



**Masila & 2 others v Krotonite Enterprises Limited (Miscellaneous Application  
31 of 2018) [2024] KEELC 5982 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5982 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 31 OF 2018**

**LL NAIKUNI, J**

**SEPTEMBER 18, 2024**

**IN THE MATTER OF: APPLICANTS ENTITLED TO BY VIRTUE OF  
ADVERSE POSSESSION OF 25 YEARS ALL THAT PIECE OF LAND  
KNOWN AS L.R NO. MN/III/5612 REGISTERED AS CR.58960**

**AND**

**IN THE MATTER OF: SECTION 38 OF THE LIMITATIONS  
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**BETWEEN**

**HUSSEIN SULEIMAN MASILA ..... 1<sup>ST</sup> APPLICANT**

**LILIAN KAVUTI MUSYOKA ..... 2<sup>ND</sup> APPLICANT**

**IBRAHIM LUGUSA ALUDA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KROTONITE ENTERPRISES LIMITED ..... RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement by this Honourable Court pertains to the suit instituted by the Applicants against the Respondent by way of Certificate of Urgency, Notice of Motion and Originating Summons/ Plaint on the 9<sup>th</sup> February, 2018. Subsequently, the pleadings were amended on 18<sup>th</sup> April, 2018 premised under the provision of Sections 37 and 38 of the Limitations of Actions Act, Cap. 22, Orders 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Cap. 21; Order 37 and Order 8 rule 7 of the Civil Procedure Rules 2010 respectively.



2. Upon filing of the afore - stated Originating Summons/Plaint, the Defendant/Respondent, while opposing the suit, filed a notice of motion application dated 9<sup>th</sup> May, 2022 and a supporting affidavit and list of documents dated 25<sup>th</sup> July, 2023.
3. On 9<sup>th</sup> May, 2023, as part of the Pre – Trial Conference, directions having been taken and upon confirming that all parties had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set down the matter for hearing on 27<sup>th</sup> July, 2023. The Plaintiffs called PW - 1 on the same day to testify and support its case. Further, on 30<sup>th</sup> October, 2023 the matter was set for further hearing on 21<sup>st</sup> February, 2024.

## II. The Applicants' case

4. From the filed pleadings, the Applicants sought to be declared owners of the suit land by way of Land adverse possession. This was to be done through the determination of the following questions:-
  - a. Whether the Applicants be declared to had become entitled by virtue of adverse possession of 17 years All That Piece Of Land known as L.R No.MN/III/5612 registered as CR. 58960 situate in South Takaungu Township in Kilifi County containing by measurement 8.616 Hectares or thereabouts (hereinafter “the property”) registered under the name of the Respondent.
  - b. Whether the Applicants were entitled to be duly registered forthwith as proprietor of the property by virtue of adverse possession
  - c. Whether the Honourable Court be pleased to order that the Land Registrar, Mombasa Lands Registry deletes the name of Krotonite Enterprises Limited the Respondent herein and register the names of the Applicants herein in place thereof absolutely and at no cost.
  - d. Whether the Honourable Court be pleased to order that the Registrar in Charge, Mombasa Lands Registry to reconstruct the parcel file in respect of the property in case the original file cannot be traced.
  - e. Whether the Honourable Court be pleased to order that after reconstruction of the parcel file; the Registrar in Charge to issue a provisional title in favour of the Applicants
  - f. Whether the Honourable Court be pleased to order that the Applicant be released from any obligation to pay outstanding rates in respect of the property and the County Rates department to alter its records to reflect the names of the Applicants to be the rate payers
  - g. Costs be in the cause
5. The Application was based on the following grounds on the face of it:-
  - a. The Applicants had since the year 1993 been in peaceful, uninterrupted and open occupation of the property for a period exceeding 12 years.
  - b. Having lived on the suit property for the forgoing period of time, the Applicant acquired prescriptive rights and the Respondent had never upset that status.
6. The Originating summons was based on the grounds on the face of it and those of the eleven (11) Paragraphed Affidavit of Hussein Suleiman Masilasworn and dated on 9<sup>th</sup> February, 2018 and the four (4) annexures marked as Exhibit “A”, “B”, “C” and “D” annexed thereto.
7. On 27<sup>th</sup> July, 2023 at 11.30 am, the Plaintiffs/Applicants called PW - 1 and he testified as follows:-



