



Richard & 15 others v Kotedia (Civil Suit 408 of 2017 & Environment & Land Case E161 of 2021 (Consolidated)) [2024] KEELC 174 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 408 OF 2017 & ENVIRONMENT &
LAND CASE E161 OF 2021 (CONSOLIDATED)**

MD MWANGI, J

JANUARY 25, 2024

(CONSOLIDATED WITH ELC CASE NO. E161 OF 2021)

IN THE MATTER OF A PORTION OF LAND REFERENCE

NUMBER 9042/143 (I.R. NO 48131)

AND

**IN THE MATTER OF AN APPLICATION FOR DECLARATION
THAT THE APPLICANT HAS OBTAINED OWNERSHIP OF THE
SUBJECT LAND**

BY WAY OF ADVERSE POSSESSION

BETWEEN

BETWEEN

SARAH NYAWIRA RICHARD 1ST APPLICANT
JOHNSTONE OKASIDA IPARA 2ND APPLICANT
ZIPPORAH WANGARI CHEPKWONY 3RD APPLICANT
LINUS OUMA 4TH APPLICANT
ANTHONY MUTHAMA MUSYOKA 5TH APPLICANT
ELIZABETH MULISYA MUSYOKA 6TH APPLICANT
ROBERT KARIUKI WANJIKU 7TH APPLICANT
NICHOLAS CHELIMO KANDIE 8TH APPLICANT
NELSON HABELI OPATIA 9TH APPLICANT
AUGUSTUS M. MUTUA 10TH APPLICANT



PURITY WAMUYU GATUA 11TH APPLICANT
GEDION OMARE MBAKA 12TH APPLICANT
RICHARD KIPKOECH KORIR 13TH APPLICANT
ROSE WAKARINDI 14TH APPLICANT
SAMUEL K. TONUI 15TH APPLICANT
JOSPHAT K. MUTAI 16TH APPLICANT

AND

DINESH RAMJI KOTEDIA RESPONDENT

JUDGMENT

1. Vide the Originating Summons dated 18th April, 2017, brought pursuant to the provisions of Order 37 Rules 7 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act, the Applicants seek the following orders against the Respondent:
 - a. A declaration that the Respondent's right to recover a portion of land measuring 1 Acre of Land Reference Number 9042/ 143 (I.R. No. 48131) situate within Nairobi County is barred under Section 7 of the Limitation of Actions Act, Chapter 22, Laws of Kenya and the applicants are entitled to be registered forthwith as the owners on the grounds that the applicants have held the suit land in adverse possession since the year 2002 to-date, for a period of more than twelve(12) years immediately preceding the presentation of this summons in court, the same being the land on which the applicants have with their families lived and occupied openly, continuously, peacefully and as of right without interruption from the Respondent or his predecessors in title.
 - b. A declaration that the Respondent's title and right to a portion of land measuring 1 Acre, of Land Reference Number 9042/143 (I.R. No. 48131) situate within Nairobi County, has been extinguished in favour of the applicants under Section 37 and 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya.
 - c. An order for costs and interests to be awarded to the applicants.
2. By consent of the parties, the O.S was consolidated with ELCC E161 of 2021 with ELC 408 of 2017 (O.S) being the lead file. The consent was adopted by the court on 22nd February 2022.
3. In ELCC E161 of 2021 the Respondent in the O.S had on the other hand, filed a case through his guardians; Kapildev Dinesh Kotedia and Mitesh Dinesh Kotedia, against all the 16 Applicants in ELC No. 408 of 2017(O.S) vide the Complaint dated 6th May, 2021. The Plaintiffs therein pray for;
 - a. A declaration that Dinesh Ramji Kotedia is the lawful registered owner of the Land Reference No. 9042/143 situated at Embakasi Area in Nairobi County and the Defendants' continued occupation of the said parcel of land is unlawful.
 - b. An order of permanent injunction restraining the Defendants jointly and severally by themselves, their workmen, servants and or agents or otherwise howsoever, from further entering upon, occupying the suit property, carrying on any further developments thereon, leasing proprietary acts whatsoever thereon, leasing, selling, charging and or performing any



further proprietary acts whatsoever thereon and or committing further acts of waste howsoever upon Land Reference No. 9042/143, situated at Embakasi area in Nairobi County or any part or portion of thereof and or from interfering with the Plaintiff's proprietary rights over the same or any part thereof.

