



Dawat-E-Hadiya (Kenya) Registered Trustees v Kaingu & 4 others (All sued in a Representative Capacity Also, on Behalf of other 104 Persons in Occupation of the Petitioners Parcel of Land) (Environment & Land Petition 7 of 2021) [2024] KEELC 4984 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 7 OF 2021
LL NAIKUNI, J
JUNE 20, 2024**

BETWEEN

DAWAT-E-HADIYA (KENYA) REGISTERED TRUSTEES PLAINTIFF

AND

DANIEL KAINGU 1ST DEFENDANT

NASSARO KAING 2ND DEFENDANT

HASSAN KAINGU 3RD DEFENDANT

KAHINDI BAYA YAA 4TH DEFENDANT

JONATHAN SAFARI KITHI 5TH DEFENDANT

**ALL SUED IN A REPRESENTATIVE CAPACITY ALSO, ON BEHALF OF
OTHER 104 PERSONS IN OCCUPATION OF THE PETITIONERS PARCEL OF
LAND**

JUDGMENT

I. Preliminaries

1. The Judgment of this court pertains the this suit which was initially instituted as a Constitution Petition dated 12th February, 2020 by Dawat- E- Hadiya (Kenya) Registered Trustees, the Petitioner (Plaintiff) against Daniel Kaingu, Nassaro Kaingu, Hassan Kaingu, Hassan Mwinga Thoya, Kahindi Baya Yaa and Jonathan Safari Kithi (All sued in a Representative capacity also, on behalf of other 104 persons in occupation of the Petitioners parcel of Land.), against the Respondents herein. (Hereinafter referred to as “The Petition” for ease reference).
2. *The Constitution* Petition was brought under the dint of the provisions of Articles 40 (1) (2) and 67 (2) (1) of *the Constitution* of Kenya 2010 and all other enabling powers and provisions of the law.



After hearing the case, on 9th April, 2024 the Honourable Court delivered the Judgment holding *the Constitution* Petition had failed to adhere with the stringent threshold of a Constitution Petition. It held that the Petitioners then ought to have instituted an ordinary suit instead rather than a Petition contrary to the Doctrine of Constitution avoidance”.

3. However, in the Course of thorough proof reading of the above stated Judgement, it came to the attention of the Honourable Court that the parties, on 24th April, 2023 had consented to have the Petition converted into an ordinary Plaint. Of course this decision caused a drastic change of the pleadings all the way through. As result of that and before formally releasing the afore said Judgement, on 24th April, 2024, in order to ameliorate the situation, the Honourable Court “Suo Moto” fixed the matter for mention whereby all the parties were summoned and the predicament was explained. Indeed, the parties confirmed the position and the hence the Court undertook to deliver a reviewed Judgement taking all the facts into consideration on its on merit. That explains the reason as to the circumstances leading to this Judgement herein.
4. Upon service of the Petition upon the Respondents, the Respondents entered appearance and filed their response to the Petition dated 25th October, 2022. The Plaintiff is described as Dawat – E - Hadiya (Kenya) Registered Trustees, pursuant to a Certificate of Incorporation of 19th February 2009, issued to it under the Trustees (perpetual) Succession Act, Cap 164, Laws of Kenya.
5. The Defendants were 107 in number. The first three Defendants initiated herein are sued on their own behalf, and also on behalf of the remaining 104 Defendants whose names were appended as Defendants to the Schedule at the end of this Plaint.
6. It is instructive to note that during the pendency of the proceedings, the Plaintiffs had offered to give the Defendants an alternative parcel of land belonging to them situated away from the suit land. The Court was informed the said parcel of land was situated at a place called Mtwapa within the County of Kilifi. But the Defendants outrightly declined the offer. Despite of this, the Honourable Court strongly feels that was a strategic and significant way to resolve the matter on a out of Court negotiation which is in tandem with the provisions of the Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Section 20 (1) and (2) of the Environment & *Land Act*, No. 19 of 2011. On 25th May, 2023, upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre-trial conference, it was fixed for full trial on 3rd October, 2023.

II. The Plaintiff Case

7. The Plaintiff sought for the following orders:-
 - a. A declaration that the Petitioner is the legal registered owners of the whole of that parcel of Land known as Number MN/I/1392, bearing Title CR No.1884, situate at Bombolulu, within the County of Mombasa.
 - b. A declaration that the Respondents are trespassers upon the Petitioner's Parcel of Land registered in the Petitioners name as Plot Number MN/I/1392, bearing Title CR No.1884, situate at Bombolulu, within the County of Mombasa.
 - c. An Order of Eviction be issued, for the eviction of all the 107 in number Respondents named as the 1st, 2nd and 3rd Respondents in this Petition as well as those named in the schedule to this Petition, from the Petitioners parcel of land registered as Plot Number MN/I/1392, bearing Title CR No. 1884, situate at Bombolulu, within the County of Mombasa.



- d. In default of the compliance with order c above, the Plaintiff be at liberty, without need to apply, to evict the all 107 Respondents through the court bailiff and the Officer Commanding Police Station, Nyali to provide security during eviction.
- e. The costs of this litigation be in the discretion of the Court.

III. The Legal foundation of the Petition

- 8. The Petition was founded on the following legal basis:
 - a. Article 67 (2) (1) provides that the Functions of the National Land Commission are:
 - i. to encourage the application of traditional dispute resolution mechanisms in Land conflicts.
 - b. Section 160(2)(c) of the Land Act empowers that commission - to establish, plan and manage refugee camps.
 - c. Section 5 (1)(t) of the National Land Commission Act provides that the Commission is empowered to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - d. While Section 5 (2) (f) empowers the Commission to:
 - i. develop and encourage alternative dispute resolution mechanisms in landdispute handling and management.
 - e. Section 25 of the Land Registration Act provides as follows:-

Rights of the Proprietor.

25(1)The Rights of a proprietor, whether acquired on a first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and apperturcences thereto, free from all other interests and claims whatsoever...

IV. The Constitutional Foundation of the Petition

- 9. The Petition also was founded on the following Constitutional provisions:
 - i. Under the provision of Article 40 (1) of the Constitution of Kenya, 2010, the Plaintiff has the right to own the suit properties and not to be arbitrarily deprived of the same or to be restricted from enjoyment of the same. The Article provides that:-
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over any property of any description.

The Respondent's action of inhabiting and occupying the Petitioner's Portion of Land aforesaid amounts to an arbitrary deprivation of the Petitioners Rights and Interests over the subject land.

V. Brief Facts

- 10. The brief facts of the Petition are that the Plaintiff is the registered proprietor/owner of property known as Plot No.1399/1/MIN, bearing CR Title No. 1884, comprising 49.I acres, and situate at Bombolulu, within the County of Mombasa. According to the Plaintiff it was registered as the



Freehold proprietor of the said parcel of land pursuant to a transfer registered in its name on the 10th February 2010. (There was exhibited at pages 1 and 2 of the annexures to the supporting affidavit, copy of a search on the property, dated 22nd November 2019 & 19th February 2020, confirming such ownership, and at pages 3 to 10, copies of the Title Documents. According to the Petitioner, it purchased the said property from Dr. Syedna Mohammed Burhanuddin, who had been the registered proprietor of the same from the year 1989, and who became the first duly constituted trustee of the Petitioner.

11. At the time of purchasing the said property, there were squatters on portion of this property, but who kept increasing with time by the entry onto the property by new entrants, as a consequence of the aforesaid, upon becoming the registered proprietor, the Plaintiff immediately commenced a process of having all these squatters removed from its property. (For ease of reference, the portion of the property occupied by the squatters is indicated in yellow colour on the deed plan of the property, at page 10 of the exhibits to the Supporting Affidavit.) In furtherance of the purpose explained at paragraph 6 above, in the year 2013, through the agent of the Petitioner, one Jithiada Agencies Limited, the Firm of Godfrey Mutubia & Company Advocates was instructed to commence eviction proceedings against the Respondents. As evidence of this assertion, there is exhibited at page 11 of the exhibits to the supporting affidavit, copy of that Advocates Letter, confirming the above. This letter is dated 23rd November 2013.

12. The Plaintiff averred that before it took any court action in the matter, by a letter dated the 16th June 2014, from the Lands, Planning & Housing Department of the County Government of Mombasa, it was informed as follows:

RE:L. R. No.MN/I/1392, CR 1884,Bombolulu.

The County Government intends to commence negotiations relating to acquisition of the above plot for the purpose of settling the squatters who are on the ground. Kindly call on our office at Bima Tower, 4th Floor at your earliest convenient time..."

Signed: Abu Salim

13. Suffice to say that no negotiations were ever concluded on this issue. This letter is at page 12 of the exhibits. After these events, on the 23rd February 2016, the Petitioner, by a letter of that date, wrote to the National Land Commission as follows:

"We hereby write to your good self to assist and guide us on Title Deed and Squatters issue on our below said property."

14. One of the properties listed thereunder is plot number MN/I/1392, the subject suit property. There is exhibited at page 13 of the exhibits, a copy of the said letter. The National Land Commission responded by its letter dated 22nd February 2016 in which it made reference to the illegal occupation of the squatters, and then proceeded, in part, to state as follows:

"The National Land Commission is now invoking Article 67(2) of *the Constitution* and Section 160(2) (c) of the *Land Act*, 2012, read together with Sections 5 (1) (D) of the *National Land Commission Act*, to Call you for a consultative meeting on how to resolve the stated matter.

This meeting is scheduled to take place at the offices of the National Land commission in Mombasa, Uhuru na Kazi Building, 7th Floor on Saturday, 5th March 2016 at 9am



(A copy of this letter, and affidavit of service on the relevant officers is exhibited at pages 14 and 15).”