### **A. Examination in Chief of PW - 1 by Mr. Siminyu Advocate**

8. PW – 1 testified and was sworn on oath in Kiswahili language. He identified himself as Mr. Maurice Mamba Chilodza. He told the court that he lived in Mtopanga and was a farmer. He recorded a witness statement which he wished to produced. This was alongside the list of documents which he produced as Exhibit Numbers 1 to 4 annexed to the initial Originating Summons. According to him, he used the Defendant/Respondent; they needed to have the Court to grant them the suit land. He had knowledge that the suit land belonged to the Defendant/ Respondent after they conducted an official search and there was a copy of the title bearing CR. Numbers 58960; Grant/ Title was issued in the year 1987. They got onto the land in the year 1993. By then, they were four people. It was a bushy/forest area. They cleared the bush and in the course of the time, they kept inviting their colleagues. They started cultivating and fishing; extracting building blocks.
9. PW - 1 stated that they then, they started building structures for habitation. Nobody gave them any permission to get unto the land. From the time they got onto the land they lived therein in peace and harmony. According to the witness, nobody interfered with their stay. With reference to the photographs showing the buildings and the structures (vibanda) he stated that they were Exhibit B which were Makuti thatched. There were plantations and a person in the photograph was known as Mr. Gambo. They were 16 people and there were people who came and left the suit property.
10. According to PW - 1 they sued the Krytonite Enterprises Limited. The one who came after was called Kryptonite Limited they did not know. Kryptonite claimed to have acquired a title on 25<sup>th</sup> January, 2013 and the date of registration was 5<sup>th</sup> February, 2013. All this time, they lived there they had never known nor come across Kryptonite but only knew Krytonite. They conducted a search and they discovered that the rates were more than a sum of Kenya Shillings Eighty Eight Million Two Hundred and Six Thousand Two Fifty Two (Kshs. 88, 206,252/-).
11. They had seen the statement of David Hahini– he claimed to be a Chief of Juju location. They found this strange; he was disowning and giving wrong information. He says that yet he had been helping them along.
12. According to PW - 1 with reference to the photograph attached by Kryptonite, it was trying to show that they never lived there. These photographs were basically taken from the side of the beach which was one sided. They never took the upper side where the Plaintiffs/ Applicants lived. They prayed to be granted the ownership of the land where they had lived for over 35 years. Their children were born there. They had several graveyards for many of their relatives. That was the only place they knew.

### **B. Cross examination of PW - 1 by Mr. Omollo Advocate**

13. On being referred to the title deed, PW - 1 confirmed the suit land had been registered on 5<sup>th</sup> February, 2013. It was signed on 25<sup>th</sup> January, 2013. He ascertained that he was both a witness and a Plaintiff though he was informed there were three (3) Plaintiffs which excluded him. These were Mr. Hussein Suleiman Masila, M/s. Lilian Kavuti Musyoka and Mr. Ibrahim Lugusa Aluda who got on the land in the year 1993. He had never known it was government land. They were between 18 to 19 people on the suit land. His portion was  $\frac{3}{4}$  of an acre. From the photographs, it showed that they were taken from the suit plot and not elsewhere. PW – 1 confirmed that Mr. Gambo also had a portion.

### **C. Re - examination of PW - 1 by Mr. Siminyu Advocate.**

14. PW - 1 reiterated that the title to hold was for 99 years from the year 1997. Hence the second registration of the year 2013. According to PW – 1, they did not know nor trust it.



#### **A. Examination in Chief of PW - 2 by Mr. Siminyu Advocate.**

15. PW - 2 testified and was sworn on oath in Kiswahili language. He identified himself as Hussein Suleiman Masila a Citizen of Kenya holding the national identity card with all the particulars stated out thereof. PW – 2 lived in Bamburi within the County of Mombasa. He did so temporarily. He used to live at Takaungu. He was a farmer. He recorded a witness statement dated 23<sup>rd</sup> February, 2022 and he adopted it as his evidence in chief in support of the case. Accordingly, he told the court that they were approximately 18 families claiming the suit land at Takaungu. They got onto the land in the year 1993. They never sought any permission from anyone to live on the suit land. They were undertaking fisherman activities. They had never been asked to leave the suit land. From the supplementary affidavit which he produced there were rates being claimed being a sum of Kenya Eighty-Eight Million Two Hundred and Six Thousand Two Fifty Two Hundred (Kshs. 88,206,252.00). It was being demanded from the Defendant company by the County government. He urged that it be marked as Plaintiffs Exhibit Number 5. He prayed for the Court to grant them the suit land. They had no relations with the Defendant company.

#### **B. Cross examination of PW - 2 by Mr. Omollo Advocate.**

16. PW - 2 asserted that by the time they got into the land, it belonged to the Government. They were fishermen. There was no title deed for the land. He did not know who was the first person to be given the title. The title deed was issued in the year 1987. It was signed on 25<sup>th</sup> January, 2013. They were more than 18 families on the suit land. Everyone had a place on the land; but its only three (3) people who came to Court. They had not indicated where they were occupying. He lived in two (2) places i.e. Bamburi and Takaungu.

#### **C. Re - examination of PW - 2 by Mr. Siminyu Advocate.**

17. PW - 2 told the court that the grant was issued on 1<sup>st</sup> June, 1997; it was in the name of Krotonite Company Limited. He guessed that it was because they had disputes on the land and hence not able to obtain proof of land occupation.
18. On 21<sup>st</sup> February, 2024, the Plaintiffs/ Applicants closed their case.

### **III. The Defendant/ Applicant's case**

19. On its part, the Defendant summoned DW - 1 and DW - 2 on 21<sup>st</sup> February, 2024 who did tendered evidence and testified as follows:-

#### **A. Examination in chief of DW - 1 by Mr. Omollo Advocate.**

20. DW – 1 testified and sworn on oath in Kiswahili language. He identified himself as Mr. Faraj Mansur Abeid said a Citizen of Kenya and holder of the national identity card bearing all the relevant details as noted by Court thereof. He filed a written statement dated 25<sup>th</sup> July, 2023. Further, he also produced his Defendant Exhibit Numbers 1 to 7 as the documents he filed and wished to rely on in support of the evidence to their case. He was a business man, a shareholder and a director of Kyptonite Enterprises Incorporated in the year 1994. According to the CR – 12 Form, the other directors of the company were:-
- a. Mr. Ketan Doshi.
  - b. Mr. Adhill Karim Swale.



