



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.30 OF 2007

GODFREY KARUME.....PLAINTIFF

=VERSUS=

- 1. MR. KILIMO FONDO SHUTU**
- 2. PHILIP CHARO SHUTU**
- 3. JOHN CHARO SHUTU**
- 4. TIMA MAULANA SAID AHMED**
- 5. MAULANA SAID AHMED**
- 6. ADIJAH MAULANA MOHAMED**
- 7. PRISCILLA MUGAMBI.....DEFENDANTS**

J U D G M E N T

Introduction:

1. The Plaintiff herein is praying for a declaration that LR. No. 4161 belongs to him and for eviction orders against the Defendants.
2. The Plaintiff has averred in the Plaint that he was allocated the suit property by the Government of Kenya in 1986 and a Certificate of Lease was subsequently issued to him; that without any colour of right, the Defendants encroached upon the suit property and started subdividing and selling it and that the Defendants should be evicted from the suit land forthwith.
3. According to the Defence filed on 6th May, 2009, the Defendants averred that they entered or were born on the suit property before the allocation of the same to the Defendants in 1986; that they have lived on the said property peacefully, openly, continuously, uninterruptedly and in adverse to the title of the registered owner for over twelve (12) years, and hence the Plaintiff's claim is time barred.
4. The 4th, 5th and 7th Defendants filed a separate Defence on 5th May 2009 which they generally denied the allegations in the Plaint.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that the 1st to the 3rd Defendants are members of the Shutu family and that they sub-divided the suit property, which is his land; that the 4th and 6th Defendants are purchasers of his land and that the suit property was meant for industrial purposes.
6. It was the evidence of PW1 that he applied to the plot allocation committee to be allocated the suit property in 1983.
7. PW1 stated that the Kenya Industrial Estate and the then Municipal Council of Malindi approved the said Application vide their letters dated 18th September 1993 and 8th June 1993 respectively.
8. It was the evidence of PW1 that he was initially allocated plot number 21 by the Commissioner of Lands. However, it later on transpired that the Municipal Council had allocated the said plot to Kipeoni Village Polytechnic. It was the evidence of PW1 that he applied to the Commissioner of Lands to be allocated an alternative land which he did by allocating him plot number 5 on 18th April 1986.
9. It was the evidence of PW1 that he engaged a surveyor who surveyed the property on 23rd April 1986 whereafter he fenced it. After the property was surveyed, PW1 informed the court that he was given a grant for the land in 1998 which was a leasehold for 99 years.
10. PW1 stated that the suit property was allocated to him for industrial purposes and that he has been paying the rates to the Council. It was his evidence that after the property was surveyed, he took possession of the same and started farming maize on it having fenced it with a barbed wire.
11. PW1 informed the court that he farmed the land in 1986 and later rented it out to PW2 in 1987 until 1990.
12. However, when PW2 stopped tilling the land in 1990, the poles and the barbed wire around the suit property were stolen. It was the evidence of PW1 that in the year 2003, he was informed that some people were subdividing and selling the suit property to the members of the public.
13. PW1 stated that on 1st August 2003 and 9th August 2003, the District Commissioner summoned the Shutu family and informed them to stop selling the suit property.
14. When the surveyor went to the suit property to re-establish the beacons, it was the evidence of PW1 that the members of the Shutu family chased him.
15. PW1 informed the court that on 13th June 2007, he gave to then District Commissioner a letter which had the names of the people who had trespassed on the suit land.
16. While trying to sought out the emerging issues out of court, it was the evidence of PW1 that the Defendants denied him entry onto the suit property when he tried to access it on 3rd March 2009. it was his evidence that on that day, he was beaten up and injured.
17. PW1 stated that he has been unable to put a hotel on the property due to the interference by the Defendants. It was the evidence of PW1 that the suit property is not meant for residential purposes.
18. According to PW1, although the Defendants were ordered by the court to stop any further construction, they have continued with the said constructions.
19. PW1 informed the court that the suit property was unoccupied by the year 2001; that the Defendants developments have not been approved by the Council and that the suit property is registered in his name and is meant for industrial purpose.
20. Although the surveyor found that fourteen people are staying on the suit property, PW1 informed the court that only four people were on the suit property in the year 2011 when the injunctive orders were given by this court. It was his evidence that having been beaten, it was difficult for him to go back to the land to ascertain the exact number of people on the suit property although he used to see developments coming up.
21. PW1 was categorical that the Defendants invaded his land in the year 2003.
22. In cross-examination, PW1 stated that he has been in Malindi for over 40 years and he knew the late Charo Chutu.
23. It was his evidence that he had a bakery which collapsed when he was involved in a road traffic accident. PW1 denied that there were people on the land between 1986-2001 when he was away seeking treatment.
24. PW1 stated that he delayed in filing the suit because the late Charo Shutu was his friend and also because he involved the provincial administration to try and solve the dispute amicably; that the Charo Shutu family invaded his land after Mr. Shutu died and that the late Mr. Shutu was not buried on the suit land.

