



Mwamngumi & another v Kagambi (Environment and Land Case E011 of 2023) [2026] KEELC 2751 (KLR) (5 May 2026) (Judgment)

Neutral citation: [2026] KEELC 2751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE E011 OF 2023**

LL NAIKUNI, J

MAY 5, 2026

**IN THE MATTER OF: AN APPLICATION UNDER SECTION
17 & 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 AND
SECTION 7 (D) OF THE LAND ACT NO.6 OF 2012 LAWS OF KENYA**

AND

IN THE MATTER OF: ACQUISITION OF TITLE BY ADVERSE POSSESSION

AND

IN THE MATTER OF: LAND PARCEL NO. KWALE/ GALU KINONDO/495

BETWEEN

MWINYI SALIM MWAMNGUMI 1ST APPLICANT

MWANAKOMBO SAID JUMA 2ND APPLICANT

AND

TIMOTHY IRIMU KAGAMBI RESPONDENT

JUDGMENT

I. Preliminary

1. The Judgement by this Honourable Court pertains to a Civil suit instituted by Mwinyi Salim Mwamngumi and Mwanakomno Saidi Juma, the Plaintiffs/Applicants herein. It was against Timothy Irimi Kagambi, the Defendant/ Respondent herein by way of Originating Summons on the 30th May, 2023 filed on 8th June, 2023 premised under the provision of Order 37 Rule 7 and 8 of the Civil Procedure Rules, 2010, Section 38 of the *Limitation of Actions Act* Cap. 22 and Section 7(d) of the *Land Act* No. 6 of 2012 Laws of Kenya.



2. Upon filing of the Originating Summons the Defendant/ Respondent responded to the Claim through a replying affidavit sworn on 5th January, 2024.

II. Court directions before the hearing

3. On 5th February, 2024, after confirming that the Plaintiffs/ Applicants had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 10th June, 2024. Priorly, on 30th January, 2025, direction were granted by this Court pursuant to the provision of Order 37 Rules, 16 and 18 of the Civil Procedure Rules, 2010 on how to dispose off the Originating Summons dated 30th May, 2023 and filed on 6th June, 2023, to wit:-
 - a). The conversion was made whereby the Originating Summons was converted to a Plaint; Supporting Affidavit to Witness statements; Annexures to Exhibits; The Applicant to Plaintiffs; the Respondent to Defendants; Replying Affidavit to Defence and documents to Exhibits;
 - b). The matter to be heard by adducing “Viva Voce” evidence.
4. Subsequently, the Plaintiffs/Applicants called PW - 1 on the same day and PW - 2, on 26th February, 2025 and closed their case thereafter.
5. The Defendant/ Respondent called their witness on 26th February, 2025.

III. The Plaintiffs/ Applicants’ case

6. The Plaintiffs/Applicants claimed entitlement of the suit property by virtue of land adverse possession and for determination seeking the following that:-
 - a. A declaration that the title deed in the names of Timothy Irimu Kagambi on all that Parcel of Land registered as Kwale/Galu Kinodo/495 has been extinguished by the Applicants adverse possession thereof for a period of more than 12 years.
 - b. The Applicants herein be declared to be entitled by way of adverse possession of over 12 years to 3.6 Hectares of land comprised in Land Parcel No. Kwale/Galu Kinodo/495is situated in Galu Kinodo within Kwale County.
 - c. An order does issue directing the Land Registrar Kwale Land Registry to register the Applicants as the absolute proprietors of 3.6 Hectares comprised in Land Parcel No. Kwale/ Galu Kinodo/495
 - d. The costs of this application be in cause.
7. This Application was based on grounds, testimonial facts and the averments made and annexed Joint Supporting Affidavit of Mwinyi Salim Mwamngumi & Mwanakombo Saidi Juma and other grounds to be adduced at the hearing of the Application hereof that: -
 - a. the Respondent was the registered owner of all that parcel of land registered as Kwale/Galu Kinodo/495.
 - b. the Applicants had been living, occupying, and farming on all that parcel of land registered as Kwale/Galu Kinodo/495 continuously and uninterrupted for over 30 years.



- c. the Applicants had developed permanent structures on the property where they had been living with their extended families continuously and without any interruption from the Respondent for over 30 years.
 - d. the Respondent had never showed up at the subject property to lay claim by taking physical possession from the time the Applicants had been in physical occupation and possession of the suit property.
 - e. it was in the interest of justice if the Application herein was allowed, since the Respondent would not have suffered any prejudice.
8. The Original Summons was based on the following grounds on the face of it and those of the 10 paragraphed Joint supporting affidavit sworn by Mwinyi Salim Mwangumi And Mwanakombo Saidi Juma, the Plaintiffs/ Applicants sworn on the same day with the Originating summons where they averred that:-
- a. They were adults, male and female, of sound mind and hence competent to swear the Joint Affidavit.
 - b. They were the Joint Applicants therein and well versed with the facts of the Application in support of the prayers sought.
 - c. The Respondent was the legally registered owner of all that parcel of land registered as Kwale/ Galu Kinodo/495 situated in Galu Kinodo within Kwale County. (Annexed and marked as “MSM & MSJ - 1” was a copy of the Land Register for the subject property).
 - d. The 1st and 2nd Affiant had been living on the subject property with their families continuously for over 30 years without any interruption from the Respondent and/or any person, agent, or employee acting on instructions of the Respondent, and they had built permanent dwelling structures on the subject property. (“MSM & MSJ - 2” were photographs of the structures built on the property).
 - e. In addition, the Affiants had been cultivating and farming continuously and uninterrupted on the subject property.
 - f. In addition to the foregoing, some of the deceased immediate relatives of the Affiants had been buried on the subject property.
 - g. Since the Affiants had taken physical possession and occupation of the subject property for over thirty years, the Respondent had never showed up on the property.
 - h. There had never been any dispute as to the Affiants’ occupation of the subject property and/or any litigation over the subject property between the Affiants and any person, or between other persons over the same property.
 - i. The Affiants had been advised by their Advocates on record, which advice they verily believed to be true, that they could claim to be vested and registered as the owners of the subject property after living and having uninterrupted occupation on the land for a continuous period of 12 years, and they prayed that the Application therein be allowed as prayed, that they be vested, registered, and issued with a title deed for all that parcel of land registered as Kwale/Galu Kinodo/495 measuring 3.6 hectares.
9. The Plaintiffs/Applicants called first witness on 10th June, 2024 and who testified as follows:-



