



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 157 OF 2015**

**MOMBASA AUTOCARE LTD.....PLAINTIFF**

**-VERSUS-**

**JAPHET PASI KILONGA & 7 OTHERS.....DEFENDANTS**

**JUDGEMENT**

**PLEADINGS**

1. The Plaintiff in this suit Mombasa Auto Care Ltd sued the eight (8) defendants claiming the following reliefs:

**a) Order for permanent injunction restraining the defendants, by themselves their servants and or agents or any person or persons acting under their authority and or instruction from trespassing and or interfering and or destroying, obstructing and or restricting and or meddling in any manner whatsoever with the applicant's suit premises, the plaintiff's servants and or employees and or denying the plaintiff's servants or employees access onto plot portion No. 123/Mtangani within Malindi Municipality.**

**b) Costs of this suit.**

**c) Interest (b above) at Court rates.**

**d) Any other or further relief as the nature of this suit may demand or as the Court may deem fit to and just to grant.**

2. It is pleaded in the plaint that the plaintiff has been the beneficial and or legal owner of land portion No 123/Mtangani measuring approximately 96.01 acres in Malindi Municipality. It acquired this land vide an indenture dated 29<sup>th</sup> September 2008. The plaintiff pleads that the defendants without any colour of right have trespassed on and are causing destruction of the plaintiff's fence surrounding the aforementioned plot without any justifiable reasons caused the plaintiff to suffer irreparable loss, harm and damage. In spite of demand and notice to sue, the defendants have failed and or refused to stop interfering with the suit premises hence this suit.

3. The suit is opposed by a statement of defence and counter-claim filed on 25<sup>th</sup> February 2010. The defendants denied the plaintiff is the legal owner of land known as portion 123 Malindi and further denied the existence of the suit property as described in the plaint, denied the transfer of ownership by the

indenture. They have denied trespassing on the land and or destroying the fence.

4. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 8<sup>th</sup> defendants pleaded that they have lived and worked on the land with their families for as long as 60 years during which time no one claimed the land except in 1989 when they were forced out for four years by one purporting to be the owner. They pleaded further that they have acquired the title by adverse possession and therefore the prayer for injunction relief is unavailable to the plaintiff.

5. The 6<sup>th</sup> and 7<sup>th</sup> defendant stated that they are not resident on the parcel and that they have no interest over the land and put the plaintiff to strict proof. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 8<sup>th</sup> defendants have counter claimed for land measuring 2, 1, 8, 6, 7 & 2 acres each and respectively which they have acquired by adverse possession having occupied, worked and possessed the same for over 12 years from 1992. They sought for an order for permanent injunction restraining the plaintiff from their occupation of the suit property including fencing, subdividing and alienating the same. They also pleaded that apart from the portions they are claiming, the rest of the land is occupied by other persons.

6. Besides the above 8 defendants, there is also ELC No 19 of 2013 in which this plaintiff sued Japhet Pasi Kilonga & Onesmus Mbogo Kimera vide a plaint dated 12<sup>th</sup> February 2013. The subject matter in dispute is the same. It prayed for an order of permanent injunction and eviction of the defendants from the suit property.

7. The 1<sup>st</sup> defendant here admitted he is resident on the suit property, but denies he is a trespasser. He admitted the plaintiff has some document evidencing title but denies they are conclusive evidence of such title. He denied cutting down the trees belonging to the plaintiff as it has not planted any. The 1<sup>st</sup> defendant denies pulling down the plaintiff's fence as there was no fence to pull down. That by dint of his long history of possession exclusive of the plaintiff, he has acquired rights akin to title superior to that of the registered owner.

8. The 2<sup>nd</sup> defendant in his defence states that his ancestors and himself together with his family have been residing on the suit land since 1940s and they have put up permanent & semi-permanent structures on the land, planted trees and buried their dead thereon. He urged the Court to dismiss the plaintiff's suit with costs.

