



East African Portland Cement Co Ltd & 6 others v Kathilu & 322 others; Kenya National Organization for Victims of Ethnic Clashes & others (Interested Party) (Environment & Land Case 155 of 2016 & 1190 & 1108 of 2015 & Petition 40 of 2016 & Judicial Review 90 of 2016 & Miscellaneous Application 428 of 2015 & Judicial Review Application 04 of 2016 (Consolidated)) [2024] KEELC 7095 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7095 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 155 OF 2016 & 1190 & 1108 OF 2015 & PETITION 40 OF 2016 & JUDICIAL REVIEW 90 OF 2016 & MISCELLANEOUS APPLICATION 428 OF 2015 & JUDICIAL REVIEW APPLICATION 04 OF 2016 (CONSOLIDATED)

CA OCHIENG, J

OCTOBER 29, 2024

(FORMERLY ELC CASE NO. 1108 OF 2015 - NAIROBI)

BETWEEN

THE EAST AFRICAN PORTLAND CEMENT CO LTD PLAINTIFF

AND

SAMMY KATHILU & 272 OTHERS & 272 OTHERS & 272 OTHERS & 272 OTHERS DEFENDANT

AS CONSOLIDATED WITH

PETITION 40 OF 2016

BETWEEN

NAFTARY KARIUKI & OTHERS PLAINTIFF

AND

EAPCC DEFENDANT

AS CONSOLIDATED WITH

JUDICIAL REVIEW 90 OF 2016

BETWEEN



PATRICK MAINGI NGUKU & OTHERS PLAINTIFF

AND

EAPCC DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 1190 OF 2015**

BETWEEN

SYOKIMAU BRIGHT HOMES & OTHERS PLAINTIFF

AND

EAPCC DEFENDANT

**AS CONSOLIDATED WITH
MISCELLANEOUS APPLICATION 428 OF 2015**

BETWEEN

FRANCIS KIRIMA M'IKUNYUA & OTHERS PLAINTIFF

AND

EAPCC DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 1108 OF 2015**

BETWEEN

EAPCC PLAINTIFF

AND

**SAMMY KATHILU & 49 OTHERS & 49 OTHERS & 49 OTHERS & 49
OTHERS DEFENDANT**

**AS CONSOLIDATED WITH
JUDICIAL REVIEW APPLICATION 04 OF 2016**

BETWEEN

PATRICK MAINGI NGUKU & OTHERS PLAINTIFF

AND

EAPCC DEFENDANT

AND



**KENYA NATIONAL ORGANIZATION FOR VICTIMS OF ETHNIC CLASHES
& OTHERS INTERESTED PARTY**

JUDGMENT

Introduction

1. The Judgment herein emanates from six (6) consolidated suits involving very many parties against East African Portland Cement Ltd. After consolidation of the aforementioned suits, ELC No. 155 of 2016 was made the lead file. The fulcrum of the dispute revolves around several parcels of land to wit: LR No 12948/17 (I.R 39448/1), LR No. 10425 (I.R 17839), LR No. 8784 (I.R 75467), LR No. 7815/1, and LR No. 8786, hereinafter referred to as the 'suit lands'. East African Portland Cement Limited holds various certificates of title in respect to the said suit lands except for LR No. 10425 which is held by the Cabinet Secretary, Treasury. As per court proceedings of 18th July, 2018, I note Judgment was entered against the 2nd, 5th to 21st, 34th, 35th, 38th, 40th, 41st, 43rd, 44th and 45th Defendants. Further, I note some of the consolidated suits had already been determined. Most of the Defendants including the Interested Parties were mainly interested in LR No. 10425.

