



Sila v Al Haiee Investments Limited & 5 others (Enviromental and Land Originating Summons 1030 of 2016) [2025] KEELC 966 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 966 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1030 OF 2016
OA ANGOTE, J
FEBRUARY 27, 2025
IN THE MATTER OF SECTION 7, 9(1), 37 AND 38 OF THE
LIMITATION OF ACTIONS ACT
(CHAPTER 22 OF THE LAWS OF KENYA)
AND
IN THE MATTER OF ACQUISITION OF L.R NO
209/12071/1/BY WAY OF ADVERSE POSSESSION

BETWEEN

FREDNARD MUAIA SILA PLAINTIFF

AND

AL HAIEE INVESTMENTS LIMITED 1ST DEFENDANT

PROP INVESTMENTS LIMITED 2ND DEFENDANT

FREDRICK KATHANU KAVUTHI T/A KANYUNI CONSTRUCTORS 3RD DEFENDANT

JAMES KYALO T/A SECOND TRY CONSTRUCTION COMPANY 4TH DEFENDANT

REGISTRAR OF COMPANIES 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT



JUDGMENT

Introduction

1. Vide an Originating Summons dated 18th August, 2016, brought pursuant to the provisions of sections 37 and 38 of the Limitation of Actions Act, and Order 37 Rule 7 of the Civil Procedure Rules, the Plaintiff seeks the following reliefs;
 - i. A declaration that the 1st Defendant's title to ALL THAT piece of land known as L.R No 209/12071/1 registered under Grant Number I.R 61996 has been extinguished in favour of the Plaintiff by virtue of adverse possession pursuant to Sections 7, 9(1), 37 and 38 of the Limitation of Actions Act, having occupied the said land for more than 12 years preceding the filing of this suit.
 - ii. That the Plaintiff is entitled to be registered forthwith as the owner of all that piece of land known as L.R No 209/1207/1 registered under Grant I.R 61996 which said land he has held on adverse possession since 1995 to date for a period of more than 12 years immediately preceding the filing of this suit, the same being land which the Plaintiff has occupied openly and continuously as of right and without any interruption from the 1st Defendant or his predecessors in title.
 - iii. That the Land Registrar at Nairobi to delete the name of Al:Haiee Investments Limited, the 1st Defendant herein and register the name of Frednard Muaia Sila, the Plaintiff herein in place thereof absolutely.
 - iv. That the 2nd to 8th Defendants have no legal right to the said land at all.
 - v. That the costs of this Petition(sic) be provided for.
2. The Originating Summons is based on the grounds thereof and supported by the Affidavit of Frednard Muaia Sila, the Plaintiff, of an even date, who deponed that sometime in March, 1995, he entered into and squatted onto L.R No 1209/12071/1 situate along Mombasa Road Nairobi(hereinafter the suit property); that the 4th and 5th Defendants found him in occupation at the time they came and begun works on the property and that he has been in open and continuous possession of the land for over 12 years and is entitled to the suit property by way of adverse possession.
3. The Plaintiff deponed that during his stay on the suit property, he came to know the owner of the property as one Mr Anif Guramali Jiwa; that Mr. Jiwa constantly threatened to evict him from the property when he found him there upon his visits and that the other Defendants claiming ownership of the property are mere imposters.
4. He stated that his possession was temporarily interrupted on the 11th February, 2014 when the 2nd -6th Defendants using the OCS-Embakasi Police Station caused him to be evicted, arrested and subsequently charged in Criminal Case 928/14 at Makadara Law Courts with the offence of trespass with the intent to commit a felony and that after being charged in the criminal matter, he realized that there was another matter being ELC 1264/13 where the other Defendants filed fraudulent documents in a bid to unlawfully claim the suit property.
5. According to the Plaintiff, it is clear from the Affidavit of Diamond Hasham Lalji dated 12th February, 2014 in ELC 1264 of 2013 that there are no documents showing how he acquired the directorship of the Defendant's company and that the letter from the Registrar of Companies dated 22nd May, 2015