9. The plaintiff filed a reply to the defence and defence to the counter-claim in ELC No 8 of 2009 reiterating the contents of his earlier pleadings and urged that judgement be entered in his favour against the defendants. The two suits were consolidated and heard together as ELC Case No 157 of 2015 after it was transferred from Malindi on orders of the Court to Appeal for a re trial.

#### **EVIDENCE:**

10. On 7<sup>th</sup> March 2016, the plaintiff gave evidence through Mohamed Salim Ali. He stated that he is a director of the plaintiff. The plaintiff has its offices in Mombasa along Nkrumah road. He produced company resolution dated 6<sup>th</sup> February 2013 as Pex – 11 authorising him to testify. Mr Mohamed states that the plaintiff bought the suit land from Mohamed Ali Mohamed and Alshabin through an indenture signed by Mansoor Satchu who was donated a power of attorney. The indenture & Power of Attorney were produced as Pex 1, 2 & 3 respectively.

11. The witness continued that the purchase price was \$ 300,000. That the plaintiff paid the stamp duty and the transfer of the property to the plaintiff was duly done. He stated further that before the signing of the indenture, the plot was vacant except for six (6) families living at a corner. That at the time of purchase, the land had been subdivided and where the six families lived was given No 123/67 measuring 3 acres. PW 1 produced the mutation map as Pex 4. The plaintiff opted to give these families that portion and they signed an agreement between them on 4.8.2008 which agreements were produced as Pex 5 (a) – (f).

12. PW 1 continued that they proceeded to fence the whole land using block poles and barbed wire. In 2009, the whole fence was brought down by the defendants. The plaintiff reported the matter to the police. It is the plaintiff's case that the 1<sup>st</sup> defendant had built his house on the land and he was charged with the offence of forcible detainer. The charge was later withdrawn. The plaintiff's witness stated that they took the pictures of the fence before and after it was destroyed. He produced the pictures as Pex 6. He also reported the 2<sup>nd</sup> defendant who was cutting down their trees to the Agriculture Officer. The officer visited the land and prepared a valuation report of the cut trees vide his report dated 19.12.2012 and produced as Pex 7.

13. PW 1 said that they later obtained injunctive orders but when he visited the suit premises, there were five houses under construction two outside the 3 acres and 3 within the 3 acres given to the six families. He went again in January 2015 and through a Court Order they demolished the houses outside the 3 acres. As at now the premises is built up including a school. That the defendants are very violent and have failed to obey the injunctive orders given by the Court barring them from carrying on activities on the land. The orders were produced as Pex 8 (a) – (d). He denied the averments that the defendants have been on the land since 1992 but stated that they started encroaching on the suit land since December 2009. He urged the Court to grant the plaintiff orders of eviction and permanent injunction as prayed in the plaint. He produced a certificate of official search as Pex 10 (a), (b) & (c) showing the plaintiff as the owner of the land. He also prayed for vacant possession, damages and costs of this suit.

14. PW 1 was put to cross examination by Mr Obaga advocate for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 8<sup>th</sup> defendants. He answered that the plaintiff bought the land in 2008. Mr Shabin is in Dubai. That Mr Shabin told him he visited the land in 2005 and informed him of the six families. That it was not difficult to access the plot earlier and it took them 3 months to put the fence. He was not told of an attempt to evict the occupants in 1989. When the witness visited the land, there were about 4 people on it. He did not involve the local administration. That the crop damage was on the old mango trees but he does not know who planted them.

15. In re – examination, the witness confirmed they did not involve the local administration. That there was no cultivation on the land and no one was living on the land besides the six families. No one also claimed compensation for the mango trees so he presumed they belonged to the previous owners of the land. With this evidence, the plaintiff closed its case.

16. The defence opened their case with the evidence of Mwangonde Pande Nyiro who testified as DW 1. He stated that he lives at Majivuni and he is a farmer. That he was born on this land and has lived on it for many years. He has relatives buried on it. He planted mango & coconut trees on it. DW 1 knows the land belongs to him and his family. He also relied on his witness statement filed in Court.

