



REPUBLIC OF KENYA



Makau & 25 others v Noor & another (Environmental and Land Originating Summons 11 of 2022) [2024] KEELC 4653 (KLR) (4 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4653 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 11 OF 2022**

LL NAIKUNI, J

JUNE 4, 2024

BETWEEN

MUTHOKA MAKAU 1ST PLAINTIFF

HAMISI MUSTAFA 2ND PLAINTIFF

DANIEL KYALO MWATHI & 23 OTHERS & 23 OTHERS 3RD PLAINTIFF

AND

AHMED SIRAJ NOOR 1ST DEFENDANT

AISHA FARAJ MOHAMED 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. This is a Judgment that pertains to a suit instituted through the Originating Summons by Mr. Muthoka Makau, Hamisi Mustafa, Daniel Kyalo Mwanthi and 23 others the Plaintiffs herein dated 16th February, 2022 against Ahmed Siraj Noor, the 1st and 2nd Defendants herein. In the course of time, the Plaintiffs further filed an Amended Plaint dated 28th November, 2023 supporting their claim against the 1st and 2nd Defendants.
2. Upon service of the pleading and Summons to Enter Appearance, the 1st and 2nd Defendants filed a response through a replying affidavit sworn on 15th December, 2022.
3. On 30th October, 2023, after confirming that all parties had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 25th January, 2024. The Plaintiffs called PW - 1 on the same day. Subsequently, as required by law, the originating summons was converted into a Plaint pursuant to the provisions of Order 37 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.



4. It is instructive to note that from the request made by parties herein, the Honourable conducted a Site Visit (“Locus in Quo”) pursuant to the provision of Order 18 Rule 11 of Civil Procedure Rules, 2010. An elaborate and comprehensive report has been prepared and reproduced herein verbatim for ease of reference.

II. The Plaintiffs’ case

5. The Plaintiffs claimed to be entitled to the ownership of suit property Title Number MN/1/18815 by virtue of adverse possession. The Plaintiffs sought for the following orders:-

- a. A declaration that the title of the said Ahmed Siraj Noor to the freehold Interest in all that parcel of land comprising in Title number MN/1/18815 sub - divided into various plots known as MN/1/18815 subdivided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/1/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/1/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/19664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/1/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts has been extinguished by the Applicants/Plaintiffs’ adverse possession thereof for a period of more than 12 years in terms of Section 17 and 38 of the *Limitation of Actions Act*, CAP 22 Laws of Kenya.
- b. A declaration that the Applicants/Plaintiffs have acquired the freehold interest in ALL THAT parcel of land comprising in Title number MN/1/18815 subdivided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708,



MN/1/19707, MN/1/19703, MN/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts, by their adverse possession thereof for a period of more than 12 years i.e. from at least 2004 to date.

- c. An Order requiring and directing the Registrar of Lands Mombasa be to reconstruct a skeleton file for ALL THAT parcel of land comprising in Title number MN/1/18815 subdivided into various plots known as MN/1/19609, MN/119600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts.



- d. That the plaintiffs/applicants have become entitled to adverse possession to the suit land in Mombasa County and Registered under the Registration of Titles Act in the names of the Defendant and/or Respondent.
 - e. That an order do issue requiring and directing the Chief Land Registration Officer, Mombasa County to register the Plaintiffs/Applicants jointly as the proprietors of the said parcel of land namely Title number MN/1/18815 subdivided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/1/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/1/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/19664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located in Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts in place of AHMED SIRAJ NOOR who is presently claiming title and in place of any other person succeeding the Defendant/Respondent.
 - f. That the land Registrar Mombasa be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Defendant/Respondent to the Plaintiffs/Applicants.
 - g. That the Defendant/Respondent be permanently restrained from disposing off, selling, transferring, leasing, sub-dividing and/or dealing with the suit property in any other manner.
 - h. That cost of the suit be provided for.
6. The Plaintiffs based the Originating summons on the grounds below:-
- i. The Plaintiffs had reason to believe that the 1st and 2nd Defendants were the absolute proprietor of the suit property(s).
 - ii. The suit property(s) is located in Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts (approximately (12.207 acres)).



- iii. The 1st and 2nd Defendants or any party claiming interest in the suit property(s) has never sought to assert their proprietary rights over the suit property(s).
 - iv. The Plaintiffs were not licensees of the 1st and 2nd Defendants and that their occupation of the suit property(s) was adverse, hostile and was not sanctioned by the 1st and 2nd Defendants.
 - v. The 1st and 2nd Defendants' title in the suit property had been extinguished by the Plaintiffs' adverse possession thereof for a period which exceeded 12 years in terms of provided Sections 17 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - vi. There would be no prejudice occasioned to the 1st and 2nd Defendants.
 - vii. It was in the interest of justice and fairness that the Orders sought be granted as prayed
7. The Originating summons were premised on the grounds in the 19th paragraphed supporting affidavit sworn by MUTHOKA MAKAU, the 1st Applicant herein on 16th February, 2022 where the deponent averred that:-
- a. He was duly authorized by Hamisi Mustafa, Daniel Kyalo Mwanthi, Patrick Nyambu Mwadime, Salome Kimonje, Dama Thoya, Mwalimu Khamis Ali, Dicfson kaingu, Rashid Sadiq, Yusuf Abdalla Khamis, Lucy Naspan, Shomali Ali, Gumaa Sadiq, Willia Matano Mwadime, Mary Otieno, Shee Athman Omar, Anzazi Shida, Jumaa Saleh Jumaa, Catherine Naliaka, Hussein Sadiq, Sarah Chichi Mwinyi Juma Mwinyihaji, Charles Bahati, Mwatela, Ali Kasim, Kanze Charo (Hereinafter referred to as Plaintiffs) to swear the affidavit. (Annexed in the affidavit and marked as "WFC - 1" was a true copy of the authority to plead, swear affidavits and/or testify issued to me by the Plaintiffs on the 14th day of February 2022)
 - b. The Defendant is the absolute owner of al that parcel of land constituting the suit property(s) as he was the one servicing the local authority land rates with respect to the suit property. (Annexed inn the affidavit and marked as "WFC - 2" was a true copy of the E - Lands Services Statement dated the 19th day of January, 2022.)
 - c. The property was located at Utange area, in Mombasa County, measuring approximately Four Nought Nine Four (4.94) of a Hectare or thereabouts.
 - d. At the time he together with the other Plaintiffs occupied the suit property(s), and that the property(s) is identified the by the LR No. MN/1/18815 which was thereafter subdivided into various plots known as MN/1/19609, MN/119600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/264,



MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646, sub - division which was conducted by the Defendants either by his representatives, agents, employees, servants and/or assignees (Annexed in the affidavit and marked as “WCF – 3” & “WCF – 4” were copies of maps showing the suit properties before and after the sub-division respectively).

- e. They asked one Mr. Alex Lugua Kahutsu to make an application for an official postal search on their behalf with respect to the suit property but they were informed by the officials at the land registry that there exist no records with respect to the suit property at the lands registry in Mombasa. (Annexed herewith and marked as “WFC - 2” was a true copy of the postal search dated the 2nd February, 2022)
- f. He was the first person to occupy the suit property sometime in the year 2004 having migrated from the present day Bombolulu and upon settling on the suit property allocated himself a parcel of land proximal to the road.
- g. All the other Plaintiffs were his neighbors and well known to him who have been in occupation of the suit property(s) from the year 2004 having found the suit property bare and unoccupied. (Annexed in the affidavit and marked as “WFC - G” was a true copy of a letter by the area chief confirming the same).
- h. The other Plaintiffs had since then occupied the suit property and constructed thereon various structures both semi-permanent and permanent and which are the current homes of 25 families consisting of school going children, the elderly and persons living with disabilities some of which have never known of any other place as a home other than the suit property(s).
- i. The 1st and 2nd Defendants or any party claiming interest in the suit property(s) had never sought to assert their proprietary right over the suit property(s).
- j. Together with the other Plaintiffs they had remained in actual, open, hostile, continuous and uninterrupted possession and/or occupation of the suit property(s) in full knowledge of the 1st and 2nd Defendants and to the exclusion of the 1st and 2nd Defendants or any party claiming interest in the suit property(s).
- k. They were not licensees of the Defendants and that their occupation of the suit property was and had always been adverse, hostile and was not sanctioned by the Defendants.
- l. The 1st and 2nd Defendants’ title in the suit property(s) had been extinguished by himself and the other Plaintiffs’ adverse possession thereof for a period which exceeded 12 years in terms of Section 17 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
- m. There would be no prejudice occasioned to the Defendant.
- n. It was in the interest of justice and fairness that this Honorable Court do grant the said Orders as prayed.



- o. In the circumstances, and based on the foregoing reasons, the Orders sought in this application supported by the affidavit annexed thereto ought, in the interest of justice and fairness be allowed.
8. The Plaintiffs in their Amended Complaint narrated the facts of the case as follows that at all material times relevant to the suit, the 1st Defendant was the registered owner of all that parcel of land known as and comprising in title number MN/1/18815 sub - divided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/1/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/1/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/19664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/1/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/1/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts. The 2nd Defendant was the Registered Owner of all that piece of land known as Plot No. MN/1/19667 forming part of the suit property. The Plaintiffs averred that they have been in continuous occupation of the suit property since the year 2004 without interruption from the Defendants or any other persons whatsoever.
9. They had built their homesteads on the suit property where they live with their families. There were about twenty-five (25) families living on the suit property consisting of school going children, the elderly and persons with disabilities. Further, the developments they had made on the suit property include their houses, animal sheds, and the animals they rear and plants they grow. The Plaintiffs stated that they never had any other place to call home other than the suit property. The Defendants title in the suit property had been extinguished by their adverse possession thereof for a period which exceeded 12 years. The Plaintiff had acquired an interest in the suit property by way of adverse possession.
10. The Plaintiffs relied on the following particulars of the Plaintiffs' acquisition of adverse possession pursuant to the provision Sections 17 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya:-
- i. Taking possession of the suit property without the consent and/ or authority of the Defendants.



- ii. Having actual, continuous and uninterrupted possession of the suit property since year 2004 with the full knowledge of the Defendants and to the exclusion of the Defendants.
 - iii. Undertaking developments on the suit property including building of permanent and semi - permanent houses, rearing animals and planting crops.
11. According to the Plaintiffs their claim against the Defendants was for adverse possession. There was no other suit pending between the Plaintiffs and the Defendants over the same subject matter. The cause of action arose within the jurisdiction of the Honourable Court.
12. The Plaintiffs had also relied on the following particulars of fraud/ illegality on the part of the Defendants:-
- i. That the Certificate of title in the names of 1st Defendant is married with illegalities being a fruit of an irregular processes and having been executed by the 1st Defendant and transferred to the 3rd parties on a Sunday 21st July 2013, a clear indication that the same was done irregularly as in the entry No.12 of the mother title being sub-division No. IMN/16634 CR.36243 issuance of New CT/CR of LR NO.196531 to 19664.
 - ii. Procuring the title Deed without validity executed transfer instruments by law required.
 - iii. Failing to execute the necessary valuation report and paying stamp duty as prerequisite for to transfer to be effected.
 - iv. Tempering and/or coming up with parallel register for the said parcel of land at the registry.
 - v. Conducting and/or assisting in processing of fraudulent activities.
13. The Plaintiffs prayed against the 1st and 2nd Defendants jointly and severally for:-
- a. A declaration that Registrar of title Mombasa do revoke the title Deed that was obtained, and/ or issued to the 1st Defendant and the subdivided illegally and/or fraudulently and that the same be issued to the Applicants instead.
 - b. A declaration that the title of the said AHMED SIRAJ NOOR to the freehold interest in ALL THAT parcel of land comprising in Title Number MN/1/18815 located at Utange area in Mombasa County, containing by measurements approximately 4.94 Ha or thereabout subdivided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/1/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/1/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/19664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/1/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676,



MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts has been extinguished by the Applicants/Plaintiffs' adverse possession thereof for a period of more than 12 years in terms of Section 17 and 38 of the Limitation of Actions Act, CAP 22 Laws of Kenya.

