



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**HCCC NO. 2 OF 2012 (OS)**  
**(FORMELY MOMBASA HCCC NO. 173 OF 2008 (OS))**

**IN THE MATTER OF: THE PARCEL OF LAND KNOWN AS PLOT NO. 816**  
**(ORIGINAL NO. 703/47) MALINDI**

**AND**

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CHAPTER 22**  
**OF THE LAWS OF KENYA**

**BETWEEN**

**PRICILLA GACERI MUGAMBI.....PLAINTIFF**

**=VERSUS=**

**RICHARD KARL ZIPS.....DEFENDANT**

**AND**

**1. GUDDY K. HARBHAJAN BIRKIGIT**

**2. OLIVER TAVARES.....INTERESTED PARTIES**

**JUDGMENT**

**Introduction**

1. The Plaintiff moved this court by way of Originating Summons filed on 10<sup>th</sup> July 2008 in Mombasa.
2. In the said Originating Summons, the Plaintiff is claiming entitlement of plot number 816 (original number 703/47) Malindi by virtue of adverse possession.
3. After filing the Originating Summons, the Plaintiff filed an Application on 24<sup>th</sup> September 2008 and sought for the leave of the court to serve the Defendant through substituted service. The said Application was allowed by the court on 17<sup>th</sup> October 2008.
4. The Interested Parties herein happened to read in the newspaper the service of the Originating

- Summons upon the Defendant by way of advertisement. They filed an Application on 19<sup>th</sup> November 2008 seeking the leave of the court to be enjoined in the suit as Interested Parties.
5. The Interested Parties were allowed by the court to participate in the proceedings so as to enable the court to effectively and completely adjudicate upon the matter. The court also directed the Plaintiff to amend the Originating Summons to include the Interested Parties in the suit.
  6. The Plaintiff filed a Further Amended Originating Summons on 23<sup>rd</sup> September 2010 and framed the following questions for determination by the court:

**(a) Save for an area measuring 35 Meters by 25 Meters or thereabouts of plot number 816 [originally 703/47] Malindi which is duly fenced and under occupation and in use by the Interested Parties, whether the Plaintiff is a beneficiary by virtue of adverse possession of the remaining portion thereof of the parcel thereof known as plot no. 816 (originally 703/47).**

**(b) Whether an order of partition should issue to curve out the said 32 meters by 25 meters area of plot number 816 (originally 703/47) Malindi under occupation and in use by the Interested Parties thereby leave out the reminder thereof to be registered in favour of the Plaintiff.**

7. In support of the Originating Summons, the Plaintiff filed an affidavit in which she deponed that for a period exceeding 12 years and until the filing of the suit, save for an area measuring 35 by 25 meters or thereabout which is duly fenced and under occupation and use by the Interested Parties, she had all along been in exclusive, continuous and quiet possession of the remaining portion thereof of the suit property which property is registered in the name of Richard Karl Zips, the Defendant.
8. The 2<sup>nd</sup> Interested Party swore a Replying Affidavit on his behalf and on behalf of the 1<sup>st</sup> Interested Party on 3<sup>rd</sup> August 2009 and deponed that he had occupied the suit property since 1985 together with the 1<sup>st</sup> Interested Party after the property was handed over to them by the Defendant who was their close friend.
9. The 2<sup>nd</sup> Interested Party further deponed that sometimes in the year 2000, the Plaintiff approached him and requested to be granted a lease on a part of the premises standing on the suit property with a view of renovating the same for her intended business; that the Plaintiff carried out minor repairs and took possession of a portion of the premises and that he has since learnt that the Plaintiff has illegally sublet the premises to unsuspecting persons without his consent.
10. The 2<sup>nd</sup> Interested Party finally deponed that in the year 2004, the Plaintiff stopped paying rent but after sending to her demand letters, she forwarded to him cheques in settlement of the rent arrears; that the Plaintiff registered a caveat on the property as a lessee; that the Plaintiff is not entitled to the orders sought since her occupation of the suit plot has neither been continuous nor uninterrupted for twelve years.
11. The matter proceeded by way of viva voce evidence.

