IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA,OUKO & M'INOTI JJA.)

CIVIL APPEAL NO. 56 OF 2014

BETWEEN

MTANA LEWA…….....……APPELLANT

AND

KAHINDI NGALA MWAGANDI……. RESPONDENT

(Appeal from the ruling of the Environment and Land Court of Kenya at Malindi (Angote, J.) dated 14th July, 2011

in

E.L.C. C, No. 108 of 2011 (O.S.))

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JUDGMENT OF ASIKE-MAKHANDIA, JA

The present appeal arises from the ruling of the High Court at Malindi disallowing the appellant's Preliminary Objection dated 13th March, 2014. The appellant, **Mtana Lewa** was the defendant in the trial court, and the registered owner of all that piece or parcel of land known as **Tezo/Roka/371** measuring approximately 16 acres "*the suit premises*". The respondent **Kahindi Ngala Mwagandi** as plaintiff, had filed in the trial court Originating Summons dated 1st April, 2011 seeking a declaration that title to the suit premises had by operation of the principle of adverse possession devolved to him. The Preliminary Objection challenged the jurisdiction of the court to entertain the claim for the reason that **Section 38** of the Limitation of Actions Act was in conflict with **Article 40** of the Constitution as read together with the doctrines of *ex turpi causa non oritur actio* and *ex dolo malo no oritur action* and therefore unconstitutional. These maxims simply mean that no action should be founded on illegal or immoral conduct and or that the plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act and or that no right of action can have its origin in fraud. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The objection was argued before **Angote, J.** who on 31st July, 2014 dismissed it, thus setting the stage for this appeal on grounds that the Judge erred:-

i. in not upholding the preliminary objection;

ii. in holding that under the Constitution, the court had jurisdiction to dispose an owner the property pursuant to the doctrine of recent possession;
iii. In holding that under **Article 40 (2) (a**) and **(b)** of the Constitution, Parliament can enact a law to limit the right to own property;
iv. in failing to uphold the rights of a property owner enshrined under **Article 40** of the Constitution; and finally,
v. In holding that the court had jurisdiction to hear a claim for adverse possession in view of the provision of **Article 40** of the Constitution.

In a nutshell, this appeal challenges the constitutionality of the doctrine of adverse possession as enshrined in **Section 38** of the Limitation of Actions Act. **Mr. Ochwa**, learned counsel for the appellant made similar submissions before us in this regard. Counsel also relied on the same authorities as cited in the High Court. The appellant urges that the said section is contrary to the provisions of the Constitution and therefore null and void in accordance with **Article 2** of the Constitution of Kenya. He submitted that the doctrine of adverse possession was anchored in **Section 75(6) (v)** of the repealed Constitution under which there was room for a statute to alienate private land in that fashion. That in the absence of a provision in terms similar to **Section 75(6) (v)** of the rested Constitution, the current Constitution does not allow for the operation of the doctrine of adverse possession and that Parliament is expressly prohibited from enacting laws that would arbitrarily deprive one of his property. The court, being a state organ is also prohibited from acting arbitrarily and it will be doing so if it invoked that doctrine. The appellant further submitted that Limitation of Actions Act violates **Article 43** of the Constitution on the economic and social rights since it would impoverish the owner of land adversely possessed as he might swell the ranks of squatters.

He also submitted in the alternative that under the new Constitution, the deprivation of property without compensation was unconstitutional and therefore any person who wished to seek land under the guise of the doctrine of adverse possession ought to make the application through the National Land Commission which is mandated to deal with issues concerning acquisition and deprivation of land and consequential compensation. On the whole however, the appellant prayed that, we find that **Section 38** of the Limitation of Actions Act is contrary to the Constitution and accordingly set aside the ruling and order of the High Court.

The appeal was opposed. The respondent through **Mr. Nyange**, learned counsel implored the court to disallow the appeal for being time barred. Although there was a certificate of delay, the respondent submitted that time started to run on 10th September, 2014. The record was filed on 16th October, 2014 and therefore out of time. However, when the court pointed out to counsel that the submission had no legal basis as he ought to have applied to have the appeal struck out, he wisely chose to abandon that line of argument.

The respondent submitted that **Article 40** of the Constitution is not absolute. It has limitations for instance **Article 40(2) (a)** which allows Parliament to legislate for permissible deprivation of property, with the rider that it should not be arbitrary. The respondent urged that adverse possession does not arbitrarily take away one's land, since there is due process that must be followed in court. He pointed out that **Article 24** provides for limitation of rights under the Constitution which would justify **Section 38** of the Limitation of Actions Act. It was also urged that the doctrine is necessary to protect litigants from the prejudice of long and dormant claims and related instances. It was submitted further that to leave land abandoned would be contrary to the principles of land policy enshrined in **Article 60** of the Constitution. The respondent sought to distinguish this case from the provisions of **Article 40(3)** which relates to state action in acquiring land, as opposed to an individual's acquisition which is the case. The respondent added that ownership of property brings with it rights and duties. If one is caught up with laches one cannot claim that the law is unfair. Adverse possession does not lead to arbitrariness. The respondent therefore prayed that the appeal be dismissed with costs.

I have anxiously considered the record of appeal, the grounds thereof, the ruling of the High Court, the rival submissions and authorities cited. Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take

action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which is in these terms:-

> ***"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."***

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

> ***" (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."***

Sections 37 and **38** of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that:-

> ***" (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in*** *section 37,* ***to land or easement or land comprised in a lease registered under any of those Acts, 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****."*

Section 75(6) (v) of the repealed Constitution was in the following terms:-

> ***"(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) –***
>
> ***a. To the extent that the law in question makes provision for the taking of possession or acquisition of property-***
>
> ***vi. In consequence of any law with respect to the limitation of actions."***

It was stated by the trial court that this section was made necessary owing to the proviso in **Section 70** of the former Constitution, to specifically state the circumstances under which the right to own property could be limited, which included any law with respect to the limitation of actions, amongst other limitations. Similar provision was not inserted in the current Constitution. However, the Judge opined and rightly so in my view that since **Article 40** does not specifically mention that the right to own

property can be limited by any law relating to limitation of actions, neither does it state that such a law cannot be enacted.

Chapter 4 of the Constitution of Kenya contains the Bill of Rights, which is a collection of fundamental rights and freedoms sought to be protected including the right to life (**Article 26),** human dignity (**Article 28**), freedom of movement and residence (**Article 39**), right to property (**Article 40**), fair administrative action (**Article 47**), access to justice (**Article 48**) and fair hearing (**Article 50**). The bill of rights are to be applied so as to develop the law where there is a gap in giving effect to a right or fundamental freedom as per **Article 20 (3) (b)**. These rights are however not absolute, but subject to limitations in so far as such limitations are reasonable and justifiable taking into account the factors set out in **Article 24** including the nature, importance, purpose and extent of the right vis a vis the limitations as well as prejudice to the rights and freedoms of others. The Constitution further dictates in **Article 24 (2)** that any statute limiting a right or fundamental freedom should be clear about the right or freedom being curtailed and specifically express such intention as well as the nature and extent of the limitation for it to be valid. For the avoidance of doubt, the framers of the Constitution included a list of rights and freedoms which may not be limited notwithstanding any provisions of the Constitution. These absolute rights are set out in **Article 25**. It is instructive that the right to property is not one of them. This then leaves the protection of the right to property within the precincts of allowable limitations by the statute.

Section 7 of the Transitional and Consequential Provisions (**Schedule 6** of the Constitution) requires that all statute in force prior to the promulgation of the new Constitution be construed with alternations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. **Schedule 5** of the Constitution specifies legislation to be enacted by Parliament in order to give effect to the provisions of the Constitution amongst others, regulation of land use and property (**Article 66**) and land (**Article 68**). **Article 68** is couched in very specific terms. Without intending to speculate, it is quite evident that the list while not exhaustive, encompasses the areas of the law that the people of Kenya felt strongly that had to be addressed. Adverse possession was not among this list and would not by the *ejusdem generis* interpretation fall within this list.