15. The Plaintiff stated that firstly, the County Government of Mombasa never took any steps towards the acquisition of the Portion of Land inhabited by the squatters. Its intentions as expressed in its letter 16th June 2014 were never realized. Secondly, none of the dispute resolution mechanisms intimated by the National Land Commission in its letter of 22nd February 2016 was also achieved. Finally, it will be observed that the time lapse from the dates of the two letters referred to above is six (6) and five (5) years respectively.
16. The Plaintiff further averred that as registered proprietor of Plot Number MN/I/139, holds the said land in terms expressed in Section 25 of the Land Act. The Respondents who inhabit its property are an impediment to the Petitioner's rights to the said property. Their occupation of a portion of the Petitioner's property has the undesirable effect of defeating the rights and interests of the Plaintiff over this property, contrary to the mandatory Provisions of Section 25 of the Land Registration Act. The Respondents have no right or any interest, legal or otherwise, to occupy the Plaintiff's Property. Again, the occupation by the Respondents over a portion of the Petitioner's property does not fall under the exceptions provided in Sub-Section (2) of Section 25 of the Land Registration Act. Such occupation by them is therefore illegal.
17. According to the Petitioner, it now came to court to seek protection therefrom of its Rights and Interests over Plot Number MN/I/3190 situate at Bombolulu, within Mombasa County, The Petitioner therefore sought for orders of eviction of all the Respondents, 107 in number, from its aforesaid property. However, the Petitioner states that it is not inhuman to the point of failing to appreciate the plight of the Respondent squatters. For this reason, and as explained in the Supporting Affidavit to this Petition, it, the Petitioner is willing to offer them alternative settlement in one of its Plots situate in Mtwapa, Kilifi County. over which parcel of land it is registered as proprietor.
18. The Petition was grounded on the facts, testimonies and the averments on the face of the Petition and further 13 Paragraphed affidavit in support of the Petition of Quresh Zakir Lukmanji one of the Trustees of the Petitioner. He averred that:-
 - a. The Petitioner is the registered proprietor of property known as MN/I/1392, CR No. 1884, situate at Bombolulu within the County of Mombasa.
 - b. The Petitioner was registered as such proprietor, pursuant to a transfer registered in its name, on the 10th February 2010. The said property comprises of a total of 42.1 acres.
 - c. There existed a small number of squatters on the subject property at the time of its transfer into the name of the Petitioner. However, these squatters kept increasing with the passage of time, and now occupy a portion of the property that has been earmarked and coloured yellow on the deed plan which is at page 10 of his exhibits.
 - d. For the reason stated at paragraph 4 above, in the year 2013, the Petitioner, through its agent, instructed the firm of Godfrey Mutubia & Company Advocates to commence eviction proceedings against the squatters on the property.
 - e. Before any action was taken, on the 25th June 2014, by a letter of that date, the County Government of Mombasa wrote to the Petitioner, intimating that as a Government, it



intended to acquire the portion occupied by the squatters for the sole purpose of setting them thereon. In that letter, it was written that:

“The County Government intends to commence negotiations relating to acquisition of the above plot for purposes of settling the squatters who are on the ground”

f. Those negotiations never settled any dispute. When this attempt by the County Government failed, the Petitioner wrote to the National Land Commission, through raising the issue of squatters on its plots, including the present one, MN/I/1392.

g. Another attempt was made, by the National Land Commission, through its letter dated 22nd February 2016 which was written to the “Representatives of Squatters Occupiers” and was served, among many others, the Petitioner, in that letter, the Chairman of the National Land Commission informed the squatters that the Commission was calling them:

“...for a consultative meeting on how to resolve the stated matter. This meeting is scheduled to take place at the offices of the National Land Commission in Mombasa on the 6th March 2016 at 9am.”

h. The squatter issue was again not resolved through this process. The two approaches by both the County Government of Mombasa and the National Land Commission have not been able to resolve the issue of squatters who are on the Petitioner's property. This has therefore necessitated the bringing of these proceedings against the squatters in order to protect the Petitioner's rights on its property.

i. He referred to the matters stated at paragraph 18 of the Petition and confirm that they are a correct statement of fact. He further added thereon as follows:

(a) The Petitioner is registered as freehold proprietor of plot number CR 36781, situate at Mtwapa within Kilifi County. This property is located a short distance away from Bombolulu in Mombasa County.

(b) The Petitioner has willingly, without any coercion, offered to have the squatters whose names are both at the beginning of this Petition and in the Schedule thereto, to be resettled on that piece of Land.

(c) Therefore, the squatters on Plot MN/I/1392 will have an opportunity to settle on that alternative piece of land, without the tag “squatter” being appended to them.

j. The Affidavit was in support of the Petition filed herein, and request that the Orders sought therein be granted.

19. On 3rd October, 2023 the Plaintiff called its 1st witness PW - 1 who testified as follows:-

A. Examination in chief of PW - 1 by M/s Nafula Advocate

20. PW – 1 testified on oath in English language. He identified himself as Mr. Yusuf Taherali Noorali Imani, and provided his Kenyan national identify card particulars accordingly. He was a Property Manager of Dawat – E – Hadiya, the Plaintiff herein and hence duly authorized to tender this evidence on its behalf. He adopted his witness statement dated 28th November, 2022 as his evidence in chief. He confirmed the Plaintiff acquired the suit property in February 2010. They acquired it from His Holiness Saya Mohamed Nahuddin. They took possession of the property but they realized that there were squatters on the land. They had engaged many authorities to have them get back their property.



For instance, the County Government of Mombasa but all in vain It was as result of this frustration that they decided to come to court. They were not able to do anything on the property.

B. Cross examination of PW - 1 by Mr. Kenga Advocate.

21. PW – 1 was not aware how this property was acquired as a gift or through purchase. He would need to confirm that position. With reference to Entry No. 21 of the title – he did not know when the transfer was done. With reference to the contents of Paragraph 4 of the supporting affidavit, at first the squatters were four but they kept on increasing. He had never seen the 1st, 2nd and 3rd and 4th Defendants. He did not know them. His appointment as the Property Manager from the year 2015. The Plaintiffs purchased the property while it was already occupied by these few people. He never went to the suit land but he had the information he had written it in his statement.
22. With reference to the contents of Paragraph 18 of the Petition. The Petitioner was willing to offer the squatter alternative settlement in one of its plots situated in Mtwapa within the County of Kilifi County in the year 2020. They did this as its part of the community to help the needy not because they recognized them as squatters. They had knowledge of 2 to 3 houses. He was employed in the year 2015. He was staying opposite Sheikh Khalifa by thus year the witness was 19 years. The suit property is located in new Bombolulu, a place called Mworoto Village.
23. He confirmed that that it was in the year 2012 that it was developed but not when they purchased it in the year 2010. There were efforts to try and settle the squatters. Upon reference being made to the contents made under Photographs 81, the witness could not confirm the set of photographs. He did not know Mr. Ali. With reference to a letter dated 21st October, 2009 by the Defendants, the witness stated that he knew of it being a village with 2 to 3 people.

C. Re – examination of PW - 1 by M/s. Nafula Advocate:-

24. He told the court that he had authority to testify on behalf of the Plaintiff. None of the Defendants had denied being squatters. The Plaintiff wanted to evacuate the people to an alternative land. The Plaintiff did charity work and hence wanted to evacuate the Defendants as it was their role.
25. On 3rd October, 2023 the Petitioner marked their case closed through their Learned Counsel M/s. Nafula.

VI. The Respondents' (Defendants) case

26. The Defendants responded to the Plaint through a filing of the Statement of Defence dated 25th October, 2022. They averred as follows that:-
 - a. Save as to what was herein expressly admitted, the Respondents denied each and every allegation contained in the Plaintiff's Petition as if the same were set out herein seriatim and specifically traversed.
 - b. The Defendants deny the contents of Paragraphs 3 to 18 of the Plaintiff's Petition and put the Plaintiff to strict proof of its allegations.
 - c. Entirely on without prejudice basis to the fore goings, the Defendants stated that they occupied, resided and/or lived on the suit premises herein, being Plot No. 1392/I/MN,CR No. 1884, which they had had physical and/or actual possession for over 12 years, a fact that was recognized by the Plaintiff, herein.



- d. The Defendants' possession of the suit land has been openly and/or publicly and/or uninterruptedly and/or continuously and/or exclusively and/or adversely to the title of the registered owner and further that their entry onto the suit land was without anybody's permission and/or consent and/or authority and as such the Plaintiff's claim herein is time barred under the provision of Section 7 as read with the provision of Section 17 of the Limitations of Actions Act, Cap. 22.
- e. Owing to the above, the Plaintiff's Petition should be dismissed with costs and appropriate orders be made for the suit land to be registered in the names of the Defendants by way of Land adverse possession.
27. On 3rd October, 2023 the Defendant called its first witness - DW - 1 who testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Kenga Advocate.

28. DW – 1 testified on oath in Kiswahili language. He identified himself as being Mr. Hassann Mwinga Thoya (A.k.a Mzee Balala). He recorded a witness statement on 2nd October, 2023 which he adopted as his evidence in chief. His testimony was that the first person to settle on the suit land was Mr. Mariam Jefa Shari for into the land in the year 1998. Whist, the last persons to enter into the suit land were Mr. David Mwendu and Mr. Nyundo in the years 2007 and 2008 respectively. There were many people occupying and living on the land. None had lived on it for less than 12 years. There were five documents dated 2nd October, 2023. The Defendants' Exhibit 3 was a letter dated 14th February, 2008 by the Chief. He was the village elder. He wrote the letter as the village elder.
29. He told the Court that on the Defendants Exhibit Number 4 was a letter from Shu Nayan School. The school management had wanted to go visit and see the said Village. He prayed for the Court to give them the suit land. He was aware of the offer to the alternative as they were to take the Defendants from the land at Kisauni, Mombasa to another at Kilifi. He had knowledge of the letter to the Plaintiff. However, they advised them not to do as it would be dangerous for their life and others too. They had never been threatened. He would go to pray at the Village. The suit land measured approximately 6 acres.