25. PW2 informed the court that she came to Malindi in the year 1977. PW2 stated that the Plaintiff leased to her the suit property for four years in the 1980's.
26. The evidence of PW2 was that she used to pay to the Plaintiff Kshs.2,500 per year for utilizing the land. According to PW2, she used to plant maize on the land which she would sell. It was her evidence that nobody was living on the land and the same was fenced.
27. In cross-examination, PW2 stated that the suit property did not have cashewnut trees. PW2 could not remember the exact dates when she leased the land from the Plaintiff for cultivation.
28. The surveyor, PW3 informed the court that she visited the suit property on 15th August 2013.
29. According to PW3, the Defendants became violent after she identified two beacons in respect to the suit property. Due to the said violence, she was unable to complete the exercise of identifying the other beacons.
30. However, PW3 stated that using the google map, she was able to identify 14 houses on the suit plot. It was the evidence of PW3 that she was unable to know the number of people residing on the property due to the hostility of the people occupying the land.

The Defendants' case:

31. The 1st Defendant, DW1, stated that he stays on plot number M5 having been born on the land in 1974.
32. It was the evidence of DW1 that he has constructed residential houses in which he stays with his family members and that he has known the suit property as his home since 1974.
33. DW1 produced a letter dated 13th December 1989, which, according to him, shows the existence of the family and its occupation of plot number M5.
34. DW1 produced more letters from the District Officer and the Chief showing that plot number M5 belonged to the late Charo Shutu. The said letters are dated 29th December 1993, 1st February 1994, 2nd August 1994, 13th July 1995, 22nd August 1995, 21st June 1996, 19th September 1996 and 20th September 2007.
35. DW1 also produced the letter of allotment dated 12th April 2001 showing that Charo Shutu Masha, Kazungu Fondo and Japhat Noti Charo were allocated plot No "A" within Malindi Municipality measuring approximately 7.53 hectares being a leasehold for a term of 99 years.
36. In cross-examination, DW1 stated that the family of Charo shutu owns the whole of Plot number M4 and M5 which is as big as "a location". Although DW1 could not tell where the family land starts and ends, it was his evidence that the whole land measures approximately 18 acres.
37. DW1 stated that he was surprised when he learnt that the Plaintiff was issued with a letter of allotment in respect to the suit property because it is his family which has been in occupation of the land.
38. It was the testimony of DW1 that he knew about the issuance of the title document to the Plaintiff in the year 2003.
39. It was the evidence of DW1 that his grandfather had 38 wives who were living on plot number M4 and M5; that his father had over 100 children and that 10 of them live on the suit property.
40. DW1 informed the court that the suit property was forcefully taken away from them by the government; that the suit property is a portion of M5; that the late Mr. Shutu did not know about the issue of registration of land and that they have never challenged the titles that were issued to individuals in the area.
41. DW1 admitted in cross-examination that M5 has been allocated to many people who have put up houses. It was his evidence that on the plot marked "A" as indicated in the letter of allotment, there are almost 100 houses which do not belong to the Shutu family only.
42. The 2nd Defendant, DW2, informed the court that he was born on the suit property 60 years ago. It was his evidence that he first built his house on the land when he was 14 years old and that he has been living on the land since then.
43. According to DW2, he witnessed the construction of the airport and the Malindi-Mombasa Road which abuts the suit property and that the family used to plant cotton, mangoes, coconuts and cashew nuts on the suit property which was part of the 18 acres that the family owned.
44. DW2 informed the court that the Plaintiff only showed up with the title document in the year 2003 after the demise of their father.