Article 64 of the Constitution defines private land as registered land or land held by any person under freehold or leasehold or any other land declared private land under an Act of Parliament (**Article 64 (c)).** This definition would include land acquired by adverse possession, or at lease does not preclude such. Every person in Kenya has the Constitutional protection of the right to property under **Article 40**. This entitles every person to the right to acquire and own property in any manner prescribed by law. The doctrine of adverse possession in effect allows a party to acquire land in accordance with the law. The same Article also protects every person from arbitrary limitation or restriction of this right to property by discrimination. In addition, any person who has an interest in property is assured of the right of access to a court of law before any deprivation.

Among the legislation enacted in relation to land in the new constitutional dispensation is the Land Act and the Land Registration Act. **Section 7 (i)** of the Land Act recognizes that title to land may be acquired through any manner prescribed by statute. **Section 28** of the Land Registration Act, too recognizes right to land acquired by virtue of any written law relating to the limitation of actions or other rights acquired by any written law. By operation of these statues, an adverse possessor gains title and is entitled to equal protection of the law over this property. On the principle that these statutes are designed to give effect to the Constitution and provide practical interpretation, these statutes, it would appear to me not to discard but rather continue to develop the doctrine of adverse possession. Had the framers of the Constitution intended to root out adverse possession, nothing would have been simpler than to do just that.

This is not the first case in which the doctrine of recent possession has come under focus. It has been the subject of litigation in our High Court, see for instance **Kasimu Sharifu Mohamed v Timbi Limited [2011] eKLR** and **Kazungu Moli & 6 others v Perihan Torun & 6 others[2014] eKLR**. In all these cases, the High Court declined and rightly so in my view to hold that **Section 38** of the Limitation of Actions Act was unconstitutional. What is the position in other jurisdictions? In the Supreme Court of India in the case of **State of Haryana v Mukesh Kumar & Others [2012] AIR SCW 276** while acknowledging the decision of the European Court of Human Rights "ECHR" in **JA Pye (Oxford) Ltd v**

United Kingdom [2008] 1 EHRLR 132, where the ECHR took a dim view of the concept of adverse possession, has itself opined that the law of adverse possession is irrational, illogical and wholly disproportionate, and recommended to the Union of India to seriously consider and make suitable changes in the law. The Indian courts drew comparisons with English law, in which the law has reformed and modernized the doctrine. The UK Land Registration Act, 2002 now requires the Registrar of Lands to notify the land owner of an adverse possessor's intention to apply for title over the land, giving the land owner 2 years and 65 days within which to oppose and evict the adverse possessor. In this system, the adverse possessor who has been in occupation for 10 years may apply to the Registrar of Lands and the Registrar will in turn notify the registered owner of this application. If after the period no action is forthcoming from the registered owner, then the adverse possessor may succeed in his claim to title. This new legal position makes it much harder for opportunist and or squatters to acquire title to registered land.

In the English case of **JA Pye (Oxford) Ltd v United Kingdom** (supra), at the first instance, the ECHR (reported in (2005) 19 BHRC 705) held that adverse possession violated Article 1 of the European Convention on Human Rights, Protocol No. 1 for the reasons that first, the consequence is disproportionate, second, that no public interest exception is involved and third, that the property should not be deprived without compensation. However, the Grand Chamber of the ECHR (reported in (2007) 46 EHRR 45) reversed the decision holding that adverse possession is not a "*deprivation of possessions*", but rather a "*control of use*." It opined that the limitation period is also long enough hence reasonable. The Court also pointed out the importance of respecting domestic legislation as the UK Parliament did not abolish adverse possession when passing the Land Registration Act 2002. What these authorities are suggesting, is that the doctrine of adverse possession is not a bad thing perse. What is perhaps required is to smoothen the rough edges.

The acquisition of land under the doctrine of adverse possession is therefore recognized in all the civil and common law jurisdictions. The concept and elements of adverse possession are almost the same. However, there is no clear pattern as regards the length of limitation periods. The period after which the real owner may no longer bring an action to repossess her land varies from 10 years to 30 years. Proof of good faith on the part of the possessor of the land will significantly reduce the limitation period in some jurisdictions such as France, Spain, The Netherlands and Poland. For instance, French law permits the acquisition of title to land by prescription over a 30 year period if the possession is continuous, uninterrupted, peaceful, public and unequivocal. A reduced prescription period of ten years is provided if the possessor had acted in good faith and in genuine belief of the existence of a just title. However, if the true owner does not live within the district of the Court of Appeal, then the period is extended by twice the number of years i.e. 20 years. In some countries e.g. Hungary, Germany, Massachusetts US, the evidence of good faith is not a relevant consideration. The application of the doctrine of adverse possession as well as the duration of possession also depends on whether the land is registered or not.

In US, all States within the Federation recognize title acquired by adverse possession after limitation periods ranging from 5 to 40 years. In addition to varying time limitations, there are differences among the States as to the role of good faith as a necessary condition for adverse possession and as to certain categories of land type and use. Most of the jurisdictions in US do not require an element of good faith in cases of actual and uninterrupted possession. See generally "*consultation paper on adverse possession of land/immovable property, Law Commission of India*."

As it can readily be seen most countries do maintain the doctrine of adverse possession and courts continue to recognise the public policy value of extinguishing title to registered property after a certain period. Limitation of actions mechanisms such as adverse possession play an important role in the enforcement of one of the fundamental legal principles of the judicial system, which is that at some point, litigation must come to an end. It is in the public interest and indeed in the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce. Limitation of time for land claims as with claims of any other nature exist for three main reasons which are:

i. ***A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent);***

ii. ***A defendant might have lost evidence over time to disprove a stale claim; and***

iii. ***Long dormant claims have more cruelty than justice in them (Halsbury's Laws of England, 4th Edition.)***

Every limitation of actions, including adverse possession, does come with certain exceptions and extensions to ensure justice and fairness as far as possible. Opening the litigation door on this principle would be akin to opening Pandora's Box. **Section 38** of the Limitation of Actions Act cannot be read in isolation. Declaring it unconstitutional in the manner suggested by the appellant in this case would not only be lacking in good reason, but would pose the danger of exposing the entire statute and principle of limitations to challenge with undesirable effects and consequences. For instance, what will stop a litigant from challenging defences of limitation in cases of torts and contracts as being unconstitutional for the reason that they are an impediment to his constitutional right to access justice? It may be admitted that adverse possession in its present form in Kenyan law may occasion unsavory results for land owners, but such is the position in law even within the new constitutional dispensation. The proper recourse would be for the statutes to be carefully researched and developed to cover the mischief of unscrupulous squatters in the current state of affairs.

Otherwise, I have not found a reason to fault the decision of the High Court and as a consequence would dismiss the appeal without costs to any party considering the constitutional discourse involved.

As Ouko and M'Inoti, JJA agree, the order of the Court is that the appeal is dismissed with no order as to costs.

Dated and delivered at Malindi this 17th day of July, 2015.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF OUKO, JA

The respondent instituted an originating summons in which he asked the **High Court** to declare him as the absolute owner of parcel of land known as **TEZO/ROKA/374**, registered in the name of the appellant by reason of having been in open, peaceful and continuous occupation, without interruption for a period exceeding 12 years; and that the Registrar of Lands be directed to issue to the respondent the title to the suit property.

In reply to the originating summons the appellant denied the respondent's claim and asserted that the **High Court** lacked jurisdiction to determine the question raised in the originating summons because, *inter alia*, the claim for adverse possession under **Section 38** of the Limitation of Actions Act was inconsistent with and violated **Article 40(2)** of the Constitution hence, in terms of Article 2(4) void to that extent rendering the claim for adverse possession invalid. This question was the subject of a notice of preliminary objection brought by the appellant.

After hearing counsels submissions, the learned Judge (**Angote, J**), in a well-researched and reasoned

judgment found, *inter alia*, that **Article 40** aforesaid does not specifically state that the right to own property can be limited by any law, neither does it state that such law cannot be enacted thereby holding that the acquisition of property by adverse possession does not amount to an arbitrary deprivation of property; that such acquisition is based on reasonable foundation that is acceptable in an open and democratic society demanding that persons with causes of action should persue them with reasonable diligence; that it is against public interest and the Constitution to allow land, a scarce resource to lie abandoned in perpetuity; that although the Constitution protects property rights, such rights must be qualified by regulation in the use of land, which includes how long the owner of the land can abandon it without utilizing it, because the Constitution provides in **Article 60(1)** that land must be held, used and managed in a manner that is equitable, efficient, productive and sustainable. The learned Judge concluded that;

> "***The law of limitation therefore cannot be equated with a law which arbitrarily deprives one of his land because it protects individuals and the society at large from stale claims; prevents land from falling into disuse; facilitates conveyancing, an important component in the growth of the economy of an agrarian society like ours and prevents disturbance or deprivation of what may have been acquired in equity and justice by long use and enjoyment"***

For those reasons the objection was overruled. This has prompted the appellant to proffer this appeal on the broad ground that the learned Judge erred in holding that **Sections 7, 9, 13, 37** and **38** of the Limitation of Actions Act were not in contravention of **Article 40(2) (a)** & **(b)** of the Constitution.

