



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELCLOS NO. E 041 OF 2024 (O.S)**

**JAPHETH MUKOMBI MUSYOKA ..... 1<sup>ST</sup>**  
**APPLICANT**

**IBRAHIM ADAN JIRMA ..... 2<sup>ND</sup>**  
**APPLICANT**

**=VERSUS=**

**KIGWOR KENYA LIMITED ..... 1<sup>ST</sup>**  
**RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup>**  
**RESPONDENT**

**JUDGEMENT**

1. By an Originating Summons dated 19<sup>th</sup> June 2024, the Applicants seek the following orders against the Respondents:

- a. The Applicants have obtained title over land parcel known as L.R No. 209/12877, recently converted to Nairobi Block 31/110 situated in Woodley Division, Kibra Sub- County within Nairobi City County, (the suit property) by way of adverse possession having occupied the same in an exclusive, open, peaceful, continuous and***

**uninterrupted manner for a period of over twelve (12) years since May,2010.**

- b. The 1<sup>st</sup> Respondent's title over parcel of land known as L.R No. 209/12877, recently converted to Nairobi Block 31/110 situated in Woodley Division, Kibra Sub-County within Nairobi City County, has been extinguished by operation of law.**
  - c. The Applicants be registered as the absolute and indefeasible proprietors of the parcel of land known as L.R No. 209/12877, recently converted to NAIROBI BLOCK 31/110 situated in Woodley Division, Kibra Sub-County within Nairobi City County.**
  - d. The Chief Land Registrar, the 2<sup>nd</sup> Respondent herein do register the Applicants as the proprietors of the land parcel known as L.R No. 209/12877, recently converted to Nairobi Block 31/110 situated in Woodley Division, Kibra Sub-County within Nairobi City County pursuant to order (c) above in place of the 1<sup>st</sup> Respondent herein within fourteen (14) days of the judgment, order or decree herein.**
  - e. Cost of the suit be borne by the 1<sup>st</sup> Respondent.**
2. The Originating Summons is supported by the affidavit of Ibrahim Adan Jirma and Newton Omogo Auko, sworn on even

date. It is further supported by the supplementary affidavit of Ibrahim Adan Jirma, sworn on 4<sup>th</sup> November 2024.

3. The Originating Summons was canvassed by way of viva voce evidence

### **THE APPLICANT'S CASE**

4. The Applicants called four witnesses in support of their case. The 2<sup>nd</sup> Applicant, Ibrahim Adan Jirma, testified as PW1. He adopted his supporting affidavit, sworn on 19<sup>th</sup> June 2024, and the supplementary affidavit sworn on 4<sup>th</sup> November 2024 as his evidence-in-chief. He also produced the annexures attached to his supporting affidavit as exhibits 1 to 9, respectively. PW1 testified that they have been in open, exclusive, peaceful, and uninterrupted occupation of the parcel of land formerly known as L.R. No. 209/12877 and now known as Nairobi Block 31/110, the suit property herein, for over twelve years, having entered the property in May 2010 while seeking employment in Upperhill.
5. He testified that he initially found another person living in a structure on the suit property, and they later established a hotel, a car wash, and a parking business as their main source of livelihood. He testified that although they had previously operated a food kiosk on the suit property, they leased it to Newton Omogo Auko in 2016 for a monthly rent of KShs. 10,000/=. He further testified that they cultivated seasonal crops and kept poultry on the suit property.

6. He denied that the 1<sup>st</sup> Respondent had granted him permission to occupy the property, arguing that he had never met the Respondents before 2024.
7. He further testified that they installed water and electricity on the suit property without the consent of the 1<sup>st</sup> Respondent. He testified that in January 2014, a vehicle owned by the former Cabinet Secretary for Interior, Dr Fred Matiang'i, was damaged while parked within the parking yard on the suit property. Subsequently, he was arrested and detained at the Capitol Hill Police Station under OB No. 29/13/1/2014 before being released unconditionally. He argued that this incident demonstrated the Applicants had established a car wash and parking business on the suit property before 2015.
8. He denied knowing the late Stephen Gathogo Njuguna and maintained that the suit was only filed after the 1<sup>st</sup> Respondent's agents demanded that the Applicants vacate the property in June 2024. He also stated that they leased out a kiosk on the property in 2016 and that the Area Chief was aware of their occupation of the suit property.
9. He acknowledged that the suit property was registered in the name of the 1<sup>st</sup> Respondent on 19<sup>th</sup> August 1996, in accordance with Gazette Notice No. 12628 of 5<sup>th</sup> October 2022.
10. He claimed that they entered and occupied the suit property without the consent of the 1<sup>st</sup> Respondent, but with its knowledge, while they were homeless and engaged in

casual work within the vicinity. He stated that they later established their residence on the land and occupied it continuously for over 12 years.

