Pages 23-24);
 - g) Document 10 (a) was a receipt for rent payment by the 10th Plaintiff, David Mwanyonyo Gari (Page 34);
 - h) Document 12 was a receipt for rent payment by the 11th Plaintiff, James Mwangudza Bulushi (Page 37);
105. It was his further evidence that the suit property was Wakf property and could therefore not be subject of adverse possession. He produced through the further further list of documents dated the 24th May, 2024 a letter dated the 12th March, 2024 written to Wakf Commissioners of Kenya (Document number 1 of the List of documents) seeking confirmation that the Wakf Deed consecrating the property as a Wakf was registered with the Wakf Commissioners of

Kenya. The Wakf Commissioners of Kenya confirmed through a letter dated the 21st March 2024 that the Wakf Deed was duly registered (Document 2 of the further further list.) He produced copy of the Wakf Deed duly certified by the Wakf commissioner of Kenya as document 3 of the further further List of documents and the a receipt dated the 29th February, 2024 issued by the Wakf Commissioners for the certified copy of the Deed (Document number 4-Page 6 of the further further list.

106. DW - 1 was also asked to clarify why the Plaintiff produced a letter dated the 30th of May 2019 from the Wakf (cross-reference document number 5 of the Plaintiff's List of documents) stating that the Wakf deed was not registered with the Wakf Commissioners of Kenya. He responded that the Defendants' advocates wrote a letter dated the 5th April, 2024 (Document 5 of the further further list-Page 7) seeking for clarification on the contents of the said letter produced by the Plaintiff. He stated that the Wakf responded through a letter dated the 22nd May 2024 (Document number 6 of the further further list-Page 8) clarifying that the Wakf Deed was indeed registered and apologized for the confusion created through the letter of 30th May, 2019. PW - 2, namely Dr. Ibrahim Bulushi who was summoned by the Court gave evidence. He stated that he was the Secretary of the Wakf Commissioner of Kenya. He produced the said letter dated the 22nd May, 2024 (Document number 6 of the further further list-Page 8) as Defendant Exhibit Number 35. He also confirmed that the position of the records with the Wakf Commissioners of Kenya was that the suit property was a

Wakf property and its Wakf Deed was duly registered with the Wakf Commissioners of Kenya.

107. The Learned Counsel submitted that prior to delving into the issue whether the Plaintiffs' case for adverse possession was merited it would be proper to first deal with the issue as to whether the suit property was Wakf property as this would be dispositive of the Plaintiffs' claim. This was because the provision Section 15 of the Wakf Commissioners Act Cap. 109 which was currently repealed, however applied in this case as it was still in force during the institution of this suit). It provides that:

“15. Titles to wakf property shall not be acquired by prescription or adverse possession after commencement of Act.

Notwithstanding anything to the contrary in any Act or law for the time being in force, no title to any property the subject of a wakf shall, after the commencement of this Act, be acquired by any person by reason of that person having been in adverse possession thereof or by reason of any law of prescription.”

108. The said provision had also been maintained in the current law in force governing wakfs, i.e. The Waqf Act, 2022 at Section 19 thereto. Having established that Wakf properties were exempted and immune to adverse possession, the question then was whether the suit property was a Wakf property? Wakf is defined under Cap. 109 as:

religious, charitable or benevolent endowment or dedication of any property in accordance with Muslim law.”

109. The Counsel averred in detail that under the Act, there were two types of Wakf, Wakf Ahli and Wakf Khairi, both defined

under Section. In a nutshell, Wakf Ahli was a Wakf made for the benefit of an individual or a family; while Wakf Khairi was made for any religious, charitable or benevolent public purpose. In the instant case, as could be gathered from the Title to the suit property (Annexure B) of the Replying Affidavit, entry number 4 showed that the proprietor of the property was one Mwanakomwinyi Binti Mwinyi. It could be seen from entry number 9 (presentation number 1716) that a Wakf was established by Mwanakomwinyi whereby she consecrated as a Wakf subject to the terms set out in the Wakf Deed. The said Wakf Deed, Annexure A of the Replying Affidavit, shows that the Wakf Deed by Mwanakomwinyi was dated the 14th July, 1954. It could also be seen from Page 2 thereof that it was registered at Land Title registry Mombasa on the 17th August 1954 as presentation number 1716.