### **Plaintiff's case**

12. The Plaintiff (PW1) informed the court that she would be relying on her written statement which was produced as exhibit number 1 and her bundle of documents which were produced by consent as Plaintiff exhibit number 2. The Plaintiff's bundle of documents were filed on 15<sup>th</sup> June 2012 and are paginated from number 1 all through to number 54.
13. It was the Plaintiff's testimony that she came to Malindi in 1982 and knew the Defendant in the year 1985. By then, the Defendant was running a horse riding center on the suit property which is the same plot that she is currently occupying. The Plaintiff testified that she is occupying  $\frac{3}{4}$  of the plot while the Interested Parties are occupying the remaining portion.
14. The Plaintiff informed the court that she was aware of the cheques that were annexed on the Interested Parties' Replying Affidavit. She stated that she issued the cheques when the Interested Parties claimed to be the owners of the suit property and that she stopped the cheques from being paid although the Interested Parties had cashed them.

15. It was PW1's further evidence that she stopped the cheques when she came to learn that the Interested Parties were not the owners of the suit property.
16. The Plaintiff stated that every time she repaired the structures on the suit property, the Municipal Council of Malindi would demolish them on the basis of the Interested Parties complaints. The Plaintiff further stated that she knew the Defendant while she was working at Ostrich and Tour Company in Malindi.
17. It was the Plaintiff's testimony that the Defendant went to Germany in 1986 and they continued communicating. She even visited him in Germany in November 1986 and informed him that she wished to purchase the suit property.
18. It was her evidence in chief that she informed the Defendant that she will move on his property while he was still thinking about her proposal to purchase the same. The communication between her and the Defendant stopped and she moved on the property in 1989 where she has been operating from to date.
19. In her written statement, the Plaintiff stated that once she got onto the suit property, she had the place "redone" and started to operate a camp site called AB & C.
20. According to the Plaintiff, as she took possession of the suit property, the Interested Parties approached her around the same time and told her that they were interested in the property; that they took a dilapidated cottage which was previously an office of Robinson Island at the corner of the land and that the 2<sup>nd</sup> Interested Party moved into the cottage and had it fenced off.
21. According to the Plaintiff's written statement and testimony, she has been paying rates to the Municipal Council of Malindi and that in the year 2005, the Interested Parties sent auctioneers to her premises and distrained her property in the year 2009 for non-payment of rent claiming that they were the owners of the land. She however discovered that they were not the owners of the property.
22. The Plaintiff denied having been a tenant of the Interested Parties and stated that the Interested Parties are occupying an area measuring 35 meters by 25 meters; that she registered a caveat on the title in respect to the suit property and that she started constructing rental houses, a bar and restaurant on the suit property in 1989; that she has licenses and approved plans from the Municipal Council of Malindi.
23. In cross-examination, PW1 denied of having been the Defendant's tenant in in the year 2006. She stated that when she moved to the property she believed that the Interested Parties were the owners.
24. PW1 agreed that she dealt with the Interested Parties and gave them cheques thinking that they were the owners of the suit property. However, she stated that she knew that the property belonged to the Defendant.
25. PW1 was referred to a notice that was put in the nation newspaper of 23<sup>rd</sup> November 2005 by her then Advocate Khaminwa & Khaminwa Advocates entitled "**Important Notice.**" The Notice is in the Plaintiff's bundle of documents.
26. According to PW1, the importance of the notice that she caused to be published in the newspaper was to find out if the Defendant was still alive. According to her, she knew that the Defendant was dead in the year 2005 but she was not sure "whether he was dead" thus the notice.
27. The Plaintiff stated in cross-examination that she lodged a caveat on the title as a lessee but denied that she was a tenant of the Interested Parties. She further testified that she lodged the caveat after the distress for rent by the Interested Parties so as to protect her property.
28. According to PW1, the Defendant was the owner of the suit property in 2005; that she lodged the caveat on the property before the distress for rent in the year 2006 and that she wrote a letter dated 18<sup>th</sup> January 2006 addressed to the 2<sup>nd</sup> Interested Party which was in reference to the distress for rent by the auctioneer.
29. According to the Plaintiff, it was pursuant to her letter that she issued the cheques to the 2<sup>nd</sup> Interested Party. On further cross-examination, the Plaintiff stated that she wrote a letter to the 2<sup>nd</sup> Interested Party in the year 2006 in reference to some money which she was to pay him as a caretaker for a different property.
30. The Plaintiff further stated that the land rates for the year 2008, 2009 and 2010 shows that the rates were paid by the Defendant. However that changed in the year 2011. The Plaintiff could not explain how her name found its way on receipt for the payment of rates for the year 2011.
31. It was the Plaintiff's testimony that she stays in her house in Mtangani and not on the suit