17. In his witness statement, DW 1 said he planted a local mango tree known as **“punda”** which is still there to date. He also stated that he has built a house three times and the last house is still there. He buried his mother, father, his brothers Nyiro, Mwarabu, Hamisi and Nyiro. He has also buried a nephew on the land and their graves can still be seen to date. DW 1 continued that he bore Mwalimu Mwangonde while living on this land and they were brought up on the property together with his nephews Dida, Kahindi, Kwekwe, Mbeyu, Kadzenda, Neema & Makuu. They all went to Ganda Primary School. Every year he planted cassava, green peas, cow peas and maize on the property. In 2014, he also planted and harvested on this property. He named his neighbours as Nyanje Kombo, Kiraga Dzenga and Kadenge Chanzera. That from 2000 – 2014 he planted and harvested cassava.

18. In cross – examination, DW 1 does not know the person claiming to have bought the land or who sold the land. That he lived on this land with his family and relatives who came on his invitation. He knew the people named in the agreement of 2008 but said Daniel is on a different part of the land and Francis on the other part. He did not know whether they were living on the same piece of land. DW 1 said he saw a fence put up but his house was outside the fence. The fence was to enclose his house but he refused. His relatives were buried within his home. DW 1 continued that someone came from the administration and evicted people. That his house is in the open anyone can see and he has never moved from this place whether in 1989 or any other time. He is living on the boundary put by the Asian.

Previously they had no boundaries.

19. Kache Kalume Chai testified as DW 2. She lives in Majivuni in Malindi and is a farmer. She adopted her statement as her evidence. She said she was married on this land while very young and has lived on the land for 40 years. She has children and a home on the land. She knows the land as theirs as it's where they buried their parents in law. She continued that she is a widow and has nowhere else to go. She urged the Court to give them the land.

20. In her statement, DW 2 stated that she had farmed the property by planting mango and cashew nut trees. She built a house on the land but it is no longer there. She buried her husband, parents in-law and her daughter on this land. She gave birth to her five children while living on this land and they attended Malindi Primary School. Every year she planted and harvested millet, maize, beans, cassava, mnavu and cow peas on the land. Every year since she was born either her or her parents planted these crops on the land including the year 2014. She gave the names of her neighbours as Changawa Kitsaya and Wanje Zomolo. That from 2000 – 2014 she planted and harvested the same crops.

21. In cross – examination, DW 2 answered that she has lived and cultivated on the land. From 2000 – 2014 she planted and harvested crops. Her house was demolished. She does not know the size of the land in dispute or plot number. She knows the people named in the agreement. They are her neighbours living together. Japheph Chimera is the son of her brother in-law. Japheph has not told her he has been compensated. She still lives where she buried her parents in law. That someone put a fence in 2009 and destroyed her house in the process. She is not named as one of the defendants but insisted the land is hers. She was arrested with DW 1 and put in custody. In re – examination, she said after her release from custody, she returned on this land.

22. DW 3 is Juma Kenga Mavogo. He is a painter and a farmer. He was born in Majivuni on plot No 123 in 1961. His parents lived on this land and planted mangoes & food crops. The land belonged to his grandfather Mavogo. They were neighbours with DW 1 and it never bothered them to claim the land. He is asking the Court to stop persons disturbing them. In his statement, he stated that his grandfather owned approximately 3 acres. That they used to construct grass thatched houses, dug wells and buried several relatives on the land. He has lived on the land with his family and he is a village elder.