45. DW2 maintained that plot number M5 was their father's land; that plot number M4 is partly owned by their family and the Bakshwein family and that as a family, they have a burial site for all the family members on plot M5.
46. DW2 informed the court that his father used to work at Malindi Municipal Council while his grandfather was a Chief.
47. The 3rd Defendant, DW3, informed the court that he has been living on plot number M5 for 30 years. It was his evidence that his father gave him a portion of the suit land as inheritance and he has been living on it with his wife and children.
48. It was the evidence of DW3 that his father had 38 wives with more than 100 children and that his father's land includes the land that was acquired by the airport where a radar has been put up.
49. DW3 informed the court that as a family, they are in possession of a letter of allotment that was issued to Charo Shutu, their late father, dated 12th April 2001. It was his evidence that his father never pursued the title document because he did not have money to do so.
50. DW4 informed the court that she is the daughter in law of the late Charo wa Shutu, wife to Kahindi Charo Shutu, whose mother was the 1st of the 38 wives of Charo wa Shutu.
51. DW4 stated that she was married to the Shutu family before independence by which time the Shutu family was tilling the suit property.
52. The evidence of DW4 is that she has been living on the suit property all along and that the Plaintiff started claiming that the land is his in the year 2003 when her husband died.
53. In cross-examination, DW4 stated that it is the Shutu family that owns the whole of M5 which runs from where the airport is, to the Municipal Council of Malindi's office, all the way to Muyeye, Mbuzi Wengi, Naran and Malindi Total Petrol Station.
54. According to the witness, the land on which the BP and Total Petrol Stations stand were given to them by the late Charo Shutu and that her house is next to where the Shutu family usually bury their kin.
55. It was her evidence that her husband had five wives while her father-in-law had 42 wives.
56. Elizabeth Fondo Shutu, DW5, informed the court that she is the mother of the 1st Defendant and was married to Joseph Fondo Shutu in 1959. It was her evidence that by the time she was married, Mzee Shutu Masha, the father of Charo shutu had passed on.
57. According to DW5, Charo wa Shutu was the first born of Mzee Masha and that he is the one who took control of the land owned by Shutu Masha upon his demise.
58. It was the evidence of DW5 that she has been living on the land since she was married and that her first born son was born on the suit property in 1963; that she only came to know the Plaintiff in the year 2003 and that she does not understand why the Plaintiff is claiming the suit property.
59. DW5 stated in cross-examination that the industries neighbouring the suit land were allocated the land by Charo Shutu who owned the whole land and that the 4th Defendant bought part of the suit property from Charo Shutu.
60. DW5 could not state the acreage that was owned by the Shutu family.
61. The Defendants' neighbour, DW6, stated that the 5th Defendant's daughter is his wife and also his cousin.
62. It was his evidence that the 5th Defendant, now deceased, is his uncle and that they have stayed on plot M5 for many years.
63. DW6, stated that the late Charo Shutu was a friend of the 5th Defendant. It was his evidence that he put up his house on the suit property 15 years ago.
64. It was the evidence of DW6 that the suit property has 16 houses including the house of the 1st, 2nd and 3rd Defendants. According to DW6, it is the late Charo Shutu who allowed the 5th Defendant to construct his house on the suit property because they were friends.
65. The 4th, 6th and 7th Defendants did not testify. The court was informed that the 5th Defendant is deceased.

The Plaintiff's submissions:

66. The Plaintiff's advocate submitted that the Plaintiff is the registered owner of plot number 4161; that the Defendants have trespassed on the said land and that the Defendants should be enjoined from using the land.