- property; that the first time she constructed houses on plot number 816 was between 1999 and 2000 although she did not have evidence of the said construction. The house that the Plaintiff claimed to have constructed was marked as “A” while the house which she renovated was marked as “B” at page 14 of her bundle of documents. She also claimed to have constructed the structure marked as “C” in the year 2002 and the house marked as “D” which is a rental house. The structures that was being occupied by the Interested Parties was marked as “I”.
32. In re-examination, the Plaintiff stated that there was a lot of harassment by the Interested Parties; that she never signed any agreement with the Interested Parties as there tenant and that she was distressed for rent twice by the Interested Parties.
33. PW2 informed the court that she came to Malindi in 1995 to seek employment. When she was unable to get employment, she started cooking chapatis outside the suit property, which she referred to as “Mama Priscilla's” for three years.
34. She was thereafter employed at African Pearl Hotel until 2003 when she was employed at a club called “Mabeste Club”. This club is on the disputed parcel of land. PW2 is currently working at the Plaintiff's residence as a caretaker.
35. The witness testified that the Plaintiff renovated a building on the suit property and the said building currently has a restaurant which is being run by the Plaintiff. She stated that in addition to the said restaurant, the Plaintiff has eight houses on the plot.
36. The witness described the houses on the suit property as follows: one of the houses is known as Muthaiga and is next to the road at the gate. The other three houses are on the same side next to the fence; a bar known as Central Park (formally Mabeste); an office and a kiosk. It was PW2's testimony that the kiosk is next to mama Jamilla's house.
37. The witness stated that she did not know the Interested Parties.
38. According to PW2 written statement filed on 14<sup>th</sup> December, 2012, she cooked chapatis outside the suit property until sometime in the year 2002 when she was employed by African Pearl Hotel which is next to the suit property.
39. PW 2 further stated in her statement that in 1995, the suit property had horse stables as well as a dilapidated structure which was renovated by the Plaintiff who then established a restaurant known as “Family Pot”.
40. In cross-examination, the witness stated that she did not know the Defendant and the plot number in respect to the suit property; that the plot has eight houses with one gate and that the house marked as “B” in the photograph has its own gate. According to the witness, all the eight houses have their own plot which is distinct from plot marked as “B”.
41. The witness finally stated in cross-examination that she used to see houses in 1995 although she did not know the owners and that she knew the Plaintiff in 1995.

### **Interested Parties' case**

42. The 2<sup>nd</sup> Interested Party, DW1, stated that he has been in Malindi since 1969 and that he used to work with a tour company.
43. DW1 testified that he moved to the suit property in 1985 when the Defendant was going overseas. According to DW1, the Defendant was his friend by virtue of the business he (DW1) was involved in. He used to get for the Defendant clients for his business of horse riding.
44. When the Defendant was leaving the country, he approached DW1 and requested him to take care of his business. The understanding that they had was for DW1 to take care of the two horses that were on the property. He was also supposed to take care of the place, pay the rates and other outgoings in respect to the suit property.
45. DW1 testified that testified that everything was fine between 1985 until 1989 when he started experiencing financial problems. One of the horses had died and it was becoming expensive to take care of the other horse which was aging. He gave out the aging horse to Kibokoni Riding School and he continued taking care of the plot. He maintained one person on the plot as a watchman and released the other workers.
46. DW1's further evidence was that in the year 2000, the Plaintiff approached him with a view of renting a house on the suit property and also to open a restaurant which she christened “Family Pot”. He agreed to let the house to the Plaintiff because of the financial problems that he was experiencing.