- c. A declaration that the title of the said AISHA FARAJ MOHAMED to the freehold interest in ALL THAT piece of land known as Plot no. MN/1/1/19667/I/ M forming part of the suit property has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya.
- d. A declaration that the Plaintiffs have acquired the freehold interest in ALL THAT parcel of land comprising in Title number MN/1/18815 located at Utange area in Mombasa County, containing by measurements approximately 4.94 Ha or thereabout subdivided into various plots known as MN/1/19609, MN/119600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646.
- e. An order that the Plaintiffs have become entitled to adverse possession to the suit land in Mombasa County and registered under the Registration of Titles Act in the names of the Defendants.



- f. An Order do issue requiring and directing the Chief Land Registration Officer, Mombasa County to register the Plaintiffs jointly as the proprietors of the suit land being the Plaintiffs have acquired the free hold interest in ALL THAT parcel of land comprising in Title number MN/1/18815 located at Utange area in Mombasa County, containing by measurements approximately 4.94 Ha or thereabouts subdivided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/1/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/1/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/19664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/1/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/1/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 in place of AHMED SIRAJ NOOR and AISHA FARAJ MOHAMED who are presently claiming title and in place of any other person succeeding the Defendants.
- g. The land Registrar Mombasa be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Defendants to the Plaintiffs.
- h. Cost of the suit be
- i. Any such other or further relief as this Honourable Court may deem appropriate.
14. The Plaintiffs called PW - 1 on 25th January, 2024. PW - 1 testified as follows:-

A. Examination in Chief of PW - 1 by M/s. Chano Advocate.

15. PW – 1 testified on oath in Kiswahili language. He identified himself as Mr. Muthoka Makau Kapiti. He told the court that he was born in the year 1972. He recorded a statement dated 28th November, 2023 which he adopted as his evidence in chief. He had a list of documents (8) dated 28th November, 2023 which he produced as Plaintiff Exhibit Numbers 1 to 8.
16. According to PW - 1 as a family of Kapiti, entered the suit land in the year 2004. It was bushy and unoccupied. Hence they had nobody to seek consent/permission from. They lived there in the suit land in peace and cultivated it. They also constructed temporary mud structures on it. They entered as over 150 people i.e. squatters. They entered in groups. They never knew each other. However, later



on they were evicted in the year 2011 by the Defendants using police officers as he was a rich man. He had never seen the Defendants before. They saw him for the first time they saw him the day he came to evict them.

17. PW - 1 stated that they knew the village elders. They had not processed the title documents as they had not anticipated that they would be evicted. While living there they had never anyone conducting land surveying exercise. They could not salvage anything after the demolition. Before relocating to the suit property, they were living in Utange.
18. PW - 1 told the court that it was Hon. Emmanuel Karisa Maitha who helped them get a place called Jishikilie in Utange. They felt it was no longer secure hence the need to relocation to the suit property.

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

19. PW - 1 confirmed that from the time they entered the land in the year 2004, they had never conducted any official search to show them the owner of the land. For the over 100 parcels, he had only produced the official search for Aisha. The other sub - divisions never had any official searches. The pleadings (OS) were his. He never disputed that the land had been sub - divided severally. He admitted that from the year 2018, they were evicted. None of them was able to settle on the suit land. They only came to court in July 2022.
20. The witness recalled that one time on 20th July, 2023, the Deputy Registrar from this Court visited the suit property and deliberated with them. He confirmed that by then there were no people living or occupying the land. From the title deed there had been transfers to many people i.e. Entry 14 showed James Nyangweso Nyatigo. Entry No. 24, 25, 26, 30, 31 and 36 showed the land had been transferred to many other people. They had never sued nor joined these people in any suit in the court of law. He admitted that Parcel MN/I/18815 belonged to the Respondent although there was no official search.
21. PW - 1 also recalled that the Government surveyor was on the land and he prepared a report dated 24th July, 2023. He referred to the google maps and confirmed that the pictures showed that there were no structures on the land as by then they had been evicted. He was aware that the Defendants had prepared a land survey report by PRIMATECH Land Surveyors dated 6th December, 2022 by then they had been evicted. He confirmed that from 2018 onwards they were not on the suit property.

C. Re - examination of PW - 1 by M/s Chano Advocate.

22. PW - 1 reiterated that he did not know how to conduct an official search. If he needed any to be undertaken he would conduct his advocate. He had seen the search that had been done by the advocate. He had knowledge of the sub division done due to the road. They were evicted in September 2018 and they filed the case in July 2022.
23. According to the witness during the site visit, he could not identify everyone. They had never constructed a pit latrine. They used flying toilets. He retracted his earlier statement and stated that he was not aware of the sub - division that was undertaken on the suit land. From the year 2018, they never tried coming back to the land. They would have been stopped and there were reports already filed at Bamburi Police Station.
24. The Plaintiff called PW - 2 on the same day who told the court that:-

A. Examination in Chief of PW - 2 by M/s Chano Advocate.

25. PW - 1 testified under oath in Kiswahili language. He identified himself as Mr. Elisha Kenga Mwakamsha. He told the court that he was walking on the land and PW - 1 showed him the suit land.



He had been on the land for a long time. Nobody had ever come to claim it. However, it was in the year 2018, they were evicted by Police officers at night. They could not salvage anything. He claimed not to know any of his neighbours. He was not aware that there had been a survey exercise. The locational chief knew they lived on the suit property. They never conducted official searches as to regards to the suit property.

26. According to the witness, he was told by Mr. Muthoka that the land belonged to the 1st Defendant. He had never known him. After the eviction, he had never seen the 1st Respondent and the witness went back to Utange. He urged the court to give the land to them as they were poor people. That they had no place to go.

B. Cross examination of PW - 2 by Mr. Omwenga Advocate.

27. He confirmed that from the time they were evicted from the suit land in the year 2018, they instituted the suit in court in the year 2022. That was 4 years after the eviction had occurred. According to him from 2018, all their houses were demolished and no cultivation took place and the suit property had never been accessed. With reference to Plaintiff Exhibit 1, the witness told the Court that his name was not listed as one of the parties in the suit. He stated that when the Deputy Registrar paid a visit to the land to conduct a site visit, he was not present. He knew a few of his neighbours. To date, it had been five (5) years since they had been on the suit land.

C. Re - examination of PW - 2 by M/s Chano Advocate.

28. The witness stated that the names in the suit were not of all the people who occupied the land. There were more names of people who were on the land but not noted in the pleadings. During the site visit, the report may not contain more who were not captured. They never got access to the land due to the police officers manning the land.
29. On 24th January, 2024 M/s. Chano marked the Plaintiff's case closed.

III. The Defendants' case

30. The Defendants filed a 22nd Paragraphed Replying Affidavit sworn by AHMED SIRAJ NOOR on 15th December, 2022 with one annexure marked as "ASN - 1" who averred that:-
- a). He used to be the duly registered owner of Plot No.18815/1/MN (C.R. No. 56243) until sometimes on or about 17th April, 2013 when he sub-divided the property into 133 sub-plots and a sub-division certificate was issued and registered on the title for those sub - divisions Nos 19597 to 19729 and since then a number of those sub-division have been sold to several purchasers. He produced hereto a copy of the original title deed on pages 1 to 10 of his exhibit marked as "ASN - 1".
 - b). The Sub - division was done in the year 2013 that was only 9 years ago and indeed as at the time of Sub - division his plot was empty with no single squatter and or occupants on it, otherwise the Sub-divisions and beacons would not be placed on the ground, hence the allegation by the Plaintiffs that they had extinguished his title by adverse possession for having occupied the property for 12 years of continued stay is not correct and right but pure lies. The Court ought to dismiss the averments by the Plaintiffs that they had been in possession for over 12 years.
 - c). On 5th December, 2022 he instructed Pimatech Land Surveyors & Consultants through his Advocates on record to carry out a comprehensive survey on the Plot. He produce hereto the instructions letter dated 5th December, 2022 on pages 11 and 12 of his exhibit and indeed a



comprehensive survey was done and a report was done dated 6th December, 2022. He produced the same on pages 13 to 25 of my exhibit. He produced his exhibits marked as “ASN - 1” on pages 1 to 25.

- d). From the said comprehensive report its inter alia clear that Plot No.18815/I/MN had been sub - divided into 133 sub - divisions. A number of the sub - plots had been sold to third parties who are in occupation of the same as legal owners. Another of the sub - plots had been developed and on in the process of being developed with appropriate approved plans. There were no squatters and or illegal structures or shanties on the ground within the boundaries of his mother title (or new sub-divisions) hence all the averments by the Plaintiffs in the Originating Summons and Supporting Affidavit were false and pure lies which needed to be discarded completely by this Honourable Court.
- e). It was not true or all that the Plaintiffs had acquired adverse possession of the suit plots, nor had they ever occupied, developed and used the suit plots as per the comprehensive surveyor's report of 6th December, 2022. Hence no declaration ought to be granted that the Plaintiffs had acquired the freehold Interest in respect to Plot Nos. 19597/1/MN to 19729/1/MN.
- f). He had sold a number of the plots to Third Parties who had developed and were in occupation of their plots and indeed not parties in this matter. This Court could not issue adverse orders to innocent purchasers for value without being heard. The orders requiring and or directing the Registrar of Lands Mombasa could not issue ordering him to reconstruct a skeleton file for all those parcels of land that is from 19597/I/MN to 19729/I/MN. Those orders could not issue because the Plaintiffs had never been in occupation and were not in occupation of portions.
- g). Since the Plaintiffs had never been occupation nor were they in occupation of any sub - divided portions Nos. 19597/1/MN to 19729/1/MN. The order to change the titles issued in respect of those sub-divisions could not issue because a number of those sub-divisions have been sold to third parties who are in occupation of the same and they were not parties in this matter. The orders sought in paragraphs 4, 5, 6 and 7 of the Originating Summons could not issue or at all. The Plaintiffs were put to strict proof of their alleged occupations and usage of the sub - divisions.
- c). On the ground of those sub - division No. 19597/1/MN to 019729/1/MN were in occupation of the legal owners who had purchased and total empty as per the Surveyor's Report of 6th December, 2022. Together with the other legal owners of the portions could not be restrained from disposing off, selling, transferring, leasing, subdividing and or dealing with the suit portions on mere allegations of busy bodies who were not in occupation or usage of the suit property. The orders of injunction sought should not be granted or at all.
- h). The Plaintiffs had never been in occupations not were they in occupation of the suit properties. His title or titles had not been extinguished by the Plaintiffs adverse possession, indeed the allegations by the Plaintiffs having stayed/occupied the suit property or over 12 years is their own wild imagination without factual basis. He averred that the surveyor's Report of 6th December, 2022 was very clear that they were not in occupation of the suit properties.
- i). Any order to be issued in favour of the Plaintiffs would have serious Prejudice to him and the innocent third parties who were in occupation of their legally purchased properties. The orders sought should never issue or at all.
- j). Interest, justice and fairness require the orders sought by the Plaintiffs should be rejected forthwith.



