Mwasi & 2 others v Nyatta & another (Environment & Land Case 241 of 2008) [2024] KEELC 412 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 412 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 241 OF 2008

LL NAIKUNI, J

JANUARY 25, 2024

IN THE MATTER OF: THE LIMITATION OF ACTION CAP 22 OF THE LAWS OF KENYA

BETWEEN

NEWTON MAGHANGA MWASI .... 1ST PLAINTIFF

SHINGIRA MWASI .... 2ND PLAINTIFF

BRYSON MWASI .... 3RD PLAINTIFF

AND

MWASI NYATTA .... 1ST DEFENDANT

COMMISSIONER FOR LANDS .... 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment herein by this court relates to the Civil Suit instituted by the 1st, 2nd and 3rd Plaintiffs - Newton Maghanga Mwasi, Shingira Mwasi and Bryson Mwasi against the 1st and 2nd Defendants herein. As fate would have it, the 1st Plaintiff passed on and was never substituted as required by the provision of the *Law of Succession Act*, Cap 160 and/or Order 24 of the Civil Procedure Rules, 2010.

2. At the initial stage the suit which was filed before High Court on 12th September, 2008 way before this court was established in the year 2010 with promulgation of the new Constitution of Kenya, 2020 pursuant to the provisions of Article 162 (b) of *the Constitution* of Kenya which establishes the said court at the status of High Court.

3. It was instituted over fifteen (15) years ago and having been presided over by nine (9) Judicial Officers at different intervals over this suit. Honestly, I have not yet appreciated the reason the suit protracted. The suit was commenced as an Originating Summons dated 11th September, 2008 under the Provisions

of Section 38(1) of the Limitation of Action Cap 22 Order XXXVI rule 3D (1) and (2) of the Civil Procedure Rules and Section 81 of the *Civil Procedure Act*.

4. Upon service on 11th November, 2008 the 1st Defendant filed a Replying Affidavit opposing the suit. On its part, the 2nd Defendant never participated in these proceeding at all though I must point out that Court benefitted immensely as several Government officers from the land Registry and Survey offices were summoned to tender their valuable evidence by both parties. Subsequently directions were taken under Order 37 Rules 11, 13 and 16 of the Civil Procedure Rules 2010 accordingly and the suit commenced for hearing in earnest on 18th February, 2019.

5. It is instructive to note that upon the closure of the case, the Honourble Court by invoking the provision of Section 173 of the *Evidence Act*, Cap. 80 and Order 18 Rule 11 of the Civil Procedure Rules, 2010. Thus, on 26th October, 2023 a Site Visit ("Locus in Quo") was conducted in the presence of all parties. Immediately thereafter, with the leave of Court, each of the parties herein engaged their separate private Land Surveyors to undertake intensive land Surveying process on the two (2) parcels of the suit lands and prepare reports. Resultantly, this did occur and the said reports were filed respectively. The Honourable Court found the said reports extensively valuable and resourceful and apparently corroborates with the observation made out during the site visit. Hence, it has decided to re – produce them verbatim and attach them as part of the Judgement and for ease of reference. Additionally, the parties prepare d supplementary submissions which the Honourable Court found useful to boot.

II. The Plaintiff's Case

6. From the filed pleadings claim by the Plaintiffs is one of Land Adverse Possession whereby the Plaintiff's sought a declaration to the effect that they had become entitled as at the date of the suit to all that parcel of land registered "Werugha/Werugha/364 (hereinafter referred as "Parcel 364").

7. The Plaintiffs held that their father Mr. Mwasi Shingira was the registered proprietor of all that parcel of land known as Werugha/Werugha/773 measuring approximately 0.9 HA which parcel was adjudicated in or about the year 1969 and first registered in the year 1970. They attached an extract of Certified copy of title. Their family had lived on the suit property ever since. Indeed, according to them the 3rd Plaintiff had built his matrimonial home on the property.

8. During the 1969 Land Adjudication process, the family of their deceased father occupied the entire parcel adjoining parcel No. 773 whereon there stood a house which the 1st Plaintiff occupied as his family's house until he relocated to Taveta in the early 1980's when he left the same in possession of the 2nd Plaintiff. The adjoining parcel was known as Werugha/Werugha/364 – the suit land measuring approximately 0.09 HA and presently registered in the name of the 1st Defendant who had the same transferred to him on 11th February, 2008. Upon purchasing the land from one Amos Mwamburi Kituri himself as the proprietor since 1996 when it was transferred to him by one Mr. Mgiriama Jefsa the 1st registered proprietor.

9. They averred that the 3rd Plaintiff had been tilling the suit property especially those area surrounding the house that was previously occupied by the 1st Plaintiff and subsequently left to the 2nd Plaintiff. Presently, they claimed there were crops such as maize planted by the 3rd Plaintiff's family who for many years been using the portion of land for agricultural purposes.

10. The Plaintiffs held that parcel 773 was their late father's and they utilized it in common and 1st Plaintiff left his share to them in trust. They averred that sometime in the year 1972 or thereabout on realization that the suit parcel although adjudicated in their favour fell within the area occupied by their family – one Mr. Mgiriama Jefsa – (aka Nyatta Mwanyama) sought to sell the land to the 1st

Plaintiff their elder brother but the sale transition was incomplete and the Plaintiff continued to be in possession uninterruptedly. They noted that the suit property had changed hands twice over lately in favour of the Defendant. They held that their occupation over the suit land was a matter of public notoriety. To them, the had commenced a conveyancing process of purchasing the suit parcel No. Werugha/Werugha/364 from Mr. Mgiriama Jefsa and although the transaction never sailed through, the Plaintiff took possession and started cultivating on it and hence that consequential entry granted him prescriptive rights through Land Adverse possession. He argued that the title, rights and interest for the 1st Defendant was extinguished by that fact and he could not be re - gained through the re – entry into the suit land.

III. The Testimony by the Plaintiff

11. The Plaintiff's Case commenced on 18th February, 2019 through the testimony of the following witnesses.

A. Examination in Chief of PW – 1 by Mr. Mwakisha Advocate

12. PW – 1 was sworn and testified in English language he identified himself as being Mr. Mike Sego Manyarki. He stated that he was the District Land Registrar at Taita Taveta County. He was summoned to produce Registry Map Sheet No.9 for Werugha/Werucha registration section. He then proceeded to produce it as an exhibit marked as Plaintiff Exhibit 1. He had copies of certified green cards parcel No. Werugha/Werucha/364 and Werugha/Werucha/773. He produced the Green Cards as Plaintiff Exhibit Number 2 (a) and 2 (b) respectively. He had certified copies of documents. They were certified by his retired colleague, Mr. Donald Mwakiyo Mwongoli. These related to parcels No. Werugha/Werucha/548 in the name Darius Mwatela Mwandime, No. 550 in name of Mwashigadi Paul, No. 949 in name of Mwandawiro Mganga. He produced them as Plaintiff Exhibit 3(a) – (c). That was all.

B. Cross Examination of PW – 1 by Mr. Otieno Advocate

13. He had been a land Registrar for four (4) years. He had been in Taita Taveta Land Registry for three (3) years. He was summoned in the registry. He had the files. He had the file for Plots numbers Werugha/Werugha/364 and Werugha/ Werugha/773. The current registered owner of Plot No. 364 is Mwasi Nyatta. During the adjudication the first registered owner on 1st July, 1970 was one Mgiriama Jefsa. In July 1995, there was a correction of names to Mgiriama Yatta Mwanyama. On 17th January, 1996, the parcel was transferred to one Amos Mwamburi Kituri at a consideration of a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000/=).

14. On 11th February, 2008, the property was transferred to one Mwasi Nyatta, the current registered proprietor at a consideration of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=). These transactions were dealt with before PW – 1 joined that office. The evidence PW – 1 had was based on the history of the file. From his file he did confirm that there was a boundary dispute held on 8th May, 2008. The parties to the dispute were one Mwasi Shingira and Mwasi Nyatta. Mwasi Shingira was the applicant. The dispute was dealt with by the Land Registrar then and made a report dated 8th May, 2008.

C. Re - Examination of PW – 1 by Mr. Mwakisha Advocate

15. PW – 1 had an introduction letter from the acting Chief, Werugha Location introducing Mr. Mwasi Shingira and that he came from his location and that he was the rightful owner of parcel No. 773.

D. Examination in Chief of PW – 2 by Mr. Mwakisha Advocate.

16. PW – 2 was sworn and testified in English language. He identified himself as RAJAB SHABAN. He lived in Bamburi within the County of Mombasa. He worked with Kenya Ports Authority. He knew the Plaintiffs in this case. They were neighbors in his rural home in Taita Taveta, Werugha Location. He recorded and signed a witness statement dated 9th March, 2019 and filed on 11th March, 2019. He wished to rely and adopt his said statement as his evidence-in-chief.

E. Cross Examination of PW – 2 by Ms. Ngure Advocate

17. They were not age mates with the Plaintiffs. They were older than PW - 2. PW – 2 grew up in his grandfather's homestead which was neighboring Shingira's homestead. Bryson Mwasi used to work in Mombasa and used to come so often. He was not permanently residing there.

18. Mwasi Shingira's brother Mzee Maghanga was not living there. The body of the late wife to the late Newton was buried there. What he knew was that they used to live in Taveta when the wife died. She was brought to the Shingira homestead for burial. There were several structures in the homestead Shingira's home was near the road. PW – 2 was born and brought up there. He knew them as their neighbors.

F. Re - Examination of PW – 2 by Mr. Mwakisha Advocate

19. PW – 2 was born in the year 1972. He knew the wife and children of the 3rd Plaintiff as they were living there. PW – 2 was still young but he saw the dead body being brought there. PW – 2 knew the neighbors of Bryson Mwasi. One was Mzee Apollo who was now deceased. The other was his brother who was also deceased. He did not know of any other owner until recently when he heard someone was claiming it.

G. Examination - in - Chief of PW – 3 by Mr. Mwakisha Advocate.

20. PW – 3 was sworn and testified in Kiswahili language. He identified himself as being Mr. Paulo Mwadime Maighacho. PW – 3 lived in Taita. He was a farmer. On 10th March, 2019 he prepared and signed a witness statement which I wished to adopt as my evidence-in-chief.

H. Cross-Examination of PW – 3 by Ms. Ngure Advocate.

21. PW – 3 confirmed there were disputes over that land. There had been disputes about three times. He lived in Werugha. There was no building currently. It was only a shamba.

I. Re - Examination of PW – 3 by Mr. Mwakhisa Advocate

22. The disputes arose recently between the 2nd Plaintiff – Mr. Mwasi Shingira and the 1st Defendant - Mr. Mwasi Nyatta. The dispute was over that plot. They were his neighbors. He knew the plot belonged to the Plaintiff – Mr. Mwasi Shingira. The structure there used to be occupied by tenants of the 1st Plaintiff, Mr. Maghanga Mwasi. Nobody else was using that land except the 2nd Plaintiff, Mr. Shingira Mwasi. He only saw the 1st Defendant, Mr. Mwasi Nyatta who came on it recently about 3 years ago.

