



**Mwendo & 4 others v Vekaria; Victoria Commercial Bank Limited (Interested Party)**  
**(Environment & Land Case 459 of 2018) [2024] KEELC 3392 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3392 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 459 OF 2018**  
**OA ANGOTE, J**  
**APRIL 24, 2024**  
**IN THE MATTER OF L.R NO 209/10307 AND 209/10308**  
**AND**  
**IN THE MATTER OF SECTION 37 AND 38 OF THE LIMITATION OF ACTIONS ACT**  
**(CHAPTER 22 OF THE LAWS OF KENYA)**

**BETWEEN**

**RAPHAEL NZAMU MWENDO ..... 1<sup>ST</sup> PLAINTIFF**  
**GEORGE NYAGA KIRAITHE ..... 2<sup>ND</sup> PLAINTIFF**  
**MICHAEL MWAURA NJOROGE ..... 3<sup>RD</sup> PLAINTIFF**  
**STEPHEN MUGO GITARI ..... 4<sup>TH</sup> PLAINTIFF**  
**GEOFFREY MWAURA KAIGAI ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**RAMJI DEVJI VEKARIA ..... DEFENDANT**

**AND**

**VICTORIA COMMERCIAL BANK LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. Vide an Originating Summons dated 23<sup>rd</sup> October, 2018 brought pursuant to the provisions of Orders 37 and 38 of the *Limitation of Actions Act*, Cap 22, Section 3A of the *Civil Procedure Act*, and Order 37 Rule 7 of the Civil Procedure Rules, the Plaintiff is seeking for the following reliefs;



- i. A declaration that the Plaintiffs are entitled to be registered forthwith as owners of all those parcels of land known as L.R No's 209/10307 and 209/10308 which the Plaintiffs have been in adverse possession since the 1990's to date for more than 12(twelve) years immediately preceding the presentation of this suit and, on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendant or his predecessors in the above title and that the Defendants' title to all those parcels of land known as L.R Nos 209/10307 and 209/10308 have been extinguished in favour of the Plaintiffs under Sections 37 and 38 of the Limitations of Actions Act, Laws of Kenya.
  - ii. An order for permanent injunction be issued restraining the Defendant, his employees, servants, agents, or any person claiming through him from evicting the Plaintiffs from all those parcels of land known as L.R Nos' 209/10307 and 209/10308(suit lands) or from fencing the suit lands or interfering with Plaintiffs possession of the same or alienating, transferring, disposing and/or dealing with the suit lands in any manner whatsoever.
  - iii. A declaration that the Interested Party's chargees' interest is extinguished simultaneously with that of the Defendants' title to the suit lands L.R No 209/10307 and 209/10308 and be and hereby vacated from the suit lands registers.
  - iv. An order for costs and interest thereon of this suit.
2. The Originating Summons is supported by the Affidavit of Raphael Nzamu Mwendo, the 1<sup>st</sup> Plaintiff of an even date, who deponed that him, and his co-Plaintiffs entered onto the properties L.R Nos 209/10307 and 209/10308 (hereinafter the suit properties) at the beginning of the year 1990 and that the suit properties were un-occupied at the time and after their entry.
  3. It was deposed by the Plaintiffs that they put up structures thereon; that at the time of occupation, they assumed the land belonged to the Government or City Council of Nairobi and that their occupation of the suit property continued and by the end of 1998, they had fully occupied the land, sub-divided the same and each occupant shown their boundaries.
  4. The Plaintiffs deponed that sometime in the year 1999, two persons came to the suit land claiming to have been sent by the Defendant and gave them an oral notice to immediately vacate the suit lands; that when they demanded that the said persons identify themselves, they left in a hurry only to re-appear in 2018 and that the Defendant has sent them two written notices dated 26<sup>th</sup> June, 2018 and 14<sup>th</sup> October, 2018 requiring them to vacate the suit property.
  5. It is the Plaintiffs' case that despite the demands, they have stayed put because they are poor and don't own any alternative place to move to; that further, the owners, although claiming ownership did not produce any Court order requiring them to vacate the suit premises and that they sought legal advice from their Counsel who informed them that they had acquired prescriptive rights by way of adverse possession over the suit properties.
  6. The deponent urged that the suit land is occupied by more than 90 families hence the need to file the suit as a representative suit and that the lands register shows that the Interested Party became a chargee recently despite them being in total possession of the land.
  7. In response to the summons, the Defendant, Ramji Devji Vekaria, filed a Replying Affidavit in which he deponed that the Originating Summons is fatal and offends the provisions of Order 37 Rule 7 of the Civil Procedure Rules and that he is the registered proprietor of all those parcels of land known as L.R No 209/10307 and 209/10308 each measuring one decimal nought nought nought (1.000)Hectares.