- indicate the 1st Defendant's directors and shareholders as Shahid Diamond Lalji and Prop Investments Limited.
6. According to the Plaintiff, the letter of 15th June, 2015 lists the directors and shareholders of Trident Insurance as Diamond Hasham Lalji; Shahid Lalji; Maurice Otieno Omuga; Edward Oloo Onyango; Benjamin Mbithi Kinyumu and Trident Investments Limited whereas the letter of 6th July, 2015 lists the directors and shareholders of Prop Investments as Elijah Kipkorir Chepkwony and Ann Kwamboka Chepkwony.
 7. He opines that it is clear from the foregoing that Diamond Hasham Lalji is not a Director of the 1st Defendant but of Trident Insurance Company Limited; that Maurice Otieno, the Counsel on record for the 1st Defendant is shareholder of Trident Investments Limited with no shares; that Diamond Hasham Lalji is also a Director of Trident Insurance Company with 17 shares and that it is apparent that the 1st Defendant's deponent is committing perjury not being a Director thereof.
 8. According to the Plaintiff, the allegations that the 1st Defendant was advanced the sum of Kshs 70,000,000 by Trident Insurance Company has not been proven; that it is further alleged that the suit property was charged in favour of Trident Insurance Company Limited; that on the 23rd November, 2012, there was a gazette notice on reconstruction of lost/destroyed land register on the suit property; that the aforesaid documents confirm the well calculated fraud by the Defendants' to alienate the suit property and that he has been planting maize and vegetables on the suit premises for all the years he has been thereon.
 9. The 1st Defendant's case is that it is the legitimate proprietor of the suit property having been registered on 13th May, 1994; that it enjoyed peaceful possession of its property until 6th February, 2014 when unknown persons invaded the property; that the second invasion occurred on 11th February, 2014 and the Plaintiff who was part of the invaders was arrested and charged with trespass to commit felony at Makadara Law Courts and that the criminal case was subsequently withdrawn by the prosecution due to lack of witnesses.
 10. The 1st Defendant states that in September, 2017, another group of persons invaded the suit property; that the persons aforesaid have protection from the OCPD Embakasi and emboldened by the same, have brought in a disused bus that they currently to use to shelter themselves; that it is inconceivable that the Plaintiff claims a right of adverse possession yet the Plaintiffs in the case of ELC 1264/13, being the 3rd and 4th Defendants herein made no mention of him and that this is even as, during the site visit conducted in the aforesaid case, he identified himself as their caretaker.
 11. It was stated that the Plaintiff, together with the 3rd and 4th Defendants, are working in cahoots and at the behest of fraudsters to institute multiple suits with the sole intent of defrauding it of the suit property. The 2nd Defendant did not file any response.
 12. The 3rd and 4th Defendants filed an Affidavit on the 13th October, 2016. The Affidavit was sworn by Fredrick Kathanzu Kavuthi, who deponed that in 1995, the 1st Defendant, through its Directors Anif Guramali Jiwa Walji, Sherali Gulam Hussein Fazal and Nazarali Madatal Jiwa entered into a contract with them to construct a fence and godowns on the suit property and that at the time they commenced work in 1995, the Plaintiff was on the suit property.
 13. He deponed that the Plaintiff's stay on the suit property was only interrupted after he was arrested together with four of their employees and charged with trespass; that one of his employees was also charged with malicious damage to property; that to date, the 1st Defendant owes them the sum of Kshs