- c. An order for eviction of the Defendants jointly and severally by themselves, their workmen, servants and or agents or otherwise howsoever, from Land Reference No. 9042/143 situated at Embakasi area and demolition and removal of all structures constructed by the Defendants on the said land.
- d. An order that the Defendants do pay the Plaintiffs mesne profits equivalent to the rent chargeable for the said property at the market rent from October 2013 at Kshs. 500,000 per month for the continued occupation of the suit property together with the interest thereon at the prevailing commercial rate of interest until they give vacant possession of the same or as the court shall order.
- e. Exemplary damages.
- f. Costs of the suit.
- g. Interests on (d), (e) and (f) above at court's rate.

Applicants' case

4. The O.S is premised on the Supporting Affidavit of Sarah Nyawira Richard deponed on the 18th April, 2017 on her own behalf and on behalf of other 15 Applicants. The deponent avers that they gained access to and started occupying the parcel of land known as Plot Number 9042/143, in the year 2002. She stated that as a slum upgrading project of the Embakasi Constituency, the local administration in conjunction with the then Member of Parliament of Embakasi, resettled homeless and jobless people within the area. She annexes a copy of the Title and a Map identifying the suit land.
5. The Applicants state that upon being settled, they were allowed to utilize the land for their own exclusive use. They constructed temporary houses and sheds on their respective portions with the help of the local leaders and well-wishers. The deponent produced a bundle of photographs of some of the permanent and semi-permanent structures on the suit land. They contend that their possession and occupation the one (1) acre land was visible, actual, open, notorious and exclusive.
6. The deponent further states that while in occupation of the suit land, they formed a group known as Embakasi Slum Dwellers Self Help Group, whose members were issued with a certificate of membership upon payment of Kshs. 700/=. Since then they have heavily invested on the plot by building both permanent and semi-permanent houses with the belief that the plot was lawfully and procedurally allocated to them. Their occupation has equally been peaceful and without consent or knowledge of the owner.
7. The deponent states that the land is their only source of income and livelihood. She asserts that they depend on small scale businesses thereon to fend for their families. Their families stand to be rendered destitute and with no source of income should they be deprived of the occupation thereon.
8. The Applicant asserted that the Respondent herein has never had active possession of the suit land since their occupation in the year 2002 to date. He has never asserted his claim on the land in any way. They argue that they have acquired individual proprietary rights which have crystallized due to their continued stay on the land unperturbed, hence the instant claim of adverse possession as against the Respondent having resided there for more than 15 years.