A. Examination in Chief of PW - 1 by Mr. Mungai Kamau Advocate.

10. PW - 1 was sworn and testified in Kiswahili language. He identified himself as Mwinyi Salim Mwamngumi, the 1st Plaintiff in the matter, a Citizen of Kenya and holder of the national card with all particulars shown to Court during hearing of the case. He stated that he knew the 2nd Plaintiff, Mwanakombo Saidi Juma, who was his brother's daughter. He confirmed that he had sworn a joint affidavit together with her and that he wished to adopt the same as his evidence in court.
11. PW - 1 further relied on the annexures therein, namely the Green Card for the property and photographs of structures, which he produced as exhibits. The Court admitted them as Plaintiff Exhibit 1 and 2 respectively and in that order.
12. The 1st Plaintiff testified that he had carried on activities on the suit property for 37 years, while the 2nd Plaintiff had been on the property for 29 years. He stated that he had allowed her to build on the property. He described the land as having coconut trees, mango trees, and open space for cultivation of food crops. He emphasized that they had lived there with neighbors since the time of their grandfathers.
13. PW - 1 denied knowledge of the Respondent, Timothy Irimu Kagambi, as the registered owner appearing on the green card. He maintained that since he began living on the land, no one had ever come to claim it. He disputed the Respondent's assertion that the land was unoccupied, insisting that he had lived there and had placed the 2nd Plaintiff to guard the property. He reiterated that he had never met anyone claiming ownership and that he considered the land his home, inherited from his grandfather and father. His prayer before the Court was that he wished to be declared the rightful owner of the land.

B. Cross examination of PW - 1 by Mr. Kihira Advocate.

14. PW - 1 confirmed that he had lived on the property for 37 years, having entered in it from the year 1987. He admitted that he did not know who the registered owner was at the time of his entry, noting that the shambas had been registered in the year 1974. He stated that the photographs produced were taken on the land and that the borehole had been dug by his father.
15. He acknowledged reporting a matter to the Kwale CCIO office, though he could not recall the details of the report. He was shown "TK - 3", a notice to compel attendance, and confirmed that he had reported the matter to the police concerning allegations of fraud. He reiterated that he did not know the Respondent personally and had only heard that the land was being subdivided, though he never saw the persons involved.
16. PW - 1 further testified that the 2nd Plaintiff, a female, had lived on the property for 29 years and had her own house there. He stated that there were six houses on the land, but clarified that his own houses were on another parcel. He concluded by restating his prayer that the land be declared his.
17. The Plaintiffs called PW - 2 the 2nd Plaintiff/ Applicant on 25th February, 2025 at 12.45 pm where she testified that:-

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

18. PW - 2 was sworn and testified in Kiswahili language. She identified herself MWANAKOMBO SAIDI JUMA, the 2nd Plaintiff in the matter and a Citizen of Kenya holding a national identity card bearing all the particulars as shown to Court during the hearing of the case. She resided at Mwabungo Biza, Mtagazeni Beach, where she engaged in farming. She confirmed that she had recorded a joint supporting affidavit, thumb-printed on 30th May 2023, and wished to adopt the same as her evidence



in court. She testified that she had lived on Land Parcel No. Kwale/Galu Kinodo/495, the land on which she was born, and continued to reside there with her family, including her six children and three brothers. She identified the 1st Plaintiff, Mwinyi Salim Mwamngumi, as her nephew, and stated that her uncle was called Salim.

19. PW - 2 further testified that she had built houses on the land and that she and her family considered the land to be theirs. She admitted that she did not know who the registered owner of the land was, nor whether Salim Mwamngumi held the title. She also stated that she did not know the Respondent and could not confirm whether he was the registered owner of the suit property.
20. She sought to have the annexures attached to the joint affidavit, namely the green card and photographs, produced as Plaintiffs' Exhibits 1 and 2. She referred to the copy of the affidavit extracts filed and dated 2nd June 2022, Marked IX-3, which bore two names—herself and her nephew—whom she asserted were the first allottees during the Land Adjudication process.
21. PW - 2 emphasized that she had not been involved in any sub - division of the land and that during all the years she had lived there, no one had ever come to make a claim over the property. She concluded her testimony by urging the Court to issue a title deed in her favor.

B. Cross examination of PW - 2 by Kihira Advocate.

22. PW - 2, M/s. Juma informed Court that she was a female adult aged 70 years, having been born in the year 1953. She confirmed that the identification card produced was hers, though she did not recall the number offhand. She stated that she had been born on the suit land and had lived there throughout her life.
23. She referred to the persons who had been registered as joint allottees during adjudication, namely:
 - a. Salim Suleiman Mwamngumi.
 - b. Mwinyi Salim Mwamngumi.
24. She observed that the record did not indicate where the two were registered as owners of the suit land as first allottees.
25. PW - 2 testified that she did not know the Respondent personally. She explained that the Respondent, Timothy Irimu Kagambi, had only been identified after his name appeared in the land registry records through an official search. She stated that apart from that, she had never met him. She produced a set of photographs comprising houses, plantations, and structures, but admitted that she did not know who had taken the photographs or when they had been taken, and that it was not clear from which land they had been taken.
26. PW - 2 further testified that she was aware that the 1st Plaintiff, Mwinyi Salim Mwamngumi, had reported the Respondent to the Kwale CCIO over allegations concerning the land. She concluded her testimony by urging the Court to issue a title deed in her favor together with the 1st Plaintiff.

B. Re - examination of PW - 2 by Mr. Mungai Kamau Advocate.

27. PW - 2 referred to the adjudication document. She stated that she did not know where it had originated from and explained that she was illiterate. She further testified that she knew the photographs produced were taken from their land, although she could not recall when they had been taken.
28. On 26th February, 2026 the Plaintiffs through their legal counsel Mr. Mungai Kamau marked their case closed.