B. Cross examination of DW - 1 by Mr. Khalid Salim Advocate.

30. DW – 1 was given authority by 110 people to go to Court and testify. Upon tendering his testimony, DW – 1 confirmed the following facts to the Court:-
- a. that the Defendants occupied 6 acres.
 - b. Being aware that the land belonged to the Bohora Community.
 - c. The Plaintiffs had a title. The title belonged to the Bohora Community.
 - d. None of the Defendants had a title to the land.
 - e. The Defendants were never given any permission to occupy the land by the Bohora Community.
 - f. Each Defendant had all built houses hence there were a total of 110 houses.
31. He got to settle in the land in the year 1998. After they realized that the land belonged to the Bohora Community, a meeting was convened at the District Officer's office whereby this matter was discussed. From the list of the names, it indicated the years when the people got in the land and built structures.



None of them had approvals to build from the National Environment & Land Authority (NEMA) nor the national Construction Authority (N.C.A).

32. The witness told the Court that the Certificate allowed them to build. Occasionally, the municipal council officials got into the land to query why they had built without approval. He was the one who applied for official searches. He found out that the land belonged to Dawat – E – Hadiya. By this time, he had already built his house. The first person to get onto into the land was in the year 1998 while the last one was in the 2008. The people would enter the land through him as he was the one who would give people the authority to settle. He acted as the Village Elder. From the time a meeting was held the three Bohora Members and the District Officer's at the Ngumbao's offices (2003), the Village Elder lost control over the settlements. He could not prevent people from occupying the land. This was at the time of the death of the late Member of Parliament for Kisauni constituency, Hon. Karisa Maitha, MP.
33. According to the witness by the year 1998, there were 30 houses. He was aware that it was illegal to enter into someone's land. Further, that it was also an offence to build on it without the permission of the land owner. As far as he was concerned, between the years 1998 to 1999 they had not known whose land it was. It's from year 1999 that they came to the knowledge of the owner of the land. He prayed to the Court to give them the land where they had occupied. He had not been aware of the letter by the National Land Commission (NLC) but later on it was brought to his attention after the Plaintiff filed this case. With reference to the letter by the school, it lacked some specific particulars. For instance, there was no reference to the Plot number on it. The letter was written to him as the village elder of Bombolulu Mworoto Village.
34. He was informed that the alternative being offered by the Plaintiff plot at Mtwapa was a beach plot. They declined the offer for various reasons. For instance, they had lived on the land for over 20 years from year 1998 to date. The proposal to take them to Mtwapa was an indication that the Plaintiff had recognized them as being squatters. Further, there were no economic nor income generation activities at Mtwapa unlike Kisauni.

C. Re - Examination of DW - 1 by Mr. Kenga Advocate.

35. The witness told the Court that, they had never been sued by NEMA, NCA and the Municipal Council over any issue whatsoever. The letter was written to them as occupants of Mworoto Village which belonged to Bohora Community. He had no authority to allow or prevent people to build nor not to occupy the suit land. He had no authority. The number of occupants moved from 3 to 110 people. These were the families that settled there. They had not trespassed on the land. They just occupied it. The meeting was convened by the District officer. It was the Bohora community that suggested that they deal on the issue through the District officer rather than directly with the Community itself. According to the witness, the suit land and the place generally belonged to them and their children.
36. On 3rd October, 2023 the Defendants marked the close of their case through their legal counsel Mr. Kenga Advocate.

VII. Submissions

37. On 3rd October, 2023 in the presence of both parties, the Honourable Court directed that the Plaint/Petition dated 12th February, 2021 be dispensed off by way of written submissions. Pursuant to that on 29th January, 2024, the Honourable Court confirmed compliance and thus issued a Judgment date on 4th March, 2024.



38. Accordingly, as indicated above, it was later on after the delivery of the Judgment on 9th April, 2024 that it realized that there had been a consent entered by the parties to convert the suit into an ordinary suit from the Constitutional Petition. Resultantly, upon informing the parties and once more arriving at a mutual consensus, on 24th April, 2024, the court reserved 25th June, 2024 for the delivery of this reviewed Judgment.

A. The Written Submissions by the Plaintiff

39. The Plaintiff through the Law firm of Messrs. Khalid Salim & Company filed their written submissions dated 18th January, 2024. Mr. Khalid Salim Advocate commenced their submissions by stating that the Plaintiff through a Petition filed on 12th February, 2021, which was later converted to a Plaint vide orders issued on 24th April, 2023. It sought the orders as set out above.

40. The Learned Counsel submitted that the Defendants statement of Defence denied all the averments set out in the Plaint and further stated that they had been in occupation of the subject property for a period exceeding 12 years. On the brief facts of the case. The Learned Counsel averred that the Plaintiff is and remained the registered freehold property of all that parcel of land Plot No Number MN/I/1392, bearing Title CR No.1884, situate at Bombolulu, in Mombasa having purchased the same from Dr. Syedna Mohammed Burhanuddin sometimes in year 2009. The ownership of the land by the Plaintiff was uncontroverted and undisputed. The Defendants never disputed that the suit property belonged to and is properly owned by the Plaintiffs. It was also not disputed whether the Defendants were and had been in occupation of the Plaintiffs suit land without their consent and or authority.

41. According to the Learned Counsel, the Plaintiff's case was simple and straight forward. The Defendants had unlawfully, wrongfully and without their authority, consent and or permission occupied a portion of their land thus violating their Constitutional right to their property. Prior to the institution of this suit, it had initiated processes in a bid to have the Defendants vacate its property without resorting to court process. It was the Plaintiff's case that it was only after they were offered alternative land by the Plaintiff and have the Defendants vacate the suit property that they decided to institute this case. The Plaintiff stated that it involved several agencies including the National Lands Commission as well as the County Government of Mombasa to engage with the Defendants in a bid to amicably have them vacate the Plaintiff property.

42. The steps taken by the County Government and the National Land Commission never materialized and the Defendants remained in occupation of the Plaintiffs land to date. The Plaintiff averred that the Defendants' occupation of its proportion of land was illegal and an impediment to its proprietary rights.

43. The Learned Counsel submitted that the Defendants in their response admitted being in occupation of the suit premise. The Defendants stated that they had lived on the property for a period of over 12 years. They further stated that their occupation of the premise had been open, public, uninterrupted and exclusive to the title of the registered owner. Their Defence was that the property should be registered in their names by way of adverse possession pursuant to the provision of Section 38 of the Limitation of Actions Act, Cap. 22. It was fundamental to note that the Defendants never filed any Counter - Claim to the suit.

44. On the issues for determination the Learned Counsel relied on the following three (3) issues. Firstly, on the issue of who is the registered owners of the suit property. The Learned Counsel submitted that the Plaintiff had demonstrated that it held a valid title to the suit property. The Plaintiff ownership of the entire parcel of land being LR No.1392 Section I Mainland North CR No.1884 measuring approximately 42.1 acres was undisputed and unchallenged. None of the Defendants had challenged



the Plaintiffs rights over the entire suit property and or any part of it. The Plaintiff, in support of its ownership and proprietorship over the suit land, had produced a copy of the Certificate of Title, Official Searches dated 22nd November 2019 and 13th February 2020 as well as evidence of payment of land rates for the entire property.

45. Even during testimony, the Defendants witness confirmed that the property was indeed owned and belonged to the Plaintiff. The Defendants confirmed that said property belonged to the Bohra Community and that they indeed knew that fact even at the time that they unlawfully came into the property. Further, the Plaintiff title had not been impeached by any fraudulent dealing and or acquisition. The Plaintiff title was not tainted by mistake and or fraud. No such contention was ever raised.

46. To buttress on this point, the Learned Counsel relied on the case of “Sai Office Supplies Limited – Versus Rosemary Alivista Luseno & Another [2014] eKLR”, whereby Lady Justice Nyamweya when dealing with the issue of ownership having not been contested held as follows:

“I find that since the Plaintiffs evidence of its ownership of the suit property is not contested by the Defendants, it is therefore entitled to the declaration sought of ownership and any consequential orders arising from such ownership.”

47. Thus, it was the Learned Counsel’s submission that in light of the evidence of ownership presented in court coupled with the Defendants admission of the Plaintiff interest over the land, this Honourable Court would indeed not find difficulty in holding that the subject property is rightfully owned by the Plaintiff. The suit property having been properly and lawfully registered in favour of the Plaintiff, the Plaintiff acquired all rights and interest over the same which right and interest is protected by the law. The Plaintiff right over the suit property was protected by not only *the Constitution* but also in the provision of the *Land Registration Act*, No. 3 of 2012 specifically the provisions of Sections 24, 25 and 26 of the *Land Registration Act*.

48. He further cited the case of “Samuel Odhiambo Oludhe & 2 others – Versus - Jubilee Jumbo Hardware Limited & another [2018] eKLR”, where M.A. ODENY when emphasizing on the import of the provision of Section 26 of the LRA stated as follows:

“I am in agreement with Munyao J. that Section 26 of the *Land Registration Act* is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown.”

49. Therefore, the Learned Counsel humbly invited this Honourable Court to find that the suit property being LR No.1392 Section I Mainland North CR No. 1884 measuring approximately 42.1 acres is and remained the property of the Plaintiff by virtue of the evidence of ownership presented before the Court coupled with the express admission of the Defendants. They invited the Court to find that by virtue of the provisions of *the Constitution* and in particular Article 40 as well as the above quoted provisions of the law that the Plaintiff rights over the subject property are enshrined under the law and hence require protection from any illegality.

50. Secondly, on whether the Defendants occupation of the Plaintiff’s parcel of land was unlawful and wrongful. The Learned Counsel submitted that the Plaintiff’s suit sought to have the Defendants evicted from its parcel of land on the grounds that the Defendants occupation, development is wrongful, unlawful and illegal as it was done without their authority and consent. The Plaintiff had categorically stated, both in its testimony as well as pleadings, that it never authorized any of the



Defendants to occupy and or settle on a portion of their land and as such, the occupation and settlement was wrongful, an infringement of its right to property and in the circumstances illegal.