8. The Defendant deponed that he became the registered owner of L.R No 208/10307 on 14<sup>th</sup> September, 2006 as per entry 954 and L.R No 209/10208 on 4<sup>th</sup> October, 2006 as per entry 178; that he purchased the aforesaid properties from Alpha Development Company Limited who were the registered proprietors thereof and that before purchasing the suit properties, he carried out due diligence to establish ownership.
9. It is the Defendant's case that to that end, he visited the lands registry for a search which revealed that Alpha Development Company Limited was the registered owner of the land having been so registered on 19<sup>th</sup> December, 1988 when the parcel files were opened; that he also visited the suit parcels to physically examine their topography and was satisfied with the state and conditions they were in, noting that no one was in occupation of the suit property and no activities were being undertaken thereon and that he equally sought the original title documents for verification.
10. According to Mr Vekaria, upon becoming the registered owner of the suit property, he commenced the process of seeking approval from the defunct Nairobi City Council to enable him develop the same; that as 2007 was an election years, it was not the appropriate time for him to commence construction and that he obtained approval from the Nairobi City Council to erect go-downs and perimeter walls on 11<sup>th</sup> November, 2008.
11. It is the deposition of the Defendant that during the post-election violence in 2007/2008, internally displaced persons pitched their tents on his property since it was bare and vacant; that after normalcy resumed, he went and attempted to carry out construction but was met with violence from the persons on the property and that attempts to diplomatically resolve the stand-off also failed as local leaders politicized the situation.
12. He stated that as advised by Counsel, the Plaintiffs cannot claim the property "nec vi, nec clam, nec precario" as they have been on the property forcefully; that further, the Plaintiffs have not demonstrated that they have been in continuous un-interrupted occupation of the suit property for 12 years and that he is aware that the Plaintiffs have constructed iron sheet houses on the land but the same is against his wishes.
13. It was deposed by the Defendant that vide the letters of 26<sup>th</sup> June, 2018 and 14<sup>th</sup> August, 2018 he, through the firm of J.M Kimani & Co Advocates, issued notices to the illegal occupants of the suit property to vacate; that the same was further published in two local dailies; that the property is charged to Victoria Bank Limited which has an interest thereon as Chargee and that the Plaintiffs are illegal occupiers of the suit property and only moved to Court when they were served with notices to vacate.
14. The Defendant has sought for orders of eviction as against the Plaintiffs and demolition of all the structures on the suit land.

### **Hearing and Evidence**

15. PW1, Geoffrey Mwaura Kaigai, the 5<sup>th</sup> Plaintiff, stated that he lives in Reuben Village in Embakassi South, Nairobi. He adopted the witness statement filed by the 1<sup>st</sup> Plaintiff on 23<sup>rd</sup> October, 2018 as his evidence in chief and produced the documents annexed to the Originating Summons as PEXHB1-3.
16. It was his testimony that he has been on the suit property since 1993 and has residential mabati houses thereon; that he found other people on the property and was among the last people to get on the property; that there are two parcels of land being 209/10307 and 209/10308; that the entire land had been developed except the road and that the land belonged to Reuben, a white man and that when the white man left, their parents occupied and utilized the land.



17. According to PW1, initially, their parents used to cultivate the land; that they occupied the land after they moved out of their families' homes; that it is untrue that they entered the suit property during the post-election violence; that the Defendant does not know the properties' beacons and that they want to be given a title by the Court.
18. During cross-examination PW1 stated that the former President put up sewerage facilities on the land for them; that no one told them to leave the site except once; that the Defendant did not give them a Court order which they needed to enable them vacate the land and that they did not know the owner of the suit property and did not know the Defendant was the registered as the owner of the property.
19. According to PW1, they could not move out of the land because they had nowhere to go; that they came to Court after receiving the notice dated 14<sup>th</sup> August, 2018 and that the photos adduced do not show his house and that the photos show the houses from the road, whereas he lives deep inside the suit properties.
20. It was his further evidence on cross-examination that an old man called "senior", who had worked for the white settler was the one who showed people, including himself, where to put up structures.
21. DW1 was Ramji Devji Vekaria, the Defendant, who adopted his witness statement dated 28<sup>th</sup> March, 2019 as his evidence in chief and produced the documents attached to the Replying Affidavit as DEXB1-13.
22. It was his evidence that the suit properties are L.R 209/10307 and L.R 209/10308; that he was registered as the proprietor thereof on 14<sup>th</sup> September, 2006 and 4<sup>th</sup> October, 2006 respectively; that before he became the owner of the property, the property was owned by Alpha Development Company, registered in 1988 and that before buying the land, he conducted a search and went to the ground and found it vacant.
23. Mr Devji stated that he intended to put up a perimeter fence on the suit property and his Architect had already drawn the designs; that he got the approvals from the Nairobi City Council on 11<sup>th</sup> November, 2008; that he could not start the construction in 2007 during the election; that the land was vacant during the post-election violence; that people displaced during the 2007 post-election violence put up temporary tents on the land and the police gave them security and that when normalcy returned, he was unable to get the land back.
24. It was the Defendant's testimony that the Plaintiffs are on the land illegally and should be evicted therefrom; that their case should be dismissed; that they have not been on the land for over 12 years; that he has never filed a suit to evict the Plaintiffs except the present suit; that he did not go on the land with the surveyor and that he is not aware of any approval plans which were done in 1988.

