



**Boga & 2 others v Wahome (Enviromental and Land Originating Summons E002 of 2023) [2024] KEELC 6189 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6189 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023  
AE DENA, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**MWINYI ALI BOGA ..... 1<sup>ST</sup> APPLICANT**

**OMARI ALI BOGA ..... 2<sup>ND</sup> APPLICANT**

**HUSSEIN JUMA MWAKULAGIZWA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**STEPHEN KANJA WAHOME ..... RESPONDENT**

**JUDGMENT**

1. The Applicants commenced this suit against the Respondent by way of Originating summons dated 9<sup>th</sup> August 2023. They seek the following orders; -
  1. A declaration that the title deed of Stephen Kanja Wahome of all that parcel of land registered as Kwale/Diani Settlement Scheme/306 has been extinguished by the Applicants adverse possession thereof for a period of more than 12 years.
  2. That the Applicants herein be declared to be entitled by way of adverse possession of over 12 years to 2.0 Hectares of land comprised in land parcel No. Kwale/Diani Settlement Scheme/306 situate in Diani within Kwale County.
  3. An order to issue directing the Land Registrar Kwale Land Registry to register the applicants as the absolute proprietor of 2.0 Hectares of land comprised in land parcel No. Kwale/Diani Settlement Scheme/306.
  4. That the costs of this application be in the cause.
2. The Originating summons is supported by the Affidavit sworn by Mwinyi Ali Boga the 1<sup>st</sup> Applicant with the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants. It is deponed that the Respondents have together with



their extended families been living occupying and farming on land parcel No. Kwale/Diani Settlement Scheme/306 (suit property) continuously without interruption from the Respondent or his agents for over 40 years. That since the time the applicants took physical possession the Respondent has never been to or laid claim on the suit property. That the Applicants have built permanent dwelling structures thereon and there has been no dispute to the said occupation. The deponent attached to the affidavit a copy of title register for the suit property and official search, Photographs of the structures allegedly built and crops cultivated on the suit property.

3. The Originating Summons is opposed by the Respondents affidavit sworn on 12<sup>th</sup> October 2023. It is deponed that the Respondent is the bonafide registered owner of the suit property. That he has been in possession of the suit property since he purchased it. That upon service of summons herein he visited the suit property and found a newly erected small mud house that had no occupants. According to the applicants it may have been erected to hoodwink the court into believing they have been in occupation for many years. The occupation is termed as false and illogical. That going by the 40 years of their alleged occupation it would mean the Applicants have been in occupation since 1983 when the suit property was government land and incapable of being adversely possessed as the registration of the suit property and the entire Diani Settlement Scheme commenced in 1992.
4. Further to the above the Respondent attached to his affidavit his witness statement and those of his workers Moses Deche, Kaingu Kitsao and Everlyne Obuya in further support of his case.

### **Hearing**

5. The suit was heard viva voce on 17/01/24 and 13/02/24 virtually.
6. PW1 was Mwinyi Ali Boga the 1<sup>st</sup> Applicant and testified that he was born and raised in the suit property. He adopted the Supporting Affidavit to the Originating Summons and the attachments thereto as part of his evidence. PW1 testified that the Respondent came to the suit property in 1992 and informed them he was the owner thereof. That as a result the Applicants left the land but returned thereon in 1998 after realising the Respondent was not occupying the land or undertaking any activities on it. That they undertook farming and constructed buildings in the year 2005 and never saw the Respondent again. That they have never been sued by the Respondent or charged under criminal proceedings or summoned by the police over the alleged complaint by the Respondent. PW1 prayed that they be given the land for they have nowhere to go.
7. On being cross examined PW1 stated the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were his siblings. That there were 3 structures on the land two temporary and the other a stone house. On being shown the exhibits 'MAB 2a and 2b the witness could only identify houses built of mud. On being shown the search in his affidavit PW1 noted the Respondent was the 1<sup>st</sup> allottee. That his parents did not take any action against the Respondent for chasing them away from the suit property. The witness conceded they were disturbed by the Respondent. He stated the houses were scattered and he could not remember the acreage for the occupied area. That he has never met the Respondent since the year 2005. That the Respondent cited the title number of the suit property when he chased them away.
8. PW1 clarified in re-examination that the shamba they were chased from by the Respondent is the same one they lived in presently. He reiterated that he has lived on the suit property for 38 years without being evicted.
9. With the above the Plaintiffs case was marked as closed.
10. DW1 was Stephen Kanja Wahome the Respondent. He testified that he lives on plot 6 Ukunda Settlement Scheme one and half kilometres from the suit property. That he purchased the suit property