51. According to the Learned Counsel, it was the Plaintiff contention that in the absence of an express authority to occupy, it was only lawful, just and fair for the Defendants to vacate the occupied portion of the property and render vacant possession to the Plaintiff. The Defendants also admitted in their testimony that:

- i. The property belonged to the Plaintiff,
- ii. Their occupation was without the authority and consent of the Plaintiff;
- iii. That at the time of their occupation, they were well aware that the property belonged to the Plaintiff;
- iv. That despite being aware of the Plaintiff ownership, they still never sought any consent from them;
- v. That it was Hassan Mwinga Thoya (the one who testified) who used to grant all the other Defendants authority to come into the Plaintiff property;

52. According to the Learned Counsel, the 4th Defendant, in his Statement dated 2nd October 2023, which statement was made for and on behalf of all the other Defendants, expressly and categorically confirmed and admitted that their entry into the Plaintiff parcel of land was without anyone's authority and consent, including that of the Plaintiff. He stated at the contes made out under Paragraph 4 as follows:

“.....And further that our entry onto the suit land was without anybody's permission and or consent and or authority.....”

53. According to the Learned Counsel, again it was uncontroverted that the Defendants entry was without the permission, authority and consent of the Plaintiff. Therefore, it was the Learned Counsel's contention and prayer that the Defendants be declared to be trespassers over the Plaintiff parcel of land. It was trite law that the unlawful entry onto someone's parcel of land without their authority and consent amounted to illegal trespass. He stated that Trespass was defined at the provision of Section 3 of the *Trespass Act* which provides that:-

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stocks to be on private land without the consent of the occupier thereof shall be guilty of an offence.”

54. As stated above, it was not in dispute that the land in issue is privately owned by the Plaintiff, that the Defendants had entered on a portion of the said land where they had erected structures thereon, cultivated thereon without the consent and or authority of the Plaintiff.

55. The Learned Counsel humbly invited this Honourable Court to find that the Defendants had trespassed onto the Plaintiff land. They beseeched the Court to be guided by the sentiments of Lady Justice Lucy Mbugua in the case of “Rhoda S. Kiily – Versus - Jiangxi Water and Hydropower Construction Kenya Limited (2019) eKLR” when dealing with the issue of trespass stated as follows:

“Thus, trespass is an intrusion by a person onto the land of another who is in possession or ownership. Through the letter dated 14th May 2018, it has been confirmed by the land adjudication and settlement officer that the suit property are owned by the Plaintiff. The Plaintiff never authorized the Defendant to enter into her land and carry out works of



construction and dumping. I am therefore inclined to find that the Defendant had trespassed on the suit parcels of land belonging to the Plaintiff.

56. According to the Learned Counsel, in the above case, the Defendants (Trespassers) were ordered to pay damages to the Plaintiff for trespass. It was the Learned Counsel's submission that the Defendants entry into the Plaintiff parcel of land was unjustifiable, unauthorized. In the case of "Entick – Versus - Carrington (1765)" Lord Camden stated that:

“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbors close without his leave.”

57. It was the Learned Counsel's submission that the Kenya law was no different. The right to property was enshrined and protected under *the Constitution* of Kenya, 2010 and further entrenched into the Kenyan laws. Land is and remained sacred and he invited this Honourable Court to protect, preserve that right. The suit property belonged to the Community known as Bohra Community. Therefore, it was a land that was for the benefit of the community. Out of good faith, the Plaintiffs had prior to the institution of this suit offered an alternative parcel of land to settle the Defendants as the Plaintiff intended to preserve the entire land in dispute for the Community. This offer was made despite the fact that it was known for a fact that the Defendants occupation of the portion of land was wrongful and illegal. The offer had unfortunately lapsed after the Defendants declined to take it up.

58. Despite such an offer, the Defendants had the audacity and the arrogance to state in Court that even if that offer was again tabled, they would not be willing to take it up as they were not ready to vacate the suit property and move to any alternative location.

59. They invited this Honourable Court, after having properly demonstrated that the Defendants occupation of the Plaintiff land was and is wrongful to proceed and issue appropriate orders for vacant possession.

60. Thirdly, on whether the Defendants acquired the property by virtue of Land adverse possession. The Learned Counsel submitted that it was imperative to point out that the Defendants never filed a Counter Claim in this case. As such, there was no case by the Defendants to be dealt with by the Court save for the Statements and averments contained in their Statement of Defence. It is trite law that parties were bound by their pleadings. To support his point, the Learned Counsel relied on the case of: "Independent Electoral and Boundaries Commission and Another – Versus - Stephen Mutinda Mule and 3 Others [2014]eKLR" which case also cited with approval the decision of the Supreme Court of Nigeria in the case of: "Adetoun Oladeji (NIG) – Versus -Nigeria Breweries PLC SC 91/2002" where Adereji JSC expressed himself on the importance of pleadings as follows:

“.....It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings was to no issues and must be disregarded in fact, the parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence on the issues as joint and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”



61. The Learned Counsel submitted that in the case of:- “Daniel Otieno Migore – Versus - South Nyanza Sugar Co. Limited [2018]eKLR” Mrima J held that:-

“It is now well settled that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings’ evidence, however strong, that tends to be at variance with the pleadings must be disregarded.

62. The Defendant only filed their Statement of Defence dated 26th September, 2023. There was no Counter - Claim seeking for any relief was accompanied by the said Defence. Although the Defendants, in their Defence, alleged that they had occupied and lived on the portion of the land for a period of more than 12 years. Even if it were to be argued that the said allegations amounted to a Counter - Claim (which was not), the same was fundamentally flawed and defective as there was no Affidavit verifying the correctness of the allegations as required by law. The issue of acquiring the property and or any part of it by adverse possession could not stand as there was no claim by the Defendants and or any of them against the Plaintiff for adverse possession. It therefore must fall flatly.

63. The Defendants had, before the trial, moved Court through an application dated 1st November, 2021 seeking to have the suit struck out on grounds that the Petition would not allow them and/or never had a window for them to file any Counter - Claim to the suit. Among other grounds was that they were unable to file a Counter - Claim in the Petition. The Motion was heard and determined with a Ruling being delivered on 18th May 2022 rightfully dismissing the said motion. Despite the Court granting them the right to file a Cross Petition, the Defendants never filed any suit for determination and or for enforcement of any alleged rights. Even despite the Petition having been converted to a Plaint as they sought, they also never filed a Counter - Claim for enforcement of any rights.

64. Therefore, it was far-fetched for the Defendants to expect to be granted orders to enforce rights over the Plaintiff parcel of land and or any portion of it when there was nothing on record for determination. Furthermore, the procedure for enforcement of rights in the nature of adverse possession is well provided for in the law. Order 37 Rule 7 of the Civil Procedure Rules, 2010 expressly provides for the procedure to be followed in cases for enforcement of adverse possession rights. In the case of “Hassan Mutisya Mulinge – Versus - Malombe Kyunuue Nzau [2017] eKLR”. Mbogo C.G stated as follows:

“On the issue of claim for adverse possession being not in proper form, I do agree with the defendant’s counsel that such claim can only be made by way of originating submissions. The plaintiff has brought this suit by way of plaint. Order 37 rule 7(i) and(2) of the Civil Procedure Rules 2010 is clear on the format in which such claim should be commenced- and proceeded to strike out and dismiss the suit.”

65. Additionally, the Learned Counsel referred Court to the case of:- “Tetesa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, the Court emphasized the importance of following the prescribed procedure in adverse possession claims. Claims for land adverse possession had to be in the form of an Originating Summons supported by an Affidavit. He reiterated that there was neither a Counter - Claim nor an Originating Summons by the Defendants for determination. His contention was that the 4th Defendant had provided a list of names of the Defendants in occupation of the land, their Identity Card Number and their alleged year of entry. Other than stating the years, there was no evidence that had been tendered to actually confirm the years of entry.



66. When questioned, the Defendants, through DW – 1, stated that all the structures erected on the portion of land were done without any building permits and or approvals issued by either the Defunct Municipal Council of Mombasa or the County Government of Mombasa. He further stated that neither the NEMA Licence nor the NCA Certificates were issued during the construction of the houses thereof. There were no permits, licenses, or license fee receipts to ascertain when some of the Defendants started running their shops on the property or even that there were shops that were being operated thereon. So that other than the allegations on the year of entry, there was no documentary evidence to demonstrate that there was construction of the houses during those years. This would have assisted this court in reaching the conclusion that the Defendants had been in occupation of the suit property for the time period the so allege. The Defendants had also not annexed any survey report to confirm that the existence of structures, old or new, on the suit property.
67. The documents produced by the Defendant were all in a bid to attempt to demonstrate the length of their occupation. That were the letters dated 14th February 2008, 28th April, 2008 and 21st October, 2009. Other than the mere fact that there was the word ‘Kijiji’ and or ‘Moroto’ on these correspondence, there was nothing to demonstrate that Kijiji and or Moroto were in any way related to the Plaintiffs parcel of land and/or their occupation thereof.
68. In support of this argument, they relied on the Judgment in the case of:- “Chigamba & 2 others – Versus - Noormohamed & 8 others (Civil Appeal 126 of 2019) [2022] KECA 535 (KLR) (6 May 2022) (Judgment)” where the bench stated as follows:

“In the present appeal, PW - 1 (the 2nd Appellant herein), PW - 2 (the 1st Appellant herein) and PW - 3 all testified to having been born on the suit property – PW - 1 in 1953, PW - 2 in 1957, and PW - 3 in 1963; and having resided thereon with various members of their family. In addition, that other deceased members of their families who previously resided on the suit property including their parents and children are also buried on the land. PW - 1 in this respect produced copies of his father’s identity card and photograph as proof of this fact, and pointed out various homesteads, structures and graves on the suit property belonging to the Appellants, during a site visit conducted by the trial Court of the suit property on 15th May 2009.

We need to point out at this juncture that this Court, in a recent decision delivered in Eliakim Masale – Versus - Ilale Mohamed & 4 Other, Mombasa Civil Appeal 135 of 2019, noted that identity cards are only proof of the date and district of birth, but not of the holder’s actual residence at the time of birth or proof of the time of entry into or occupation of a property. Further, that a photograph, being a static and inert representation of facts, can only objectively identify a certain person, item, or place at the particular period of time when the photograph is taken, and has limited evidentiary and probative value of as regards the facts of duration of occupation, or the continuous occupation of a property that is the subject of a claim by adverse possession.