21. They had already sub divided the suit land and therefore the original land did not exist. Their title deed was issued on 25<sup>th</sup> January, 2013. By then it had a typographical error instead of read “Kryptonite” it was issued in the names of “Krozonite”. Hence they applied for rectification which was successful. They wrote a letter to show there were discrepancies. Before they got the title to the land, it belonged to the Government of Kenya. He strongly refuted that the Plaintiffs had been on the land for many years and hence they were entitled to it.

**B. Cross examination of DW - 1 by Mr. Siminyu Advocate.**

22. DW - 1 confirmed that he was a director/ shareholder of Kryptonite Enterprises Limited but he had not produced any CR – Form 12 nor a Certificate of Incorporation for the said company. According to DW – 1 , the government allocated land in the year 1997. They applied for the land which application was available. From the list of documents, he produced the application was not there. It was his testimony that Kryptonite was incorporated in the year 1996 through a Memorandum and Articles of associations. They paid the consideration to the Government but he did not remember the amount paid nor the time when this took place. Additionally, he could not remember paying stamp premium. This document was not there i.e. the official receipt. He did not have the letter of allotment – in court. It was the company that applied for the land but there was nothing to show this. As far as he was concerned, they had been on the land for 5 years and hence for anyone to claim to have been on the land was a lie.
23. According to DW - 1, this civil suit was filed in the year 2018. On being referred to the set of the photographs filed as exhibit in Court, he confirmed seeing some structures and crops depicted from the said photographs. He did not remember when he wrote to the Commissioner of land for the rectification although the letter was dated 6<sup>th</sup> February, 2013. He attached nothing on the letter i.e. the letter made no reference to any attachment. From this letter there was no reference from the Commissioner of Lands but they got a title. He was given a title in the year 2013. By year 2013 the rate owed to the County Government of Mombasa was a sum of Kenya Shillings Eighty Eight Million Two Hundred and Six Thousand Two Fifty Two Hundred (Kshs 88,206,252/-). They came to court in the year 2018 exactly on 24<sup>th</sup> February, 2018.
24. DW - 1 further stated that from the notice of Motion application, they sought for prayer No. 4 seeking for an inhibition. He did not have the date for the sub -division of the land. However, on 1<sup>st</sup> December, 2018 – they had documents in their names and those were the ones they used for the sub - division. The date of the grant was 1<sup>st</sup> June, 1997 and the date of the Deed Plan was 11<sup>th</sup> December, 2019. He confirmed that it came way after the title had been issued. With reference to the letter dated 21<sup>st</sup> November, 2017 for the rectification of Deed Plan for MN/III/5612. He had not produced the document dated 30<sup>th</sup> January, 2013. The sub - division of the government land was a process; he did not have the consent to sub - divide the land.
25. DW - 1 confirmed that he was aware that several government agencies were involved in this matter. Although he was involved in the process but he did not have any prove in court. He could not produce the approvals by any statutory authorities such as the National Environment & Management Authority (NEMA), the national Land Commission (NLC), Public Health and the National Construction Authority (NCA). When they caused the sub - division, the matter was still pending in Court. They had been on the land for 5 years.



### **C. Re - examination of DW – 1 - Mr. Omollo Advocate.**

26. DW – 1 told the court that the date of the grant was 25<sup>th</sup> January, 2013 and not 1<sup>st</sup> June, 1997 – this date was the beginning of the lease. The Deed Plan was dated 11<sup>th</sup> February, 2019. It was the one used to register the grant on 25<sup>th</sup> January, 2013. He first came to court on 24<sup>th</sup> December, 2018 long after they had done the sub - division.

### **A. Examination of Chief of DW - 2 by Mr. Omollo Advocate.**

27. DW – 2 testified and was sworn on oath in Kiswahili language. He identified himself as being Mr. David Kahindi Samson. It was the testimony of DW - 2 that he was a retired Locational Chief of Junju the area within the County of Kilifi where the suit land was situated. He recorded a Witness Statement on 25<sup>th</sup> July, 2023 and he had retired in 2021. By that time there was no buildings and nor any occupation on the suit land. There were no homesteads. The suit land had always been lying idle and vacant with no agricultural no any other activity taking place therein. He did not know any of the Plaintiffs. They had never lived on the suit land even a day at Junju Location.

### **B. Cross examination of DW - 2 by Mr. Siminyu Advocate.**

28. DW - 2 told the court that he had been a Chief for 34 years – Senior Chief for 12 years and 22 years as an Assistant Chief. She did not know the size of Junju Location. But he stated that it had 45,000 people whom he knew by name and faces. He was not sure of the four people who came to his offices. (Witness pointed out the Plaintiff who was in Court and told the court that he had never seen him before.)
29. DW - 2 on being referred to the set of photographs by the Defendant/Applicant, he denied having ever seen them. He confirmed that he knew them. However, he affirmed that they were taken from the beach part of the suit land but not the interior land. There were no people on the land as per his Affidavit then. But by the time of his testimony there were numerous fishermen on the land. He remembered two people went to his offices and informed him they wanted to claim the land.