IV. The Defendant/Applicant's case

29. The Defendant responded to the claim through a 12 paragraphed Replying affidavit sworn by Timothy Irimu Kagambi, on 5th January, 2025 where in the affiant averred as follows:-
- a. The Respondent, Timothy Irimu Kagambi, averred that he was a male adult of sound mind and the Respondent in the matter, well versed with the facts surrounding the dispute and therefore competent to swear the affidavit.
 - b. He stated that he had read and understood the Applicants' Originating Summons dated 30th May 2023, and where necessary, his advocates on record, Messrs. Mwangi Kihira & Company Advocates, had explained the same to him. He contended that the application was misdirected, brought in bad faith, and intended to mislead the Court by virtue of malicious and false accusations, and therefore ought to be dismissed with costs.
 - c. The Respondent asserted that he was the registered owner of the suit property, LR No. Kwale/ Galu Kinodo/495, measuring approximately 3.6 hectares. He produced a copy of the title deed annexed and marked as "TK – 1". He further testified that he had been in occupation of the entire property since purchasing it in December 1988, and that the Applicants' claim was only intended to dispossess him of his rightful property which he had owned for many decades.
 - d. He referred to a self-recorded statement dated 27th October 2023, annexed and marked as "TK – 2", which he wished to rely upon as part of his response. He also produced a summons letter from the Kwale County Criminal Investigations Officer (CCIO) dated 17th August 2023, annexed and marked as "TK-3".
 - e. The Respondent further testified that on or about 7th December 2023, he received information that his property was being marketed by land brokers in Diani for sale and subdivision. He stated that he was informed that the restriction he had placed could have been removed. He produced a subdivision plan annexed and marked as "TK – 4".
 - f. He confirmed that he had conducted an official search and established that the restriction was still present. He produced two recent searches annexed and marked as "TK – 5" and "TK – 6".
 - g. The Respondent categorically denied that the Applicants had ever been in occupation of the suit property for the number of years claimed. He maintained that he had been in full occupation of the property since purchase.
 - h. He concluded his affidavit by swearing in opposition to the application and prayed that the same be dismissed with costs.
30. The Defendant/ Respondent testified as DW - 1 on 26th February, 2025 but before then his Counsel on record made the following remarks:-

A. Opening Remarks by Mwangi Kihira Advocate.

31. The Learned Counsel for the Respondent averred that the Applicants were individuals who sought to reap where they had not sown. He argued that the matter before the Court was a claim of land adverse possession, but the Applicants had failed to produce credible evidence to demonstrate entitlement to the suit property.
32. The Counsel emphasized that the Respondent had lawfully purchased the land as an bona fide innocent purchaser for value without notice and had all along been living on it, exercising his rights



as the registered proprietor. He contended that the Applicants had attempted to acquire the property through other means and, upon failing, had resorted to filing the present claim under the land adverse possession.

33. It was his averment that the Applicants had not satisfied the legal requirements for adverse possession and that their claim was ill-founded. Counsel therefore urged the Court to dismiss the Application with costs.
34. The Defendant/Respondent's testimony: -

B. Examination in Chief of DW - 1 by Mr. Kihira Advocate.

35. DW - 1 was sworn and testified in English language. He was called Timothy Irimu Kagambi, a Citizen of Kenya holding a national identity card bearing all the particulars as shown to Court during the hearing session. He resided in Nairobi and originally came from Nyeri. He confirmed that he had sworn a Replying Affidavit dated 5th January 2024, to which he had attached six documents, produced in court as Defendant's Exhibits 1-6. He adopted the affidavit as his statement.
36. He stated that he became the registered owner of the suit property, LR. No. Kwale/Galu Kinodo/495, measuring 3.6 hectares, when a title deed was issued to him on 11th January, 1989. He testified that at the time of purchase, the land had no developments in the form of houses or structures. He explained that he had been working and living at the Alliance Hotel when he purchased the property, and since then, there had never been any claim made against his ownership.
37. The Respondent maintained that he had never seen PW - 2 and that they had never met. He insisted that he had never allowed the Applicants onto the land and that during his visits to the property, he had never seen them or anyone else occupying it.
38. He further testified that on 27th August, 2023, while at Kiganjo, he received a call from the Kwale County Criminal Investigations Officer (CCIO). The officer identified him as Mr. Timothy and inquired whether he knew the land parcel Kwale/Galu/Kinondo/495. The CCIO sought to verify his identity and requested that he present the original title deed for purposes of investigating allegations of fraud. The Respondent confirmed that he was the owner of the land and that he had never lent out the title deed. He stated that he wanted to know who the complainant was.
39. He testified that the CCIO issued him with a summons to attend, transmitted through WhatsApp. He added that there had been attempts to subdivide his land, and on 22nd August, 2022, he had requested a caution or restriction to be placed on the property. He explained that he had received a letter from another lawyer who was allegedly being used in the subdivision process, and he instructed the lawyer to confirm the ownership of the land.
40. The Respondent stated that a friend later alerted him to an advertisement in the newspaper concerning the property. He admitted that he did not attend at the CCIO's office because he had not been informed who the complainant was, and he feared for his life.

B. Cross examination of DW - 1 by Mr. Mungai Advocate.

41. DW - 1 confirmed that he had purchased the suit property in the year 1989 and became the registered owner when the title deed was issued on 11th January 1989. He explained that he had engaged an advocate to facilitate the transaction, who summoned him when the transfer documents were ready. He stated that there had been a sale agreement between himself and the vendor, which was executed, and thereafter he signed the transfer forms.



42. The Respondent identified Mr. Ahmed Salim as the vendor who sold him the property, noting that Mr. Salim later relocated to Switzerland. He testified that upon inquiry, Mr. Salim informed him that the land had previously belonged to a European (“Whiteman”) who used to breed horses there. He admitted, however, that he was not certain whether the European had been the registered owner or merely a lessee. He confirmed that the Title Deed had been opened on 15th November, 1974, and that he purchased the land in January 1989. He stated that he did not know who the owner of the land was prior to the year 1974.
43. The Respondent was referred to the adjudication document produced by the Applicants. He stated that he did not know whether the two individuals named therein were the first allottees and questioned the authenticity of the document. He noted that the adjudication search was dated 2nd June, 2022, prior to the institution of the present suit in 2023. He denied knowledge that the Applicants had ever been allottees of the suit property.
44. He further testified that at the time PW - 1 was giving evidence, he himself had been in India receiving medical treatment. He reiterated that when he purchased the land, there were no neighbors and the land was vacant bush. He maintained that he had been an innocent purchaser for value, having relied on the original title deed. He admitted that he had not made inquiries from the local chief at the time of purchase.
45. The Respondent stated that after purchasing the land, he took possession and visited it frequently. He testified that he had planted trees and reared goats for a period, though he later stopped rearing goats after the year 2002. He admitted that he had never lived on the land physically and had no documentary proof of the trees he claimed to have planted. He nonetheless insisted that he was familiar with the land and its location.
46. He acknowledged knowing the area chief but admitted not knowing the names of the local Members of Parliament or other leaders. He stated that before reaching his land, there were several cottages owned by Italians, whom he considered his neighbors. He concluded by reiterating that he had been in possession of the land since purchase and had never allowed the Applicants to occupy it.