110. According to the Learned Counsel, it could be seen from the Wakf Deed that the object of the Wakf is to hand the income therefrom to the Settlor's daughter namely Kobana Binti Said Bin AbdulRehman El-Mambasiyah, and after her death, to her son Abdulla Bin Said Bin Hassan and any other of her children and thereafter to her further descendants, generation after generation. It can therefore be seen that this was a Wakf Ahli. The Wakf Commissioners of Kenya also confirmed through a letter dated the 21st March, 2024 that the said Wakf Deed was registered with the Wakf commissioners of Kenya (Document number 2 of the further list of documents dated 24th May, 2024 - page 2.) DW - 1 also produced a certified copy of the Deed issued by

the Wakf Commissioners of Kenya (Document number 3 of the further further list-Page 3-5) together with a payment receipt issued by the Wakf Commissioners of Kenya for the certified copy of the Deed (Document 4-Page 6.) Vide a letter dated the 22nd May 2024 produced by DW - 2, the Secretary to Wakf Commissioners of Kenya (Document 6 in the further further list Page 8), the Wakf Commissioners confirmed that the subject Wakf Deed was registered under Page reference No. 551 of the Wakf register. This was in line with the provision of Section 10 of cap. 109 which provided for registration of all Wakf with at the Wakf Commissioner's of Kenya. The current Trustees of the said Wakf were appointed by the Kadhis Court through Mombasa Succession cause E160 of 2021 (Annexure D of the Replying Affidavit) through an order of 30th August, 2021. Amongst the Trustees were the Defendants herein. Therefore, the Learned Counsel contended that it was clear beyond peradventure that the suit property was a Wakf property. The Plaintiff attempted to discredit and impeach the notion that property was a Wakf property. Before going to the merits as to whether this attempt was merited, there was need to ask whether the Plaintiffs in their capacities as Tenants could challenge a title or question the proprietorship of land. The provision of Section 121 of the Evidence Act, Cap. 80 provides that:

“121. Estoppel of tenant or licensee

No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the

beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a right to such possession at the time when the license was given.”

111. Due the said provision, the Plaintiffs were estopped from attempting to question or impeach the proprietorship of the suit property by attempting to claim that the same is not a Wakf property. Furthermore, it was not a pleaded prayer in the subject Originating summons, to declare that the property was not a Wakf property. This is essentially challenging a title and its entries which would include the Court investigating a process that took place in the year 1954 done by a now Deceased proprietor. This had to be a pleaded prayer. The Court could not just proceed to impeach proprietorship and entries in the title in passing and by way of assumption. The importance of a prayer being pleaded clothing the Court with jurisdiction to deal with such a prayer was determined by the Court of appeal in the case of: ***“Caltex Oil (Kenya) Limited - Versus - Rono Limited [2016] eKlr”*** which held that:

“If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.”

112. The Learned Counsel asserted that even if the Court were to examine the Plaintiff’s challenge of title, it was merely based on a letter written by the Wakf Commissioners on the 30th

May, 2019-Document number 5 in the Plaintiffs' list of documents. That letter was written by the Wakf Commissioner of Kenya and it stated that the subject Wakf was not registered with the Wakf Commissioners of Kenya. However, the Commission through the afore-said letters, and especially through the letter dated the 22nd May, 2024 clarified that the correct position was that the Wakf was registered with the commission and apologized for the confusion brought about by the said earlier letter. The author of both letters, one Dr. Ibrahim Bulushi was summoned to Court and he did confirm that the correct position of their records was that the Wakf was indeed registered with the Commission at Page reference No. 551 of the register. Therefore, this resolved that issue and did confirm the subject property as duly registered as Wakf. The Plaintiffs' challenge therefore come a cropper.

113. On whether the prayer for adverse possession is merited. The Learned Counsel informed that only three Plaintiffs appeared in Court to prove their case. The rest of the Plaintiffs did not come to court to give any form of evidence. Only the 1st, 4th and 13th Plaintiffs gave evidence. The rest did not. The other Plaintiffs through an authority to act and make Affidavit dated the 6th April, 2022, appointed the 1st Plaintiff to represent them. During cross-examination of PW - 1, admitted neither not knowing the other Plaintiffs nor when and the circumstances under which they came to the subject parcel of land. Therefore, aside from the pleadings, the other Plaintiffs did not adduce any evidence in support. In the said circumstances, the rest of the

Plaintiffs had failed to discharge their basic burden of proof as per the provision of Section 107 (1) of the Evidence Act, Cap. 80 which provides that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
Sub - section (2) further states that:-

“when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

114. The Counsel held that given that the Plaintiffs claim for adverse possession and desire for Judgement as such, they were duty-bound to adduce evidence to prove the same. As was held in the case of **“Rono - Versus - Lomsons Enterprises (Civil case 5 of 2019) [2024] kehc 6249 (KLR)”**:

“...that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party’s pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination.”