23. In cross – examination, he stated that he did not give the name of his grandfather in his statement filed. He had 5 brothers of which three are deceased. His father had three brothers. He did not have a photo of the well. He does not know the owner of the land other than themselves. The people named in the agreement are his neighbours but he was not aware of this agreement. That on their portion of the land only poles were put up but not the wire. He said he was not arrested but only followed up the arrest of DW 1. He is not aware of any eviction that took place. On cross – examination by Wameyo advocate for the 2<sup>nd</sup> defendant, he said he has no other land to go if the Court grants eviction orders. That the plaintiff has not built or used the land in any way.

24. Rajab Massoud Ali testified as DW 4. He lives in Majivuni in the area known as “*Kwa Mzee Mwangonde*”. He does not know the plot number. When he was born, the 5<sup>th</sup> defendant was there and his parents also lived here. All the defendants live on this land to date. That there are several people who have not been sued but are living on the land. Each family have their portions for home and farming. DW 4 stated that he has buried his grandparents on this land and urged the Court to grant him orders to enable him continue living on the land.

25. In cross – examination, he said he was born in Majivuni but does not know the plot number. To his knowledge, the land belongs to him and they have commenced processing title. He schooled upto class 7 but has not produced photographs of his house on the land. He said he is not lying. That he has not produced chief's letter confirming he buried relatives on this land. He was not aware of a police report but they were evicted last year when the case was on-going. He saw a fence but it did not fence the whole plot. In re – examination, he said he still lives on the land to date.

26. DW 5 is James Kalua Pande a.k.a. Ndahe Ndaze. He testified that he is a resident of Majivuni and a

businessman. He lives on the suit premises. He said he was born in 1969 at the home of Mzee Mwangonde Pande. DW 5 states that he farms here and got married here. That Mzee Mwangonde dug a well in 1979 which they use for irrigation. Previously they had grass thatched houses but now have houses built with iron – roofed, stones and mud. That they have contributed money to improve the borehole to serve the community. There are also schools built on this land. He has never seen the plaintiff's surveyors. This is the only place he knows as home where he buried his father.

27. In cross – examination, he stated that he is not claiming but he is living on the land. That the land is for Mwangonde. In 1989 many things happened on this land but he was not evicted. He was charged in Malindi Court in 2008. He cannot tell the size of his portion because he has not measured it. He denied making the statement made in case No 8 of 2008. That he has nothing to do with the claim for 8 acres in the defence and counter – claim. He said he knows how to read Kiswahili and knows the people named in the agreement but he does not know if they signed the document. DW 5 said he knew nothing about the fence.

28. That his house was not demolished in 2014. That he has built a stone house about 4 – 5 years ago. He does not know when the school was built and does not know the owner or the principal. The second school is called Glorious situate within the suit plot but he does not know the owner of the school. In cross – examination by Wameyo advocate he states that he still lives on the land. That he got this land through his father. That he sacked their previous advocates because they did not trust him. That no one has been convicted in regard to evictions of 1989.

29. Ngala Alfred Kaisa aka Mzee Mdaris testified as DW 6. He stated that he was born in 1972 in the suit premises. The land belonging to his grandfather was about 3 acres. He said that his grandfather used to plant cashew nuts trees, coconut trees & seasonal crops such as maize & beans. That he has buried his grandparents, sister and one surviving auntie called Kathumu Ngala is still there with her family. He also said he has a mud house on the land and named Mwangonde, Juma & Katana Salim as his neighbours. He grows maize and they have schools on the land. That he has never been evicted from this land.

30. During cross – examination by Mr Bosire advocate for the plaintiff, the witness said he has lived on the land since birth. That the land belongs to his grandfather called Ngala who is entitled to approximately 3 acres. That there are two schools on the land but he does not know when they were built the same time saying they were built more than 10 years ago. He does not know if electricity is connected to the school.

31. DW 7 is Fredrick Harrison Kapanga. He adopted his statement filed in Court on 24.6.2016. That after the judgement in Malindi Court, over 10 houses were demolished in 2014 but many houses also remained. That he was born on this land and has a house on it and has never met the plaintiff. That the plaintiff has nothing on this land and there are over 2000 people living on the suit land. That they use a well communally and the schools. He was born in 1982. They use about 3 acres of the land.