11. The Applicants relied on letters from the area Chief, utility payment records, a lease agreement, and photographs to support their claim of residence, business activities, and occupation of the suit property. They argued that the suit property had been their home and sole source of livelihood for over twelve years and that they would suffer prejudice if evicted or if their occupation were disrupted.
12. He denied that the Applicants occupied the property with the 1<sup>st</sup> Respondent's consent or under any caretaker arrangement, arguing that no evidence supported the alleged oral agreement. He also denied that the 1<sup>st</sup> Respondent's directors, architect or quantity surveyor had visited the suit property during the Applicants' occupation, dismissing the supposed interactions with George Migwi Maina and Charles Kanyua Waweru as fabricated.
13. He further testified that they were not aware of any contractual arrangements between the 1<sup>st</sup> Respondent and its consultants and that such arrangements could not defeat rights accrued through limitation of time. He maintained that their occupation had been open, exclusive, continuous and uninterrupted, without the 1<sup>st</sup> Respondent's permission, and urged the Court to find that the legal threshold for adverse possession had been satisfied.

14. In cross-examination, he admitted that the photographs produced as evidence were taken in 2024, shortly before the commencement of the suit. He confirmed that he had no earlier photographs to demonstrate his occupation. He stated that they installed water in 2023, while electricity was connected in 2024 through an application made to Kenya Power Company. He admitted that the application form was incomplete and that he had no receipts proving payment to Kenya Power Company. He also admitted that they did not hold a licence for the car wash business.
15. PW2, Newton Omogo Auko, adopted his supporting affidavit, sworn on 19<sup>th</sup> June 2024, as his evidence in chief. He also produced the annexures attached to his supporting affidavit in support of his evidence. He informed the Court that he operated a canteen on the suit property pursuant to a lease agreement dated 1<sup>st</sup> January 2016 granted by the Applicants, whom he had known since 2012.
16. He further testified that the Applicants had been paying for water and electricity charges incurred on the suit property.
- 24.
- 26.
17. In cross-examination, he admitted that he had no business licence for the kiosk, no documentary proof of rent payments, and that the lease agreement had not been

drafted by an advocate. He also admitted that the photographs produced did not specifically identify the suit property. He further stated that he drew the lease agreement.

18. PW3, PC Edwards Mwema, attached to Capital Police Station, produced a certified copy of the cell register under OB No. 29 of 13<sup>th</sup> January 2014. He testified that Ibrahim Adan was booked for the offence of malicious damage and was released on the same day.
19. In cross-examination, he admitted that the cell register did not indicate the complainant, the location of the offence, the property allegedly damaged, or the suspect's identity number. He explained that the original OB was destroyed after the statutory retention period expired.
20. PW4, Patrick Weru, the area Chief of Golf Course Location, testified that he authored letters dated 5<sup>th</sup> January 2024 and 26<sup>th</sup> March 2024 regarding the Applicants' occupation of the suit property and their application for electricity connection. He stated that the Applicants have resided on the property with their families since 2010, where they operated a car wash and a tea kiosk.
21. In cross-examination, he admitted that he has only served as Chief in the area since 2023 and lacks direct knowledge of the Applicants' occupation from 2010. He explained that the information in the letters was obtained from local residents, village elders, neighbours, and other intelligence sources.

## **THE 1<sup>ST</sup> RESPONDENT'S CASE**

22. The 1<sup>st</sup> Respondent called three witnesses in support of its case.
23. DW1, Maryann Wanjiku Kungu, a director of the 1<sup>st</sup> Respondent, adopted her replying affidavit dated 2<sup>nd</sup> April 2024 as her evidence-in-chief. DW1 informed the Court that the 1<sup>st</sup> Respondent is the registered proprietor of the suit property, having acquired it from the Government of Kenya on 12<sup>th</sup> August 1996 for a term of ninety-nine years, and that it has continuously managed and protected the property since acquisition.
24. She further testified that in 2013, some fraudsters interfered with the title of the suit property at the land registry, which necessitated reconstructing the title documents and registering a caveat over the property in 2015.
25. She explained that the property remained unoccupied until 2015, when the Applicants were employed as caretakers following an attempted fraudulent interference with the land. She emphasized that the Applicants entered the property with the 1<sup>st</sup> Respondent's knowledge and consent solely to protect the land from encroachment and land grabbing. She stated that the 1<sup>st</sup> Respondent allowed the Applicants to live on and utilize the property, including conducting agricultural and business activities.

