

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELC NO. E005 OF 2023

MNYAZI GWAMA NDORO

MLONGO NDEGWA MUNGUMI

UMAZI MWERO KALIMBO

RACHEL MWAKA MWACHIRO.....PLAINTIFFS

- VERSUS -

MWERENI GROUP RANCHDEFENDANT

JUDGEMENT

I. Preliminaries

1. The Judgement of this Honourable pertains to the Civil Suit instituted in form of the Originating summons dated 4th October, 2023 by *Mnyazi G. Ndoro, Mlongo Ndegwa Mungumi, Umazi Mwero Kalimbo* and *Rachel Mwaka Mwachiro*, the Plaintiffs herein. It was against *Mwereni Group Ranch*, the Defendant herein. The Summons was premised under the provision of Sections 17, 18, 37 and 38 of the Limitation of Actions Act Cap. 22 of the Laws of Kenya and Order 36 Rule 30 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. The Plaintiffs claim entitlement to a portion of land measuring approximately 9.88 hectares (24.5 acres) hived from L.R No.

KWALE/MWERENI/14, registered in the name of the Defendant, by way of adverse possession.

3. Upon service of the pleading and summons to enter appearance, the Defendants, a Group Ranch incorporated as such under the Land (Group Representatives) Act, Cap. 287 of the Laws of Kenya, only entered the Memorandum of Appearance dated 1st November, 2023. They never filed any replies nor Statement of Defence as required by Law. Hence, being a land matter, Court directed and indeed it proceeded on as formal proof pursuant to the provision of Order 10 Rules 4, 5, 6, 7, 9 and 10 of the Civil Procedure Rules, 2010 accordingly.

II. Court directions before the hearing

4. On 27th February 2024, after confirming service of the Originating Summons and noting the Defendant's failure to file a defence despite entering appearance, the Court directed that the matter be listed for pre-trial under Order 11 of the Civil Procedure Rules, 2010.
5. On 29th April 2024, the Court noted that the Defendant had been duly served but failed to attend. The Court directed that the matter proceed to hearing by way of formal proof under the provisions of the law as indicated above.
6. On 13th September 2024, the Deputy Registrar fixed the matter for hearing on 25th February 2025, noting that the Plaintiffs had complied with filing requirements and served the Defendant

7. On 24th February 2025, the Court directed that the Originating Summons be converted into a plaint, and the supporting affidavit into evidence, pursuant to Order 37 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010. The Court further ordered that viva voce evidence be adduced, and the Plaintiffs be granted seven days to file coloured photographs and a complete copy of the title deed.
8. On 26th March 2025, the Court directed that the Plaintiffs file additional documents, including coloured photographs and a certificate of production under Section 106A-D of the Evidence Act, Cap 80. Witness summons were issued to the Area Chief and the County Land Surveyor, Kwale, to testify at the next hearing.
9. On 24th June 2025, due to paucity of time, the Court adjourned the matter and fixed it for further hearing on 15th July 2025 by virtual means.
10. On 15th July 2025, the Plaintiffs produced evidence through three witnesses, including a neighbour, the County Land Surveyor, and the Sub-Chief. The Court directed that written submissions be filed within 21 days, with mention on 14th October 2025 to confirm compliance, and reserved judgment for 27th November 2025.

III. The Plaintiff's case

11. The Plaintiffs sought for the following orders:-

- a. THAT the Plaintiffs/Applicants be declared to have become the legal owners of 6 acres of land forming part of the whole title No.**

KWALE/MWERENI/14 measuring 43466HA entitled by adverse possession of over (12) years since the Plaintiffs have stayed on the suit property for over 47 years.

- b. THAT parcel of land claimed by the Plaintiffs comprises 6 acres part of Plot No. KWALE/MWERENI/14 situate in Patanani village, Mwereni location Lunga Lunga Sub County Kwale County.***
- c. THAT the Applicants be registered as the sole proprietors of the said parcel of land namely KWALE/MWERENI/14 in place of the above named Defendant/Respondent in whose favor the land is currently registered.***
- d. THAT the last original indentures in respect of Title No. KWALE/MWERENI/14 which are with the Defendant/Respondent be dispensed with.***
- e. THAT the 6 acres mentioned above be hived from Title No. KWALE/MWERENI/14 and further subdivisions be done and individual titles given to the Plaintiffs herein.***
- f. THAT costs of this Application be provided for.***