67. The Plaintiff's counsel submitted that at the time the Plaintiff was allocated the land, there were no families living on the suit land; that the land falls under an industrial area development zone and is not residential zone and that the Defendants entered the land after the suit was filed.
68. Counsel submitted that the Plaintiff has neither been dispossessed of the land nor discontinued his possession for a period of more than twelve years and that they have not shown that they were in actual and uninterrupted possession of the suit property for more than twelve years.

The Defendants' submissions:

69. The 1st, 2nd, and 3rd Defendants' advocate submitted that the Defendants produced evidence to show that they were born on the suit premises. Counsel submitted that the 1st, 2nd and 3rd Defendants are related, being either the grandchildren or the children of Charo Shutu.
70. The Defendants' advocate submitted that DW4 gave a detailed history regarding their occupation of the suit premises; that the site visit confirmed that the 6th Defendant together with the 4th Defendants have very old houses on the suit premises and that the Defendants and their respective families have been in occupation of the suit premises since they were born.
71. The 4th, 5th and 7th Defendants' advocate submitted that from the evidence presented in court, the Defence of adverse possession has been established; that by virtue of the provision of section 7 of the Limitation of Actions Act, the Plaintiff is precluded from evicting the Defendants.
72. Counsel submitted that his clients' case is based, besides adverse possession on the fact that they are innocent purchasers for value without notice.

Analysis and findings:

73. The Plaintiff is seeking for the eviction of the Defendants from the suit property on the ground that he is the registered proprietor of the same.
74. On the other hand, the 1st, 2nd and 3rd Defendants claim is that they have lived on the suit property for more than twelve (12) years and have acquired interest in the suit property by virtue of the doctrine of adverse possession.
75. The 4th, 5th and 7th Defendants did not testify in this matter. Consequently, their advocate submissions that they have been on the suit property for more than twelve years and that they are innocent purchasers for value has no basis in law.
76. The only issue for determination in this matter is whether the 1st, 2nd and 3rd Defendants, and by extension the people claiming interest in the suit property through them have acquired a title to the Plaintiff's land by continuously occupying it in a way that is inconsistent with the right of the Plaintiff as the registered proprietor.
77. The Defendants in this matter have raised the defence of limitation of time to defeat the Plaintiff's claim in respect to the suit property pursuant to the provisions of Section 7 of the Limitation of Actions Act.
78. Section 7 of the Limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of twelve years from the date of which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
79. The evidence that was produced in this court by the Plaintiff shows that on 8th June 1983, he applied for allocation of a plot within the Municipal Council of Malindi.
80. Initially, the Commissioner of Lands allocated to the the Plaintiff plot number 21, which according to the Plaintiff's letter dated 22nd July, 1985, was found to be within the Kenya Industrial Estate land.
81. The Plaintiff then requested to be allocated plots number 4 and 5 which had been advertised to enable him put up a bakery.
82. On 29th July 1985, the then District Commissioner, writing in his capacity as the Chairman of the allocation committee informed the Commissioner of Lands that the Committee had recommended the allocation of plot number 5 to the Plaintiff which was one of the plots that had been advertised.
83. The Plaintiff was issued with a letter of allotment for an unsurveyed industrial plot number 5, Malindi, on 18th April, 1986.