Replying Affidavit

9. The Respondent opposed the Originating Summons through the Replying Affidavit of Kapildev Dinesh Kotedia, the Respondent's son and one of his duly appointed Guardians, sworn on the 28th May, 2021. The deponent confirms that in deed the Map adduced by the Applicants represents the suit property. He however states that his father fenced off the property in exclusive occupation but left it vacant intending to construct in compliance with the special conditions in the title. He continued to pay the land rents and municipal rates as required.
10. The deponent contends that the Applicants are trespassers and several actions have been initiated to evict them from the suit property. The Applicants' occupation has therefore not been uninterrupted as alleged.
11. The deponent denies the allegation that the Applicants have been in occupation of the suit property since 2002. He avers that the Applicants unlawfully entered into and took occupation of the suit property sometime back in the year 2013 - 2014 or thereabouts through the help of the 2nd Applicant, who was a Senior Police Commandant. The deponent avers that upon becoming aware of the illegal occupation, the Respondent reported the illegal occupation and constructions to the Police and to the Nairobi City County.
12. The deponent avers that despite the complaints, no action was taken against the Applicants despite the glaring illegalities. The Respondent realized that the 2nd Applicant was using his influence and power to grab his land. The deponent points out that the electricity and water connection supply documents are in the name of the 2nd Applicant and were obtained in 2013, when the Applicants actually occupied the suit property, albeit illegally.
13. The deponent further faults the alleged allocation by the Slum upgrade project as it could not purport to allocate that which they did not own. The slum upgrading project could not pass a title that it did not have. In any event, the Applicants cannot seek adverse possession while at the same time claim ownership through allotment.
14. The deponent denied that the Applicants' occupation has been peaceful and uninterrupted. The Respondent had made numerous complaints seeking their eviction. The complaints include that of February, 2014 made at Parklands Police Station, the Letters dated 15th April, 2014 and 22nd July, 2015 to the directorate, City Inspectorate Department of Nairobi, who issued and served an enforcement notice upon the Applicants. The enforcement notice required the Respondents to stop further developments and remove their structures thereon.
15. The deponent stated that they contracted Arch Surveyors who conducted a land survey on the suit property. From the Surveyor's Report the Applicants had removed the beacons, and were equally occupying a road reserve.
16. The Respondent argues that he filed a suit in 2015 being Milimani ELCC No. 295 of 2015. The matter was however withdrawn under unclear circumstances. Further that he has also lodged a complaint with the Directorate of Criminal Investigation. He contends that the Applicants are land-grabbers in disguise as slum dwellers registered as "Embakasi Village Upgrade Project", which group issued the Applicants with a certificate confirming ownership. The illegal occupation cannot therefore afford the Applicants a title over the property. In any event, the constructions done on the suit property by the Applicants are illegal as they are in contravention of the special conditions contained in the grant. The land was for industrial purposes only. The conditions are shown on the attached title.



17. The deponent argues that the Applicants have not met the statutory and common-law threshold for adverse possession. He avers that during the pendency of Milimani Elc No. 259 of 2015, the Applicants reached out to the Respondent with a proposal to purchase the property at a sum of Kshs. 27 Million. He attaches copies of correspondences to that effect. The negotiation however did not bear fruits as the Respondent declined payment of the purchase price in instalments. It was only then that the Applicants filed the instant suit.

Applicants' Supplementary Affidavits

18. Both the 1st and 2nd Applicants filed Supplementary Affidavits sworn on the 25th May, 2022 in response to the assertions contained in the Respondent's Replying Affidavit. The 1st Applicant, Sarah Nyawira Richard, insists that the Applicants took possession of the land in the year 2002 and that there have no attempts to evict them. She denies being settled on the suit property by the 2nd Applicant and maintains that they each settled on the suit property independently and at their own time. Some current Applicants however purchased their portions from the initial settlers.
19. She further avers that each Applicant has their own meter and electricity connection as they each applied independently. She contends that the structures on the suit land have been approved by the local authorities otherwise the same could have been demolished over the years. She denies knowledge of any enforcement notices requiring them to demolish or stop development of any structures thereon.
20. Regarding the initially filed suit, the deponent avers that the Respondent opted to withdraw the suit when they sought to cross-examine him in the said suit i.e. ELC Miscellaneous No. 295 of 2015, on the basis that imposters were acting on his behalf.
21. She acknowledges that the Respondent has been exerting pressure on them through various offices in an attempt to coerce them to vacate the land. She avers that their occupation has been quiet and the alleged complaints have never been brought to their attention nor disturbed their quiet possession of the land.
22. Regarding the correspondences with the Respondent seeking to purchase the suit land, she states that the correspondences were made on a without prejudice basis hence inadmissible and of no evidentiary value to this court.
23. The 2nd Applicant, Johnstone Okasida Ipara, in his Affidavit denies personally knowing the Respondent or his son as alleged in the Replying Affidavit. He avers that he in deed owns two plots on the suit land which were allocated to him in the year 2002. He denies the allegation that he brought other Applicants on the suit land.
24. The 2nd Applicant further avers that he obtained all the necessary approvals and consents from all the relevant authorities, he thereafter constructed a permanent house where his family lives. He states that the suit property is occupied by over 20 members of the self-help group some of whom have not been issued with any certificates yet due to non-payment of the registration fees and other payments. They have not participated in this matter. There are also Tenants who have leased the houses built in the suit property. In total there are about 200 people residing on the suit land. He asserts that their occupation has been peaceful and without consent or knowledge of the owner. He denies knowledge of any complaints to Nairobi City County or having any influence at Embakasi Police Station as alleged. He denies aiding any of the Applicants in obtaining the land.
25. The deponent further states that he applied for water and electricity connection after developing his two plots. Each of the Applicants has their own separate and distinct accounts for water and electricity. He contends that the Applicants have had active possession of the suit land since their occupation in



2002 to date. Neither the Respondent nor his sons has asserted their ownership rights over the suit property.