Pleadings

2. In the lead file ELC No. 155 of 2016, the Plaintiff filed a Plaint dated the 2nd November, 2015 where it sought for the following Orders:-
 - a. A declaration that the Plaintiff is entitled to exclusive and unhindered right of possession and occupation of the parcels of land known as LR No. 12948/17 (I.R 39448/1), LR No. 10425 (I.R 17839), LR No. 8784 (I.R 75467), LR No. 7815/1, and LR No. 8786. ('Suit properties')
 - b. A declaration that the Defendants whether by themselves or their servants or agents and/ or otherwise howsoever are illegally in occupation of the suit property and are accordingly trespassers on the same.
 - c. A declaration that the Defendants whether by themselves or their servants or agents and/ or otherwise howsoever are not entitled to remain on the suit property.
 - d. A permanent injunction restraining the Defendants whether by themselves or their servants or agents and/ or otherwise howsoever from remaining on, continuing occupation of the suit property;
 - e. In the Alternative, an eviction order to issue for forceful eviction of the Defendants from the Subject parcels of land known as LR No. 12948/17 and I.R 39448/1, LR No. 10425 and I.R 17839, LR No. 8784 and I.R 75467, LR No. 7815/1, and LR No. 8786 ('the suit properties') directed at the Officer Commanding Police Station Athi River to assist in peaceful execution.
 - f. General damages for trespass;
 - g. Mesne profits (at current market rates) for the continued stay of trespassers on the suit profit from the date of their entry to the date of their eviction.
 - h. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.



3. The 3rd and 4th Defendants in their Defence denied the averments in the Plaint except the descriptive and jurisdiction of the court. They contended that their land being Mavoko Town Block 3/1334 is distinct from the suit properties. They insisted that they purchased their land from one Philip Kithome and have no interest on the suit properties. Further, that the Plaintiff did not disclose any reasonable cause of action against them. They denied trespassing on the suit properties.
4. The 14th, 22nd to 33rd, 36th, 37th, 42nd and 49th Defendants in their Statement of Defence dated the 10th January, 2016 denied the contents of the Plaint except the descriptive and jurisdiction of the court. They disputed that the Plaintiff maintained full possession and rights over the suit properties. They denied jointly and severally invading nor trespassing on the suit properties. They explained that they applied to the offer for sale and/or allotment of the suit properties by the Plaintiff, following the advice by the Government through the National Land Commission. Further, that the Plaintiff has always been aware and/or approved and provided security for their interest in the suit property being LR No. 10425. They further denied having been engaged in illegal subdivision, apportionment, fencing off and placing for sale and/or seeking for registration at the Lands Registry of the suit property. They averred that the Plaintiff had approved their interest in the suit properties and specifically a portion of LR No. 10425 measuring approximately 1000 acres and provided security thereof from encroachment by other interested groups. They stated that the Plaintiff having extinguished and/or depleted extraction of the raw materials, the Government through the National Land Commission advised for societies from the community to apply for sale and/or allotment. They denied that the parent Ministry directed the Plaintiff not to make any offer or sale or lease of the suit property.
5. The 46th Defendant in their Defence denied the averments in the Plaint except the descriptive and jurisdiction of the court. They denied that their members are trespassers on the suit properties. They further denied subdividing and/or offering for sale of any property belonging to the Plaintiff. They argued that the Plaintiff's suit was defective and incontestably bad in law.
6. The 47th Defendant in their Defence denied the averments in the Plaint except the descriptive and jurisdiction of the court. They denied that their members were trespassers on the suit properties. They further denied subdividing and/or offering for sale of any property belonging to the Plaintiff. They argued that the Plaintiff's suit was defective and incontestably bad in law for violating the mandatory provisions of Order 4 of the Civil Procedure Rules.
7. The 51st to 273rd Defendants filed a Defence including Counter-claim where they denied the averments in the Plaint except the descriptive and jurisdiction of the Court. They contended that they have been in peaceful and uninterrupted occupation of LR No. 10425 for now fifteen years since the year 1999 and have never seen the owner until May 2017 when they learned of the instant suit. They confirmed that they subdivided the plots in the year 2002 to enable them build houses which now stand on LR No. 10425. Further, that no one had ever tried to evict them therefrom. They denied that there is excavation on LR No. 10425 and insisted that, by the time they entered into occupation of the said land, it was not inhabited nor utilized. They claimed it is the Plaintiff infringing on their rights. In the counterclaim, they sought for the following Orders:-
 - a. A declaration that the 51st to 273rd Defendants have acquired ownership rights of all that parcel of land known as LR No. 10425 by way of prescription/ adverse possession.
 - b. An order do issue vesting and directing that all that parcel of land known as LR No. 10425 be registered in the name of the 51st to 273rd Defendants.