47. According to DW1, he agreed with the Plaintiff that she would clear the area and then start paying rent after three months. She started paying rent in the year 2001 of Kshs.10,000 per month.
48. In 2004, the Plaintiff stopped paying rent and that is when DW 1 demanded for the outstanding rent of Kshs.339,120 as at 2<sup>nd</sup> November 2005.
49. DW1 stated that he thereafter sent auctioneers to the Plaintiff's premises to distress for rent but the Plaintiff later agreed to pay Kshs.20,000 every month so as to clear the outstanding rent. The demand letter is in the Plaintiff's bundle of documents.
50. It was DW1 further testimony that the Plaintiff gave him postdated cheques. Two cheques went through but she stopped the other cheques after which DW1 sent Tip Top auctioneers to distress for rent for January 2005 up to August 2009. When the auctioneers went to the Plaintiff's premises to distrain for rent as instructed by DW 1, they found that the Plaintiff had filed the current suit.
51. DW1 referred the court to a caveat which had been registered by the Plaintiff against the title as a lessee on 28<sup>th</sup> March, 2006. The caveat was dated 10<sup>th</sup> July, 2005.
52. DW1 maintained that the Plaintiff is his tenant; that she has not paid rent to date because of this suit and that he is still claiming for rent from her which now stands at over Kshs.1,000,000.
53. In cross-examination, DW1 admitted that he did not have a lease agreement with the Plaintiff; that the Plaintiff occupies a portion of the suit premises and that the Plaintiff did not have exclusive occupation of the property. She only occupied part of the property.
54. It was DW1 evidence in cross-examination that the agreement between him and the Defendant was mutual and that he had no document to show that the Defendant handed to him the property. He stated that the 1<sup>st</sup> Interested Party has been running her business in the suit property since 1985 and further that he was the one who gave Kinyua Auctioneers the instructions to levy distress over the Plaintiff's property for non - payment of rent.
55. According to DW1, he levied distress for rent as an agent of the owner of the property although he did not have any document on the issue of agency.
56. DW1 admitted that the Plaintiff renovated some structures on the suit property on agreement; that some structures were put up by the Plaintiff between the year 2002 and 2003 and that the structure labeled as "C" was repaired by the Plaintiff and that the council stopped her from constructing the structures on the suit property.
57. DW1 testified that he has not been in communication with the Defendant since 1985 and that the Plaintiff has been on the property since the year 2000 with his (DW 1) permission.
58. The 1<sup>st</sup> Interested Party testified that he runs a tourist venture called Robinson Island.
59. DW2 stated that the Plaintiff has been a tenant on the suit property since the year 2000 after asking them (DW1 and DW2) to lease the place to her. According to DW2, they only leased to the Plaintiff ¼ of the suit property and the Plaintiff started renovating some of the structures on the suit property.
60. It was DW2 evidence that the Plaintiff stopped paying rent in the year 2004 and that is when they instructed auctioneers to levy distress for rent. That is when she gave them postdated cheques.
61. In cross-examination, DW2 was categorical that she was with the 2<sup>nd</sup> Interested Party when the discussion on the renting of the property to the Plaintiff happened and that the Defendant was their mutual friend; that they have never heard from the Defendant since he left the country; that the Plaintiff occupied either 1/4 or 1/3 of the property and that she has renovated all the structures on the suit property.
62. DW2 finally stated that the Plaintiff never moved in the suit property in 1986 and that the Plaintiff used to pay the rent since the year 2000 which enabled them to pay the rates and other expenses.

### **Submissions**

63. The Plaintiff's and Interested Parties' counsels filed their written submissions on 3<sup>rd</sup> June 2013 and 19<sup>th</sup> July 2013 respectively. Counsel's appeared before me on 27<sup>th</sup> July 2013 and highlighted the said submissions.
64. The Plaintiff's counsel submitted that the Interested Parties are not the legal representatives of the Defendant; that they cannot mount a defence to this suit and that they have not filed a counter-claim against the Defendant or a cross-suit.