115. The Counsel averred that the Court of Appeal in a similar situation in the case of:- **“Kamau & 42 Others - Versus - Leonid Limited [2023] KECA 1221 (KLR)”** where the Plaintiffs in an adverse possession matter failed to call evidence during trial. It held that:

“The suit was instituted by 43 Appellants led by James Kamau, the 1st Appellant as the champion who swore the supporting affidavit on behalf of the other appellants

and testified as PW - 1. Of the 43 Appellants, only 14 gave evidence. The remaining 29 Appellants did not testify and consequently their claims were rightfully dismissed without much ado."

116. Therefore, the Counsel prayed that their claims be dismissed as orders that had the serious consequence affecting the right of ownership could not be casually determined without any cogent evidence adduced. Even so, it could be seen from evidence that the said Plaintiffs were currently paying rent and had entered into agreements with the Defendants (see further list of documents dated 14th October, 2023.) This probably explained the reason why they failed to participate in the suit as they had agreed with the Defendants to continue to pay rent. Either way, they never proved their claim.

117. Regarding the case by the 1st, 4th and 13th Plaintiffs. It was well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", which means "without force, without secrecy, without permission". This was elaborated in the case of "**Richard Wefwafwa Songoi - Versus - Ben Munyifwa Songoi [2020] eKLR**" where the Court stated that:

"For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner...."

118. The Court went on to underpin 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."**

119. The Learned Counsel argued that it was not disputed that the 1st , 4th and 13th Defendants did enter into the suit property with permission in their capacities as Tenants. It was also not disputed that the said Defendants were permitted to put up structures on their respective portions on the land which they occupied. This was an arrangement which was common in the coast region known as "**house without land**" arrangement. The said concept was comprehensively discussed by the Court of Appeal in the case of "**Abdukrazak Khalifa Salimu - Versus - Harun Rashid Khator & 2 Others [2018] eKLR**" as follows:

"In Christopher Baya and 2 Ors. - Versus - Philip Kiluko and Another Mombasa HC Civil Appeal No. 64 of 2004, Khaminwa, J. correctly understood the concept as follows:

"This arrangement is known as "House Without Land" meaning the right to build on another's land under agreement which does not pass title to the land."

"... we are persuaded by dictum in Famau Mwenye & 19 Others - Versus - Mariam Binti Said, Malindi High Court Civil Case No. 34 of 2005, where the trial judge likened the concept of house without land to a lease stating, "No matter what that arrangement is called, in my view it is a lease within the meaning of Section 105 of the Transfer of Property Act". A lease can be determined by either effluxion of time or notice given by either party in accordance with the lease agreement or as stipulated by law in reference to the period in which rent is paid."

41. The Court further stated that:

".....the house without land having been erected

by consent, the continued presence of the house on Plot No. 3891 can only be with the consent of the registered owner... This being so, the Respondents as registered owners of Plot No. 3891 have a right in law to withdraw and terminate the permission or consent granted to have the house without land on the suit property.”

42. Further, the Court went on to hold that:

“the Appellant concedes that he entered the suit property and owns the house without land through consent and permission given by the registered proprietor of Plot 3891 and his successors in title thereto. Having conceded that the house without land was erected with permission, it follows that if such permission is withdrawn or cancelled then the house must be removed.”

120. The Learned Counsel submitted that given that the Defendants came to the land with permission and the nature of their stay there was also with permission, given that the nature of possession was one where they were allowed to put up structures on the land, there is no way that the possession can be said to be adverse. The consent and permission had never been withdrawn. The Defendants had continued to demand for rent from the Plaintiffs. The point of entry and the question of permission and consent is crucial. This point was stressed by the Court of Appeal in the case of **“Wilson Kazungu Katana & 101 Others - Versus - Salim Abdalla Bakshwein & Another [2015] keca 728 (KLR)”** as follows:

“a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land.

....

It is not disputed that the entry into the suit premises by the appellants and or their forefathers was with the consent of the deceased. They were tenants paying to the deceased rent and/or Ijara for the occupation and use of the various portions in their occupation. The situation remained this way until the deceased passed on in 1970. Following the said death the appellants and or their forefathers stopped paying the rent to the respondents believing that they had no proof that they owned the suit premises. This far, it has been demonstrated that the forefathers and through them the appellant, entered the suit premises with the permission and consent of the deceased. The entry was thus not adverse to the title nor did they enter as trespassers. Accordingly time for purposes of adverse possession did not start running in their favour.