- 38, 540, 567.60 and that arising from the debt aforesaid, they were unable to pay their workers who took them to the labour office.
14. He noted that they have been on the suit property from 1995 to 2014 when they were forcefully removed; that the pleadings by the other parties in ELC 1264 of 13 are forgeries; that Diamond Hasham Lalji who claims to have purchased the property in 1994 is not indicated as a director of the 1st Defendant and that there is no transfer document showing how the company's directorship changed hands if at all.
 15. According to Mr. Kavuthi, there have been several attempts to grab the property by different parties; that as at the 10th June, 2014, a search undertaken by one of their agents was unsuccessful because the file was missing and he was advised to sign a Deed of Indemnity; that if indeed a Deed of Indemnity had been done by Mr Diamond Hasham Lalji as alluded to in his Affidavit of 12th February, 2014 in ELC 1264 of 13 then the said advise would not have been necessary and that there is no proof of Kshs 70,000,000 that was advanced to the 1st Defendant as alleged.
 16. The 5th and 6th Defendants filed a joint statement of Defence dated 9th March, 2020. Vide the Defence, they denied the assertions as set out in the Plaint stating that they have no knowledge of occupation of the suit property and that in any event, no action can be instituted against them based on possession.
 17. According to the Defendants, as per their records, the 1st Defendant was incorporated on 4th May, 1994 with Anif Gulamali Jiwal and Sheral G Fazal as directors with 1 share each; that Form 203 had as directors of the company Anif Gulamali Jiwa, Sheral Gulamhussein Fazal, Nizar Madatali Jiwa and Bhatia Registrars(Company Secretary) which position remained constant between 1995-1999.
 18. In the year 2000, it was averred, Anif Gulamali Jiwa (director), Sheral Galamhussein Fazal (director), Nizar Madatali Jiwa (director) and Bhatia Registrars allegedly resigned with effect from 15th May, 2000 and were replaced by Azim Jamal Virjee (director), Consolidated Trustees Limited (director) and Equatorial Secretaries and Registrars (Secretary) with effect from the same date.
 19. The 5th and 6th Defendants averred that the aforesaid changes were reflected in the annual return for the year 2000 and that there are no returns for the years 2001-2003 but as per the annual return of 2004, the afore stated position had not changed.
 20. It was averred in the Defence by the 5th and 6th Defendants that they have no documents for the period between 2005-2006 but in 2007, Azim Jamal Virjee, Consolidated Trustees Limited and Equatorial Services and Registrars allegedly resigned and were replaced with Diamond Hasham Lalji, Shahid Diamond Lalji and Zianash Registrars with effect from 9th October, 2007.
 21. It is the 5th and 6th Defendants' case that there is no evidence of procedural transfer of shares to the purported Diamond Hasham Lalji, Shahid Diamond Lalji and Zianash Registrars with effect from 9th October, 2007.

Hearing and Evidence

22. The matter proceeded for hearing on 7th March, 2024. The Plaintiff, as PW1, adopted his witness statement dated 15th July, 2019 as his evidence in chief and adopted the list and bundle of documents dated 24th April, 2023 as PEXHB1.
23. It was his oral evidence that he entered the suit property in 1995, having come to Nairobi to look for casual work; that Mr Amit Guramali Jura saw him on the property and asked him to vacate but he did not do so; that contrary to what the report of 26th July, 2019 indicates, he was not a caretaker; that when the court undertook a site visit, he told them that he was the caretaker and refused to open the gate