26. She further testified that the 1<sup>st</sup> Respondent constructed temporary mabati structures for the Applicants' use and permitted them to install electricity and carry out business activities on the suit property.
27. She informed the Court that between 2015 and 2017, the 1<sup>st</sup> Respondent intended to commercially develop the property and engaged Charles Kanyua Waweru, an architect and George Migwi Maina, a quantity surveyor, who visited the suit property in the presence of the Applicants and prepared drawings and cost estimates for the proposed development. She stated that the project was not carried out due to financial constraints.
28. She told the Court that she and her late husband regularly visited the property and interacted with the Applicants regarding its maintenance. She stated that the Applicants' business activities, cultivation, utility payments, and occupation of the property were conducted with the 1<sup>st</sup> Respondent's permission.
29. She maintained that the Applicant's occupation was permissive as it related to a caretaker arrangement starting in 2015 and therefore, cannot form the basis of a claim for adverse possession. Accordingly, she urged the Court to dismiss the suit with costs.
30. DW1 challenged the authenticity and evidentiary value of the letters allegedly issued by the area Chief confirming the Applicants' occupation from 2010, arguing that they were obtained to support a fraudulent claim over the suit

property. She further stated that the suit was filed shortly after the death of her husband, Stephen Gathogo Njuguna, who had mainly managed the company's properties, which, in her view, demonstrated an attempt by the Applicants to unlawfully deprive the 1<sup>st</sup> Respondent of its property.

31. In cross-examination, she admitted that she had not produced documentary evidence showing the Applicants' engagement as caretakers, payment of land rates, or instructions issued to the architect and quantity surveyor. She acknowledged that the Applicants built the kiosk on the property and that she permitted its operation, and the installation of electricity. She disputed the authenticity of the Chief's letters but admitted that she had not reported the alleged fraud to the police.

32. DW2, Charles Kanyua Waweru, a registered architect, adopted his replying affidavit dated 2<sup>nd</sup> September 2024 as his evidence in chief. He also produced the annexures attached to his replying affidavit in support of his evidence. He testified that in 2015, the late Stephen Gathogo Njuguna engaged him to prepare concept designs for a proposed commercial development on the suit property. He stated that he visited the property on 24<sup>th</sup> March 2017 in the company of the late Mr Njuguna, took photographs of the site and observed that the property was being used for parking and contained a temporary structure made of iron sheets. He thereafter prepared concept designs for the

proposed development, which underwent several revisions, although the project ultimately did not proceed.

33. In cross-examination, he admitted that the concept drawings and project documents, were unsigned, unstamped, and were not supported by correspondence directly linking them to the 1<sup>st</sup> Respondent or the suit property. He also acknowledged that no change of use had been obtained for the proposed commercial development. He further testified that he had not presented the emails supposedly transmitting the deed plans or instructions for the work.

34. DW3, George Migwi Maina, a registered quantity surveyor, adopted his replying affidavit, sworn on 24<sup>th</sup> August 2024, as his evidence in chief. He testified that he was instructed by the late Stephen Gathogo Njuguna to prepare cost estimates for the proposed commercial development on the suit property. He stated that he visited the site with the architect and the late Mr Njuguna and found that the suit property was mainly undeveloped and used as a parking area with a temporary structure occupied by a caretaker. He stated that he prepared cost estimates for the proposed development amounting to Kshs. 17,589,439.14 inclusive of VAT, which was presented to the 1<sup>st</sup> Respondent's directors, although the project did not proceed due to financial constraints.

35. He further testified that he visited the suit property several times between 2015 and 2017 with the late Mr Njuguna

and worked alongside the project architect, Charles Kanyua Waweru, who had prepared concept drawings for the proposed development. He asserted that the Applicants were present during those visits and were introduced to him by the late Mr Njuguna as caretakers of the property.

36. He disputed the Applicants' claim that they had occupied the suit property since 2010, asserting that he had accompanied the late Mr Njuguna to the property between 2011 and 2012 and found no one residing there. He maintained that he first saw the Applicants in 2015, who were on the property with the permission of the 1<sup>st</sup> Respondent as caretakers, not as adverse possessors. He maintained that the affidavits sworn by Ibrahim Adan Jirma and Newton Omogo Auko were inaccurate and misleading.

37. In cross-examination, he admitted that he had not produced documentary evidence showing formal instructions, payment for the work done, or correspondence forwarding the estimates to the 1<sup>st</sup> Respondent. He nonetheless maintained that the proposed development was intended for the suit property and that the Applicants occupied the property with the permission of the 1<sup>st</sup> Respondent as caretakers.