B. Re-examination of DW - 1 by Mr. Kihira Advocate.

47. DW - 1 reiterated that he had undertaken due diligence through his advocate prior to the purchase of the suit property. He confirmed that there had been a sale agreement, and that after execution, he signed the transfer documents.
48. He was referred to the adjudication section document produced by the Applicants. He stated that he had never been served with the same as part of the filing of the case. He questioned its authenticity, noting that the document did not indicate the time the search was conducted, nor the name of the officer who undertook it, and that it only bore an unclear official stamp.
49. The Respondent reiterated that after purchasing the land, he signed the transfer documents and took possession. He stated that although he left the Coast in the year 2002, he continued to visit the property thereafter. He explained that he resided in Nairobi, and that his knowledge of local leaders did not equate to community ownership of the land.
50. On 26th February, 2025, the Defendant/Respondent marked his case closed through his counsel Mr. Kihira Advocate.



V. Submissions

51. On 26th February, 2025, upon the closure of the Plaintiffs/ Applicants' and the Defendant's cases the Honorable Court directed the parties to canvass the originating summons dated 30th May, 2023 through written submissions.
52. Thereafter, all parties fully complied and the Honorable Court reserved a date for delivery of Judgement on 27th May, 2025 accordingly.
53. However, due to unavoidable circumstances, it was eventually delivered on 5th May, 2026.

A. The Written Submissions by the Plaintiffs/Applicants

54. The Plaintiffs/Applicants filed their written submissions through the Law firm of Messrs. Mungai Kamau & Company Advocates dated 10th March, 2025. Mr. Mungai Kamau Advocate commenced their submissions by stating that the Applicants filed the instant suit seeking among others the above stated orders.
55. The Counsel held that the two witnesses relied on the Joint Supporting Affidavit dated 30th May 2023, the annexures attached therein of the land register of the subject property and the photographs of the houses of the Applicants and their families and the borehole attached therein. Further, the Applicants sought leave to file Further List of Documents being an Adjudication Search dated 2nd June 2022 and the same was allowed vide the ruling dated 11th December 2024. The same was also produced as an exhibit by the Applicants.
56. He stated that the 1st Applicant testified on 10th June 2024 and relied on the Joint Supporting Affidavit and the annexures therein. The 1st Applicant testified that he knows the 2nd complainant and he has lived on the suit property and his parents and he lives therein with other people and has planted crops and that no one has ever laid claim on the land. During cross examination, he confirmed he was the one who owned the suit property and that during the demarcation of the land in 1974, he was living on the suit property. He further testified during cross examination that he has never seen the Respondent.
57. The 2nd Applicant testified on 26th February 2025 and relied on the Joint Supporting Affidavit and the documents attached therein. She testified that she was born and brought up on the said land and has lived therein since then together with her children and grandchildren and the 1st Applicant was an allottee of the suit property. She testified that she has lived there without any interruption from anyone and prayed that the prayers be allowed as pleaded. On cross examination, she testified that she was born on the suit property and that from the Adjudication Search, the 1st Applicant was allocated the suit property.
58. The Respondent also testified and relied on his Witness Statement and List of Documents. He testified that he used to work as a hotelier within Diani till the year 2002 when he relocated to upcountry but currently, he lives in Nairobi. He testified that he does not know the Applicants and that he has been in physical possession of the land. He stated that he was summoned in the year 2023 by the CCIO-Kwale but was afraid to come since he feared for his life and also after getting advice from his Lawyer.
59. On cross-examination, he testified that he confirmed he was the registered owner of the suit property and at the time of the purchase, the land was a thick bush. He stated that he never engaged a Surveyor to point out the land to him, he does not know the Applicants. He further stated that he has never built any structures therein and has never lived there. His only physical possession was planting trees and goats, but he could not produce any evidence to confirm that he had ever been in physical possession.



60. The Respondent could not explain who his neighbors are, his Area Chief and the current Member of Parliament.
61. On the Analysis, the Learned Counsel submitted that the main issue for determination by this Court is whether the Applicants have acquired title by way of Land adverse possession. To support their case he relied on the provision of Order 37 Rule 7 (1) of the Civil Procedure Rules, 2010.
62. Further the Learned Counsel relied on the case of”- “Tabitha Waitherero Kimani – Versus - Joshua Ng’ang’a [2017] eKLR”, it enumerated the ingredients to be satisfied in a claim of adverse possession as follows:

- “(A) Open And Notorious Use Of The Property: For this condition to be met, the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert a 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 a 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.
- (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 the adverse possessor’s time on the land, not how long the true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fails 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 limitations starts over from the time of the adverse party’s return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
- (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.
- (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.”

In the case of Mtana Lewa – Versus - Kahindi Ngala Mwangandi (2015) eKLR it was held that:-

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



in Kenya 12 years. The process springs into action essentially by default or inaction of the owner.”

63. According to the Learned Counsel, the Applicants had proved they were *aminus possidendi* of the suit property. This is defined as the intention to possess land to the exclusion of all other persons, including the owner. The intention must be straight and sufficiently clear to the owner. Therefore, the mere fact that one is enjoying a piece of land does not guarantee one's claim of adverse possession. The possession of the adverse possessor should not be concurrent with that of the owner.
64. From the evidence of the Applicants and the structures erected therein, it is clear they have permanently settled on the suit property and their intention is to use the said land to the exclusion of the Respondent.
65. In the case of:- “Wambugu – Versus - Njuguna (1983)KLR 172”, the Court of Appeal held that: -

“in order to acquire adverse possession, the owner of the land must have lost his right to the land by either being dispossessed of it or by discontinuing his possession of it.”
66. The Applicants have resided there peacefully without any interventions from the Respondent.
67. On open, notorious and hostile use of the property, the Learned Counsel submitted that in this case, for a party to claim adverse possession over a piece of land, the practice requires that the person must have been in an open and notorious possession. This was meant to ensure that in case an adverse possessor comes into a registered land, the paper owner is notified of the same. Thus, possession should not be concealed. Therefore, time for action could not start running against a paper owner unless he could observe or witness his land being possessed by that other person claiming adverse possession. Notorious possession includes fencing, erecting sign post, planting crops and parking of cars amongst others. This action would definitely bring into attention of a reasonable man.
68. Hostile use of property means that the adverse possessor must have entered into the land without the permission of the owner. From the above, they submitted that the Applicants have demonstrated and proved they have resided peacefully in the suit property without the consent of the Respondent.
69. The Applicants according to the Learned Counsel had demonstrated that they have physical possession of the suit property with the intention of excluding any other person, including the Respondent, from owning the land thus establishing *animus possidendi*. The Applicants had produced evidence demonstrating that they have built permanent structures on the suit property where they live with their families, have dug a well in which they use for provision of water, they do animal and crop farming, all of which are demonstration of acts that are adverse to the Respondent. The Respondent confirmed during cross-examination that when he bought the land, it was a big bush and he was thus unable to take physical possession and he further confirmed that he has never been in physical possession of the land.
70. They urged the Court to prove that the Applicants were in physical possession for over 40 years to consider the physical location of the land and the type of the land/registration regime of the suit property. The 1st Applicant produced Adjudication Search confirming he was the 1st allottee of the suit property when it was adjudicated on or around the year 1974. Galu Kinodo is an adjudication section and during the adjudication and demarcation of the area the 1st consideration by the Government was to allocate the land to persons who were living therein physically on the suit land and the 1st Applicant was duly considered to have been residing therein hence his entry of his names on the Adjudication Register.