- without his lawyer; that his actions aforesaid were because he had been previously arrested in February, 2014 and that he had not been informed of the visit.
24. It was his evidence that on 11th February, 2014, he and four other persons who had been employed by the contractors who were putting up the wall on the suit property were arrested; that he was charged for trespass and given cash bail of Kshs 10,000; that he never found any security men on the land; that he has photographs showing that he was living on the land; that he had a toilet made of cartons on the land and that he lived alone on the land, his family being in the village.
 25. PW1 stated that his family occasionally visited for two weeks and went way; that he planted tomatoes and sugarcane on the land; that there is a mast near the land and initially thought the property belonged to Kenya Power or the County Government; that he never paid any rates and rents; that when he was evicted, he filed this suit and that he is not currently on the land.
 26. It was his evidence on cross-examination that he was severally asked to leave by Mr Anif but refused to do so because he did not enter the land forcefully; that Mr Anif came back with two people who built a wall around the property but never told him anything; that he doesn't know Mr Diamond and has never met him since he left; that he doesn't have photos showing his family members coming to visit and that before he carried out the search, he did not know the owner of the land.
 27. PW2 was Kennedy Mwangi, a foreman. He adopted his witness statement[undated] as his evidence in chief. It was his evidence that in 1995, he was employed by Fredrick Kathanzu Kavuthi and James Kyali as a foreman in charge of timber whenever they took employment contracts and that in October, 1995 his employers were awarded a construction contract by a company called Al Haiee Investments Limited to carry out fencing and construct go-downs on the company's parcel on Mombasa Road.
 28. He stated that when they approached the site to commence work, they found the Plaintiff residing on the suit property where he had constructed a dwelling house and planted crops; that even as they carried out the works, it is the Plaintiff who cooked and supplied them with tea and snacks; that he was on the site until August, 1996 when his employers abandoned him and his colleagues forcing them to leave the site and that he left the Plaintiff on the site.
 29. DW1 was Diamond Hasham Lalji. He adopted his witness statement dated 5th March, 2020 and 7th May, 2021 as his evidence in chief and produced the documents in the bundle dated 5th March, 2020 and 7th May, 2021 as 1DEXHB1 and 2[Save for document 4 in the bundle of 5th May, 2020 and document 2 in the bundle of 7th May, 2021].
 30. It was his testimony that they acquired the property from the Jiwa's who were winding up and moving to Canada; that the shares in the 1st Defendant's company were transferred to Azim, the company secretary and Trustees Limited who held the same on their behalf; that the property was fenced and they placed security thereon and that he visited the property on numerous occasions and found it unoccupied.
 31. It was his further evidence that he and his son were appointed as directors of the company in October, 2007 and the change was filed at the company's registry; that he has adduced the title to the property which was initially charged to KCB, discharged and subsequently charged to I& M Bank which charge subsists and that he is up to date with the land rents and rates.
 32. DW1 stated that on 6th February, 2012, cartels attacked the suit property and overran the same; that the matter was reported to Embakasi Police Station; that after the Police response, the invaders ran away save for one Stanley Kyalo Ndi who was arrested and charged in Makadara Criminal Case 716 of 2014; that there was a second invasion and the Plaintiff was arrested and charged in Makadara Criminal



Case 928/2014 and that no witnesses were called and the case was subsequently withdrawn by the prosecution.

33. DW1 stated that they rented out the property and had an active tenant on the property; that they have google maps which show the wall and the plot; that the report of 26th July, 2019 adduced in ELC 1264/2013 by the Deputy Registrar concluded that the Plaintiff was not in active possession; that the water tank in the Plaintiff's photos is not on their property and that similarly, the photo of the construction is not on their land which only has an incomplete structure which is in the middle of the photos.
34. It was his evidence on cross-examination that the Plaintiff has not raised the issue of shareholding in the O.S; that there is no evidence showing the appointment of Consolidated Trustees Limited as their trustees; that he doesn't have a power of attorney; that there are no documents showing Azim was asked to be a company secretary; that there was no exchange of cheques as the same was a swap and that the name Prop Limited does not appear in the swap.
35. It was his further evidence on cross-examination that in 1994, he had no business concerning the 1st Defendant company; that he did not take photos of the suit property; that the land was already walled when he visited and that the company has never changed hands since they owned it.
36. It was the evidence of DW1 that there has been no change of the land ownership; that before the change of directorship, he visited the land; that there was no water tank on the land and that the Plaintiff was charged in a criminal case for trespassing on the land.