38. After the hearing concluded, the parties agreed to file and exchange their written submissions

### **APPLICANTS' SUBMISSIONS**

39. The Applicants filed their submissions dated 27<sup>th</sup> November 2025.

**40.** On behalf of the Applicants, Counsel submitted that they had met the legal threshold for acquiring title through adverse possession. Counsel argued that adverse possession occurs when a person openly and continuously occupies land without force, secrecy, or permission, and that the construction of structures and acts of ownership may demonstrate animus possidendi. To support this point, Counsel relied on **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR and Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR.**

41. Counsel contended that the evidence of PW1 shows that they entered the suit property in May 2010 while homeless and established their residence, car wash, parking business, and other developments on the land. Counsel submitted that the photographs, utility records, evidence of Newton Omogo Auko, and letters from the Area Chief confirmed the Applicants occupation of the suit property for over twelve years. Counsel further submitted that PW3's evidence regarding an incident in 2014 involving a motor vehicle linked to Fred Matiang'i supported their occupation before 2015 and contradicted the 1<sup>st</sup> Respondent's claim that they only entered the property in 2015.

42. Counsel submitted that the Applicants occupation had been open, notorious, actual and exclusive, as demonstrated by their construction of structures, operation of businesses, cultivation of crops, poultry keeping, procurement of utility connections and leasing of part of the property to Newton

Omogo Auko without the 1<sup>st</sup> Respondent's permission. Counsel relied on **Tabitha Waitherero Kimani v Joshua Ng'ang'a [2017] KEELC 2455 (KLR)**, **James Maina Kinya v Gerald Kwendaka [2018] eKLR** and **Pina Waithera Kamau v Shmina Mandai & another** to contend that such acts constitute visible and unequivocal assertions of possession.

43. Counsel further submitted that the Applicants possession was continuous and uninterrupted for over twelve years. Counsel submitted that the testimony of PW4, along with evidence from PW2 and PW3, demonstrates long-term occupation and use of the suit property. Counsel cited **Raphael Kahindi Kawala v Mount Elgon Beach Properties Ltd [2018] KECA 194** and **Achieng & others v Odongo & 2 others [2023] KEELC 20983** to support the evidentiary value of the testimony by local administrators regarding land occupation.

44. Regarding the issue of interruption, Counsel argued that the alleged intention by the 1<sup>st</sup> Respondent to commercially develop the suit property did not constitute an interruption of possession, as no development was carried out and the Applicants remained in occupation throughout. Counsel cited **Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR** and **Mac Gardens Limited & another v County Secretary, Nairobi City County Government & 3 others [2023] KEELC 22447 (KLR)** to submit that interruption must be actual and physical, and

that unimplemented development plans are insufficient to negate adverse possession.

**45.** Counsel disputed the 1<sup>st</sup> Respondent's claim that the Applicants occupied the property as caretakers or licensees. It was argued that the burden of proof regarding permission lay with the 1<sup>st</sup> Respondent. Counsel submitted that no documentary evidence, such as company resolutions, employment records, or written authority, was produced to support the alleged caretaker arrangement. To support this argument, Counsel cited **Francis Gicharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 239 of 2002; Richard Kipkemboi Limo v Hassan Kipkemboi Ngeny & 4 others [2019] eKLR; Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 18 others [2023] eKLR; and Ngunyumu Housing Co. Ltd v Njambi Angela Gathecha & 3 others [2024] KEELC 6412 (KLR).**

**46.** Counsel challenged the credibility and probative value of the evidence presented by the 1<sup>st</sup> Respondent's witnesses, particularly the architect and the quantity surveyor. Counsel submitted that the consultants failed to produce practising licences for the relevant period, documentary instructions, correspondence, proof of payment, or properly authenticated photographs linking their alleged work on the suit property. Counsel further contended that allegations of fraud against the Applicants and the Area Chief had neither been specifically pleaded nor strictly proved. To support these arguments, Counsel relied on **Vijay Morjaria v**

**Nansing Madhusingh Darbar & another [2000] eKLR, Naimisha Somchand Shah v Resident Magistrate, Mombasa & 3 others [2017] eKLR, Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR, Shah & another v Shah & others [2003] 1 EA 290 and In re Estate of the Late Peter Omondi Adoyo (Deceased) [2025] KEHC 4155 (KLR).**

47. Counsel urged the Court to find that the Applicants had established actual, open, exclusive, peaceful, and uninterrupted possession of the suit property for over twelve years, and to allow the Originating Summons as prayed.

