



Runya & 3 others v Mugo & 6 others (Environment & Land Case 17 of 2020 & 15 & 122 of 2021 (Consolidated)) [2024] KEELC 1544 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1544 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 17 OF 2020 & 15 & 122 OF 2021 (CONSOLIDATED)
LL NAIKUNI, J
FEBRUARY 21, 2024

BETWEEN

FITINA RUNYA 1ST PLAINTIFF
NG'OA MWACHOMBO 2ND PLAINTIFF
CHARO FIKIRI 3RD PLAINTIFF
YUSUF MWANGIRA 4TH PLAINTIFF

AND

DAVID MUCHIRI MUGO 1ST DEFENDANT
ATHMAN SWALEH 2ND DEFENDANT
COUNTY COMMANDANT MOMBASA COUNTY 3RD DEFENDANT
OCS BAMBURI POLICE STATION 4TH DEFENDANT
DEPUTY COUNTY COMMISSIONER KISAUNI 5TH DEFENDANT
OCS KIEMBENI POLICE STATION 6TH DEFENDANT
OCPD KISAUNI 7TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Fitina Runya, Ng'oa Mwachombo, Charo Fikiri and Yusuf Mwangira the Plaintiffs herein through a Plaint dated 7th February, 2020 and filed in Court on the same day against the David Muchiri Mugo, Athman Swaleh, County Commandant Mombasa County, O.C.S. Bamburi Police Station, Deputy County Commissioner Kisauni, O.C.S. Kiembeni Police Station and O.C.P.D. Kisauni Defendants herein and



in the originating summons dated 28th January, 2021 filed on the same date by Dickson Maringa Runya, Joshua Baya Kenga and Mohamed Mbaao Mgandi, the Plaintiffs/ Applicants in ELC Case No. 15 of 2021 (OS) against David Muchiri Mugo, the Defendant/Respondent herein and the 1st Defendant in ELC Case No. 17 of 2020 which is the lead file in the consolidated matters.

2. The Plaintiffs as per the Plaint are described as male adults of sound mind residing in Utange, Mombasa County. The 1st and 2nd Defendants are male adult person of sound mind, the 3rd to 7th Defendants are described as security officers within Mombasa county.
3. Upon service of the Plaint to the Defendants, the 1st Defendants filed a Statement of Defence and Counter Claim dated 24th February, 2022.
4. On 27th April, 2022 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - trial conference, it was fixed for full trial on 13th October, 2022 with the 1st Defendant calling his witness with the Plaintiffs calling their witness on 17th May, 2023.

II. The Plaintiffs' case

5. Based on the filed pleadings by the Plaintiff and the Plaint the brief facts of the case are that at all material times to this suit the Plaintiffs have been staying on Plot Nos.286/II/MN, 289/11/MN and 14110/II/MN in Utange, Mombasa County since the 1982. The Defendants through the assistance of Police Officers is illegally demolishing the Plaintiffs houses and threatening to evict the Plaintiffs from Plot Nos.286/II/MN, 289/II/MN and 14110/II/MN Utange Mombasa County yet the defendants were not the legal owners of the said plot.
6. It had now forced the Plaintiffs to come to Court and obtain an injunction against evicting them from the said Plots. There had been no previous proceedings in the Court between the Plaintiffs and named in the Plaint. The Plaintiff subscribed to the jurisdiction of the Honourable Court.
7. In the originating summons dated 28th January, 2021 was premised under the provision of Sections 37 and 38 of the Limitations of Actions Act (CAP 22) and Order XXXIV Rule 3 (d)(1)(2) and (3), Section 3A of the Civil Procedure Act, Cap. 21.
8. According to the summons the Plaintiffs/Applicants who claims to be entitled to the parcel of the Land known as Plot No. 289/II/MN Utange Mombasa County by virtue of adverse possession for determination of the following questions:-
 - a. Whether the Applicants themselves, their ancestors and families be declared to have become entitled by virtue of adverse possession of 20 years of all that piece of land containing an area of 21/2 acres or thereabout registered under the registration of Titles Act(Chapter 281)Laws of Kenya in the name of David Muchiri Mugo and compromised in Plot No.289/II/MN in Utange Mombasa County.
 - b. Whether the plaintiffs/Applicants are entitled to be duly registered as proprietors of the suit land by virtue of adverse possession.
 - c. That costs of this application be provided for
9. The Originating summons were supported by a 10th Paragraphed affidavit sworn by Dickson Mwangi Runya where he averred that:-
 - i. The Plaintiffs/Applicants herein had been in occupation of the parcel of land known as Plot No.289/II/MN and hence openly, peacefully and as of right been in possession and occupation of the said piece of land over 20 years.



- ii. The parcel of parcel of land comprises of 289/II/MN in Utange, which is registered in the name of David Muchiri Mugo.
 - iii. The Plaintiffs fear that they may be evicted anytime and this had promoted the Applicants to file a suit for adverse possession.
 - iv. During their livelihood, they had been having a quite enjoyment without any interruption and at no time had he ever required permission of the Respondent to carry out the activities thereon.
 - v. Indeed they were under fear of being evicted from the said land by the Respondent, who was the registered owner.
10. The Plaintiffs prayed for Judgment against the Defendants for;
- a. A permanent injunction against the defendants themselves, their servants and or agents from evicting, demolishing the applicants houses, harassing and or interfering with the Plaintiffs/ Applicants occupation of Plot No.s 286/II/MN, 289/II/MN, 14110/II/MN in Utange in the County of Mombasa.
 - b. Costs of this suit.
11. The Plaintiffs called their first witness on the 17th May, 2023 where the Witness testified as follows:
- A. Examination - in - Chief of PW - 1 by Ms. Wathera Advocate.
12. PW – 1 was sworn and testified in Kiswahili language. He introduced himself as Dickson Mwaringa Runya. He was a holder of the Kenyan national identity card bearing numbers 22514699. He was born on 12th April, 1979. He was of Kilifi location and Chonyi sub – location. He told the Court that they shall rely on the summons and supporting affidavit. He stated that he was a business man. Plaintiff Exhibit No. 1 to 3 filed on 7th February, 2020 and on 24th January, 2023 – 2 documents Plaintiff Exhibit 4 and 5 respectively. He was in Court to get his right from the land. He was born and married from there. But in the year 2019 Mzee came and broke down their property – the plot was no. 289; he was brought up from there. They were around 9 people. He used to cultivate but not anymore.