12. The Application for land adverse possession was accompanied by a 13 Paragraphed supporting affidavit sworn by MNYAZI GWAMA NDORO, the 1st Plaintiff/ Applicant herein. He averred as follows that:-

- (a) He was the 1st Plaintiff in the matter, with full knowledge of the facts in issue and with authority to swear the affidavit on behalf of the 2nd to 4th Plaintiffs, hence competent to depone to the matters contained therein. He produced a letter of authority annexed and marked as "MGN - 1".
- (b) The Plaintiffs had been living on the parcel of land known as KWALE/MWERENI/14 for over forty-seven (47) years.
- (c) They had resided there with their children, who had since become adults, and had buried their loved ones on the land while engaging in farming activities for the said period. He produced

photographs annexed and marked MGN-2 to demonstrate this occupation

- (d) The Defendant was the registered proprietor of the parcel KWALE/MWERENI/14, measuring approximately 43,466 hectares, having been issued with a Certificate of Title on 14th November 1984. A copy of the land certificate was annexed and marked as "MGN - 3".
- (e) The Defendant had always been aware of their existence on the land but had never made any effort to evict them, demand rent, or appoint an agent to collect rent or other payments. Consequently, no lease agreement, tenancy, or contract had ever been drawn or executed between the parties.
- (f) To the best of their knowledge, neither the Defendant nor its agents or servants had ever attempted to remove them from the suit property.
- (g) As a result, the Plaintiffs and their families had enjoyed uninterrupted and continuous possession of the property for over forty-seven (47) years.
- (h) They had lived on the parcel openly, with the knowledge of the Defendant, without paying rent, licence fees, or any other consideration, and in a manner wholly adverse to the Defendant's interests. There had never been any interference with their occupation.
- (i) He prayed the Honourable Court to declare the Plaintiffs the legal owners entitled by adverse possession, having occupied the suit property measuring approximately six (6) acres for over forty-seven (47) years, well in excess of the statutory twelve (12) years.

(j) The Plaintiffs were claiming the said six (6) acres hived from the larger parcel measuring approximately 43,466 hectares.

They had taken care of the suit property by clearing bushes, planting, harvesting, and maintaining the land to habitable standards throughout the period of occupation.

(k) He had been advised by his advocates on record, which advice he verily believed to be true, that the Plaintiffs had acquired a right of ownership by adverse possession in respect of the parcel KWALE/MWERENI/14, which right had accrued by virtue of their uninterrupted, continual, and exclusive possession of the suit property for more than twelve (12) years since 1959.

(l) What was deponed was true to the best of his knowledge, save where the sources and basis thereof had been disclosed as information and belief.

B. Opening remarks by the Plaintiff

13. The Plaintiffs' advocate M/s Memia holding brief for Mr. Opwapo Advocate made the following opening remarks on 26th March, 2025. The Learned Counsel for the Plaintiffs informed the Court that the case was one about acquisition of title through land adverse possession. The Plaintiffs had been residing on the suit property known as L.R No. KWALE/MWERENI/14, which measured 43,466 hectares (approximately 107,405 acres). Out of this acreage, the Plaintiffs were only interested in a portion of it measuring 9.88 hectares (24.5 acres), being the land they occupied. Their occupation was supported by the Land Surveyor's Report produced in court, dated 13th March 2025.

14. The Learned Counsel averred that the Plaintiffs were born on the suit land. Indeed, their father, Gwama Ngoro, and grandfather, Ngoro Ngowa, had also lived there since the late 1950s. Upon his demise, their father was buried on the land, and photographs showing the burial site were produced, covering the portion of 9.88 hectares. Further, the Plaintiffs relied on a letter dated 27th February 2025 from the area Chief, Mr. Elijah Mburia, confirming their occupation. The Learned Counsel emphasized that the Plaintiffs had lived on the plot continuously from birth, thereby satisfying the statutory requirement of twelve (12) years under the Limitation of Actions Act, Cap. 22.
15. The Learned Counsel submitted that while dwelling on the land, the Plaintiffs had never been disturbed by the Defendant. The Defendant was aware of their occupation, yet the Plaintiffs had remained in exclusive possession with their families, undertaking farming activities whereby the cultivated various crops on it. The Learned Counsel further averred that the Plaintiffs had dwelt on the land without the Defendant's permission. The Defendant had never interrupted their use and occupation. The Plaintiffs had occupied the 9.9 hectares exclusively, without allowing the Defendant to interfere, and urged the Court to grant them title to their share.
16. In conclusion, the Learned Counsel by letting the Court to take judicial notice that despite of the Defendant having been served properly as required by law, they had failed to file any Memorandum of

Appearance, Defence nor any other documents. Therefore, the Plaintiffs prayed that they be granted ownership of the land and issued with a title deed. That was all.