- k. There was no proper legal authority given to the deponent of the Supporting Affidavit by the other 23 others and hence the entire suit was defective and it ought to be struck out forthwith.
- l. He was a rate payer of some of the portions of the suit plots, however others had been sold to third parties who were now the rate payers and not him.
- m. The suit property was no longer measuring 4.94 Hectares or thereabouts since the same was sub-divided and a sub-division certificate issued and there were 133 portions duly approved by the County Government of Mombasa.
- n. The Plaintiffs were in occupation of any of those sub - divisions as alleged. The deponent referred the Court to comprehensive Surveyor's Report of 6th December, 2022 produced herein which is very clear that the Plaintiffs were not in occupation of the suit properties.
- o. Indeed after the sub - division of the mother title plot No. 18815/I/MN no longer exists.
- p. The Plaintiffs had not produced any Surveyors Report to aver and confirm that they were in occupation an usage of the suit plots hence their averments in Paragraphs 8, 9, 10, 11, 12, 13 and 14 of the Supporting Affidavit are mere allegations without any proof. Indeed the Surveyors Report of 6th December, 2022 was very clear that the Plaintiffs were not in occupation and or usage of the suit portions/properties. The Plaintiffs were put to strict proof of their allegations.
- q. If the orders/prayers sought by the Plaintiffs were granted, himself and the other innocent third parties purchasers in occupation shall be seriously prejudiced and for the interest of justice and fairness the orders sought be rejected and the matter/suit be dismissed with costs.

31. On 24th January, 2024, the Defendant testified as DW - 1 as follows:-

A. Examination in Chief of DW – 1 by Mr. Omwenga Advocate.

- 32. DW – 1 testified on oath in Kiswahili language. He identified himself as Mr. Ahmed Siraj Noor. He stated that he was born on 20th December, 1960. He produced the Defendant Exhibit 1 to 25. His bought the land - CR. No. 18815 and CR. No. 16634 in the year 2012. He bought it through cash payment. He used to live in the nearby estate by the name Siraj which is his name He heard that the land was being sold. He approached a bank who financed him 60% and he paid the 30%. The bank undertook the searches and evaluations. By then, his Advocate was Messrs. A.B. Patel Advocates.
- 33. The witness told the court that eventually he got the title deed and it was discharged, he caused the sub – division and sold the sub divided parcels to enable him settle the pending land. He showed Court the original Certificate of Title Deed. (After keenly assessing it, Court returned it to the DW – 1 for his safe keeping). He had a survey report of 6th December, 2022 there was no bush as the Plaintiff alleged. There was a google map to show nobody had settled on the land. The Deputy Registrar was directed to conduct the site visit; He participated in the site visit exercise. From year 2018, there had been no one on the land, no cultivation was going on to date from year 2018 and he had never been sued until the year 2022. He prayed for the suit too be dismissed. It was true hat he had cause the sub - division of the land. He had sold the land to 75 people. These people were not in Court.

B. Cross examination of DW - 1 by M/s. Chano Advocate.

- 34. DW - 1 informed the court that he had lived on he land since he bought it in the year 2012. He bought it from Mr. Henry Waitthaka (deceased). He had brought the evaluation report but had not produced it. He had not produced a survey report of 6th December, 2022 by then the case was on going. He was aware that the Plaintiffs had been evicted. He paid the rates from the year 2012. When referred to Entry



12, the witness he conformed that date was for 21st July, 2013 which was a Sunday. He had nothing urgent. According to him, this ought to have been an error caused by the Land Registrar. He confirmed that these were his documents. He did not know the area chief. He had never been called to be told that there were people on the land. From the year 2012, he had Security from guarding the land. He had never received any letter from the police on people occupying the land. The valuation report was part of his evidence. From the sub – division there were title deeds as shown from the entries on the title.

C. Re - examination of DW - 1 by Mr. Omwenga Advocate.

35. DW - 1 confirmed that he was given Entry No. 12 for 12th July, 2023, and that there were 12 title deeds. He had the original Certificate of title deed. He never and did not work in the land office. He had not seen any complaints on entry No. 12 for 12th July, 2023. He knew about this in the new case filed after this suit. If anything, this must have been an error which would be rectified if need arose. The parcels of land mentioned there were within his land. None of the Plaintiffs occupied those parcels. They had no right to be raising the Complainant. It was only the land registrar who can explain this. It was Mr. Rexon – the current DPP. The Plaintiffs had nothing to show and proof they were in occupation.
36. On 24th January, 2024, the Defendant through his advocate marked the case closed.

d. Submissions

37. On 24th January, 2024, upon the closure of case by the both the Plaintiffs and the 1st and 2nd Defendants, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the parties complied accordingly. On 5th March, 2024, the Honourable Court reserved a date to deliver its Judgement on 22nd May, 2024. However, due to unforeseen circumstances beyond the control of the Court, it was eventually delivered on 4th June, 2024.

A. The Written Submissions of the Plaintiffs.

38. The Plaintiffs through the Law firm of Messrs. Paul Kenneth Kinyua & Associates filed their written submissions dated 4th March, 2024. M/s. Cano Advocate commenced her submissions by stating that the suit was instituted through Originating summons which were rightly directed to be converted to a Plaint dated 28th of November, 2023 and filed on the 18th of January, 2024. The Plaint sought for the orders as set out above. On the brief facts of the case, the Learned Counsel submitted that the 1st Defendant is the registered owner of all that parcel of land known as plot number MN/1/18815. On or about the year 2004, the Plaintiffs and their families legally entered the Defendants' parcel of land when it was vacant cleared the bushes, farmed and started building temporary structures therein.
39. According to the Learned Counsel, the Defendants never wrote or appeared in any way to the Plaintiffs to demand that they vacate suit property until year 2018 when he appeared with police officers who forcefully evicted them. The Plaintiffs thereafter tried to negotiate with the 1st Defendant to settle the issue amicably but he refused and instead used police and guards to harass, violate their rights and forcefully kept the Plaintiffs away from a place they considered home. Due to the failure of alternative dispute resolution the Plaintiffs were constrained to seek the intervention of this court to settle this dispute. Despite the notice of intention to sue being served on the 1st Defendant he had refused and/or ignored to solve this matter amicably and out of court.
40. On the evidence, the Learned Counsel asserted that the Plaintiffs called two witnesses while the defendants only called the 1st Defendant as their only witness. PW - 1 one Muthoka Makau testified that he was seeking to be recognized as the owner of the suit property since him and his family have farmed and lived on the suit property since year 2004. They were always on the property and only got to



- know of the owner who is the 1st Defendant in the year 2018 during the eviction process. He stated that he had neighbours but did not know all of them by their government names, he knew others through the nicknames they gave each other and that was why during the site visit, some could not properly name or identify with the names asked. He also stated that no survey was done during the time he was in possession of the land and that post the eviction in year 2018, he never know if another was conducted. The Plaintiffs only realized that they could get reprieve after looking for help since they did not conclusively know what the law states, this was the reason it took them a while before filing the suit.
41. PW - 2 one M/s. Ali Mwakamsha testified to the effect that he got to know of the suit property through the 1st Plaintiff and settled there in 2004 or thereabout. He stated during cross examination that not all occupants of the suit property had been exhaustively listed in the suit as parties or the site visit report because the property is vast. That the names on the lists also did not include the nicknames they were used to and this explained why the names were different and why not all of them could not identify each other conclusively. He stated that since the eviction, he had had to sort temporary solace most times with his family because there were guards at the property that denied them access to it.
 42. The 1st and 2nd Defendants brought one witness DW - 1 by the name M/s. Ahmed Siraj who stated during cross examination that he had never lived on the suit property neither did he know who the neighbours or area chief had been all those years. He admitted to producing the copies of exhibits that contained the questionable dates in the entries of transfers to the 2nd Defendant and other 3rd parties. He stated that the office of the Land Registrar's works during the weekends when called upon yet failed to produce evidence of the recall to work. He later claimed that the entries were a mistake. Which version should the court then pick to be the truth? The valuation report done in the year 2012 which was alluded to was not produced in his testimony and he relied on the one dated 6th December 2022 after the eviction and institution of the suit to show that the Plaintiffs were not living on the property.
 43. On analysis and the law, the Learned Counsel submitted on the issue of whether the 1st Defendant is the owner of the suit property, that the provision Section 26 of the [Land Registration Act](#) provides for a certificate of title to be taken by court to be prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge. Whereas the 1st Defendant claims ownership of the land known as MN/1/18815 without conveniently showing or providing the 1st entry in the title which he claims to be the one which gave him ownership as evidence, the existence of a transfer entry in favour of the 2nd Defendant as to the 1st Defendant's transactions and the current ownership of the property known as Plot No. MN/1/1/19667//M forming part of the suit property.
 44. The provision of Section 35 (3) of the [Land Registration Act](#) provides that every entry or note on any register shall be received as conclusive evidence of the matter or transaction it records. The above in turn brings in the question as to whether the 1st Defendant legally or rightly transferred the suit property to 3rd parties as he claims. In his evidence tendered before this court, there existed entries that were purportedly done to 3rd Parties on a Sunday. The office of the Registrar of Lands in Kenya never work during the weekend so how were the entries done on a Sunday? Even so, the Plaintiffs were on the suit property in year 2014 when the alleged transfers were done, does it mean the 2nd Defendant and the alleged 3rd parties bought property without performing due diligence to notice that the property was not vacant? Again, the 1st Defendant produced a valuation report that was done after the eviction to prove vacant possession as evidence and not the year 2012 one when he claimed another report was done.
 45. The suit property still belonged to the 1st defendant and not the 2nd defendant or alleged 3rd parties. The 1st defendant only tries to show transfers were done through fraudulent and wrong entries so as



to avoid being named as the registered owner and consequently evade the claim of being indolent with action on his suit property leading to claims of adverse possession by the plaintiffs.

46. On whether the Plaintiffs have a claim to the suit property via adverse possession, the Learned Counsel submitted that the Plaintiff's claim was rightly before this court as provided for under the provision of Section 38 of the Limitations of Actions Act, Cap. 22 which expressly states that one could apply to the High Court where he claimed to own property by way of adverse possession. It states:-

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

47. The Counsel cited the provision of Article 40 of the Constitution provides for the right to own through adverse possession. Adverse possession is a doctrine that is not expressly defined under the Limitations Act however case law has clearly put criteria one has to uphold to claim property through it. Criteria to be upheld was stated in the case of "Maweu – Versus - Liu Ranching and Farming Cooperative Society 1985 KLR 430" where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

48. Further, the Learned Counsel averred that the suit property was a parcel of land the plaintiffs entered when the same was vacant sometime in the year 2004 and they harmoniously lived on it continuously until the year 2018 when the Defendants suddenly appeared with police officers to interrupt their stay claiming ownership. The 1st Defendant herein forcefully brought guards to harass the Plaintiffs, occupy the property and adamantly refused to vacate. He has illegally taken possession of the suit property and is utilizing it for his own benefit, those actions of the 1st Defendant amount to violation of the Plaintiffs' right as guaranteed in the constitution and must be stopped.