84. On 13th July, 1998, the Commissioner of Lands forwarded to the Land Registrar the grant in respect of portion number 4161 Malindi in favour of the Plaintiff for registration.
85. The grant that was produced in this court shows that although the Commissioner of Lands signed it on 28th December 1995, it was not until 16th April 2004 that the said grant was registered as CR 37527, thus giving to the Plaintiff the proprietorship rights over the suit property. Indeed, the stamp on the face of the grant shows that the same was received by the District Land Registry on 16th April 2004 for registration. Those dates are important as I shall show why they are important shortly.
86. The Defendants case is that they have been on the suit property for many years. DW1 Informed the court that he was the son of Joseph Fondo Shutu and was born on the suit property in 1974. Joseph Fondo Shutu was the brother of Charo Shutu who was said to have had over 38 wives and more than 100 children.
87. According to the evidence of DW1, the families of Charo Shutu and Joseph Fondo Shutu owned the land known as M5 and M4. It was his evidence that parcel of land known as M5 covered an area equivalent to a location and that the suit property is a portion of M5.
88. The mother of DW1, Elizabeth Fondo Shutu, informed the court that she was married to Joseph Fondo Shutu in 1959, by which time Shutu Masha had died.
89. It was her evidence that she has been living on the suit property since she was married and that she saw the Plaintiff for the first time in the year 2003.
90. The 3rd Defendant DW1, stated that he was born on plot M5 sixty years ago. It was his evidence that he has been living on the said plot with his wife and children since then. That is the same evidence that Philip Charo Shutu, the 2nd Defendant gave.
91. To show that Plot number M5 belonged to the Shutu family, the Defendants produced several letters in evidence.
92. The first letter is dated 13th December 1989 by the Town Clerk and addressed to the District Officer. In the said letter, the Clerk informed the District Officer that the official residence of Charo Shutu is designated as an industrial zone in the Council's Development Plan. The Clerk informed the District Officer that Charo Shutu had lived on the land for the last 40 years. The Clerk finalised his letter as follows;

“The case of Charo Shutu should receive the highest consideration as he has a large family and will need alternative residence in the event the plot is developed. The council will advise the developer to wait until the matter is solved.”

93. The Clerk did not state in his letter which developer(s) will have to wait as the issue of relocating the residence of Charo Shutu was being considered. The suit property is one of the portions within the industrial zone.
94. In his letter dated 29th December 1993, the District Officer informed the District Commissioner that Charo Shutu Masha, a squatter on plot number M5, is a long time resident of the plot. The DO stated in his letter that Mr. Shutu used to occupy a bigger area which had since been allocated for other purposes.
95. On 2nd August 1994, the Provincial Commissioner requested the Commissioner of Lands to revoke the letters of allotment already issued to other people in respect to plot number M5 so that the family of Charo Shutu Masha could be left to occupy the land.
96. On 13th July 1995, the Commissioner of Lands, in response to the request to allocate Mr. Charo Shutu land, directed the District Land Officer to liaise with the Surveyor and prepare a plan showing the exact site(s) occupied by Mzee Charo Shutus family and “all the vacant sites within the above plot (M5) and forward the same to him to enable him process the family's request.”
97. In his report dated 22nd August 1995 to the Commissioner of Lands, the District Lands Officer stated as follows:

“SPRO at (100) states that a small fragment of plot A indicated as “A1” is committed site, “B” is committed and “C” is planned for a fire station and Council garage. These sites measure 6.70 ha, 0.90 ha and 1.6 ha respectively.

A family representative has pointed out that the family dwelling houses are clustered around site “A”..... I recommend that the physical planner be requested to plan for site “A” for allocation to the Shutu family and forward the same for your approval and or further instruction.”