It was further observed in the said case that corroboration of the fact and length of occupation by independent verifiable and reliable evidence is necessary in cases of adverse possession, to be able to meet the threshold required of a to be able to meet the balance of probabilities to divest a registered owner of his or her property. This requirement is also necessary to avoid the risk of collusion as regards the fact and duration of possession of the property...It was thus the learned Counsel’s conclusion that the evidence adduced by the Appellants in this regard did not demonstrate and prove to the required standard the duration of their possession, the identifiable portions of land that they each possessed in



terms of location and size, nor exclusivity of possession of the land they claimed, arising from insufficient evidence and inconsistencies and contradictions in their evidence as regards each of these elements. It is also notable that from the evidence adduced, some of the alleged possessors of the suit property did enter into agreements with the 4th Respondent to be allocated certain plots, including PW - 1 as evidenced by his testimony, and their possession cannot therefore be said to be adverse. The findings by the ELC that the Appellants did not prove the elements of adverse possession were therefore not in error.”

69. The Learned Counsel invited this Honourable Court to take into consideration the above findings and find that there was no cogent evidence that was tendered to buttress the issue of the length of occupation and stay on the land as alleged other than the mere stating of years. In addition, departing from their Statement, the Defendant witness testified that they entered the property with the permission of the Bohra Leader (the former registered owner) who allowed them to stay on the property. This goes against the principle that a party claiming adverse possession should have been in occupation of the suit's property without the permission of the registered owner. Going by the evidence of the Defendants, they had failed to meet the threshold for adverse possession.
70. Fourthly, on whether the Plaintiffs were entitled to the relief sought. The Learned Counsel submitted that the Plaintiff had proved its case to the required standards as required by law which is on a balance of probabilities. The Plaintiff had been able to prove, without a shadow of doubt, that it is the actual registered owner and proprietor of LR No.1392 Section I Mainland North CR No. 1884 measuring approximately 42.1 acres. The Plaintiff had been able to also prove that the Defendants have occupied a portion of its land and further demonstrated that the said occupation was without its consent and or authority hence wrongful and unlawful in the circumstances. All the above facts had also been expressly admitted by the Defendants.
71. In light of the above, the Learned Counsel humbly invited this Court to grant the declaratory orders sought as well as orders to have the Defendants vacate the suit land failure of which they should be evicted. The provision of Article 40 of *the constitution* 2010 guarantees one a right to lawfully acquired property. This right had been violated by the Defendants who without any legal right had invaded the suit's property and had trespassed on the same. Their Defense was but an attempt to dispossess the Plaintiff of its property under the guise of adverse possession unfortunately without a proper claim for determination. The Plaintiff, being the absolute and indefeasible owners of the property, had a right to protection under the law.
72. The Learned Counsel humbly asked that the suit be allowed as prayed.

B. The Written Submissions by the Defendants.

73. The Defendants through the Law firm of Messrs. Kenga & Company filed their written submissions dated 1st March, 2024. Mr. Kenga Advocate submitted that on behalf of the Respondents herein who were now Defendants by virtue of the Petition to Plaint conversion orders of 24th April, 2023, the Learned Counsel wished to submit that the Petitioner's suit filed on 12th February, 2021 vide a Petition dated 12th February, 2020 was non – meritorious and the same should be dismissed with costs.
74. On the background, the Learned Counsel submitted that the Petitioner (Plaintiff) filed this suit against the Respondents (Defendants) seeking for declaratory orders on ownership of Plot No.MN/I/1392, CR No. 1884, situate at Bombolulu within Mombasa County, the suit premises herein. It also sought for eviction of the Respondents (Defendants) from the suit premises, which said eviction should be with the assistance of Police. Upon service of the pleadings, the Respondents (Defendants) filed an application dated 1st November, 2021 to have the Petition struck out for being an abuse of the Court



process as it sought for enforcement of private land ownership rights as opposed to public litigation, the former being a preserve of private litigation, requiring all proceedings to commenced by way of a Plaintiff.

75. The said application was heard and dismissed on 18th May, 2022 but since directions were made with consent of the parties on 24th April, 2023 to have the Petition converted into a Plaintiff, the Respondents (Defendants) were now in a position to file a proper response by way of a Defence to the Petition. Based on the said conversion, the Respondents (Defendants) filed a joint statement of Defence dated 26th September, 2023. They also filed a List of documents dated 1st October, 2023 and a List of witnesses dated 2nd October, 2023, containing the 4th Respondent's(Defendant's) Statement of 2nd October, 2023. Therefore, the suit was defended.
76. On the evidence, the Learned Counsel argued that the Plaintiff, through their property manager by the name of Yusuf Taherali Imani testified in the matter as PW - 1 on 3rd October, 2023. The said witness adopted his statement of 28th November,2022 and produced all the documents listed in the Plaintiff's List of documents of 28th November, 2022 as Plaintiff Exhibit Number 1 to Plaintiff Exhibit Number 12 respectively. His evidence was that the Plaintiff acquired the suit land in the year 2010 from his holiness Dr. Syedna Mohamed and that they engaged the National Land Commission over the squatter issue on their alleged land before moving the Court. Upon closure of the Plaintiff's case, the Defendants through the 4th Defendant one Hassan Mwinga Thoya alias Balala testified on the very same day as DW - 1 and the Defence case was also closed. His testimony was with the strength of the authority to appear and/or act and/or plead dated 17th September, 2021, which was produced as Defendant Exhibit Number 1 and which appeared from pages 3 to 11 of the Defendants' List of documents of 1st October, 2023.
77. The Defence witness adopted his statement dated 2nd October, 2023 as evidence in support of the Defence. The said statement appeared from pages 1 to 12 of the Defendants' List of witnesses dated 2nd October, 2023. He also produced the documents listed in the Defendants' List of documents dated 1st October, 2023 as Defendant Exhibit Number 1 to Defendant Exhibit Number 4 respectively running from pages 3 to 32 of the said List. The Learned Counsel submitted that contrary to the evidence of the Plaintiff that in the year 2010, they were only 2 to 3 people on the suit land. That there was evidence that in the said year, that the suit land was already a village, inhabited by many people. The name of the village was "Moroto". The Plaintiff vide the contents of Paragraph 4 of the affidavit in support of the Petition admitted that there was a small number of squatters in the year 2010. Though the witness wanted the Court to believe that by saying a small number of squatters, it meant 2 to 3 people on the suit land, the evidence tendered through the letters produced as Defendant Exhibit Number - 3, Defendant Exhibit Number 4 & Defendant Exhibit Number 5, appearing from pages 30 to 32 in the Defendants' List of documents of 1st October, 2023 reveal that in the years 2008 and 2009, they were many people living on the suit land.
78. The Learned Counsel stated that that emphasis should be made to the contents of the letter dated 21st October,2009 from Shree Swaminarayan Academy, Mombasa addressed to the 4th Defendant -(DW - 1) for him to allow students from the said school to learn a few things about the life, behavior, daily duties, state of road, security and the opinions of the villagers at Moroto Village, Bombolulu. This letter was produced as Defendant Exhibit Number 5. On cross -examination, PW - 1, the Plaintiff's witness admitted that Defendant Exhibit Number - 3, Defendant Exhibit Number 4 & Defendant Exhibit Number 5 clearly confirmed that in the years 2008 & 2009, the suit premises was a village but to him, a village could mean 2 to 3 people, a perception and/or opinion which by all standards was illogical.



79. The Learned Counsel submitted that the said perception and/or opinion was illogical because the general meaning of a village was that, it was a group of houses and associated buildings, larger than a hamlet and smaller than a town situated in a rural area. Therefore, there was no way 2 to 3 people could constitute a village. No wonder, when the witness was asked other questions regarding acquisition and/or occupation of the suit land, he admitted that his testimony was full of hearsay evidence as in the year 2010, he was 19 years old and not yet employed by the Plaintiff as his employment came in the year 2015. On the part of the Defence, their witness confirmed that they occupied 6 acres on the suit premises. The witness admitted that the suit land is in the name of the Bohora Community, the Plaintiff herein. He also admitted that they entered the suit land without anybody's permission and had had peaceful occupation and/or possession of the suit land.
80. According to the Learned Counsel, the Defence witness, who was the village elder of Moroto, a village situated on the suit premises, through his statement had indicated when and how each of the Defendants entered the suit premises. The first entry was in the year 1998, while the last entry was in the year 2008. With that, it was obvious that none of the Defendants had been on the suit land for less than 12 years by the time the suit was filed in the year 2021. Equally, each of the Defendants knew the size of his or her portion of land on the suit land.
81. It would appear that the Plaintiff realized that it had bought a parcel of land with squatters when it commenced negotiations with a view of moving the Defendants to another portion of land, which was not mentioned in the pleadings but it became apparent during cross-examination that the re-settlement was to be in Mtwapa within Kilifi County. Though this offer was rejected by the Defendants, it was a clear indication that the Plaintiff had admitted the validity and/or lawfulness and/or legality of the Defendants' occupation and/or possession of the suit land.
82. As the Defendants had raised a defence on limitation through their joint statement of defence dated 26th September, 2023, they ought to be awarded the suit land by way of adverse possession and even though it has been alleged that the said orders could not be issued without there being a Counter - Claim, new jurisprudence has emerged through case laws that a Defence on Limitation was as good as a Counter - Claim or a suit for adverse possession.
83. On the law and the analysis, the Learned Counsel relied on the following four (4) issues for determination:-
- a. Whether the Plaintiff is the registered owner of the suit premises?
 - b. Whether the Plaintiff's suit is time barred?
 - c. Whether the Defendants were entitled to orders of adverse possession based on their defence on Limitation?
 - d. What reliefs were to be issued to either party?
84. According to the Learned Counsel, the Plaintiff had argued that it owned the suit land and even produced ownership documents to support the same. The Defendants had not challenged the said claim even though a few questions may be raised regarding the process of acquisition, including why there was a provisional certificate without there being a claim that the original was lost or was misplaced. Another question was as to when the transfer was made and/or registered as entry No. 21 on page 8 of the Plaintiff's List of documents raised serious issues. Be that as it may, the Defendants had opted not to challenge the same and therefore the issue of paper ownership of the suit land was uncontested. Therefore, it could be said that the 1st authority relied on by the Plaintiff, being ELC No. 92 of 2013 (Nairobi), Sai office supplies Limited had very little value in the matter as nobody had



contested the registration processes of the suit land but the physical and/or actual possession and/or ownership of the suit land was with the Defendants.