Submissions

37. The Plaintiff filed submissions on 11th November, 2024. Counsel submitted that Diamond Hasham Lalji is not a lawful director of the 1st Defendant and as such the evidence adduced by him should be disregarded and the suit deemed as undefended.
38. It was submitted that the court in Ibrahim Wachira Karaguri vs Mary Mwhaki Simon & Another[2020]eKLR set out the parameters for the claim of adverse possession being proof by an Applicant that he/she has been in actual, open and exclusive possession of the suit property for a period of 12 years; that the Plaintiff has testified that he entered the suit property in March, 1995 which evidence was corroborated by PW2 and that the said evidence was not contested by the 1st Defendant.
39. Reliance in this respect was also placed on the cases of Chevron (K) Ltd vs Harrison Charo Wa Shutu [2016]eKLR and Alice Chemandan Siyoi vs Joel Kiptoo Ng'eno & 3 Others; John Thuo Gakuru(Interested Party).
40. As to the nature of the Plaintiff's possession, Counsel submitted that the Plaintiff proved that the same was open and continuous having only been interrupted in 2014 when he was arrested and that the Plaintiff's evidence in this regard was not controverted by the Defendants who bore the burden to do so.
41. Reliance in this respect was placed on the cases of Kairu vs Gacheru[1988]eKLR and Joseph Kithinji M'Eringi & Another vs Christine N Mbiti[2021]eKLR and Elijah Maingi Kimengere vs Teresiah Wanjiku Juna[2022]eKLR and Mbuthia Macharia vs Annah Mutua Ndwiga & Commissioner of Lands[2017]KECA 290(KLR) and Joseph Kithinji M'Eringo & Anor vs Christine N Mbiri[2021]eKLR
42. It was submitted that it is apparent that the 1st Defendant did not visit the suit property during the period within which the Plaintiff was in occupation; that further, DW1 is attempting to vary the agreement of 9th May, 2000 which is not allowable in law and that as observed in Madara & 2 Others



vs Chite & Anor[2023]KEHC 24270 and Speaker of County Assembly-Kisii County and 2 Others James Omaribo Nyaoga[2015]eKLR, the parole evidence rule prohibits variation of the terms of a written agreement using oral evidence.

43. Counsel submitted that the 1st Defendant as a legal person could only occupy the land through natural persons; that the only person who had capacity to testify on behalf of the company during the period he was in occupation was its director at the time and that nonetheless, the change in directorship did not restart the clock for purposes of adverse possession. In support, the Counsel referenced the cases of Joseph Kithinji M' Eringo & Another vs Christine N Mbiti[2021]eKLR, KipKoech Arap Langat & Anor vs Kipng'eno Arap Laboso[2011]eKLR.
44. It was urged that the charging of the suit property after the lapse of the limitation period did not interfere with the claim for adverse possession as the 1st Defendant's title was extinguished by operation of law on or about March, 2007. Reliance in this respect was placed on the cases of Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others[2017]eKLR and Martha Njeri Karanja vs Solomon Mukundi Gichinga: Equity Bank Limited(Interested Party)[2018]eKLR.
45. The 1st Defendant's counsel filed submissions on 15th November, 2024. Counsel submitted that that the Plaintiff did not demonstrate the particulars in support of his plea for adverse possession and that in any event, the Plaintiff conceded that his possession was temporarily interrupted on 11th February, 2012 and as such, time begun running afresh from the next date of re-possession as stated in Section 13(2) of the *Limitation of Actions Act*.
46. It was submitted that consequently, when the Plaintiff commenced these proceedings, he had not occupied the property for a continuous period of 12 years and that the Plaintiff's assertions that during his stay, the owners severally threatened to evict him points to permission which is contrary to the claim for adverse possession.
47. Reliance in this regard was placed on the case of Gabriel Mbui vs Mukinda Maranya(1993)eKLR and Mtana Lewa vs Kahindi Ngala Mwangandi[2015]eKLR and Mombasa Teachers Co-operative Savings and Credit Society Limited vs Robert Muhambi Katana & 15 Others[2018]eKLR.
48. It was submitted that the claims of fraud by the Plaintiff run counter to the one for adverse possession; that nonetheless, the same has not been established to the requisite threshold which is beyond the mere balance of probabilities as held in R.G Patel vs Lalji Makanji[1957]E.A 314 at 317 and that there are two earlier findings of the court in respect of ELC No 1264 of 2013 and the report by the Deputy Registrar published on the 26th July, 2019 which are relevant to the facts of this case as they point to the fact that the 1st Defendant has never lost possession of the suit property to either the Plaintiff or the 3rd and 4th Defendants.
49. The 2nd Defendant filed submissions on 18th November, 2024. Counsel submitted that the allegation of fraud as against the 2nd Defendant has not been demonstrated considering that the same is founded on unsigned letter and that even if it was the 1st Defendant's shareholder, this would not form any basis for its joinder into these proceedings.
50. It was submitted that Sections 107 and 109 of the *Evidence Act* places the burden of proof of the allegation that the 2nd Defendant has colluded to defeat the Plaintiff's legal rights of ownership on the Plaintiff and that this burden has not been met and the suit against it should be dismissed.