### **Submissions**

25. The Plaintiffs did not file submissions. The Defendant's counsel submitted that the principle of adverse possession is founded on Section 7 of the *Limitation of Actions Act* which places a bar on recovery of land after 12 years, as read with Sections 13 and 38 of the Act.
26. It was submitted that the principle of adverse possession was elaborately set out by the Court in the cases of Wambugu vs Njuguna[1983]KLR 172, Mtaana Lewa vs Kahindi Ngala Mwangandi [2016]eKLR, Samuel Kihamba vs Mary Mbalisi[2015]eKLR, all of which affirmed that for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy and without license or permission on the land.



27. It was submitted that the Plaintiffs oral testimony as to how they entered into the suit property conflicts with the written statement on the same; that this contradiction shows that the Plaintiffs are unaware of when they entered the suit property and it is apparent that the same was forceful and that the evidence by way of photographs adduced by the Plaintiffs did not prove occupation.
28. Counsel for the Defendant submitted that the 5<sup>th</sup> Plaintiff admitted on cross-examination that his house was not captured in the photographs; that it is apparent that the Plaintiffs have stayed on the suit property forcefully despite threats to vacate and that they cannot be said to have been in “peaceful possession” thereof. Reliance in this regard was placed on the case of Samwel Kihamba(supra).
29. Counsel submitted that as expressed by the Court in the case of Wachira Githinji & Another vs Kanothi Githinji[2014]eKLR, a claim made in a Replying Affidavit in respect of a claim based on Order 37 of the Civil Procedure Rules is a Counterclaim; that Section 24 of the Land Registration Act protects the rights of a registered owner of property subject only to the rights as set out under Section 25 and that the Defendant’s title is not affected by Section 25 aforesaid;
30. According to counsel, the Defendant is entitled to Kshs 20,000,000 as damages and that the Plaintiffs have not met the threshold for the claim of adverse possession and their claim should be dismissed.

### **Analysis and Determination**

31. Having considered the pleadings, testimony and submissions, the issues that arise for consideration are;
  - i. Whether the Originating Summons is fatally defective?
  - ii. Whether the Plaintiffs are entitled to L.R 209/10307 and L.R 209/10308 by way of Adverse Possession? and if not,
  - iii. Whether eviction and demolition orders should issue against the Plaintiffs?
32. The Defendant asserts that the Originating Summons is fatally defective and offends the provisions of Order 37 Rule 7 of the Civil Procedure Rules for want of a Supporting Affidavit.
33. Order 37 Rule 7 (2) of the Civil Procedure Rules indeed mandates that a Summons such as the one filed herein should be supported by an Affidavit. The Court concurs that this is a mandatory requirement. Considering the pleadings, the Court notes that the Summons was filed contemporaneously with a Notice of Motion seeking injunctive orders.
34. The Notice of Motion was supported by an Affidavit, which Affidavit indicates at paragraph 19 as follows: “this Affidavit is sworn in support of both the Application and the Originating Summons filed herewith.”
35. It is common practice for parties to file a single Affidavit in instances where there are pleadings seeking both interlocutory and substantive reliefs requiring the same nature of Affidavits, and where the deponent intends to rely on the same set of facts for both. Considering the foregoing, and noting that the Affidavit is explicitly expressed to be in support of the Originating Summons, the Court finds no merit in the objection.
36. The Plaintiffs lay claim to the suit property by way of Adverse possession. It is their case that they entered onto the property sometime in the 1990’s and have lived thereon for a period of more than 12 years immediately preceding the institution of the suit and that they have lived openly, and continuously as of right and without any interruption from the Defendant.