32. In cross – examination by Mr Bosire advocate, he said he has been on the land from birth. That they use about 3 acres of the land where they live as a family. He denied saying there have been any evictions. He cannot tell the size of the whole land. That he did not go to the two schools built on the suit land but went to Malindi Primary School. He does not know the owners of the two schools. His children do not go to these schools. At this point the defendants closed their case.

### **SUBMISSIONS:**

33. The parties' advocates filed written submissions. The plaintiff opened his submissions by giving a summary of the facts of their case. Based on the evidence adduced, the plaintiff submits that it has proved it owns the suit premises which it developed by putting up a perimeter fence and that it has been in possession of the same since 27<sup>th</sup> September 2008. To support its submission, the plaintiff quoted the case of **Zacharia Onsongo Momanyi vs Evans Omurwa (2014) eKLR** on the definition of trespass. That proof of ownership is a prima facie proof of possession. The plaintiff submits that the acts of the defendants amount to trespass.

34. The plaintiff also submits that the defendants' evidence that they have been living on the suit premises is contradictory particularly the evidence of DW 1 who stated that his homestead was outside the perimeter wall. That the defendant did not file any approved plans of houses built before the filing of this suit. The plaintiff contends it proved possession by virtue of the agreements signed between itself and the six families on the land. Further that it has also proved acts of trespass by the defendants through production of photographs of cut trees and the valuation report of the agricultural officer.

35. The plaintiff also submits that the defendants failed to prove their claim for adverse possession. It took issue with the evidence of DW 7, DW 5 & DW 6 which in effect were contradictory with their pleadings. The plaintiff concluded that it has proved its case and is therefore entitled to be granted the orders sought. The plaintiff cited several cases inter alia: **a) IEBC & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR**

**b) Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR**

**c) Benjamin Kamau Murma & Others vs Gladys Njeri C.A No 213 of 1996.**

36. Katsoleh & Co advocates for the defendants also gave a summary of the evidence adduced vide their submissions filed. The defendants submit their evidence was consistent, reliable and truthful. That the plaintiff is merely a paper owner and he was not the first registered owner. The defendants submit that the plaintiff failed to prove the previous owners had been in occupation of the land at any time. Consequently the plaintiff's suit is time barred in line with the provisions of section 7 of Cap 22 of the Laws of Kenya.

37. The defendants continued that change of ownership does not interrupt a person's right to adverse possession (**Kasuve vs Mwaani Investments Ltd & 4 others (2004) IKLR 184**). That even if the plaintiff made effective entry in 2008 by building a fence which they deny, it was made too late after its title had been extinguished. Therefore the plaintiff's suit must fail.

38. The defendants further submitted on the invalidity of the plaintiff's title i.e. that the power of attorneys were not executed in Kenya or a commonwealth country. Therefore the donors could not lawfully divest their interest in the property to the donee under section 7 of the ITPA. The plaintiffs cannot therefore purport to own the suit premises. Lastly they submit they have demonstrated that they have been in physical control of the premises and are thus entitled to be granted orders of adverse possession.

39. The 2<sup>nd</sup> defendant also gave summary of the facts adduced in evidence. He submits that he has proved that his occupation is adverse to the interest of the plaintiff. He also submitted that the plaintiff's suit was time barred. In support of his submissions, he relied on the provisions of section 17 of Cap 22 and the case of **Ndatho vs Humo & 2 others (2002) 2 KLR 627**.