49. The Learned Counsel contended that the Plaintiffs' witnesses in their evidence given in court state that they publicly entered the suit property in the year 2004 without anyone's permission. They found vacant land which they cleared, farmed on it and eventually built houses in which they lived in. They lived on the suit property continuously for over 16 years, interacted with neighbours and were known even by the area chief until year 2018 when they were forcefully and unfairly evicted by the 1st Defendant using the police. The Plaintiffs continuously lived on the suit property for 16 years before the 1st Defendant who is the registered owner tried to evict them. His actions however came a little too late since the 12-year mark needed for one to claim land via adverse possession had already been surpassed. The Plaintiffs had become known to the public as the suit property owners and had the area chief also involved in their matters when need arose and he settled disputes for them as his subjects. The 1st Defendant in his evidence stated he had never known the area chief in whose jurisdiction the suit property lies, this only proves that he never visited the property since the Plaintiffs entered. To buttress her point, the Learned Counsel cited the case of: "Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR" as follows:

“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 license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms: - “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

50. There were about twenty - five (25) families living on the suit property consisting of school going children, the elderly and persons with disabilities before the Defendants unfairly evicted them from the property. The Plaintiffs genuinely entered the vacant suit property, farmed and owned it until the unfortunate events occurred. That was the place they called home for over 16 years. The children born there know and identify it as their home. The Defendants were acting in laxity until it was too late and this should not be the reason people lose their homes. The Plaintiffs occupation of the suit property was open, exclusive, and continuous for over 16 years without interruption. The Plaintiffs should therefore be declared as the rightful owners of the suit property. The court in “Environment & Land Suit 929 of 2000 (O.S) Joseph Kamau Gichuki (Suing as the administrator of the Estate of Gichuki Chege (Deceased) – Versus - James Gatheru Mukora & another [2019] eKLR” held:-

“The only relevant issues for the court’s consideration are, whether the deceased took possession of the suit property, whether his possession was open, continuous and uninterrupted for the statutory period of 12 years and whether his possession was adverse to the interest of the registered owner of the property. I have already held that the deceased entered the suit property in 1974. It was not contested that when the deceased took possession of the property, the property was registered in the name of Mukaria. It was also not contested that as at that time, Mukaria was deceased. The deceased did not enter the suit property with the permission of Mukaria or his legal representatives. The evidence that was adduced by the plaintiff that the deceased occupied the suit property openly and without interruption until he died in 1994 was not contested. There is no doubt from the developments which the deceased carried out on the suit property that he asserted ownership rights over the suit property. His occupation was therefore adverse to the interest of Mukaria in the property. By the time he died on 15th April, 1994, the deceased had been in occupation of the suit property for over 19 years.

51. In conclusion, the Learned Counsel opined that the Plaintiffs had met the requisite threshold for granting a declaration of ownership by Land Adverse Possession. Thus, they humbly prayed that the court grants the orders as sought with costs to the 1st and 2nd Defendants.

B. The Written Submissions by the 1st and 2nd Defendants

52. The 1st and 2nd Defendants through the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their written submissions dated 4th March, 2024. Mr. Omwenga Advocate submitted that these were the Written Submissions by the 1st and 2nd Defendants’ in respect to the Plaintiffs’ Claim as per the originating Summons dated 16th February, 2022. The Plaintiffs’ purported Plaint filed on 19th January, 2024 and dated 28th November, 2023 was filed out of time, without leave of the Court and hence the Court ought not to consider the same since they never produced any evidence of service upon the purported 2nd Defendant. Hence the said Plaint ought to be struck out. This Honourable Court ought only to deal with the originating summons dated 16th February, 2022.



53. The Learned Counsel averred that on 30th October, 2023 the Honourable Court gave the Plaintiffs twenty-one [21] days to file and serve an Amended Plaintiff to include 2nd Defendant. The twenty-one [21] days expired on 22nd November, 2023. They never filed any Amended Plaintiff until 19th January, 2024, that is sixty [60] days after expiry of the timeline given. The time was only six [6] days away from the Hearing date. The Amended Plaintiff purportedly filed on 19th January, 2024 was filed out of time, with no leave sought to extent timeline and or request to consider the document filed as duly file with leave. Hence it was the Learned Counsel's Submissions that this Honourable Court ought not to consider the same but revert to the original Originating Summons of 16th February, 2022, which they now submitted as hereunder.
54. The Plaintiffs inter alia sought the prayers in their Claim herein as set out above. The Plaintiffs called two [2] Witnesses who testified in support of their Claim and produced the documents in the List of Documents or Supporting Affidavit as Exhibits. The 1st Defendant filed a replying affidavit to the Originating Summons on 13th October, 2022 in opposition to the Plaintiffs' Claim. The Replying Affidavit is dated 15th December, 2022 and the same has twenty-five [25] pages Exhibit which was produced as evidence in the matter. The Defendant did testify in opposition to the Plaintiffs' claim herein.
55. The Learned Counsel submitted that the Plaintiffs' witnesses' evidence inter alia did bring out the following:-
- a. They were residents of Utange
 - b. That they used to occupy the Suit Land till the year 2018 when the 1st Defendant demolished their structures. Since the year 2018 to-date they are not on the Suit Land.
 - c. They confirmed that they had no structures, home, houses on the Suit Land.
 - d. They had no toilets on the Land.
 - e. They alleged their parents used to stay in the Land.
 - f. They did not know who their neighbours were.
 - g. They did not know the Title number on which they used to occupy.
 - h. They were not on the ground that was the Suit Land, hence they were not in occupation and or usage of the Suit Land.
56. The Defendants testified and 'inter alia' told the Court:-
- a. He bought the Land in the year 2012, it was empty, he used a Bank loan to purchase it. He had documents to proof the same. He sub - divided the Suit Land into 133 Parcels of Land. A number of the Sub - divisions had been sold to different persons. The same was evidenced by the Entries in the Mother Title produced on pages 1 to 10 of his Exhibit.
 - b. He further testified that his Surveyor's Report produced on pages 13 to 25, the Regional Surveyor's Report of 24th July, 2023, the Site visit Report of 21st July, 2023 all did confirm that the Plaintiffs were not in occupation and usage of the Suit Land.
 - c. The report further confirmed that the Plaintiffs had never been in occupation and or usage of the suit land. The google earth photos confirmed that the Plaintiffs had never occupied the suit land. The suit land was sub divided into 133 parcels of land which was now occupied by some of those purchasers.



- d. There were no squatters, illegal structures on the Suit Parcels of Land.
 - e. The alleged Entries on a Sunday were erroneous since the resultant Titles were all dated 21st June, 2023 and not 21st July, 2013 as alleged by the Defendant.
 - f. The Plaintiffs had no Claim over the Suit Land hence their Claim ought to be dismissed with costs.
57. The Learned Counsel relied on the following issues for determination:-
- i. Did the Plaintiffs make full disclosures as to whether they were in occupation of the Suit Parcels of Land? What are the consequences of their failure to make full frank disclosure?
 - ii. Are the Plaintiffs entitled to the Orders being asked in their Originating Summons and or their purported Amended Plaint and in particular as it relates to Orders of Adverse Possession and Orders for Permanent Injunction as against the Defendant.
 - iii. What is the effect of the error on entry of dates in the Mother Title.
 - iv. What are the Orders as to costs?
58. The Plaintiff in their pleadings averred that they were in occupation and usage of the Suit Land. However in their testimony they confirmed they left the Land in the year 2018. The Surveyors and Deputy Registrar's Reports it was indeed confirmed that they were not in occupation and or usage of the Suit Land. Hence they did not make full, accurate and frank disclosure of their status as it relates to the Suit Land. Hence they simply lied to the Court in wishing to get the Orders they wanted. Hence on the Issue No. A what effect of failure by the Plaintiffs to make full disclosure of all material facts. The Applicant failed to disclose that they were not in occupation and usage of the Suit Property as at the time they obtained the Interim Order. Hence this failure automatically led to the discharge of the Orders granted and further denial to get any Orders. They relied on the Case of:-
59. In the case of:- "Eldoret ELC NO.107 OF 2019 Kenya Electricity Transmission Co. Ltd – Versus - Kibotu Limited" -where by the Court held inter alia;
- “The other issue that is relevant to this case is whether the plaintiff obtained the interlocutory orders of injunction by non-disclosure of material facts and misrepresentation of facts. The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows:
- a. The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
 - b. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
 - c. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and(c)the degree of legitimate urgency and the time available for the making of the inquiries.



- d. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the Judge in the application.
 - e. The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
 - f. Finally, it is not every omission that the injunction will be automatically discharged.
60. According to the Learned Counsel, it should be noted that the Issue of non-disclosure of material facts to the Courts was indeed a serious which may warrant a Court to set aside or vary Interlocutory Injunctive Orders. In the current Case they invited the Court to find that the Plaintiffs failed to make full disclosure of all material facts and hence the Orders they were seeking should not be granted.
61. On issue b, the Learned Counsel submitted that the Plaintiffs were not entitled to Orders of adverse possession and Order to change the Suit Title into their names. They submitted so because inter alia:-
- a. They never demonstrated they had been in continuous uninterrupted occupation, possession and usage of the suit property for aver 12 years.
 - b. They confirmed that in the year 2018 they alleged that they were evicted and their structures demolished. It not more than 12 years continuous of non-interruption, hence their suit for adverse possession is premature.
 - c. None of the Plaintiffs ever testified and identified which structures they were in occupation
 - d. None of the Plaintiffs testified and confirmed the size of their structure and whether indeed they were in occupation of those structures.
 - e. The evidence by surveyors and the Court’s Deputy Registrar was that the Plaintiffs were not in occupation of usage of the Suit Land.
 - f. The evidence on record was extremely doubtful if the Applicants ever occupied the Suit Land at any given time.
 - g. The evidence on record was against the Plaintiffs alleged Claim of adverse possession.
 - h. In light of the above the Learned Counsel referred the Court to the following authorities to oppose the Plaintiffs prayers for adverse possession.
62. On these points, he cited the case of: “CACA No.119 of 2016 Nairobi Ravji Karsan Sanghani and Pamur Investment Limited”, the Court held as follows:-

On 22nd September 2005 Ravji Karsan Sanghani, the appellant, filed an originating summons seeking the following orders:

“(a) The Plaintiff be declared to have become entitled by adverse possession of over twelve (12) years (sic) ALL THAT piece of land registered under the



Registration of Titles Act (Chapter 281 of the Laws of Kenya) and comprised in Title No. L.R. No. 209/10596 and situate in the City of Nairobi.

After a full hearing, the trial court (L. Gacheru, J.) dismissed the appellant's suit, holding that the appellant had not proved that he had been in exclusive and uninterrupted possession of the suit land for a period exceeding 12 years or that the respondent had been dispossessed of the suit land over the statutory period.

Before we consider the grounds of appeal, we need to restate what this Court held in *Wambugu – Versus - Niuguna* [1983] X.T.R 172:

“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 for which is intended to use it. The claimant must prove that the Respondent had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of 12 years as to entitle him, the Respondent, to title to that land by adverse possession.”

In considering whether the appellant satisfied the principles stated above, we think it is important to restate the dicta in *Kiveyu – Versus - Omutut* [1990] K.L.R 709 at page 716 where Gicheru, J.A. delivered himself as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period of 12 years, it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality).

Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation.

To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

For possession to be adverse, it must start with a wrongful dispossession of the rightful owner of the land in a peaceful and open manner, must be continuous and exclusive for over a period of twelve years, with a clear and manifest intent by the claimant of asserting his or her right of ownership of the land in question so as to defeat that of the registered owner. As Gicheru, J.A. put it is not enough for a claimant to simply prove that he has been



in occupation of the land for a period exceeding twelve years, the claimant must also prove that the intent of such occupation was to assert right of ownership.

The architectural material that was tendered in evidence by the respondent and the testimony of the two Architects revealed that the extent of the land that was to be occupied by the intended developments was well identified. There was no indication that any structures needed to be pulled down to give way to the proposed developments. It was not disputed that the appellant undertook some developments on the suit.

The learned judge not only summarized the evidence of each of the witnesses but also analysed it. Having done so, she was inclined to believe the testimony of the respondent and of his witnesses, and that was also influenced by their demeanour. On our part, we have no basis of discrediting the trial court's finding as regards the demeanour of the respondent's witnesses. It is a strong thing for an appellate court to differ with the trial court's views on the demeanour of witnesses who appeared before it. An appellate court does not have such benefit. We must therefore dismiss grounds 1 and 9 of the appeal.

Grounds 2, 3, 4 and 8 of the appeal relate to the findings made by the trial court in relation to the observations made by Okwengu, J.(as she then was),when she visited the suit land on 3rd December 2010.The learned judge noted that the whole plot was approximately 5 acres; there were two buildings, one being permanent which was put up three years after the case was filed; the whole plot was fenced, partly with chain link, bamboo and corrugated iron sheets; the ground had “cabro” works on some part of the plot, a water meter, a store, a motor vehicle rump and nearly 6 timber and iron sheet structures used as staff quarters. The respondent's witness, Mr. Muriuki, was able to identify the area occupied by the suit land, even though the beacons had been disturbed. On the other hand, the appellant told the court that he could not tell where the external boundaries of the suit land were.

In *Gerisho Muindi Baruthi – Versus - Willays Mukobwa & Another*, Civil Appeal No. 98of 1998, this Court held that only exclusive possession of a parcel of land which is definite could suffice in a claim of land if such possession was for a period of more than 12 years. The learned judge was therefore right in holding that the appellant “failed to prove that the land he is claiming from the defendant is identifiable and definite.”

It is also doubtful whether the appellant's intention in entering a portion (or even the whole) of the suit land whenever he may have done so was to dispossess the Respondent of the same, since adverse character of such possession must be proved, as held in *Kweyu v Omutut* (supra). We say so because whereas the appellant alleged that he did not enter the suit land with the respondent's permission, Mr. Muriuki (DW4) stated in his affidavit in reply to the originating summons that since the year 2000 the appellant had been allowed to store some 4 containers on a part of the suit land. Although the appellant denied having ever sought such consent, there was admission that there had been some containers on a part of the suit land but had since been removed to give way to some developments thereon. There was no sufficient proof of adverse intent in the appellant's occupation of the suit land. We therefore dismiss grounds 2, 3,4 and 8 of the appeal.

Ground No. 6 faults the learned judge for holding that the appellant became aware that the respondent was the registered owner of the suit land in the year 2005 and that is when time started to run. In a claim of land under the doctrine of adverse possession, the claimant must show that the registered owner of the land knew or ought to have known about the adverse possession over the statutory period but took no action to retake the land. The learned judge



cited the case of Charles Mathcka – Versus - Haco Industries Ltd, Misc. Civil Case No. 1 or 2004 where Lenaola, J.(as he then was) held that:

“one of the hallmarks of any claim for adverse possession is that the registered owner was aware of the trespasser’s possession but did not interrupt it for a period exceeding twelve years. If the possession was stealthy, secret and evasive, then no adverse possession can attach.”

In Benson Mukuna Wachira – Versus - Assumption Sisters of Nairobi Registered Trustees [2016] eKLR, this Court held that

“ A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an uninterrupted period of not less than 12 years.”

See also Kimani Ruchine – Versus - Swift Rutherford & Co. Ltd [1980] KLR 10. Similarly, in Titus Kigoro Munyi – Versus - Peter Mburu Kimani [2015] eKLR, this Court held that in a claim for adverse possession, actual or constructive knowledge of adverse possession must be proved. This the appellant failed to do. The record does not reveal that the respondent was at all aware of the appellant’s unlawful occupation of the suit land. To the contrary, there is no denial that the appellant initiated the suit only after the respondent through Tysons Ltd advertised the land for sale.

All in all, we find and hold that the appellant did not prove his claim over the suit land in accordance with the principles of adverse possession. The appeal is without merit and is hereby dismissed with costs to the Respondent.

ELC No.116 of 2013 Busia Herbart Ehara – Versus - Linet Ajiambo Ochieng

HERBART EHARA hereinafter referred to as the Plaintiff, commenced these proceedings through the originating summons dated 30th June, 2010 against Linet Ajiambo Ochieng, hereinafter as the Defendant. The Plaintiff case is that he has acquired by way of adverse possession a portion of land measuring 0.6 hectares out of Samia/Butabona/ 1589.

That the Plaintiff occupation and possession of the portion of land parcel Samia / Butabona/87 was with the consent of the registered owner under a land sale agreement. The occupation and possession was therefore not adverse or in consistent with the tide of the owner namely John Ongode or his estate.

Hellen Barasa Oehieng (PW - 4) who is widow to John Ongode confirmed that her late husband had sold a portion of land to the Plaintiff.

That the Defendant became the registered proprietor of Samia/Burabona/1589 which was one of the two parcels subdivided from Samia/Butabona/87 on 28th February, 2008. The time in relation to adverse possession could not have started to run against the Defendant before she became the registered owner. By the time this suit was commenced through the originating summons dated 30th June, 2010 and filed on 9th August, 2010 the period that had passed from 28th February, 2008 when Defendant became the registered owner or Samia/ Butabona/1589 is about two years and six months. Even if the Plaintiff had been in occupation and possession of a portion of land comprised in the said title, the prescribed period of 12 years had not elapsed from the time Defendant got registered with the land to the time the originating summons was filed.



That the Plaintiff claim over the suit land under adverse possession principle fails in view of various superior court decisions to the effect that where it is found that "Occupation is derived from the proprietor of the land in the form of permission or agreement or grant, then such occupation is not adverse." See Benjamin K. Murima & Others -Versus - Gladys Njeri C.A.NO.213 of 1996, Wambugi – Versus – Njuguna (1983) KLR 172. That it is worth to note that the Plaintiffs claim is not against John Ongode who sold the land to him or his estate. Had that been the case and he had shown his occupation has been adverse, time would have started being counted from 1978 when he took possession. The Defendant herein only became the registered owner of the suit land on 28th February, 2008 and 12 years had not passed by the time this suit was filed.

That for reasons set out above, the court finds that the Plaintiff has failed to establish his case to the standard required and his claim is dismissed with costs.

It is so ordered.

63. Further, the Learned Counsel relied on the case of "ELC No.70 of 2014 Busia Jacob Adungo Odakai-Versus - Folobia Emokolo & Another", where the Honourable Court opined as follows:-

"Jacob Adungo Odakai commenced this suit against Falobia Aujo Emokolo and Beatrice Tata, hereinafter referred to as 1st and 2nd Defendants respectively, through the originating summons dated 12th April, 2010. His claim was for three (3) hectares out of South Teso/ Angoromo/ 419 on the basis of adverse possession.

That the evidence availed by both the Plaintiff and Defendants shows that the Plaintiff lived peacefully on the suit land with the family of his late brother until sometimes in 1999 when the Plaintiff lodged a complaint on the size of the land he was using. This clearly shows that upto the year, 1999, there was no dispute between Plaintiff and the registered owner of the suit land.

Herbert Ehara hereinafter referred to as the Plaintiff, commenced these proceedings through the originating summons dated 30th June, 2010 against Linet Ajiambo Ochieng, hereinafter as the Defendant. The Plaintiff case is that he has acquired by way of adverse possession a portion of land measuring 0.6 hectares out of Samia/ Butabona/1589.

That the Plaintiff occupation and possession of the portion of land parcel Samia/ Butabona/87 was with the consent of the registered owner under a land sale agreement. The occupation and possession was therefore not adverse or inconsistent with the title of the owner namely John Ongode or his estate. Hellen Barasa Ochieng (PW - 4) who is widow to John Ongode confirmed that her late husband had sold a portion of land to the Plaintiff.

That the Defendant became the registered proprietor of Samia/ Butabona/1589 which was one of the two parcels subdivided from Samia/ Butabona/87 on 28th February, 2008. The time in relation to adverse possession could not have started to run against the Defendant before she became the registered owner. By the time this suit was commenced through the originating summons dated 30th June, 2010 and filed on 9th August, 2010 the period that had passed from 28th February, 2008 when Defendant became the registered owner of Samia/ Butabona/1589 is about two years and six months. Even if the Plaintiff had been in occupation and possession of a portion of land comprised in the said title, the prescribed period of 12 years had not elapsed from the time Defendant got registered with the land to the time the originating summons was filed.



That the Plaintiff' claim over the suit land under adverse possession principle fails in view of various superior court decisions to the effect that where it is found that "Occupation is derived from the proprietor of the land in the form of permission or agreement or grant, then such occupation is not adverse." See Benjamin K. Murima & Others vs Gladys Njeri CA. No. 1996, Wambugi – vs - Niuguna(1983) KZ.R 172. That it is worth noting that it is not against John Ongode who sold the land to him or his case. Had that been the case and he had shown his occupation has been adverse, time would have started being counted from 1978 when he took their pleadings indicated that they had moved onto the land with permission of the registered proprietors. (see paragraph 2,3,7,8,9B(b),10B,toc and tor(a) of the Amended Defence and counter claim. That the content of the said paragraphs shows the Defendants to have been in occupation either by right as family members and or with permission of the registered proprietors. These pleadings cannot go hand in hand with a claim on adverse possession which cannot run against one's own entitlement or where possession or occupation is through a licence or permission.

The Defendants declined and their continued occupation of the land after 1996 became adverse to the title of the registered proprietor. That by the time this suit was filed in 2004, only a period of about eight (8) years had passed from 1996. That accordingly, the defence or claim based on adverse possession over the land is not available to the Defendants as the period of twelve years had not lapsed as required under Section 7 and 17 of the Limitation of Actions Act Chapter 22 of Laws of Kenya.

64. On the issue of whether the Plaintiffs were entitled to orders of injunction, the Learned counsel submitted that there was absolutely no evidence to support the issuance of the Orders of injunction in favour of the Applicant. The Learned Counsel referred the Court to the Replying Affidavit by the Defendant together with the Exhibits thereto. They relied on the case of-
65. "Embu ELC NO. 36 OF 2018 (O.S.) Alexander Karioko Bedan – Versus - Diocese of Embu Trustees Registered" where it was inter alia held that;

"At this stage, what the applicant is seeking is a temporary restraining order injunctioning the respondent from constructing or erecting structures on the portion of land occupied by him pending hearing and determination of the suit. The applicant would also wish the court to make provision for cost of the application. As initially brought, the application had four prayers but some, like prayer 1, were allowed by consent while others, like prayer 2, were for consideration at an earlier stage.