65. The Plaintiff's counsel further submitted that the Plaintiff has over the years repeatedly used her own financial resources to renovate existing buildings, paid rates and done substantive physical acts on the buildings standing on the suit property. She has been in a non-permissive actual occupation of the portion of an area of land on plot no. 816.
66. According to the Plaintiff's counsel, the actual Plaintiff's possession of the portion of the suit property that she occupies has been open and notorious and the said possession has been exclusive and uninterrupted for over 12 years; that the evidence from the Plaintiff as well as that of the 2<sup>nd</sup> Interested Party confirm that the Defendant abandoned plot number 816 in 1985 and has to date not returned to resume possession of it and that the Plaintiff who entered adversely onto the portion of land 1986 has thus been there for over 12 years.
67. The Plaintiff's counsel submitted in detail the elements of adverse possession which I have considered.
68. The Interested Parties' Advocate submitted that a squatter has a title based on his own possession and this title is good against everyone except the true owner.
69. Counsel submitted that a Tenant cannot acquire a title against his landlord for occupation by a tenant is never adverse to the Landlord's title which the tenant is estopped from denying.
70. Counsel submitted that the Plaintiff entered the suit land herein on the permission of the Interested Parties by way of a verbal lease; that the Plaintiff did not have exclusive physical control of the land; that the Plaintiff paid rent to the Interested Parties from the year 2000 and only stopped paying rent using a court order; that there is no clear *animus possidendi* and that the Interested Parties have always been in occupation of the suit property and are entitled to adverse possession.

### The Law

71. Adverse Possession has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by state law.
72. The Period prescribed by the Limitation of Actions Act, cap. 22 for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years.
73. According to **Halbury's Laws of England, 4<sup>th</sup> Edition, Volume 28, paragraph 768, no right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.**
74. An owner of land may cease to be in possession of his land by reasons of dispossession or discontinuance of possession. Discontinuance of possession occurs when the person in possession goes out and another person takes possession and that possession must be continuous and exclusive.
75. To constitute dispossession, the acts must have been done which are inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it, thus the term "adverse".
76. The Court of Appeal in **Wambugu -vs- Njuguna KLR 172** defined what discontinuance of possession means. The Court of Appeal was of the view that the proper way of assessing proof of adverse possession would 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 or she has been in possession for the requisite number of years.
77. The elements of adverse possession that must be proved by a claimant are well settled. According to the **"Element of Law, 5<sup>th</sup> Edition by Kevin Gary and Susan Francis Grey at paragraph 9.1.43 at page 1179,** the author has described those elements as follows:

**"Possession is attributed to the squatter only if he has both factual possession (*factum possession*) and the requisite intention to possess (*animus possidendi*). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period."**

78. The intention (*animus possidendi*) must be manifested unequivocally to signify an intention to dispossess the owner. Any form of acknowledgement of the true owner's title will operate to

negate such intention (see **Megarry & Wade, The Law of Real Property; 6<sup>th</sup> Edn Sweet and Maxwell**).

79. Proving that one has disposed the true owner of a property for more than 12 years might not be difficult. But what happens when the true owner leaves his property in possession of somebody else as alleged by the Interested Parties? In the case of **Hughes Vs Griffin (1969) 1 ALL ER 460**, it was held that an owner who actually occupies land is in possession of it. If he does not actually occupy it but puts someone else in to occupy it for him without creating any kind of tenancy, then the owner is actually in possession.

### **Analysis of the Evidence**

80. It is not in dispute that the suit property is registered in the name of the Defendant. It is also not in dispute that the Defendant left the country in or about 1985.

81. According to the Plaintiff, she continued communicating with the Defendant after he left the country and even visited him in Germany in 1986. During this communication, the Plaintiff offered to purchase the suit property but the Defendant declined to sell it to her.

82. In the written statement, the Plaintiff has stated that she subsequently moved into the suit property without notice to the Defendant and started clearing the bushes. She then started operating a camp site. This, according to her testimony, was in the year 1989.

83. It was the Plaintiff's evidence that around this time, the 2<sup>nd</sup> Interested Party also moved on the suit property and occupied a cottage which covered an area measuring 35 Meters by 25 Meters.

84. The Plaintiff has not indicated in her statement the year she took over the suit property. However, while testifying, she stated that she moved to the suit property in 1989.