Mr.Ochwa for the appellant submitted before us that the doctrine of adverse possession has all along, until 2010 been anchored in **Section 75(6) (vi)** of the former Constitution; that prior to the passage of the Constitution of Kenya, 2010 the right to property guaranteed under **Section 75(1)** was limited by the application of the doctrine of adverse possession under the aforesaid **Sub Section (6) (vi).** But because there is no similar provision in the present Constitution, learned counsel submitted, the Constitution does not permit the taking of another person's property by adverse possession; that while the Constitution provides for the manner public and community land may be disposed of or used, there is no similar provision with regard to private land. In the learned counsel's view this was a deliberate omission because in **Article 40 (2)** the Parliament is prohibited from enacting a law that would permit the State or any person to arbitrarily deprive a person of his property; that the doctrine of adverse possession is in conflict with the provisions of **Article 43,** on economics and social rights; that today the Constitution addresses the question of landlessness by providing for the National Land Commission whose functions, among others, is to settle the landless; that the Land Settlement Fund under **Section 135** of the Land Act is created for this purpose.

Mr.Nyange for the respondent, on his part, submitted that the right to property under **Article 40** is not absolute as it is not among the rights identified in **Article 25 –Fundamental Rights and Freedoms that may not be limited**- and therefore the limitation to right to property brought about by the Limitation of Actions Act is permitted; that adverse possession is not an arbitrary deprivation of land because due process is followed before the registered owner can be declared to have lost his land to an adverse possessor; that **Section 38** of the Limitation of Actions Act imposes a reasonable limitation in a democratic society on the property rights in order to protect litigants from prejudice of stale claims and to avoid using land for speculation.

The question being raised in this appeal is extremely important and novel since we are being asked to find that the doctrine of adverse possession, which has been applied in this country for decades, even before the enactment of the Limitation of Actions Act by virtue of the **Indian Limitation Act of 1877**, is to the extent that it is inconsistent with the Constitution,void. It is for us a matter of lament that in view of the important constitutional question raised in this appeal, only **Mr.Nyange**, cited a single authority, the famous case of **J.A Pye(oxford) Ltd** & a**nother** v **the United Kingdom,** European Court of Human Rights, Grand Chamber Application **No.44302 of 2002** to support his arguments in opposition to the appeal.

In terms of **Sections 7**, **9,13,17,37** and **38** of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner. See **Titus Kigoro Munyi** v **Peter Mburu Kimani** Civil Appeal No.**28 of 2014** where this Court recently restated the law.

No case demonstrates the controversial nature of the doctrine of adverse possession than the single case cited in this appeal, **J.A, Pye** (Supra). In that case, which commenced as **J.A. Pye (Oxford Limited** v **Graham** in the Chancery Division of the High Court of Justice in the United Kingdom, the Grahams claimed 25 hectares of agricultural land belonging to **J.A Pye** by operations of **Section 15** of the English Limitation **Act**, **1980,** equivalent of our **Section 7**. The **High Court**, **Neuberger, J** held that since the Grahams had enjoyed factual possession of the land for more than 12 years**, J.A Pye's** title was extinguished and the Grahams were entitled to be registered as proprietors of the entire 25 hectares of land in dispute. In the closing paragraphs of his judgment, the learned Judge while appreciating the controversy in the application of the doctrine of adverse possession and the need for reform expressed his misgivings stating that;

> ***"A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely, and that is a proposition to which at least in general nobody could take exception. However, if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years. To say that in such circumstances the owner who has sat on his rights should therefore be deprived of his land appears to me to be illogical and disproportionate. Illogical because the only reason that the owner can be said to have sat on his rights is because of the existence of the 12 year limitation period in the first place; if no limitation period existed he would be entitled to claim possession whenever he actually wanted the land. Of course one can well see the justification for saying that the owner should not be entitled to recover damages for trespass going back more than six years; that involves rather different considerations. I believe that the result is disproportionate because, particularly in a climate of increasing awareness of human rights including the right to enjoy one's own property, it does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no steps to evict a squatter for 12 years, the owner should lose 25 hectares of land to the squatter with no compensation whatsoever."*** (my emphasis)

The Court of Appeal in an appeal brought by **J.A.Pye** reversed the decision of **Nueberger, J** on the ground that the Grahams did not have the necessary intention to possess the land and **J.A Pye** was not therefore "*dispossessed*" of it within the meaning of the 1980 Act. Although this conclusion was sufficient to dispose of the appeal, the court considered the question whether a loss of title by **J.A Pye** of the property in dispute to the Grahams would have amounted to a violation of **Article 1** of **Protocol No.1** of the European Convention of the Protection of Human Rights and Fundamental Freedoms. It found that nothing was inherently incompatible between the **Limitation Act of 1980** and **Article 1** of **Protocol No. 1**, aforesaid. This finding will become relevant shortly.

The Grahams were dissatisfied and appealed to the House of Lords which allowed their appeal, holding that, the Grahams were in possession having "dispossessed" **J.A Pye**. But of importance to the point being made in this judgment, **Lord Bingham of Cornhill** sharing the misgivings of the trial Judge (**Neuberger, J**) reproduced earlier came to the same conclusion albeit "*with no enthusiasm*" that the Grahams were entitled to the land by virtue of Limitation Actions. No enthusiasm because of what he considered to be the injustice of the claim. **Lord Hope of Craighead** also agreeing with the leading judgment of **Lord Brown-Williamson** dismissing the appeal however observed that;

> ***"The question itself however is not an easy one, as one might have expected the law - in***

> ***the context of a statutory regime where compensation is not available – to lean in favour of the protection of a registered proprietor against the actions of persons who cannot show a competing title on the register. Fortunately … a much more rigorous regime has now been enacted in Schedule 6 to the Land Registration Act 2002. Its effect will be to make it much harder for a squatter who is in possession of registered land to obtain a title to it against the wishes of the proprietor. <u>The unfairness in the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.”</u> (*my emphasis*)***

The question whether the result was incompatible with **J.A Pye's** right to property under **Article 1** of **Protocol No. 1** was not pursued in the House of Lords. However following the dismissal of **J.A Pye's** appeal by the House of Lords, **J.A Pye** moved the European Court of Human Rights umH (the ECHR) – Strasbourg, **<u>in J.A Pye (Oxford & another</u>** vs **<u>The United Kingdom</u>** Appl.No.**44302 of 2002** arguing that the United Kingdom law on adverse possession by which its land had been awarded to the Grahams was in violation of **Article 1** of **Protocol No. 1**. They claimed £10 m in damages from the Government for the loss. Article 1 of Protocol No.1 provides that;

> ***“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”***

The ECHR found that **Article 1** of **Protocol No.1** was applicable to the dispute. By a majority of four to three the Court held that the deprivation of **J.A Pye** of their title to land through adverse possession infringed Article 1 of **Protocol No.1** because;

> ***“The taking of property in the public interest without payment of compensation reasonably related to its value is justified only in exceptional circumstances. There is no justification for treating the present case as an exception to the general principle. The application of the provisions of the 1925 and 1980 Acts to deprive Pye of their title to the registered land imposed on them an individual and excessive burden and upset the fair balance between the demands of the public interest on the one hand and Pye's rights to the peaceful enjoyment of their possessions on the other.”***

The United Kingdom Government requested for a re-hearing of the matter by the Grand Chambers of the ECHR. By a ten to seven votes the Grand Chambers reversed the decision of ECHR holding that the United Kingdom Government did not violate **Article 1** of **Protocol No.I**

I have gone into this detail, tracing the dispute between **J.A Pye** and the Grahams though the High Court in 1998, the Court of Appeal in 2001, the House of Lords in 2002 the, ECHR in 2005 and finally in the Grand Chamber in 2007, to demonstrate the pain, determination, resilience and the length a land owner who stands to lose his land to a stranger for free, will go to in order to protect his right over property.