#### **THE 1<sup>ST</sup> RESPONDENTS SUBMISSIONS**

48. The 1<sup>st</sup> Respondent filed its submissions dated 15<sup>th</sup> January 2026.

49. On behalf of the 1<sup>st</sup> Respondent, Counsel submitted that the Applicants had failed to establish the legal requirements for adverse possession and as such, the Originating Summons should be dismissed with costs. Counsel asserted that the 1<sup>st</sup> Respondent is the registered proprietor of the suit property, having acquired the same from the Government of Kenya in 1996. Counsel argued that the Applicants had not proved open, notorious, exclusive, continuous and uninterrupted occupation adverse to the 1<sup>st</sup> Respondent's title for the statutory period.

50. Counsel contended that the Applicants entered the suit property with the 1<sup>st</sup> Respondent's consent in 2015 after they were engaged as caretakers to safeguard the land following interference with the land records and reconstruction of the title documents. Counsel submitted that the Applicants occupation was therefore permissive and does not serve as a basis for a claim for adverse possession. Counsel further relied on the registration of a caveat against the title in May 2015 as evidence of continued assertion of proprietary rights over the property.

51. Counsel challenged the Applicants' evidence of occupation from 2010, arguing that the photographs relied upon were taken in 2024, shortly before the institution of the suit, while the utility records produced did not predate 2023. Counsel further contended that the alleged electricity application was incomplete, no receipts were provided for utility payments, and no reliable documentary evidence was tendered to prove occupation from 2010. Counsel challenged the evidence relating to the alleged 2014 arrest on the grounds that the police officer only produced a cell register, which did not identify the complainant, the property involved, or the location of the alleged offence.

52. Counsel also challenged the evidence of Newton Omogo Auko and the Area Chief, Patrick Weru arguing that Newton Omogo Auko had not provided proof of rent payments or independent verification of occupation since 2016, whilst

the Area Chief had only been posted to the area in 2023 and relied on information from third parties rather than personal knowledge.

53. In support of the 1<sup>st</sup> Respondent's defence, Counsel relied on the evidence of DW1 Maryanne Wanjiku Kungu, who testified that the company actively managed and protected the suit property, reconstructed the land file after interference at the Lands Registry, registered a caveat against the title, and permitted the Applicants to occupy the property as caretakers. Further reliance was placed on the evidence of DW2 and DW3, who testified that they visited the property in 2017 with the late Stephen Gathogo Njuguna regarding a proposed commercial development and found the property was substantially undeveloped apart from a temporary structure occupied by a caretaker. According to Counsel, this evidence demonstrated the 1<sup>st</sup> Respondent's continued assertion of ownership and rebutted the Applicants' claim of exclusive occupation from 2010.
54. Regarding the applicable law, Counsel relied on Sections 7, 13 and 38 of the Limitation of Actions Act and the decisions in **Karanja Riji v Commander Charo [2016] eKLR**, **Ndolo v Kitutu & 8 others [2022] KECA 1289 (KLR)**, **Samuel Kihamba v Mary Mbaisi [2015] eKLR** and **Mbira v Gachuhi (2002) 1 EALR 137**, to submit that adverse possession must be open, peaceful, exclusive, continuous and without permission. Further reliance was

- placed on **Mwagandi v Lewa [2025] KECA 1036 (KLR)** to submit that the claimant bears the burden of proving adverse possession with credible and admissible evidence.
55. Counsel further submitted that an occupation based on permission cannot constitute adverse possession. Counsel relied on **Langat & 3 others v Sigilai [2025] KECA 1039 (KLR)** to submit that time does not start to run where possession is permissive until such permission is withdrawn. Counsel maintained that the Applicants' occupation as caretakers was inconsistent with hostile or adverse possession and remained subordinate to the 1<sup>st</sup> Respondent's title.
56. Counsel argued that if time had started to run, it was stopped by the registration of the caveat in 2015 and by the entry on the property by the late Stephen Gathogo Njuguna and the company's consultants in 2017. Counsel relied on Sections 78A and 106B of the Evidence Act and the decision in **Kahira v Varam & 2 others [2023] KEELC 16287 (KLR)** to defend the admissibility and probative value of the photographs produced by the architect
57. Counsel urged the Court to find that the Applicants had failed to prove open, notorious, exclusive, peaceful, and uninterrupted occupation of the suit property for twelve years adverse to the title. In conclusion, Counsel urged the Court to dismiss the Originating Summons with costs.

### **THE APPLICANTS SUPPLEMENTARY SUBMISSIONS**

58. The Applicants filed supplementary submissions dated 2<sup>nd</sup> February 2026. On behalf of the Applicants, Counsel contended that the 1<sup>st</sup> Respondent had improperly addressed contested matters as undisputed facts. Counsel asserted that the only uncontested issue was that the 1<sup>st</sup> Respondent is the registered proprietor of the suit property, while the alleged caretaker arrangement, the purported 2017 site visits, and the legal effect of the caveat remained disputed matters subject to evidentiary proof.