J. Examination in Chief of PW – 4 by Mr. Mwakisha Advocate.

23. PW – 4 was sworn and testified in Kiswahili language. His name was Bryson Mwagula Mwasi. He lived in Taita Werugha Location. He was a farmer. On 10th March, 2019 he prepared and signed his witness

statements which he adopted as his evidence-in-chief. On 27th November, 2008, his advocate wrote a demand letter complaining about trespass by the 1st Defendant.

24. PW – 3 also had a notice to produce dated 17th March, 2010. He produced the said letter as marked Plaintiff Exhibit No. 1 and the Notice to produce marked as Plaintiff Exhibit No. 2.

K. Cross Examination of PW - 4 by Ms. Ngure Advocate

25. PW – 4 stated that in the year 1996, he learnt that one Amos Mwamburi Kituri came claiming the land. His brother reported the matter to the Land Registrar who warned him against setting foot on that land because it belonged to Mzee Shingira who was their father.

26. In the year 2008, the Defendant came and claimed the land. They reported it to the chief. The chief warned them against trespassing on the suit land, yet the land was theirs. The land had not been sub-divided. In year 2008, the Land Registrar, the Land Surveyor and the 1st Defendant came and demarcated/surveyed the land. They had never had a boundary dispute. A structure in Plot No. 364 was sold by one Mr. Mgiriama Jefsa to PW – 4's brother. As far as he knew, the land had not been sub-divided. There was a time his brother went to Taveta and he rented out the structure.

27. I had no documents in support of this. PW – 4's brother left a family. They are in Taita. The house was on the side of Mgiriama. PW – 4 had lived in that land all through. He used to work in Mombasa but his family was living on the land. They were not squatters. This case was not about a boundary dispute.

28. PW – 4 was not aware of a report over boundary dispute. They came to court because they had not given out the land neither did their late father. We have not sub - divided the land but they live on it. They had mangoes e.t.c. there are also houses.

L. Re - Examination of PW – 4 by Mwakisha Advocate.

29. Their father was the owner of Plot No. 773, in which they lived in and it had never been sub-divided. Mr. Newton Mwasi, the 1st Plaintiff was sold a structure by Mr. Mgiriama Nafsi. He came to know of Plot No. 364 in the year 1993. He was the one owning it. His neighbor was Mzee William. When Mgiriama sold the house to PW – 4's brother, he left it to him. When the Land Registrar and Surveyor came, they were surprised as there had never been any boundary dispute.

30. After that meeting, PW – 4 continued planting but the crops were destroyed and hence he filed this case. He had never seen Amos and did not know him. He had never used that land. The Land Registrar never gave them notice that they were coming. They got them by surprise. His brother completed payment for the house.

M. Examination - In – Chief of PW – 5 by Mr. Mwakisha Advocate.

31. PW – 5 was sworn and testified in Kiswahili language. He stated that he was Mr. Shingira Mwasi. He lived in Werugha. He was 70 years old. He recorded witness statement on 10th March, 2019 and which adopted as his evidence-in-chief.

N. Cross Examination of PW - 5 by Ms. Ngure Advocate

32. PW – 5 testified that one Mgiriama Jefsa and Newton Maghanga entered into a sale agreement for a building. They did not buy the land. They purchased a house. They inherited the land. It was ancestral land. Nobody had interfered with their occupation. It was true one Amos Kituri whom he did not know, attempted to fence but he was unsuccessful. They reported the matter at the lands office, who

made a report that no one should fence that land. They had sued the Defendants because he wanted to grab their land.

33. The report never mentioned Mr. Nyatta Mwasi. They made complaint against Nyatta Mwasi not Amos Kituri whom they did know. They knew the people who bordered them and who they shared a boundary. He knew the size of the land. It was about 2.4 acres. He lived in Taveta when he was young.

O. Re-Examination of PW – 5 by Mr. Mwakisha Advocate

34. Mr. Mgiriama sold a house and not the land. They did not share a boundary with Nyatta Mwasi. Their neighbors whom they shared a boundary were William, Mwatele, Mwashivati and Mwandawiro. Nyatta Mwasi went with 0.2 acres. PW – 5 left Taveta in the year 1982 and came to Werugha. He had lived there since.

35. To support their case, the Plaintiff relied on the following documents:-

  a. A copy of the Green card to all that parcel of Land known as Werugha/Werugha/364.

  b. A copy of the Green card to all that parcel of Land known as Werugha/Werugha/773.

  c. A copy of the Green card to all that parcel of Land known as Werugha/Werugha/949.

  d. A copy of the Green card to all that parcel of Land known as Werugha/Werugha/548.

  e. A copy of the Green card to all that parcel of Land known as Werugha/Werugha/550.

  f. A copy of the Map sheet for the Werugha Registration Section with amendments from 7th August, 2014 to 22nd January, 2019;

  g. A Copy of the Land Survey Report by Messers. Pimatech Land Surveyors & Consultants upon being on land on 6th November, 2023.

  That was the close of the Plaintiff's case.

IV. The 1st and 2nd Defendant's Case

36. As stated above on 11th November, 2008 the 1st Defendant filed 17 paragraphed Replying Affidavit sworn and dated even date by Mwasi Nyatta the 1st Defendant herein. He averred as follows:-

  a. He was the lawful registered owner of the parcel of the land known as Land Reference No. Werugha/Werugha/364. He annexed a copy of the Certificate of title deed issued in his name on 10th September, 2008 marked as "MN8"

  b. The history of land showed that it passed from Mr. Mgiriama Nyatta Mwanyama to Mr. Amos Mwamburi Kituri in January, 1996.

    i. The 1st Defendant purchased the parcel from Mr. Kituri in September 2008.

    ii. Transfer of land dated 17th January, 1996 from Mr. Mgiriama to Kituri.

    iii. Letter of consent dated 17.1.1996.

    iv. Application for consent of Land Control Board dated 14th December, 1995.

    v. A Copy of the Certificate of Title deed dated 18th January, 1996 in the names of Amos Mwamburi Kituri.

    vi. Application for consent of Wundanyi Land Control Board dated 2nd January, 2008

vii. Transfer of Land dated 6th February, 2008 from Kituri to Mr. Nyatta

viii. Title deed dated 10th September, 2008 in the names of Mwasi Nyatta.

ix. Record held at the Land Officers in respect of the parcel of land known as Werugha/ Werugha/364.

c. In a letter dated 27th March, 2008 the local chief which warned the Plaintiff from over entering and/or trespassing on his land. His land shared a common boundary with the Plaintiff's parcel No. Werugha/Werugha/773.

d. There has always been a boundary dispute between the Plaintiffs and the Defendants who had always wanted to own his parcel of land though land adverse possession. For instance, there a Civil Suit at R.M. Court Civil No. 244/1996. 1st Plaintiff had entered into an agreement for the purchase of the suit land.

e. The Plaintiffs were not n possession and/or occupation of the suit land as alleged. They had not raised any ingredients to be awarded the land pursuant to Land Adverse Possession nor injunction.

f. A bundle of photographs marked as batch A & B;

g. A Survey map;

h. A copy of the Certificate of Title Deed for all that parcel of land known as Werugha/ Werugha/364;

i. A copy of transfer document for all that parcel of land known as Werugha/Werugha/364;

j. A copy of the stamp duty valuation form and an acknowledgement receipt.

A. The Testimony by the 1st and 2nd Defendants

37. The Defendant commenced its case from 4th March, 2020 upto 14th July, 2022. The Defendants testified and closed his case as follows:-

B. Examination in Chief of DW – 1 by Mr. Onduso Advocate.

38. DW – 1 was sworn and testified in English language. He identified himself as Donald Mwakio Bongoli. He was a retired Civil Servant. He was a Land Registrar at Taita Taveta District. He had some interaction over title No. Werugha/Werugha/773 and 364. Plot No. 364 belonged to Mr. Mwasi Nyatta, the 1st Defendant. The family of Shingira Mwasi, i.e. Newton Mwasi and Bryson Mwasi were complaining of their boundary. A team visited their land and confirmed that their boundary was intact. That the boundary was over plot No. 773 which was intact. The team also checked the boundary of Plot 364 which they also found to be intact. The dispute was for investigation of Plot No. 773. All the parties were present.

39. The team found that the boundaries were intact. Plot No. 773 belonged to Mr. Mwasi Shingira and Plot No. 364 belonged to Mr. Nyatta Mwasi. Their records in the office and the ground were all matching. There was no land that was encroached. According to his findings, plot No. 364 belonged to Mr. Mwasi Nyatta. He prepared a report which he produced as an exhibit Defendant Exhibit No. 1.

C. Cross Examination of DW – 1 by Mr. Mwakisha Advocate

40. DW – 1 last visited the two plots on 8th May, 2008. It was also his first visit. He went there on the request of area chief, Boniface Mganga. Mr. Newton Mwasi and Bryson Mwasi went and complained to the chief. Mwasi Shingira was deceased. Mr. Shingira did not state other numbers other than Plot No. 773. DW – 1 was not aware if there had been no disputes before the year 2008. He was not aware whom Mr. Nyatta bought the plot from. The fence was a barbed wire part of which was still visible.

41. DW – 1 was not aware who was carrying farming activities on Plot No. 364. He realized there was no boundary dispute and the team advised them to file a claim for land. DW – 1 was in court as the Land Registrar then. He had no idea who had been occupying the land before. The team informed the Plaintiffs that Plot 364 existed and it was fenced. Mr. Nyatta did not tell who put the markings on the plot and when. It was an old fence.

D. Re - Examination of DW – 1 by Mr. Onduso Advocate.

42. The hedge was separating Plots 773 and 364. They must have been aware that there were two plots. The owner of plot No. 364 was present at that time. The dispute was over boundary dispute. He was not interrupted by any of the parties. All parties were aware the dispute was over a boundary. DW – 1 advised them to go to court because his powers were limited to boundary dispute and they were claiming the land. Mwasi, Shingira was the owner of Plot 773 and that was why his name appeared there.

E. Examination – Chief of DW – 2 by Mr. Otieno Advocate

43. DW – 2 was sworn and testified in English language. He was called Mr. Ayub Mwasi Nyatta. He lived in Taita County at a place called WERUGA. He was a retired 80 years old. His date of birth was 31st December, 1942. He was a holder of the national Identification card bearing No. 308221. He recorded his Witness statement dated 15th February, 2019. He filed List of documents on 15th February, 2019. They were 11 documents marked as Defence Exhibits Numbers 2 to 12.

44. These were his properties. He was a holder of the title deed to Plot numbers 364. He had transfer documents and the Land Board Consent. He acquired it in the 1980.

Court:-

45. Court is shown the original Certificate of the title deed Land Reference No Werugha/Werugha/364. It measures 0.09 Hectares. It was registered in the names of Mwasi Nyatta – ID No. 0308221 issued on 10th September, 2008. Court is also shown the Letter of Consent from the Land Control Board.