26. The 2nd Applicant argues that the Letters and complaints by the Respondent to Independent Police Oversight Authority and the Directorate of Criminal Investigations were made after the withdrawal of Milimani ELC No. 295 of 2015. He insists that the Respondent has unsuccessfully been exerting pressure against him through various offices to try and coerce him and other applicants to vacate the land. He denies giving any offer to the Respondent for the purchase of the suit property.

Respondent's claim as stated in ELC No. E161 of 2021

27. The Plaintiffs in ELC No. E161 of 2021 aver that they are sons of Dinesh Ramji Kotedia and his joint guardians having been duly appointed in Milimani High Court Miscellaneous Application No. 177 of 2019. They aver that Dinesh Ramji Kotedia is the registered owner of parcel of land known as Land Reference Number 9042/143 situate at Embakasi Area within Nairobi County. Their father purchased the suit property on 5th April, 1995 and the instrument of transfer was registered on 19th April, 1995. Dinesh Ramji Kotedia thereafter became the leasehold proprietor for a term of 99 years from 1987. They restate the special conditions as contained in the Grant.
28. The Plaintiffs state that upon purchase and registration of the suit property, their father fenced it off in exclusive occupation but left the land vacant anticipating to construct thereon in compliance with the special conditions in the title. He continued to pay rents and rates as required of him.
29. The Defendants (Applicants in the Originating Summons) unlawfully entered into, took occupation of and remained on the suit property around 2013. The Plaintiffs' father reported the illegal occupation to the Police and to Nairobi City County among other authorities for illegal constructions on the suit property as well as illegal water and electricity connections on the suit property. They accuse the 2nd Applicant of masterminding the illegal occupation of the suit property.
30. The Plaintiffs assert that their father resisted the illegal occupation of his land and reported the matter to several agencies to protect his proprietary interests in the suit property. They include; making a complaint at Parklands Police Station CID Department in February, 2014, and a complaint to the then Nairobi City Council resulting to the issuance of an enforcement notice against the Applicants.
31. The Plaintiff had also filed a suit being Milimani ELC Misc. No. 295 of 2015 which matter was withdrawn under unclear circumstances. He further made a formal complaint with the Independent Police Oversight Authority on 24th June, 2016 which agency referred the matter to DCI. On 16th July, 2014 and 21st December, 2016, he lodged a formal complaint at the DCI which complaint is still being investigated.
32. The Plaintiff argue that the Applicants' forceful and illegal entry on the suit property amounts to trespass as presented in the Plaint. As a result, the registered owner has suffered loss and damage as particularized in the Plaint. The Plaintiff therefore prays for orders as stated above.
33. The Defendants (Applicants in ELC No. 408 of 2017) did not file any reply to the suit.

Evidence adduced for the Plaintiffs

34. The matter thereafter proceeded for hearing with the O.S as the lead file. The applicants called two (2) witnesses in support of their case. PW-1 was the 1st Applicant and PW-2 was the 2nd Applicant.
35. PW1 adopted her Supporting Affidavit sworn on 18th April, 2017 as her evidence in-chief. She stated that that the subject property is 9042/143.