17. The Plaintiffs called their 1st witness on 24th February 2024 at 12.00 noon wherein he testified as follows:-

A. Examination in Chief of PW - 1 by Ms. Memia Advocate

18. PW - 1 testified and was sworn on oath in Duruma language (It was interpreted by a Court Interpreter). She identified herself as MNYAZI GWAMA NDORO a citizen of Kenya holding the national identity card bearing all the particulars as shown to Court during the hearing hereof.

19. She was born on 1st January 1976. She averred that she had signed an authority dated 4th October 2023 to handle the proceedings on behalf of the other Plaintiffs, namely the 2nd, 3rd and 4th Plaintiffs. PW - 1's witness statement and list of documents were adopted as evidence in chief in this matter. She described her self as a farmer residing in Patanani village in Matuga, She confirmed that she had recorded a witness statement dated 4th October 2023 together with a list of three documents.

20. She stated that they had sued Mwereni Group Ranch, having lived on the land for forty-seven (47) years. They moved on it in the year 1976.

The land title was KWALE/MWERENI/14. PW - 1 testified that they had obtained the land through inheritance, it being family land. She emphasized that the Defendant had never issued them with any notice of eviction from the land.

21. She deponed that they had never been removed from the land nor received any notice to vacate. They had never paid rent on the land. She testified that they had occupied six (6) acres out of the total parcel measuring approximately 43,466 hectares.
22. PW - 1 stated that they lived on the land and carried out cultivation of maize, cassava, coconut trees, and mangoes, as shown in the black-and-white photographs produced. She informed the Court that the land had been developed extensively. She referred to a photograph of their father's grave, Gwama Ngoro, who had been buried on the suit land. She also referred to the identity cards of the 2nd, 3rd and 4th Plaintiffs, who were his sisters and all lived together on the land.
23. She stated that the land belonged to Mwereni Group Ranch, as shown by the title deed attached to the pleadings. She confirmed that the Defendant was aware of their occupation, but had never given them permission or consent to reside there. PW - 1 deponed that Mwereni Group Ranch had never interfered with their occupation of the land. She explained that they carried out cultivation of cashew nuts, coconuts, mangoes, and livestock on the portion they occupied. She further testified that some members of their family had been buried on the

land, including their father, Gwama Ngoro, their mother, Musirimi Makaa Malama, and siblings such as Sungu Brame Ngurui.

24. PW - 1 stated that on the suit property there were four Plaintiffs together with their family members, and that Mwereni Group Ranch was aware that they had been in occupation for more than twelve (12) years. She clarified that they were not occupying the entire parcel but only a portion of it. He emphasized that their occupation was exclusive of the Defendant, who had never been allowed to interfere with their use of the land.

25. She testified that apart from cultivation, they had erected semi-permanent structures for the four Plaintiffs and their sons. She concluded by praying that the Court grant them title to the land to enable them to own the portion they had occupied.

26. The Plaintiffs called PW - 2 on 15th July, 2025 and he testified as follows:

A. Examination in Chief of PW - 2 by M/s. Matoke Advocate.

27. Plaintiff Witness 2 was sworn and testified in Swahili language. He was called MWADIGA NDEGWA DUKA, a citizen of Kenya holding the national identity card bearing all the particulars as shown on it to Court during the hearing of the case. He informed the Court being aged sixty-seven (67) years at the time of testimony. He averred that he had recorded a witness statement dated 28th February, 2025 and which he wanted to be adopted as his evidence in chief. He testified that he had known the family of Gwama Ngoro Ngowa for the past forty (40) years. He as very

familiar with his children, who were the Plaintiffs in the matter. During all this period, they had lived on the land and utilized it accordingly. He confirmed that the Plaintiffs had cultivated different crops on the land, including maize, legumes, and mango trees.