In a more specific way, the prayers for consideration are set out here *ipsisssima verba*:

Prayer 3: That the respondent herein be restrained by way of temporary injunction from constructing, erecting structure on the portion occupied by the plaintiff on land parcel No. Gaturi/Nembure/3120 pending hearing and determination of the main suit herein.

Prayer 4: That the costs of the application be provided for.

On its part, the respondent submitted that the applicant has not satisfied the threshold for granting temporary injunctive relief as set out in the locus classicus case of *Giela – Versus - Cassman Brown & Co. Ltd* [1973] EA 358. The threshold entails establishing a *prima facie* case with a probability of success; demonstrating a likelihood of suffering irreparable harm which damages cannot compensate, and, where doubts arise regarding satisfaction of the first two considerations, choosing the balance of convenience as the last option.



In my view, the applicant approached the issue in a rather casual manner. Giela case (Supra) is only given momentary or fleeting mention. I expected to be shown clearly that a prima facie case is established. It behoved the applicant to appreciate that he does not have title to the portion he is claiming. It is the respondent who has title. Getting an injunction concerning land registered in the name of another is never a very easy task. In *Jamin Kiombe Lidodo – Versus - Emily Jerono Kiombe & Another*; HCC No. 81/05, Gacheche J (as she then was) was stating a generally accepted position when she held that where an applicant has not shown title to the suit land, it is unsafe to hold that a prima facie case is made.

The applicant also needed to demonstrate that he would suffer irreparable loss. The position in law is that you don't get temporary injunctive relief where damages would be an adequate remedy. An injunction is a remedy in equity and it's never resorted to where the common law remedy of damages is thought to be adequate. And the onus is always on the person seeking the remedy of injunction to demonstrate that the harm likely to be suffered if injunction is not granted is of the kind that common law damages may not adequately compensate.

And it is not enough to make a mere allegation before court that you will suffer irreparable loss. In *Nguruman Limited – Versus - Jan Bonoe Nielson & 2 Others*; CA No. 77 of 2012, the court expressed itself clearly on the issue:

“... the applicant must establish that “he might otherwise” suffer irreparable injury which cannot be adequately compensated in damages in absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of injury.

Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial, and demonstrable; injury that can not “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

Further, this court also expected that as the applicant is not the title holder to the land, he would make an undertaking to pay damages to the respondent if it ultimately turns out that the order of injunction granted was not merited. In *Gati – Versus - Barclays Bank (K) Ltd* [2001] KLR 525 the court held, inter alia, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

As pointed out earlier, the applicant approached the application in a rather casual way. I have endeavoured to point out what is remiss with that approach. I do not deem it necessary to consider the issue of balance of convenience but it seems to me that, were I to consider it, the result might favour the respondent given that the land is registered in its name.

Given what I have said so far, I think its clear that the application herein is one for dismissal and I hereby dismiss it with costs.

66. According to the Learned Counsel, the Plaintiffs did not at all meet the very minimum requirements for the issuance of the Orders sought since they were are not in occupy and usage of the Suit Property



as per the clear evidence and of those of the Surveyors report of 6th December, 2022. Hence guided by the about case Law, they urged the Court to reject prayer for Injunctive Orders by the Plaintiffs.

67. On the issue of the effect of error on dating by the Land Registry staff. Can the same be visited upon a Defendant. The Learned Counsel submitted that, their simple submission was no. They relied on the following case law:-

68. In the case of: “EMBU HCC MISC. CIVIL APPLICATION NO. 3 OF 2008: Joseph Kariuki Njoka T/A Jofoco Contractors -Versus - Action and International Kenya (NGO)”-the Court held inter alia that:-

“The bundle of forged documents the applicant refers to were filed in court in June 2015. These documents were served on the Applicant by the Respondent’s counsel as required by the law which must have been after June 2015. The wrong date on the court stamp must have been an error on part of the court registry, neither can it be alleged that the Respondent forged the documents since the court stamp was not under his possession or control.

The upshot of the above is that the application dated 10th August 2018 lacks merit and is dismissed with costs to the respondent.”

69. Additionally, he cited the case of:- “Nairobi Civil Appeal No, 324 Of 2005 Kenya Oil Company Limited and Jayantil Dharamshi Gosrani” whereby the Court held inter alia:-

“The Plaint was accompanied by a verifying affidavit of the Respondent allegedly sworn on 24th January 2005 before Njeri Onyango-a Commissioner of Oaths. The verifying affidavit had a date stamp of the High Court indicating that it was received on 21st January 2005.

The appellant filed a defence denying liability, in addition, the Appellant averred that the Plaint should be struck out as the verifying affidavit did not comply with provisions of Order 7 Rule 3(2) of the Civil Procedure Rules (CPR) and alternatively, that the Plaint and the verifying affidavit should be struck out as the Commissioner for Oaths before whom the oath was purportedly taken did not truly state in the jurat the date on which the oath was so taken.

The Respondent filed a reply to the defence. In respect to the verifying affidavit, the Respondent averred that the same was not defective as the conflict in dates was occasioned by the fact that whereas the plaint and verifying affidavit were filed on 24th January 2005, the court stamps indicated the erroneous date of 21st January 2005. The Respondent referred to the cheque for payment of the filing fees and the court receipt, which were both dated 24th January 2005.

The confusion of the date of filing the suit was sufficiently explained although it is not a ground of the application. We are satisfied that the learned Judge exercised his discretion judicially.

Therefore, in the circumstances of this case, we think the appeal was filed and prosecuted in bad faith and in a manner to abuse the administration of Justice. We decline such a demonstration.

For those reasons, we find no merit in this appeal and we accordingly dismiss it with costs to the respondent.”



70. The Learned Counsel concluded that the error in respect to date in the Entry of the Mother title had been sufficiently explained by production of the resultant Title documents which were all dated 20th June, 2013 and not 13th June, 2013 as per the clerical error caused by the Registry staff.
71. On the Issue of costs. It was the Learned Counsel's humble Submissions that the Plaintiff's Claim ought to be dismissed. The costs do follow the event. Hence the Defendant to be paid costs by the Plaintiffs.

IV. Analysis and Determination

72. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the myriad of cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
73. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
- a. Whether the Plaintiffs had acquired the title by way of adverse possession as required by law?
 - b. Whether the Plaintiffs are entitled to the suit property;
 - c. Whether the issue arising to the legality of the 1st Defendant's title is sustainable.
 - d. Who bears the costs of the suit/ originating summons?

ISSUE No. a). Whether the Plaintiffs had acquired the title by way of adverse possession as required by law

74. Under this sub title, the main substratum of the case is on acquiring of title to land based on the Doctrine of Land Adverse Possession based on the dictum of the Law. This Honourable Court will examine if the Plaintiffs have made out their case from the filed originating summons/ amended plaint leading to the title deed held by the 1st and 2nd Defendants be extinguished thereof. If the answer is in the affirmative then when did time start running for purposes of determining these rights and finally whether or not the Plaintiffs are entitled to the prayers in the Amended Plaint.
75. From the surrounding facts and inferences of the instant case, it will be imperative and hence inevitable not to divulge onto the Concept of the Land Adverse possession in depth as a matter of precedence. Whilst doing that, the Honourable Court takes cognizance of the elaborate citations made by the Learned Counsels particularly the one for the Plaintiff herein and hence will tend to avoid belaboring on the point herein. It is trite that a claim for title to land through the doctrine of adverse possession is attached to land and not title. It is a matter whereby it is not on whether the land was owned by either Kimingi Wairera or Mwangi Kimingi. This was the position in "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".
76. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ 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”.



77. The principle of adverse possession is well settled under *Limitation of Actions Act*, Cap. 22. 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 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.”

78. Finally, 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.”

79. The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the *Limitation of Actions Act* by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. Under the provision of Article 162 (2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession. As already stated above, it should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title, where the land is yet to be registered, it cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under Article 24.



80. The principles were well set out in the case of “Kahindi Ngala Mwangandi - Versus - Mtana Lewa [2021] eKLR” where the Court of Appeal sitting in Malindi held:

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

“7

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

In the case of “Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court.

See the case of:- “Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson Kinyua – Versus - Simon Gitura Civil Appeal No. 265 of 2005,” where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.

In case of: “Kimani Ruchine – Versus - Swift Rutherford (Supra) it was stated on this point that:-

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be



broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See the case of:- “Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J.”

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

“ There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

81. Further, R.C.N. Kuloba, J in the case “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR elaborately enlisted 7 key elements that a person claiming adverse possession must establish. Summarily, according to the retired Judge, the elements that a person claiming a right by adverse possession.
- a. The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. This is because a right of action cannot accrue unless there is somebody against whom it is enforceable.
 - b. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. That is to say, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non - permissive use, ie without permission from the true owner of the land occupied. Acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the



land being in actual possession with intent to hold solely for the possessor to the exclusion of others.

- e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies. That is to say the possession and user was such as to give a cause of action or right to sue for possession, throughout the twelve years preceding the suit.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The purpose of this element is to afford the owner an opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose. Possessory acts carried out only under cover of darkness will be insufficient to justify a claim based on adverse possession. Related to the requirement of actual possession, the requirement of openness and notoriety, also calls for the need that the possessory acts must be substantial and leave some physical evidence. If the acts are too insubstantial or temporary, there is no actual possession and the possession will not be notorious
 - g. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. There are circumstances under which adverse possession which has begun to grow may be interrupted. Possession may be interrupted;
 - i. by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or
 - ii. by the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - iii. by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
82. The rightful owner must know that he is ousted, he must be aware he had been dispossessed. The owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted. The land or portion of land being adversely possessed must be a definite, with clear boundaries. Order 37 Rule 7 is mandatory that title to the land must be attached to the Originating Summons.
83. The burden of proving the above elements is on the person seeking title by Land adverse possession, he/she proves it in the usual standard of proof in civil cases i.e. balance of probability. The facts that must be asserted, pleaded and proved are; the date of occupation, the nature of possession, whether the occupation is known to the owner, how long the occupation has been going on, whether possession has been open and undisturbed. All these are questions of facts and unless they are asserted and proved adequately through a trial.



84. Recently, the Supreme Court had an opportunity to further address the issue of the Land Adverse Possession but only in jest in the matter of “Supreme Court Applications No. 16 (E026) of 2021 – Thomas Muka Maulo & Walter Washington Barasa Nyogensa – Versus – Robert Ouma Oduori”. Briefly, the Applicants had sought the Supreme Court to review the Court of Appeal decision declining to grant Certification of leave against its Judgement of the general importance under the provision of Article 163 (4) (b) of *the Constitution* of Kenya. The subject matter was that the Court of Appeal in its Judgement had ignored critical evidence and facts on record thereby arriving at a decision that would amount to conflicting principles on a claim of Land Adverse possession. In its ruling, on 19th May, 2021 while dismissing the application the Court held

“that the jurisdiction of the Supreme Court under Article 163 (4) (b) of *the Constitution* went beyond resolving factual contestations between parties. In any event, the principles of Land Adverse Possession were settled and the Applicants had not demonstrated any inconsistency of findings by the Court of Appeal on the Doctrine. The Supreme was not convinced that there was any miscarriage of Justice or violation of any Constitutional provision as alleged by the Appellant or at all. The Appellant were merely in disagreement with the ultimate Court determination & that did not suffice to invoke the Supreme Court’s jurisdiction or amount to miscarriage of Justice”.