85. Further, the Learned Counsel argued that, it had also been argued that land title holders should be protected by recognizes adverse possessors as lawful owners of any parcel of land so with the provision of Section 17 of the *Limitation of actions Act*, Cap. 22 was applicable. Therefore the 2nd authority relied on by the Plaintiff on protection of land ownership rights should be interpreted alongside other provisions of law, including the provision of Section 28 (h) of the *Land Registration Act*, No. 3 of 2012 which provides for prescription. Thus, the Counsel held that the authority of “Samuel Odhiambo Oludhe, being ELC No. 417 of 2015 (Kisumu) (Supra)” was distinguishable.
86. According to the Learned Counsel, through the 3rd authority of “Rhodah S Kiilu, being ELC No.34 of 2018, (Meru)” (Supra), it’s been claimed that trespassers entering other people’s parcels of land were Criminals. In the present case, the Defendants were no longer trespassers by virtue of provision of Sections 7 and 17 of the Limitations of Actions Act, Cap. 22. Authority No. 4, though mentioned in the list of authorities, the same was not attached. Through the 5th, 6th and 7th authorities, being Civil appeal No.219 of 2013(Nairobi), IEBC & Others, Civil Appeal No. 52 of 2017 (Migori), Daniel Otieno Migore and ELC No. 213 of 2017 (Makueni), Hassan Mutisya Mulinge (Supra), respectively, it had been argued that parties were bound by their own pleadings, which argument was presumably directed at the Defendants’ failure to file a Counter - Claim. The answer to that was provided through the findings in the case of:- “Civil Appeal No. 17 of 2016 (Malindi), Chevron (K) Limited – Versus - Harrison Charo Wa Shutu” where the Learned Judges of the Court of Appeal held that the position taken in the Case of:- “Njuguna Ndatho – Versus - Masai Itumu & 2 others in Civil Appeal No. 231 of 1999” had now changed in that even through a defence, orders of Land adverse possession could issue. In the case of:- “Chevron(K) Limited case (supra)”, the Learned Judges at the second last paragraph on page 3 of their judgment, commenced by stating:

“The courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff. See *Mariba – Versus - Mariba* Civil Appeal No.188 of 2002, counter-claim or defence as was the case here. See *Wabala – Versus - Okumu* (1997) LLR 609 (CAK). In *Gulam Mariam Noordin – Versus - Julius Charo Karisa*, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala – Versus - Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Limited – Versus - Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”



87. Still in the said authority, the Learned Judges reminded themselves (Page 6, thereof) on the rationale of the procedure of acquiring land by adverse possession as explained in a passage from the decision of “Adnam – Versus - Earl of Sandwich (1877) 2 QB 485”:

“The legitimate object of all statutes of limitation is in no doubt to quiet long Continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

88. Having reminded themselves on the aforementioned passage, they went on and stated as follows:-

“With respect, we agree with the learned Judge that the appellant ought to have exercised diligence at the time it purchased the suit premises by inspecting it. The manner it dealt with the acquisition was evidently contrary to its own policy not to purchase land occupied by squatters or one with a dispute. As this Court stated in Mweu – Versus - Kiu Ranching & Farming Co – Operative Society Ltd. [1985] KLR 430:-

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

89. The learned Judges then concluded by saying;

“It follows therefore that when the appellant instituted the action in 2008 its title to the suit premises had been extinguished”

90. According to the Learned Counsel, the Plaintiff) through its 3rd authority of Rhoda S. Kiilu (Supra) had claimed that a trespasser was a Criminal whom upon conviction is punished and in civil proceedings, he or she was punished through damages. This argument had been made clear in the case of:- “Chevron (K) Limited case” where the Learned Judges dealt with the issue of trespassers and stated as follows on page 6, thereof:

“It was the Appellant’s contention that the Learned Judge wholly misunderstood its case by basing his decision on the doctrine of adverse possession while the claim was premised on the tort of trespass to land; that the issue before the trial court was simply whether the Respondent entered on the suit premises without its permission. We think it is futile to draw such a distinction. Sections 13 and 38 of the *Limitation of Actions Act*, respectively simply recognize “some person in whose favour the period of limitation can run” and “where a person claims to have become entitled by adverse possession to land.....” Invariably all cases of adverse possession arise from claims to recover land from persons regarded as trespassers.”

91. Finally, the Learned Judges had to deal with the issue as to whether a defence on limitation could qualify one to obtain orders of adverse possession and their findings were in the affirmative as they stated the following:-

“The last matter for us relates to the final orders. We alluded at the beginning of this Judgment to a statement in the trial court’s Judgment to the effect that the Respondent was not entitled to an order directing that he be registered as the proprietor of the suit premises for the



reason that the claim was not brought by suit pursuant to Section 38 (1) of the Act. We reiterate that Section 38 provides that whenever an adverse possessor claims to have become entitled to land he “may apply to the High Court for an order that he be registered as the proprietor.....”

92. In response to the decision of the trial Court on the above issue, the Learned Judges adopted the findings in the case of “Gulam Mariam (Supra) in which a similar question arose and the Court resolved it thus:-

“When the Respondent elected to raise the defence of adverse possession without a Counter - Claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the Respondent's occupation of the suit property was adverse to that of the Appellant; and that the latter's was so extinguished.”

93. Based on the above, the Learned Judges awarded the suit land to the Respondent who had only filed a Defence on limitation by stating the following:-

“For all the reasons given above the appeal fails and is dismissed. Like in the above authority, we make the order that the Appellant shall transfer to the Respondent the property at the latter's expense within 30 days from the date hereof, failing which the Registrar of the High Court at Malindi shall execute, on behalf of the Appellant the necessary transfer documents.....”

94. According to the Learned Counsel, in a different authority, the Learned Judges on the Court of appeal invoked the provision of Section 3(2) of the *Appellate Jurisdiction Act* as read with Section 38 of the *Limitation of Actions Act* to award a parcel of land to Appellants who had only raised a defence of Limitation in the superior court. This was what the Learned Judges in the case of: “Kirimo Shutu and 6 others – Versus - *Godfrey Karume*”, being *Civil Appeal No. 85 of 2015* (Malindi) said:

“For all these reasons we come to the conclusion that the Learned Judge failed to adequately evaluate the evidence before him, in the manner we have done with the result that he arrived at a wrong conclusion that the Appellants were not entitled to claim ownership of the suit property by statute of limitation and conversely by declaring the Respondent the lawful provisions of Section 3 (2) of the *Appellate Jurisdiction Act* as read with section 38 of the *Limitation of Actions Act* it is ordered that the Appellants be registered as the proprietors of the portions of the suit property which they occupy.”

95. According to the Learned Counsel, this Honourable Court was faced with a similar case and since the above authorities which had also borrowed and/or adopted similar findings from other authorities were well reasoned and based on sound principles, they urged for the Honourable Court to adopt the same. Through the 8th authority of “Teresa Wachuka Gachira, being Civil Appeal No.325 of 2003 (Nyeri) (Supra), the Plaintiff had again rehearsed the procedure of acquiring Adverse possession orders through originating summons. They needed to go back to their earlier submissions on this but in the said authority, the Appellant's Appeal failed because he was a licensee on the suit land. The 9th and final authority relied on by the Plaintiff was that of “Chigamba Badi Chigamba and others, being Civil No. 126 of 2019 (Mombasa)”, where it is argued that Identity cards and photographs taken on the suit premises were not conclusive evidence of occupation and/or possession unless other factors were considered.



96. In the present case, there was no denial from the Plaintiff that the photographs produced jointly as Defendant's Exhibit No. 2, appearing from pages 12 to 29 of the Defendants' List of documents were not photographs taken on the suit premises. The Plaintiff had not tendered any other evidence on occupation and/or possession on the suit land. Therefore, this evidence had not been challenged and remained the true position on the suit land. In the said authority, it was stated that adverse possession claims could not be raised by a purchaser. Though, these findings were irrelevant to the present case, it was held in the case of "Kirimo Shutu and 6 others - Versus - Godfrey Karume", being Civil Appeal No.85 of 2015(Malindi) that a purchaser of land from an adverse possessor who had met the threshold for acquisition of land by way of adverse possession acquired a right to the land. This was what the Learned Judges said:

"This finding only relates to the claim in respect of the 1st, 2nd and 3rd Appellants, who have, through evidence demonstrated that they have been in actual, exclusive, continuous, hostile, open and notorious possession of the suit property and did acts which were adverse and contrary to the Respondent's interests, including sub - dividing and selling parts of it as if they were the true owners. Tima Maulana named in the appeal as the 4th Appellant, who is the daughter of Maulana Said Mohammed, the 5th Appellant was said to have been one of those who purchased a portion of the suit property and put up a house. The 4th, 5th, 6th and 7th Appellants did not testify. The 5th Appellant was deceased while some of the Appellants were said to be in Italy and others in England and their attendance could not be procured without undue delay and expense. The result was that they did not give evidence regarding when they entered the suit property. The 1st Appellant however testified that one Maulana, the father of the 5th Appellant, a great friend of Mzee Shutu was invited by the latter and settled on suit property many years ago and lived with his family throughout. DW - 6, Mohammed Ali Bakari, a nephew of the 5th appellant confirmed this. From this we can only say that since the 4th, 5th and 6th Appellants based their claim both on adverse possession and purchaser's interest, the second limb of their claim could be sustained as it was dependent on the titles of the first three Appellants, who we have found to have had a legitimate claim over the suit property.."