### **C. Re - examination of DW - 2 by Mr. Omollo Advocate.**

30. DW - 2 reiterated that by 25<sup>th</sup> July, 2013 there was no one on the land. That was the close of the Defendant's case.

## **IV. Submissions**

31. On 21<sup>st</sup> February, 2024, immediately after the closure of the Plaintiffs' case, the Honorable Court directed the parties to canvass the originating summons through written submissions. Thereafter, on the 2<sup>nd</sup> May, 2024 the Plaintiffs fully complied while the Defendants were accorded a further extension of 14 days to comply. The Honorable Court reserved a date for delivery of Judgement on notice accordingly.
32. However, by the time of penning down this Judgement, the Defendants had not filed their written submissions and hence it proceeded to render the Judgement on merit whatsoever.

### **A. The Written Submissions of the Plaintiffs**

33. The Plaintiffs through Law firm of Messrs. Oduor Siminyu & Co. Advocates filed their written submissions dated 11<sup>th</sup> March, 2024. Mr. Siminyu Advocate commenced his submissions by stating that the Plaintiffs had proved their case on a balance of probability and were therefore available to the prayers sought in their Amended Originating Summons dated 18<sup>th</sup> April, 2018.



34. According to the Learned Counsel, the Plaintiffs' case was that the Plaintiff called two witnesses in total. PW - 1 Maurice Momba Chikodza gave evidence on how they came on to the suit land in the year 1993 cleared the bushes within the property started cultivation, put up structures and reared animals on the land. It was their evidence that since then, they had been in occupation of the suit land continuously, peacefully, uninterrupted and openly for the past 30 years and this was the place they called home. PW - 2 Hussein Suleiman Masila, corroborated the evidence of PW - 1 and confirmed that for over the 30 years, they had been in possession of the suit property.
35. The Learned Counsel submitted that the two witnesses confirmed that the title upon which they sued was registered in the name of "Krotonite Enterprises Limited" and not "Kryptonite Enterprises Limited". The witnesses then invited the Honourable Court to find in their favour that they had acquired the suit land by way of prescriptive rights and should therefore be registered as the owners of the suit land as prayed for in their Originating Summons. As clearly stated by the Plaintiffs' witnesses, the party sued was "Krotonite Enterprises Limited" the Defendant. The copy of the title produced showed the registered owner of the suit property as "Krotonite Enterprises Limited". Apparently the party who defended this suit calls themselves "Kryptonite Enterprises Limited" and for purposes of this proceedings, referred to them as interested party. The interested party called two witnesses namely Faraj Mansur Abeid Said who called himself the Director of Kryptonite Enterprises and David Kahindi Samson. The Defendant (Krotonite Enterprises Limited) never entered appearance despite service.
36. The witness DW - 1 testified to the effect that the land belonged to them after getting the grant in the year 2013. He insisted that the Plaintiffs do not stay on the suit premises. DW - 2 who had been the area chief denied that despite the Plaintiffs presenting photographs of their structures and crops on the land, they were not occupying the land. On cross examination of the Interested Party witnesses, the following points came out that were not answered:-
- i. The witnesses did not produce any registered documents of "Kryptonite Enterprise Limited". No certificate of incorporation, CR Form 12 nor Articles and Memorandum of Association were produced.
  - ii. No application letter to the Commissioner of Lands for this property was availed.
  - iii. No proof of filing of Annual Returns by the Company was tendered.
  - iv. No receipt for payment of stand premium by Kryptonite produced.
  - v. The Interested Party failed to provide proof for payment of land rent/rates over the suit property.
  - vi. The Interested Party Exhibit Number - 2 never had an attachment to show what was to be corrected nor was there any proof that the author was a director of Kryptonite Enterprises Limited.
  - vii. Defendant Exhibit Number - 3 under Paragraph 3 speaks of a date of preparation of the document (30<sup>th</sup> January, 2013) when as a matter of fact the document existed before then.
37. The Learned Counsel submitted that it was trite law that whoever alleges must prove. To buttress on this point, he relied on the provisions of Sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya states as follows:-

107;(1) Burden of proof

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2)When a person is bound to prove the existence of any fact is said that the burden of proof lies on that person.

108; Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

109; Proof of particular facts

The burden of proof as to any particular fact lies on the person who wished the court to believe in its existence, unless it is provided by (any law that the proof of that fact shall lie on any particular person.

38. The Learned Counsel averred that from the foregoing, the alleged Defendant bore the evidentiary burden to prove, the existence of Kryptonite Enterprises Limited and secondly that the Plaintiffs had not and were not in possession of the suit property for the stated period. He opined that let it not be lost that the registered owner of the suit property is Krotonite Enterprises Limited as per the grant produced. They were issued with a grant running from 1<sup>st</sup> June, 1997. A copy of the said title was produced as Plaintiff Exhibit Number 3. The 2<sup>nd</sup> Defendant had miserably failed to prove its case on a balance of probability.