121. The Counsel held that this was also discussed in the case of ***“Kenatco Transport Co. Limited - Versus - Samuel Gikaru Njoroge (Suing on behalf of the estate of the late Geoffrey Gikaru Njoroge) & Another [2021] eKLR*** as follows:

“Are the Defendants entitled to the suit premises by virtue of adverse possession? It is not disputed that the Defendants, or their predecessors in title, came into the suit premises by virtue of their employment with the Plaintiff and were paying rent to the Plaintiff. Although the Defendants state that they stopped paying rent sometime in the year 1977, there was no evidence adduced when the tenancy expired. In my considered view, the defendants continued in possession of the suit premises as rent paying tenants, although they stopped paying the requisite rent. From the evidence on record, it is clear that the Defendants took possession of the suit premises under the licence of the owner by virtue of their employment and as rent paying tenants. Their occupation and possession was with the leave and licence of the Plaintiff. Since there was no evidence tendered as to when, if at all the tenancy ended, the rule on permissive possession cannot be said to have become adverse simply by refusal to continue paying rent. There was no material presented before court to show that the tenancy was determined. It cannot therefore be said that the Defendants’ possession was hostile to the registered owner.”

122. Thus, the Counsel posited that the issue of nature of entry and nature of possession was also crucial in determining the issue of *animus possedendi* basically means the intention to possess. It means that a person claiming adverse possession had to have the intention to possess the land in a manner that was adverse to the owner's interest and in exclusion of the owner and the rest of the world. There had to be an unequivocal intention to do so. This point was stated by the Court of appeal in the afore-said case of "**Richard Wefwafwa Songoi ("Supra")**" as follows:

"In Alfred Welimo -v- Mulaa Sumba Barasa, CA No 186 of 2011, this Court expressed itself thus:
"...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 establish adverse possession. The abandonment of possession must be coupled with the Respondent taking possession of the land 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...."
For a claim founded on adverse possession to succeed... Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession."

123. Also in the said case of "**Wilson Kazungu (Supra)**" the Court of Appeal stated that:

"Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner."

124. As could be gathered from the evidence, PW - 1 stated he stopped paying rent because the land was sold to him for Kshs. 1,800/= . He also stated that he stopped paying because he was told by the government that he did not

have a title and therefore should not pay rent. It could therefore be gathered from this that the idea behind the PW - 1 not paying rent was not because he wanted to dispossess the owner of land and exclusively possess the same in an adverse manner. It was because he said he believed he brought it and because he was told by the government not to pay. This shows that there was no *animus possidendi* on his part, no unequivocal intention to dispossess. On the part of DW - 2 (4th Defendant), she said that she stopped paying rent as she saw on TV that Tenants who had occupied land for long should not pay rent. This was the reasoning behind her not paying rent. She also admitted that she would be willing to pay rent if ordered to do so. Again, there was no *animus possidendi* to adversely dispossess. Further, she admitted that she would be willing to continue to pay rent. This was antithetical to adverse possession. On PW - 3, he said that he merely stopped paying because no one demanded for ground rent. He said that if demanded, he would be willing to pay. Again, it could be seen that there was no element of *animus possidendi*.

125. A further aspect of the orders being sought by the Plaintiffs was the obviolation and cancellation of the ownership of the entire land title which measures approximately 5.50 Acres and that the Plaintiff be declared the owners thereof by virtue of adverse possession. It was the Defendants' uncontroverted evidence that the suit property contained 83 ground paying Tenants, 79 houses and 3 kiosks. The Plaintiffs only occupied small portions on the land where they had put up their houses. Therefore, were they entitled

to claim for adverse possession for the entire suit property? The Court of appeal in the afore-said case of “**Wilson Kazungu Katana (Supra)**” stated that:

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu - Versus - Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

126. It was also held in the case of “**James Kamau & 42 Others - Versus - Leonid Limited [2020] eKLR**” that:

“No testimony was led on to demonstrate that the Plaintiffs were occupying the entire land. There was no survey report that was produced by the Plaintiffs to ascertain the portions each occupied. Only some of the Plaintiffs gave estimate size of Plots they were in occupation of. With the contradictory evidence from Plaintiffs, identification and survey of the actual land they were in actual occupation of was necessary”.

127. Based on this the Learned Counsel argued that the Plaintiffs could not claim the entire land as they only occupied some portion of it. They were not able to discharge the burden of proof. For instance, the Plaintiffs failed to have undertaken a Land Surveying exercise on the suit land and hence a report prepared and filed for that matter. If anything, they all confirmed being tenants of some of the portion of land.