F. DW – 2 continues testifying as follows:-

46. He knew about the suit property from the year 1963. The suit property was owned by his elder brother called Mr. Mgiriama Nyatta Mwanyama. It was also not far from his home. It's a quarter kilometer away. His brother built a mud semi-permanent structure on it. He would use it it as a butchery and a bar. This was not actualized as the church objected and offered to buy it.

47. There were two (2) parcels and he sought to consolidate it. The Plaintiffs - Newton Maghanga, Shungira Mwasi, Bryson Mwasi and Bryson Mwasi they moved there during the Land Consolidation Process. They moved from their ancestral land. They were settled next to DW – 2's brother. DW – 2's brother disposed the property in January 1996. Mr. Newton Maghanga Mwasi offered to buy the land. He entered into an agreement but he was not able to finalize the payment. He never took possession

neither did he cultivate it. Later on DW – 2's brother sold the land to Mr. Amos Kituri in January 1996. He took possession of the land. He erected a barbed wire fence and he had intend to build a supermarket but this did not happen. Before that the only structure on the property was only the mud house by the DW – 2's brother. They never did nothing. DW – 2 acquired the property in the year 2008 from Mr. Amos Kituri. The property was overgrown with lantern and barbed wire. The Plaintiffs had not done anything on it. By then the Plaintiffs were not living on the property. It was only the lantern bushes that had grown on it.

48. When DW – 2 acquired the property, he dug for cassava and banana trees for 2 to 3 years. There was the dispute in that the Plaintiffs alleged that DW – 2 was encroaching. They claimed DW – 2 was encroaching with boundary of the land and trespassing. The complaint was brought to the attention to the Chief. The Chief checked and he indicated in a letter dated 27th March, 2008.

49. They also lodged a complaint with Lands Registry of Land Reference 773 and 364. The land Registrar prepared a Report of 8th May, 2008 produced as Defence Exhibit – 1. (Refer) – The dispute that had been there was merely about boundary. DW- 2 refuted that the Plaintiffs were in occupation of the suit property and they would occasionally lease to the other persons. This would be possible as there was a mud semi-permanent structure. The team from the land offices came and they never saw any graves. Mr. Newton Maghanga Mwasi died. He was never substituted. DW – 2's brother acquired the property. He demarcated, built the structure. DW – 2 never saw any of them on the property. In any case, the building that his brother built collapsed. The claim to have been in continuous possession and without interruption was frivolous.

G. Cross Examination of DW – 2 by Mr. Mwakisha Advocate

50. DW – 2 informed Court that he had been in the United States of America for a while. He came back to Kenya in the year 1970. He retired in the year 1976 as the Deputy Secretary from the office of the President. He had been a fairly a busy man. He lived a quarter kilometer from the property. According to him, from the junction its 200 metres to the suit/land. Land Reference -364 hence it's not a quarter kilometer. As one moved, you found Mr. Mwakisha and Mr. Richard Mwakasha. The son had testified. There were several people on these parcels of land. There was a library built on Plot No.1575 - "Mary Tango Memorial Library". It was put up based on personal efforts and donations from the well-wishers. Mr. Mgiriama Nyatta in the year 1970 was in the process of selling it to Mr. Newton Maghanga Mwasi. He never occupied it. The structure collapsed before DW – 2 bought the land. Before that they were no tenants. They never occupied the house. All he knew was that the property was always vacant. He never saw any property there on the land. Amos Kituri put up the fence. He died and DW – 2 never knew where he was buried. He never used the land. DW – 2 did not know why Mr. Kituri could not take up possession and why he sold off the land to him. It was out of desperation as there were other people in occupation of the land.

51. The photographs were for Plot Werugha/Werugha 364 in the years 2010. People were vandalizing the plot. DW – 2 had not seen a letter dated and a notice to produce. For him, there had never been any uprooting of the plantation. He had not seen it. After the purchase of the land, he started cultivating on it. The Plaintiffs complained of the boundary set on Plot Numbers 773 and 364. They never complained that this was their land. DW – 2 was not aware of the plot No.773. He testifying that the Plot No.364 was not occupied from year 1963. Mr. Amos Kituri erected the fence and only intended to build a supermarket but he did do anything else. The letter was by the chief. His name was Mr. Boniface Mghagha, there was a dispute. It's the Land Registrar who came to resolve the boundary dispute with the participation of everybody and made a report on boundary dispute. He was not aware

of any other issue thereafter. They were insisting DW – 2 had been encroaching onto their land. They said he was getting into their graves.

H. Re - Examination of DW - 2 by Mr. Otieno Advocate

52. DW – 2 was referred to Defendant Exhibit 1. It was titled "boundary resolution". The complaint lodged by the Plaintiffs was that DW – 2 had been encroaching on their land. It was a boundary dispute. Thus, all along it was a boundary investigation. There was remarking of the boundaries with tapes and nobody raised any questions.

53. DW – 2 had never been shown of any photographs of the activities they did on the land. There was no complaint on the barbed wire by Mr. Amos Kituri. There was no order directing DW – 2 from utilizing his property. When he took over the property there were no plantations hence the allegations of him uprooting was far-fetched. There was no evidence of the Plaintiff's development on the suit property. DW - 2 had not been shown any lease or tenancy agreement showing the Plaintiffs were leasing out the land. DW – 2 came from United States of America in the year 1970. He used to come home very often as he used to build a library. His parents were old. He could never have stayed over 12 years without ever going home. The Plaintiffs never took possession of the property. That was the close of the Defendants Case.

V. Submissions

54. Upon the closure of the Plaintiffs' and the 1st and 2nd Defendants case the Honorable Court gave direction with clear time frame in the filing and service of written submissions. Pursuant to that all the parties complied accordingly and court reserved a date to render judgment on 1st March, 2023.

55. However, in the course of penning down the draft Judgement, it came to the realization of the Court that there was significant need to conduct a Site Visit on the strength of the provision of Section 173 of the *Evidence Act*, Cap. 80 and Order 18 Rules 11 of the Civil procedure, 2010. Hence, upon seeking the consensus of the parties, it was agreed the visit be conducted on 26th October, 2023. The Judgement date was re – scheduled to 23rd January, 2024 from the afore – stated date. But, for a reason explained to the parties, it was then delivered on 25th January, 2024 through Micro – Soft Teams Virtual means.

56. For ease of reference, with the leave of Court the Plaintiff filed three sets of Submissions dated 29th September, 2022; 5th December, 2022 and 9th December, 2023. While, the 1st Defendant filed two of their submissions dated 21st November, 2022 and 17th November, 2023.

A. The Written Submissions by the Plaintiffs:-

57. On 29th September, 2022, the Learned Counsel for the Plaintiff through the Law firm of Messrs. M.A. Mwinyi and Company Advocates dated even date Mr. Mwakisha Advocate commenced his submissions by providing the with a detailed background information of the suit as contained in the pleadings and the evidence adduced in court. He reiterated that the Plaintiffs claim was for the suit land on adverse possession. In their capacity on account of their exclusive continuous and uninterrupted occupation of the suit land. He indicated that seen from the Registry Map Sheet No. 9 produced in evidence for the Plaintiffs to be a small enclave to the South Eastern top of Plot No 773. According to the Counsel the area map sheet was important here as the area laid out of the various adjacent or neighboring plots would be important in aiding the court to appreciate both the historical and ground scenario as set up by the testimonies on record.

58. The Learned Counsel stated that the Plaintiffs relied on the evidence of five (5) witnesses – being 2nd Plaintiff – (PW-4), 3rd Plaintiff (PW-5), the Land Registrar (PW-1), and the two (2) neighbors PW-2 and PW-3 respectively.

According to the counsel their evidence was that since the land adjudication of the parcel during the land adjudication/ consolidation process in the area between the years 1968 to 1970 they were allocated parcel No. 364.

59. The 1st Defendant confirmed that there was a sale agreement between his brother Mr. Mgiriama Jefsa as the registered proprietor and the 1st Plaintiff to sell the suit land but which fell through.

That the 1st Defendant testified that his brother has wanted to put up a traditional liquor club on the land but was denied Licence and hence he got constrained to sell it. Hence this was an indication he had never taken possession.

He further stated that the Plaintiffs had exclusive possession and open control of parcel No. 773 and 364. The 1st Plaintiff had in the year 1996 instituted a suit at Voi before the Magistrate Court, which apparently has no jurisdiction to deal. There was evidence that prior to the agreement the Plaintiffs had taken possession of the suit land and the first question was whether such apparent consensual entry could give rise to prescriptive rights upon which a claim for adverse possession would lie. For this, the Learned Counsel argued that adverse possession would still be sustained where there was entry on land but ultimately there was unconcluded conveyance. To buttress on this point, he cited the case of Public Trustee –Versus Waruru Ndegwa (1984) eKLR where Madam J.A. held:-

> " Adverse Possession should be calculated from the date of payment of the purchase price to the full span of 12 years of the purchaser taken possession of the property because from this date the rue owner is dispossessed of possession"

60. Further the Learned Counsel cited the case of Sisto Wambugu – Versus- Njuguna (1983) eKLR where the court recognized exclusive possession pursuant to a sale that never was as being capable of providing a platform upon which time would run for purposes of limitation. They denied that the dispute between the parties was not merely one of boundary dispute. The Learned Counsel averred that this assertion emanated from the letter by the local chief dated 27th March, 2008 Boniface R. Maghanga – Exhibit – 1 the report by the Land Registrar Taita Taveta, allude to a boundary dispute holding that: -

> " Remember I also visited the site on same issue same weeks past and advised you all on what to do. Lastly, I referred you to Lands Office on 13.3.2008 for boundary. Re-marking on your land parcel number Werugha/Werugha/773.
>
> The Learned Counsel out rightly castigated these position and the contents of the letter having been crafted by a lay person not well versed on matters of law and in particular the principles of the Land Adverse Possession.
>
> The Learned Counsel averred that following the Chief's recommendations a meeting was convened at the site with the Land Registrar in attendance and all the parties. The 3rd Plaintiff objected in the boundary re-survey and insisted that Plot No. 364 was also part of his land. Based on this, the Land Registrar concluded by advising the Plaintiffs to file a claim in court of theirs exceeded the mere question of boundary. Contrary to what was provided for under the provisions of section 18 and 19 of the *Land Registration Act* and then Section 21 and 22 of the Registered *Land Act* Cap 300 (Repealed)

The Learned Counsel held that the land Registrar was summoned to produce certified copies of the green card in respect of the following parcels: -

a. Parcel No. 349 – Registered in the name of Shadrack Maiga Cho

b. Parcel No. 949 registered in the name of Mwandawiro Mganga

c. Parcel No. 548 registered in the name of Darius Mwatela

d. Parcel No. 1286 registered in the name of Isela William

On perusal of the map sheet Parcel No. 1286 lied between Parcel No. 349, and 364 the suit property Abutting on parcel No. 364 to the west was the Plaintiff's parcel 773 parcel No. 949 was across the road sitting opposite both on 773 and 364.