39. On the issues for determination, the Learned Counsel relied on the following:-

- a. Whether the Plaintiffs have shown (on the balance of probability) that they acquired the property by adverse possession?
- b. Is Kryptonite Enterprises Limited the registered owner?
- c. Who meets costs?

40. On whether the Plaintiffs had proved their case. It was their humble submission of the Learned Counsel that the Plaintiffs had on a balance of probability proved their case. They had had a peaceful, uninterrupted, continuous and open possession of the suit land without the consent or authority of the Registered Owner (Krotonite Enterprises Limited). The legal implications of the doctrine of adverse possession was well summarized by the Court of Appeal in the case of - "Benjamin Kamau Murima & Another v Gladys Njeri C.A No.213 of 1996" where the court held that:-

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

41. Once an adverse possessor is eligible for title under the doctrine, he must move court under the provision of Section 38 of the Act; which provides that:-

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



42. The Learned Counsel relied on the case of “Patrick Tsangare Mangale v Mohamed Saleh Bawazir ELC No. 406 of 2016 (O.S.) Justice Yano had this to say:-

“For one to sustain a claim for adverse possession, he must demonstrate possession that is nec vi, nec clan and nec precario, that is possession which is without force, without secrecy and without permission. Such possession must also be accompanied by the necessary animus possidendi, which is an intention to acquire the land as one’s own. Such possession must have been continuous and uninterrupted for at least 12 years”.

43. The Learned Counsel asserted that this case was filed 25 years after the Plaintiffs came onto the suit property. The Interested Party never gave any contrary evidence. Their occupation was uninterrupted, peaceful and open. The Plaintiffs had proved their case beyond probability. The balance of probabilities referred to a level of certainty or degree of evidence that is needed to establish proof, especially in cases where rivaling parties have both attempted to prove their respective cases. To use the words of Lord Denning J in the case of:- “Miller v Minister of Pension 1947 2 ALL ER 372” that:-

“If the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not; Expressing that in percentage terms, if a judge conclude it is 50% likely that the Claimant’s case is right, then the claimant will lose. However, if it is 51% the claimant wins.”

44. The Learned Counsel submitted that going by the wisdom of Lord Denning J., and the evidence on record, they could comfortably say that the evidence tendered by the Plaintiff was 100% proof that they had acquired adverse interest over the suit property. On this point, the Learned Counsel relied on the case of “Littledale v – Liverpool College 1900] 1 CH 19, 21” where it was held that:-

“In order to acquire by the statute of limitation a 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.....the next question, therefore is what constitutes dispossession of the proprietor? .....acts must be done which are inconsistent with his (the owner’s) enjoyment of the soil for the purposes for which he intended to use it.”

45. The Learned Counsel further relied on the case of “Abdulkhall Mohamed & 6 others v Josah Kafula J. Mtila & Another C.A. No. 24 of 2019”, the Court of Appeal held that:-

“By erecting a residential house and carrying out his business within the suit land as though it belonged to him for all those years, we are satisfied like the learned judge, that the 1st respondent’s possession was adverse to the 1<sup>st</sup> and 2<sup>nd</sup> Appellant’s title, who were clearly dispossessed.”

46. According to the Learned Counsel it was clear from the Plaintiffs’ case that they erected residential houses and carried out farming and fishing mongering activities on the suit land as though it belonged to them for all those years.

47. On whether Kryptonite Enterprises Limited was the registered owner of the suit property, the Learned Counsel submitted that the Plaintiffs sued the registered owner of the suit property CR. No.58960 and LR. No.MN/III/5612 known as Krotonite Enterprises Limited the Defendant. Another entity known as Kryptonite Enterprises Limited sought to be joined into the case and for purposes of this proceedings. He referred to him as Interested Party. Kryptonite Enterprises Limited claimed being the



registered owner of the suit property. They produced a copy of the Grant which was registered in the name of Krytonite Enterprises Limited. The Grant issued to Krytonite Enterprises Limited was for a term of 99 years commencing from 1<sup>st</sup> June, 1997. Krytonite Enterprises Limited claimed that their name had been wrongly typed at the lands department and also claimed that there was no entity by the name Krotonite Enterprises Limited. According to the Learned Counsel, what they failed to do was to bring any evidence from the Registrar of Companies stating non - existence of Krotonite Enterprise Limited. Additionally, they also failed to comply with the basic evidentiary principle of “he who alleges must prove”.

48. According to the Learned Counsel apparently DW - 1, the Defendant’s witness failed to provide CR - 12 Form to confirm their existence. They also failed to provide any document from the Commissioner of Lands confirming that they were the registered owners of the suit land. The Learned Counsel further stated that a party coming into a matter must come with the aim of assisting the Court in administration of Justice. In the case of Krytonite Enterprises Limited's participation in this proceedings was purely academic and of no assistance to the court. In the case of “New *Mega Africa Limited v ABSA BANK Kenya PLC & Another. HCC No. E068 OF 2022*”, Justice Kizito Magare had this to say in a similar case:-

“Their presence will not aid ends of justice. The Applicant is a hatchet man hired to throw a spanner into works.....whichever one looks at it, the Applicant is a busybody. Before I depart, I wish to point out that parties must help the Court in administration of justice.”