128. In conclusion, the Learned Counsel urged the Honourable Court to find that the suit instituted by the Plaintiffs was without any merit and hence should be dismissed with costs.

VI. Analysis & Determination

129. 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.

130. 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 five (5) sub-headings. These are: -

- a) *Whether the Suit instituted by the Plaintiffs through the filed Originating Summons/Plaint against the Defendants has any merit whatsoever?***
- b) *Whether the Defendants can levy distress for rent arrears.***
- c) *Whether the suit property is validly Wakf land.***
- d) *Whether the Parties herein are entitled to the reliefs sought.***
- e) *Who will bear the costs of the suit.***

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

131. Under this sub title, the Honourable Court shall examine the merit of the Plaintiffs/Applicants' 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 Defendants' title has been extinguished by operation of law.***

132. 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 prove. (See “**Nairobi CoA App No. 95 of 2014 Ruth Wangari Kanyagia - Versus - Josephine Muthoni Kinyanjui [2017] eKLR**”)

133. I must admit that on the concept of Land Adverse possession both the Learned Counsels for the Plaintiffs and the Defendants. Pursuant to that, the Honourable Court will be making only supplementary additions to affirm and tighten it whatsoever. The doctrine of Adverse Possession is one of the ways of land acquisition in Kenya under the provision of Section 7 of the Land Act, No. 6 of 2012. I will highlight some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap. 22 and the Land Registration Act No. 6 of 2012.

134. 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”

135. Further, under the provision of Section 13 of the Act:-

“(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”.

136. 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.”

137. Section 17 of the Act 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”.

138. Finally, the provision of Section 38 (1) and (2) of the Act 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.”

139. 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**

140. 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.

141. The provisions of Section 30 of the Registered Land Act, Cap. 300 (Now repealed) and Section 28(h) of the Land Registration Act, No. 3 of 2012 recognizes Over - riding

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.

142. 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....”

143. 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. ”

144. 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.”

145. 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.

146. 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”.

147. 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.***

148. The Honourable Court fully concurs with the submissions by the Learned Counsel for the Defendants to the effect that the burden of proof lies with the Plaintiffs/ Applicants 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.
149. The Court was called upon to determine whether the Plaintiffs' suit, filed by way of Originating Summons under Sections 37 and 38 of the Limitation of Actions Act, Cap. 22, had merit. The Plaintiffs claimed ownership of Title No. C.R. 2006 Plot No. MN/II/80 by way of adverse possession, asserting that they had occupied the land openly, peacefully, and continuously for over four decades, and that they ceased paying ground rent in the years 1999-2001, thereby crystallizing their cause of action.
150. On the contrary, the Defendants vehemently opposed the claim, arguing that the property had been consecrated as Wakf land in the year 1954, duly registered, and held in trust for religious purposes. They maintained that the Plaintiffs were tenants permitted to build houses without land, had been paying rent, and were in arrears. They insisted that adverse possession could not accrue against Wakf property, which was consecrated for perpetual charitable use.
151. 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).

152. The Court must determine whether the Plaintiff’s occupation was peaceful and uninterrupted for a continuous period of 12 years. The Plaintiffs demonstrated occupation exceeding twelve (12) years, producing photographs of permanent structures, receipts evidencing rental income from tenants, and letters from local authorities confirming their occupation. They argued that the Defendants never instituted any legal proceedings to evict them within the statutory period, and that mere demand letters or distress attempts did not interrupt time. Elaborately, they challenged the efficacy, indefeasibility and validity of the Wakf Deed. They contended that the property was never registered under the Wakf Commissioners Act, Cap. 109, and was omitted from **“the Attorney General’s 2017 Taskforce Report on Wakf properties”**. They relied on a letter dated 30th May, 2019 written by the Wakf Commissioners way before the suit was instituted confirming the non-registration of this Wakf Deed.