97. Flowing from the above, the Learned Counsel submitted that the Plaintiff's suit commenced by way of a Petition but later on converted into a Plaint was time barred by virtue of Section 6 as read with Section 17 of the Limitation of Actions Act and therefore should be dismissed with costs, the consequence of which was to grant orders of adverse possession in respect of the suit land in favour of the Defendants herein.

98. In conclusion, the Learned Counsel, urged the Honourable Court to be guided by the evidence tendered herein and any applicable laws and the various Authorities available (including the above) in dismissing the Plaintiff's suit with costs. On the other hand, the Honourable Court may award the suit land to the Defendants by way of adverse possession.

VIII. Analysis and Determination

99. I have carefully considered all the filed pleadings pertaining to the Petition dated 12th February, 2020, but which by consensus of the parties was converted to a Plaint, the Supporting affidavit, the statement of defence by the Defendants and the myriad of cited authorities by the Counsels the relevant provisions of the Constitution of Kenya, 2010 and the statutes of the law.



100. For the Honourable Court to arrive at an informed, reasonable, fair and Equitable decision, it has condensed the subject matter into the following five (5) salient issues for determination. These are:
- a. Whether the Plaintiff is the bona fide legal owners of the suit property.
 - b. Whether the Defendants are entitled to plead adverse possession by virtue of staying on the suit property for 12 years;
 - c. Whether the Defendants trespassed unto the suit properties without authority of the Plaintiff;
 - d. Whether the Plaintiff is entitled to damages.
 - e. Who should bear the costs of the suit filed on 12th February, 2021?

ISSUE No. a.) Whether the Plaintiff is the bona fide legal owners of the suit property.

101. The main substratum of this case is on the proprietary rights of the suit land by the Plaintiff having been extinguished and thus the same being entitled to the Defendants through land adverse possession. Under this sub - heading, the Plaintiff through their witness and in their submission has averred, a fact which is not disputed at all, that they are the registered and absolute legal owners of the suit property with indefeasible rights, interest and title vested in it by law. However, as indicated, the Defendants main defence is that this right has been extinguished from the cogent facts and circumstances and instead they should be granted the title to the suit land.
102. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the Evidence Act Cap 80 laws of Kenya which provides as follows:-

“ 107 Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

103. Fundamentally, as indicated, the issue of the ownership of the suit properties has been an issue in this proceedings. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that they are the absolute and legal owner of the property. In so doing, the effect of registration is based on the provision of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012, the owner attains indefeasible rights, title and interests on the land vested in him/her by the law. The provision of Section 24 of the Land Registration Act provides:-

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

104. While the provision of Section 25 states as follows:-

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and



appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 1. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by the provision of Section 26(1) of the [Land Registration Act](#) which states as follows:-

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

 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
 1. In the instant suit as already stated above, the evidence of the Plaintiff remain uncontroverted. The Plaintiff through its Witness (PW – 1) – Mr. Yusuf Taherali Nooralali Imani, the Property Manager of Dawat – E – Hadiya, testified that they acquired the property through sale from His Holiness Saya Mohamed Nahuddin. They took possession of the property but they realized that there were squatters on the land. They had engaged many authorities to have them get back their property – e.g. County Government, the National Land Commission, the Provincial Administration e.t.c but all in vain. Resultantly, they decided to come to court. They were not able to do anything on the property. The witness produced the Copies of the document of title and its respective plan marked as Plaintiff Exhibit Number 3 and the official searches dated 22nd November, 2019 and 13th February, 2020 for Plot No. MN/I/1392, CR No. 1884 belonged to the Plaintiff.
 2. For the umpteenth times, it has been said that a Title Deed is a “prima facie” and conclusive evidence of the ownership of land. It is also not in dispute that the ownership of the land is uncontroverted. In other words, the Defendants never challenged the Plaintiff’s title by reason of having been acquired through fraud, mistake, omission or otherwise corrupt scheme as envisaged under the provision of Section 26 (1) (a) and (b) of the [Land Registration Act](#), No. 3 of 2012. I have keenly looked at the original Certificate of title deed of Land parcel known as Land number C.R 1884, the searches and other transfer documents. I am fully satisfied that the suit property indeed belongs to the Plaintiff as the registered proprietors of the suit property. Therefore, taking that the registration and proprietorship of the suit land is not in dispute, thus, the Plaintiff remains the rightful, absolute and indefeasible owner of the property with all the rights and privileges accruing therefrom; including the right to possession, to a quiet and peaceful occupation and right to use of their property.



3. For these reason, I emphasis and that Plaintiff is the rightful registered proprietor of the suit properties having been issued with the title deeds and the boundary features clearly outlined by the Land Registrar and is thus entitled to protection of the law.

ISSUE No. b). Whether the Defendants are entitled to plead adverse possession by virtue of staying on the suit property for 12 years.

109. Under this sub - title, the current suit is whereby the Defendant are seeking ownership based on Limitation of Action i.e. the land adverse possession. As indicated above, the main issue for determination in the current suit is whether or not the Plaintiffs has established ownership by way of adverse possession. Admittedly, the Plaintiff is pursuing a right of ownership with the divergence being the issues of specific performance pursuant to a contractual claim based on a legal claim. From the very onset, while concurring with the Submissions by the Learned Counsel for the Plaintiff, I have taken cognizance to the fact that the Defendants never filed a Counter – Claim to this effect.
110. The key issue for determination is whether or not the Defendants acquired title by way of adverse possession. If yes when did time start running for purposes of determining these rights and finally whether or not the Plaintiff is entitled to the prayers of adverse possession. In the statement of defence the Defendants claimed that they owned the land by of adverse possession. It is trite that a claim for adverse possession is attached to land and not title. It matters not that the land was owned by either the Plaintiff or the Defendants. This was the position taken in the case of:- “Maweu – Versus - Liu Ranching & Farming Cooperative Society [1985] eKLR” as quoted in “Civil Appeal No 164 of 2011 Gachuma Gacheru – Versus - Maina Kabuchwa [2016] eKLR” where the Court held “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”.
111. At this juncture, it imperative that the Honourable Court delves slightly on the concept of the Land Adverse possession in order to be at par with the matters in issue in the instant case. The principle of adverse possession is well settled under the Limitation of Actions Act, Cap. 22. To begin with, the provision of Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further, the provision of Section 13 of the same Act, provides that adverse possession is the exception to this limitation:
 - (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 of this Act 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 a fresh 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) of this Act, the land in reversion is taken to be adverse possession of the land.”



112. While the provision of Section 38 of the Act provides that:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

113. The principle of adverse possession was more elaborately set out in the case of “Wambugu – Versus - Njuguna [1983] KLR 172”, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

114. And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

115. This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. Set the findings of the Court in Malindi App No. 56 of 2014 “Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR” where it held:-

“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 nor 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”.

116. Further, in the case “Mbira – Versus - Gachuhi (2002) 1 EALR 137”: the court stated as follows:-

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

117. Therefore, to determine whether the Defendants’ rights accrued the Court will seek to answer the following:-

- i. How did the Defendants take possession of the suit property?
- ii. When did she take possession and occupation of the suit property?



- iii. What was the nature of her possession and occupation?
- iv. How long has the Defendants been in possession?

This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above. It is the Applicant's case that they have been in occupation of the parcel of land known as Plot No. 1392/I/MN and hence openly, peacefully and as of right been in possession and occupation of the said piece of land over 20 years. The burden of leading the Court to ascertaining this lies with the Defendants. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civil No. 283 of 1990 "Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR", where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

- 118. According to the Learned Counsel for the Defendants, in the present case there is no denial from the Plaintiff that the photographs produced by the Defendants being Defendant Exhibit Number 2, appearing from pages 12 to 29 of the Defendants' List of documents were not photographs taken on the suit premises. The Plaintiff has not tendered any other evidence on occupation and/or possession on the suit land. Therefore, this evidence has not been challenged and remains the true position on the suit land. According to the Defendants' witness (DW – 1), the first person to enter and occupy the suit land was in the year 1998. He was one Mariam Jefa Shari while the last persons to enter were Nyundo in the 2008 and David Mwendu in the year 2007. In total there were over 110 persons on the land. According to DW – 1, none of these persons had lived or occupied the suit land for less than 12 years. There were five documents dated 2nd October, 2023 to support this assertion. The Defendants' Exhibit Number 3 was a letter dated 14th February, 2008 by the Chief. He was the village elder. In the year 2008, he wrote a letter as the village elder. From the onset, I noted that that neither of these person recorded their statements nor called to tender their evidence to this effect.
- 119. Nonetheless, on cross examination, DW – 1 told the court that he was given authority by 110 people to go to Court and testify. His evidence was that they occupied 6 acres. He was aware that the land belonged to Bohora Community as they had a title to it. They were never given any permission to occupy the land by the Bohora Community. None of them had a title to the land, the title belonged to the Bohora Community. He got to settle in the land in the year 1998. Every one of them had all built houses hence there were 110 houses. For years shown in the list shows when the people got in the land and build. None of them had approvals to build nor approvals from NEMA or N.C.A. According to the witness by the year 1998 there were 30 houses. He was aware that it's illegal to enter into someone's land and also it was an offence to build without permissions of the land owner. As far as he was concerned they did not know whose land it was and from the year 1998 to 1999.
- 120. It's from 1999 that they came to the knowledge of the owner of the land. After they realized that the land belonged to Bohora Community they called them for a meeting at the District Officer's office and they discussed the matter. He had prayed to the Court to give them the land where they had occupied. He was not aware of the NLC letter but later on it was brought to his attention after the Petitioner had filed this case. With reference to the letter by the school, the number of the Plot number had been mentioned. The letter was written to him as the village elder of Bombolulu Mworoto Village.
- 121. He was informed that the alternative plot at Mtwapa was a beach plot. They declined that offer taking that they had lived on the land for over 20 years from the year 1998 to date. Additionally, for them



to taken to Mtwapa was an indication they had recognized them as squatters. Also, there were no economic activities for income generation at Mtwapa unlike Kisauni.