from one Jotham Kariuki with vacant possession and paid off the caretaker who was on the property. The witness adopted as his evidence the contents of the Replying affidavit sworn on 12/0/23 and annexures thereto. It was his evidence that he employed Moses Deche as DW1 driver and to also take care of the properties. That he also employed a casual labourer Ali Shaban as well as Kaingu Kitsao as a fundi/mason and engaged him to dig a well and build a house. DW1 told the court that he built a two bedroomed mud house for Ali Shaban in 1994/95. That he allowed Kaingu to undertake farming in the suit property. They fenced the property by planting trees around it including mangoes, coconut trees with Kaingu's help. That in 1997 there were tribal clashes (Kaya Bombo) the locals took the position that Kikuyus should not own land. They chased Kaingu and destroyed the house and the trees. That he reported the matter to the police who advised him to keep off the property for his safety which he did. That calm was restored in 1999 and Kaingu returned to the suit property. That they were informed by neighbours that the 1<sup>st</sup> and 2<sup>nd</sup> defendants participated in the destruction/attacks. Kaingu left in 2007 and Everlyne Obuya came in and continued with farming assisted by her caretaker one Joseph Ouma. That subsequently in 2013 being an election year the same problems of harassment emerged and the employees left. In 2014 Mr. Agostino one of his employees continued with the planting of trees but was chased away during the 2017 elections.

11. DW1 told the court he had other plots neighbouring the suit property which were invaded by goons who subdivided the same among themselves without his consent and that Ali Boga was mentioned as one of the culprits. That due to inaction on the part of the police the DCIO was demoted and some police officers were transferred. That with the help of the administration police he was able to reclaim his land. DW1 added that in July 2021 and 2013 Ali Boga approached him through his workers for permission to cultivate on the suit property which DW1 declined. The witness view was that this was just a ploy to spy. That at the time of filing the suit there was a small unoccupied structure which he was advised not to demolish. That it was a lie that the Applicants had resided in the property for 40 years. That allowing the suit would be encouraging mayhem.
12. On being cross examined DW1 testified that the title to the suit property has not changed hands. That he had no structure of his own on the property for there was no use if they end up being destroyed. He had no activities currently on the property and only checked up on the property from time to time. DW1 confirmed that during every election there were gangs that forced him out and he did a comprehensive complaint to the police (SKW3). The witness conceded there is no reference to plot 306 nor the present applicants in the report to the police. That the intimidation of his employees was on 4 incidents Kayabombo, 2007 clashes, 2013 and 2017. He confirmed getting access to the police station. That he had no photos of what was on his land because they were destroyed. The applicants were not charged because they always disappeared. He denied that the reason for the same was because he never lodged a complaint. That he was not aware if anyone was charged after the Nairobi team took over the matter. That he had two employees who were Mijikenda's and who were chased away from the land because they worked for a Kikuyu. That the applicants never resided in his land and therefore no eviction was necessary. That his witnesses in the matter were his employees well versed with the issues and they would be independent regardless of being his employees.
13. DW1 clarified in re-examination that the dates on page 17 are when the matter was reported. He was not assisted by the police and he went to see Mr. Boinett. That when he built the house in 1994/5 he didn't expect it would be demolished thus the lack of photos. He reiterated that he has been in possession of the suit property except during election years when they intimidated the staff but did not take the land but which they had hoped to. That he made the complaint in 2018 after the elections, he was assisted and got his land back. There were no issues during the 2022 elections. After police action he has never had problems on the land. That he did not force any witness to come to court.