49. The Learned Counsel further submitted that DW - 2 in his statement and evidence alluded to the fact that in the year 2018 there were no buildings or structures on the suit premises. Nothing would be far from the truth as at the time of filing this suit, the Plaintiffs annexed photographs showing their homes and activities being done and undertaken on the premises. The Interested Party failed to produce any photographs to contradict the Plaintiffs. When hard pressed on cross-examination, DW – 2 confirmed that some men had visited him at his office seeking assistance on how to go to court over this property in the year 2018. He bragged on having a sharp memory of knowing all the 45,000 inhabitants in Junju Location by name and face. But when shown PW - 2, in the court gallery, he conveniently couldn't remember him. His demeanor in court exhibited a man hired by the Interested Party.

50. The Learned Counsel further submitted that for the past 30 years the Plaintiffs had been on the suit property, the Interested Party confirmed that they never in anyway interfered with their stay. The Learned Counsel relied on the case of “*Kimani Ruchene & Another v Swift Rutherford & Co. Ltd [1980] KLR 10*”, the Court had this to say:-

“Time cannot therefore start running until registered owner becomes aware that there was a trespasser occupying his/ her property and does nothing to assert his rights on the property for at least 12 years?”

51. The Learned Counsel opined that they were also guided by the Court of Appeal in the case of “*Alfeen Mehdi Mohamed v Basil Feroz Mohamed and 223 others No. 84 of 2015*” where it opined that:

“The acts done on the suit land by the Respondent as enumerated above occupation and use of the suit land by the Respondents had animus possidendi and was nec vi, nec clam nec precario”

52. The Learned Counsel submitted that the Interested Party (Kpytonite Enterprise Limited)purported to have done sub-division of the suit property. No supporting documents were ever provided to prove



whether concerned government agencies gave approvals. This was choreographed to try and still a match. DW-1 on cross-examination admitted not having the documents. Not even the sub-division scheme nor consent to sub-divide was produced. It was therefore the Learned Counsel's humble submission that if any, the court should annul any sub-division done on the suit property.

53. On who meets the costs of the suit. The Learned Counsel submitted that under the provision of Section 27 of the *Civil Procedure Act*, costs follow the events. The Interested Party herein, made an application for joinder in this suit knowing very well that he had no arguable case as against the Plaintiffs in respect of the suit property. Therefore, the ultimate end game is for the Interested Party to pay the costs of the suit. They therefore, urged the court to award the Plaintiffs costs of the suit.
54. In conclusion, the Learned Counsel submitted that one of the principles to adverse possession is that the person seeking to acquire title of land by adverse possession must prove non-permissive or non-consensual, open, notorious, exclusive and adverse use by him. The Learned Counsel went further to stated that the Plaintiffs had proved this principle and was available to the prayers sought in the Originating Summons. In the wise word of Lord Denning J., the Plaintiffs have proved their case on a balance of probability.

## V. Analysis and Determination

55. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
56. For the Honourable Court to arrive at a reasonable, fair and Equitable decision, it has crafted three (3) key issues for its determination. These are:-
  - a. Whether the Plaintiffs have shown (on the balance of probability) that they acquired the property by way of land adverse possession?
  - b. Whether or not the Plaintiff is entitled to the prayers in the originating summons/ plaint.
  - c. Who will bear the costs of the suit.

### **IssueNo. a). Whether the Plaintiffs have shown (on the balance of probability) that they acquired the property by way of Land adverse possession**

57. The main substratum in this matter is singular in nature. Whether the Plaintiffs are entitled to ownership and/or proprietary rights in terms of prescriptive right by way of Land Adverse Possessions as stipulated by law. In order to fairly tackle the issue, it will be inevitable to avoid extrapolating the detailed legal expose on the subject matter. The law in respect to adverse possession is now settled. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Section 13 “(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”.

Additionally, the provision of Section 13 on the other hand provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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 purpose 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.

While the provision of Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Finally the provision of Section 38 states:-

38.

- (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

From the above provisions of the law of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under Article 40 of *the Constitution* of Kenya becomes extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.

58. 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. I take notice that this was exactly what the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein did in the instant suit. 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.

59. 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.
60. 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 the provision of Article 24. The principles were well set out in the case of “Kahindi Ngala Mwangi v 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 v Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of:- “Kyeyu - v Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson *Kinyua v Simon Gitura Civil Appeal No.265 of 2005*,” where this Court found that the existence and proprietorship of



land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

61. 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 the case of: “Kimani Ruchine v Swift Rutherford & Co. Limited [1980] KLR it was stated on this point that:-

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario .... So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See the case of:- “Wanyoike Gathire v Berverly [1965] EA 514, 518, 519 per Miles, J.”