122. It is trite that claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See “Mombasa Teachers Co-operative Savings & Credit Society Limited – Versus - Robert Muhambi Katana & 15 others [2018] eKLR”, where the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/ occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*.”

123. Clearly, from the aversions of the Plaintiff and the admission by the Defendants, the Defendants occupancy on the suit property was not permissive. I have gone through the evidence adduced by the Defendants and there is nothing tangible nor empirical evidence to demonstrate that they had been in occupation of the suit land for the years they are claiming. Apart from the said construction of structures, the Honourable Court was not informed of the activities such as cultivations and of what plantations, trading centres, amenities such as schools, religious shrines, health facilities, roads networks and so forth that the Defendants had been embarking on during the said duration. For instance, from the set of photographs produced, the same do not show when in terms of dates, year and place when they were taken. As required by the provision of Section 106A of the *Evidence Act*, Cap. 80 being electronically made documents they ought to be accompanied by a Certificate of production. Certainly, though the Plaintiff never pressed for it, but it would have been a critical document to be produced by the Defendants. This simply means that the same do not prove that the Plaintiffs had stayed in the suit property for 12 years. The fact that the Defendants were born on this land, or that their parents were born on this land, or that they have been on this land all their lives, does not allow them to claim the land by dint of the doctrine of adverse possession. Their claim that they are entitled to this land through the doctrine of adverse possession therefore fails.
124. Ideally, therefore, having looked at the evidence produced by the Defendants for their claim for adverse possession, this Court strongly opines that the Defendants have failed to establish “a prima facie” case and proved their case to the required threshold to warrant being granted title through the claim for Land adverse possession. It must fail.

ISSUE No. c). Whether the Defendants trespassed unto the suit properties without authority of the Plaintiff.

125. Under this sub – title, the Plaintiff has contended that it purchased the said property from Dr. Syedna Mohammed Burhanuddin, who had been the registered proprietor of the same from the year 1989, and who became the first duly constituted trustee of the Petitioner. At the time of purchasing the said property, there were squatters on portion of this property, but who kept increasing with time by the entry onto the property by new entrants, as a consequence of the aforesaid, upon becoming the registered proprietor, the Plaintiff immediately commenced a process of having all these squatters removed from its property. It was pleaded that in the year 2013, through the agent of the Plaintiff, one Jithiada Agencies Limited, the Firm of Godfrey Mutubia & Company Advocates was instructed to commence eviction proceedings against the Defendants. As evidence of this assertion, there was exhibited at page 11 of the exhibits to the supporting affidavit, copy of that Advocates Letter, confirming the above. This letter is dated 23rd November 2013.



126. The Plaintiff averred that before it took any court action in the matter, by a letter dated the 16th June 2014, from the Lands, Planning & Housing Department of the County Government of Mombasa, it was informed as follows:

RE:L. R. No.MN/I/1392, CR 1884,Bombolulu.

The County Government intends to commence negotiations relating to acquisition of the above plot for the purpose of settling the squatters who are on the ground. Kindly call on our office at Bima Tower,4th Floor at your earliest convenient time...”

Signed: Abu Salim

127. Suffice to say, that no negotiations were ever concluded on this issue.This letter is at page 12 of the exhibits. After these events, on the 23rd February 2016, the Petitioner, by a letter of that date, wrote to the National Land Commission as follows:

“We hereby write to your good self to assist and guide us on Title Deed and Squatters issue on our below said property.”

128. One of the properties listed thereunder is plot number MN/I/1392, the subject suit property. There is exhibited at page 13 of the exhibits, a copy of the said letter.The National Land Commission responded by its letter dated 22nd February 2016 in which it made reference to the illegal occupation of the squatters, and then proceeded, in part, to state as follows:

“The National Land Commission is now invoking Article 67 (2) of *the Constitution* and Section 160 (2) (c) of the *Land Act*, 2012, read together with Sections 5 (1) (D) of the *National Land Commission Act*, to Call you for a consultative meeting on how to resolve the stated matter. This meeting is scheduled to take place at the offices of the National Land commission in Mombasa, Uhuru na Kazi Building, 7th Floor on Saturday, 5th March 2016 at 9am

(A copy of this letter, and affidavit of service on the relevant officers is exhibited at pages 14and 15).

129. The Plaintiff stated that firstly, the County Government of Mombasa never took any steps towards the acquisition of the Portion of Land inhabited by the squatters. Its intentions as expressed in its letter 16th June 2014 were never realized. Secondly, none of the dispute resolution mechanisms intimated by the National Land Commission in its letter of 22nd February 2016 was also achieved. Finally, it will be observed that the time lapse from the dates of the two letters referred to above is six (6) and five (5) years respectively.
130. The Plaintiff further averred that as registered proprietor of Plot Number MN/I/139e, holds the said land in terms expressed in Section 25 of the *Land Act*. The Defendants who inhabit its property are an impediment to the Plaintiff’s rights to the said property. Their occupation of a portion of the Plaintiff’s property has the undesirable effect of defeating the rights and interests of the Plaintiff over this property, contrary to the mandatory provisions of Section 25 of the *Land Registration Act*. The Defendants have no right or any interest, legal or otherwise, to occupy the Plaintiff’s Property. Again, the occupation by the Defendants over a portion of the Plaintiff’s property does not fall under the exceptions provided in Sub-Section (2) of Section 25 of the *Land Registration Act*, No. 3 of 2012. Such occupation by them is therefore illegal, irregular and null and void. Thus, it is safe to conclude that the act tantamount to trespass.



131. The provision of Section 3 (1) of the [Trespass Act](#), Cap 294 provides that:-
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
132. Trespass is described under the [Trespass Act](#) Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (Emphasis mine)
133. A continuing trespass is defined in “JOwitt’s Dictionary Of English Law 2Nd Edition as follows:-
- “ A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”.
134. Finally, in Clerk & Lindsell On Torts 16Th Edition, paragraph 23 - 01, it is stated that:-
- “ Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.
135. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. According to the Plaintiff as a result of the Defendants’ unlawful and illegally occupation of the Plaintiff’s properties has an impediment to the Plaintiff’s rights to the said property. Their occupation of a portion of the Petitioner’s property has the undesirable effect of defeating the rights and interests of the Plaintiff over this property, contrary to the mandatory Provisions of Section 25 of the [Land Registration Act](#). For these reasons, therefore, it is my opinion that the Plaintiff have proved his claim for trespass being a continued tort and being that the same remains uncontroverted the Honourable Court is satisfied that the Defendants indeed trespassed the Plaintiff’s properties.
- ISSUE No. d). Whether the Plaintiff is entitled to damages.
136. Under this Sub heading, the Honourable Court will embark on assessing whether the Plaintiff is entitled to the relief sought in the given circumstances. For whatever its worth, I have taken cognizance that the Learned Counsel for the Plaintiff has and rightfully so comprehensively submitted under this issue. The provision of Section 26 (i) of the Registered [Land Act](#), Cap. 300 (Now repealed) provides: -
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge.”
137. Undoubtedly, the Honourable Court has already established that the suit property belongs to the Plaintiff. In its Plaint the Plaintiff seeks a declaration as the legal registered owners of the suit property, a declaration that the Defendant is a trespasser on the Plaintiff’s parcel of land and an order of eviction. I have already declared that the Defendants actions amounted to trespass to private land. It therefore follows and I do find that the Plaintiff has suffered loss and damage, to wit: quiet enjoyment of his property through the unwarranted interference of his property by the defendants.



138. Therefore, based on the foregoing facts and inferences, I strongly discern that the Plaintiff has made out a prima facie case to warrant the grant of the said prayers in the Plaint dated 12th February, 2020.

ISSUE No. e). Who will bear the Costs of the Petition (Suit) dated 12th February, 2020.

139. It is now well established that the issue of costs is at the discretion of the court. Costs means the award a party is granted at the conclusion of any legal action or proceedings in any litigation. The Black Law Dictionary defines “Cost” to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

140. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

141. In the present case, the Plaintiff has been able to establish his case as pleaded from the filed pleadings. Therefore, they are entitled to be awarded costs of the suit to be borne jointly and severally by the Defendants accordingly.

IX. Conclusion and Disposition

142. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Plaintiff has established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiff against the Defendants herein in terms of the Plaint dated 12th February, 2020 and filed on 12th February, 2021.
- b. That a declaration do and hereby issues that the Plaintiff is the legal registered owner of the whole of that parcel of land known as Number MN/I/1392, bearing Title CR No.1884, situate at Bombolulu, within the County of Mombasa.
- c. That a declaration do and hereby issues that the Defendants were trespassers upon the Plaintiffs’ Parcel of Land registered in the Petitioners name as Plot Number MN/I/1392, bearing Title CR No.1884, situate at Bombolulu, within the County of Mombasa.
- d. That an order of eviction be and do hereby issue pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012, for the eviction of all the 107 in number Respondents named as the 1st, 2nd and 3rd Defendants in this Petition as well as those named in the schedule to this Petition, from the Petitioners parcel of land registered as Plot Number MN/I/1392, bearing Title CR No. 1884, situate at Bombolulu, within the County of Mombasa.
- e. That Honourable Court do and hereby directs that in default of the compliance with order c above, the Plaintiff be at liberty, without need to apply, to evict the all 107 Respondents



through the court bailiff and the Officer Commanding Police Station, Nyali to provide security during eviction.

- f. That in the meantime, the initial out of Court negotiation between the Plaintiffs and the Defendants and which led to offering of an alternative land for them to be encouraged taking that the same is in tandem with the provision of *the Constitution* of Kenya, 2010 and Section 20 (1) and (2) of the Environment & land Court Act, No. 19 of 2011.
- g. That costs of the suit dated 12th February, 2020 to awarded to the Plaintiff and borne by the Defendants herein.

It Is So Ordered Accordingly.

**REVIEWED JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS,
SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF JUNE 2024.**

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**HON. MR. JUSTICE L.L NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant
- b. Mr. Khalid Salim Advocate for the Plaintiff.
- c. M/s. Chengo Advocate holding brief for the Defendants.