#### **DETERMINATION:**

40. Taking the pleadings and the evidence adduced together with the submissions rendered this Court is tasked to determine the following questions:

**a) Whether the plaintiff having proved his ownership of title of the suit property is entitled to orders of vacant possession and permanent injunction as prayed in the plaint.**

**or**

**b) Whether the defendants have proved that their occupation of the land is adverse to the title to plaintiff for the requisite period hence they are entitled to be declared as owners of the land as prayed in the counter-claim.**

41. It is not in dispute that the plaintiff acquired registration of the suit property in 2008. It produced a

certificate of postal search to confirm its registration. The plaintiff also produced the powers of Attorney and the indenture transferring the property to them. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, & 8<sup>th</sup> defendants questioned the validity of the Power of Attorney in their submissions. The Power of Attorney was registered in our registry as per the stamps appearing on their faces. Secondly their legality was not questioned by the statement of defence filed or evidence adduced. It is late in the day to bring up this matter through submissions as it does not give the plaintiff an opportunity to revert the allegations. Parties are also bound by their pleadings and this serves a purpose for each party to know what battle he has to face and therefore prepare his ammunition in defence. I thus dismiss the objection and reach the finding that indeed the plaintiff is legally registered as owner of the suit property.

42. Further, the registration of the plaintiff is indeed admitted by all the defendants except they state he is now a paper owner as his title has been extinguished. These same defendants acknowledged registration when they referred the Court to the position taken in the case of **Githu vs Ndeete (1984) KLR 776** in submitting that change of ownership does not stop time from running in their favour in pursuit of their claim for adverse possession.

43. The defendants except No 6 & 7 have not denied they are in occupation of the suit premises. The 2<sup>nd</sup> defendant even admitted cutting down the trees but state the trees belonged to them and not the plaintiff. This corroborates the evidence by the plaintiff that some trees were cut as per the valuation report produced as Pexh – 7. In determining whether the plaintiff is entitled to vacant possession I shall do so by determining whether the defence claim to adverse possession has been proved or not.

44. Adverse possession is a question of fact that must be proved by evidence. It is now settled by case law that in order to prove adverse possession, the claimant must prove that he has dispossessed the title holder for the statutory period (see **Wambugu vs Njuguna (1982) KLR**. In **Kasuve vs Mwaani Investments Limited & 4 others Civil Appeal No 35 of 2002**, the Court of Appeal held that ***“adverse possession can be acquired under the Act for part of the land.”***

45. Have these defendants established dispossession for the statutory period? The suit land in question is said to be some 96 acres. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 8<sup>th</sup> defendants referred to DW 1 as their star witness probably by virtue of him being the oldest amongst them and the one who has “*stayed*” on the land the longest. DW 7 even said the place is called “*Kwa Mwangonde Area*” named after DW 1. So what did DW 1 say that supported their case? He said that he was born on this land and has lived on it for many years. He said the land belongs to him and his family. That he bore his children and brought them up on this land and buried several of his relatives he named. He also has neighbours whom he gave their names.

46. In cross – examination, he said the fence put up by the plaintiff left out his home upon his refusal. He also stated that his relatives were buried within his home. That his home is in the open any one can see. Lastly, he said he is living on the boundary put by the Asian as previously they had no boundaries. The plaintiff had given evidence that it had put up a fence around the plot which took them 3 months to put up. DW 1 stating his home is outside of this fence means he is not within the plaintiff’s land. Secondly DW 1 did not say what size of the land he and his relatives were using. His evidence does not say it is the whole of the 96 acres. DW 1 does not say this is community land. He did not mention when these other defendants entered the land. In fact his evidence is strictly in support of his case. He did not even say if he is related to any of the defendants sued.

47. Similarly DW 2 did not say what size of land she occupied. She said her house was on this land but it is no longer there as it was demolished. She did not tell the Court what structure she currently lives in that is on the suit land. Probably time stopped running for on the suit property when her house was destroyed during the process when the fence was being put up. Although she said that after she was released from custody she returned to the land but does not lead evidence if she built another house and when this was done. In my view if she had been on the land then her occupation was interrupted in 2009 before the filing of this suit. Her claim for adverse possession is not supported by evidence.