Analysis and Determination

51. Having considered the Originating Summons, responses, testimony and submissions, the issues that arise for consideration are:
- i. Whether Diamond Hashim Lalji has the requisite locus in these proceedings?
 - ii. Whether the Plaintiff is entitled to L.R. 209/12071/1 by way of Adverse Possession?
52. The Plaintiff questions the locus of Mr. Diamond Hashim Lalji in these proceedings. It is his position that Mr. Diamond Hashim Lalji is not a Director of the 1st Defendant company and cannot purport to give any evidence on its behalf. He opines that essentially; the suit is undefended by the 1st Defendant.
53. This is disputed by Mr. Lalji who asserts that he is a director of the 1st Defendant and duly authorized to testify on its behalf.
54. It is at the onset noted that the Plaintiff has presented substantial arguments regarding the directorship of the 1st Defendant, specifically challenging the manner in which the directorship and shareholding changed hands. However, what is before this court is a claim of adverse possession. The directorship of the 1st Defendant has no bearing on its title to the suit property which is admitted.
55. Consequently, the question of the 1st Defendant's directorship is relevant only to the extent that it affects the admissibility of the evidence by Mr. Diamond Hashim Lalji on behalf of the 1st Defendant. Beyond that, this court has no jurisdiction to determine questions on directorship and shareholding, as such matters fall outside its purview.
56. It is trite that a company, as a distinct legal person only acts through authorized representatives. The court in *Assia Pharmaceuticals vs Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000* held as follows:
- “It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so.”
57. Ordinarily, where a deponent states that he is the director of a company and duly authorized to act for it, the court will presume this position to be correct unless the contrary is proved. Speaking to this, the Court of Appeal in *Meya Agri Traders Ltd vs Elgon House (2010) Ltd (Civil Appeal 15 of 2020) [2023] KECA 574 (KLR) (26 May 2023)* stated as follows:
- “Under Order 9 rule 2(c) of the Civil Procedure Rules (2010) the recognized agent of parties by whom such appearances, applications and acts may be made or done are, in respect of a corporation is an officer of the corporation duly authorized under the corporate seal. The question then is whether one Kiritih Govindilah Shah qualifies as an authorized officer under Order 4 Rule (1)(4). In our view, once the deponent swore that he is a director of the respondent, and that he was duly authorized, the judge could not rule otherwise in the absence of evidence to counter or contradict him.”