A. Cross examination of PW - 1 by Mr. Mutisya Advocate

13. PW – 1 was referred to his National Identity card. He stated that it indicated that he was in Kilifi. The suit land was located in Bamburi which was in Kisauni of the County of Mombasa. There was no blood relationship between him and M/s. Fitina Runya. He did not know her. He was aware of the squatters committee and he was the secretary of the committee. M/s. Fitina Runya was not a member of that committee which was established in 2019. The function of the committee was to deal with matters brought out by the 1st Defendant. He had wanted to evict them from the suit property, by then the matters had not been lodged to Court. He was aware there were people who were arrested for being trespassers onto the 1st Defendant's land.
14. According to the witness the 1st Defendant had reported to the police. With reference to the authority to file the suit, the witness testified that there were only two people who gave him authority to file and represent the people yet there were many people in the suit. He was aware all those who have constructed were involved and/ or parties to the suit. He knew the person who had constructed a church there but he did not know his name nor the name of the church.



15. He told the Court that the list of 25 persons does not show who the persons who prepared it nor the date. When referred to the list of documents dated 21st January, 2023 attached to the Chief letter dated 22nd December, 2022 of 89 people. It was prepared by the Chief of Bamburi location. From the list, it never had a date nor source; the persons on the list had not appended their signatures against their names. PW – 1 saw the letter by Chief dated 22nd December, 2022. This was much more than the time the suit had been filed. It was after that the 1st Defendant had testified. He knew the chief called Pondo. He had known him for over ten (10) years. With reference to the land surveyors report dated 30th December, 2022, the witness stated that it was after the 1st Defendant had testified. From the land surveyors report, his name was not mentioned nor of any other squatter who allegedly lived on the suit land.
16. When referred to the set of photographs attached to the originating summons, he stated that they did not show the does when they were taken. They did not show the owners of the land. With reference to the certificate of search, the witness told the Court that the owner of the land was David Muchiri Mugo – the 1st Defendant. It also showed that the land was charged severally o the bank. They never invaded the land in December, 2019. By then they had cultivated on the land. it was in the year 2019, the 1st Defendant went to the land and broke down their house. He only had one house on the land which he built in 2010 after demolitions and he rebuild in 2012. He had never reported him for the malicious damage to be compensated. He had not taken the land away. It belonged to his parents.
17. According to him the squatters committee was still there. It was to protect the people from then had rights. There were 86 people on the 4-acre land.
18. On 17th May, 2023, the Plaintiffs through their Counsel Ms. Wathera marked the close of the Plaintiffs case.

III. The 1st Defendant's case

19. On 13th October, 2022 the 1st Defendant filed his Statement of Defence and Counter Claim dated 24th February, 2022. In the defence the 1st Defendant averred as follows:
 - a. The 1st Defendant totally denied all the plaintiff's allegations of the plaint.
 - b. The 1st Defendant was the lawful owner of plot Nos. 289/ II/MN, 14110/ II/MN (Orig. No.286/ II/MN) situate at Kiembeni/Utange Mombasa County having acquired them lawfully. He had either sold and/or transferred any other mentioned plots.
 - c. The Plaintiffs were now misusing this suit quickly selling, sub-dividing, excavating or undertaking constructions or damaging/wasting his suit premises.
 - d. He stated that there was a new emerging trend by people filing a baseless suit and once they obtain a court order now invade other people's private properties to unlawfully grab it which is what the Plaintiffs did in this case.
 - e. The Plaintiffs misleading the court and concealing material facts as follows:-
 - i. The plaintiffs or other people under whom they claim have prior to this suit filed multiple suits and applications of the same/ similar nature i.e.
 - a. Msa Cmcc/Elc No. 201 of 2019, Safari Charo Ngao, Arnold Kahindi Wanje, Muthoka Makau, Chengo Charo -Vs- David Muchiri Mugo, pending for hearing with injunction order varied to include a condition that the plaintiffs and /or their servants or agents should not sell or undertake any construction



or any interference with my suit premises plot No. 289/II/MN or any part therein pending the hearing and determination of this suit.

- b. Msa Cmc/Elc No. 49 of 2019, Kazungu Kiraga, Musa Said, Kahindi Katana, Mohammed Karisa -Vs-Peter Muchiri Mugo pending for hearing with injunction order discharged.
 - c. Msa Elc No. 15 of 2020 (O.S), Dickson Mwaringa Runya, Joshua Baya Kenga, Mohammed Mbaog Mgandi -Vs-David Muchiri Mugo, pending for hearing.
- f. From the above it is very clear that the Plaintiffs are grouping and colluding to invade his land to forcibly take it and deprive him of the same.
 - g. The Plaintiff have no lawful interest in his land but mere busy bodies and trespassers who invaded the land only recently and as can be evident from the fresh structures.
 - h. It is not true that the Plaintiffs have lived in the land undisturbed as he had all through demanded their vacant possession but they keep on threatening to kill him and could not step in his land for fear and he had reported severally to the police.
 - i. From the above actions it is clear that the Plaintiffs want to defeat justice by selling, subdividing, excavating or undertaking constructions or damaging/wasting his suit premises so as to render all suits nugatory and overtaken by events and null and void and an act in vain and courts don't act in vain.
 - j. It is only fair and just that the orders sought herein to avoid the Plaintiff's above mischief and preserve the suit premises in the same condition pending the hearing.
 - k. The orders are not prejudicial to the Plaintiffs at all but protect his interest.
 - l. Considering all the circumstances of this case and in the interest of justice, equity all the relevant law and *the Constitution* (2010) this application should be allowed accordingly.
 - m. The Defendant further stated that this suit/O.S is untenable and the orders sought herein cannot be granted because:-
 - i. The plaintiffs had not established a prima facie case to the required standard.
 - ii. The plaintiffs were mere trespassers to the property.
 - iii. The Defendant was the actual owner and in possession and occupation of the property.
 - iv. The Plaintiffs were guilty of equity and cannot seek equity i.e. no clean hands(concealing material facts as above etc.), not done equity, etc.
 - v. The Plaintiffs illegal acts amounts to trespass and violation of the 2nd Defendant's right to own his private property as guaranteed by the Kenya Constitution (2010), Article 40 which is unlawful and cannot be allowed in law at all.
 - n. The Defendant further stated that he has even obtained a loan with the property as the security in 2013. Further, the suit herein is incompetent and bad in law and the and be struck out with costs accordingly.No demand or notice of intention to sue was given hence the Plaintiffs to pay the costs of this suit.
20. On the Counter claim, the 1st Defendantrepeated the foregoing and states that the Plaintiffs are trespassers in his land. He prayed for Judgement to be entered against the Plaintiffs for:-