85. From these decisions of Court, and in a nutshell, for one to qualify for a title by virtue of a claim of Land Adverse possession, one has to have fulfilled the following ingredients. These are:-

- a. There has to be a registered proprietor of the land being claimed;
- b. The Claimant ought to have occupied the suit land without any interruption and continuously.
- c. The Claimant ought to have used and taken possession of the suit land for over twelve (12) years.
- d. The Claimant should not have been granted any permission to use or occupy the suit land by the registered owner, the principle of non-permissiveness.

86. Additionally, 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.”

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.”

87. 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 Mwagandi [Supra]” 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.

88. Further, in the case “Mbira – Versus - Gachuhi (2002) 1 EALR137”: 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...”
89. Having laid - down the principles on the doctrine of Land Adverse possession, the Honorable Court will now proceed to apply it to the instant case herein below. It is the contention of the Plaintiffs that the 1st Defendant is the registered owner of all that parcel of land known as plot number MN/1/18815. On or about the year 2004, the Plaintiffs and their families legally entered the Defendants’ parcel of land when it was vacant cleared the bushes, farmed and started building temporary structures therein.
90. The Plaintiff called two witnesses while the Defendants only called the 1st Defendant as their only witness. PW - 1 one Muthoka Makau testified that he is seeking to be recognized as the owner of the suit property since him and his family have farmed and lived on the suit property since 2004. They were always on the property and only got to know of the owner who is the 1st Defendant in the year of 2018 during the eviction process. He stated that he had neighbours but did not know all of them by their government names, he knew others through the nicknames they gave each other and that is why during the site visit, some could not properly name or identify with the names asked. He also stated that no survey was done during the time he was in possession of the land and that post the eviction in the year 2018, he does not know if another was conducted. The Plaintiffs only realized that they could get reprieve after looking for help since they did not conclusively know what the law states, this is the reason it took them a while before filing the suit.
91. PW - 2 one Ali Mwakamsha testified to the effect that he got to know of the suit property through the 1st Plaintiff and settled there in the year 2004 or thereabout. He stated during cross examination that not all occupants of the suit property had been exhaustively listed in the suit as parties or the site visit report because the property is vast. That the names on the lists also do not include the nicknames they are used to and this explains why the names are different and why not all of them could not identify each other conclusively. He stated that since the eviction, he has had to sort temporary solace most times with his family because there were guards at the property that denied them access to it.
92. The Defendant testified and inter alia told the Court:-
- a. He bought the Land in the year 2012, it was empty, he used a Bank loan to purchase it, he has documents to proof the same. He sub-divided the Suit Land into 133 Parcels of Land. A number of the Sub-divisions have been sold to different persons. The same is evidenced by the Entries in the Mother Title produced on pages 1 to 10 of his Exhibit.



- b. He further testified that his Surveyor's Report produced on pages 13 to 25, the Regional Surveyor's Report of 24th July, 2023, the Site visit Report of 21st July, 2023 all did confirm that the Plaintiffs are not in occupation and usage of the Suit Land.
 - c. The report further confirmed that the Plaintiffs had never been in occupation and or usage of the suit land. The google earth photos confirmed that the Plaintiffs have never occupied the suit land. The suit land was sub divided into 133 parcels of land which was now occupied by some of those purchasers.
 - d. There were no squatters, illegal structures on the Suit Parcels of Land.
 - e. The alleged Entries on a Sunday were erroneous since the resultant Titles were all dated 21st June, 2023 and not 21st July, 2013 as alleged by the Defendant.
 - f. The Plaintiffs have no Claim over the Suit Land hence their Claim ought to be dismissed with costs.
93. Being in possession is “pari material” herein and particularly being an isolated issue that has been spiritedly and vehemently opposed and challenged by the 1st Defendant herein. To the 1st Defendant, the Plaintiffs never at all occupied nor took possession of the suit land from the year 2004. According to the 1st Defendant, the Plaintiff in their Pleadings avers that they were in occupation and usage of the Suit Land. However in their testimony they confirmed they left the Land in the year 2018. The Surveyors and Deputy Registrar's Reports it was indeed confirmed that they were not in occupation and or usage of the Suit Land. Hence they did not make full, accurate and frank disclosure of their status as it relates to the Suit Land. Hence they simply lied to the Court in wishing to get the Orders they wanted. Hence on the Issue No. A what effect of failure by the Plaintiffs to make full disclosure of all material facts. The Applicant failed to disclose that they were not in occupation and usage of the Suit Property as at the time they obtained the Interim Order. Hence this failure automatically leads to the discharge of the Orders granted and further denial to get any Orders
94. To determine the nature of possession, this Court is guided by the decision in Kisumu Civil Appeal No. 27 of 2013; - “Samuel Kihamba – Versus - Mary Mbaisi [2015] eKLR” where the court held:
- “Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”
95. Undoubtedly, the suit property was registered at the Lands Registry, Mombasa in the name of 1st Defendant. Consequentially, the Deputy Registrar – ELC conducted a site visit on 21st July, 2023 and compiled the following report:-
- Republic Of Kenya
 In The Environment And Land Court At Mombasa
 Elc Case No. E011 Of 2022
 Muthoka Makau.....plaintiff
 - Versus -



Ahmed Siraj Noor.....defendant

And

Aisha Faraj Mohamed.....interested Party

Site Visit Report Held On 21st July, 2023 At Bamburi, Mombasa

I. Quorum

A. Court

1. Hon. J. M. Nyariki - Deputy Registrar
2. Zainab Khalid - Court Assistant
3. Midega Jaika - Advocate Trainee

B. The Representation and parties present

1. Mr. Yose Edwin – Advocate for the Plaintiff,
2. Mr. Peter Omwenga – Advocate for the Defendant.
3. Mr. Ahmed Siraj - the Defendant
4. Mr. Muthoka Makau – the Plaintiff
5. Mr. Abbas Mohamed – Interested Party
6. Mr. Abbas Walid – Government Surveyor and
7. CI. Ezekiel Odhis – OCS Bamburi.

II. Preliminaries

The session started at 12.00 noon. Present at the site were many people who had an interest in the property from both the Plaintiff and the Defendant side. The Government Surveyor showed the Court where the property boundaries were. At one edge of the property was a wall fenced building with some constructions. Another side of the property had some buildings. There was also a large field with bushes and trees. Some portion of the land had been subdivided to different people with one mother title.

The Court elected to conduct individual interview sessions with the parties laying claims to the land being that they claim ownership by way of adverse possession. The people who alleged to own the land or to have previously lived in it were called forward and interviewed separately.

III. Interviews

1. Omar Hemed Omari - states that he was born in 1997 and showed his ID card as proof. He told the Court that he had stayed in the suit property since 2015 when he moved from Darajani. He stayed with his parent, one Bahati Karisa. His parent left him on the suit property. He had no knowledge when the father settled into the land. He identified the walled property at the corner of land and said that it was built two years ago. He told the court



that he had to rent a house away from the suit property when the police officers demolished their homes in 2018.

2. Tsuma Ngao Tsuma – Born in 1985. He stated that he was born in the adjacent property to the suit property. Issues began after Mzee Mwamwera died; he was the owner of the suit property. Mzee Mwamwera left them the suit property for farming. He settled in the adjacent suit property in 1992. The chief of the area was the first person to be evicted from the suit property. He told the court that there was a surveyor by the name Pendo who told the settlers to leave the suit property, further stating that the owner of the property did not leave the suit property to him. It was his father who left the property to him. He did not have any legal documents to prove ownership.

He averred that they fetched water from a well and they did not have proper sanitation, they used the forest to ease themselves. He built his house in 1997 where they lived with his three brothers and his parents.

The Court observes that there are houses (estate) that have been built on the said piece of land. He told the court that the houses were demolished in 2009. He averred that the land belonged to his grandfather although he had no documents to substantiate the same. He recalled being neighbors with Omar Hemed Omari who lived in the farthest left of the suit property.

The Court observed that the said witness claimed to live in a parcel which the Government Surveyor indicated not to fall within the disputed property being 18815. The Government Surveyor stated that the witness lived in 11360/North/Section 1.

3. Idd Mwangiri Ngoro – born in 1978. He states that he lived in the suit property for 18 years. He told the court that he stated living in the suit property from 2017. He claimed that there were people living on the property and that his house was located where there is currently a flat under construction. He stated that he knew the Plaintiff and that he lived in the suit property near the road. According to him the demolitions of the properties and houses in the suit property took place between 2018 and 2019. That his father used to live in the suit property and he only went there to visit him. They fetched water from a well in the horse farm and used the forest for any sanitary needs. He had no knowledge as to where the second witness lived as he was not known to him neither did he know how his father acquired the suit property.
4. David Nzaro – born in 1983. He stated that he came to the suit property in 2006 after his uncle invited him to live with him in the suit property, he was 25 years by then and he relocated to the suit property with his brother and sister. He told the Court that the uncle has since relocated to Bamburi. It was his testimony



that he lived in the suit property since 2018/ 2019 until when the police officer evicted them in 2019. He claimed demolition began in 2018. He had no documents to prove ownership of the land. According to him, the community fetched its water from Mwembeni. They had a semi – permanent house and the toilet was next to where they lived. He identified the Plaintiff as one of the people he knew and saw while living in the property. He could not recall where all the other witnesses lived.

5. Patrick Baraka Kenyatta – He told the court that he was born in 1993 in Bamburi while his parents lived in the suit property. He moved to the suit property in 2015 and stayed there for 2 years. That demolitions started in 2017. He still lives in a neighboring plot to the suit property. According to the witness they fetched water from a water source at the main road (Bamburi - Utange Road). For their sanitary needs the witness told the Court that they helped themselves in the forest. He recognized witnesses 1, 2 and 3 as his neighbors telling the Court that Omari lived behind the fenced structure (outside the disputed property). He also alleged that the 2nd witness lived outside the suit property. He could not recognize the Plaintiff as his neighbor.
6. Muthoka Makau Kapiti – the Plaintiff stated that he was born in 1972. His parents lived in the suit property with his property measuring 100 by 100. His mother died in 2016 and his father died in 2020. The witness told the Court that he moved into the suit property in 2009 and in 2017 he built a semi-permanent house. Demolitions began in 2018. Omari (1st Interviewee) moved into the property recently but he has no knowledge of where he lived. He recognized the 5th Interviewee could not recall where he lived on the suit property. According to him Tsuma (2nd Interviewee) never lived in the suit property. There was a borehole but no sanitation measures and they helped themselves in the forest and used ‘flying toilets’. He claimed that around 200 people lived in the suit property.

The witness told the court that demolitions on the suit property started in 2010 when the police officers began evicting them from the suit property. According to him there were semi-permanent houses in the suit property. The fenced plots were built before he settled in the suit property. By the time he settled there, there was no settlement of persons.

7. Ahmed Siraj Nooh – the Defendant stated that he was born in 1960. In 2007 he came to the suit property. He owns a 7-star estate adjacent to the suit property. He told the court that he bought the suit property in 2012 from Waithaka Wilson Ndungu who had since passed on. His purchase of the suit property was facilitated by Fidelity Bank Limited and he had documentation

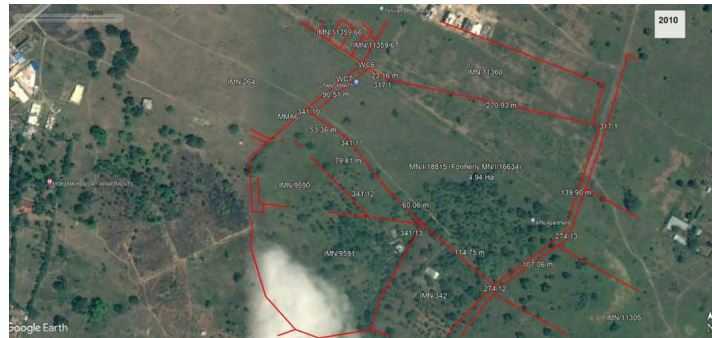


to prove his ownership. He subdivided the suit property into 129 plots.