61. During the cross examination the 1st Defendant confirmed that he knew the families of both proprietors of parcel nos. 349 and 949. He also admitted knowing PW-4. The Learned Counsel extensively relied on the evidence of both PW-4 and PW-2 whose testimony affirmed that all along there existed Parcel No. 949 on the upper end of the road separating 949 from 773 and 364 as these two were neighboring properties and knew that they were all along occupied by the Plaintiffs and there was never any other proprietor. It was only later when this dispute arose that they heard there was within the area a distinct plot registered in some else's name.

62. The Learned Counsel recounted on the evidence by the Defendant at length to show though he had the land registered in his name but he never was in occupation of the suit land – 364. For instance, he had indicated having been away in the United States of America since 1968. His brother though attempted to sell the land but never took possession and even the previous owner Mr. Amos Kituri had attempted to put up the fence as at year 2008 but it was dilapidated.

63. He held that the buyer never dispossessed the Plaintiffs as they were still in possession even when the suit was filed on 8th August, 2008 – a fact that was evident from the letter by the Plaintiff's Counsel complaining of the Defendants act of uprooting the Plaintiff's maize crops. According to the Learned Counsel there were two (2) issues.

64. Firstly, he held that what was the effect of successive transfers of title on accrued prescriptive rights. He held prescriptive rights were in the nature of overriding interest and ran with the land and would not be defeated or annulled by mere change of the registered proprietor. He cited Bridges –Versus- Mees (1975) 2Ch.D and Mwangi Githu –Versus- Ndeete (1980) eKLR.

Secondly, what was the effect of re-entry upon land by the registered owner after the claim of adverse possession had been lodged in court. There has been a letter complaining of purported acts of re-entry after suit had been commenced, but also the 1st Defendant displaced photographs of the state of the property in the years 2010 and not 2008 nearly two years after filing of the suit at a time when he had purported to re-enter. He stressed to that fact that re-entry into the suit land after the commencement of the suit for adverse possession did not negate a Plaintiff's right of claim as the matter would have to be decided on the state of things prevailing at the inception of the suit.

The Learned Counsel further submitted that both Plaintiffs in their testimony asserted that there had been no evidence of dispossession by the time of filing the suit and the alleged fence was a contradiction – the 1st Defendant stated there was in 2008 only a fence, nothing else had been done on the parcel by Amos Kituri his predecessor as registered proprietor. The Plaintiffs on the other hand stated they never had him on the land. The Land Registrar's report held that the fence was on parcel No. 773 supposedly put up by the Plaintiff's father.

65. The only neighbor who testified held that they had never known any other person on land apart from the Plaintiffs. Hence merely having put up a fence would not amount to effective control and possession. On the contrary the actual occupation and user of the land would be paramount. What was referred as a fence was described in the report by the Land Registrar as : -

> " We confirmed that the boundaries of Plot 773 were well marked with Misimu and Masai trees all around. We also confirmed that the boundaries of Plot No. 364 had been fenced earlier and some of the fence was still visible but Mr. Shingira was insisting that the plot was his"

66. According to the Learned Counsel, the Plaintiffs provided the graphic, cogent and ultimately reliable evidence on the question of whether they had possession of the Land since the years 1970's and the same was supported by the evidence of their neighbors. To buttress his point he relied on the court of Appeal Case of "Eliakim Masale – Versus- Ilale Mohamed & Others – Civil Appeal 135 of 2019 where the court held:-

> " In our view, corroboration of facts and length of occupation by independent verifiable and reliable evidence is necessary in cases of adverse possession to be able to meet the threshold required of a balance of probabilities to direct a registered owner of his or her property.

67. He stressed on the continued and exclusive possession of the suit land, by relying on the evidence of PW-2 and PW-3, locals who grew up next to the suit land who held that all they knew the land distinctly belonged to the Plaintiffs and that only came to learn of an individual claiming land in the much later years. The 1st Defendant held that his brother indeed long left the land where his structure once stood in form of a traditional liquor club. The counsel further relied on the decision of Ádnam –Versus- Earl of Sandwich (1877) 2BQ – 485 referred to by the Court of Appeal in Chevron (K) Limited – Versus- Charo Shutu (2016) eKLR which underlined the police reason for the doctrine of Adverse Possession thus: -

> " The Legitimate object of all statutes is no doubt to quiet long continued possession but they all rest upon the broad and intelligible principles that persons who have at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment of immunity to which they have in some sense been tacit parties"

68. In conclusion the Learned Counsel submitted that the preponderance of the evidence adduced favoured upholding the Plaintiff's claim and hence prayed for the relief sought for land adverse possession and others be granted by court accordingly by entering judgment in their favour.

B. The Written Submissions by the 1st Defendant

69. On 21st November, 2022, the Learned Counsels for the 1st Defendant through the Law firm of Messrs. Otieno B.N. & Associates file their written submissions dated even date. Mr. Otieno Advocate as staring point commenced his submission by providing court with a brief overview of the case instituted by the 1st and 2nd Plaintiffs herein. He held that the 1st Defendant would be relying on the Replying Affidavit and the Counter - Claim, the filed documents and witness statements dated and filed in court on 15th February, 2019 already adopted as exhibits. In order to advance his submissions, the Learned

Counsel framed and based his argument to be considered by court on the following four (4) issues. These were:-

70. Firstly, whether the Defendant was the rightful owner of the suit property. On this issue he submitted that it was on record the Defendant bought the suit land from Amos Mwamburi Kituri and upon payment of the full consideration, stamp duty application for consent and letter of consent from the Land Control Board and was issued with a title deed dated 10th September, 2008, hence the Defendant became the legal and absolute registered owner to the suit land. To buttress on this, he relied on the Provisions of Section 26(1) of the *Land Registration Act* No. 3 of 2012.

71. Secondly, whether the Plaintiff's prayers in the Originating Summons for adverse possession could be granted, on this issue the Learned Counsel averred that it was now well settled and trite law that for adverse possession the mature into title to land all of the following conditions ought to be fulfilled. These were: -

   a. The trespasser that he/she had been in continuous and uninterrupted possession without the consent/permissions of the owner of the land.

   b. The trespassers interest had to be inconsistent to the interest of true owner of the land.

   c. The possession had to be open and notorious, to enable the owner be on notice that there was a trespassing on his/her land.

   d. The possession had to be actual to enable the owner have a cause of action which if he/she failed to act on within the required legal period then he/she would be estopped by the law of limitation to claim back the land.

   e. The possession had to be exclusive to avoid confusion on who was entitled to obtain the title to the suit land once the limitation period lapses.

   f. The possession must be without the permission of the owner.

   g. On the requisite of continuous and uninterrupted possession the Counsel relied on the decision of "Gabriel Mbui – Versus- Mukindia Muranya (1993) eKLR where the court Kuloba J. held: -

> " It is well known in our law that the adverse possession characters of the intruders possession of another's land must be proved as a clear fact and cannot be assumed as a matter of law from mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the court is to draw legal inferences as to whether there was or there was no adverse possession. The inference one way or the other is a legal one. This means that the acts of possession are factual data from which a legal conclusion may or may not arise as to whether they amount to adverse possession."

72. He held that the Plaintiff failed to prove their case on a balance of probabilities in order to meet the required threshold. He averred that none of the Plaintiffs proved to have been in exclusive, continuous, physical possession of any identifiable portion of the suit land. Further the Plaintiffs failed to demonstrate that the said exclusive possession was coupled with an intention to exclude the world at large (personum in vein) including the 1st Defendant from the suit land.

73. To buttress on this point the Counsel cited two 92) decision of Joseph Mutafari Situma –Versus- Nicholas Makhanu Cherono Civil Appeal No. 351 of 2002 (Kisumu) and J.A. Rye (Oxford Ltd) and others – versus- Graham and Another (2003) 1 AC 419 – to wit that each of the Plaintiffs ought to

individually (not "jointly possession") prove exclusive and continuous possession together with the intention to exclude the whole world. He further asserted that the Plaintiffs filed to establish an exact continuous period of time amounting to at least 12 years during which they occupied the suit land in a manner adverse to the 1st Defendant title. Instead, they had only thrown before court generalized allegations of possession.

74. The Learned Counsel drew courts attention to the Chamber Summons application dated 11th September, 2008 filed by the Plaintiffs seeking injunction orders. From the averments made there, it held that the 1st Plaintiff resided in Taveta but resided on suit land whenever he returned home while the 2nd Plaintiff was said to reside on the neighboring plot – Werugha/Werugha/773. The 3rd Plaintiff resided at Mombasa and had been active on the property by planting various crops. While dismissing the application court ruled on 23rd July, 2009 that "the alleged occupation not established. It is clear from the affidavit of Bryson Mwasi that the Deponent resides in Mombasa though he occasionally visits the suit land" that the 1st Plaintiff resides in Taveta. That it is not in dispute that none of the Plaintiffs reside on the suit land.

75. The suit for adverse possession was instituted by the 3 Plaintiffs. The 1st Plaintiff is deceased. The following emerged from the cross examination of PW - 2

i. he confirmed none of the Plaintiffs had lived in Plot No. 364.

ii. He used to be employed and retired in 1993.

iii. Before retirement he used to stay in Taveta but used to work for Kenya Railways in Mombasa.

iv. After retirement he moved to Taveta and resided there on a plot he had purchased in 1993 – different from the suit land.

v. Their claim only related to plots No. 773

vi. He attended a meeting on 8th May, 2018 on boundary dispute.

The Learned Counsel asserted that from the evidence of PW-1 the Land Registrar Taita Taveta acknowledged and confirmed that the land dispute that existed between the parties was a boundary dispute in respect to Plot No. Werugha/Werugha/773 and Werugah/Werugha/364 which dispute was logged with the Registrar and attended to by one Mr. D. B. Mwakio the Land registrar and Mr. M. B. Kinanda – the District Surveyor.

76. In a boundary investigations report dated 8th May, 2008 otherwise adduced in evidence. Subsequently as Defence Exhibit 1. It was concluded inter alia as follows: -

> " We confirmed that the boundaries of Plot No. 773 were well marked with Misimu and Masai trees all round, we also confirmed that the boundaries of Plot No. 364 had been fenced earlier and some of the fence was still visible." Indeed this position was buttressed by the former Land Registrar D. B. Mwakio who testified as Defence Witness No. 1.

To this end, it was very evidence that the Claim by the Plaintiff all along was none other than boundary dispute between the two parcels of land that Plot No. Werugha/Werugha/ 773 and 364. In simple terms according to the Counsel, the 1st Defendant in the process of utilizing his plot No. 364 exceed his boundaries by encroaching on to their plot No. 773 – from the report it showed there was clear visible demarcations between the two plots separated by a fence, not eligible for adverse possession.

77. Further the report never at all reveled any form of activity and or usage whatsoever by the Plaintiff over the 1st Defendant's Plot No. 364. The Learned Counsel, assessed the evidence of PW-2 Mr.