- a. Vacant possession / eviction of the plaintiffs from plots. 289 /II/MN and 14110/II/MN (Orig. 286/II/MN) and the Mombasa County Police Commanding Officer to provide security to the 1st Defendant in effecting the said order.
 - b. Permanent injunction restraining the plaintiffs by themselves or their servants or agents or any other person whatsoever from trespassing into or undertaking any construction or in any other manner whatsoever interfering with plots. 289 /II/MN and 14110/II/MN (Orig.286/II/MN).
 - c. Costs of the counter-claim.
21. The 1st Defendant called his first witness on 13th October, 2022 who testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Mutisya Advocate:-

22. He was sworn and testified in Kiswahili. He told the Court that his name was David Peter Muchiri Mugo. He was a holder of the Kenyan national identity card bearing numbers 3087701. He was born on 1st January, 1946. He was the 1st Defendant herein. He resided at Kiembeni near the Catholic Church. He was a farmer by profession and was the owner of plots no. 289/II/MN and Plot No. 141110/11/MN which were the subject to the two civil suits being - ELC No. 17 of 2020 and ELC No. 15 of 2020 which were pending before this Honourable Court and had now been consolidated. He had filed documents in both the suits which included:-
- a. The certificate of official search dated 15th December, 2021;
 - b. The certificate of official search dated 30th April, 2015.
23. Accordingly, he filed a witness statement dated 24th February, 2022 and filed in court on 13th October, 2022 and his prayer was to be granted the reliefs as prayed for in the Defence and Counter Claim. He bought the land as per paragraph 3. There were people who were claiming to be the owners of the land. They had sold it to other people. They had sold it to other people who had constructed structures for rental and settlement. He could not visit the land as the persons in the land could get violent. He could only visit when he is disguised as a visitor. At the moment he got no financial benefit from the land. Before they got there he had planted nappier grass for his livestock.
24. He told the Court that he was between Wema Centre and Swaleh Ngumi at Kiembeni. It was not true that the Plaintiffs had lived on the land for over twelve years continuously and uninterruptedly. There were no single house that was over 3 years old on the land. There had been a lot of interruptions over the land dispute and court case. He had never given them permission to be on the on the land instead they evicted him. Hence he decided to go to Court as before. He wanted them to be evicted from the land which was his land. He had never profited from the land dispute having gotten it for his own use. They used it for their own personal and self-enrichment. They have been selling the plot. He wished to adopt his statement as part of his evidence.
25. According to his evidence, his title deed was severally charged with the Kenya Commercial Bank. It had four (4) charges registered against it as follows:-
- a. To secure a sum of Kenya Shillings Fifteen Thousand (Kshs. 150,000/-);
 - b. To secure a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/-).
 - c. To secure a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-).



- d. To secure a sum of Kenya Shillings Three Million Three Hundred Thousand (Kshs. 3,300,000/-).
26. According to the witness he continued paying the above debt secured from the financial institution.
27. On 13th October, 2022 the 1st Defendant through his Counsel Mr. Mutisya marked their case closed.

IV. Submissions

28. On 17th May, 2023 the Honourable Court in the presence of all the parties gave directions on the disposition of the suit dated 7th February, 2020 by way of written submission. Pursuant to that on 17th October, 2023 after the Honourable Court confirming compliance set the Judgment date on 14th February, 2024 but which was on the material date deferred to 21st February, 2024 in the presence of all the parties whatsoever.

A. The Written Submissions of the Plaintiff

29. The Plaintiff through the Law firm of Messrs. Megwe & Co. Advocates, filed their written submissions dated 5th June, 2023. M/s. Waithera Advocate commenced her submission by relying on a Ruling delivered by this Honourable Court on 24th January, 2022 which was herein attached for easy reference at pages 12 of 26 paragraph 17 and which stated “inter alia”:-

“..... from the pleadings, what is the main issue in dispute is the claim on ownership to the suit property known as plot.No.286/II/MN, PLOT 289/II/MN AND 14110/II/MN situated at Kiembeni within the county of Mombasa...”

30. Further at Paragraph 21 of the said ruling went on to state thus:-

“..... it is my humble view that the cause of action all these five (5) cases arise from a set of three parcels of land that have been interchanged among the said cases creating a web and triangle of litigation... admittedly, the causes of action are both a claim of land ownership through land adverse possession and permanent injunction against the same person.”

31. The Counsel observed that as part of the determination of the said ruling was to consolidate this matter with four (4) other suits namely:(Paragraph 28 (a)):-

- a. Mombasa ELC No. 17 of 2020 (OS).
- b. Mombasa ELC No.122 of 2021(OS).
- c. Mombasa ELC No. 49 of 2020 (OS);and
- d. Mombasa ELC No. 201 of 2019 (OS).

32. The Learned Counsel submitted that the Plaintiff’s claim on behalf of themselves and other squatters numbering close to 90 people appearing in the chief’s letter dated 22nd November, 2022 herein was for a claim of Land title by Adverse possession of all that suit properties known as title No.286/II/MN measuring 1.829 HA and 289/I/MN measuring 1.011ha or thereabouts for determination of the following questions:-

- a. Had the Plaintiffs been in un-interrupted possession of the suit property for more than 12 years?
- b. Were the Plaintiffs entitled to adverse possession of the suit properties?