36. She testified that in the year 2002, she found some ladies selling vegetables on the suit property. In 2002 or 2003 thereabout, they built some sheds thereon. In 2004/2005, conflicts arose and they were called for a meeting by the then Councilor of the area and the then Member of Parliament. The intention was to resettle people for peaceful co-existence. The meeting was not in respect of the suit property only.
37. She states that they were registered as Embakasi Slum Dwellers. Each member paid Kshs. 50/= for registration. Thereafter they elected officials to help them be organized. Each member was thereafter given a space of either 30 ft. by 30 ft. or 25 ft. by 20ft. Each Member paid Kshs. 700/= to be shown a Plot for purposes of building. Upon allocation, PW1 stated that she started developing her plot gradually. Currently, the suit property is fully developed with permanent houses. She states that on her part she has built 6 rooms and lives in 3 of them.
38. PW 1 informed court that she does not know the Respondent and that she has never seen him. She asserted that no one has ever laid a claim over the land. No notice to vacate has ever been issued to them. They have lived there in peace. She testified that they did not get the consent of the owner. She reiterated her assertions as contained in her Affidavits.
39. In cross-examination by the Respondent's Counsel, PW 1 stated that prior to the year 2000, she was living in Embakasi Village and it is the very year that she started a small business around the area. In the year 2003, the then Member of Parliament and the Area Chief called them for a meeting whose agenda was to resettle the Applicants in the shamba. She referred to the Map adduced as SNR 2 as evidence of the shamba but she could not identify the plot on the map. She had not signed on the map and the owner's signature was also missing. She does not know the land known as LR No. 9042/143, Embakasi Village.
40. She averred that although the officials of the Self Help Group are named in her Supporting Affidavit, the said officials are not witnesses to the suit. The Certificate of ownership exhibited has nothing written on it under the Transfer Section. The alleged officials never signed the Transfer. The Certificates issued to them do not indicate the Land Reference Number.
41. PW 1 further confirmed that they had been summoned to the DC1 offices but she never knew the reasons for the summons. She further informed court that while applying for water connection, she did not submit any plot ownership documents.
42. It was PW 1's evidence that they was granted approvals to build on their plots by Nairobi City Council. She had not attached the approval Letters nor the alleged building sketch plans allegedly submitted to the authorities. She confirmed her assertions that the Applicants were allocated the Plots by the government of the day represented by the Area Chief, Village Elders, Councilors and the then area Member of Parliament.
43. In re-examination, the witness stated that she has been on the suit property since the year 2000 to date. By the time the meeting was being called by the local administration, they were already in occupation of the suit property. The meeting was only intended to formalize their occupation. She confirmed that they paid the membership fee and were issued with certificates of ownership by the officials of the Self-Help Group who were not in occupation of the suit property themselves.
44. PW 2 was the 2nd Applicant, Johnstone Okasida Opara, currently serving as Member of the County Assembly of Bungoma. He relied on his Supporting Affidavit deposed on 25th May, 2021 as his evidence in-chief. He further stated that the suit land is LR No. 9042/143. It was his testimony that he learnt of the suit land way back in 2002 while stationed at Mombasa and serving as Deputy Company Commander of the General Service Unit. He developed interest and was subsequently shown some 2 plots measuring 60 feet by 60 feet.



45. It was his evidence that he paid the requisite fees to the Self-Help Group and was subsequently issued with a Certificate of Ownership for the Plots on 30th May, 2007. He thereafter took possession of the Plots, put up a temporary structure before building permanent structure. He maintains that ever since they were allocated the suit land, no one has ever interfered with their possession.
46. He contends that he has never been informed that the suit property belongs to the Respondent herein. He avers that he has been a loyal public servant and has never been accused of grabbing land. He denies ever serving as a Police Officer in Embakasi or as an OCPD within Nairobi County. He asserts that he has never received any summons against him by either IPOA or DCI as alleged. It is his evidence that he only went to DCI in 2017 to record a statement but he was never charged in any court of law.
47. It was his testimony that he has never harassed or intimidated the Respondent or a member of his family. In fact, the Respondent is not known to him. In reference to the 2015 suit, he confirmed that the suit was withdrawn. He averred that he was not aware of any enforcement notices from the then City Council of Nairobi. There has been no attempts whatsoever from any government agency to evict them from the land. He argues that he got approvals for construction of his structures from Nairobi County. He further states that he independently applied for his own water and electricity connection but not for other occupiers.
48. In cross-examination, PW 2 testified that the land was being offered for the landless persons within Embakasi. He averred that his family moved to the suit property in 2005 when he completed constructing a 2-bedroomed house. He confirmed being allocated two plots by the officials of the Self Help Group. Although he was issued with a receipt, he had not produced it in court. In reference to the Certificate of Ownership, he confirmed being issued with a Certificate on 30th August, 2007 indicating the area as Airport View Estate.
49. Although he stated that he sought approvals to develop his plots, he had not produced a copy of his application as an exhibit nor the approval itself. He informed court that he does not pay rates to the Nairobi City County. He averred that he has never made an offer to buy the suit property despite having instructed the Law Firm that acted for them.
50. The Witness confirmed that he had recorded a Statement with the Directorate of Criminal Investigations though he had not been charged with any offence.
51. In re-examination, PW 2 stated that he was not hiding from the DCI since he had not been summoned. He confirmed that he moved to the suit property in the year 2005.