The law of adverse possession has been viewed as theft of land and described in very harsh terms. No statement depicts this view with greatest disdain as the words employed by EAPNOW – End Adverse Possession Now – an organization championing the abolition of adverse possession in the United States of America.

In 2011 it introduced the House Bill 1026 intended to introduce a public policy for legislative change that would lead to the reforms of the law of adverse possession. This is how the movement describes the doctrine;

> ***“…<u>most outdated</u>, <u>unnecessary</u> and <u>unfair</u> law-adverse possession. Unchanged in Washington Since the 1890's, adverse possession allows anyone to legally take land from another <u>for free</u> provided they meet certain requirements… the bill would help eliminate the <u>practice of legalized land theft</u> known as adverse possession……***

> ***Washington is no longer in the wild-wild-west …Adverse possession laws have already been changed in Colorado & New York, making it much harder for squatters and thieves to take land for free… much like laws of slavery, dowry and other laws that society has found to be repugnant, the justification for having adverse possession no longer applies today.***
>
> ***Adverse possession claims undermine public faith and confidence in land recording systems, payment of land taxes, and even contradicts the U.S. Constitution's Fifth Amendment "takings" clause, which provides that if the government takes property, it must provide "just" "compensation." Fundamental fairness simply does not apply to claims of adverse possession, which explains why citizens cannot steal land from the government under adverse possession. The government is protected from legalized land theft, but ordinary people have no recourse. This bill, HB 1026, helps prevent adverse possession abuse, which is why End Adverse Possession Now (EAPNOW) urges the public to contact their local representatives and voice their support for this bill." (****Emphasis supplied****)***

Similarly the Supreme Court of India recently handed down a judgment that could force a re-look at the law of adverse possession in that country in the case of **State of Haryana** v **Mukesh Kumar & others**, Petition For Special Leave to Appeal (Civil) No.28034 of 2011 in which **Bhandari, J** opened his judgment by the following statement;

> ***"People are often astonished to learn that a trespasser may take the title of a building or land from the true owner on certain conditions and such theft is even authorized by law". (****my emphasis****)***

He went to state that;

> ***"The right to property is now considered to be not only constitutional or statutory right but also a human right. Human rights have already been considered in realm of individual rights such as right to health, right to livelihood, right to shelter…etc. But now human rights are gaining a multi-faceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context….***
>
> ***We inherited this law of adverse possession from the British. The Parliament may consider abolishing the law of adverse possession or at least amending and making substantial changes in law in the larger public interest …..***
>
> ***Adverse possession allows a trespasser-a person guilty of a tort, or even a crime, in the eyes of law-to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling.***
>
> ***This outmoded law essentially asks the Judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible…..***
>
> ***If this law is to be retained, according to the wisdom of the Parliament, then at least the law must require those who adversely possess land to compensate title owners according to the prevalent market rate of the land or property in question. This alternative would provide some semblance of justice to those who have done nothing other than sitting on their rights for the statutory period, while allowing the adverse possessor to remain on property……***
>
> ***In our considered view, there is an urgent need for a fresh look of the entire law on adverse possession. We recommend the Union of India to immediately consider and***

seriously deliberate either abolition of the law of adverse possession and in the alternate to make suitable amendments in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India."

Bearing these developments elsewhere in mind, what is the present state of the law of adverse possession in Kenya? **Section 75 (6) (a) (vi)** of the former Constitution permitted the passage of any law; **"with respect to the limitations of actions"** to make **"provision for the taking of possession or acquisition of property".**

This has been argued to be the basis of **Sections 7,9,13 37 and 38** of the Limitation of Actions Act. It has been submitted in this appeal that without a similar provision in the present Constitution and with the introduction of **Article 40(2) which** guarantees right to property, the people of Kenya made a conscious decision not to allow the State or any other person for that matter to arbitrarily deprive any person of his or her property of any description. **Article 40** stipulates that;

"40. (1) Subject to Article 65, <u>every person has the right</u>, either individually or in association with others, <u>to acquire and own property-</u>

(a) of any description; and

(b) in any part of Kenya

(2) Parliament <u>shall not enact a law that permits the State or any person-</u>

a. ***to <u>arbitrarily</u> deprive a person of property of any description o*r of any interest in, or right over, any *property of any description: or…." (****Emphasis supplied)***

The key word with regard to the kind of legislation Parliament is prohibited from enacting is "arbitrarily." Parliament under the Constitution cannot enact a law that will permit or has the effect of permitting the arbitrary deprivation of a person of his property. The State may, however, deprive a person of his property only where such deprivation results from an acquisition of land in accordance with Chapter Five or only if it is acquired for a public purpose or in the public interest and again, only on condition that prompt payment is made of just compensation to the owner of the land. Because the Constitution recognizes the rule of law as a national value and declares any law which is inconsistent with it (the Constitution) void, it follows that any legislation that makes provision for any arbitrary action would similarly be void because the rule of law and arbitrariness are like water and oil. **A.V Dicey** the English jurist and Constitutional theorist (1835-1922), in the **<u>Introduction To The Study of the Law of the Constitution</u>** (1885) defines rule of law to mean;

".. in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness."

Is adverse possession as practiced and applied in Kenya arbitrary, capricious or whimsical? Before I venture to answer that question, it is necessary to state here that the fact that the Constitution does not make provision recognizing the doctrine of adverse possession cannot *per se* imply that it has outlawed it. The converse is equally correct, that because the Constitution does not outrightly outlaw adverse possession that alone is sufficient indication that the right to property is not absolute. Applying the Constitutional principles of interpretation that insists on consideration of the whole Constitution(the principle of harmonization), as opposed to a narrow interpretation, one that promotes the purposes, values and principles of the Constitution, advances the rule of law, human rights and fundamental freedoms, I am of the firm view that, if it was the intention of the people of Kenya to say enough is enough with this law, nothing would have been easier than to say so loud and clear, leaving no room for conjecture. That perhaps explains why right to property is not listed among the rights that may not be limited. A right or fundamental freedom may be limited by legislation if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, *inter*

alia, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation.

Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario,* that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of **Section 38** of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land he must apply to the **High Court** for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the **High Court** is provided for in **Order 37 rule 7** as follows;

> ***"7(1) An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.***
>
> ***(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.***
>
> ***(3) The Court shall direct on whom and in what manner the summons shall be served."***

In **Teresa Wachuka Gachira** v **Joseph Mwangi Gachira**, Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See **Kyeyu** v **Omuto,** Civil Appeal No. 8 of 1990. See also the present position in **Johnson Kinyua v Simon Gitura** Civil Appeal No.265 of 2005, where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim. In **Kimani Ruchine** v **Swift Rutherford & Co.Ltd (1980) KLR** it was stated on this point that;

> "***The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario ….. So the plaintiffs must show that the company 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 endevours to interrupt it or by any recurrent consideration; See Wanyoike Gathire v Berverly (1965) EA 514, 518, 519 per Miles, J."***

In **Teresa Wachuka Gachira** (Supra), a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. This Court, on appeal found that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

> ***"There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land.***

Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor"

Further safeguards are provided in **Sections 22** and **26** of the Limitation of Actions Act. The former prevents time from running on account of disability in which case the action can be brought before the end of 6 years from the date when the person ceases to be under a disability. Under **Section 26** in the case of fraud or mistake, the period of Limitation will not begin to run until fraud or mistake has been discovered.

What I have said in the preceding paragraphs demonstrate that by the time the requirements for the application for a declaration that one has acquired title by adverse possession is satisfied the true owner of the land will have been subjected to a due process of the law. It therefore follows, from the foregoing that the Limitation of Actions Act does in fact provide protection of the right to property by the application of specific rules that ensure due process before title can be lost to a third party. The process leading to acquisition of land by adverse possession is, accordingly not arbitrary and does not contravene **Article 40(2) (a)** of the Constitution, I so find.