- c. Whether the possession and occupation by the Plaintiffs of the suit property constituted an over riding interest in terms of the provisions of the Land Act 2012, No. 6 of 2012 or Section 30 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed.)
 - d. Were the Plaintiffs entitled to be registered as the owner of suit properties?
 - e. Whether a permanent injunction order could be issued against the Defendant by himself, servants, family members authorized agents or independent contractors not to demolish or damage the Plaintiffs' structures built on the land or interfere with their crops on the land and or evict the Plaintiffs from the suit land?
 - f. Whether damages were adequate remedies to the Plaintiffs and/or whether compensation to the Plaintiffs by the Defendant was a viable remedy?
 - g. Were the Plaintiffs entitled to costs of the suit?
33. According to the Learned Counsel the Plaintiffs prayed for the orders as set out from the filed Plaintiff herein.
34. As indicated upon service, the Defendant filed a Statement of Defence and Counter Claim. From the said pleadings, the Defendant stated that he is the registered owner of the suit properties as evidenced from the filed Certificate of official searches. The Defendant held that the Plaintiffs could not claim title to the suit properties through Land adverse possession against the Defendant as they had never occupied the suit property at any point in time. The Counsel posited that in his testimony, the Defendant refuted that fact the Plaintiffs had continuously and uninterruptedly lived on the suit properties for over twelve years being one of the ingredient for a claim of land adverse possession. He further denied there being any single homes on the land in over three years. That there had been a lot of interruptions over the land dispute and court cases.
35. Unfortunately, the Learned Counsel averred that the Defendant never produced any evidence in support of his testimony/claim that there were no single homes in over three years nor that Plaintiffs had been in possession for over twelve years. For instance, the Defendant never produced a copy of any titles of the suit properties: even the property that he claimed was charged to a bank. The Defendant never tendered any evidence that there had been interruptions before the years 2019 to 2020 being the police reports, Occurrence book numbers, criminal charges and convictions etc. The Defendant never availed any documents to prove how he acquired the said suit premises. Nor did he bring any witnesses in support of his ownership claim. Again, no evidence of his growing nappier grass or livestock farming as testified.
36. On the contrary, the Plaintiffs produced a Chief letter dated 22nd November, 2022 and a Survey report dated 30th December, 2022 in support of their possession and settlement in the suit properties. The production of the above documents were never objected to by the Defendant. Wasn't the Defendant not curious to find out what the Chief and Survey would state on his allegedly suit properties or was he afraid that their testimonies would collaborate the Plaintiffs' and damage his case.
37. The last the paragraph at Page 2 of the Survey Report by Nyamawi Mwajoto, a Hydrographic Surveyor stated as follows:

“..... a sketch plan and a most recent clear google image was prepared after the field work in order to show the area occupied by the squatters on the above plots and also to show how people are settled on the neighborhood for easy of refence and further necessary action.....”



38. The Learned Counsel submitted that during cross examination of PW - 1, the Defendant tried to insinuate that the fact since the national identity card details held by the Plaintiffs under the following categories; district, division, location and sub location never indicated nor correspond with the location of the suit properties then the Plaintiff's claim of adverse possession should fail. The Counsel argued that of all the purposes and objectives of having and or acquiring a Kenyan national identity card (I.D), proof of one's residence was not one of them. As per the Chief's letter dated 22nd November, 2022, the suit properties had over ninety residents together with their families. It was correct then, to rightly assume then that these suit properties had over one hundred residents in occupation.
39. The Defendants could not expect PW - 1 to know the name of all residents (over a hundred of them) or that the bank visited the properties when the Defendant charged the suit properties. Utmost, the Defendant confirmed in cross examination that the suit properties were in occupation and that a church was one of the structures on suit premises.
40. In conclusion, the Learned Counsel submitted that in determining whether or not to declare that a party had acquired a title to land by adverse possession, there were certain principles which must be met as quoted by Seron J in the case of:- "Gerald Muriithi – Versus - Wamugunda Muriuki & Another (2010) eKLR" while referring to the case of "Wambugu – Versus - Njuguna (1983) KLR" page 172 the Court of Appeal held as follows:-
- a. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
 - b. The *limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years...
41. Additionally, she cited the case of:- "Francis Gicharu Kariri – Versus - Peter Njoroge Mairu, Civil Appeal No. 293 of 2002(Nairobi)" the Court of Appeal approved the decision of the High Court in the case of "Kimani Ruchire – Versus - Swift Rutherfords & Co. Ltd.(1980) KLR 10" where Kneller J, held that:
- "The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)."
42. So, in the instant case, the Plaintiff must show that the Defendants 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 purposes or any endeavours to interrupt it by way. To buttress on that point she referred Court to the case of:- "Kasuve – Versus - Mwaani Investments Ltd. & 4 others (2004) KLR 184" the court stated thus:-
- "In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a



period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

43. The Learned Counsel submitted that the issue for this court to determine was whether or not the Plaintiffs had been in un-interrupted possession of the suit property for more than 12 years and were the Plaintiffs entitled to a claim of the title by land adverse possession of the suit property. PW - 1, testified that he had lived on the suit land since he was born. It was his testimony that he was the secretary of their committee which comprised of 100 members. They had given him and three others authority to represent them. Members of this group had lived on that and for over 12 years uninterrupted, openly and peacefully. They had built houses, shops, school and churches. Indeed, the Chief's letter and Surveyor's report corroborated his evidence. PW - 1, produced a letter from the Chief confirming their occupation of the suit properties. The Plaintiffs' evidence was never challenged.

44. To further support her legal position, she cited the case of:- “Simon Kilinge Kingoo & 11 others v Amos Kamia Nguku & 4 others [2019] eKLR”, Judge O.A. ANGOTE noted in paragraph 29:-

“...Justice J.B. Ojwang (as he was then) stated as follows on that issue:

“The only business of the squatter is to squat, possess, enjoy and retain; and once the minimum duration is completed, he can seek the formal indicia of ownership of the land which he has possessed for long...”

45. In conclusion she urged the Court to allow the suit by the Plaintiffs and grant the prayers as sought.

B. The Written Submissions by the 1st Defendant

46. On 27th October, 2022, the 1st Defendant through the Law firm of Messrs. Mutisya & Associates Advocates filed their written submissions dated 26th October, 2022. Mr. S. Mustiya Advocate commenced their submissions by stating that the Plaintiffs filed the above various suits which were all consolidated with ELC No. 17 of 2020 being the lead file. The cases were fixed for hearing on 13th October, 2022 but come that material day the Plaintiffs applied for adjournment on the ground that the Counsel was not able to attend Court as the Clients had failed to firmly instruct her to do so. The Honourable Court finding this being not cogent reason to grant an adjournment declined to grant and allocated time for its hearing. At the allocated time, once more neither the Plaintiffs nor their Advocates appeared in Court, and hence their suits were dismissed for non – attendance and want of prosecution. The matter proceeded on for hearing of the Defendant's Counter – Claim. Later on Claim, the Plaintiffs successfully applied to set aside the orders of dismissal of the suit but only with a rider of them to tender their evidence.