14. DW2 was Moses Deche. He adopted his witness statement dated 30/9/23 as his evidence in chief. The witness testified he was employed at the Defendants company as Driver/mechanic in 1993 and was also given the duties of looking over DW1 plot 6 where the witness resided, plot 2 and 306 the suit property. That there were other workers mentioned in the statement. DW1 did a well in 2005/6 (sic 1995) and a two bedroomed house where Ali Shaban lived in and also fenced the property with bouganvila. That Kaingu Kitsao who was a mason used to farm in a portion of the land with DW1 permission upto 1997 when he left because of the Kaya Bombo chaos but returned around 1998/99. In 2007 non coastals were being chased out and he stopped farming. In 2008 Everlyne Obuya took over farming and employed Joseph Ouma as her worker but they had to stop the activities in 2013 when her property was destroyed under the same circumstances. That the applicants never lived on the suit property and never built anything thereon. That Franco Agostino an employee of DW1 farmed on the property in 2014 but was chased away by gangs because he worked for a Kikuyu. The witness stated that he had heard that Ali Mwinyi Boga was the one organising the incidents with the intention of taking over the land. That they went to site with the Police but the group escaped. That in 2023 Omari Ali Boga visited DW1 office to seek permission to cultivate on the suit property but DW1 declined. That he visited the offices again in June 2023 sought DW1 telephone number which he was given. On the Photos on page 33 the witness denied he had ever seen the houses on the suit property and appeared to be recent constructions. That Omar Ali Boga never lived on the land. The witness stated he had come to testify on his own volition.
15. On cross examination DW2 stated he has never lived in the suit property. That it was 5 acres. That fencing was started but was never completed as it was destroyed in the process around 2007. He did not know who lived on the property before 1993 but reiterated he never saw anyone living therein when he came to the property. That only Shaban lived on the property between 1996- 2007 while the rest used to live in plot 6. He could not state the extent of the portion cultivated by Shaban. That he never witnessed anyone being chased from the shamba. He never made any report to the police but was aware DW1 and those who were chased reported at Diani Police station. The witness was not aware of anyone charged pursuant to the report. That he was last in the suit property in 2021 and could not tell who was in the shamba as the date of his testimony.
16. DW2 clarified in re-examination that when he last visited the property in 2021 there was a structure though he did not know its owners and which they were permitted to demolish. The fence used to be destroyed from time to time including the crops.
17. DW3 was Kaingu Kitsao who adopted his witness statement dated 28/3/23. The witness told the court he was employed by the DW1 as a Mason/Fundi. That he was familiar with the location of the suit property wherein he dug a well sometime in 1994. That upon striking water he farmed on 1 acre of the land with DW1 permission and derived income from the various horticultural produce he planted. That Ali Shaban lived in the house in the land. That in 1997/8 they were threatened by Kaya Bombo who did not want Kikuyus in the area. The witness stated he abandoned his crop and went to live in plot 6. That thereafter Everlyne their Manager asked for permission to cultivate the land. DW3 stated they in 2021 demolished a structure on the suit property. That he met Omar Ali Boga who came to the office to see Kaingu for purposes of seeing the owner of the suit property and he was denied permission to cultivate thereon. That for the entire period he worked for DW1 he never saw Omar Ali Boga living on the suit property.
18. In cross examination DW3 stated he went to the suit property for the first time in 1995 and there was no one thereon before this. That there were mango and coconut trees though young. That he used to farm on 1 acre and the remainder of the land was populated with mango trees. He left the land between 1997 – 2008. He came back to check the property in 2008 and there was no one. Ali Boga



and his group would chase away Kikuyus during elections. He was aware DW1 reported the matter to the police. That he was in charge of the property but he misplaced the OB though he had not referred to the same in his statement. He reiterated that his goats and chicken were destroyed but he did not have photos of the same. That he witnessed when Agostino and Evelyne were chased away though they did not keep animals. That they did not use the entire 5 acres of the property. That his evidence was based on what he saw and experienced on the shamba and not as an employee who feared his boss. He conceded he was told by neighbours that Ali Boga was the one who used to threaten people. That he was last on the suit property in 2023 when he saw two mud structures which they were told were constructed at night by Omari Boga. That after the structure DW1 never built again and he was not undertaking any activities on the shamba.