71. The provision of Section 23 of the *Land Adjudication Act*, Cap. 284 provides for Preparation of adjudication record: -
- (1) The forms prepared by the Recording Officer under Section 19 of this Act shall together comprise the Adjudication Record.
 - (2) In preparing the adjudication record, the Recording Officer, if he is satisfied that-
 - (a) any person who has, under recognized customary law, exercised rights in or over land which should be recognized as ownership, shall be determined to be the owner of that land:
72. Based on the foregoing, it is clear that the suit property and the size the Applicants occupied was duly recognized by the Adjudication Officer in the year 1974 hence the entries of the 1st Applicant's name on the Adjudication Register. Section 23 (3) provides that the Adjudication Record shall contain the parcel number as shown on the demarcation map, its approximate area and the name of the owner therein.
73. In conclusion, the Learned Counsel stated that based on the foregoing, they submitted that the Applicants had demonstrated that they had been in actual and exclusive possession of the suit property from the time of demarcation and adjudication to the exclusion of the world. Had the Respondent done physical inspection, enquiries and survey of the land before purchasing it, he would have noted the land was physically being occupied by the Applicants. The Respondents had failed to demonstrate that he had been in physical possession and occupation of the land in addition he failed to demonstrate he even knows and described its physical location so as to claim he had been in physical possession. They prayed that the suit herein be allowed as prayed.

C. The Written Submissions by the Respondent

74. The Respondent through the Law firm of Messrs. Mwangi Kihira & Company Advocates filed their written submissions dated 15th March, 2025. Mr. Kihira Advocate commenced his submissions by stating that the matter for determination was the Applicants' originating summons dated 30th May, 2023 seeking orders to register them as the owners of the suit property Kwale/ Galu Kinodo/ 495 by way of Adverse Possession. The Respondent filed a replying affidavit in response thereto. All parties testified, adopted and produced their documents.
75. On the Applicants' case. The Learned Counsel submitted that in summary, their testimony was that they resided on the suit property for over 12 years. According to the 1st Applicant, he came into the suit property in the year 1987 while the 2nd Applicant was born there. Towards the end of the 1st Applicant's testimony, he specifically stated that he did not have a house on the suit property. He affirmed that his house was on a neighbouring parcel. However, conflicting his testimony, the 2nd Applicant stated that he had a house on the suit property and they lived together with him. During the hearing, the 1st Applicant stated that he did not have an identification card. His identification therefore was uncertain and could only be left to question.
76. It was noteworthy that at the beginning of the testimony of the 2nd Applicant (if at all she was the 2nd Applicant), she stated that she lived in Ukunda/Mwabungo and not on the parcel of land. She did not specifically state that she lived in Galu Kinodo 495. She did not know her age or year of birth or an approximate thereof. Despite the fact that the Applicants stated that they lived in the Suit Property for many years, neither of them could ascertain the portion in which they built their houses on. They did not produce a survey report to indicate their area size of occupation. There was no proof that they



occupied the entire portion of land or what was on the rest of the portion to afford them conferment of Ownership.

77. Both Applicants stated that they never met the Respondent and they did not know him or even did not know if he owned the said Suit Property. The 1st Applicant said that he started looking for the owner and reported the Respondent with land fraud at the office of the CCIO Kwale and the CCIO told him he would “tengeza” (Kiswahili meaning to ‘make something from him’). The 1st Applicant stated that he came into the Suit Property on year 1987 as he was not there during adjudication. He stated that the father placed a caretaker who lived in the said land before he occupied it, his date of occupation not specific. By the photos produced by the Applicants, it is impossible for the said Applicants to have lived in the said structure for Fifty One years moreso, with their families. Their aversion and claim to have resided on the suit property if at all, is entire false and illogical.
78. On the significance of the adjudication search. The Learned Counsel submitted that the Applicants were granted orders to produce an additional document, which was an Adjudication search dated 2nd June, 2022 with the names of Salimu Suleiman Mwangumi And Mwinyi Salim Mwangumi on it. It was their case that Suleiman was the uncle to Mwinyi (the 1st Applicant) who were both registered as the first allottees of the Suit Property.
79. Without going to its Authenticity of the document, what significance did the search have to a claim of Land Adverse Possession? They submitted that:-
- a. No proof was tendered that the said Suleiman was the uncle to the 1st Applicant,
 - b. There existed no unique form of Identification of the said Suleiman.
 - c. There was no evidence that the Mwinyi appearing on the search was the same 1st Applicant,
 - d. If at all the Applicants purport to have been the first allottees, the Respondent who was the 5th registered Owner ipso facto indicated that the property exchanged hands severally. Could it be possible that previous owners who purchased the Suit Property found the Applicants on the suit property but let them live on the same? This was illogical.
 - e. A closer look at the copy of the Green Card of the Suit Property ‘MSM and MSJ - 1’ confirmed the Respondent as the Owner in the 5th entry. Interestingly and cunningly entries 1 to 4 were left out and not produced by the Applicants to show flow of ownership.
 - f. The purported import of the document was to try and perpetuate the lie that the Respondent acquired the Suit Property through underhand means but again that was out of the purview of their claim despite the fact that it was still not established.
 - g. What took them 30 years to realize that the Suit Property records showed that it did not belong to them?
 - h. If the Applicants were the true owners, why didn't they sue the Respondent for vacant possession?
80. On the Respondent's case. The Learned Counsel held that DW – 1 testified that he is the registered owner of the Suit Property namely Kwale/Galu Kinodo/495 measuring approximately measuring 3.6 Ha and had been in full occupation of the property. He was a hotelier when he purchased the said parcel. He reared goats and planted crops on the land. He testified that no house had been erected in the said land. He sunk a well, and carried out farming activities in the suit property until sometime in the year 2002 before relocating to Nairobi and later Nyeri.