58. The Plaintiff was categorical that Diamond Hashim Lalji is not a Director of the 1st Defendant. In this respect, he has relied on the letters of 22nd May, 2015, 15th June, 2015 and 6th July, 2015. The letters of 15th June, 2015 and 6th July, 2015 speak to the directorship of Trident Insurance Co Ltd and Prop Investment Company respectively. They are of no relevance in this respect.
59. On the other hand, the letter of 22nd May, 2015 which is with respect to the 1st Defendant's shareholding is unsigned. An unsigned document is of no probative value, for what authenticates a document and gives it legitimacy is the signature. Execution of the document means that the person uttering it gives it ownership and reliability.
60. As regards reliance on the 5th and 6th Defendants' Defence, the same is untenable. The aforesaid Defendants did not testify and as such their Defence is unsubstantiated. This position was affirmed by the Court of Appeal in SYT vs TA [2019] KECA 374 (KLR) who stated thus:
- “It is established that where a party fails to call evidence in support of his case, that party's pleadings remain mere unsubstantiated statements of fact.”
61. In view of the foregoing, the evidence by DW1 as to his directorship of the 1st Defendant as evinced by the Notice of Change of Directors dated the 18th October, 2007 which change took effect as at the 9th October, 2007 suffices to prove that he is the 1st Defendant's director and duly authorized to give evidence on its behalf. The court so finds.
62. As to the contention that Mr. Diamond Hashim Lalji could only give evidence touching on the period when he was a director, the court notes that a company being a distinct entity from its members has perpetual succession which allows it to continue to exist even after its directors change. Therefore, there is nothing that prevents a director from testifying to matters that occurred prior to his appointment, as long as those matters fall within his knowledge.
63. The Plaintiff lays claim to the suit the property by way of Adverse possession. It is his case that he entered into the suit property which belongs to the 1st Defendant and has lived thereon openly and continuously as of right and without any interruption from the 1st Defendant for a period of more than 12 years entitling him to the suit property by way of adverse possession.
64. The Plaintiff adduced into evidence a copy of the title to the suit property; charge sheet dated 13th February, 2014; Affidavit dated 12th February, 2014 filed in ELC 1264 of 2013; submissions filed in ELC 1264 of 2013; letters dated 22nd May, 2015; 15th June, 2015 and 6th July, 2015; charge over the suit property; gazette notice dated 23rd November, 2012; photographs of the Plaintiff's house/structure; letter by labour officer dated 6th September, 1996; Motion for joinder dated 19th May, 2016 in ELC 1264 of 2013; and a notice of withdrawal of the aforesaid application for joinder.
65. On its part, the 1st Defendant states that it is the legitimate proprietor of the suit property having acquired the same by way of purchase in May, 1994; that it has had peaceful and open possession of the suit property since its purchase until sometime on 6th February, 2014 when a gang invaded the suit property and subsequently on the 11th February, 2014 when the Plaintiff and other persons also invaded the suit property.
66. The 3rd and 4th Defendants filed an Affidavit supporting the Plaintiff's averments, to wit, that he entered the suit property in 1995 and has been in occupation thereof until his eviction and arrest in February, 2014. No evidence was adduced on their behalf.



67. The 4th and 5th Defendants filed a Defence in which they contended that they have no information regarding the occupation of the suit property. They set out the details of the directorship and shareholding of the 1st Defendant as per their records. No evidence was adduced on their behalf.

68. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act, provides as follows:

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

69. Further provisions are made under Section 13 of the Act which provides:

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

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

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

70. And Section 17 of the Act which states:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

71. Finally, Section 38(1) and (2) states:

“(1) 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

72. The net effect of the foregoing sections is to extinguish the title of the proprietor of the land in favour of a party who has been in possession thereof for a minimum period of 12 years.