19. On re-examination the witness clarified that he was also threatened and left and therefore witnessed the same. He never knew Ali Boga as friend or anything.
20. DW4 was Everlyn Obuya employed by DW1 as Manager and Administrator (Kanja & Fischer). She adopted her witness statement dated 28/9/23. DW4 testified that she manages some of DW1 properties including plot 306 the suit property situated along Mvindeni road. That though she lives in Mombasa depending with her schedule she also lived in plot 6 which was 1.5 Km from the suit property. That she started managing the suit property in 2006 and it had a borehole, mango and coconut trees as well as other trees planted along the fence. That with the permission of DW1 she undertook farming on the suit property in 2008. She employed Joseph Juma as his worker together with some casuals. She had challenges in 2013 an election year in the form of intimidation by gangs who were of the view Kikuyus had no rights to own land in the area. That her crops were destroyed and she as well as Joseph had to leave the land. That there was calm in 2014 and she allowed Agostinos request to farm and which he did until 2017. There was serious invasion then including DW1 property 663 and other neighbouring properties which was destroyed. That Agostino reported to her the incident and DW1 instructed her to go and see the property before she reports to the police. That on her way there she saw a police van on patrol on Mvindeni road who accompanied her to the suit property but upon seeing the van the gang ran away and thus no one was arrested. In 2021 she was informed by DW1 that a neighbour had informed him there was a structure on the property. She went to the property and was informed the same was erected by Omari Ali Boga overnight. On instructions of DW1 she instructed some of the employees to demolish the same. The witness repeated the two incidents of Omari Ali Boga visit to the offices of DW1.
21. The witness further told the court that she frequently visited the property and for the 15 years she had worked with DW1 she had never seen a structure in the property and it was therefore a lie that Boga had lived thereon for 40 years. That she visited the land in August/September 2023 after information from DW1 about the suit and found two newly built mud houses which they learnt from neighbours were erected by Omari Boga and Hussein Mwakulagizwa and who were the inciters. That she took a photo of the same (see page 30-33 replying affidavit). That she reported to the police and was given OB No. 44 dated 29/9/23 at 1.36 pm but the police never took any action. She stated that there was a possibility it is the same people who also invaded plot 633,
22. On cross examination DW4 testified that she did not know the history of the property before from 1993. She did not farm on the entire 5 acres. That when she was employed there was no structure on the land. Currently there was no structure belonging to DW1 on the land and no farming. That she got to know of the proceedings through DW1 lawyer and never discussed her evidence with DW1. She clarified in court that there was no farming taking place on the suit property because of the present court dispute, there were no structures because every time they were built they were destroyed. That after employment and the period thereafter she became familiar with the land.



23. With the above evidence the Defendants case was marked as closed.

### **Submissions**

24. Parties filed and exchanged written submissions in support of their cases/ The Applicants submissions are dated 5/03/24 and the Respondents are dated 21/3/24. The court has considered both sets of submissions in arriving at this judgement.

### **Analysis and Determination**

25. Upon considering the pleadings, the evidence led and the arguments in the submissions filed on behalf of the parties it is the courts view that the main issue that commends determination is whether the Applicant has acquired a title by way of adverse possession against the registered owner of the suit property.

26. Adverse possession is grounded in sections 7, 13, and 38 of the *Limitation of Actions Act*, (Cap 22) as follows; -

#### Section 7

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

#### Section 13

“(1) A right of action to recover land does not accrue unless the land is in 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.”

#### Section 38

“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.”



27. The courts have also in a number of decided cases expounded on the doctrine of adverse possession. In *Wambugu Vs Njuguna* [1983] KLR 172, 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.”

28. In *Ongwen & another v Keya & another* (Environment & Land Case E027 of 2021) [2023] KEELC 279 (KLR) the court stated

29. This right to be adverse to land does not automatically accrue unless the person in whom 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. See the findings of the Court in *Malindi App No. 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where it held;

30. 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.

29. Arising from the provisions of the law and judicial precedents above I have decanted a number of requirements that must be met by a litigant claiming adverse possession.