85. The Interested Parties version is different. According to the Interested Parties, the suit property was left in their possession in 1985 by the Defendant and they continued looking after the two horses that he left behind.

86. Although the Defendant had informed the Interested Parties that he was going away for a few months, he has never come back since then.

87. It is rather incomprehensible that the Defendant could have left the suit property which had structures and horses unattended to, and that the same remained unattended to until 1989 when the Plaintiff took possession.

88. The Interested Parties version that the suit property together with the structures thereon and the two horses were left to them by the Defendant for a few months sounds credible and plausible. In any case, the Plaintiff did not state in which capacity the Interested Parties moved to the suit land around the same time she also moved on the suit property, if her testimony is to be believed. Did they just emerge from the space and claimed a stake on part of the property whose owner she claims she knew? It is highly unlikely.

89. According to the Plaintiff's testimony, she has always been in possession of the suit property and she has been carrying on the business of a bar and restaurant. The Plaintiff stated that she does not stay on the suit property.

90. If in deed the Plaintiff has been operating her businesses on the suit property since 1989, nothing would have been easier than for her to produce in evidence the licenses for the said businesses which are ordinarily issued annually by the Municipal Council. Such licenses or permits would have shown the time when she took possession of the structures on the suit premises for the purpose of computing time.

91. PW2 informed the court that she was employed by the Plaintiff at a club situated on the suit property in the year 2003. She stated that she used to sell chapatis outside the suit property in 1995. She stated that in 1995, there were people who were clearing the bush and staples and that the Plaintiff renovated a building and established a restaurant which was known as "family pot".

92. No evidence was tendered by the Plaintiff to show when this particular restaurant was established on the suit property to assist the court in computing of time.

93. The 2<sup>nd</sup> Interested Party's evidence was that the Plaintiff approached him in the year 2000 to rent the structures on the suit property which she was allowed to renovate and pay a monthly rent of Kshs.10,000. The Plaintiff then opened a restaurant christened "family pot". This is the same restaurant that PW2 said she saw while selling chapatis outside the suit property.