28. It was his testimony that he had never known anyone who had come to threaten the Plaintiffs or attempt to remove them from the land.

29. PW - 2 emphasized that he was their neighbour and had witnessed their peaceful occupation and farming activities on the suit property throughout the years.

30. The Plaintiffs called PW - 3 who testified as follows:

A. Examination in Chief of PW - 3 by M/s. Matoke Advocate.

31. PW - 3 was sworn and he testified in English language. He as called ELIJAH MRITO MVURYA, a citizen of Kenya and holding the national identity card bearing all the particulars as shown to Court. He resided in Mali Maleli, Mwereni and that he was the Sub-Chief of Mwema Sub-Location, a Public Servant under the Ministry of Interior & national Administration of the Government of Kenya. He averred that he was present to confirm the family of Gwama Ngoro Ngoma and their occupation of the land. According to him, he knew the family very well. He testified that upon the demise of Gwama Ngoro Ngoma, he left behind four children, who were the Plaintiffs in the matter. He deponed

that on 27th February 2025 he had written a confirmation letter to the Plaintiffs, which he produced in court. He stated that he had known the deceased and his family for twenty-three (23) years.

32. PW - 4 testified that it was the family of the deceased who had occupied the land, and upon the death of Gwama Ngoro Ngoma, he was buried on the said land. He confirmed that the land was within Mwereni Group Ranch, specifically Plot Number 14, and produced the confirmation letter as Plaintiff Exhibit No. 1.
33. On 15th July, 2025, the Plaintiff closed his case through his Legal Counsel on record M/s. Matoke Advocate.

IV. Submissions

19. On 15th July, 2025, immediately after the closure of the Plaintiffs' case, the Honorable Court directed the Originating summons dated 4th October, 2023 be canvassed through written submissions.
20. As it were, and based on the given circumstances of the case, by the time of penning down this Judgement, the Honourable Court was only able to access the Written Submissions by the Plaintiff from the Judiciary CTS Portal and ELC Registry.
21. Pursuant to which the Honorable Court reserved a date for delivery of Judgement on notice and on its merits accordingly.

A. The Written Submissions by the Plaintiffs

22. The law firm of Messrs. Opwapo & Company Advocates filed their written Submissions dated 3rd October, 2025 on behalf of the Plaintiffs. M/s. Matoke Advocate commenced her submissions by informing the Court that the Plaintiffs herein filed the Originating summons dated 4th October, seeking the above stated orders. According to the Learned Counsel, despite of the Respondent having been served with copies of the pleadings, they only entered appearance vide a Memorandum of Appearance filed on 1st November, 2023. The Defendant/Respondent failed to file any other relevant response to the said claim. The 1st Plaintiff in her supporting affidavit sworn on behalf of the 2nd to 4th Plaintiffs stated that they had been living on the suit parcel of land for over 47 years. He further stated that they had lived there together with their children, constructed their homes therein, engaged in farming and buried their loved ones thereon.

23. The Plaintiff also stated that during the possession of the suit portion of land, the Defendant never interrupted their possession of the suit land. During the proceedings, her evidence in area Chief, the 1st Plaintiff and another witness adopted their written statements dated 24th February, 2025 together with the Plaintiff's List of documents dated 4th October, 2023, the Plaintiffs' Supplementary list of documents dated 4th March, 2025 and the Plaintiffs' further list of documents dated 20th March, 2025 as the evidence before this honorable court.

24. The Learned Counsel referred Court to the case of:- ***“Tabitha Waitherero Kimani - Versus - Joshua Ng'ang'a [2017] KEELC 2455 (KLR) the Environment and Land Court”*** sitting in Eldoret outlined the minimum five basic conditions that must be met in order to perfect a title under adverse possession as follows:
25. ***(A) “Open and notorious use of the property:- For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about”.***
26. In this instance, the 1st Plaintiff in her Sworn Affidavit in support of the Chamber summons stated that the Defendant is the registered proprietor of the suit parcel of land and the Plaintiff annexed a copy of Land Certificate in its sworn affidavit. Further, the 1st Plaintiff in her said affidavit stated that the Plaintiffs had been living with their children in the suit parcel of land, they had farmed in the said parcel of land and even buried their loved ones therein. The 1st Plaintiff Annexed Copies of photographs of the same. One of the photographs stated above showed the grave of the Plaintiffs' father one GWAMA NDORO (deceased) who was said to have died in the year 1984.
27. ***(B) Continuous use of the property:-The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been***

dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

28. The 1st Plaintiff in this instance stated in her sworn affidavit stated that as the time of filing this suit, they had lived in the suit property for over 47 years. She further stated that their possession of the suit property had been continuous, open, exclusive and uninterrupted. At paragraph e of his sworn affidavit the First