1. The land must be registered in the name of a third party. A known owner.
2. There must be possession which possession ought to be adverse and to the exclusion of the owner
3. The possession must be without permission of the owner for a continuous/uninterrupted period of 12 years
4. The owner of the land fails or neglects to take action against the ‘intruder’

Also see the case of **Tabitha Waitherero Kimani Vs Joshua Ng’ang’a (2017) eKLR** cited on behalf of the applicants.

30. Applying the above to the present case I will proceed to consider if the threshold set has been met by the Applicants since the burden of proof lies them – See section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya.

31. Firstly it is imperative that the land in issue is registered in the name of a third party that is to say a registered owner other than the claimant. PW1 produced a green card for Kwale/Diani S.S/306



showing Stephen Kanja Wahome and who is the Respondent herein as the registered proprietor. He also produced a Certificate of Official Search dated 26/11/2020 indicating that as at 2/9/92 Stephen Kanja Wahome was the absolute proprietor of the suit property. This was not in dispute. DW1 confirmed in his oral testimony that the property has never changed hands since then. This therefore confirms that the land belonged to another person other than the Applicants herein and it is registered under one of the Acts envisaged in section 37 of the Act.

32. Secondly it behoved the claimants to prove they have been in possession of the suit property for a continuous period of 12 years as required by statute. PW1 told the court in his evidence in chief that he was born and grew up in the suit property. That together with the extended families he has lived on the property for over 40 years without any interruption from the Respondent or his agents. I found it necessary to consider at this juncture what amounts to possession in law and specifically for purposes of the doctrine of adverse possession. Guided by the authorities cited my understanding is that the claimant enters the land, remains in physical possession and assert rights over it. The right is asserted by use of the land to the exclusion of the registered owner.
33. The Applicants case is that they have been in physical possession built permanent dwelling structures on the suit property and have been cultivating and doing farming continuously. PW1 produced photographs of the said alleged structures and crops farmed. The Respondents case as pleaded and captured in the testimonies of DW1 – DW4 is that this is a lie. That the applicants have never lived in the suit property and that the said structures were recently constructed. The court had occasion to look at the photographs produced as MAB 2a & 2b. The same showed two structures thatched with what seemed to be palm fronts otherwise locally known as ‘makuti’. They appeared to be mud structures as opposed to be built by stone or cement. In other words, to me they could not be said to be permanent houses as pleaded by the claimants. PW1 upon being shown the said exhibits testified that there were three structures comprising of two temporary and one stone house. Granted the former could be seen in the photos but what about the stone house? PW1 conceded there was no stone house in the photographs contradicting his own evidence. Further these houses ought to be the houses constructed in the year 2005. I say so considering PW1 testimony in cross examination that after being chased or leaving the suit property in 1992 they returned undertook farming and constructed buildings in the year 2005. I have nothing placed before me to convince me that these were the same structures. PW1 did not call to court any of the members of the extended family to corroborate this evidence not even the other two applicants cited in the Originating Summons. Additionally, no ground status report was filed to corroborate this evidence. In my view the evidence tendered was not sufficient for purposes of proving physical occupation in a case for adverse possession.
34. But having stated the above I will still pose the question as to when the claimants entered the suit property. I pose this question in view of the statutory limitation period of 12 years. The Applicants case is that they have been in possession of the suit property for over 30 years going by the age of PW1 given in his oral evidence. The court will focus on the period of registration of the Respondent as the absolute proprietor. The title deed produced and the Certificate of official search which revealed that this was a first registration the register having been opened on 10/3/92. Indeed, on being shown the search in his affidavit PW1 noted the Respondent was the 1<sup>st</sup> allottee. For me any occupation before 10/3/1992 would be immaterial for purposes of adverse possession in this case. I say so because there was no title then the land having not been registered under any of the Acts envisaged and the Respondent was not the registered owner before 1992.
35. So, when did time start running for purposes of limitation? I noted from the pleadings that the Applicants did not plead any specific dates they entered the property. Counsel for the Respondent places this in the year 2005 and submits that adverse possession kicked in 2017. The answer in my



view is 1998. I draw my conclusion from PW1 evidence in cross examination when he testified that the Respondent came to the suit property in 1992, found the claimants on the land and told them it was his land. That they the applicants left the suit property and returned in 1998 started farming, built houses in 2005 and they never saw the Respondent again. If this is the case, then a claim for adverse possession would have crystalized around the year 2012. Be that as it may applying the caselaw this ought to be an uninterrupted period which also ties up with the requirement for proof that the Respondent never took any action against the claimants or abandoned the land.