- c. An order do issue directing the Plaintiff to transfer all that parcel of land known as LR No. 10425 to the 51st to 273rd Defendants and in default the Deputy Registrar do execute all the necessary instruments to effect the transfer.
 - d. Costs of the suit and Counter-claim.
8. The Interested Party Kenya National Organization for Victims of Ethnic Classes (KNOVEC) filed a Defence and Counter-claim dated the 20th April, 2018 where it denied the averments in the Plaint, admitted operating under Settle Villagers Scheme. It claimed to be the registered owner of LR No. 10425 vide Letter of Allotment No. 3974 /XXVI of 24th February, 1997 and paid over Kshs. 42,000,000 in standard premium including other charges. It disputed that LR No. 10425 belongs to the Plaintiff. It contended that 51st to 273rd Defendants are bogus, non-existent, fictitious and mere creation of someone's fertile imagination. In the counterclaim, it sought the following Orders as against the Plaintiff:-
- a. The Plaintiff's suit herein be dismissed with costs in entirety as against the Interested Party herein.
 - b. There be a declaration made herein that the Interested Party and Plaintiff in the Counterclaim is the legal and rightful owner of parcel of land No. 10425.
 - c. An Order be made dismissing the Counterclaim filed herein by Defendants No. 51 to 273 including Mto Mawe the organization that represents them with costs.
 - d. An Order be made dismissing any claim over Land Parcel No. 10425 or suit by Kenanie Settlers Self Help Group whether sued or suing through its officials.
 - e. An Order be made dismissing any suit or counterclaim filed herein by the organizations known as Kyeni Kya Katani SGH, Dama Mavoko Welfare Society, Mtojua Welfare Association, Kihito Ruai Sacco, the groups known as Mavoko Informal Settlement Community and Athi River Informal Settlement Community led by Francis Kirima M'Ikunyua or whatever other names they go by, Syokimau Bright Homes, the Plaintiff in Consolidated suit 1190 of 2015 and groups led by Naftaly Kariuki Petitioner in Consolidated Petition No. 40 of 2016 and Sammy Kathilu the Plaintiff in Consolidated Suit 1108 of 2015, or any other entity or organization that has laid a claim on LR 10425.
 - f. An order of eviction be given and issued against all the Defendants named herein in this suit or other persons unmade who are in the suit land without the consent or permission of the Plaintiff/ Interested Party removing them from land parcel 10425 and putting the Plaintiff/ Interested Party's members into quiet possession in the same land and the same be enforced by the Commandant Machakos County.
 - g. An order of permanent injunction do issue restraining the 1st Defendant in the Counterclaim, its servants and/or agents and anybody acting by them or through them from entering or remaining into Land Parcel number 10425 and from excavating, digging, mining, constructing, planting explosives and from carrying stones, soil or other materials out from the said land or in any other manner interfering with the ownership and possession by the Plaintiff/ Interested Party of the said Land Parcel Number No. 10425.
 - h. In the alternative but without prejudice to the foregoing the Second Defendant be ordered to adequately compensate the Plaintiff/ Interested Party for loss of its land and further pay



General Damages for the inconvenience, anxiety and agony its members have suffered during the invasion of their land.