47. In his case, the 1st Defendant testified and relied on his witness statements and documents and closed his case accordingly. On the 1st Defendant's case and analysis, the Learned Counsel submitted that the 1st Defendant's case was that he is the owner of the subject plots having acquired the same lawfully. The official search certificates confirmed him as the legal and absolute owner to the suit properties. In fact one of the properties being all that parcel of land known as Plot No. 289/II/M.N had 5 charges to the bank to secure financial resources which the 1st Defendant confirmed he was still paying. He testified that he had occupied the land and developed the same and was even farming dairy cattle and napier grass on them. The Plaintiffs invaded the land sometimes in December 2019 and the 1st Defendant's efforts to remove them therefrom by himself and the police bore no fruits. It was not true that the Plaintiffs had been in occupation for more than 12 years neither had they developed any permanent



structures therein. The Plaintiffs as squatters therein had threatened the 1st Defendant of harm/injury and he now lived under extreme fear and could not enjoy his own land.

48. To support his case he relied on the provision of Article 40 (1) (a) (b) of *the Constitution* of Kenya, 2010 on the right to own private property in the Republic of Kenya. According to the Learned Counsel, the 1st Defendant's above Constitutional rights were being curtailed by the Plaintiffs and this should not be allowed at all.
49. In conclusion, the Learned Counsel submitted that the 1st Defendant's case was clear as in Black and white he had proved his case for the following orders:-
 1. ELC No.17 of 2020
 - a. Vacant possession/ eviction of the plaintiffs from plots. 289 /II/MN and 14110/II/MN (Orig.286/II/MN) and the Mombasa County Police Commanding Officer to provide security to the 1st Defendant in effecting the said order
 - b. Permanent injunction restraining the plaintiffs by themselves or their servants or agents or any other person whatsoever from trespassing into or undertaking any construction or in any other manner whatsoever interfering with the plaintiffs from plots. 289/II/MN and 14110/II/MN (Orig.286/II/MN)
 - c. Costs of the counter-claim.
 2. ELC No.15 of 2021 (O.S)
 - a. Vacant possession / eviction of the plaintiffs from plot No. 289/II/MN.
 - b. Permanent injunction restraining the plaintiffs by themselves or their servants or agents or any other person whatsoever from trespassing into or undertaking any construction or in any other manner whatsoever interfering with the plaintiffs plot No. 289/II/MN.
 - c. Costs of the counter-claim.
 3. ELC No. 122 of 201 (O.S)

The suit stands dismissed with costs for want of prosecution as per the order made by this court on 13/10/2022
 4. CMCC/ELC 49 of 2020
The suit stands dismissed with costs for want of prosecution as per the order made by this court on 13/10/2022.
 5. CMCC/ELC 201 of 2019
The suit stands dismissed with costs for want of prosecution as per the order made by this court on 13/10/2022

C. The Supplementary Submissions by the 1st Defendant

50. With the leave of Court, the 1st Defendant through the Law firm of Messrs. Mutisya & Associates filed their supplementary written submissions dated 20th June, 2023. Mr. S. Mutisya Advocate stated that these were the 1st Defendant's supplementary submissions which in addition to those filed on 27th October, 2022. Following the experts hearing on 13th October, 2022 the 1st Defendant's case was



closed and filed the submissions on 27th October, 2022 after which the Plaintiff's applied to set aside the hearing but this court only allowed the Plaintiff's to adduce evidence without the 1st Defendant testifying and his evidence to remain on record.

51. The Plaintiff called only one (1) witness being Mr. Dickson Runya (PW - 1) who testified on 17th May, 2022 and was extensively cross-examined by the 1st Defendant's Counsel, Mr. Mutisya. According to the Learned Counsel, the 1st Defendant's evidence was not challenged at all.
52. On the issue of the consolidation of suits. The Learned Counsel submitted that it was true the suits were all consolidated and the lead file became the one being ELC No. 17 of 2020 vide the ruling delivered on 24th January, 2022 with a further rider that each shall be considered on its pleadings. It was not disputed that the 1st Defendant is the legal and absolute registered owner of all the suit properties. The Plaintiff's evidence was clearly a claim for adverse possession. The Plaintiffs were only those mentioned in the suits and no more. The attempt to introduce other parties by a letter of chief (or the annexure thereto) was irregular and unlawful because:-
 - i. The alleged parties were not indicated in the original pleading as parties.
 - ii. The alleged parties were being introduced too late after the 1st Defendant had already testified and closed his case.
 - iii. There was no formal application for a representative suit under Order 1 Rule 8 (1) (2) (3) of the Civil Procedure Rules, 2010.
53. Furthermore, the Learned Counsel submitted that it was only the 2nd and 3rd Plaintiffs who gave the 1st Plaintiff authority to act on their behalf (filed on 28th January, 2021). On the 1st Defendant's pleading, the Learned Counsel stated that the 1st Defendant denied the Plaintiff's claims and filed defences and Counter - Claims for vacant possession/eviction of the Plaintiffs from the suit premises, permanent injunction restraining the Plaintiff's from trespassing into or constructing or in any other manner interfering with the suit premises.
54. The 1st Defendant filed a list of witness statements and documents all which were adopted as evidence and he also testified and his evidence was not challenged by way of cross-examination at all. He particularly pleaded that;
 1.
 5.
 6.
 7. That from the above it is very clear that the Plaintiffs are grouping and colluding to invade my land to forcibly take it and deprive him of the same.
 8. That the Plaintiff have no lawful interest in my land but mere busy bodies and trespassers who invaded the land only recently and as can be evident from the fresh structures.
 9. It is not true that the Plaintiffs have lived in the land undisturbed as I have all through demanded their vacant possession but they keep on threatening to kill me and I cannot step in my land for fear and I have reported severally to the police.
 10. From the above actions it is clear that the Plaintiffs want to defeat justice by selling, subdividing, excavating or undertaking constructions or damaging/wasting my suit premises so as



to render all suits nugatory and overtaken by events and null and void and an act in vain and courts don't act in vain.

11.
12. ...
13. ...
14. The Defendant further states that this suit/O.S is untenable and the orders sought herein cannot be granted because:-
 - (a) The plaintiffs have not established a prima facie case to the required standard.
 - (b) The Plaintiffs are mere trespassers to the property.
 - (d) The Plaintiffs are guilty of equity and cannot seek equity i.e. no clean hands (concealing material facts as above etc.), not done equity, etc.
 - (e) The Plaintiffs illegal acts amounts to trespass and violation of the 2nd Defendant's right to own his private property as guaranteed by the Kenya Constitution (2010), Article 40 which is unlawful and cannot be allowed in law at all.
15. The Defendant further states that he has even obtained a loan with the property as the security in 2013.
16. Further, the suit herein is incompetent and bad in law and the and be struck out with costs accordingly.
17. No demand or notice of intention to sue was given hence the Plaintiffs to pay the costs of this suit.