Having said that, the next thing is to consider the relevance today of the law of adverse possession against the backdrop of the on-going land reforms in Kenya. In 2002 the United Kingdom Parliament made the most dramatic change in the recent English law concerning adverse possession by enacting the Land Registration Act, 2002. The statute made changes to the rules regulating adverse possession in respect of registered land. While retaining the usual strictures of- *nec vi, nec clam, nec precario*, for 12 years, the law with respect to registered land,requires that the person claiming title by adverse possession must apply to the Registrar to be so registered after being in adverse occupation of the land for 10 years. The Registrar on receiving the application is to notify the registered proprietor, who has 65 days to raise an objection, if any, to the registration. The registered proprietor who objects has a further two years to evict the adverse possessor from the land. Failure to secure the eviction of the adverse possessor within these two years presents a second chance to the adverse possessor to re-apply to be registered as the appropriator in place of the original owner. See paragraph **1 (1)** of Schedule **6** of the Land Registration Act 2002, United Kingdom. With the enactment of the Land Registration Act, 2002 the United Kingdom, where the doctrine traces its origin from the medieval period, has led the way in the transformation of the doctrine.

The main justification for the law of adverse possession has variously been given as the need to discourage land owners against, as it were, sitting or sleeping on their land-related rights hence the maxim "*vigilantibus non dormientibus, jura subveniunt*", an equivalent to the maxim that equity aids the vigilant. Paper owners of land are encouraged to utilize their land or else a squatter would be prepared to make use of it, invoke the equitable defence of laches and the law will protect him. **Article 68** of the Constitution of Kenya, envisages that Parliament will revise and rationalise existing land laws by enacting legislation **"to provide for any other matter necessary to give effect to the provisions**" relating to land, guided by the principles of equitable access to land and security of land rights in terms of **Article 60**. Unlike the English legislation, the Land Registration Act, 2012 reiterates the doctrine in **Section 24,** to the effect that the registration of a person as the proprietor of land vests in that person the absolute ownership of the land, subject to overriding interests enumerated under **Section 28** which includes;

> ***"(h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription."***

Similarly **Section 7 (d)** of the **Land Act, 2012** recognizes prescription as a method of acquiring title to land. Interestingly the Act does not provide how this acquisition is to be realized. (I think this goes back to the limitation of Actions Act.)

I hold the view that the previous justification that a squatter has a right of invading private land (as opposed to public land) if the paper owner "abandons" it and the squatter occupies it for a period of 12 years is no longer plausible. To begin with, it is a criminal offence under **Section 155** for a person to unlawfully occupy a public land. Secondly in terms of **Section 107,** the Government can compulsorily

acquire private land and compensate the paper owner. Why should a stranger be permitted to invade private land regardless of the law of trespass specifically **Section 3** of the Trespass Act, and even after that be rewarded with it for free after 12 years.

Today, pursuant to economic and social rights contained in the Bill of Rights, squatters and the landless are sufficiently catered for in Part **IX** of the **Land Act,** which provides for the establishment of **Settlement Schemes** to facilitate access to land, shelter and livelihood; **Settlement Programs** to provide for access to land to squatters, displaced persons; establish **Land Settlement Fund** to be applied in the provision of access to land for squatters and displaced persons.

For those reasons I find no justification to encourage acquisition of title through adverse possession. It is not lost on me that there are other philosophical bases for the doctrine of adverse possession, such as what I have identified earlier and described as utilitarian theory, rewarding productive use of land over extended non-use; considering non-use of land to be wasteful, and reducing stale claims. It is equally erroneous to think of adverse possession as a means by which the landless (squatters) acquire land. Adverse possession can be claimed in the cities, in the affluent settlement where there is overlap of boundaries. Adverse possession in such situations will be used to settle any likely boundary disputes where the elements expressed by *nec vi, nec clam, nec precario* are pursued.

This leads me to suggest that the reforms required in this area must include reasonable compensation of the paper owner for loss of his land to the neighbour since in the case of squatters and displaced persons **Section 135 (3) (b)** of the Land Act makes provision for a fund to be used in purchasing private land to settle such class of people. Although I have noted earlier that the acquisition process under **Sections 7,9,13,37** and **38** of the Limitation of Actions Act follows due process, of the law the most acceptable way of hearing the paper-owner is by a procedure, similar to that of the English Registration of Land Act 2002, where the paper owner is given notice on the 10th year, to decide his fate with regard to his ownership of the land. He may have only relapsed into a siesta but not gone to sleep. It is only when the owner fails to take advantage of this window can it be concluded safely that he has lost interest in the property.

Thirdly what is magic about 12 years? Is 12 years long enough to justify loss of land? Many large-scale projects on land take several years to conceptualise and plan before execution. What happens to those Kenyans who own land in the country but have settled in the diaspora and who may not have immediate use for the land?

My last concern is to do with the dramatic approach the claims based on adverse possession have taken in this country, only comparable to the biblical prophecy to the effect that a day would come when:

> ***"…there will be five in one family divided against each other, three against two and two against three. They will be divided, father against son and son against father." See Luke 12:49 New International Version.***

See <u>Obiero</u> v <u>Opiyo</u> (1972) EA227, and **<u>Esiroyo</u> v <u>Esiroyo</u>** (1973) EA 388, **<u>James Kamau</u> v <u>James Gichuru</u>**, Civil Case No.1024/1999(OS), **<u>Mukangu</u> v <u>Mbui</u>** (2004) 2 KLR, and **<u>Kanyi</u> v <u>Muthiora</u>** (1984) KLR 712, among several others.

For the reasons given earlier I stress that acquisition of land by adverse possession is not inconsistent with **Article 40 (2) (a)** of the Constitution. I find no merit in this appeal and dismiss it. Because of the novelty of the point raised in the appeal and hearing in mind that the originating summons is yet to be heard and determined, each party to bear own costs.

Dated and delivered at Malindi this 17th day of July, 2015

W. OUKO

……..……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF K. M'INOTI, JA

The only issue in this appeal is the constitutionality of the doctrine of adverse possession in Kenya after the proclamation of the Constitution of Kenya, 2010. The essence of adverse possession under the ***Limitation of Actions Act***, ***cap 22 Laws of Kenya***, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court to be declared the owner of the land.

Before the ***Environment and Land Court,*** the appellant, ***Mtana Lewa*** contended, as he still does before this Court, that under the Constitution of Kenya 2010, adverse possession is not a recognized ground for limitation of the right to property. In his view, adverse possession constitutes unconstitutional deprivation of property. The respondent, ***Kahindi Ngala Mwagandi***, on the other hand contends that the doctrine of adverse possession is not inconsistent with the right to property as protected by the Constitution, is not an arbitrary deprivation of property and is otherwise a reasonable limitation of a constitutional right that is justifiable in an open and democratic society based on human dignity, equality and freedom. In his view, under the Constitution of Kenya, 2010, the doctrine of adverse possession is still alive and well.

The background to this appeal is as follows. By an Originating Summons taken out on 11th August 2011 under ***Order XXXVI Rule 3(d) (1), (2) and (3)*** of the ***Civil Procedure Rules***, the respondent pleaded that since 1992 he had been in peaceful, open and continuous occupation of the parcel of land known as ***Tezo/Roka/374*** situate in ***Tezo Location, Bahari Division, Kilifi County (the suit property)***. It was further pleaded that the suit property, measuring approximately 16.0 acres, was at all material times registered in the name of the appellant.

Accordingly the respondent prayed for a declaration that he was the absolute owner of the suit property by adverse possession, having been in occupation of the suit property ***nec vi, nec clam, nec precario*** continuously for over 12 years. The respondent also sought an order directing the Registrar of Lands to survey, ascertain and excise from the appellant's title, the actual portion of the suit property occupied by him, for purposes of registration in his name.

It is apt to point out that to the extent that the Originating Summons was taken out in August 2011 after the Civil Procedure Rules 2010 had already come into effect, the Summons ought to have been taken out under ***Order 37 Rule 7 (1), (2) and (3)***. However, nothing turns on that in this appeal since the appellant did not take up the issue.

In a replying affidavit sworn by the appellant on 9th November 2013 in opposition to the Summons, the appellant admitted that the suit property was indeed registered in his name. He deposed further that in January 1995 he had charged the suit property in favour of the ***Kenya Commercial Bank,*** which had subsequently misplaced the documents of title and was in the process of applying for a provisional replacement title. In his view, in so far as the charge over the suit property remained undischarged, the respondent's occupation of the suit property could not be described as peaceful, open and continuous.