37. The Plaintiffs adduced into evidence their authority to act on behalf of the other people residing on the land, photographs showing houses built on the property, a copy of the title to the properties and a copy of eviction notices dated 26<sup>th</sup> June, 2018 and 14<sup>th</sup> August, 2018.
38. On the other hand, the Defendant states that he is the registered proprietor of the suit properties having purchased them sometime in 2006; that he was unable to undertake any construction in 2007 because it was an election year; that the Plaintiffs entered into the property as internally displaced persons during the 2007 post-election violence and that attempts to have them vacate have been futile.
39. The Defendant adduced into evidence a letter from Alpha Development Company dated 12<sup>th</sup> June, 2006, copies of the title deeds for the suit properties, copies of transfer documents for the suit properties dated 17<sup>th</sup> July, 2006, bankers cheques and bank slips for stamp duty payments for the suit properties dated 4<sup>th</sup> January, 2007 and 18<sup>th</sup> July, 2007 and approval plans from the Nairobi City County dated 11<sup>th</sup> November, 2008, photographs of the suit properties, notices to vacate dated 26<sup>th</sup> June, 2018 and 14<sup>th</sup> August, 2018, a response to the vacation notice dated 10<sup>th</sup> July, 2018, official searches for the suit property and land rent and rates clearance certificates.
40. 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.”
41. Further provisions are made under Section 13 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.”
42. 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.”



43. Finally, Section 38(1) and (2) states as follows:

- “(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.”

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

45. In discussing the essential elements in a claim for adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR stated thus;

“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.”

46. Earlier on, the Court in *Gabriel Mbui vs Mukindia Maranya* [1993]eKLR gave a thorough and exhaustive explanation of these elements thus;

- i. The intruder must make physical entry and be in actual possession for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land and time does not begin to run merely because the land is vacant, adverse possession rests de facto use and occupation by an entrant. There must be actual possession which requires some with sufficient degree of physical occupation for 12 years.
- ii. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words the intruder must have some apparent title, the appearance of title but not the reality of it. He must have with him his own apparent right which affords him



some semblance of title under which he claims to found his occupation of the land independently of anyone else's power.

- iii. The occupation of the land by the intruder must be without permission from the true owner of the land. Permissive occupation or where possession was consensual or contractual cannot be called adverse. Any kind of permissive use, as a tenant, licence, contract purchaser in possession, or easement holder is rightful and not hostile. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable animus possidendi that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the owner....”
- v. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner, unless the acts be done are inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it. He must show that his possession was of such a nature and involved the exercise of rights so irreconcilable with those claimable by the owner of the land, and gave rise to a cause of action or right to sue for possession throughout the 12 years. Where the true owner of land intends to use it in the future for a particular purpose, but has no immediate use for it so leave is unoccupied does not lose his title to it simply because someone enters on it and uses it for some purpose not even if this purpose continues year after year for 12 years or more (see Leigh V Jack 1879 5 Ex D 264) The reason being by using land knowing it does not belong to him, he assumes the owner permits it and by not turning him off the owner impliedly gives him permission. Where the true owner can make no immediate use of the land, as the years go by it cannot be said he would lose his rights as an owner merely by reason of acts of trespass. Time therefore does not run against a true owner whose purposes are not prejudiced by the intruder's acts.
- vi. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice by the owner and the community of the exercise of dominion over the land. The owner has an opportunity to notice the intruder if reasonable inspection is conducted. There must be a denial of the owner's right by an open assertion of a hostile title by the person setting up adverse possession and there must be notice of the denial to the owner, either given directly or inferred from notorious acts and circumstances. So notorious must be the overt acts of ouster that there must be nothing that would lead the owner to suppose that his rights remain intact.
- vii. The possession must be continuous, uninterrupted, unbroken for the necessary statutory period. The possession by the adverse possessor must continue without significant interruption for a solid block of time at least so long as the period of limitation being at the moment 12 years before filing of the suit. The test is whether the adverse possessor used the land as a true owner would. There are a number of ways in which adverse possession which has begun to grow may be interrupted. Possession may be interrupted:-