COUNTER-CLAIM

18. The 1st Defendant repeats the foregoing and states that the plaintiffs are trespassers in his land hence claims by way of counter-claim for:-
 - (a) Vacant possession / eviction of the plaintiffs from plots. 289 /II/MN and 14110/II/MN (Orig.286/II/MN) and the Mombasa County Police Commanding Officer to provide security to the 1st Defendant in effecting the said order.
 - (b) Permanent injunction restraining the plaintiffs by themselves or their servants or agents or any other person whatsoever from trespassing into or undertaking any construction or in any other manner whatsoever interfering with plots. 289 /II/MN and 14110/II/MN (Orig.286/II/MN).
55. On the issue of some suits were not for adverse possession. He averred that the following suits were transferred to this court but were not claims for adversepossession. They should be dismissed with costs the Plaintiffs having not proved they were “prima facie cases”. These were “CMCC No. 201 of 2019 - Morris Karisa Mwanajama & others – Versus - Mohsin Saleh Sherman & others & CMCC No. 49 of 2020-Kazungu Kirage & others -Versus - Caroline Bahati Gormans & Anor”. These cases were for claim of for injunctions and not adverse possession. The only suits which allege adverse possession were civil cases ELC Nos. 17 of 2021 and 15 of 2022 and the Learned Counsel submitted for each as follows. There were only three (3) Plaintiffs as parties to the said two suits.



56. On the issue of whether the Plaintiffs had proved a claim of title through land adverse possession (being on land on uninterrupted occupation for more than 12 years), the Learned Counsel submitted that the answer was in the negative. PW – 1 being the only Plaintiffs witness admitted he having been born in Kilifi. However, from his filed pleadings he claimed to have been born on the suit properties which were situated at Kiembeni. This was an outright falsehood and contradiction. The witness could not establish exactly when he (or any other) Plaintiffs entered the premises. The alleged structures on the photographs could not be identified to the Plaintiff's nor could they be shown when they were built. The PW – 1 admitted there was a committee for squatters in which he was its Secretary. This appeared to be for a well-coordinated illegal grouping for land grabbing. When asked by the court the size and population of the squatters, the PW – 1 stated that the area measured approximately 2 acres and comprised of 85 families which was unlikely and impossible.
57. Further, the Learned Counsel submitted that during the hearing it would have been expected that all the Plaintiffs attend court to the full. On the contrary, only the PW – 1 and 2 others attended court's proceedings. Furthermore, the 1st Defendant the Certificates of official searches showed very clearly that the property was charged severally by Kenya Commercial Bank Ltd as follows:-
- i. On 7th February, 1991 for a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000.00/=);
 - ii. On 10th April, 1995 for a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000.00/=).
 - iii. On 3rd February, 2000 for a sum of Kenya Shillings Two Million (Kshs.140,000.00/=).
 - iv. On 24th February, 2014 for a sum of Kenya Shillings Two Million (Kshs. 2,000,000.00/=).
 - v. On 16th December, 2014 for a sum of Kenya Shillings Three Million Three Hundred Thousand (Kshs. 3,300,000.00/=).
58. Before charging the property and during the due diligence stage, if at all the Plaintiffs had been in the suit properties, the financial institution granting the financial facilities would have noticed and declined the same. Clearly, again this was outright proof that the Plaintiffs were not in the premises at all. The letter from the Chief Mwembe of Legeza location was also suspect because the area where the suit properties were located in Bamburi area and not Mwembe Legeza. The letter never stated whether the chief knew them nor when he knew them nor whether he was still the Chief more than 20 years ago) and the alleged names on the letter never borne any signatures nor thumb print affixed on it at all. The alleged survey was done only on 15th December, 2022 more than 2 years after this case was filed but still never showed any of the Plaintiffs names. Hence, it could not be associated with the Plaintiffs. Furthermore, the Plaintiffs never called either of them (the Chief or the Land Surveyor) to shed light on their documents. The survey report alleged that the squatters occupied 1.011 Ha of Plot No.MN/II/289 while the Search showed the area measured 2.69 Acres so according to them, were they claiming the whole of the suit properties?
59. On the issue of whether the 1st Defendant had proved his Counter – Claim. The Learned Counsel answered in the affirmative. He submitted that it was not in dispute that the 1st Defendant is the registered owner of the with a title of ownership. He gave extensive evidence backed by documents hence proved his case on a balance of probability on the counter-claim accordingly. The Plaintiff's entry therein was illegal and hence he was entitled to the reliefs sought in the Counter - Claim.
60. On whether the 1st Defendant's had Constitutional right to own the property. The Learned Counsel reiterated the argument that the 1st Defendant had a constitutional right to own and enjoy his private



property in conformity to the provision of . Article 40 of *the Constitution* of Kenya, 2010. To him, his right should be protected by court at all costs and encouraging every “Tom” and “Dick” to just take away this right by mere allegations without any strong basis will be setting a bad precedence and should be discouraged.

61. To buttress on this legal position, the Learned Counsel relied on the case of:- “Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR”, the Court held:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it, and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve(12) years. The process springs into action essentially by default or inaction of the owner.

The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

62. According to the Learned Counsel, the 1st Defendant never omitted nor neglected to take action against the Plaintiffs as stated above. In the case of “Wambugu – Versus - Njuguna (1983)KLR 173”, the Court of Appeal held thus:-

- “1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
3. The *Limitation of Actions Act*, on adverse possession, contemplates two concept; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

63. According to the Learned Counsel, the 1st Defendant never lost his right to the land because he always agitated for the same. He was not discontinued of possession of the land and in fact he stated that he was farming on the same, grazing cattle etc.

64. In the Civil Appeal No. 53 of 2017 “Mombasa Teachers Co-operative Savings & Credit Society Limited – Versus - Robert Muhambi Katana & 15 others [2018] eKLR”, where the Court stated as follows;

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

65. In the instant case, there was no prove of non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years. In fact the Plaintiffs could not establish the correct actual date of entry into the land.