The appellant also took issue with the respondent's Summons on grounds of its technical competence, in particular the lack of a certified extract of the title as required by ***Order 37 Rule 7(2).*** However, the

fundamental issue that the appellant raised and which forms the core of this appeal was that a declaration that the respondent was the owner of the suit property by adverse passion would be a violation of the appellant's right to property under ***Article 40(1***) of the Constitution. It was contended that ***Section 38*** of the Limitations of Actions Act, which provides for acquisition of title to land by adverse possession, was an arbitrary deprivation of the right to property and to that extent it was unconstitutional, null and void. Accordingly, it was submitted that the High Court lacked jurisdiction to grant the reliefs sought by the respondent.

Before the Summons could be heard, the appellant filed a Notice of Preliminary Objection on 18th March 2014, which was framed as follows:

> ***"1. That pursuant to the provisions of Article 40 as read together with Article 2 and 3 of the Constitution of Kenya 2010, this court does not have jurisdiction to entertain the claimants claim filed herein;***
>
> ***2. That pursuant to the provisions of Section 7 to the Sixth Schedule to the Constitution, Section 38 of the Limitation of Actions Act is in conflict and or contravention with express provisions of section 40 of the Constitution and the same is null and void pursuant to the provisions of Article 2 of the Constitution and the said section 38 of the Limitation of Action Act cannot be the basis on which this Honourable Court can assume Jurisdiction over this matter (sic). The court does not have jurisdiction and;***
>
> ***3. That under the doctrine of ex turpi causa non oritur action and or ex dolo malo no oritur actio this court as a matter of public policy and the new constitutional dispensation has no jurisdiction to entertain the*** **claimant's claim."**

Satisfied that the preliminary objection was properly taken on a jurisdictional issue deserving of peremptory and immediate disposal, (see ***MUKISA BISCUITS MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD [1969] EA 696*** and ***OWNERS OF MOTOR VESSEL "LILLIAN S" V. CALTEX OIL (KENYA) LTD (1989) KLR 1)***, ***Angote, J***. heard the same and in a considered ruling dated ***14th July 2011***, the learned judge held that the doctrine of adverse possession was consistent with the Constitution and accordingly dismissed the preliminary objection with costs. Aggrieved by the ruling, the appellant preferred the present appeal.

The appellant's memorandum of appeal dated 11th December 2014 raises five grounds of appeal, but as I have already stated, at the heart of all those grounds is the question whether the doctrine of adverse possession is unconstitutional under the Constitution of Kenya, 2010. ***Mr. Patrick Ochwa***, learned counsel, instructed by ***Cootow & Associates Advocates*** appeared for the appellant while ***Mr. Nyange Sharia***, learned counsel, instructed by the ***Legal Advice Centre, Kituo cha Sheria,*** appeared for the respondent.

Presenting the appellant's case, Mr. Ochwa attacked the constitutionality of section 38 of the Limitation of Actions Act on the ground that the provision was blatantly inconsistent with and contrary to ***Article 40*** of the Constitution which guarantees every person the right to acquire or own property. In learned counsel's view, unlike under the former Constitution of Kenya where section ***75 (6) (vi)*** expressly recognised that the right to property guaranteed by that Constitution could be legitimately limited by a law on limitation of actions, there was no equivalent provision in the current Constitution.

It was submitted that the express recognition of adverse possession as a valid ground for limitation of the right to property under the former Constitution, and the lack of an equivalent provision in the current Constitution, was deliberate and intended to underscore the fact that under the current Constitution the right to property could not be limited by adverse possession. Mr. Ochwa further argued that the right to property under the current Constitution can only be limited in the manner provided for by the Constitution, namely under ***Article 40 (1)*** (land holding by non citizens under ***Article 65***), ***Article 40 (3) (a)*** (acquisition or conversion of land or an interest in land under ***Chapter 5***), ***Article 40(3) (b)*** (compulsory acquisition of land for a public purpose or in public interest upon prompt payment in full, of

just compensation) and ***Article 40(6),*** which does not protect unlawfully acquired property.

To emphasize further the sacrosanct nature of the right to private property, it was submitted that the Constitution classifies land in Kenya as ***public***, ***community*** or ***private land***, and that while ***Articles 62(4)*** and ***63 (4)*** and ***(5)*** respectively provide mechanisms and procedures for disposal, alienation or change of status of public and community land, there was no equivalent provision on disposal of private land. This arrangement, it was argued, was a further pointer to the fact that under the current Constitution, private property cannot be expropriated except in the specific instance spelt out in the Constitution, which do not include adverse possession.

Next it was contended that save for the specific limitations to the right to property provided in the Constitution, the Constitution prohibited the State in ***Article 40(3)*** from depriving a person of property of any description or an interest therein. It was argued that under ***Article 260*** the State includes the Judiciary and therefore the courts are equally prohibited by the Constitution from depriving property owners of title to their land through adverse possession.

Addressing the intention and purpose of the doctrine of adverse possession, which in learned counsel's opinion is to enable landless persons obtain land, Mr. Ochwa submitted that the Constitution had expressly addressed the question of squatters and landless people, thus rendering the doctrine of adverse possession constitutionally superfluous and underlining further the reason why the Constitution had deliberately failed to recognized it as a ground for limitation of the right to property. That point of view was buttressed by the argument that ***Article 67*** of the Constitution creates the ***National Land Commission***, which among other things is empowered to establish a land bank, and by dint of ***section 134*** of the ***Land Act*** is allowed to implement settlement programs to provide land for shelter and livelihood to squatters and persons displaced by natural causes or internal conflicts. It was additionally emphasized that the Land Act had in ***section 135*** established the Land Settlement Fund for the same purpose.

As regards ***clause 7*** of ***Schedule 6*** of the Constitution which saves existing laws that ante dated the current Constitution subject to alterations and adaptations to make them consistent with the Constitution, it was submitted that section 38 of the Limitation of Actions Act was blatantly in conflict with the Constitution so as to make it incapable of accommodation under Schedule 6.

Counsel concluded by submitting that under the current Constitution of Kenya, there can be no deprivation of private property without compensation. Any deprivation of the right to property without compensation, it was argued, amounts to arbitrary deprivation of property. Since adverse possession entails loss of title to private property without any compensation, it was submitted, the doctrine is arbitrary, unconstitutional in terms of Article 2(4) and has no place in the current Constitution.

For the respondent, Mr. Sharia took a different view, contending that there was nothing unconstitutional about section 38 of the Limitation of Actions Act *vis-à-vis* the right to property under Article 40 of the Constitution. It was submitted that Article 40(2) (a) of the Constitution only prohibited Parliament from enacting a law that allows ***arbitrary*** deprivation of property and that loss of the right to land through adverse possession was not an arbitrary deprivation of land within the meaning of the Constitution.

Relying on the definition of the term ***"arbitrary"*** in ***Black's Law Dictionary, 8th Ed***. it was contended that it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts. As far as adverse possession is concerned, it was argued, a person claiming title to property is required to prove, before an impartial and independent court, some important facts such as occupation of land, which occupation is open, peaceful and as of right, continuously for a period of at least 12 years. It was therefore submitted that since these matters have to be established to the satisfaction of the court, and that in arriving at its decision the court must hear and consider the evidence of both the claimant and the registered owner of the property, acquisition of property by the claimant through adverse possession and the concomitant loss of title thereto by the registered owner, is not arbitrary.

While conceding that the current Constitution does not contain a provision equivalent to section 75(6)(vi) of the former Constitution, the respondent nevertheless submitted that lack of such provision of itself cannot lead to the conclusion that the doctrine of adverse possession is unconstitutional under the current Constitution. It was contended on the strength of ***section 7(d)*** of the Land Act, that Parliament had recognized ***prescription*** as one of the methods by which title to land may be acquired, and that it had not been suggested by the appellant that the Land Act was unconstitutional.

Next the respondent submitted that ***Article 24*** of the Constitution permitted Parliament to enact a law abridging some of the rights guaranteed by the Constitution, including the right to property, so long as the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It was argued that the doctrine of adverse possession is justifiable on the above grounds as it seeks to protect litigants from stale and dormant claims and is otherwise based on public interest considerations, which seek to discourage land lying idle for considerable lengths of time. The majority judgment of the ***Grand Chamber*** of the ***European Court of Human Rights*** in ***The case of J. A. PYE (OXFORD) LTD & ANOTHER V. THE UNITED KINGDOM (APPLICATION NO. 44302/02*** was relied upon to make the point that adverse possession was reasonably justifiable in a democratic society based on the attributes set out above.