- a) By the physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption.
  - b) By the institution of legal proceedings by the rightful owner to assert his right to the land; or
  - c) By any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
- viii. The rightful owner against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, during the statutory period. If at any time in the course of the running of the time he had no right to claim possession, or he was under a disability or legal impediment, time does not run against him during that spell. The true owner must have the right to immediate possession during the 12 years and if he has no right to immediate possession it is practically immaterial to him who is in possession. Having no right himself to possession, he cannot eject the person in possession.
- ix. The rightful owner must know that he is ousted, he must be aware that he has been disposed or he must have parted and intended to part with possession. Just as the adverse possessor cannot succeed if he did not know he was in actual possession of another's land, the owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted or have quit the land."
47. 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. This was enunciated by the Court in the case of Gabriel Mbui (Supra) which stated as follows:
- "The plea of adverse possession is always based on facts and they 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 when on, whether his possession was open and undisturbed. Unless these questions are asserted and proved a plea of adverse possession must fail."
48. The first point of determination is when the Plaintiff came into possession of the property. PW1, through his oral testimony, stated that he entered into the property sometime in 1993 having found others already thereon; that the land initially belonged to a white settler and when he left, their parents took over the parcels of land by cultivating them and that they (the Plaintiffs) thereafter took over and constructed their houses thereon.
49. It was the evidence of PW2 that at the time, the land was un-occupied and they presumed it belonged to the Government or the Nairobi City Council and that as at the end of 1998, the property was fully occupied. The Defendant on his part asserts that the Plaintiffs entered into the property during the 2007/2008 post-election violence and after normalcy returned, they resisted attempts to have them vacate the property.



50. Apart from the conflicting oral testimony, no other evidence has been adduced to support the assertion that the Plaintiffs entered into the suit property in the 1990's. The Defendant has on the other hand, through his testimony, supported by evidence, proved on a balance of probabilities that as at the time he purchased the property in mid-2006, the same was vacant. The Court finds his assertion that the Plaintiffs entered the suit properties during the 2007 elections credible. For clarity, the 2007 elections were conducted in December, 2007.
51. Having found that the Plaintiffs entered onto the suit properties in 2007, a period 12 years thereafter would be sometime in the year 2019. This means that as at the time the Plaintiffs filed the present suit in 2018, the Defendant's title had not been extinguished.
52. As expressed by the Court of Appeal in *Wines & Spirits Kenya Limited & another vs George Mwachiru Mwango* [2018] eKLR;
- “...It therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration.”
53. The Plaintiffs have been unable to show that they have been in occupation of the suit property for 12 years or at all. Indeed, the only witness for the Plaintiffs, PW1, informed the court that his house was not amongst the houses depicted in the photographs that were annexed on his Affidavit. What this means is that there was nothing on record to show that indeed the Plaintiffs are occupying the suit properties. The Plaintiffs have not proved the claim for adverse possession to the required standards. The said claim therefore fails.
54. Vide the Replying Affidavit, the Defendant seeks to have the Plaintiffs evicted from the suit properties. The Originating Summons and the Replying Affidavits are the only pleadings anticipated under Order 37 of the *Civil Procedure Act*. That being so, the Replying Affidavit is in the nature of a Defence and a claim can be raised therein such as in the nature of a Counterclaim.
55. The title held by the Plaintiff is registered under the Registration of Titles Act (repealed) which provides as follows with respect to proprietorship;
- “23. The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.
56. The same is replicated in Section 24 of the *Land Registration Act*, 2012 which provides as follows;
- “Subject to this Act—



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

57. Section 26(1) of the *Land Registration Act* provides for instances in which a registered proprietors title may be challenged. It provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

58. The Plaintiff has alleged unprocedural allocation of the suit property to the Defendant. It is however noted that the Defendant was not the original allottee of the land but purchased the same from the original allottee. Nonetheless, these allegations have not been substantiated. Ultimately, no challenge has been raised in respect of the Defendant’s title in terms of Section 26 above. It is the court’s finding that the 1<sup>st</sup> Defendant is the rightful proprietor of the suit property.

59. One of the rights of a proprietor of property is the right to peaceful and quiet possession of the same. Having affirmed the Defendant’s proprietorship, and it being admitted that the Plaintiffs are on the suit properties and have constructed thereon, the Court finds the prayers for eviction and demolition merited.

60. As to the claim for general damages for trespass, the same was not sought in the Replying Affidavit. The Court need not reiterate that submissions are not pleadings and new issues cannot be raised by way of submissions.

61. In the end, the Court makes the following final determination;

- a. The Plaintiffs’ Originating Summons dated the 23<sup>rd</sup> October, 2018 be and is hereby dismissed.
- b. The Plaintiffs are given 120 days (4 months) from the date of this Judgement to vacate from the suit properties and demolish the structures thereon.
- c. If the Plaintiffs do not vacate the suit property within 120 days, the Defendant, with the assistance of the police, to evict the Plaintiffs.
- d. Each party to bear his/ its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF APRIL, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**



Mr. Mathai for Defendant  
No appearance for Plaintiff  
Court Assistant- Tracy