66. Also, he referred Court to the case of Civ. Appeal No. 27 of 2013 Kisumu “Samuel Kihamba – Versus - Mary Mbaisi [2015]eKLR”, where the Court held:

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

67. In this case, the entry to the land was by force because the plaintiffs used to chase the 1st Defendants with pangas when he was attempting to go to the premises. There was no license or permission of the land owner. There was no apparent dispossession of the land from the land owner.

68. In conclusion, the Learned Counsel submitted that the suits by the Plaintiffs should be dismissed with costs and the 1st Defendants Counter - Claim be allowed with costs. The Plaintiffs and/or their agents and/or any other person occupying the suit premises may be given minimum time (e.g. 30 days) to vacate the suit premises failing which to be evicted therefrom and the Mombasa County Police Commanding Officer (County Commander) to provide security to the 1st Defendant in effecting the said order. Further to avoid the Plaintiffs from coming back there should also be an order for Permanent injunction restraining the Plaintiffs by themselves or their servants or agents or any other person whatsoever from trespassing into or undertaking any construction or in any other manner whatsoever interfering with the Plaintiffs from the suit premises

V. Analysis and Determination

69. I have carefully read and considered the pleadings herein by the Plaintiffs and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. Notably, this case proceeded whereby the Plaintiffs tendered evidence and produced several documents in support of their cases. It should be noted that apart from the 1st Defendant, (who filed a Defence and a Counter – Claim- thereof) the other the Defendants never filed a defence neither did they tender any evidence.

70. This Honourable Court will still examine the facts of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has crystalized the subject matter into the following five (5) issues for its determination. These are:-

- a. Whether the Plaintiffs have been in un-interrupted possession of the suit property for more than 12 years?
- b. Whether the Plaintiffs entitled to adverse possession of the suit properties?
- c. Whether the Counter - Claim by the 1st Defendant is sustainable?
- d. Whether the 1st Defendant is entitled to the prayers sought in the Counter claim?
- e. Who will bear the Costs of suit and Counter claim?

ISSUE No. a). Whether the plaintiffs have been in un-interrupted possession of the suit property for more than 12 years

71. Under this sub - title, the main substratum is on the claim of title on land based on the Doctrine of Land Adverse possession. Critically speaking, from the surrounding facts and inferences of the current suit, though it is seeking ownership is based on Limitation being land adverse possession. Essentially,



the issue for determination in the instant suit is whether or not the Plaintiffs has established ownership by way of adverse possession admittedly the Plaintiff in both suit was/is pursuing a right of ownership with the divergence being the issues of specific performance pursuant to a contractual claim and while the present suit is based on a legal claim. In other words, the key issue for determination is whether or not the Plaintiff has acquired title by way of adverse possession. If yes when did time start running for purposes of determining these rights and finally whether or not the Plaintiffs are entitled to the prayers in the originating summons.

72. It is trite that a claim for adverse possession is attached to land and not title and it matters not that the land was owned by either the Plaintiffs or the Defendants. The governing principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further, the provision of Section 13 of the same Act, provides that adverse possession is the exception to this limitation:-

- “(1) (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 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 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) of this Act, the land in reversion is taken to be adverse possession of the land.”

73. 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.”

74. This was the position in “Maweu – Versus - Liu Ranching & Farming Cooperative Society [1985] eKLR” as quoted in “Civil Appeal No 164 of 2011 Gachuma Gacheru – Versus - Maina Kabuchwa [2016] eKLR” where the Court held “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”.

75. The principle of adverse possession was more elaborately set out in the case of “Wambugu – Versus - Njuguna [1983] KLR 172”, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts



which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

76. And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

77. This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. Set the findings of the Court in Malindi App No. 56 of 2014 “Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR” where it held;

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

78. Further, in the case “Mbira – Versus - Gachuhi (2002) 1 EALR 137”: the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

79. Therefore, to determine whether the Applicant’s rights accrued the Court will seek to answer the following:-

- i. How did the Applicant take possession of the suit property?
- ii. When did she take possession and occupation of the suit property?
- iii. What was the nature of her possession and occupation?
- iv. How long has the Applicant been in possession?

80. Now this Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above. It is the Plaintiffs’ case that they have been in occupation of the parcel of land known as PLOT NO.289/II/MN and hence openly, peacefully and as of right been in possession and occupation of the said piece of land over 20 years precisely since the year 1982 having resided on the suit properties. According to them the Defendants through the assistance of Police Officers is illegally demolishing the Plaintiffs houses and threatening to evict the Plaintiffs from PLOT NOS.286/II/MN, 289/II/MN and 14110/II/MN UTANGE MOMBASA COUTY yet the defendants were not the legal owners of the said plot. It had now forced the Plaintiffs to come to Court and obtain an injunction against evicting them from the said Plots. This was supported by the evidence of PW - 1.



81. The burden of leading the Court to ascertaining this lies with the Plaintiffs/ Applicants. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ No. 283 of 1990 “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR”, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

82. It is trite that claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See “Mombasa Teachers Co-operative Savings & Credit Society Limited – Versus - Robert Muhambi Katana & 15 others [2018] eKLR”, where the Court enumerated the required elements to prove adverse possession as follows:

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

83. Clearly by the aversions of the 1st Defendant the Plaintiffs occupancy on the suit properties were not permissive. I have gone through the evidence produced by the Plaintiffs/ Applicants being photographs, have not shown when they were taken and the dates that they were taken which means that the same do not prove that the Plaintiffs had stayed in the suit property for 12 years.

84. The 1st Defendant has also testified that he had never given them permission to be on the on the land instead they evicted him. Hence he decided to go to Court as before. He wanted them to be evicted from the land which was his land. He had never profited from the land dispute having gotten it for his own use. They use it for their own personal and self-enrichment.

85. The fact that the Defendants were born on this land, or that their parents were born on this land, or that they have been on this land all their lives, does not allow them to claim the land by dint of the doctrine of adverse possession. Furthermore, there was no empirical evidence to demonstrate their occupation and use of the suit land for that period by the Plaintiff as alleged by the Plaintiffs. Indeed, the information from their national identity cards utterly contradicted those on the pleadings. The Honourable Court was never informed the reason as to why only the PW – 1 testified and not the others out of the over 90 people who claimed to be residing on the land nor the Chief of the Mwembe Legeza location nor the Land Surveyor to support the Plaintiffs case. For these reasons, therefore, their claim that they are entitled to this land through the doctrine of adverse possession must fail.