73. Discussing the concept of adverse possession, the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015]eKLR stated thus:
- “ Adverse possession is essentially a situation where a person takes possession of land, 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 12 years.”
74. As regards the elements to be proved in a claim for adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR noted as follows:
- “ A person who claims adverse possession must inter alia show:
- (a) on what date he came into possession;
 - (b) what was the nature of his possession;
 - (c) whether the fact of his possession was known to the other party;
 - (d) for how long his possession has continued; and
 - (e) that the possession was open and undisturbed for the requisite 12 years.”
75. In a claim for adverse possession, the burden of proof is upon the person setting up and seeking to prove title by adverse possession. The required element of proof is the usual standard of proof in civil cases, namely, on a balance of probability.
76. The plea of adverse possession is always based on facts which must be asserted, pleaded and proved. The person claiming adverse possession must show on what date he took occupation of the premises, the nature of his possession, whether his possession is known to the true owner, how long the possession went on and whether his possession was open and undisturbed. Unless these questions are asserted and proved, a plea of adverse possession fails.
77. The claim for adverse possession herein is as against registered land. In such circumstances, adverse possession dates from the date the Certificate of Title was issued because that is when the title holder is prima facie entitled to possession and therefore entitled to take action against any intruder to the land. This position was enunciated by the Court of Appeal in *Solomon Muathe Mitau & 787 others vs Nguni Group Ranch* [2017] eKLR.
78. Both the Plaintiff and the 1st Defendant have produced the Certificate of Title in respect of the suit property which shows the 1st Defendant was registered as the proprietor on the 13th May, 1994.
79. As to when the Plaintiff entered the property, the Plaintiff states that it was in March, 1995. His evidence in this respect was supported by PW2, Kennedy Mwangi, who stated that in 1995, while engaging in construction on the property, he found the Plaintiff residing thereon.
80. The mere assertions by the Plaintiff and PW2 that the Plaintiff was in possession of the suit property in 1995 was not supported by any document. The said assertions should have been supported by evidence of the activities that the Plaintiff undertook on the property around that time.
81. The small structure in the photograph attached on the Plaintiff’s affidavit does not indicate when the photograph was taken. Further, the Plaintiff informed the court that he neither had water nor electricity connected on the suit property, which would have assisted this court to confirm when he actually entered the suit property.



82. Further, it was the testimony of the Plaintiff that he did not have a toilet on the land, other than a make shift made of cartons. One wonders how he could be living on the said property since 1995 until 2014 when he was purportedly evicted without a toilet.
83. Although the Plaintiff stated that his family used to visit him for two weeks, he seems not to have taken even a single photograph with the said family while on the land.
84. Further, the report of the Deputy Registrar of 26th July, 2019 in ELC No. 1264 of 2013 (O.S) shows that when the Deputy Registrar visited the site pursuant to the orders of the court in that suit, he found the Plaintiff on the land. The Plaintiff informed the Deputy Registrar that he was a caretaker, and declined to allow the Deputy Registrar on the land.
85. More importantly, in ELC No. 1264 of 2013 (O.S), the Plaintiffs therein sued the Defendants claiming for adverse possession. The said Plaintiffs never mentioned the Plaintiff herein as one of the people who were in occupation of the land. That is despite the fact that in this suit, they have deposed that while constructing the perimeter wall, the Plaintiff was already on the suit property.
86. The said suit, which was filed three years before this particular suit, was dismissed for want of prosecution. The fact that the Plaintiffs in that suit never recognized the presence of the Plaintiff confirms the narration by the 1st Defendant that different groups of people have been invading the suit property at different times. On all the occasions, they have been repulsed by the police, with some of them being charged for trespass.
87. The evidence before this court shows that the 1st Defendant has been in possession of the suit property since 1995 when it built the perimeter wall around the plot, and in 2008 when it leased it to ENG Emirates Neon Group for bill boards, a fact that was admitted by the Plaintiff. The Lease agreements and the cheques evidencing the said arrangement was exhibited by the 1st Defendant.
88. What this means is that during this period, the Plaintiff was not in exclusive, peaceful possession of the suit property and as such, cannot maintain a plea of adverse possession. Exclusive possession means that the exercise of dominion over the land must not be shared with the owner.
89. That being the case, and considering that a title holder cannot be in concurrence possession of land with an adverse possessor, it is the finding of this court that the Plaintiff did not prove to the required standards of having been on the suit property openly, peacefully and continuously for a period of 12 years.
90. For those reasons, the Plaintiff's Originating Summons dated 18th August, 2016 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ngethe for Plaintiff

Mr. Otieno for I & M bank (Chargee)

Mr. Waku for 2nd Defendant

Mr Kaaton for proposed Interested Party



Mr. Omuga for 1st Defendant

Mr. Allan Kamau for 4th and 5th Defendant

Court Assistant: Tracy