Rajab Shabon who confirmed that he lived in Bamburi Mombasa and worked with the Kenya Ports Authority. He identified himself as a neighbor to the Plaintiffs and in his cross examination confirmed that the Plaintiffs only used to come and go as their permanent home was at Taveta disproving the Plaintiffs assertion that their possession was actual continuous and uninterrupted. He confirmed that Bryson Mwasi, the 3rd Plaintiff used to work in Mombasa and used to come so often. he as not permanently residing in their neighborhood. He confirmed that the plaintiffs used to live in Taveta and only brought the body of the wife in Shingira's homestead for burial. He indicated that although there were many houses on Plot No. 773 there were none on that plot No. 364. He testified not knowing exactly where the boundaries of the respective parcels were no notorious physical entry on the suit property as alleged by the Plaintiffs. He confirmed being aware that there had been a dispute between the 1st Defendant and the 2nd Plaintiffs. He further stated that possession had not been peaceful.

79. The Learned Counsel asserted that the evidence of PW-4 – Mr. Bryson Mwasi had several inconsistences. These were: - he confirmed there were homesteads on the land in dispute while the previous witness PW - 3 held none existed. He denied boundary investigations on Plot 773 and 364 on 8th May, 2008 despite having been present during the meeting as per the report and minutes. He confirmed Jefsa sold the house not the land contrary to his recorded statement. He denied notice to attend the boundary meeting being served upon him though he attended, the meeting. He confirmed the owner of the land was Amos Mwamburi Kituri. Constructed a fence around Plot No. 364 thus excluding it from anyone. From his statement his address is of Mombasa and that he resided on Werugha/Werugha/773 registered in the name of their late father Mwasi Shirira who passed away in year 1985.

80. Notably therefore he never resided on Plot Werugha/Werugha/364. He worked for Kenya Ports Authority. It was only his parents and the family of the 1st Plaintiff (now deceased) who lived on and tilled the land – as indicated he was never there. His statement was more on his brother Maghanga's family allegedly occupying the club house. He indicated that his brother later relocated his family to Taveta and left the house for rental purposes – but no rental evidence – agreements receipts for invoices. No substituted evidence in form of photographs for the alleged cultivation undertaken by the Plaintiffs on the suit land.

The Learned Counsel assessed the evidence of PW-5 Mr. Shingira Mwasi, where he held the scope and nature of occupation was not established or even distinguished from the other Plaintiffs. He confirmed what existed on Plot No. 364 was a tiny mud and tin house which once stood there. He alleged that the mud house being rented out but without evidence.

81. He alleged that a number of family members had been buried on the suit land but no evidence of the grave not of the cultivation nor crops was shown. In summary, the Defendants was that:-

   a. 1st Defendant was the legal and absolute registered owner to all that property No. 364 with title deed in his name.

   b. Thus was a boundary land dispute between 364 and 773 as shown by the Report by the Land Registrar dated 8th May, 2008.

   c. The 1st Defendant produced adequate evidential proof of his occupation and ownership of the land. These included – Bundle of photographs; showing the cultivation and crops on the property having been planted by 1st Defendant and trees and vegetation, survey maps of the area, Title deed, transfer dated 17th January, 1996, Letter of consent dated 17th January, 1996, Application for consent dated 14th September, 1996, transfer documents from Mr. Kituri to Mwasi Nyatta, Application for consent from land Control Board dated 2nd January, 2008,

Letter of Consent dated 6th February, 2008, Stamp Duty declaration form dated 11th February, 2008, Letter by the Chief to Shingira Mwasi dated 27th March, 2008, a copy of the Green Card and the Affidavit by Mgiriama Jefsa indicative that he repossessed his parcel of land from Newton Mghanga for failure to complete payment of the agreed possession and the witness statements showing the origin of Plot No. 364, the development on the suit plot and the coming to the area of the family of Mwasi Shingira, the relationship between the Mwasi Shingira family and Mgiriama Nyatta, Mwanyama, the sale of the Plot 364 to Mwasi Nyatta.

A. The Supplementary Written Submissions by the Plaintiff

82. On 6th December, 2022 the Learned Counsels for the 1st and 2nd Plaintiffs herein while making a reply on behalf of the Plaintiffs with regard to the Submissions by the 1st Defendant dated 21st, November, 2021 filed the Supplementary Submissions. Mr. Mwakisha Advocate made reference to the assertion by the 1st Defendant made out at page 4 of their submissions, to wit that at the interlocutory proceedings, under the sub-title "Applications by the Plaintiffs" and, at paragraph 7 thereof, attention was drawn to certain observation by the Judge back in the year 2009 where it was recorded thus:-

> " The alleged occupation was not established. It is clear from the affidavit of Bryson Mwasi that the deponent resides in Mombasa though he òccasionally visits the suit land".

83. The Learned Counsel held that it was trite that a court dealing with an interlocutory application such as one for injunction pending suit, as it was here, was not to make any definitive findings of fact, which function was the province of the trial court that hears the evidence of parties and their witnesses tested in cross-examination. The Learned Counsel submitted that that observation by the Learned Judge, therefore, should be of little purchase in the ultimate decision of this court on the question of effective possession of the suit property which court would independently assess the material before it and reach its own conclusion.

84. This matter -of Bryson Mwasi's association with the suit land -is also revisited and clarified hereafter. Paragraph 8 of the submission referred to testimony by the 1st Plaintiff, Newton Maganga Mwasi who had testified before Azangalala J. Again, fit was subsequent to the demise of this Plaintiff that the trial began de novo before Yano J. At any rate, such previous evidence could at best only be useful as a template for cross-examination to test veracity or consistency where the same witness testified before a subsequent Judge at the trial de novo. It could not be such evidence as would be in competition with the evidence taken by the Judge at the trial de novo, moreso where that witness was no longer available to testify and be cross-examined afresh.

85. On the issue of Boundary dispute:- The defence made a heavy weather of the issue between the parties having been one turning on a boundary dispute. However, the Learned Counsel asserted that the handwritten record of proceedings, at page 61, had the former Land Registrar at Wundanyi, Donald Bongoli, testified on 4th March,2020. A wholesome appreciation of his testimony suggested that while he thought it was a boundary related exercise during his visit to the suit land, but he soon realized that the Plaintiff's claims went beyond issues of boundary and therefore advised the parties to move to court. In essence, he had realized the dispute was one outside his jurisdiction.

86. On the issue of Occupation – The Learned Counsel submitted that there had never been any effective dispossession of the Plaintiffs before this claim was filed in court. He stated that at page 53, the witness said he was now 70 years (when testifying in the year 2019) and that while he had lived in Taveta when young. That he had returned to Werugha – on the suit land, in the year 1982 and lived there since. He admitted, at page 52, that it was true, one Amos Kituri (the Defendants' predecessor was the holder

of the title between the years 1996 - 2008) had attempted to fence off, but was unsuccessful (which unsuccessful attempt at fencing should marry with the evidence of the Registrar that there were traces or remnants of a fence between Plot 773 and the suit property. To him there was no dispossession of the Plaintiffs by anybody was conclusively established.

89. He asserted that as for the 2nd Plaintiff - Bryson Mwasi, it was alleged that he worked in Mombasa so he could not, therefore, have been in occupation. However, at page 49, he did clarify that while he used to work in Mombasa, his family was on the land. At page 44, too, the witness, Rajab Shaban, referred to the Plaintiffs' family living on the land and, at page 45, the witness there stated that he knew of no other owner of the land until recently when he heard someone was claiming. This should offset the submission at paragraph 14 of the Defence submissions to the effect that Bryson Mwasi worked in Mombasa and was not permanently in the neighbourhood.

90. At any rate, it remained the position at law that occupation by a claimant through his family members being continuously present on the land as he worked elsewhere was effective possession for purposes of adverse possession as one may, for instance in possession through workers or farmhands yet be working elsewhere. The presence on the land may therefore be through agents, or family, as in the case here, where Bryson Mwasi's family, as well as the 3rd Plaintiff, were always present on the land. At page 52, on re-examination, it was stated for the Plaintiffs that after the Registrar's visit on 8th May, 2008, the Plaintiffs had continued to work on the land, a fact corroborated by the complaint raised in November, 2008 vide the letter produced as Plaintiff Exhibit - 2, which letter was written after filing of suit, to the effect that the Defendant was interfering with Plaintiffs' maize crop. PW - 3, Paul Mwadime, for his part had weighed in with evidence, at page 46, that the structures on the land used to be occupied by tenants of the Mwasis (the Plaintiffs).

C) The further written Submissions by the Plaintiff.

91. On 10th November, 2023, with the leave of Court the Learned Counsel for the Plaintiff filed their further written Submissions. Mr. Mwakisha Advocate informed Court that these submissions followed the court's visit to the locus in quo. Thereafter the said Visit, the Plaintiffs submitted a report by M/s Pimatech Land Surveyors and consultants. The Learned Counsel underscored that it was important to note that the suit having been filed on 12th September, 2008, the relevant ground status upon which the question of possession for purposes of the claim for adverse possession would turn must be that round about the date of filing suit. As such, the status of the land was as at the year 2023, some 15 years later, would be immaterial for the purpose save for certain features that may relate back to the period, or remain a constant regardless of time passage, such as boundaries and other physical features from which a contrast may be drawn across time.

92. The suit having been filed in September, 2008 on the basis that the Plaintiffs were in adverse possession of parcel no. 364 and had been so since the year 1970s. To the Learned Counsel, two dates were critical to the Plaintiffs' case.

93. First, the date of 8th May, 2008. This was the date of the report by Mr. D.B Mwakio, the Land Registrar, Taita Taveta. It was produced in court. It speaks of there being evident land dispute between the Plaintiffs' plot 773 and the suit property No. 364 and the trace of a collapsed wire fence. In his conclusion, he referred to "some of the fence being still visible".

95. Secondly, the other date was 27th November, 2008. This was when the Plaintiffs' Counsel wrote to the Defendant's advocates complaining of a re-entry after inception of the suit. He reproduced the letter for emphasis. It stated:-

> " Dear Sir,
>
> HCCC 241 of 2008("OS") Newton Maghanga Mwasi & 2 others –
>
> Versus - Mwasi Nyatta & Anor.
>
> We refer to the above matter. Our clients complain that yours has now trespassed unto the area planted by ours and is busy working the same, thus damaging our client's crop. Our clients suspect this is a ploy by your client to reclaim possession, and we must advise that such theatrics have come too late in the day. The action for adverse possession is not only already in Court, but that time for any claim against our client ran out quite a while back. Your client is best advised to await the Court verdict.
>
> Yours faithfully,
>
> M.A.Mwinyi

96. Fast forward to October, 2023 when the court visited the site, and the subsequent Land Survey report prepared and filed by the Plaintiffs' Land Surveyor, trading in the names and style of Messrs. "Pimatech Land Surveyors and Consultants". According to them, they conducted the land surveying exercise on the two parcels - Werugha/Werugha/ 364 abutting on Werugha/Werugha/773 on 6th November, 2023.which noted that there was now between the two plots a line of "msimu" (the traditional boundary demarcation plant) which he estimated to be of about 10 years' vintage. This would not be the same "still visible" fence referred to in the Registrar's report of May,2008- it would likely be part of activity undertaken following the re-entry post filing of suit complained of in the letter of November,2008.