153. The Defendants produced the Wakf Deed of 1954, succession orders appointing them trustees, rent receipts, and correspondence with the Chief and National Land Commission to demonstrate landlord-tenant relations. They argued that the Plaintiffs were tenants who defaulted on rent, and that adverse possession could not accrue against Wakf property consecrated for religious purposes. They maintained that they had consistently demanded rent and levied distress, thereby asserting their ownership rights.
154. From the testimony adduced, the Plaintiffs had occupied the land for over forty years, ceased paying rent in the years 1999-2001, and made developments inconsistent with the Defendants' ownership, including construction of permanent houses and establishment of businesses.
155. The Defendants did not institute eviction proceedings within twelve years. Their reliance on demand letters and distress was insufficient to interrupt time under the doctrine of adverse possession, as established in "**Peter Kamau Njau - Versus - Emmanuel Charo Tinga [2016] eKLR**" and "**Benson Mukuwa Wachira - Versus - Assumption Sisters of Nairobi Registered Trustees [2016] eKLR**". The Wakf Deed, though produced, was not registered under Cap. 109 as required by law. The Attorney General's Taskforce Report confirmed the property was not among registered Wakf lands. The contradictory letter of 22nd May, 2024 - which was written while the suit and proceedings was subsisting, making an effort to correct the earlier position taken by the Wakf Commissioners, carried diminished probative value compared to the independent 2019 letter from the Wakf

Commission confirming non-registration. The provision of Section 8 of the Limitation of Actions Act barred recovery of rent arrears after six years, rendering the Defendants' distress attempts time-barred.

156. Kenyan courts have recognized such acts—especially burials and permanent buildings—as strong evidence of animus possidendi (intention to possess) and factual occupation. In the case of:- ***“Kipkoech arap Langat - Versus - Kipng’eno arap Laboso [2011] eKLR”***, the court held that building houses, cultivating, and burying family members were clear indicators of possession.

157. From the foregoing, the Honourable Court strongly finds that the Plaintiffs have satisfied the legal requirements for adverse possession: their occupation was open, peaceful, uninterrupted, and hostile to the Defendants' title for more than twelve years. The Defendants' reliance on Wakf status was unsubstantiated in law, and their claims for rents arrears were statute - barred.

158. Accordingly, the suit instituted by the Plaintiffs through the filed Amended Originating Summons had merit and the Plaintiffs are entitled to the reliefs sought.

ISSUE NO. (b) Whether the Defendants can levy distress for rent arrears.

159. Under this heading, the Court considers whether the Defendants, as alleged landlords and trustees of the suit property, are legally entitled to levy distress for rent arrears against the Plaintiffs.

160. The provision of Section 8 of the Limitation of Actions Act, Cap. 22 provides that an action to recover arrears of rent, and the making of distress, is barred after six years from the date the arrears become due. The law on interruption of time requires positive steps by the proprietor to assert title — typically eviction or institution of suit — to stop the running of limitation for adverse possession. Mere letters, demands, or proclamations ordinarily do not interrupt time.
161. The Plaintiffs stop paying ground rent around 1999–2001 and continue in open occupation thereafter. The Defendants rely on historical rent receipts, demand letters, proclamations and a 2021 attempt to levy distress and advertise sale. The Defendants do not show that they instituted eviction proceedings within the statutory periods alleged.
162. The Defendants’ right to recover rent or to levy distress is subject to the six-year limitation. Any attempt to recover arrears that accrued more than six years before the distress is statute-barred. The Defendants’ demand letters, communications with chiefs, and proclamations of distress do not amount to the kind of legal proceedings or effective entry that the authorities treat as interrupting the running of limitation for the purposes of adverse possession.
163. Where the tenant ceases payment and thereafter occupies the land openly and continuously with acts inconsistent with the owner’s enjoyment (e.g., erecting permanent structures, sub - letting), the tenancy is effectively determined and the occupier’s possession may become hostile. If the occupier

completes the statutory period for adverse possession, any subsequent distress is ineffective because the occupier has acquired a proprietary interest that overrides the landlord's remedy.

164. Even if the Defendants act as trustees or custodians (for example, under a Wakf claim), the statutory bar on recovery of rent after six years still applies unless a specific statutory exception is shown. The evidence adduced does not establish a timely legal step that preserves the Defendants' right to distress.

165. In conclusion, on the evidence and the applicable law, the Defendants cannot lawfully levy distress for the rent arrears claimed. Their remedy to recover arrears is time-barred by the provision of Section 8 of the Limitation of Actions Act, and their procedural steps short of eviction or instituting suit do not interrupt the running of limitation. Further, if the Plaintiffs' occupation ripens into ownership by adverse possession, any attempted distress is rendered wrongful and ineffective.

ISSUE No. (c) Whether the suit property is validly Wakf land

166. Under this sub - title the Honourable Court examines the statutory requirements under the Wakf Commissioners Act, Cap. 109 Laws of Kenya. It came into force on 8th June 1951. The Act provides that all Wakf Deeds, whether private or public, must be registered with the Wakf Commissioners within two months of execution. The provision of Sections 3 and 10(1) make registration mandatory, and failure to comply renders the Wakf invalid. The Lands Registry is not

the statutory repository of Wakf records; only the Wakf Commissioners maintain the official register.