81. He frequented the suit property severally since then and no one was in occupation. He testified that his ownership of the suit property had been unchallenged. Sometime in August 2023, he received a threatening call from the CCIO Kwale who seemed to have been bribed by the Applicants to threaten the Respondent into coming to Kwale with his original title deed, something unheard of. He refused to comply with the threats from the CCIO Kwale and came to learn that someone had tried subdividing the property.
82. He placed a restriction on the parcel which was later removed and reinstated back. It is humble prayer that the unsubstantiated claim to his suit property be dismissed.
83. On the law, and the question of what is adverse possession. The Learned Counsel relied on Justice Asike Makhandia J.A decision in the case of:- “Mtana Lewa – Versus - Kahindi Ngala Mwangandi (Supra)” described land adverse possession as below: -

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

84. Can a purported owner/first allottee of a property claim adverse possession on their own property?
85. On the requirements for adverse possession claim. The Learned Counsel submitted that in the case of “Joseph Macharia Kairu – Versus - Kenneth Kimani Muiruri (2021)eKLR”, the court cited the Court of Appeal in Kisumu Civ App. No. 110 of 2016 of:- “Richard Wefwafwa Songoi – Versus - Ben Muniyifwa Songoi [2020] eKLR” which laid the following requirements for a person claiming adverse possession:-

On what date he came into possession

86. The Learned Counsel submitted that the Applicants’ testimonies conflict as to the dates they started living on the Suit Property. Whereas the 1st Applicant came in after the year 1987, the 2nd Applicant claimed that she lived in the suit property before 1974 with the 1st Applicant. These two conflicting testimonies are questionable and it cannot be ascertained when they came into the Suit Property.

What was the nature of his possession?

87. The Applicants did not certify the size of the Suit Property they occupied. No ground report was filed in court. The 1st Applicant stated that he did not have a house on the land. The 2nd Applicant testified that she lived elsewhere in Ukunda. The record itself shows that the Applicants are conniving litigants. If they do not reside on the Suit Property what nature of activities are being carried out in the said parcel?
88. To buttress on this point, the Learned counsel relied on the decision by Justice Kuloba J (as he then was) in “Nairobi Civ No. 283 Of 1990 Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR”, the Court held: -

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve



or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.”

Whether the fact of his possession was known to the other party

89. They submitted that the Applicants testified that their alleged possession was never known to the respondent. This statement was repeated severally during the trial. The Applicant stated that they never saw the Respondent, which means that they fail to meet the threshold. They further submitted that the alleged possession was never known to anyone and the Respondent testified that he never saw the Respondents and the land is bare. Both Applicants on this limb alone fail the most important test in a claim of Adverse Possession. Their possession seemed to have been a secret.
90. He referred Court to the case of:- “Ravji Karsan Sanghani – Versus - Peter Gakunu [2019] eKLR 23” the Court cited the case of “Titus Kigoro Munyi – Versus - Peter Mburu Kimani [Supra]” which held that for a claim of adverse possession to succeed, it must be proved that the registered owner had knowledge of the occupation. The Court held as follows:-

“Guided by the dicta as stated by Kneller J. hereinabove and as adopted by this Court in Francis Gicharu Kariri – Versus - Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi), we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved.....”

91. Nevertheless, they submitted that the Applicants were never in possession or occupation of the Suit Property at any given time.

For how long his possession has continued

92. According to the Learned Counsel, the evidence of the Applicants do not prove that they have been in possession or continued possession. The Respondent testified that he took possession imitate after purchase in the year 1989 yet the Applicants had it before 1989. It could only seem that they had possession from the year 1974 until realized in 2022 that the Respondent was the owner of the parcel. Their conflicting testimonies do not assist them in ascertaining the dates or their theory altogether.

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

93. They submitted that the Applicants ownership was not in an open and exclusive possession of the Suit Property in an adverse manner to the title of the real owner. Based on the evidence of the Respondent, the Applicants were never in possession of the suit property. To determine the nature of possession, this Court according to the Learned Counsel was guided by the decision in Kisumu Civil Appeal No. 27 of 2013 “Samuel Kihamba – Versus - Mary Mbaisi [2015] eKLR”, where the court held:

“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 license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, NEC vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”.

94. In conclusion, the Learned Counsel contended that the fact that the Respondent went to live in Nairobi did not mean he abandoned the Suit Property. Nowhere in law was it written that a person should know their area member of Parliament, area chief or MCA. Knowledge of local Public Officers



were not requisite of owning property. Public Officers tenure were based on a term which was subject to change through Administrative re-shuffles, retirement, resigning non-election etc. The Respondent cannot lose a 7 Acre piece of land because he did not know the area Chief.

95. They submitted that the case of:- “Alfred Welimo – Versus - Mulaa Sumba Barasa, CA No 186 of 2011”, this Court expressed itself thus: -

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

VI. Analysis and Determination

96. 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 plethora of cited authorities made by the Plaintiffs and Defendant and the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
97. In this regard, there are four (4) key issues for determination is:
- Whether the Applicants have been in open, continuous, exclusive, and hostile possession of the suit property for over 12 years?
 - Whether the Respondent has demonstrated actual possession of the property.
 - Whether the Applicants are entitled to be registered as proprietors by way of adverse possession
 - Who meets costs of the suit

ISSUE No. a). Whether the Applicants have been in open, continuous, exclusive, and hostile possession of the suit property for over 12 years

98. Under this sub-title, the Honourable Court shall examine the evidence tendered by both parties against the legal principles governing the main substratum and claims of land adverse possession being the pith and substance of this case herein. The Applicants testified that they had been in occupation of the suit property for periods exceeding thirty years, during which they constructed permanent houses, cultivated crops, planted trees, and buried relatives on the land. They asserted that their occupation had been uninterrupted, peaceful, and without challenge from the Respondent or any other person. They relied on annexures including a copy of the land register and photographs of structures on the property to support their claim.
99. On the other hand, the Respondent maintained that he was the registered proprietor of the suit property, having purchased it in 1989 and obtained a title deed. He produced the title deed as Defendant's Exhibit “TK – 1”, together with searches confirming his ownership and restrictions placed on the land. He testified that he had taken possession upon purchase, visited the land frequently, and planted trees and reared goats, though he admitted he had not lived there physically. He denied ever allowing the Applicants onto the land and insisted that he had never seen them occupying it.



- a. The Land Adverse possession is a doctrine of law, as provided for under the provision of Section 7 (1) of the *Land Act*, No. 6 of 2012 as one of the modes of acquiring land in Kenya. It is a doctrine vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on the provision of Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap. 22. Section 7 of the Act provides 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.”
100. Section 13 of the *Limitation of Actions Act* provides:
- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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 purpose 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.
101. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the *Limitation of Actions Act*, Cap. 22 and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides:-
- (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 sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
102. And Order 37 Civil Procedure Rules provides:
- “(1) An Application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons
 - (2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”
103. The provision of Article 162(2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act*, No. 19 of 2011; Sections 101 of the Land Registration No. 3 of 2012; Section 150 of the *land Act*, No. 6 of 2012 and Section 38 of the *Limitation of Actions Act*, Cap. 22 confer jurisdiction on this court to handle claims premised on adverse possession.