97. The report also noted that there was no similar demarcation between Plot Numbers 364 and 1286. Which may imply that the Msimu fence had been planted, post filing of suit, to create the impression of the parcels being distinctly delineated, against the evidence by the Plaintiffs and their witnesses. That may explain why there was no fence demarcating Plot numbers 364 from 1286.

98. At the same time, the Learned Counsel relied and attached the undated Survey report by a Private Surveyor. In all fairness and due to its importance in this matter, the Honourable Court has decided to re – produce the said report in this Judgement.

The 1st Defendant further List of documents.

99. After the Site Visit, the 1st Defendant filed a further list of document being the Survey Report dated 10th November 2023 by Geomatics Licensed Land Surveyor. He stated that whereas they were not served with the Survey Report by the Plaintiff, they still managed to file this report whatsoever.

D. Further Written Submissions by the 1st Defendants

100. Following the site visit by the Honourable Court, the Learned Counsel for the 1st Defendant filed a Further Submission dated 17th November, 2023. Mr. Otieno Advocate submitted as follows. While giving directions following the site visit, the Court that did indicate that a site visit Report would be served upon the parties following which parties could file in Court further Submissions. This was not forthcoming. Consequently, the Counsel wrote to the Court vide their letter dated 15th November

2023 requesting for the same. However, they received response indicating that the file was with the Judge for purposes of writing a Judgment and the report shall be availed to the parties together with the Judgment of instance.

101. The Learned Counsel made reference to the report by their Land Surveyor. In their report, the Surveyor “inter - alia” made the following highlights:-

> “That the parcel boundary between parcel 364 (the Suit Land) & 1286 is defined partly by a shallow terrace and partly by visible trees (commonly referred to as msimi) on the lower side adjacent to murram road as explicit in photos 2(a), 2(b), and 2(c). That parcel boundary between parcel 364 & 773 is also clearly marked by the same msimi trees as explicit in photos 3(a).

102. Indeed this was consistent with the 1st Defendant's testimony and evidence on record vis-à-vis the boundary clearly defined by msimi” trees. This also flied against the contention by the Plaintiff that Plot Nos. 773 and 364 were utilized together by the Plaintiffs without any demarcation in between. It was notable that the Msimi trees were both demarcating 364 from 773 and the adjacent 1286 as well. It thus could not be gainfully said that the Msimi trees were planted after the institution of these pleadings as alleged in the Plaintiff's further submissions. As apparent during the site visit, the "msimi" trees were commonly demarcating boundaries of other parcels of Land within the area. There was also apparent confusion on the part of the Plaintiff who could clearly tell the end of their boundary of Plot 773 and clearly demarcated by the “Msimi"trees.

103. The Learned Counsel submitted that there was a visible grave located on parcel No. 773 as explicit in photos 4(a). Through the proceedings, the Court was taken through a narrative of the Plaintiffs having buried their relatives on the suit parcel of Land. To the contrary the only graves that were visible including the cemented ones were in fact on Plot No. 773 and not 364. It was important to note that when visiting the site with the Surveyor, a section of Parcel No. 773 had been cleared revealing graves including a cemented one. This definitely was after the site visit. It would raise eye brows of the intent of clearing the section after the site visit. Perhaps the Survey report by the Plaintiff's surveyor that was not served upon the 1st Defendant would have explained much. However, from the Survey report filed herein by the 1st Defendant, the graves in the cleared areas were sighted in Plot No.773 and not 364. Indeed the parties combed the suit parcel No. 364 with Court on the material day of site visit and no grave existed thereon not even a cemented one.

104. The Learned Counsel further submitted that, the land parcel (Werugha/Werugha/364) was wholly_uncultivated (bushy) with no visible temporary or permanent structure as explicit in photos labelled 1(a) and 1(b). He stated that other than occupation by the 1st Defendant by planting food crops on the subject parcel as apparent from the uncontroverted photographic evidence furnished forming part of the record, the site visit revealed no evidence of occupation, possession nor activity by the Plaintiffs as alleged in the suit herein. He reiterated that the Plaintiff's miserably failed in their onus to prove possession which is very cardinal vis-à-vis the cause of action of instance. No evidence of any prior activity or at all was tabled in proof thereof. From the site visit, it was apparent that the Plaintiffs in fact had their distinct homes far and distinct from the suit property. The Learned Counsel submitted and reiterated his submissions filed herein and posited that the Plaintiffs miserably fell short of proving their case on a balance of probabilities as required by law.

105. On whether the Plaintiffs were entitled to reliefs sought hereto. The Learned Counsel averred that for all the foregoing reasons, the elements of adverse possession claim had not been fulfilled by the Plaintiffs and asked Court to dismiss the Plaintiff's Originating summons and or suit with costs to the 1st Defendant.

C. The Issues for determination.

106. I have keenly perused the filed pleadings by the 1st, 2nd & 3rd Defendants herein, and the Defence by the 1st and 2nd Defendants, the comprehensive written Submissions and the plethora of authorities cited by the parties herein, the relevant provisions of *the Constitution* of Kenya, 2020 and the statutes.

107. In order for the Honourable Court to arrive at an informed, reasonable, fair and Equitable decision, it has crystalized the subject matter into the following three (3) issues for its determination. These are:-

   a). Whether the suit instituted by the 1st, 2nd and 3rd Plaintiffs herein against the 1st and 2nd Defendants herein has any merit;

   b). Whether the parties herein are entitled to the reliefs sought herein;

   c). Who will bear the Costs of the suit.

IV. Analysis and Determination.

Issue No. a). Whether the suit instituted by the 1st, 2nd and 3rd Plaintiffs herein against the 1st and 2nd Defendants herein has any merit;

108. From the very onset, the Honourable Court wishes to state that both the Learned Counsels for the Plaintiffs and the Defendants have ably executed the task of the exact facts of the case. Besides, the pleadings and the evidence adduced has been rather comprehensive. For that reason, the Honourable Court need not rehash on the facts any more. Instead, the Honourable Court will just proceed onto the analysis of the framed issues under this sub – heading. Nonetheless, the Honourable Court wishes underscore the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.

109. Now turning to the issue under the sub - heading and whether the suit by the Plaintiffs has merit, the Honourable Court has deciphered three (3) fundamental substratum from the instituted suit. Firstly, are the ingredients of acquiring the prescriptive rights through the land Adverse possession and the principles of re – entry to the suit land satisfied from the pleadings and the proceedings. Secondly, does the 1st Defendants bear a good title deed to the suit land and whether the same has been extinguished whatsoever and finally the issue of who bears the costs liability in this matter altogether.

110. On the claim of land adverse possession. Based on the background of the matter and the extensive submissions made by the parties, the Honorable Court feels it significant to expend a little more time deliberating on the concept of Land Adverse possession. The Doctrine of Land Adverse Possession is anchored on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap. 22. Section 7 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."

The provision of Section 13 on the other hand provides:

(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor 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.

111. Finally the provision of Section 38 states:-

38.

(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.

> "Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, nec vi, nec clam, nec precario, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:-

"7

(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.

(3) The Court shall direct on whom and in what manner the summons shall be served."

In the case of "Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira", Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of:- "Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990". See also the present position in case "Johnson Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005," where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

112. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.

In the case of: "Kimani Ruchine – Versus - Swift Rutherford & Co.Ltd (1980) KLR it was stated on this point that:-

> " The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario ..... So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endevours to interrupt it or by any recurrent consideration; See the case of:- "Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J."
>
> In Teresa Wachuka Gachira (Supra), a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. This Court, on appeal found that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;
>
> > "There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor"

113. Hence, the bottom line the Honourable Court will deliberate on whether the Plaintiffs have been able to fulfill these fundamental requirements of law for them to have acquired the prescriptive rights on Land Adverse possession over the Parcel No. 364 and whereby the 1st Defendant will have had its title to the said land extinguished thereof.

114. On the second substratum is on the legal ownership of the suit land. Primarily, I have noted that the Certificate of Title Deed for the suit parcel of land herein being Werugha/Werugha/364 and 773

respectively were issued in the year 1970 under the Registered *Land Act*, Cap. 300 (Now Repealed). Thus relevant provisions would be Sections 27, 28 and 143 of the RLA to wit:-.

> Section 27(a) "Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"
>
> Section 28 of the Act provides that:-
>
> > "The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..."
>
> Section 143 (1) of the Act provides thus:
>
> > "Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake
> >
> > (2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default"

115. However, considering that the Act has now been repealed, and based on the saving Clause under Section 107 of the *Land Registration Act*, No. 3 of 2012, the applicable law is the Lands Registration Act, No. 3 of 2012 and the relevant provisions being Sections 24, 25 and 26 (1) of the LRA , No. 3 of 2012 and the *Land Act*, No. 6 of 2012. This Legal position finds grounding in the provisions Section 23 (3) (c) of the *Interpretation and General Provisions Act*, Cap. 2 which provides.

> " Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed"

116. This legal position was upheld in the cases of "Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR" .

Having stated that, the Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods on how titles may be acquired in Kenya.

S.

7 Title to land may be acquired through:-

i. Allocations;

ii. Land Adjudication process;

iii. Compulsory acquisition;

iv. Prescription;

v. Settlement programs;

vi. Transmissions;

vii. Transfers;

viii. Long term leases exceeding Twenty one years created out private land; or

ix. Any other manner prescribed in the Act of Parliament.

117. In the instant case, this Honourable Court has a very simple legal task of making a determination on the legitimacy and legality on the indefeasible ownership, rights and interest over all these parcels herein. That is the pith and substance of this Judgement. To do so, the Honourable Court is guided by the Court of appeal in the case of: "Munyu Maina – Versus - Hiram Gathiha Maina, Civil Appeal No.239 of 2009", the Appeal Court held that:-

> " We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

118. In order to move forward, it is imperative to note that the provision of the *Land Registration Act*, 2012 are very clear on the position of a holder of a title deed in respect of land. The registration of person as a legal proprietor vests in them the absolute and indefeasible rights, interest and privileges. The states as follows:-

24. Subject to this Act:-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor.

(1) "The rights of proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register".

119. According to the provision of Section 26 (1) of the *Land Registration Act* (2012), it provides as follows:

> " A Certificate of Title issued by the Registrar upon registration shall be taken by all courts as a prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, except on grounds of fraud, misrepresentation, illegality and corrupt scheme.
>
> Section 26(2) provides that
>
> > "certified copy of only registered instrument signed by the registrar, shall be received in evidence in the same manner as the original".