Evidence adduced for the Defendant

52. Mr. Kapildev Dinesh Kotedia, testified as DW 1 in support of the Defendant's case and claim against the Applicants. He averred that he is one of the sons and a duly appointed Guardian of Dinesh Ramji Kotedia, the Defendant herein. He adopted his Witness Statement dated 6th May, 2021 and the Replying Affidavit sworn on 28th May, 2021 in response to the Originating Summons as his evidence in-chief. He also produced the documents on the Defendant's List of Documents in support of the Defendant's case.
53. In cross-examination, the Witness averred that he became a guardian of his father in the year 2020. This was after his mental illness. He stated that their father had started showing signs of mental illness in the year 2015. He averred that his father had purchased the suit property in the year 1994. However, he did not produce the sale agreement confirming the said purchase, the payment of the purchase price or stamp duty to that effect.



54. It DW 1's testimony that the Respondent was last in the suit property in the year 2015. The Respondent had not been aware that the land had been occupied until the year 2013. In the year 2017, their father could not write. However, the handwritten statement on record was done by the Respondent himself on 16th February, 2017. In the statement he states he was not in the country and his visits to the suit property was limited.
55. He further confirms that there are permanent structures on the suit property which were constructed without his authority or consent. He states that the Respondent reported the matter to the Directorate of Criminal Investigation which led to the arrest of the 2nd Applicant.
56. It was his evidence that in deed the Respondent filed the suit ELC Misc. Application No. 295 of 2015 which was withdrawn under unclear circumstances. He asserts that there were negotiations with the Applicants who were proposing to purchase the land. He avers that in the year 2016, DW 1's father, the Respondent herein, had granted him a Power of Attorney. He further states that the Respondent had through the City Council, served the eviction notices. Although the Respondent had not made any attempts to evict the occupants, he has made reports to the Police seeking their eviction in the 2014.
57. In re-examination, DW 1 confirmed that his father has the title to the suit property, without any caveats. He confirmed that the 2nd Applicant's Advocate made a proposal for the purchase of the suit property at a sum of Kshs. 27 Million but they declined the offer. It was his evidence that the occupants were not in the land in the year 2010. He states that they have been paying rates. He clarified that he was appointed as a guardian on the 25th November, 2019 alongside his brother, the 2nd Plaintiff in ELC No. E161 of 2021.

Submissions

58. At the close of the hearing, the Court directed that the parties to file submissions in support of their respective cases. Both Parties complied. The Applicants filed submissions dated 1st August, 2023 whereas the respondent's submissions are dated 9th October, 2023. The Court has had a chance to read through the said submissions and considered them accordingly.

Issues for determination

59. I have carefully read the pleadings in the two consolidated suits, the responses thereto, the submissions, authorities relied on and the relevant provisions of the appropriate and enabling laws. In order to arrive at an informed decision, this honourable court has framed the following issues for its determination. These are: -
 - a. Whether the Applicants have proved that they have acquired the suit land by way of adverse possession.
 - b. Whether the Respondent is entitled to the orders sought in Plaintiff.
 - c. Who should bear the Costs of the suits?



Analysis and determination

a. Whether the Applicants have proved that they have acquired the suit land by way of adverse possession.