104. The Court notes that for a claim of adverse possession to succeed, the Applicants must demonstrate open, continuous, exclusive, and hostile possession of the property for a period of not less than twelve years, to the exclusion of the registered owner. The burden lies on the Applicants to prove that their occupation was adverse to the Respondent's title and that the Respondent was either dispossessed or had discontinued possession during that period.
105. In the case of:- “Kimani Ruchure – Versus - Swift Rutherfords & Co. Ltd (1980)KLR 10” Kneller J held that:
- “ the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion).”
106. Additionally, in the case of:- “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” the land adverse possession was defined as
- “.....the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it.”
107. In the case of “M'ikiara M'rinkanya & Another – Versus - Gilbert Kabeere M'mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR”, the Court held that:-
- ‘...From the above analysis, it is clear that a Judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher – Versus - Donovan [1948] 2 All ER 11, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession...
- ..as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in Lowsley – Versus - Forbes [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.’
108. Further, in the case “Mbira – Versus - Gachuhi [2002] 1 EALR 137” the court stated as follows;
- “.....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 statutorily prescribed period without interruption...”



109. Similarly in the case of “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” Kuloba enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;
- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
 - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupant.
 - d. The non-permissive actual possession hostile to the current owner must be un equivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
 - e. The possession by the person seeking to prove title by adviser possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
 - f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
 - g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession
110. Therefore, to determine whether the Applicants’ rights accrued the Court will seek to answer the following
- i. How did the Applicant take possession of the suit property?
 - ii. When did he take possession and occupation of the suit property?
 - iii. What was the nature of his possession and occupation?
 - iv. How long has the Applicant been in possession?
111. The Land Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.
112. On examination of the questions above, and on open possession; the Applicants testified that they had constructed permanent houses, cultivated crops, planted coconut and mango trees, and buried relatives on the suit property. They produced photographs and a copy of the land register to support their claim. Such acts, if proved, amount to open and visible possession. The Respondent, however, denied ever seeing the Applicants on the land and maintained that when he purchased the property in the year 1989, it was vacant bushland. He produced a title deed and official searches confirming his ownership. He argued that the Applicants’ alleged developments were neither visible nor known to him.



113. The Court must weigh whether the Applicants' activities were sufficiently notorious and visible to put the Respondent on notice that his title was being challenged.
114. On the continuous possession, the Applicants claimed uninterrupted occupation for over thirty years, with PW - 1 stating he had lived there since the year 1987 and PW - 2 for 29 years. They asserted that no one had ever evicted them or challenged their stay. The Respondent countered that he had been in possession since the year 1989, visiting the land frequently, planting trees, and rearing goats, though he admitted he had not lived there physically. He argued that his occupation had been continuous and that the Applicants had never been in possession.
115. The Court must determine whether the Applicants' alleged occupation was indeed continuous and unbroken for the statutory period, or whether the Respondent's activities amounted to retention of possession.
116. On exclusive possession, the Applicants testified that they had occupied the land with their families, built houses, and cultivated crops without interference. They claimed exclusivity by stating that no one else had laid claim to the property during their occupation. The Respondent disputed this, insisting that he had never allowed the Applicants onto the land and that he remained the sole registered owner. He produced documents showing restrictions and searches to demonstrate his control over the property.
117. The Court must assess whether the Applicants' occupation was exclusive to the exclusion of the Respondent, or whether the Respondent's legal and factual control negated exclusivity.
118. Hostile possession entails that for adverse possession to succeed, the Applicants must show that their occupation was hostile to the Respondent's title, meaning without permission and in defiance of his ownership. The Applicants testified that they considered the land their ancestral home and never sought permission from the Respondent. The Respondent maintained that he had never permitted them to occupy the land and that he had always asserted his ownership. He argued that the Applicants' claim was malicious and intended to dispossess him unlawfully.
119. The Court must evaluate whether the Applicants' occupation was indeed adverse to the Respondent's title, or whether it was permissive or otherwise insufficient to extinguish ownership.
120. The Kenyan courts have consistently held that for adverse possession to succeed, the claimant must prove open, continuous, exclusive, and hostile possession for at least 12 years (see "Kasuve – Versus - Mwaani Investments Limited & 4 Others [2004] 1 KLR 184"; "Mtana Lewa – Versus - Kahindi Ngala Mwangandi [Supra]"). The burden of proof lies squarely on the Applicants.
121. Therefore, the question was the possession uninterrupted for more than twelve years? The answer is of course to the affirmative because the Defendant never interrupted their stay on the suit property. They had had uninterrupted occupancy of the suit property for more than 12 years. In the case of:- "Githu – Versus - Ndeete [1994] KLR" quoted by the Court of Appeal in the case of:- "Kenya Commercial Bank (suing as Administrator of the Estate of Paul Njoroge Muchene) – Versus - Sarah Njeri Muchene" the court held that: -

“time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of actions Act*.”



A title by adverse possession can be acquired under the Limitation of actions Act to a part of the parcel of land to which the owner holds title.”

122. Similarly, in the case: - “James Obande Wasui – Versus - Jeremiah Ochwada Musumba [2002] eKLR” the court held that as an occupier’s right, the land adverse possession runs with the land irrespective of change in proprietorship. Under the provision of Section 28 of the Land Registration Act, No. 3 of 2012 as at the time of transfer of the suit land, the land was subject to an overriding interest in the form of rights of adverse possession in favour of the Plaintiff. Section 28 provides:

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

- a.
- b.
- c.
- d.
- e.
- f.
- g.
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.

123. For adverse possession to succeed, I emphasize that the Applicants must prove open, continuous, exclusive, and hostile possession for at least 12 years. The burden lies squarely on them. The Respondent’s production of the title deed, searches, and restrictions demonstrates continued assertion of ownership. The Applicants’ evidence, though suggestive of occupation, lacked independent corroboration beyond oral testimony and photographs.

124. On the preponderance of probabilities, the Honourable Court strongly finds that the Applicants have not succeeded in demonstrating possession that meets the threshold of adverse possession. Thus, their claim of occupation is not sufficiently supported to extinguish the Respondent’s title. It must fail.

ISSUE No. b). Whether the Respondent has demonstrated actual possession of the property

125. Under this sub-title, the Honourable Court shall examine whether the Respondent’s evidence establishes actual possession of the suit property, beyond mere registration of title.