29. The Plaintiffs stated that the Defendant had been aware of their possession of the parcel of land and never made any efforts in evicting them from the suit property, demand rent or appoint any agent or lawyer to collect rents or make any payments, as a result no lease agreement, rent agreement or any form of agreement or contract or contract was ever drawn, executed or entered into. At paragraph f the Plaintiff stated that either the Defendant nor its agents or servants have ever come back to remove them from the suit property.

(C). Exclusive use of the property:- The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

30. The 1st Plaintiff in the suit herein stated in his sworn affidavit together with her written statement that they had exclusively possessed the suit property for over 47 years to the exclusion of the Defendant.
31. ***(D)Actual possession of the property:-The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.***
- a. The Plaintiff in this instance has adduced evidence to the effect that for over 47 years in which they had been in exclusive possession of the suit property they had raised their children therein who were now adults, they had farmed in the suit property and buried their loved ones therein.
32. It was the submission by the Learned Counsel that pursuant to the provisions of Sections 7, 13,17 and 38 (1) and (2) of the Limitation of Actions Act, Cap. 22 as read with Section 28 (h) of the Land Registration Act, No. 3 of 2012, the Plaintiffs had satisfied the conditions required for to claim under adverse possession and the suit property should be registered under the names of the Plaintiffs as proprietors of the portion of land in their possession.
33. To buttress our point, the Learned Counsel placed further reliance on the case of ***"Mwita &another - Versus - Administrators of the Estate of Weisiko Banchwa Kegocha &another [2023] KEELC 22655 (KLR)*** the Court held that:
- "I am guided by the Court of Appeal in the case of Johnson Kinyua - Versus - Simon Gitura Rumuri [2011] eKLR, as it upheld the earlier High Court findings as follows: With regard to the extent of adverse possession, we think that possession of 8 acres of land for a period exceeding twelve years has been clearly established and that the Respondent was in exclusive possession of the piece of land openly and as of right during all this time. With respect, this is all***

that a claimant is required to establish. In the face of the nature of the possession as described above including dwelling houses and permanent plants and the visible burial ground of the Respondents parents in the disputed land, we think it is quite evident to us that the respondent used the land which he claims as of right: nec vi, nec clam, nec precario (no force, no secrecy, no evasion). It follows from the foregoing the appellant is deemed to have had either actual knowledge of the possession or had the means of knowing of the possession or occupation but did nothing about it by way of asserting the right of ownership (constructive knowledge). It is also not in dispute that the possession was never interrupted and was continuous for the entire period as prescribed. We are therefore satisfied that the superior court had properly addressed the issue of the fact of possession and also the applicable law."

34. Therefore, the Counsel held that the Plaintiffs had sufficiently demonstrated that they had acquired prescriptive and overriding rights over the portion of the suit parcel measuring 1 Acre, by virtue of their occupation and use of the suit land from the year 1990. The said rights were adverse to the Respondents' rights over the same portion of land and are capable of registration.
35. In conclusion, the Counsel urged the Court to consider their submission on a balance of probabilities and based on the evidence adduced by the Plaintiffs. They urged the Honourable Court to make a finding that the Plaintiffs had acquired proprietary rights over the said portion of land by dint of Adverse Possession and proceed to allow this claim as prayed for in the originating summons herein.

V. Analysis and Determination

36. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiffs and the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

37. This is a case of formal proof pursuant to the provision of Order 10 Rules, 4, 5, 6, 7 .9 and 10 of the Civil Procedure Rules, 2010. It is trite law that where a Defendant fails to adduce evidence in support of the Defence and fails to attend court to prosecute the case, the Plaintiff's evidence escapes the possibility of being controverted by defence evidence. It escapes the scrutiny of cross-examination by the Defendant. It therefore stands unchallenged and uncontroverted. However, the Plaintiff does not escape the burden and standard of proof which he has to satisfy and discharge in accordance with the law in order for his claim to succeed.