60. The Applicants' claim is for adverse possession. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which states that:

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

61. The *Limitation of Actions Act* makes further provision for adverse possession at Section 13 that:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

62. Finally, Section 38 of the Act provides that:

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

63. The Court of Appeal in the case of *Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging adverse possession is a common law doctrine cited with approval the Indian Supreme Court decision in the case of *Kamataka Board of Wakf –vs- Government of India & Others* [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in



continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

64. It is trite law that the possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner.
65. Therefore, to determine whether the Applicants’ rights accrued, the Court will seek to answer the following:
- i. How did the Applicants take possession of the suit property?
 - ii. When did they take possession and occupation of the suit property?
 - iii. What was the nature of their possession and occupation?
 - iv. How long have the Applicants been in possession?
66. The Applicants aver that they were allocated the suit land in the year 2002/2003 by Embakasi Slum Dwellers Self Help Group in conjunction with the local administration and the then Member of Parliament for Embakasi. They were thereafter issued with membership cards upon payment of the requisite fees. The Applicants’ mode of entry therefore was as a result of allocation by the self-help group.
67. It is evident that the Applicants did not take possession from the Respondent and/or dispossess the Respondent of the suit land. As duly submitted by the respondents’ Counsel, the Applicants’ claim is contradictory as they are on one hand claiming title to the suit land by adverse possession and on the other hand claiming that they acquired the land through settlement and allocation by the Self-Help Group. The Applicants’ cannot claim adverse possession on a parcel of land they believed to be theirs.
68. As to when the Applicants took possession of the suit land, the Applicants allege that they have been in occupation of the land excess of 12 years at the time of filing their suit. Although the Applicants’ have adduced photos in support of their allegation, the photos are undated. Further, even if the court was to rely on the Membership Cards, the cards are in reference to a parcel of land indicated to be at Airport View Estate on Block No.6. Nothing shows the Land Reference Number of the suit property herein.
69. The Respondent insists that the Applicants invaded the suit property in 2013. He has made reference to the electricity connection application forms confirming that the 2nd Applicant applied for electricity connection in 2013 yet he alleged that he settled his family therein in 2005. Although the Applicants contend that they each have their own independent water and electricity meters, they did not adduce evidence on when they applied for them to controvert the Respondent’s assertion.
70. To sustain a claim of adverse possession, an applicant must also prove continuous, quiet, and uninterrupted possession of the land in issue for a duration of at least 12 years. The latin terminology is that such possession must be nec vi, nec clam, nec precario (without permission or force, without secrecy and without interruption. One also needs to demonstrate what is termed as animus possidendi, or intention to possess.
71. In the case of Wilson Kazungu Katana and 101 others vs Salim Bakshwei and another Malindi CA No. 11 of 2014, it was held that the Applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, and adverse to the title of the owner, adequate, continuous and exclusive.



72. From the record, it is evident that the Respondent has on numerous occasions asserted his proprietorship rights over the suit property. This is evident from the complaints lodged with the police in 2014 and 2016, the complaint lodged with the then Nairobi City Council resulting to the issuance of an enforcement notice against the Applicants and filing a suit; Milimani ELC Misc. No. 295 of 2015 which matter was withdrawn under unclear circumstances. The Respondent further made a formal complaint with the Independent Police Oversight Authority on 24th June, 2016 which agency referred the matter to DCI. It was averred that the Directorate of Criminal Investigation is still investigating the matter.
73. Further, in their own admissions as contained in the Supplementary Affidavits, the Applicants confirm that the Respondent has been reporting them to different government agencies trying to coerce them into vacating the suit property.
74. From the foregoing, it is clear that the Applicants' occupation has not been peaceful and uninterrupted.
75. To this end, the Court finds and holds that the Applicants have not, on a balance of probability, met the threshold for the grant of orders for adverse possession in respect of the suit property herein.

Whether the Respondent is entitled to the orders sought in Plaintiff

76. From the evidence on record it is not in dispute that DINESH RAMJI KOTEDIA is the registered proprietor of the suit land.
77. Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, 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.”
78. Section 26 (1) of the Land Registration Act on the other hand provides that:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
79. Unless otherwise proven that the certificate was acquired fraudulently the court is obliged to treat such title as prima facie evidence that the person so registered is the absolute and indefeasible owner of land.
80. Section 25 (1) of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except as provided in the 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 to any lawful encumbrances, set out in this section.