Issue No. b.) Whether the Plaintiffs entitled to the prayers sought

86. Under this sub title, indeed Honourable Court has elaborately examined above that the Plaintiffs are not entitled to the suit properties by way land adverse possession. Nonetheless, the Honourable Court now wishes to assess whether the Plaintiffs are entitled to the prayers sought in the Plaintiff filed in the lead file ELC Case No. 17 of 2020. The Plaintiffs prayed for Judgment against the Defendants for;

- a. A permanent injunction against the defendants themselves, their servants and or agents from evicting, demolishing the applicants houses, harassing and or interfering with the Plaintiffs/ Applicants occupation of Plot No.S 286/II/MN, 289/II/MN, 14110/II/MN in Utangein the County of Mombasa.



b. Costs of this suit.

87. The Principles on Injunction were established in the celebrated case of “Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358”. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. The first authority on making this distinction was “Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case” in which Megarry .J as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.

88. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under the provision of Sections 1A, 3 & 3 A of the *Civil Procedure Act*, Cap. 21, if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just sit, wait and watch under these given circumstances.

89. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “Malier Unissa Karim – Versus - Edward Oluoch Odumbe (2015) eKLR” as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella – Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

90. Further, the same Court of appeal in the case of “Jay Super Power Cash and Carry Ltd – Versus - Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.



91. Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of “Locabail International Finance Limited - Versus - Agro Export and others (1986) All ER 906”, the court held thus:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.’

92. Having looked at the evidence produced by the Plaintiffs for their claim for Land Adverse possession, it goes without saying and I rightfully discern that the Plaintiffs have indeed not established ‘a prima facie case’ of proving their case to the required threshold to warrant the grant of permanent injunctive orders sought. For that reason, the prayer sought by the Plaintiffs must not succeed whatsoever.

Issue No. c). Whether the Counter - Claim by the 1st Defendant is sustainable

93. Under this sub title, the Honourable Court will examine whether the 1st Defendant’ Counter Claim is sustainable. The 1st Defendant has averred that is the registered owner of the suit property. The [Land Registration Act](#) is very clear on issues of ownership of land. The provision of Section 24(a) of the [Land Registration Act](#), No. 3 of 2012 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.”

94. Further, the provision of Section 25(1) provides that for such a registered owner, his/her rights, title and interest over the land are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act.

95. Additionally, the provision of Section 26 (1) of the said Act provide as follows:

“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.”

96. The law is clear 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 – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

97. In the instant case, from filed pleadings, both the oral and documentary evidence adduced in Court through the exhibits of the 1st Defendant, in my own opinion that there is no doubt that the 1st



Defendant is the legally and absolute registered proprietor of the suit properties with all the indefeasible rights, title and title vested in him by law. The 1st Defendant has led evidence that he was acquired ownership of the suit properties. On the contrary, the Plaintiffs never challenged the title nor this ownership for having been acquired through fraud, mistake, omission or corruptly means or scheme contrary to the provision of the law as stated herein. The Plaintiffs never produced any documents to dispute the same. Furthermore, the 1st Defendant has claimed that the Plaintiffs are trespassers and should be evicted from his land. The provision of Section 3 (1) of the Trespass Act, Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

98. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. The plaintiffs or other people according to the facts as per the 1st Defendant’s defence and counterclaim, under whom they claim have prior to this suit filed multiple suits and applications of the same/ similar nature which are aimed at grouping and colluding to invade his land to forcibly take it and deprive him of the same.
99. According to the 1st Defendant, the Plaintiffs have no lawful interest in his land but are mere trespassers who invaded the land only recently and as can be evident from the fresh structures. I am therefore inclined to find that the Plaintiffs had trespassed on the suit parcels belonging to the Plaintiff.
100. Therefore, its my finding that 1st Defendant’s counter claim sustainable and thus found to have merit.

Issue No. d). Whether the 1st Defendant is entitled to the prayers sought in the Counter claim

101. Under this sub title the Court will examine if the 1st Defendant is entitled to the prayers sought in the Counter - Claim. The 1st Defendant through his Counsel has argued that his constitutional right to own and enjoy his private property have been infringed. Article 40 of the Constitution of Kenya 2010 states:-

Protection of right to property

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
- (a) of any description; and (b) in any part of Kenya

102. In his counter claim the 1st Defendant prayed that the Plaintiff’s suit be dismissed with costs and Judgment entered for the Defendant’s counter-claim and the afore stated prayers. The 1st Defendant sought for vacant possession and eviction of the Plaintiffs from the suit properties. I reiterate that the 1st Defendant in my opinion has proved his case as per the Counter claim and is granted the prayers sought as per the Counter claim dated 24th February, 2022.

Issue No. e). Who will bear the Costs of suits and the Counter claim

103. The issue of costs is at the Courts discretion. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“ the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”



104. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

105. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

106. In this case, as this Honourable Court has opined above, the Plaintiffs did not prove their claim against the Defendants and therefore the 1st Defendant who participated in these proceedings has the costs of the suits filed by the Plaintiffs. The 1st Defendant also filed a Defence and Counter - Claim in which he succeeded in his proving his claim. Thus, he shall have the costs of the suit and the Counter - Claim to be paid the Plaintiffs jointly and severally.

VI. Conclusion and Disposition

107. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiffs have not established their case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favor of the 1st Defendant as against the Plaintiff as prayed in the Counter - Claim dated 24th February, 2022.
- b. That the Plaintiffs have failed to prove their claim thereby the suit against the Defendants in all the consolidated matters including this lead file be and is hereby dismissed in its entirety.
- c. That this Honourable Court do and hereby issues an order of vacant possession and the subsequent eviction of the plaintiffs from plots. 289 /II/MN and 14110/II/MN (Orig. 286/ II/MN) and the Mombasa County Police Commanding Officer to provide security to the 1st Defendant in effecting the said order



- d. That a permanent injunction do hereby issue restraining the Plaintiffs by themselves or their servants or agents or any other person whatsoever from trespassing into or undertaking any construction or in any other manner whatsoever interfering with the Plaintiffs from plots. 289/II/MN and 14110/II/MN (Orig.286/II/MN)
- e. That the 1st Defendant shall have the costs of the suits and the Counter claim to be paid by the Plaintiffs jointly and severally.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2024.

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HON. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Waithera Advocate for the Plaintiffs
- c. Mr. S. Mutisya Advocate for the 1st Defendant.
- d. No appearance for the 2nd Defendant