59. Counsel further submitted that the registration of a caveat does not interrupt adverse possession, asserting that adverse possession is based on factual possession and control of land rather than entries on the register. Counsel relied on **Maweu v Liu Ranching & Farming Cooperative Society [1985] KECA 72 (KLR), Leonola Nerima Karani v William Wanyama Ndege [2012] eKLR and Mwagandi v Dr. Mtana Lewa, Civil Appeal E004 of 2022**, to argue that interruption requires actual dispossession, re-entry or the commencement of legal proceedings, and that administrative actions or assertions of ownership are insufficient.

60. Counsel submitted that the Applicants denied the alleged visits by the late Stephen Gathogo Njuguna, the architect, or the quantity surveyor, amounted to an interruption of possession. Counsel argued that the Applicants maintained that they neither knew the deceased nor interacted with the alleged consultants. Counsel also argued that occasional

visits, photography, or inspections of the land did not constitute dispossession or recovery of possession in law.

61. Regarding the burden of proof, Counsel acknowledged that the Applicants bore the legal burden under Sections 107 and 108 of the Evidence Act. To support this point, reliance was placed on **Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] eKLR** and **Richard Kipkemboi Limo v Hassan Kipkemboi Ngeny & 4 others [2019] eKLR**. Counsel submitted that the Applicants had discharged the burden of proof through the testimony of PW1, PW2, PW3 and PW4, which established occupation of the suit property from 2010, operation of businesses thereon, leasing of part of the land, procurement of utility services and continued possession for over twelve years.

62. Conversely, Counsel submitted that the 1<sup>st</sup> Respondent failed to tender credible evidence of permissive occupation or a caretaker arrangement. Counsel contended that no employment contracts, caretaker agreements, company resolutions, payment records or correspondence had been produced. Counsel submitted that the allegation of permission was contradicted by the Applicants' acts of constructing structures, installing utilities and leasing part of the property without the 1<sup>st</sup> Respondent's consent.

**63.** Counsel challenged the admissibility and evidentiary value of the photographs produced by the 1<sup>st</sup> Respondent through DW2. It was argued that the photographs

constituted electronic evidence subject to Section 106B of the Evidence Act and were inadmissible without the necessary certificate identifying the device used and explaining how the images were generated. To support this argument, Counsel cited **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] KECA 397 (KLR)** and **John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others [2018] KECA 439 (KLR)**.

64. Counsel maintained that the Applicants' photographic evidence was properly authenticated and corroborated by oral testimony, utility records, the lease to PW2 and the evidence of PW3 and PW4. Counsel urged the Court to find that the Applicants had established open, exclusive, peaceful and uninterrupted possession of the suit property for more than twelve years and to grant the orders sought in the Originating Summons.

### **ANALYSIS AND DETERMINATION**

65. Having considered the pleadings, the respective affidavits, the evidence on record and the parties' submissions, the only issue that arises for determination is whether the Applicants have proved that they have acquired ownership of the suit property by way of adverse possession.

66. The doctrine of adverse possession is embodied in Sections 7, 17 and 38 of the Limitation of Actions Act.

67. **Section 7 of the Limitation of Actions Act** provides that;

***“An action may not be brought by any person to recover land after 12 years from the date on which the right of action accrued to him or if it first accrued to some other person through whom he claims to that person.”***

68. **Section 17** extinguishes the title of the registered proprietor upon expiry of the limitation period, while **Section 38** permits a person claiming to have become entitled to land by adverse possession to apply to the Court for an order vesting the land in their favour.

69. The legal threshold for adverse possession is well settled. A claimant must prove actual, open, notorious, exclusive, continuous and uninterrupted possession of the land for at least twelve years. Such possession must be *nec vi, nec clam, nec precario*, meaning, without force, without secrecy and without permission. The claimant must also demonstrate *animus possidendi*, the intention to possess the land as an owner to the exclusion of the true owner.

70. The ingredients of the doctrine of adverse possession were discussed in **Mtana Lewa v Kahindi Ngala Mwangadi (2015) eKLR**, as follows:

***“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it, and the person having title to it omits or neglects to***

**take action against such person having title to it for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force nor under the licence of the owner. It must be adequate, in continuity, in public and in extent to show that possession is adverse to the title owner.”**

71. Similarly, in **Samuel Kihamba v Mary Mbaisi (2015)** **eKLR** the Court held that:

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

72. It is well settled that a party claiming adverse possession must prove that the possession was actual, peaceful, open, continuous and uninterrupted for a minimum of twelve years. It is not in dispute that the 1<sup>st</sup> Respondent is the registered owner of the suit property, as evidenced by the title and the company search. The burden of proof to defeat this title by establishing adverse possession lies with the Applicants in accordance with **Section 107 of the Evidence Act**, which states as follows:

***(1) 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.***

***(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***

73. The first issue for determination is whether the Applicants proved occupation from May 2010. For the Applicants to be entitled to the suit property by way of adverse possession, they must demonstrate that they have been in open, actual, continuous and uninterrupted occupation for a period of not less than 12 years. In the case of **Wambugu vs Njuguna (1983) KLR 173**, the Court of Appeal held that:

***“Adverse possession contemplates two concepts; Possession and discontinuance of possession. It further held that the proper way***

***of assessing proof of Adverse possession would 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 or she has been in possession for the requisite number of years.***

74. PW1 testified that he entered the suit property in May 2010 and has remained there for over twelve years. He produced photographs taken in June 2024, shortly before the suit was filed. The photographs depict existing structures, several parked vehicles, and activities on the land as of 2024.

75. In ***Eliakim Masale v Ilale Mohamed & 4 Others, Mombasa Civil Appeal 135 of 2019, as cited in Chigamba & 2 others v Noormohamed & 8 others [2022] KECA 535 (KLR)***, the Court of Appeal held that a photograph, being a static and inert representation of facts, can only objectively identify a certain person, item, or place at the specific time when the photograph is taken, and has limited evidentiary and probative value regarding the facts of the duration or continuous occupation of a property that is the subject of a claim by adverse possession.

76. In the Court's view, photographs taken in anticipation of litigation or immediately before the commencement of the suit may show the state of the property at the time they were taken but do not alone establish continuous, open, and uninterrupted occupation for the statutory period needed to

support a claim of adverse possession. No photographs or other visual evidence from earlier years were presented to demonstrate continuous occupation over the intervening period. Based on the above, I find that the photographs have limited probative value in proving long, open, and uninterrupted possession of the suit property for the statutory period.

77. The Applicants also relied on utility bills to demonstrate continuous possession of the suit property. (PW1) admitted that the water connection was installed in 2023, while the electricity application was made in 2024. He further admitted that the electricity application form was incomplete and that he had not provided receipts evidencing payment to Kenya Power Company. He produced an M-Pesa statement showing payments made to Nairobi Water and Sewerage Company Limited between 2023 and 2024. Although these documents may demonstrate occupation of the suit property around the time the suit was filed, they do not prove continuous occupation of the suit property for the year 2010 as claimed. If anything, the installation of water services in 2023 suggests recent user or occupation rather than long-standing occupation

78. No utility bill receipts or related documents were produced for the preceding years to demonstrate long-standing possession of the suit property. The Court notes that adverse possession cannot be proved by isolated acts of possession shortly before the commencement of the suit.

The claimant must present cogent evidence demonstrating continuous, open, and uninterrupted possession.

79. The Applicants further relied on letters authored by PW4, the Area Chief, indicating that they have occupied the suit property with their families since 2010 up to the present. The Chief testified that he assumed office in the area only in 2023 and that his conclusion regarding the duration was based on information obtained from other sources. The Court notes that the Chief lacked direct personal knowledge of the Applicants' alleged occupation in 2010. His statement that the Applicants had occupied the suit property with their families since 2010 was based on information from local residents, village elders, neighbours, and other intelligence sources.

80. In the circumstances, the Chief's letters mainly amounted to hearsay evidence and could not, without independent corroboration, prove continuous, open, and uninterrupted possession of the suit property since 2010. Section 63(1) of the Evidence Act requires oral evidence, in all cases, to be direct. No basis was laid to bring PW4's evidence within any recognized exception to the rule against hearsay. Consequently, while his evidence could confirm matters within his personal knowledge from 2023, it could not properly be relied upon as proof that the Applicants have occupied the suit property continuously from 2010 to date.

81. The Applicants also relied on the evidence of PW3, the police officer, who stated that the 2<sup>nd</sup> Applicant was arrested

in connection with the offence of malicious damage to property. He produced a certified extract of the cell register relating to OB No. 29 of 13<sup>th</sup> January 2014, which confirmed that a person named Ibrahim Adan was booked for malicious damage and released on the same date. The cell register produced by the Applicants does not indicate the complainant, the exact location where the offence occurred, or the property alleged to have been damaged. The register does not link the incident to the suit property or demonstrate that the Applicants were in actual occupation of the property at the material time in 2014. In the absence of corroborative evidence, the Court finds that the evidence of PW3 is of limited probative value and does not establish possession of the suit property.