94. PW2 stated in her written statement that she sold chapatis outside the suit property until the year

- 2002 when she was employed at African Pearl Hotel which is next to the suit property. It is therefore more likely that PW2 saw the establishment of the said "Family Pot" restaurant in the year 2000 as claimed by the 2<sup>nd</sup> Interested Party and not before.
95. The Plaintiff annexed in her bundle of documents the letter dated 2<sup>nd</sup> November 2005 by the 2<sup>nd</sup> Interested Party and addressed to her. The letter was demanding for the outstanding rent in respect to plot number 816 (the suit property). The outstanding amount until September 2005 was Kshs.329,120 while the rent for October 2005 was Kshs.10,000. The total outstanding rent up to October, 2005 was kshs.339,120. The total amount including rent for the month of November 2005 was Kshs.349,120.
96. The Plaintiff did not pay the outstanding rent and on 14<sup>th</sup> January 2006, the firm of Kinyua & Co. Auctioneers distrained and proclaimed the Plaintiff's movable property. The Proclamation was annexed on the Plaintiff's bundle of documents.
97. It would appear that the distraint for rent and proclamation jolted the Plaintiff because on 18<sup>th</sup> January 2006, the Plaintiff wrote to the 1<sup>st</sup> Interested Party and agreed to offset the arrears by making monthly payments of Kshs.20,000 by cheques. Five postdated cheques were issued by the Plaintiff and according to her testimony, some of the cheques went through while she stopped others.
98. The letter by the Plaintiff acknowledging to settle the outstanding amount and the five copies of the cheques for Kshs.20,000 each were included in the Plaintiff's bundle of documents.
99. When the Plaintiff was asked why she had agreed to offset the rent arrears if indeed she had taken the property belonging to the Defendant, she stated that when she moved to the property, she believed that the Interested Parties were the owners of the suit property. She however stopped the cashing of some cheques which she had forwarded to the Interested Party with a request in writing that they should stop the auctioneers when she realised that the Interested Parties were imposters.
100. The demand letter by the Interested Parties for the rent arrears up to November 2005, the distress for rent and the issuance of the cheques by the Plaintiff to offset the said rent arrears confirms that the Plaintiff was all along under the impression that the suit property belonged to the Interested Parties or that the Interested Parties had the permission of the Defendant to collect the rent from her.
101. The Plaintiff would not have agreed to pay the Interested Parties the rent for using the structures on the suit property if her intention was to dispossess the Defendant, whom she claims to have known and even visited him in Germany in 1986 the suit property as she has claimed.
102. I therefore believe the Interested Parties evidence that the Plaintiff was allowed in the suit property in the year 2000 and she used to pay them a monthly rent of Kshs.10,000 until 2004 when she stopped paying.
103. From the evidence on record, it was around the year 2004 that the Plaintiff realised that the suit property belonged to the Defendant and that the Interested Parties were just imposters. That is why she stopped paying the rent to them.
104. The other reason that makes me believe that the Plaintiff only came to know the owner of the suit property around the year 2004, or that the Interested Parties did not have authority to collect rent on behalf of the owner in the year 2004 or thereabouts is because on 23<sup>rd</sup> November 2005, the Plaintiff through her advocate published in the Nation Newspaper an "Important Notice". The Notice was directed to the Defendant or his next of kin and any person who was the administrator or executor of his estate to get in touch with her using the address that was indicated in the notice.
105. When asked why she published the notice, the Plaintiff stated that she knew that Defendant was dead but "she wanted to be sure." Why would she want to be sure if the Defendant was alive if indeed she knew that he had travelled to Germany in 1985 and had never travelled back to Kenya? That question can only lead one conclusion, the Plaintiff had just discovered the real owner of the suit property and wanted to know his whereabouts
106. The Plaintiff then filed a caveat on 28<sup>th</sup> March 2006 claiming lessees interest on the property. That caveat confirms that the Plaintiff considered herself as a tenant on the suit property and that is why she used to pay to the Interested Parties rent. She was not on the suit property as of right and with the intention to dispossess the Defendant the property.
107. A claimant for adverse possession must demonstrate that he or she had an animus possidendi, meaning that he or she had an intention for the time to possess the land to the exclusion of all

- other persons, including the owner with the paper title. The Plaintiff failed to demonstrate that when she acknowledged by her actions that she was the Interested Parties tenant.
108. I found the Interested Parties' evidence that the suit property had been handed to them by the Defendant to take care of it while away as credible. The 2<sup>nd</sup> Interested Party was consistent and truthful on how he took possession of the land with the permission of the true owner.
109. As was held in the case of **Hughes Vs Griffin (1969) 1 ALL ER 460**, if the true owner does not actually occupy the land but puts someone else in to occupy it for him without creating any kind of tenancy, then the owner is actually in possession. That is what happened in this case.
110. Having found that indeed the Plaintiff entered the suit property in the year 2000, and not before, and thereafter started paying rent to the Interested Parties which she stopped paying in the year 2004, I find and hold that by the time the Plaintiff filed this suit in the year 2008, she had not dispossessed the Defendant the suit property for 12 years or discontinued the Defendant's possession of the suit property for 12 years.
111. And even if the Plaintiff was in factual possession (*factum possession*) of the suit property for more than 12 years, which was not the case, she did not have the requisite intention to possess (*animus possidendi*) the suit property until the year 2004 when she realised that the interested parties were imposters.
112. In the circumstances, I find and hold that the Plaintiff has failed to prove that she has been in exclusive possession of the suit property 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.
113. Although the Interested Parties claimed in their Replying Affidavit that they are the ones who are entitled to the entire suit property by way of adverse possession, they did not file a counter suit as against the Defendant who is the registered owner.
114. According to the provisions of section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land, he is supposed to apply to the High Court for an order to be registered as the proprietor of the land in place of the person then registered as proprietor. The interested Parties have not filed such a claim. I will therefore not express my views on whether they are entitled to the suit property or not.
115. For the reasons I have given above, I dismiss the Originating Summons filed on 10<sup>th</sup> July, 2008 with costs to the Interested Parties.

**Dated and Delivered in Malindi this 4<sup>th</sup> day of October, 2013**

**O. A. Angote**

**Judge**