38. According to the provision of Sections 107 (1), 108 and 109 of the Evidence Act, cap. 80 provides that: -

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

39. Section 108 provides:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

40. And section 109 provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

41. I make reference to the case of ***“Charter House Bank Limited (Under Statutory management - Versus - Frank N. Kamau [2016] eKLR”*** the court of appeal when discussing **“the burden of proof”** on the Plaintiff in a situation where the Defendant failed to adduce evidence stated that: -

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the Defendant’s failure to call evidence, the court must be satisfied that the Plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the Defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the Plaintiff is not entitled to Judgement merely because the Defendant has not testified.”

42. For the Honourable Court to arrive at a reasonable, fair and Equitable decision, it has crafted three (3) key issues for its determination. These are:-

- a) Whether the suit instituted by the Plaintiffs through the filed originating summons/ Plaint against the Defendant has any merit whatsoever.***
- b) Whether the Plaintiffs herein are entitled to the reliefs sought***
- c) Who should bear the costs of the suit.***

ISSUE No. a). Whether the suit instituted by the Plaintiffs through the filed originating summons/ Plaint against the Defendant has any merit whatsoever.

43. Under this sub title, the Honourable Court shall examine the Plaintiffs/Applicants' case. At the end of this analysis, these questions shall be answered:

- a. Whether the suit instituted by the Plaintiffs through the filed Originating Summons, later converted into a plaint, against the Defendant had any merit whatsoever.**
- b. Whether the Plaintiffs had proved, on a balance of probabilities, that they had acquired ownership of a portion of land measuring approximately 9.88 hectares (24.5 acres) hived from L.R No. KWALE/MWERENI/14 by way of adverse possession under sections 7 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya.**
- c. Whether the Plaintiffs' occupation of the suit property had been open, continuous, exclusive, and uninterrupted for a period exceeding twelve (12) years, and whether such occupation was**

adverse to the interests of the Defendant as the registered proprietor.

d. Whether the Defendant, despite entering appearance, had failed to contest the Plaintiffs' claim by filing a defence or replying affidavit, and what effect such failure had on the merits of the case

e. Whether the Defendant's title has been extinguished by operation of law.

44. 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"***)

45. Legally speaking, according to the provision of Section 7 of the Land Act, No. 6 of 2012, ***"the doctrine of Adverse Possession"*** is one of the ways of land acquisition in Kenya. It is a doctrine that

has been expansively deliberated by the High Court and several precedents exists on it. Hence, this Honourable Court will not be re-inventing the wheel. 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. 3 of 2012 as stated herein below.

46. 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”

47. Further in Section 13:

“(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”.

48. 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.”

49. Section 17 goes on to state:-

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

50. Finally, the provision of Section 38 (1) and (2) states:-

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

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

51. 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**

52. 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.

53. Whilst, the provision of Section 28 (h) of the Land Registration Act, No. 3 of 2012 recognizes Overriding Interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. As already indicated above, the provision of Section 7 of the Land Act, No. 6 of 2012 provides prescription on the ways of acquisition of land in Kenya.

54. 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....”

55. 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. ”

56. 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.”

57. 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.

58. 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”.

59. 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.

60. In the instant case, 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.

61. The Court noted that the Plaintiffs instituted these proceedings by way of Originating Summons dated October 2023, premised on Sections 17, 18, 37 and 38 of the Limitation of Actions Act, Cap. 22 Laws of Kenya, and Order 36 Rule 30 of the Civil Procedure Rules, 2010. In compliance with directions under Order 37 Rules 11, 13 and 16 of the Civil Procedure Rules, the Originating Summons was subsequently converted into a Plaint, the supporting affidavit into evidence, and the replying affidavit into a defence. The matter therefore proceeded in the ordinary manner of a civil suit, ensuring

that the procedural foundation of the claim was sound and within the ambit of the law.