82. PW2, Newton Omogo Auko, testified that he had known the Applicants since 2012 and that he leased a canteen from them in 2016. Although he produced a lease agreement between himself and the Applicants, he did not produce any rent receipts, proof of rent payments, or a business or trading licence to corroborate the alleged tenancy or the operation of the business. The mere assertion of a landlord-tenant relationship without the evidence of actual occupation or business operation is insufficient to establish that the Applicants were in continuous, open and exclusive possession of the suit property since 2010.

83. Accordingly, the Applicants have failed to prove, on a balance of probabilities, that they had been in open, actual,

exclusive, continuous and uninterrupted occupation of the suit property from May 2010.

84. The next issue for determination is whether the occupation was adverse to the 1<sup>st</sup> Respondent's title. DW1 testified that the Applicants were allowed to occupy the land as caretakers after fraudsters interfered with the land records for the suit property. Her evidence was partially supported by the testimonies of DW2 and DW3, who stated that they visited the suit property in 2017 regarding a proposed development and observed that the property was being used as a parking area and there was a temporary structure. The Applicants challenged the reliability of that evidence on the grounds that no documentary instructions, correspondence, proof of payment or practising licences for the relevant period were produced.

85. The evidence of DW2 and DW3 was not presented as expert opinion on architectural or quantity surveying issues. It was mainly factual evidence showing that they visited the suit land, observed its condition, and understood the occupant to be a caretaker. The probative value of that evidence was, however, diminished by the failure to produce a certificate under Section 106B of the Evidence Act regarding the printed photographs relied upon.

86. The Court concurs with the Applicants' argument that merely registering a caveat, preparing development plans, or making occasional visits by the owner do not on their own constitute a legal interruption of adverse possession.

Interruption generally requires dispossession, effective re-entry, or commencing legal proceedings to recover the land. The evidence shows that the 1<sup>st</sup> Respondent registered a caveat against the title immediately upon discovering attempts to interfere with the suit property. The 1<sup>st</sup> Respondent's registration of a caveat in 2015 and the preparation of development plans in 2017 would not alone defeat an adverse possession claim if the Applicants had otherwise demonstrated open, exclusive, and adverse occupation for twelve years. As established by the Court of Appeal in **Ndatho v Itumo & 2 others, Nairobi Civil Appeal No. 213 of 1999, as cited in Karuntimi Raiji v M'makinya M 'itunga [2013] KECA 514 (KLR)**, disruption of adverse possession involves a physical act.

87. Although the registration of a caveat does not itself interrupt time for the purpose of adverse possession, it is significant because it demonstrates that the 1<sup>st</sup> Respondent remained vigilant and actively asserted its ownership rights over the suit property. The 1<sup>st</sup> Respondent's conduct was consistent with an owner seeking to protect his proprietary interest in the suit property against unlawful dealings. It is inconsistent with dispossession and negates any suggestion that the 1<sup>st</sup> Respondent abandoned its land.

88. The 1<sup>st</sup> Respondent failed to produce a written caretaker agreement, employment records, payment vouchers, company resolutions, or correspondence expressly appointing the Applicants as caretakers. This omission

undermined the 1<sup>st</sup> Respondent's claim that the Applicants accessed the suit property with its permission and consent.

89. However, the burden remained on the Applicants to prove that their occupation was adverse to the 1<sup>st</sup> Respondent's title for twelve years.

90. In **Mombasa Teachers Co-operative Savings and Credit Society Limited Vs Robert Muhambi Katana & 15 Others [2018] eKLR**, the Court of Appeal stated that: -

***“Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an interrupted period of 12 years as espoused in the Latin maxim nec vi nec clam nec precario.”***

91. The Applicants' acts of constructing temporary structures, operating a car wash and parking business, cultivating crops, keeping poultry and leasing a kiosk may, in appropriate circumstances, qualify as acts of possession and may also demonstrate animus possidendi. However, those acts must be proven to have existed for the statutory period and to have been carried out without the permission of the 1<sup>st</sup> Respondent. In the matter at hand, the evidence presented did not establish the required duration.

92. Based on the totality of the evidence, this Court finds that the Applicants failed to prove that their occupation of the

suit property was continuous, open, exclusive, and uninterrupted possession for twelve years prior to the filing of the Originating Summons.

93. Consequently, the 1<sup>st</sup> Respondent's title has not been extinguished under Sections 7 and 17 of the Limitation of Actions Act.

94. In the end, the Originating Summons dated 19<sup>th</sup> June 2024 is hereby dismissed with costs.

**RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF MAY 2026.**

.....  
**HON. T. MURIGI**  
**JUDGE**

**IN THE PRESENCE OF:-**

Ndegwa holding brief for Otinga for the Applicants

Ms Muturi holding brief for Mr Njuguna for the 1<sup>st</sup> Respondent

Ahmed – Court assistant