The appellant lastly pressed the rather curious argument that Article 40(2) of the Constitution only prohibited enactment of ***new*** laws (i.e. post promulgation of the Constitution) permitting arbitrary deprivation of property and that to the extent that the Limitation of Actions Act was enacted on 1st December 1967, it was not among the laws contemplated in that Article. Of course taken to its logical conclusion this argument would lead to the absurd conclusion that laws that arbitrarily deprive property and are otherwise in direct conflict with the Constitution can sit easy with the Constitution merely because they ante date the Constitution.

In support of the argument that the doctrine of adverse possession was not inconsistent with the current Constitution, the respondent also relied on the decision of the High Court in ***KAZUNGU MOLI CHOGO & OTHERS V. PERIHAN TORUN & OTHERS, E&LC NO. 143 OF 2013(OS) (MOMBASA)*** in which ***Mukunya, J.*** overruled a preliminary objection similar to that raised by the appellant in this case.

Those are, in summary, the respective points of view of the appellant and the respondent. Before considering the arguments presented by the parties, it is appropriate to consider the terms of ***sections 7, 13, 17*** and ***38 (1)*** of the Limitation of Actions Act, which provide the basis for claims to title to land, founded on adverse possession. Section 7 of the Act is a classical limitation of actions provision, which prohibits actions for recovery of land after 12 years from the date when the cause of action accrued. The provision reads as follows:

> ***"7. 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."***

Section 13 provides that a right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run. It is such possession, which under the Act is referred to as adverse possession. Section 17 of the Act further provides that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

Lastly section 38 (1), is a concomitant provision to the other three sections and enables a person who claims to have become entitled to land by adverse possession, (i.e. by being in open, peaceful and as of right, occupation of land for at least 12 years) to apply to the High Court to be declared and registered as the proprietor of the land, in lieu of the registered proprietor. That provision reads:

> ***"38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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."

In ***BENJAMIN KAMAU MURMA & OTHERS V. GLADYS NJERI, CA NO. 213 OF 1996,*** this Court stated as follows regarding the above provisions:

> ***"The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land."***

(See also ***WAMBUGU V NJUGUNA [1983] KLR 172).***

The Supreme Court of India discussed the essentials of adverse possession in ***KARNATAKA BOARD OF WAKF V. GOVERNMENT OF INDIA & OTHERS (2004) 10 SCC 779*** and stated as follows:

> ***"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."***

It would be remiss if it were not pointed out that since the promulgation of the Constitution of Kenya, 2010, Parliament has enacted two statutes that expressly recognize the doctrine of adverse possession. The first is the ***Land Registration Act, No. 3 of 2012. Section 28*** thereof provides that unless the contrary is expressed in the register, all registered land is subject to specified overriding interests. One of the overriding interests recognised by ***section 28(h)*** are ***"rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription."***

The second legislation is the ***Land Act, No. 6 of 2012. Section 7*** thereof stipulates the methods of acquisition of title to land in Kenya. By ***section 7(d),*** it is provided that title to land may be acquired through prescription.

That then is the legal principle that the appellant contends is not recognised by the Constitution of Kenya 2010 and that its existence under the Limitation of Actions Act is in violation of the Constitution.

The view has been expressed that adverse possession does not *per se* deprive the registered owner of property and is therefore not a limitation to the right to property. The essence of that argument is that all that adverse possession does is only to prohibit the owner of land from accessing the court for purposes of recovering land once he or she has been dispossessed of that land for 12 years or more. To that extent, it is argued, adverse possession is not any different from the law of limitation of actions which prohibits, for example, claims founded on contract after 6 years from the date of accrual of the cause of action or claims founded on tort after 3 years. It is further contended that the extinction of the property owner's title due to adverse possession is not a deprivation *per se* but merely an incidence or the necessary consequence of the prohibition of actions for recovery of the land after the expiry of the limitation period. (See ***Mummery, LJ*** in ***PYE (OXFORD) LTD V. GRAHAM [2001] CH 804).***

The counterpoint to that argument is that adverse possession does not merely bar claims for recovery of land. It also enables the person in adverse possession to ultimately get title to the land through his or her adverse possession. My view of the matter is that to the extent that ultimately the landowner loses his or her property as a result of the application of the doctrine of adverse possession, the doctrine is a limitation of the right to property, so that the real question becomes whether it is a valid limitation of the right to

property guaranteed by the Constitution.

Turning to the appellant's arguments, his primary basis for the argument that the doctrine of adverse possession is unknown under the Constitution of Kenya, 2010 is the lack of a provision in the current Constitution similar to section 75(6) (vi) of the former Constitution, which expressly recognised loss of title to property through limitation of action laws as an exception to the right to property. That, in my view, is a simplistic way of looking at the problem in this appeal, for two reasons.

The first is that the style adopted by the drafters of the Constitution of Kenya, 2010 is radically different from that of the makers of the former Constitution. The former Constitution employed a drafting style, which entailed a statement guaranteeing a right, followed by lengthy provisions on all conceivable exceptions to the guaranteed right. It was that style, which appeared to lay more emphasis on the exceptions than on the guaranteed right that earned the Bills of Rights in the Constitutions of the generation of our former Constitution the pejorative label of "Bills of Exceptions".

The current Constitution is drafted in a rather different style, a fact which was recognized by the Supreme Court in ***IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE, (ADVISORY OPINION NO. 2 OF 2012, PARA 54)***. The drafting style, as far as this appeal is concerned, eschews cataloguing all and sundry exceptions to the guaranteed rights. Save in few specific instances, the Constitution generally focuses on the guaranteed rights and leaves Parliament, in appropriate cases, to supply any limitations to the rights, so long as those limitations satisfy the requirements set out in Article 24 of the Constitution.

Among those requirements is that the limitation should be set by a clear and specific law evincing intention to limit a right, and that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Other factors to be borne in mind in determining whether the limitation passes the constitutional muster includes the nature of the right to be limited, the purpose of the limitation, the nature and extent of the limitation, whether enjoyment of the right prejudices the rights of others and whether there are other less restrictive means of achieving the purpose of the limitation. Lastly no derogation is allowed whose effect is to derogate from the core or essential content of the guaranteed right.

The second reason why the lack, in the current Constitution, of a provision similar to section 75(6)(vi) of the former Constitution is not decisive in this appeal, is because in interpreting and applying a right that is guaranteed by one provision of the Constitution and qualified by other provisions of the same Constitution (including where such provisions permit limitation of the guaranteed right by legislation), the Constitution must be read and interpreted in a holistic and purposive manner. Speaking to that approach of constitutional interpretation, the Hong Kong Court of Final Appeal expressed itself as follows in ***NG KA LING & ANOTHER V. THE DIRECTOR OF IMMIGRATION [1999] 1 HKLRD 315:***

> ***"It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."***

And in ***LEUNG KWOK HUNG & ANOTHER V. HONG KONG SPECIAL ADMINISTRATIVE REGION (NO. 107 OF 2005)*** the High Court of Hong Kong stated that in identifying the meaning of the language of the Constitution, considered in the light of its context and purpose, a too literal, technical, narrow or rigid approach should be avoided. I find these decisions quite persuasive in the circumstances of this appeal.

Here at home ***Article 259*** specifically requires the Constitution to be interpreted in a manner that promotes its purpose, values and principles; advances the rule of law and human rights and fundamental freedoms; permits the development of the law; and contributes to good governance. An interpretation of the Constitution that achieves the foregoing purposes certainly requires much more than searching in the Constitution for the presence or absence of a particular clause that may only have had significance in a previous Constitution or bygone constitutional era. (See ***IN RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION, SUPREME COURT CONSTITUTIONAL APPLICATION NO. 2 OF 2011).***

Subject to the provisions of the Constitution on land holding by non-citizens, Article 40(1) guarantees every person the right to acquire and own property. By Article 40(2) Parliament is prohibited from enacting any legislation that allows arbitrary deprivation of property or otherwise limits the right to property on any ground that constitutes discrimination under Article 27(4). Article 40(3) further prohibits the State from depriving a person of property save in accordance with Chapter 5 of the Constitution or for a public purpose or in public interest, upon prompt payment in full of just compensation and guarantee of the right of access to a court of law.