62. The Plaintiffs adduced "**viva voce**" evidence, supported by documentary exhibits including photographs of graves and cultivation, a surveyor's report establishing the acreage of 9.88 hectares, and a letter from the area Sub-Chief confirming their occupation. They demonstrated that they had resided on the suit property for over forty-seven (47) years, openly, continuously, and without interruption. The Defendant, though aware of their occupation, had never issued eviction notices, demanded rent, or otherwise interfered with their possession. The Court noted that such evidence was not only consistent but corroborated by independent witnesses, thereby strengthening the credibility of the Plaintiffs' case.

63. The Court is satisfied that the suit was properly instituted, procedurally compliant, and supported by credible evidence. The Plaintiffs had invoked the correct provisions of law governing adverse possession, and their pleadings were accompanied by affidavits and exhibits sufficient to sustain the claim. The Defendant's failure to contest the matter further reinforced the

Plaintiffs' case, as the Court was left with no competing narrative or evidence to displace the Plaintiffs' assertions. In civil litigation, the burden of proof rests on a balance of probabilities, and where one side adduces cogent evidence while the other remains silent, the scales inevitably tilt in favour of the party who has discharged their evidentiary burden.

64. Accordingly, the Court found that the suit instituted by the Plaintiffs through the filed Originating Summons, later converted into a plaint, had merit and was properly before the Court for determination on the substantive question of land adverse possession. The Court emphasized that the Plaintiffs had not only complied with procedural requirements but had also laid a factual foundation sufficient to warrant judicial inquiry into their claim of ownership by adverse possession.

ISSUE No. b). Whether the Plaintiffs herein are entitled to the reliefs sought.

65. Under this sub-title, the Honourable Court will examine whether the Plaintiffs were entitled to the reliefs sought in their Originating Summons, later converted into a plaint.

66. The Plaintiffs prayed for a declaration that they had acquired ownership of a portion of land measuring approximately 9.88

hectares (24.5 acres) hived from L.R No. KWALE/MWERENI/14 by way of adverse possession. They further sought consequential orders directing the Land Registrar, Kwale, to excise the said portion from the larger parcel and issue them with individual titles. In addition, they prayed for costs of the suit, asserting that they had been compelled to litigate in order to secure recognition of rights that had accrued to them through long and uninterrupted occupation.

67. The Court carefully considered the evidence adduced. The Plaintiffs demonstrated that they had lived on the suit property for over forty-seven (47) years, a period far in excess of the statutory twelve years required under the Limitation of Actions Act. Their occupation was corroborated by multiple strands of evidence: photographs of graves and homesteads, testimony from a neighbour who had observed their presence for decades, confirmation from the area Sub-Chief, a Public Servant under the Ministry of Interior & National Administration in charge of all matters pertaining Government and Co - ordination affairs who had issued a letter of support, and a surveyor's report establishing the precise acreage of the portion

occupied. This mosaic and empirical of evidence painted a consistent picture of long-standing, exclusive occupation.

68. The Court notes that under the provision of Section 7 of the Limitation of Actions Act, Cap. 22 actions to recover land may not be brought after the expiry of twelve years from the date the right of action accrued. Section 38 further empowers a person who has been in possession of land for at least twelve years to apply to be registered as proprietor in place of the registered owner. The Plaintiffs' occupation, spanning over four decades, not only satisfied but greatly exceeded the statutory requirement. Their case was therefore firmly grounded in law.

69. The Defendant's failure to contest the claim by filing a defence or adducing evidence despite of having been properly served meant that the Plaintiffs' case stood uncontroverted. In civil litigation, the burden of proof rests on a balance of probabilities. Where one party adduces cogent evidence and the other remains silent, the Court is entitled to find in favour of the party who has discharged their evidentiary burden. The Plaintiffs' evidence was consistent, credible, and corroborated, thereby satisfying the Court that they had indeed acquired rights by adverse possession. The absence of any rebuttal

from the Defendant further reinforced the Plaintiffs' entitlement to relief.

70. The Court also considers both the broader constitutional and statutory equitable dimensions. Article 40 of the Constitution of Kenya protects the right to property, while Article 26 guarantees the right to life, which has been interpreted to encompass livelihood and shelter. On statutes, the provision of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012 not only provides the legal dictum on the efficacy, effectiveness of registration of land, but grants the indefeasibility of rights, title and interest on land and the sanctity of title deeds over land.