- i. Costs of the suit in the Counter-claim.
 - j. Any further or better relief this Honourable Court may deem fit and just to grant.
9. In ELC No. 532 of 2016, the Applicants vide their Originating Summons dated the 18th May, 2016 sought for the following Orders: -
- a. Whether the Applicants have acquired title to and are entitled to be registered as proprietors of various land sizes as captioned in the supporting affidavit of this Originating Summons in LR No. 10425 and or any subsequent subdivision thereto situated in Athi River Machakos Sub – County by way of adverse possession.
 - b. Whether the Applicants are entitled to a declaration that they acquire titles to LR No. 10425 situated in Athi – River Machakos Sub – County by adverse possession and to an order that a Certificate of title be issued in the name of each Applicant in terms of acreage as captured in the supporting affidavit to this Originating Summons as the proprietor of LR No. 10425 and or in any subsequent subdivision thereto.
 - c. Whether the Applicants are entitled to the costs of this suit.
10. The 49th Defendant on behalf of Dama Mavoko Welfare Society filed its Originating Summons being Nairobi ELC 532 of 2016 seeking to be registered as owner of a portion of LR No. 10425 through adverse possession.
11. The Plaintiff filed a Reply to Defence and Defence to Counter-claim to the 51st to 273rd Defendants and reiterated its averments as per the Plaint and denied the averments in the Counter-claim. It sought for a declaration that it is entitled to exclusive and unhindered right of possession and occupation over LR No. 10425. Further, that the 51st to 273rd Defendants are in illegal occupation of the suit properties and are trespassers. Further, that a permanent injunction should issue restraining them from the suit properties as well as an eviction order to issue. It sought for general damages for trespass.
12. The matter proceeded for hearing where both the Plaintiff, Defendants and Interested Parties called witnesses.

Evidence of the Plaintiff

13. The Plaintiff claims to be the owner of the suit properties. It contended that it was undertaking mining of Kunker for making cement on the suit properties. Further, that it became the owner of the suit properties in the 1960s. The Plaintiff's witnesses claimed that the Defendants' including Interested Parties had trespassed on the suit properties. The Plaintiff explained that, it used to utilize the suit properties for mining as well as rearing of livestock but in 2011 it sold their livestock to the Kenya Meat Commission. Further, the livestock was retained on the suit properties until 2014. It alleged that the Defendants including Interested Parties only trespassed on the suit properties after they had sold the livestock. Further, that the trespassers built semi-permanent and permanent structures thereon which included school, hospital and churches. They insisted that the trespassers had become violent and they were unable to control them hence sought Police assistance. The Plaintiff produced the following documents as exhibits: Copies of Title Certificates of parcels L.R. No. 12948/17 and I.R. 39448/1, L.R. No. 10425 and I.R. 17839, L.R. No. 8784/4 and I.R. No. 75467, L.R. No. 7815/1 and L.R. No. 8786, Copy of letter from the Plaintiff confirming eviction and safeguarding of the company properties, Copy of the aerial Photography google map confirming the spots within the