167. The Plaintiffs emphatically assert that the suit property, Title No. C.R. 2006 Plot No. MN/II/80, was never registered with the Wakf Commissioners as required by law. They relied on several pieces of evidence:

- a) The Attorney General's Taskforce Report of 2017, which comprehensively collated all Wakf properties in Kenya. The suit property was conspicuously absent from this list, suggesting it was never registered.
- b) A letter dated 30th May 2019 from Dr. Ibrahim Bulushi, then CEO of the Wakf Commission, confirming that the property was not registered as Wakf. This letter was authored independently, prior to the institution of the present suit, and therefore carried probative weight.
- c) The argument that the alleged Wakf Deed of 1954 was registered only at the Lands Registry, which is not the statutory repository for Wakf properties. As such, the deed was invalid ab initio.

168. The Plaintiffs further contend that the failure to register was deliberate, possibly to avoid taxation, and that the Defendants cannot now claim privileges under the Wakf Commissioners Act when they themselves failed to comply with its mandatory provisions.

169. The Defendants, on the other hand, submit that the property was consecrated as Wakf by Mwanakomwinyi Binti Mwinyi on 19th July 1954 and registered against the title on 17th August 1954. They relied on succession proceedings in

Kadhi's Court Succession Case No. E160 of 2021, which confirmed them as trustees of the Wakf property, and entry No. 13 in the Title Deed reflecting this. They argue that the Plaintiffs were tenants permitted to build houses without land, and that adverse possession cannot accrue against Wakf property consecrated for perpetual charitable use. They also rely on a subsequent letter dated 21st March 2024, allegedly from the Wakf Commission, to support their claim that the property is Wakf.

170. The Honourable Court carefully examines the evidence and submissions. It notes that:

- a) The Wakf Commissioners Act was already in force when the alleged Wakf Deed was executed in the year 1954, making registration with the Wakf Commissioners mandatory.
- b) The Defendants produced a Wakf Deed and succession orders but did not demonstrate registration with the Wakf Commissioners as required by law. Registration at the Lands Registry alone does not suffice.
- c) The Plaintiffs' reliance on the 2017 Taskforce Report and the 2019 letter from the Wakf Commission carries significant probative value. Both confirm that the property was not registered as Wakf.
- d) The contradictory 2024 letter produced by the Defendants is of diminished evidentiary weight, as it was authored after the institution of the suit and by an officer who no longer substantively in office.

e) In law, failure to register the Wakf land under Cap. 109 renders the Wakf invalid. Consequently, the property cannot be treated as valid Wakf land.

171. The Court also observes that the Plaintiffs' evidence was consistent, corroborated by independent statutory reports and official correspondence, while the Defendants' reliance on succession proceedings and later correspondence did not cure the fundamental defect of non-registration.

172. Therefore, the Honourable Court finds that the suit property was not validly registered as Wakf land under the Wakf Commissioners Act, Cap 109. The Defendants' reliance on the Wakf Deed and succession orders is insufficient to confer Wakf status without statutory registration. The Plaintiffs' evidence demonstrates that the property is not recognized as Wakf, and therefore adverse possession can accrue against it.

ISSUE No. (d) Whether the Parties herein are entitled to the reliefs sought.

173. Under this sub title, the Honourable Court shall examine whether the parties herein are entitled to the reliefs sought. Through their Amended Originating Summons dated 18th March 2024, the Plaintiffs sought:

- a) A declaration that they were the rightful owners of Title No. C.R. 2006 Plot No. MN/II/80 by way of adverse possession.**
- b) An order directing the Land Registrar, Mombasa, to cancel and/or extinguish the Defendants' ownership registration and issue title in the Plaintiffs' names.**

c) A direction that the Court's order serve as an instrument of transfer of ownership from the Defendants to the Plaintiffs.

d) A permanent injunction restraining the Defendants from interfering with their quiet possession and enjoyment of the suit property.

e) Costs of the suit and any other incidental reliefs

174. On the declaration of ownership by adverse possession, the Plaintiffs demonstrated occupation of the suit property for over forty (40) years, ceasing rent payments in 1999-2001, and undertaking extensive developments inconsistent with the Defendants' ownership. The Defendants did not institute eviction proceedings within twelve (12) years, and mere demand letters or distress attempts did not interrupt time. The Court finds that the Plaintiffs satisfied the statutory requirements under Sections 7 and 13 of the Limitation of Actions Act and the principles laid down in "**Mtana Lewa - Versus - Kahindi Ngala Mwagandi [Supra]**" and "**Wambugu - Versus - Njuguna [Supra]**".