Article 40, which guarantees the right to property, is part of the Bill of Rights. It is not one of the rights, which under Article 25 cannot be limited. In appropriate circumstances therefore, the right to property may be legitimately limited in terms of Article 24 of the Constitution, so long as the requirements of that provision are satisfied. To determine the constitutionality of limitation of the right to property through adverse possession therefore requires testing the doctrine of adverse possession as legislated in the Limitation of Actions Act against the criteria provided in Article 24 of the Constitution, namely:

i. ***Is the limitation in question to the right to property set by law?***

ii. ***Taking into account the nature of the right to property, the importance of the limitation to it by adverse possession, the nature and extent of the limitation imposed by adverse possession, the balance between enjoyment of the right to property and prejudice to the rights of others, and whether the purpose of adverse possession can be achieved by less restrictive means, is adverse possession reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?***

iii. ***Is the limitation by adverse possession clear and specific regarding the right it limits and the extent of the limitation?***

iv. ***Does adverse possession limit the right to property to such an extent as to derogate from its core or essential content?***

On the first issue the question is whether the limitation in issue to the right to property is set by law. The purpose of such inquiry is to ensure legal certainty. To that end the limiting law must to be clear enough and devoid of ambiguity, for if a guaranteed constitutional right is to be limited, the limitation must be specific enough for the citizen to know the limitation, its extent and his or her rights and obligations under the right, as limited. It has also been argued that for exactly the same reasons, the law supplying the limitation must be easily accessible to the citizens. (See ***LEUNG KWOK HUNG,*** supra).

In ***RE LUSCHER & DEPUTY MINISTER, REVENUE CANADA, CUSTOMS & EXCISE, 17 D.L.R (4TH) 503,*** the Canadian Federal Court of Appeal stated thus:

> ***"[O]ne of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and***

freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences."

I would have no problem in finding that the limitation to the right to property by adverse possession is provided by law, that law being the Limitation of Actions Act. Its purport and extent is specific and clear as explained above. I will take judicial notice that the Act is easily accessible, in hard copy at the Government Press and electronically, free of charge, at the website of the Kenya National Council for Law Reporting.

In my view nothing much turns on the fact that the Limitations of Actions Act was enacted before the promulgation of the current Constitution. By dint of clause 7 of the Sixth Schedule of the Constitution, it continues in force as a law that was in force immediately before the promulgation of the Constitution, subject to the constitutional imperatives regarding its interpretation and application.

It is also worthy pointing out that as a law that antedated the Constitution, the requirement in Article 24 (2) (a) of the Constitution that a law limiting a right must specifically express the intention to limit the right does not apply to the Limitation of Actions Act since the requirement in Article 24(2)(a) is restricted to laws enacted or amended after the promulgation of the Constitution. The Constitutionality of the laws ante dating the Constitution has therefore to be determined, having regard to the other requirements of Article 24 of the Constitution.

The second issue for determination is whether the limitation to the right to property arising from adverse possession is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors set out in Article 24(1)(a) to (e). I propose to consider all the relevant factors globally rather than separately for, as the South African Constitutional Court stated in ***SAMUEL MANAMELA & ANOTHER V. THE DIRECTOR-GENERAL OF JUSTICE, CCT 25/99*** while construing Article 36 of the Constitution of South Africa, which is similar to Article 24(1):

"It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list."

The requirement of an inquiry into whether the law supplying the limitation is reasonable is meant to ascertain that the limitation is proportional to the end sought and is necessary in the circumstances. Is there a legitimate purpose for the limitation of the right to property through adverse possession? Several reasons have been advanced to justify the doctrine of adverse possession (See generally ***The case of J. A. PYE (OXFORD) LTD & ANOTHER V. THE UNITED KINGDOM***, ***(supra)).*** The first justification looks at adverse possession from a purely limitation of actions perspective, and posits that its purpose is to avoid stale claims, because of the realities of fading memories and loss of evidence. In such circumstances therefore adverse possession compels landowners not to sleep on their rights and ensures that all claims are brought to court promptly.

The second justification, which is a corollary to the first, is that the State and the citizens have a legitimate interest, actualized by adverse possession, of ensuring that land ownership claims are lodged, heard and determined within reasonable time so as to secure a fair trial and guarantee that justice is not delayed, which are also in our context, important constitutional imperatives.

Thirdly, it is argued that the doctrine of adverse possession ensures certainty of title to land. This particular justification is faulted as of relevance only in cases where land has not been registered, since in such circumstances, title depends on possession. Where land is however registered, it is asserted, there is certainty of title from the register and therefore adverse possession serves no practical purpose in that regard.

Lastly, it is argued, as the Government of the UK did in the ***PYE CASE*** that land is a finite resource and therefore it is in public interest that it should be used, maintained and improved. The time limit set by the Limitation of Actions Act, it is contended, has a public interest effect of encouraging landowners to possess and make use of their land.

Ultimately, as the majority of the Grand Chamber in ***PYE CASE*** observed:

> ***"74. It is a characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property."***

In many respects it would appear to me that the last justification above resonates well with the provisions of Chapter 5 of the Constitution. Thus for example, Article 60 of the Constitution declares that all land in Kenya belongs to the people of Kenya, whether as a nation, communities or individuals. It also proclaims that land in Kenya shall be held, used and managed in a manner that is *equitable*, *efficient*, *productive* and sustainable. Among the principles of land policy expressly recognised by the Constitution is equitable access to land, security of land rights, sustainable and *productive management* of land and land resources. The Constitution demands that those principles be implemented through a national land policy that is subjected to regular review.

In the current ***National Land Policy (Sessional Paper No. 3 of 2009)***, which though antedating the Constitution reflects the principles of land policy spelt out in the Constitution, a statement of the problem relating to land in Kenya asserts that:

> ***"Land is critical to the economic, social and cultural development of Kenya. Land was also a key reason for the struggle for independence and land issues remain politically sensitive and culturally complex."***

In the policy the Government has undertaken to ensure that all land in Kenya ***is put into productive use*** on sustainable basis. The policy also aims, among other things, to secure rights over land while at the same time guaranteeing all citizens the opportunity to access and beneficially occupy and use land; allocation and use of land that is economically viable, socially equitable and economically sustainable; and efficient and effective utilization of land and land based resources.

In light of all the foregoing, I would not find a law that gives a land owner a period of 12 years to assert his right to land which he has allowed to be occupied by another person, openly, peacefully as of right and with a clear intention of dispossessing him *(animus possidendi),* to be in conflict with the purpose, values and principles of the Constitution. I would also find that the limitation to the right to property by adverse possession, though ultimately extreme in extent, to be important and justifiable in light of the foregoing express constitutional principles on land. As regards the extreme nature and consequence of adverse possession (extinction of the land owner's title to land) and the question whether less restrictive means of achieving the same result are available, that ultimate unpleasant result is preceded by clear opportunity offered to the land owner, over a period of time that is not by any means short, to take steps to protect or save his property.

In determining whether limitation of a guaranteed right is justifiable in an open and democratic society based on the values set out in Article 24(1), it is permissible to look at the practice of other open and democratic societies. (See the decision of the South African Constitutional Court in ***RICHTER V. THE MINISTER FOR HOME AFFAIRS & OTHERS*** ***(CCT03/09, CCT 09/09) [2009] ZACC 3)***. In the ***PYE CASE***, the Grand Chamber stated as follows on adverse possession laws in the European Union:

> ***"72. It is plain from the comparative material submitted by the parties that a large number of member States possess some form of mechanism for transferring title in accordance with principles similar to adverse possession in common-law systems, and that such transfer is effected without the payment of compensation to the original owner."***

Bearing in mind the prevalence of laws on limitation of actions and adverse possession, both in commonwealth and civil law jurisdictions, though with clear variations and differences, I would find the limitation to the right to property through the doctrine of adverse possession to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The conclusion that I have reached has also disposed of the remaining two issues, namely whether limitation by adverse possession is clear and specific regarding the right it limits and the extent of the limitation, and whether adverse possession limits the right to property to such an extent as to derogate from its core or essential content.

The doctrine of adverse possession is neither an arbitrary nor an unconstitutional limitation of the right to property. I would accordingly dismiss this appeal, but make no orders on costs on account of its circumstances.

Dated and delivered at Malindi this 17th day of July 2015

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.