parcel invaded by the Defendants, Copy of letter from one of the Defendants confirming their illegal entry and occupation of the Plaintiff's parcel; Investigative report on encroachment of; EAPCC parcels of land by Whitestone Auctioneers who had been contracted to carry out investigate report on the extent of the encroachment; List of the illegal sub-division and allocation of plots/parcels of some members of the Defendants Self-Help Group; Photographs showing the illegal structures and sub-divisions on the Company land including signage of proposed illegal police post; Letter from the Principal Secretary Ministry of Industrialization and Enterprise Development; Article of the Daily Nation Newspaper dated 13th November, 2025; Letter from Integra Supply Chain Solutions Limited dated 4th January, 2016 to the Plaintiff; Summary of Criminal Cases; The Kenya Police Charge Sheet dated 18th June, 2012; The Kenya Police Charge Sheet dated 26th September, 2011; The Kenya Police Charge Sheet dated 15th November, 2011; The Kenya Police Charge Sheet dated 14th December, 2010; The Kenya Police Charge Sheet dated 11th July, 2012; Letter from Kenya Police Service dated 15th January, 2016 to the Plaintiff; Letter dated 28th April, 2011 from the Plaintiff to the District Commissioner, Athi River; Letter dated 6th June, 2011 from the Plaintiff to the Officer Commanding Police Station, Athi River; Letter dated 6th June, 2011 from the Plaintiff to the District Commissioner, Athi River; Letter dated 6th June, 2011 from the Plaintiff to the Hon. Prof. George Saitoti, Minister for Internal Security, Office of the President; Letter dated 11th July, 2011 from the Plaintiff to the District Criminal Investigations Officer, Athi River; Letter dated 29th March, 2011 from the Plaintiff to the Hon. Wavinya Ndeti, MP, Assistant Minister, Ministry of Youth Affairs and Sports; Letter dated 23rd June, 2011 from the Ministry of Youth Affairs and Sports, Officer of the Assistant Minister to the Plaintiff; Letter dated 4th August, 2011 from the District Commissioner, Athi River District to the Plaintiff; Letter dated 8th August, 2011 from Municipal Council of Mavoko to the Plaintiff; Letter dated 8th April, 2015 from the Office of Member of County Assembly, Government of Machakos, Athi River; Letter dated 9th May, 2011 from Syokimau Bright Homes Limited to Hon. Wavinya Ndeti, MP, Assistant Minister, Ministry of Youth Affairs and Sports; Letter dated 5th May, 2011 from Syokimau Bright Homes Limited to the Plaintiff; Letter dated 16th April, 2012 from Syokimau Bright Homes Limited to the Plaintiff; Letter dated 12th October, 2015 from Dama Mavoko Welfare Society to the Chairman, National Land Commission, Nairobi; Letter dated 13th March, 2015 from Kyeni Kya Katani S.H.G the Vice Chairperson, National Land Commission, Nairobi; Letter dated 15th September, 2015 from Kinanie Settlers Self Help Group, to Mr. Muhamed Swazuri, Chairman National Lands Commission, Nairobi; Letter dated 24th August, 2015 from New Aimi Ma Lukenya Company to the Plaintiff; Letter dated 19th February, 2015 from Mtojua Welfare Association to the Plaintiff; Letter dated 12th August, 2011 from the Plaintiff to Lukenya West Self Help Group; Letter dated 26th August, 2011 from the Plaintiff to Kathama Welfare Association, Mlolongo; Letter dated 15th May 2012 from the Plaintiff to Mr. Wilson M. Munguti Chairman/CEO, Syokimau Bright Homes Limited; Letter dated 26th August, 2011 from the Plaintiff to the District Commissioner, Athi River; Letter dated 26th August, 2013 from the Plaintiff to the District Commissioner, Athi River; Letter dated 5th November, 2010 from the Plaintiff to the Ministry of Lands, Nairobi; The Plaintiff's Minutes of the meeting held on 26th May, 2011 at their office, Taj Towers, 3rd floor Upper Hill, Nairobi; Letter dated 3rd August, 2012 from the Plaintiff to Hon. Amason J. Kingi, EGH, MP, Ag. Minister for Industrialization, Nairobi; Letter dated 27th September, 2012 from the Plaintiff to Hon. Henry Kosgei, Minister for Industrialization, Ministry of Industrialization, Nairobi; Letter dated 3rd January, 2013 from the Plaintiff to the Commissioner of Lands Ministry of Lands, Nairobi; Letter dated 9th August, 2012 from the Ministry of Industrialization, Office of the Minister to the Plaintiff; Letter dated 16th January, 2014 from the Ministry of Industrialization and Development, Office of the Principal Secretary to the Plaintiff; Article of the Daily Nation Newspaper dated 5th