126. The Respondent testified that he purchased the suit property in 1989, obtained a title deed, and has since been the registered owner. He stated that he took possession upon purchase, visited the land frequently, planted trees, and reared goats until year 2002. He produced the title deed (Defendant’s Exhibit – “TK -1”) and official searches (TK-5 and TK-6) confirming his ownership and restrictions placed on the land. He further testified that he had engaged an advocate in the transaction, executed a sale agreement and transfer, and thereafter exercised control over the property.

127. He admitted, however, that he had never lived on the land physically, having resided in Nairobi and worked at the Coast until 2002. He acknowledged that he had no documentary proof of the trees or



- plantations he claimed to have established, and that his occupation was limited to visits rather than permanent residence.
128. The Kenyan jurisprudence distinguishes between legal ownership (title) and actual possession. For purposes of adverse possession, the registered owner must demonstrate factual occupation or use of the land to rebut claims of dispossession. Mere registration without evidence of physical possession may not suffice (see “Mtana Lewa – Versus - Kahindi Ngala Mwangandi [Supra]”). Actual possession requires acts such as building structures, cultivating, fencing, or otherwise asserting physical control over the land. Occasional visits or symbolic acts may not amount to possession if the land is otherwise occupied by another party.
 129. The Respondent has demonstrated legal ownership through title and searches. He has also testified to planting trees and rearing goats, which are acts of possession. However, he admitted that he never resided on the land and lacked documentary proof of his developments. His evidence suggests intermittent use rather than continuous physical occupation.
 130. The Applicants, on the other hand, testified to long-term residence, construction of houses, cultivation, and burial of relatives on the land. If their evidence is credible, it would outweigh the Respondent’s claim of actual possession, as physical occupation is the essence of possession in law.
 131. The Respondent has demonstrated legal ownership of the land with indefeasible title, rights and interest vested in him based on the provision of Article 40 (1) & (2) of *the Constitution* of Kenya, 2010; Sections 24, 25 and 26 (1) & (2) of the *Land Registration Act*, No. 3 of 2012, although his evidence of actual possession is weak, being limited to occasional visits and unverified claims of planting. The Court must therefore determine whether such acts amount to sufficient possession to defeat the Applicants’ claim of adverse possession, or whether the Applicants’ long-term residence constitutes superior factual occupation.

ISSUE No. c). Whether the Applicants are entitled to be registered as proprietors by way of adverse possession

132. Under this sub-title, the Honourable Court shall determine whether the Applicants have satisfied the statutory and judicial requirements to be declared proprietors of the suit property by way of adverse possession.
133. Section 7 of the *Limitation of Actions Act* (Cap 22, Laws of Kenya) provides that actions to recover land may not be brought after the expiration of twelve years from the date the right of action accrued. Section 38 further empowers the Court to order that a person who has been in adverse possession of land for at least twelve years be registered as the proprietor.
134. The Applicants testified that they had lived on the suit property for over three decades, constructed houses, cultivated crops, planted trees, and buried relatives there. They claimed uninterrupted occupation and produced photographs and extracts of the land register to support their claim. They argued that their occupation was open, notorious, and adverse to the Respondent’s title.
135. The Respondent produced a title deed issued in 1989, official searches, and restrictions confirming his ownership. He testified that he had taken possession upon purchase, planted trees, reared goats, and visited the land frequently, though he admitted he had not lived there physically. He denied ever permitting the Applicants to occupy the land and insisted that he had never seen them on the property.
136. The Applicants bore the burden of proving (See the provision of Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80) adverse possession. While they asserted long-term occupation, their evidence was largely testimonial and lacked independent corroboration beyond photographs. The Respondent,



on the other hand, produced documentary proof of ownership and restrictions, and his testimony showed acts of possession consistent with ownership.

137. The Court finds that the Applicants have not demonstrated exclusive and hostile possession sufficient to extinguish the Respondent's title. The Respondent's continued assertion of ownership, through title, searches, and restrictions, negates the Applicants' claim of adverse possession.
138. The Plaintiffs sought for the ownership and entitlement of the suit property by virtue of adverse possession. Had the Plaintiffs proved the above? The Honourable Court therefore holds that the Applicants are not entitled to be registered as proprietors by way of adverse possession over Land Parcel No. Kwale/Galu Kinodo/495.

ISSUE No. d). Who bears the costs of the suit

139. Under this sub-title, the Honourable Court shall determine the issue of costs which is under the discretion of Court. Costs mean the award a party is awarded at the conclusion of a legal action 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”

140. 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.”

141. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. 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.

142. 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 “Morgan Air Cargo Limited – Versus - Evrest 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.”

143. In the present case, the Applicants sought to be registered as proprietors of Land Parcel No. Kwale/Galu Kinodo/495 by way of adverse possession. The Court has found that they failed to discharge the burden of proof and that the Respondent remains the lawful registered proprietor.
144. Accordingly, the Respondent is the successful party in this litigation. The Applicants’ claim has been dismissed, and no special circumstances have been demonstrated to warrant departure from the general principle. The Honourable Court therefore orders that costs of the suit shall be borne by the Applicants, payable to the Respondent.

VII. Conclusion and Disposition

145. Ultimately, having undertaken an in-depth analysis of the framed issues herein, the Honourable Court, on the Preponderance of Probabilities and the balance of Convenience, finds that the Applicants have not established their case against the Respondent. The Applicants failed to prove open, continuous, exclusive, and hostile possession of the suit property for the statutory period, while the Respondent demonstrated legal ownership and sufficient acts of possession consistent with his title. Accordingly, and for avoidance of any doubt, the Court proceeds to make the following specific orders:-
 - a. That Judgement be and is hereby delivered dismissing the entire Suit instituted by the Applicants herein.
 - b. That the suit by the Applicants as per the Originating Summons dated 30th May 2023 is hereby dismissed in its entirety.
 - c. That a declaration holding that the Respondent, Timothy Irimu Kagambi, remains the lawful and absolute registered proprietor of Land Parcel No. Kwale/Galu Kinodo/495, measuring approximately 3.6 hectares with all indefeasible rights, title and interest on the suit land vested in him by Law.
 - d. That pursuant to that a declaration that the Applicants are not entitled to be registered as proprietors of the suit property by way of Land Adverse Possession.
 - e. That costs of the suit shall be borne by the Plaintiffs/ Applicants, payable to the Defendant/ Respondent.

IT Is So Ordered Accordingly.

JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT Kwale THIS 5TH DAY OF MAY 2026.

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

AT

Kwale

Judgement delivered in the presence of:

Mr. Daniel Disi, the Court Assistant.



Mr. Mungai Kamau Advocate for the Plaintiffs/Applicants.

Mr. Mwangi Kihira Advocate for the Defendant/Respondent