175. On cancellation of the Defendants' title and issuance of title to Plaintiffs, having established adverse possession, the Defendants' title is extinguished by operation of law. The Land Registrar is therefore properly directed to cancel the Defendants' registration and issue title in the Plaintiffs' names.

176. On court order as instrument of transfer, the provision of Section 38(1) of the Limitation of Actions Act empowers the Court to order registration of the adverse possessor as proprietor. The Plaintiffs' request that the Court's order

serve as an instrument of transfer is consistent with statutory provisions.

177. On the permanent injunction, the Plaintiffs have demonstrated exclusive possession and ownership rights by adverse possession. To preserve and protect their quiet enjoyment, a permanent injunction restraining the Defendants from interference is justified and hence sustainable to be granted.

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

178. Under this subtitle, the Honourable Court shall examine on who bears the costs of the suit. 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, Cap. 21 provides that costs follow the events.

179. 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”.

180. The Plaintiffs prayed for costs of the suit in their Amended Originating Summons. They argued that they had proved their case on a balance of probabilities, having demonstrated uninterrupted occupation for over forty years, and that the Defendants had failed to establish valid Wakf status or any lawful right to levy distress for rent.
181. The Defendants opposed the suit, maintaining that the Plaintiffs were tenants in arrears and that the property was Wakf. They did not expressly concede liability for costs but sought dismissal of the Plaintiffs' claim.
182. The Plaintiffs succeeded in establishing adverse possession, extinguishing the Defendants' title. The Defendants' claim of Wakf status collapsed under statutory scrutiny, and their attempts to levy distress for rent were found to be time-barred. The Plaintiffs therefore emerged as the successful party in the litigation. No exceptional circumstances were demonstrated by the Defendants to warrant departure from the general rule that costs follow the event.
183. The Honourable Court finds that the Defendants shall bear the costs of the suit. The Plaintiffs, having succeeded in their claim, are entitled to recover costs as against the Defendants.

VII. Conclusion and disposition

184. Ultimately, upon conducting such an elaborate analysis to the framed issues herein, the Honourable Court concludes on a preponderance of probabilities and the balance of probabilities, that the Plaintiffs have successfully established

their case against the Defendants. For avoidance of doubt, I specifically make the following orders: -

- a) **THAT Judgment be and is hereby entered in favour of the Plaintiffs in accordance with their Amended Originating Summons dated 18th March 2024;**
- b) **THAT a declaration be and is hereby made that the Plaintiffs have acquired ownership of Title No. C.R. 2006 Plot No. MN/II/80 measuring approximately 5.50 acres by way of adverse possession.**
- c) **THAT the Land Registrar, Mombasa, do and is hereby directed to cancel and/or extinguish the Defendants' ownership registration and issue title in the names of the Plaintiffs.**
- d) **THAT the order of this Court shall serve as an instrument of transfer of ownership of Title No. C.R. 2006 Plot No. MN/II/80 from the Defendants to the Plaintiffs.**
- e) **THAT a permanent injunction be and is hereby issued restraining the Defendants, whether by themselves, their servants, agents, employees, or anyone acting on their authority, from entering, interfering with, trespassing upon, or in any manner whatsoever disturbing the Plaintiffs' quiet possession and enjoyment of the suit property.**
- f) **THAT the Defendants' claim to levy distress for rent arrears is hereby declared unlawful and time-barred under Section 8 of the Limitation of Actions Act.**
- g) **THAT the Defendants' assertion that the suit property is validly Wakf land is hereby dismissed, the Court having found that the property was never registered under the Wakf Commissioners Act, Cap 109.**
- h) **THAT the costs of this suit shall be borne by the Defendants, the Plaintiffs having succeeded in their claim.**

IT IS ORDERED ACCORDINGLY.

**JUDGEMENT DELIVERED THROUGH MICRO - SOFT TEAMS
VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA
THIS.....24THDAY OF.....APRIL....., 2026.**

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

Judgment delivered in the presence of:

- (a) M/s. Firdaus Mbula, the Court Assistant.
- (b) Mr. Wasike Advocate holding brief for Mr. Nyanje Lughanje Advocate for the Plaintiffs; and
- (c) Mr. Hassan Advocates for 1st and 2nd Defendants.