120. In this regard, clearly, the ownership of the Certificate of title to the suit property is not challenged. The provision of the *Land Act*, 2012. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

121. The import of the provision of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

Issue No. b). Whether the parties herein are entitled to the reliefs sought herein;

122. Under this sub - heading, having elaborately stated the legal principles on the two broad substratum of this matter, there is need to apply these principles to the instant case. The Plaintiffs held that parcel 773 was their late father's and they utilized it in common and 1st Plaintiff left his share to them in trust. They averred that sometime in the year 1972 or thereabout on realization that the suit parcel although adjudicated in their favour fell within the area occupied by their family – one Mr. Mgiriama Jefsa – (aka Nyatta Mwanyama) sought to sell the land to the 1st Plaintiff their elder brother but the sale transition was incomplete and the Plaintiff continued to be in possession uninterruptedly. They noted that the suit property had changed hands twice over lately in favour of the Defendant. They held that their occupation over the suit land was a matter of public notoriety. To them have commenced a conveyancing process to purchase the suit parcel No. Werugha/Werugha/364 from Mr. Mgiriama Jefsa and although the transaction never sailed through, the Plaintiff took possession and started cultivating on it and hence that consequential entry granted him prescriptive rights through Land Adverse possession. He argued that the title, rights and interest for the 1st Defendant was extinguished by that fact and could not be re gained through the re – entry into the suit land.

123. From the very onset, I discern that and being in full agreement with the submission by the Learned Counsel for the 1st Defendant that the 1st and 2nd Plaintiffs they never acquired the suit land through the Doctrine of Land Adverse possession. Clearly, from their case, they were not able to prove open and exclusive possession of the suit land and the dispossession of the deceased and his descendants to the required standard of proof. They claim to have occupied and taken possession the land and even caused cultivation of certain plantation and some development on the land. But from both the site visit conducted and even the Land Surveyors' report engaged by the Plaintiffs there was no such evidence on the disputed land – Plot Number. 364. None of the Plaintiffs were able to prove actual and exclusive possession of the identifiable portion of the suit land independent of each other. For instance, there were no plantation on the land nor the famous semi – permanent structure which had been

put up by the previous owner – Mr. Jefsa for commercial purposes. Currently, there were only bushy shrubs and a few trees scattered on the land but nothing else. In other words, the 1st and 2nd Plaintiffs failed to demonstrate animus possidendi i.e. unmistakable exclusive possession ousting the title holder rightfully held by the 1st Defendant. In my own opinion, and which attains direct concurrence with the contention by the Learned Counsel for the 1st Defendant the doctrine of Land Adverse possession and even the argument on re – entry on the land cannot be sustainable at all.

124. For the benefit of doubt, the Honourable Court appreciates the legal fundamentals of law that one may gain land through Land Adverse possession from a purchase even if it fails to sail through. In that case the Plaintiffs possession of the suit land would have been in good faith and hence attained them colour of title. In saying so, I rely on the case of "Gabriel Mbui –Versus- Mukundia Maranya (1993) eKLR" where the Court held:-

> "The entirely and occupation must be with or maintained under some claim or color of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression "Colour of title" in law means that which is title in appearance but not in reality. He must have with him his own apparent right which offends him some semblance of title under which he claims to found his occupation of the land independently of anyone else's power. If he has no semblance or shadow of right to be on the land, he cannot rely on adverse possession".

125. Unfortunately, in the instant case and as already stated he Plaintiffs have failed to demonstrate actual and exclusive possession over the land. They have failed to produce any evidence of them having bought the land or the semi – permanent mud structure from Mr. Jefsa such as an agreement or acknowledgement of the transaction. From the extract of the title it shows the land was owned by M. Mgiriama Jefsa in the year 1st July, 1970 then transferred to Mr. Amos Mwamburi Kituri on 17th January, 1996. Eventually, it is Mr. Kituri who then transferred it to the 1st Defendant on 11th February, 2008. Thus, at what point did the Plaintiffs take possession and occupation of the land was never demonstrated by the Plaintiffs whatsoever.

126. The second limb of the sub – stratum to this case is the legal and absolute proprietary interest of the land. There is no doubt that the 1st Defendant acquired the proprietary rights and interest to the suit land as innocent purchasers for value. From the filed pleadings claim by the Plaintiffs is one of Land Adverse Possession whereby the Plaintiff's sought a declaration to the effect that they had become entitled as at the date of the suit to all that parcel of land registered "Werugha/Werugha/364. The Plaintiffs held that their father Mr. Mwasi Shingira was the registered proprietor of all that parcel of land known as Werugha/Werugha/773 measuring approximately 0.9 HA which parcel was adjudicated in or about the year 1969 and first registered in the year 1970. They attached an extract of Certified copy of title. Their family had lived on the suit property ever since. Indeed, according to them the 3rd Plaintiff had built his matrimonial home on the property.

127. During the 1969 Land Adjudication process, the family of their deceased father occupied the entire parcel adjoining parcel No. 773 whereon there stood a house which the 1st Plaintiff occupied as his family's house until he relocated to Taveta in the early 1980's when he left the same in possession of the 2nd Plaintiff. The adjoining parcel was known as Werugha/Werugha/364 – the suit land measuring approximately 0.09 HA and presently registered in the name of the 1st Defendant who has the same transferred to him in January, 2008. Upon purchased from one Amos Kitui himself the proprietor since 1996 when it was transferred to him by Mgiriama Jefsa the 1st registered proprietor. From

the records, this parcel was issued to Mr. Mgiriama Jefsa on 1st July, 1970; Mr. Mgiriama Nyata Mwanyama on 10th July, 1995; Mr. Amos Mwamburi Kituri on 17th July, 1996 and finally to the 1st Defendant - Mr. Mwasi Nyatta on 11th February, 2008. To support his case the 1st Defendant was able to demonstrate how he acquired the land through the required process and by producing all the prerequisite documents in such sale transaction for instance the Consents from the land board, transfer forms, stamp duty payments and so forth. None of these process was controverted at all. Resultantly, he was issued with a Certificate of Title deed in his names and which was never challenged. Indeed, the Honourable Court has taken judicial notice of two critical documents. These are firstly, the contents of the letter by the locational Chief of the area one Mr. Boniface Maganga dated 27th March, 2008. He affirms that the suit land belongs to the 1st Defendant. Secondly, it is the report by the a boundary investigations team being the Land Registrar, Taita Tavetta and The Land Surveyor dated 8th May, 2008 had clearly seem this and advised the Plaintiffs appropriately but they became adamant. The reports authoritatively holds that:-

> " We confirmed that the boundaries of Plot No. 773 were well marked with Misimu and Masai trees all round, we also confirmed that the boundaries of Plot No. 364 had been fenced earlier and some of the fence was still visible but Mr. Shingira was insisting that the Plot was his. In the circumstances, we advised Mr. Shingira to file a land claim if he was not satisfied with our confirmation that the Plot belonged to Mr. Nyatta. We stressed that the Plot No. Werugha/Werugha/364 was registered in the name of Mr. Nyatta Mwasi".

128. Thus, I discern and correctly so that the 1st Defendant is the absolute and legal owner to all that parcel of land known as Werugha/Werugha/364 with all the indefeasible title, interest and rights vested in him by law.

129. Additionally, as indicated the Court conducted a site visit and below was the report.

130. The Site Visit Report

A Site Visit Report on a Visit Held at Werugha in Wundanyi Sub-county on 26th October 2023 2.00PM

Arrived at the site at 2.00pm

Started with a word of by Mary Ngoira

i. The Court
    a. Before Hon Justice L.L Naikuni –Judge
    b. Mary Ngoira – Court Assistant
ii. The Plaintiffs
    a. Mr. Moses Mwakisha Advocate present for the plaintiff
    b. Gryson Mwasi – The 1st Plaintiff
    c. Shingira Mwasi – 2nd Plaintiff
    d. Paul Mwadime –witness for the Plaintiff;
    e. bMercy Shingira wife to the 2nd Plaintiff; and
    f. Peter Mwakula family members to the Plaintiff.
iii. The Defendants

a. Mr. Boniface Otieno Advocate for the 1st Defendant.

b. John Assistant from the Law firm of Messrs of Otieno B.N Associates Advocate

c. Mr. Ayub Mwasi Nyatta the 1st Defendant

iv. Security Operatives

a. C.I –Muktar Mohammed O.C.S, Wundanyi police station

b. Maina.

c. Nyambura.

d. Joan.

e. Driver Juma and Eugine.

(Hereinafter, all these parties are referred to as "The Site Visit Team").

v. The purpose for the Site Visit

The Court informed parties present the purpose of the site visit. It indicated that this was pursuant to a Court made on 27th July, 2023 as provided for under Section 173 of the *Evidence Act*, Cap. 80 and Order 18 Rule 11 of the Civil Procedure Rules, 2010.

The Honorable Court noted that this was not a land boundary issue which had already been dealt with by a team of Government Land Surveyor and the Land Registrar way back in the year 2008. Indeed a Survey report to that effect had been filed. For that reason, there would be no need of the presence of Land Surveyor. However as observed, there will be need for the Land Surveyors to go back on the land and complete the exercise by planting beacons and showing the parties the exact boundaries.

The Court informed the team of the basic rules and core values to be observed during the visit. For instance no taking of photographs, recording of the proceedings through phones etc.

The team agreed to be guided by a the map for the area which was part of the records of the filed documents. This was Map sheet No.9 dated 14/12/1990. It showed the two disputed parcels of land - Parcel Numbers 364 and 773. It was agreed the Plaintiff and the 1st Defendant to provide the lead as they were both conversant of the area.

Disputed 364

vi. The observations made by the team

After walking around the two parcels of land and also seeing all the neighbouring parcels to these two, the team made the following observations. These were:-

Parcel Number 364
There was a huge rock and a bushy area full of lanterns plantations on Parcel no. 364; It measured approximately 0.09HaThe 1st Defendants showed the team where the boundary of 364 was situated. It was observed that the boundary was marled with rock and row of plants quite grown small portion.Defendant showed trees boundaries of his small piece with Lantana bushy trees. The rocks were used as beacon. He indicated where semi – permanent mud structure constructed by the previous owner – Mr. Mgiriama Nyatta Mwanyama way back in the year 1965 with the intention of carrying out a butchery and a bar was once was on Parcel number 364. Unfortunately, there was no traces of the said structure in form of debris

or foundation as it was indicated the structure collapsed a while ago. The team noted the place being hilly there are occasion of strong wind and cold weather which may have eroded this evidence in the course of time. However, both parties agreed there was a house.Plaintiff also showed the team the disputed land where parcel 773 was situated. He stated that parcel number 773 measured 2 acres.There were no beacons planted at all.