36. Was there any interruption during this period? It is important to note that PW1 conceded in cross examination that they were disturbed by the Respondent. DW1 stated in his evidence that he allowed one of his employees Kaingu Kitsao to undertake farming in the suit property which was done until 1997 when the said employee had to leave due to the tribal clashes but returned in 1999 when calm was restored. Kaingu Kitsao gave evidence as DW3 and stated that he checked the property in 2008 and there was no one in terms of the claimants in the shamba. DW4 testified she started managing the suit property in 2006 undertook farming on the suit property in 2008 with the permission of her employer DW1. None of these witnesses alluded to the presence of the claimants in the suit property at the various period they undertook activities on the suit property. PW1 strangely stated the houses they built in were scattered and he could not remember the acreage for the occupied area. I have already stated the photos presented by PW1 were not sufficient proof. All this goes to cast doubt on PW1 assertions that they were not interrupted and lived peacefully in the property for 12 years if at all.
37. I will now consider whether there was any evidence of inaction on the part of the registered owner or abandonment. I will not spend much time on this because the discussion above speaks to this issue. DW1 explained to the court the activities he undertook on his land and called witness most of whom were his workers to corroborate the evidence. And I must state that I did not see anything wrong with DW1 calling his workers as witnesses to support his case as long as the veracity of their evidence was going to be tested in cross examination. DW4 was to me a very credible witness who stated that part of her duties were to look after the properties.
38. PW1 did not dispute that there were clashes where non locals and certain tribes were profiled for eviction from their lands The Respondent did not dispute the fact that the Respondent is a non-local. The court also takes judicial notice of the clashes in the South Coast of Kenya during the 1997 and 2007 elections. DW1 evidence was that he did make reports to the police but no action was taken by the Diani Police and he had to escalate the matter to Mr. Boinett. He produced as part of his evidence a letter dated 7<sup>th</sup> May 2018 to the Kwale County Criminal Investigations Officer. He conceded during cross examination that the letter does not make reference to the suit property but to plot 663. Granted there was no such mention, it would not make sense that DW1 would fight so hard for plot 633/406 and remain unmoved by activities in the suit property and which as per the evidence of all his witness was 1 and half kilometres away. Having the benefit of listening to DW1 I had no reason to conclude that the Respondent abandoned his land except where he reiterated in evidence that he kept away during the said election years but not on his own volition. It is contended in the Applicants submissions that DW1 testimony that he had to leave the land during election years as a confirmation that he was not continuously in the land. For me it was for the Applicants to prove they lived there continuously for the period of 12 years to the exclusion of the Respondent which they failed to. Evidence has also been given of how some of the workers undertook farming activities on the land.
39. This court was not persuaded that the Respondent abandoned his land neither did the applicants prove that they had exclusive possession to the exclusion of the Respondent.
40. As a court I found it very disturbing by PW1 testimony that after they left the suit property in 1992 following DW1 visitation they kept observing the land for any activities and noting that there were no



activities by the owner they returned thereon. Really? And where were they observing this from? I'm asking in view of PW1 passionate plea to the court that they would have nowhere to go. This paints a picture of predators hanging around waiting to pounce into other people's properties. Clearly this cannot be tolerated, it reeks of malafides and an abuse of the whole concept of adverse possession.

41. I think I have said enough to show why the reliefs sought by the Applicants cannot issue. Flowing from the foregoing analysis it is this court's finding that the Applicants have not proved on a balance of probabilities a case for adverse possession of the suit property.
42. Accordingly, the suit commenced by way of the Originating Summons herein dated 9<sup>th</sup> August 2023 is hereby dismissed. Accordingly, by dint of Section 27 of the Civil Procedure Act costs are awarded to the Respondents.

It is so ordered.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

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**A.E DENA**

**JUDGE**

Ms. Mkabane for the Applicant

Mr. Kihira for the Respondents

Mr. Daniel Disii Court Assistant