48. DW 3 said he was born on this land in 1961 and the land belonged to his grandfather Mavogo. That his grandfather owned approximately 3 acres. The 3 acres is owned together with his siblings. He also

admitted on their portion of the land, the plaintiff erected poles but did not put a wire. DW 4 lives in “Kwa Mwangonde” area. He does not know the plot number. He states he was born on this land but did not say when he was born. That he has buried his grand-parents here and all the defendants live on their portion. He does not specify the size he occupied.

49. DW 5 was born in 1969 in the home of Mzee Mwangonde. He also does not say his size of the land. He introduced the fact of there being schools on the suit property but which schools he does not know their owners or when they were built. From the evidence of the defendants, the schools appear to be privately and not communally owned. According to DW 5’s evidence the land he lives in belongs to Mzee Mwangonde so he cannot even claim the land as of his own right. He denied a statement he had made earlier claiming 8 acres.

50. DW 6 born in 1972 in the suit premises stated the land owned by his grandfather is 3 acres. He lives on this land where he also buried his relatives and he has a mud house on it. That he has never been evicted from the land. DW 7 also said he was born on this land in 1982. According to him, there are over 2000 people living on the suit land. He uses about 3 acres of the suit land.

51. Having analysed the evidence adduced by the defence, I come to the conclusion that DW 1 lives on the land and has done so for several years. It also appears that his house was not fenced off by the plaintiff. Therefore I make a finding that if his home comprises part of the suit land plot No 123, then he is entitled to that portion comprised in his homestead by adverse possession. Secondly I am satisfied by the evidence of DW 6 Ngala Alfred Kaisa aka Mzee Mdaris – the 8<sup>th</sup> defendant that he established being in possession of 3 acres of the land for a period in excess of 12 years therefore he dispossessed the plaintiff of this land. He is equally entitled to the 3 acres by virtue of adverse possession.

52. The remainder of the evidence of the other defendants consisted of generalities that did not satisfy me as making a case for adverse possession. For instance it is not known where DW 2 is currently living. DW 5 said he is living within the homestead of Mzee Mwangonde. In view of the evidence of Mzee Mwangonde that some people came to the land on his invitation, probably DW 5 is one of such persons invited. DW 7 did not state when he built his house for time to begin running. If born in 1982, he turned 18 in 2000. Would 12 years have lapsed by 2009 for his claim to be valid? My answer is no. DW 7 therefore failed to lay a basis why he can be entitled to the land by virtue of adverse possession when he started using the land after the plaintiff expressed his intentions by fencing the plot in 2009.

53. DW 4 introduced the issue of several other people living on this land. In submissions, Mr Obaga advocate cited the case of **Alfeen Mehdi Mohamed vs Basil Ferox Mohamed and 223 others Civil Appeal no 84 of 2015** where this Court gave the land to several people on the evidence of only 4 people. However I wish to distinguish this case and the case cited because in the Alfeen case, the people given the land gave evidence on a representative capacity and those people were also listed in the case. In the instant case, these defendants were sued individually and their evidence does not indicate they are testifying on behalf of the others. They have not established any nexus between them and the said persons. Further the plaintiff stated that when they filed this suit only these defendants were on the land. Those “*other people*” on the land ought to have applied to be joined knowing these orders would affect them. Time cannot run in their favour a suit for vacant possession having been filed.

54. Having found for only DW 1 (4<sup>th</sup> Defendant) and DW 6, the only plausible conclusion I come to is that the plaintiff is entitled to eviction orders and or vacant possession in respect of the land in use and or occupation of DW 2, 3, 4, 5 and 7. The plaintiff is also entitled to orders of permanent injunction restraining the said defendants and or their agents/employees or persons claiming through them from in any way interfering with the plaintiff’s property plot No 123. Each party to bear their costs of this suit.

**Dated and signed at Mombasa this 6<sup>th</sup> day of April 2017**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa this 7<sup>th</sup> day of April 2017 by**

**C. YANO**

**JUDGE**