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

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

62. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of “*Maweu v 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”

63. Now applying these principles to the instant case, the main issue is whether the Plaintiffs proved adverse possession? From the evidence adduced, the Plaintiffs came on to the suit land in the year 1993 as four people but later on they were 18 of them. The land was bushy and vacant. They cleared the bushes within the property started cultivation, undertaking fishing activities and put up structures and reared animals on the land. It was their evidence that since then, they had been in occupation of the suit land continuously, peacefully, uninterrupted and openly for the past 30 years and this was the place they called home. PW - 2 Hussein Suleiman Masila, corroborated the evidence of PW - 1 and confirmed that for over the 30 years, they had been in possession of the suit property. The two witnesses confirmed that the title upon which they sued was registered in the name of “Kryptonite Enterprises Limited” and not “Kryptonite Enterprises Limited”. The witnesses then invited the Honourable Court to find in their favour that they had acquired the suit land by way of proscriptive rights and



should therefore be registered as the owners of the suit land as prayed for in their Originating Summons. As clearly stated by the Plaintiffs' witnesses, the party sued was "Kryptonite Enterprises Limited" the Defendant. The copy of the title produced showed the registered owner of the suit property as "Kryptonite Enterprises Limited". Apparently the party who defended this suit calls themselves "Kryptonite Enterprises Limited" and for purposes of this proceedings, referred to them as interested party. The interested party called two witnesses namely Faraj Mansur Abeid said who called himself the Director of Kryptonite Enterprises and David Kahindi Samson, a Locational Chief of the area. The Defendant (Kryptonite Enterprises Limited) never entered appearance despite service.

64. DW - 1 testified to the effect that the land belonged to them after getting the grant in the year 2013. He insisted that the Plaintiffs did not stay on the suit premises. DW - 2 who had been the area chief denied that despite the Plaintiffs presenting photographs of their structures and crops on the land, they were not occupying the land. On cross examination of the Interested Party witnesses, the following points came out that were not answered:-
- a. The witnesses did not produce any registered documents of "Kryptonite Enterprise Limited". No certificate of incorporation, CR Form 12 nor Articles and Memorandum of Association were produced.
  - b. No application letter to the Commissioner of Lands for this property was availed.
  - c. No proof of filing of Annual Returns by the Company was tendered.
  - d. No receipt for payment of stand premium by Kryptonite produced.
  - e. The Interested Party failed to provide proof for payment of land rent/rates over the suit property.
  - f. The Interested Party Exhibit Number - 2 never had an attachment to show what was to be corrected nor was there any proof that the author was a director of Kryptonite Enterprises Limited.
  - g. Defendant Exhibit Number - 3 under Paragraph 3 speaks of a date of preparation of the document (30<sup>th</sup> January, 2013) when as a matter of fact the document existed before then.
65. The Court fully concurs with the Learned Counsel for the Plaintiff that it was trite law that whoever alleges must prove based on the provisions of Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya. Indeed, the alleged Defendant bore the evidentiary burden to prove, the existence of Kryptonite Enterprises Limited and secondly that the Plaintiffs had not and were not in possession of the suit property for the stated period. It is imperative that the registered owner of the suit property is Kryptonite Enterprises Limited as per the grant produced. They were issued with a grant running from 1<sup>st</sup> June, 1997. A copy of the said title was produced as Plaintiff Exhibit Number 3. The 2<sup>nd</sup> Defendant had miserably failed to prove its case on a balance of probability. The Plaintiffs had had a peaceful, uninterrupted, continuous and open possession of the suit land without the consent or authority of the Registered Owner (Kryptonite Enterprises Limited).
66. On whether Kryptonite Enterprises Limited was the registered owner of the suit property. From record, the Plaintiffs sued the registered owner of the suit property CR. NO. 58960 and LR. No.MN/III/5612 known as Kryptonite Enterprises Limited the Defendant. Another entity known as Kryptonite Enterprises Limited sought to be joined into the case and for purposes of this proceedings. Kryptonite Enterprises Limited claimed being the registered owner of the suit property. They produced a copy of the Grant which was registered in the name of Kryptonite Enterprises Limited. The Grant issued to Kryptonite Enterprises Limited was for a term of 99 years commencing from 1<sup>st</sup> June, 1997. Kryptonite



Enterprises Limited claimed that their name had been wrongly typed at the lands department and also claimed that there was no entity by the name Kryptonite Enterprises Limited. According to the Learned Counsel, what they failed to do was to bring any evidence from the Registrar of Companies stating non-existence of Kryptonite Enterprises Limited. Additionally, they also failed to comply with the basic evidentiary principle of “he who alleges must prove”.

67. According to the Learned Counsel apparently DW - 1, the Defendant’s witness failed to provide CR - 12 Form to confirm their existence. They also failed to provide any document from the Commissioner of Lands confirming that they were the registered owners of the suit land. The Learned Counsel further stated that a party coming into a matter must come with the aim of assisting the Court in administration of Justice. In the case of Kryptonite Enterprises Limited’s participation in this proceedings was purely academic and of no assistance to the court.
68. The Court has taken judicial notice that DW - 2 in his statement and evidence alluded to the fact that in the year 2018 there were no buildings or structures on the suit premises. However, at the time of filing this suit, the Plaintiffs annexed photographs showing their homes and activities being done and undertaken on the premises. The Interested Party failed to produce any photographs to contradict the Plaintiffs. When hard pressed on cross-examination, DW – 2 confirmed that some men had visited him at his office seeking assistance on how to go to court over this property in the year 2018. He bragged on having a sharp memory of knowing all the 45,000 inhabitants in Junju Location by name and face. But when shown PW - 2, in the court gallery, he conveniently couldn’t remember him. His demeanor in court exhibited a man hired by the Interested Party. Additionally, it will be noted that for the past 30 years the Plaintiffs had been on the suit property, the Interested Party confirmed that they never in anyway interfered with their stay. That the Interested Party (Kryptonite Enterprise Limited) purported to have done sub-division of the suit property. No supporting documents were ever provided to prove whether concerned government agencies gave approvals. This was choreographed to try and still a match. DW-1 on cross-examination admitted not having the documents. Not even the sub-division scheme nor consent to sub-divide was produced. Ideally, any sub-division done on the suit property should be annulled altogether.
69. In the case of “Samuel *Miki Waweru v Jane Njeru Richu, Civil Appeal No. 122 of 2001*”, the Court of Appeal delivered the following dictum:

“.....it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal [1975] EA 225* possession does not become adverse before the end of the period for which permission to occupy has been granted.”