98. On the basis of the report of the District Lands Officer, the Commissioner of Lands issued to Charo Shutu Masha, Kazungu Fondo and Japhet Noti Charo a letter of allotment dated 12th April 2001 for unsurveyed residential plot number “A” measuring approximately 7.53 hectares with a condition that the Shutu family pays Kshs.1,062,700.00.
99. The report of the Land Officer shows that as at 22nd August 1995, “the family dwelling houses were clustered around site “A” with semi permanent houses.” In the same report, the Land Officer confirmed that a small fragment of plot A indicated as “A1” is committed. He recommended that the area measuring approximately 6.70 Ha should be allocated to the Shutu family.
100. I have perused the sketch plan annexed on the letter of allotment that was issued to the Shutu family. The plot marked “A” encompasses the small fragment which the land officer had indicated in his report as “A1”. The small fragment within plot A is what had been allocated to the Plaintiff in 1986, and which the Land Officer had stated in his report that it was “committed”.
101. It would appear that when the Commissioner of Lands issued the letter of allotment to the Shutu family for plot marked as “A”, the Commissioner of Lands did not take into consideration the report of 22nd August 1995 which showed that a portion of Plot A was already committed.
102. Indeed, there is no indication that the Commissioner of Lands cancelled the letter of allotment that had been issued to the Plaintiff on 18th April 1986 which is a portion of the land within plot marked as “A”.
103. As I have already stated, the instructions by the Commissioner of Lands to the District Lands Officer was to identify “the exact sites occupied by Mzee Charo Shutu's family and all the vacant sites within plot M5” to enable him process “the family's request.” That is what the land officer did by confirming that although the District Commissioner had recommended that site A, B and C should be allocated to the Shutu family, a small fragment indicated as “A1” on his plan had already been committed as well as plots marked as “B” and “C”.
104. The report by the Land Officer dated 22nd August 1995 therefore leads me to one conclusion, that although the Shutu's family houses were clustered around site “A1” those dwellings were not on the small fragment of what was indicated in the drawing of the land officer as “A1”.
105. Even if the family of Mr. Shutu was cultivating the plot indicated as “A1” by 22nd August 1995, the government had already allocated the said plot to the Plaintiff.
106. The Plaintiff produced in evidence the letter of allotment that was issued to him in 1986 and the survey plan in respect to the suit property.
107. The survey plan that was produced in court shows that the suit property was surveyed on 23rd April 1986 vide a survey plan number FR 176/178. The Deed Plan in respect to the suit property was issued on 19th September 1995 and the grant was signed by the Commissioner of Lands on 28th December 1995.
108. It therefore follows that by the time the Shutu family was issued with a letter of allotment for land measuring approximately 7.53 hectares, a portion of that land abutting the Malindi-Mombasa road measuring 1.70 Ha had already been allocated to the Plaintiff and was not available for allocation.
109. It is not in dispute that the suit property is government land which is within a township and not Trust land. Indeed, from the letters that were produced by the Plaintiff, the government advertised the suit property for allocation for industrial purposes and the Plaintiff applied for it.
110. Section 9 of the Government Lands Act, (repealed) mandated the Commissioner of Lands to cause any portion of a township to be divided into plots suitable for the erection of buildings for business or residential purposes and such plots could be disposed of. A “township” has been defined in the Act to mean a municipality. Of course, this would not have been permissible if the land was classified as Trust land under the repealed Constitution.
111. Where land was classified as Trust land under the repealed Constitution, the Constitution provided that such land could only be set apart for industrial purposes once the residents ordinarily residing in the area are compensated.

112. Once an individual has been allocated government land, that land ceases being available for allocation to any other person, unless the allottee fails to comply with the conditions thereof. Consequently, the Shutu family could not have been lawfully allocated the suit property by the government in the year 2001 because the same had already been allocated to the Plaintiff and duly surveyed.
113. The Defendants have not alleged that the grant that was issued to the Plaintiff was fraudulently and unlawfully issued. Their only defence is that they are entitled to the suit property by virtue of the doctrine of adverse possession.
114. None of the advocates addressed me on the issue of when time started running in this matter, if at all the Defendants were in possession and occupation of the suit property since time immemorial as claimed.
115. Section 41(a)(ii) of the Limitation of Actions Act provides that the Act does not apply to Government land or land otherwise enjoyed by the Government.
116. As long as the suit property remained Government land, it does not matter that the 1st, 2nd, and 3rd Defendants father and grandfather and the Defendants were in possession of the land in question viz-a-viz the Limitation of Actions Act. Of course, it can be argued that when the government was allocating the land, it should have considered the people who were residing on the land first. However, the doctrine of adverse possession is not applicable over such land. In the case of **Training Institute Vs Agnes Nyavu Charo & 106 Others, Mombasa Civil appeal No. 286 of 2010**, the Court of Appeal held as follows:

“To create a precedent that a legitimate expectation for allocation of government land can arise out of an occupation declared illegal by statute would be opening a pandora's box which would compound the problem of land by encouraging squatters invasion of Government land. Further it would be tantamount to introducing the doctrine of adverse possession in Government land. This would be inimical to the public policy of maintaining law and order”.