Parcel Number 773
The 1st Plaintiff showed the team parcel no.773. He took the team around the whole parcel pointing out where the boundary started evidenced by a rock and boundary of live fence of msimu trees.There was situated a Homestead of 3 semi-permanent structures Rectangular, some plantations for subsistence farming, a mango tree and a 6000 litres plastic water tank in parcel no. 773. A cemented graveyards was visible too.From the observation clear natural features of msimu trees marking boundaries and rock in 773

Generally, the team further observed that:-
The Land adjudication and demarcation process within this area had already taken place (team was informed it was in the years 1963 to 1972) and people issued their title deeds. Indeed, we noted that there are several parcels of land that are bordering on these two parcels of land. For instance parcels Numbers 949; 548; 550;There are was long all season earth road cutting across these two parcels of land and the others neighbouring them.Although the boundary dispute seem to have been resolved by a teal of Government land Surveyor and land Registrar, unfortunately, the actual land boundaries and the beacons planted appropriately was never done. There are only rocks , Msimu trees and Kie Apples used as proof of boundaries. Todate, the parties are still anxious on appreciating these vital information. For these reason, there will be need for the Land Surveyors to go back on the suit land and finalise the surveying process.This land dispute has been protracted from the year 2008 todate. There is no good blood between the parties who though seem to be neighbours and perhaps blood related from time memorial. For peace and tranquility, there will be need for the parties to sustain cordial, good and mutual neighbourliness as advocated under the Alternative Judicial System (AJS) under the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Sections 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011. The Court advocates for further deliberation by the Court annexed mediation be upheld.

vii.

Conclusion

Upon completion of the tour around the two parcels no.364 and 773 of land as per the map, the Court made the following directions -;

a. That there would need to engage a Land surveyor to ascertain the actual position of the two parcels. Parties may file Land Survey report within 21 days.

b. That each party to be granted leave to file and serve skeletal submissions within 14 days.

c. That Judgement to be delivered on 23rd January 2024.

The session ended with a word of prayed by Mercy at 3.00 pm.

The Site Visit Report dated 26th Day of November, 2023.

....

Hon. Mr. Justice Ll Naikuni (judge),

Environment & Land Court At

Voi

131. Immediately after conducting the Site Visit, the 1st and 2nd Plaintiffs engaged the services of a private Surveyor by a Private Surveyor trading in the names and style of Messrs. "Pimatech Land Surveyors and Consultants" to under take the surveying exercise on their behalf. Indeed, the Learned Counsel for the 1st and 2nd Plaintiffs relied and attached the undated Survey report. According to them, they conducted the land surveying exercise on the two parcels - Werugha/Werugha/ 364 abutting on Werugha/Werugha/773 on 6th November, 2023. In all fairness and due to its importance in this matter, the Honourable Court has decided to re – produce the said report in this Judgement as herein below:-

Purpose of the Survey

a). To determine the ground position of the plot in question.

b). To determine the developments within and around the underline plot.

Authority

On verbal instruction from Messrs Bryson Mwasi and Shingira Mwasi.

Locality

Werugha, in Wundanyi Sub County, Taita/Taveta County.

Datum

RLM sheet number 9.

Method

The boundaries were determined by normal survey practice. Measurements were derived from a survey plans, duly approved and Existing relevant features were surveyed and plotted to form a plan by Autocad software.

Observation
Both clients are resident on plot Number Werugha/Werugha/773.Those boundaries in place are generally marked by the traditional boundary markers of "Msimu" trees, except for the boundary between plots 773 and 949 to the North of 773 which has a continuous "Kayaba" (kie apple) fence.All boundaries of plot numbers, Werugha/ Werugha/ 949,550, 548 and 207 were found insitu with no dispute thus used as basis of the survey.Existing Live fences, buildings and existing boundaries of Plot numbers Werugha/ Werugha/ 773 was picked and plotted. See plan attached.The Existing Old Live 'Msimu' fence is estimated to be of over forty (40) years, while the existing Young Live "Msimu fence standing between Plot 773 and 364 is estimated to be of around Ten (10) years of age.According to the clients pointed out boundary, plot number Werugha/ Werugha/364 has been part of their landThere is no boundary planted between Plot No 773 and 1286 to the South of Plot 364 and the clients say the owners of Plot 1286have always been their immediate neighbor to the south.Werugha/Werugha/1286 who acknowledges the encroachment. The clients also lay claim to the whole of Werugha/ Werugha/364.Plot Werugha/Werugha/364 is presently over grown with Latina Shrubs.The ground Position is the same as the one an the plan.ConclusionThe clients have no dispute with the other neighboring plot owners.The attached plan illustrates the situation on the ground.Mathias Miomba,Land Surveyor..

132. The 1st Defendant also commissioned their surveyor who undertook a land surveying report. The Survey Report is dated 10th November 2023 by Geomatics Licensed Land Surveyor.

The Survey report by the Geomatics Land Surveyors

The Topographical surveying

The measurements were derived from the registered index map, which is authenticated, approved and registered by the Director of Survey (general boundaries).

The above mentioned parcel is registered in the names of Mwasi Nyatta and title deed issued on 10th September, 2008 (see attached search)

The parcel is referenced on the registered index map (RIM) on sheet No. 9, at a scale of I:2500, with the boundaries well defined, boundering parcels, Werugha/Werugha 776 &1286 and a main murram access road. (See attached map & with measurements indicated).

The land parcel is defined by the following Global positioning System (G.P.S) Co - ordinates map datum Arc.60.

Northings Eastings

1. 9627022 425916

2. 9627030 425931

3. 9627064 425919

4. 9627059 425900

The linear measurements are indicated on the map attached.

Parcel boundary between parcel 364 & 1286 between points 2 & 3 in defined partly by a shallow terrace and partly by visible trees (Commonly referred to as msimi) on the lower side adjacent the murram road.{See photos 2 (a), 2 (b) & 2 (c)}.

Parcel boundary between parcel 364 & 773 is also clearly marked by the same msimi trees (see photos 3 (a))

There was a visible cement grave located on parcel 773. See photos 4 (a)} NB:-·The land parcel (Werugha/Werugha/364) is wholly uncultivated (bushy) with no visible temporary or permanent structure. (See photos labeled i(a) & 1 (b).

133. The above GPS coordinates on the ground conform with the authenticated map and define parcel 364, linear measurements (see attached map).

Signed

134. The outcome of the Site Visit and the exercise undertaken by the two private surveyors seem to be extremely collaborative. I discern that though a boundary dispute had been undertaken by the Land Surveyor and the Land Registrar on 8th May, 2008. Evidently, it appears the task was incomplete. The major short – coming from it was they failed to clearly place the boundaries and planting of beacons onto the two disputant parcels of land. The parties are left to rely on the traditional rocks and Msimu trees and/or Kie apples as proof of their boundaries. Clearly, this is bound to generate conflict particularly where parties have other ulterior motive. To me this has been the main cause of the long land dispute with each party accusing the other of trespass and encroachment onto their land. For this reason, the Honourable Court directs that this exerciser be completed pursuant to the provisions of Sections 18, 19 and 20 of the *Land Registration Act*, No. 3 of 2012.

135. Furthermore, as indicated, this has been such a protracted legal dispute from the year 2008 todate, close to 15 years. From the pleadings and the site visit conducted, though there is bad blood among the parties, but it was noted that these have been neighbours from time immemorial. Hence, for intent and

purposes, there is great need to sustain good, cordial and mutual neighbourliness, peace and tranquility among themselves. Therefore, it is for these reason, that the Court holds that this those cases where the the spirit of Alternative Judicial System (AJS) as founded under the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Section 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011 should be upheld strongly.

Issue No. c). Who will bear the Costs of the suit.

136. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceeding in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs to follow the events. By events it means the outcome or results of any legal action whatsoever. This legal ratio was founded in the Supreme Court case of "Jasbir Rai Singh – Versus – Trachalan Singn (2014) eKLR; Rosemary Munene – Versus Ihururu Dairy Co – Operative Societies (2014) eKLR and Cecilia Karuru Ngayu – Versus Barclays Bank of Kenya, (2016) eKLR where the Court held that:-

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event....... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case'

137. The instant case, the 1st, 2nd and 3rd Plaintiffs have not been successful in proving their case as per the required thresholds of law. It follows therefore that the 1st and 2nd Defendants are entitled to the costs of the suit thereof. However, as already pointed out, the parties herein have been neighbours from time immemorial. There is all need to sustain good, cordial and mutual neighbourliness, peace and tranquility among themselves. Thus, in the spirit of Alternative Judicial System (AJS) it is only fair, reasonable and Equitable that each party bears their own costs to this rather protracted litigation process.

VIII. Conclusion & Disposition

138. Ultimately, upon causing such an elaborate analysis of the framed issues herein, the Honourable Court on the principles of Preponderance of Probabilities and the balance of Convenience, it holds that the 1st 2nd and 3rd Plaintiffs have failed to establish their case to the required standards. For avoidance of any doubts, the Honorable Courts now proceeds to grant the following specific orders. These are:-

   a. That the suit by the 1st, 2nd and 3rd Plaintiffs herein against the 1st and 2nd Defendants has no merit and hence its dismissed with costs.

   b. That a declaration be and is hereby made the following parcels of land are duly and absolutely registered in the persons within the locality of the suit property as herein below stated:-

      i. all that parcel of Land known as Werugha/Werugha/364 belongs to Mr. Mwasi Nyatta with effect from 11th February, 2008.

      ii. all that parcel of Land known as Werugha/Werugha/773 belongs to Mr. Mwasi Shingira with effect from 1st July, 1970.

      iii. all that parcel of Land known as Werugha/Werugha/949 belongs to Mr. Mwandawiro Mghangha with effect from 1st July, 1970.

iv. all that parcel of Land known as Werugha/Werugha/548 belongs to Mr. Darius Mwatela Mwandame with effect from 11th August, 1981;and.

v. all that parcel of Land known as Werugha/Werugha/550 belongs to Mr. Mwashigadi Paul with effect from 1st July, 1970.

c. That an order be and is hereby made that the Government Land Surveyor and Land registrar from Mwatate and/or Wundayi undertake to complete the land Surveying exercise initiated on 8th May, 2008 on the two parcels of land by clearly delineating and showing the parties the boundaries and planting of permanent beacons on the land pursuant to the provision of Sections -18, 19 and 20 of the *Land Registration Act*, No. 3 of 2012 Within The Next 45 Days from the date of this Judgement.

d. That an order made to the ELC Deputy Registrar, Voi herein to refer the 1st and 2nd Plaintiffs and the 1st Defendant to the Court managed/or controlled Alternative Judicial System (AJS) under the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2020 and Section 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011 Within The Next Thirty (30) Days from the date of the delivery of this Judgement, for purposes of sustaining good, cordial and mutual neighbourliness guided by peace and tranquility among the parties herein.

e. That each party to bear their own costs.

JUDGEMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT VOI THIS 25TH DAY OF JANUARY, 2024.

....

HON. JUSTICE (MR.) L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT

VOI

Judgement delivered in the presence of:

a. M/s. Mary Ngoira, the Court Assistant.

b. Mr. Mwakisha Advocate for the 1st, 2nd & 3rd Plaintiffs.

c. Mr. Otieno Advocate for the 1st Defendant.

d. No appearance for the 2nd Defendant.