Additionally, in the case of “*Wambugu v Njuguna [1983] KLR 172*” the Court held:-

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

70. In the case of “*Public Trustee v Wanduru*”, Madan J A stated as follows; -

“.... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of



the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

71. In the case of “M’ikiara M’rinkanya & Another v Gilbert Kabeere M’mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR”, the Court held that

“.....From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan* [1948] 2 All ER 11, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession...

..as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in *Lowsley V Forbes* [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.”

72. The Court of Appeal in “Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi – v Ben Munyifwa Songoi [2020] eKLR” opined that a person claiming adverse possession must establish the following

- (a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.

73. In the case of “Kasuve v Mwaani Investments Limited & 4 others 1 KLR 184”, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

74. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. Therefore, I reiterate it is the view of the Court that the right to Adverse Possession accrued and vested in the Plaintiffs as at 1993 by 2005 they had actually acquired title by adverse possession. There is no evidence that the Defendant ever retook possession of the suit land nor that he successfully removed or ousted the Plaintiffs from the possession of the suit land after obtained a grant on 25<sup>th</sup> January, 2013. The subsequent cases cited above are not helpful either in assisting the



Defendant to assert title to the suit land because title by way of Adverse Possession had accrued and vested in favour of the Plaintiffs.

75. The Plaintiffs led evidence that they had buried their kin on the land, they had practiced farming and cultivated the same on the suit land as though it was as of right. In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts ‘Kweyu v Omuto, C A Civ Appeal 8 of 1990 (as yet unreported)’. Undoubtedly that this Court is satisfied that the Plaintiffs have proved Adverse Possession and her case is for granting. The title of the suit land is being held in trust for the Plaintiffs.

**Issue No. B: Whether or not the Plaintiffs are entitled to the prayers in the originating summons/plea**

76. Under this sub title we examine whether or not the Plaintiffs are entitled to the prayers in the originating summons/Plea. The burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher. The burden squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. This Honourable Court finds that the Plaintiffs have made out a case for adverse possession and have proved they have been in possession of the suit property for over 12 years.

**Issue No. C: Who bears the costs of the suit**

77. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that a party is granted at the conclusion of any legal process or proceedings in any litigation. The Black Law Dictionary defines cost to mean:-

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

78. The provision of Section 27 of the *Civil Procedure Act*, Cap, 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* 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.”

79. 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*, 2<sup>nd</sup> 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.

80. 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 the case of: “Morgan Air Cargo Limited v 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.”

81. In this case, as this Honourable Court has opined above, the Plaintiffs have proved their claim against the Defendant herein and therefore shall have the costs of the suit.

## **VI. Conclusion and Disposition**

82. 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 established their case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiffs as per the Amended Plaint dated 18th April, 2018.
- b. That a declaration be and is hereby made that the Plaintiffs/Applicants are entitled by virtue of adverse possession of 17 years All That Piece Of Land known as L.R NO. MN/III/5612 registered as CR. 58960 situate in South Takaungu Township in Kilifi County containing by measurement 8.616 Hectares or thereabouts (hereinafter “the property”) registered under the name of the Respondent.
- c. That an order do and hereby issued that the Land Registrar, Mombasa lands Registry deletes the name of Krytonite Enterprises Limited the Defendant herein and register the names of the Plaintiffs herein in place thereof absolutely and at no cost.
- d. That an order that the Chief Land Registrar to register the Plaintiffs as the absolute proprietors of land parcel number land parcel No. 2717/V/MN, 2718/V/MN and 2719/V/MN.
- e. That an order do and hereby issues that the Plaintiffs shall be released from any obligation to pay outstanding rates in respect of the property and the County Rates department to alter its records to reflect the names of the Applicants to be the rate payers.
- f. That this Honourable Court do issue an order against the Defendant, its agents, servants and/or any other authorized independent contractor be restrained by permanent injunction from entering the suit land or demolishing the Plaintiffs' houses and/or properties, structures thereon and/or evicting the Plaintiffs, their families and/or tenants or in any other manner whatsoever interfering with the Plaintiffs' and their tenants peaceful occupation of the suit land.
- g. That the costs of the suit shall be in favour of the Plaintiffs.



It is so Ordered Accordingly.

**JUDGMENT DELIEVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED  
AND DATED AT MOMBASA THIS 18TH DAY OF SEPTEMBER 2024.**

.....

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

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Oduor Advocate holding brief for Mr. Siminyu Advocate for the Plaintiffs.
- c. Mr. Omollo Advocate for the Defendant.