He further went ahead to state that he knew the Government Surveyor who had surveyed the land for him in 2015 and there was no person living in the suit property. He did not know the seller before the sale, he only met him on the day of the sale. During the sale he was represented by Kiarie Kariuki Advocates while the vendor was represented by AB Patel Advocates. Waithaka had already subdivided the suit property before he sold it to him. He stated that he still had the mother title.

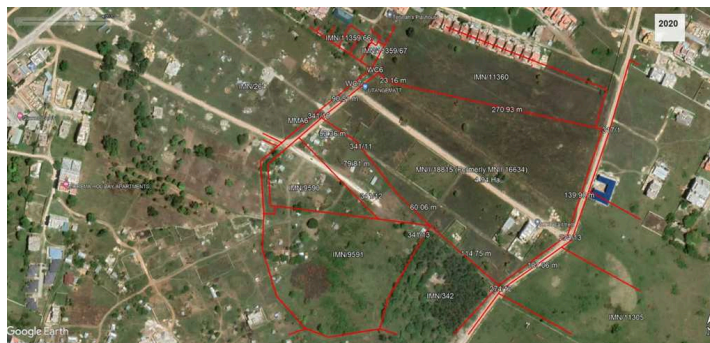
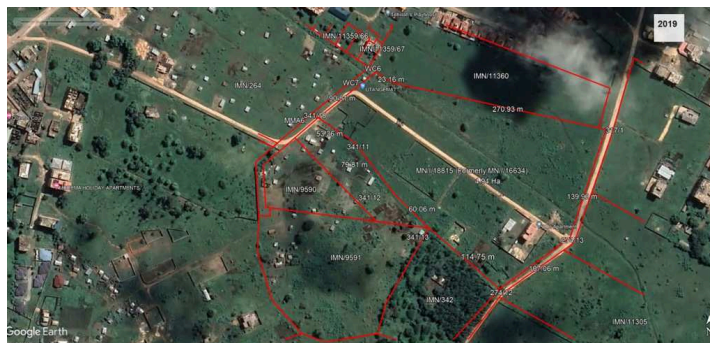
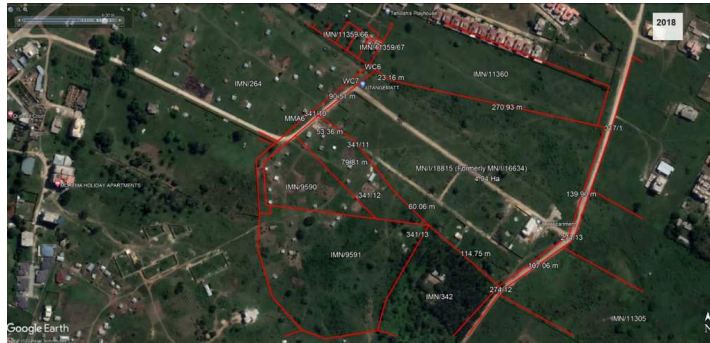
8. Abbas Walid – the Government surveyor told the court that he had conducted a survey on the suit property in 2019 and another survey in 2015. According to him and his experience by the time he was conducting the survey there were no traces that the land had buildings before the said survey. If there had been any settlement or property on the suit property, there would be indications which were not there. The parcel in dispute is number 18815. The 7-star estate was in parcel number 11361 and parcel 11360 is not in dispute. He provided the Court with satellite google images to prove that there was no settlement. The red line marks the boundaries of the suit property.

The satellite Google photographs (2010 to 2023)



He explained to the Court that as per the map there were no structures on the suit property all the way to 2023 except for the buildings constructed in 2018.







9. Gumaa Sadiq – states that he came to the suit property in 2018 from Bamburi and he built a semi-permanent house immediately. He was born in 1976. He had no county permit for the building of his house. He lived in his six bedroomed house with his father and siblings. The house was demolished in 2020. He had no documentation to prove his ownership of the land. He recognized the Plaintiff and stated that he lived near the uncompleted flat. According to him he was amongst the first settlers in the suit property. He also stated that the 2nd Interviewee lived next to the wall that the Government Surveyor had indicated is outside the suit property.

IV. Comments And Observations

Court:

The following were the observations by the Court

- a. None of the claimants to the suit property was able to identify ALL the other Claimants of the property as previous occupiers.
- b. The Claimants were unable to correctly point out where each other claimants had their property located.
- c. Some of the interviewees allege to have lived on a parcel that the Government Surveyor indicated to be outside the disputed suit property.



- d. The property is split into two with a road in between. On one side is an empty field with tall grass and the other half having few developments
- e. There was no toilet/latrine on the site
- f. Majority of the Claimants stated that it is their parents who initially lived on the suit property and they only joined them

V. Pictures Captured At The Site

- a. Photographs of the site





The site visit was concluded at 2:45 P.M.

.....
Hon. J. M. Nyariki (deputy Registrar)
Environment And Land Court
Mombasa

96. The Honourable Deputy Registrar stated that the following were the observations by the Court:-
- a. None of the claimants to the suit property was able to identify ALL the other Claimants of the property as previous occupiers.
 - b. The Claimants were unable to correctly point out where each other claimants had their property located.
 - c. Some of the interviewees allege to have lived on a parcel that the Government Surveyor indicated to be outside the disputed suit property.
 - d. The property is split into two with a road in between. On one side is an empty field with tall grass and the other half having few developments
 - e. There was no toilet/latrine on the site
 - f. Majority of the Claimants stated that it is their parents who initially lived on the suit property and they only joined them
97. The Honourable Court notes that as per the interviews conducted by the Deputy registrar on the alleged adverse possessors, majority stated that they started settling on the suit property around 2008 afterwards and by 2017/ 2018 they had already been evicted by the 1st Defendant.
98. The Law on adverse possession is very strict on the limitation period of 12 years and from the calculations and being guided by the google satellite maps provided by the government surveyor, there was no settlement on the suit property until early 2018 before that the area was just a bush.
99. That being said, the Honourable Court discerns that the Plaintiffs have not on a balance of probability established that they meet the threshold for the grant of orders for the claim of title under the doctrine of land adverse possession.

ISSUE No. b). Whether the Plaintiffs are entitled to the suit property

100. Under this Sub – heading, the Court wishes to deliberate on whether the Plaintiffs are entitled to the land or not. I have already established that the Plaintiffs did not prove when they allegedly came into the land and as per the Surveyor’s satellite google images the land was vacant until 2018. Taking that the Plaintiffs never hired any Land Valuer to controvert and/or counter the already existing report and its findings made herein, the Court was compelled to fully rely on the satellite photos.
101. It bears repeating that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor and the reckoning of time for purposes of establishing the requisite 12 years of quiet possession must start with a wrongful dispossession of the registered proprietor. It is plain enough that a party who enters and occupies another’s land pursuant to a sale agreement does so by permission of the proprietor. Such occupation does not amount to adverse possession.



102. Therefore the Honourable Court opines that with contradictory facts not qualifying the occupation of the Plaintiffs in the land for over 12 years as required by law, it is the finding of this Court that the Plaintiffs are not entitled to the suit property.

ISSUE No. c). Whether the issue arising to the legality of the 1st Defendant's title is sustainable

103. Under this sub - title the Court shall examine the validity of the title held by the 1st Defendant. Indeed, the Honourable Court has taken cognizance of the fact that the Plaintiffs have really made a meal out of this issue and hence need to critically assess it. The Certificate of title issued to Ahmed Siraj for Sub. No. 18815 (Original Title No. 16634/2) of Section I Mainland North was issued on 15th May, 2012 which was a Tuesday according to the calendar. According to the Plaintiffs, there exists entries that were purportedly done to 3rd parties on a Sunday. The office of the Land Registrar in Kenya does not work during the weekend so how were the entries done on a Sunday? Even so, the Plaintiffs were on the suit property in the year 2014 when the alleged transfers were done, does it mean the 2nd Defendant and the alleged 3rd parties bought property without performing due diligence to notice that the property was not vacant? Again, the 1st Defendant produced a valuation report that was done after the eviction to prove vacant possession as evidence and not the 2012 one when he claims another report was done.
104. The Plaintiffs have not proved in any way that the 1st Defendant was party or caused the mix up in the dates of the issuance of the titles. It is a known fact that title documents are typed and issued by the land registry as opposed to registered proprietors of land. Neither was the 1st Defendant who carried out the sub - division, he only applied to have the land sub - divided, the sub - division and allocation of numbers and the issuance of the titles was done by the Land Registrar. I cannot agree more with the contention by the Learned Counsel for the Defendants to the effect that the Defendants never worked at the Land Registry to have caused or influenced the said error. They were not in control of the official stamps whatsoever which were under the lock and key of the Land Registrar.
105. The 1st Defendant on the other hand on the issue through his learned Counsel submitted that the error in respect to date in the Entry of the Mother title has been sufficiently explained by production of the resultant Title documents which are all dated 20th June, 2013 and not 13th June, 2013 as per the clerical error caused by the Registry staff while making reference to the case of "Nairobi Civil Appeal No, 324 Of 2005 Kenya Oil Company Limited and Jayantilal Dharamshi Gosrani" whereby the Court held inter alia;

“The confusion of the date of filing the suit was sufficiently explained although it is not a ground of the application. We are satisfied that the learned Judge exercised his discretion judicially.”

106. Therefore I find that the issue of date of issuance of title deed as a basis of invalidating the sub division titles has no merit as there was no misrepresentation, illegality and fraud established. Thus, that argument is not only baseless, unfounded but immaterial to say the least.

ISSUE No. d). Who bears the costs of the suit/ originating summons

107. The issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action or proceedings. 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”



108. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

109. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

110. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Everest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

111. In this case, as this Honourable Court has opined above, the Plaintiffs have failed to prove their claim against the 1st and 2nd Defendants herein. Therefore, the 1st and 2nd Defendants are entitled and shall have the costs of the suit.

VI. Conclusion and Disposition

112. 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 Plaintiffs have not established their case against the 1st and 2nd Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a). THAT Judgment be and is hereby entered in favour of the 1st and 2nd Defendants.
- b). THAT consequently the amended Plaint filed herein dated 28th November, 2023 by the Plaintiffs be and is hereby found to lack merit and thus is dismissed in its entirety with costs.
- c). THAT costs of the suit to be awarded to the 1st and 2nd Defendants and be borne by the Plaintiffs jointly and severally.

IT IS SO ORDERED ACCORDINGLY.



**JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED
AND DATED AT MOMBASA THI 4TH DAY OF JUNE 024.**

.....

**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. M/s. Chano Advocate for the Plaintiffs.
- c. Mr. Omwenga Advocate for the 1st and 2nd Defendants.

JUDGMENT: ELC NO. 11 OF 2022 (OS) Page 23 of 23 HON. JUSTICE L.L. NAIKUNI (ELC JUDGE)