81. In the case of *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR the court held that: -

“.....the law is extremely protective of title and provides only two instances for 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 through a corrupt scheme.”

82. This is not the situation in this case as there is no challenge to the manner of acquisition of the title. I find that DINESH RAMJI KOTEDIA is the rightful owner of the suit land and is entitled to the protection of the law.

83. It therefore follows that the Respondent (Plaintiffs in ELC No. E161 of 2021) is entitled to prayer numbers (a), (b) and (c) in the Plaint dated 6th May, 2021.

84. The Respondent through his Guardians has sought for mesne profits as against the Applicants who he claims has encroached on his land.

85. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: - “mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;’

86. Order 21 Rule 13 of the Civil Procedure Rules provides as follows: -

13. Where a suit is for the recovery of possession of immovable property and for
(1) rent or mesne profits, the court may pass a decree—
 - (a) for the possession of the property;
 - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.



87. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered the issue when mesne profits could be awarded. The court stated as follows: -

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”

88. The Court of Appeal in the case of Peter Mwangi Mbuthia & Another vs Samow Edin Osman [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

89. Nyamweya J as she then was, in the case of Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR stated as follows with regard to mesne profits: -

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved...”

90. It is my finding that the Plaintiff has not tabled evidence before this court to enable the court make a determination on the amount claimed.

91. Halsbury’s Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- a. If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c. Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d. Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances.

92. On exemplary damages, I find that the same is awarded based on the facts and circumstances of the case. They are of a discretionary nature. In Obongo & Another -vs- Municipal Council of Kisumu (1971) EA 91 the Court of Appeal of East Africa held as follows:

“Exemplary and punitive damages are appropriate in two classes of cases; oppressive, arbitrary, or unconstitutional action by the servants of the government and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff....”



93. In my view, the Plaintiff did not demonstrate to the satisfaction of the Court that he was entitled to exemplary damages. Consequently, the prayer is declined.
94. What the Respondent would have been entitled to was General Damages for trespass if he had claimed it. In the case of Park Towers Limited versus John Mithamo Njika & 7 Others (2014) eKLR, where the Court held that:-
- “I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”
95. However, the same is not pleaded. Parties are bound by their pleadings. The court will therefore not grant general damages.
96. On costs of the suit, since the Respondent is the successful litigant, he is awarded costs of both suits with interests thereon from the date of this Judgment until payment in full.
97. In Conclusion, I proceed to make the following orders: -
- a. The Applicants’ claim for adverse possession is dismissed with costs to the Respondent.
 - b. A declaration be and is hereby issued that Dinesh Ramji Kotedia is the lawful registered owner of the Land Reference No. 9042/143 situated at Embakasi Area in Nairobi County and the Defendants’ continued occupation of the said parcel of land is unlawful.
 - c. An order of permanent injunction be and is hereby issued restraining the Applicants (Defendants in ELC No. E161 of 2021) jointly and severally by themselves, their workmen, servants and or agents or otherwise howsoever, from further entering upon, occupying the suit property, carrying on any further developments thereon, leasing proprietary acts whatsoever thereon, leasing, selling, charging and or performing any further proprietary acts whatsoever thereon and or committing further acts of waste howsoever upon Land Reference No. 9042/143, situated at Embakasi area in Nairobi County or any part or portion of thereof and or from interfering with the Plaintiff’s proprietary rights over the same or any part thereof.
 - d. The Applicants (Defendants in ELC No. E161 of 2021) jointly and severally by themselves, their workmen, servants and or agents or otherwise howsoever are hereby granted 180 days to vacate from Land Reference No. 9042/143 situated at Embakasi area, failure to which the Respondent will be at liberty to evict them by demolishing removing of all structures constructed by the Defendants on the said land without any further reference to this court.
 - e. The Respondent is awarded costs of both suits and interests thereon from the date of this Judgment until payment in full.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Bundi for the Applicants in the Originating Summons.



Ms. Rotich alongside Mr. Kibet for the Respondent

Yvette: Court Assistant.

M.D. MWANGI

JUDGE