71. The Plaintiffs' occupation of the land was not merely a matter of technical possession but was intertwined with their identity, family heritage, and means of subsistence. To deny them relief would have been to undermine these fundamental rights.

72. Accordingly, the Honourable Court finds that the Plaintiffs were entitled to the reliefs sought. They had demonstrated that they had acquired ownership of the portion of land measuring 9.88 hectares by way of adverse possession, and were therefore entitled to be registered as proprietors of the said portion. The Land Registrar,

Kwale, was directed to excise the portion from the larger parcel and issue individual titles to the Plaintiffs. The Plaintiffs were also entitled to costs of the suit, both as a matter of law and as recognition of the effort expended in vindicating their rights.

ISSUE No. C: Who should bear the costs of the suit

73. Under this sub-title we examine whether the Plaintiffs or the Defendant ought to bear the costs of the proceedings. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that a party is granted at the conclusion of any legal process or proceedings in any litigation. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

74. The provision of Section 27 of the Civil Procedure Act, Cap, 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows;-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the

discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

75. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure, 2nd Edition, 2005* at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

76. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of: **“Morgan Air Cargo Limited - Versus - Everest Enterprises Limited [2014] eKLR”** the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

77. In the present case, the Plaintiffs instituted the suit by way of Originating Summons, later converted into a plaint, and successfully demonstrated that they had acquired ownership of the portion of land measuring 9.88 hectares by way of adverse possession. Their evidence was credible, corroborated, and uncontroverted. The Defendant, though duly served, failed to file a defence or participate meaningfully in the proceedings. The Plaintiffs were therefore compelled to litigate to protect rights that had accrued to them, incurring costs in the process.

78. The Court finds that no special circumstances to depart from the general rule. The Defendant’s failure to contest the claim, despite being aware of the Plaintiffs’ occupation, amounted to indolence. It would be unjust to burden the Plaintiffs with the costs of a suit

they were forced to bring in order to secure recognition of their rights.

79. Accordingly, it is the Court's holding that the Defendant, Mwereni Group Ranch, should bear the costs of the suit, payable to the Plaintiffs. This award was not punitive but compensatory, ensuring that the successful litigants were reimbursed for the expense of vindicating their rights.

VI. Conclusion and Disposition

80. In the end, having undertaken an in-depth analysis of the framed issues herein, the Honourable Court, on the preponderance of probabilities, found that the Plaintiffs had successfully established their case against the Defendant. The Plaintiffs demonstrated uninterrupted, exclusive, and adverse occupation of the portion of land measuring 9.88 hectares (24.5 acres) hived from L.R No. KWALE/MWERENI/14 for a period exceeding forty-seven (47) years, thereby satisfying the statutory threshold for adverse possession under the Limitation of Actions Act. Accordingly, and for avoidance of doubt this Honourable Court makes the following orders for disposition of the suit:-

- a) **THAT** Judgment be and is hereby entered in favour of the Plaintiffs as per the Plaint converted from the Originating Summons dated 4th October, 2023, in its entirety.
- b) **THAT** a declaration be and is hereby issued that the Plaintiffs have acquired ownership by way of adverse possession of the portion of land measuring 9.88 hectares (24.5 acres) hived from L.R No. KWALE/MWERENI/14.
- c) **THAT** the Land Registrar, Kwale, be and is hereby directed to excise the said portion from the larger parcel and to register the Plaintiffs as proprietors thereof, and to issue them with individual title deeds accordingly.
- d) **THAT** a permanent injunction be and is hereby issued restraining the Defendant, its servants, agents, or anyone acting under its instructions from interfering with the Plaintiffs' quiet possession, occupation, and use of the said portion of land.
- e) **THAT** the costs of the suit shall be borne by the Defendant, payable to the Plaintiffs, together with interest at court rates from the date of Judgment until payment in full.

IT IS SO ORDERED ACCORDINGLY.

**JUDGMENT DELIVERED THROUGH MICRO - SOFT TEAMS
VIRTUAL MEANS SIGNED AND DATED AT KWALE THIS.....
21STDAY OFAPRIL.....2026.**

.....

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

Judgement delivered in the presence of:

- a) M/s. Asmaa Maftah, the Court Assistant.
- b) M/s. Kembe holding brief for Apwopo Advocate for the Plaintiffs.
- c) No appearance for the for the Defendant.