117. Consequently, time can only run as against the registered owner of the suit property, who in this case, is the Plaintiff.
118. Section 7 of the Limitation of Actions Act prohibits any person (excluding the government) to recover land after the end of twelve years from the date on which the right of action accrued to him.
119. The Plaintiff was allocated the suit property by way of a letter of allotment in 1986. However, the grant was not registered in his favour until 16th April 2004 although the same was signed by the Commissioner of Lands on 28th December 1995.
120. Considering that the grant in respect of the suit property was registered in favour of the Plaintiff in the year 2004 although he was granted with the letter of offer in 1986, can it be said that time started running in 1986 and not in the year 2004?
121. Although the suit property was not available for allocation after the same was offered to the Plaintiff in 1986 by way of a letter of allotment, the Plaintiff only had an equitable interest in the land until the same was registered in his favour in the year 2004. In the intervening period, the Government could cancel the letter of offer if the Plaintiff failed to meet the special conditions therein. The land, strictly speaking, was not private land until when it was registered in favour of the Plaintiff.
122. Section 32(1) of the Registration of Titles Act (repealed) provided that no instruments, until registered in the manner described shall be effectual to pass any land or any interest therein before registration.
123. Section 21(2) of the Registration of Titles Act on the other hand provided that every grant is supposed to be delivered to the registrar of the registration district in which the land is situated who shall register it.
124. The Plaintiff's right of action to recover the suit property for purposes of Section 7 of the Limitation of Actions Act therefore accrued on 16th April 2004 when the grant was registered in his favour.
125. A defendant can only raise a defence of the doctrine of adverse possession when, by parity of

- reasoning, he can recover the same land by either filing a suit or a counter-claim.
126. It is trite law that for a Defendant to succeed in a suit for adverse possession, he must annex or produce a certified extract of the title to the land in question (See Order 37 Rule 7(2) of the Civil Procedure Rules).
127. Consequently, the Defendants' defence in this matter that the Plaintiff's claim is time barred cannot arise considering that the grant was registered in favour of the Plaintiff in the year 2004 while this suit was filed in the year 2009.
128. In conclusion, I would say that the plight of the family of Mr. Shutu to be allocated the whole land known as M5 seems to have come too late in the day.
129. I say so because by the time the Commissioner of Lands instructed the Lands Officer to look for vacant land to allocate to the said family, he found that most of the land had already been allocated. Having offered the said land to individuals, the government bound itself to issue to those individuals titles upon meeting the conditions specified in the letters of offer. This court cannot in the circumstances declare those allocations unlawful just because the said family feels that they are entitled to the whole land. Doing so would be an abdication of this court's constitutional duty to protect the rights of the people who acquired the parcel of land within plot number M5 lawfully.
130. The Plaintiff's claim is for a parcel of land measuring 1.710 hectares. The Plaintiff has proved that the said land was lawfully allocated to him.
131. The evidence before me also shows that although the Defendants' houses were in the neighbourhood of the suit property in 1995 as observed by the Lands Officer, the Defendants trespassed onto the suit property after they were issued with a letter of allotment in the year 2001.
132. No evidence was placed before me to show that after the Defendants were issued with the said letter of allotment, they complied with the conditions therein. In any event, the Plaintiff had already been allocated the said land in 1986 and taken possession of the same by fencing and leasing it to PW2 for four years.
133. Indeed, I am not convinced that the plot allocation committee that was headed by the District Commissioner could have advertised and allocated to the Plaintiff the suit property if indeed the houses belonging to the 1st, 2nd and 3rd Defendants were situated on the land in question. It may be true that the Defendants were cultivating the suit property considering that their houses were in the neighbourhood. However, the said cultivation was on government land and the same was not available for allocation the moment the Plaintiff was allocated the land. The Shutu family was only entitled to land that had not been allocated.
134. Consequently, and for the reasons I have given above, I find and hold that the Plaintiff has proved that he is the legal owner of the suit property.
135. For those reasons, I allow the Plaintiff's Plaint dated 30th March 2009 as prayed.

Dated and delivered in Malindi this **19th** day of **June**, 2015.

O. A. Angote

Judge