February, 2016; Article of the Daily Nation Newspaper dated 16th February 2016; Article of the Daily Nation Newspaper (Public Notice, Caveat Emptor); Article of the Daily Nation Newspaper dated 1st August, 2011; Article of the Daily Nation Newspaper dated 7th December, 2015; Article of the Daily Standard Newspaper dated 7th December, 2015; Letter dated 11th September, 2015 from National Land Commission to the Principal Secretary, Ministry of Industrialization & Enterprises Development, Nairobi and the Plaintiff; Letter dated 22nd July, 2015 from the Ministry of Interior and Co-ordination of National Government to the Principal Secretary, Ministry of Industrialization & Enterprise Development, Nairobi and the Chairman National Land Commission, Nairobi; Letter dated 13th November, 2015 from the Office of the Governor, Machakos County to the Chief Executive Officer, Ethics and Anti-Corruption Commission, Integrity, Centre, Nairobi; Letter dated 14th June, 2010 from the National Land Commission to the Plaintiff; Kenya Revenue Authority payment slip dated 31st January, 2017 payment of the annual rent on the respective properties; Plaintiff's cheque No. 20078 of Kshs. 300,584 dated 31st January, 2017; Plaintiff transaction receipt from National Bank towards payment of stamp duty dated 31st January, 2017; Any other documents the court may allow; Abbutals to the suit properties; Awarding letters dated 15th October, 2014 for parcel, Parcel 10425 and Parcel 7815/1; Parcel 10425 Standard Gauge Railway compulsory Acquisition; Gazette Notice 5040 of 25th July, 2014 and 6205 of 5th September, 2014 dated 30th October, 2016; Parcel 7815/1 Standard Gauge Railway compulsory Acquisition: Gazette Notice 5040 of 25th July, 2014 and 6205 of 5th September, 2014 dated 30th October, 2016; Gazette Notice 2777 dated 15th July, 2016.

Evidence of the Defendants including Interested Parties

14. Most of the Defendants including Interested Parties who are registered members of different associations claimed to have entered the suit lands between 1999 upto 2001, respectively without the permission of the Plaintiff. They contended that they had established permanent structures thereon including schools and churches without the Plaintiff's permission. Further, the 3rd and 4th Defendants insisted their land was distinct from the suit properties. KNOVEC claimed the government had allocated them land and they paid standard premium for it. The various associations claimed the Plaintiff had demolished their homes and evicted some of them from the suit properties in the year 2013 and 2023. They sought to be registered as proprietors of suit properties through adverse possession. They produced the following documents as exhibits: Sale brochure of Ndatani Enterprises Company Limited; Title Deed held by Philip Kithome over Title No. Mavoko Town Block 3/1334; Copy of Official Search over Title No. Mavoko Town Block 3/1334; Transfer documents from Philip Kithome; Title Deed issued to us over Title No. Mavoko Town Block 3/1334; General map of the area depicting clear distinction between our parcel and the suit property; Inquiries from our concerned clients relating to our implication in this case; Bundle of photos; Registration Certificate of Mto Mawe Association; List of Mto Mawe Self Help Group officials; Survey map; Sketch map; Copy of Map of Excision of 870 acres from L.R. No. 10425; Letter dated 18th August, 2015; Letter dated 2nd September, 2015; Letter dated 8th September, 2015; Letter dated 23rd September, 2015; Letter dated 12th October, 2015; Letter dated 9th November, 2015; Letter dated 11th November, 2015; Letter to the Plaintiff dated 22nd January, 2015; Letter dated 8th April, 2015 from the Office of Member of County Assembly; Letter to the Defendant dated 15th June, 2015; Letter dated 30th July, 2015 to the National Land Commission; Letter to Chairman County Lands Management Board dated 30th July, 2015



Submissions

Plaintiff's Submissions

15. The Plaintiff in its submissions provided a background of the dispute herein and highlighted the evidence tendered by the respective witnesses. The Plaintiff argued that the Defendants illegally occupied the suit properties and were trespassers thereon. Further, on the Defendants' claim for adverse possession, they contended that none of the witnesses proved that the groups they appeared to allegedly represent were in existence for over 12 years nor that they had been on the suit properties for over 12 years. They submitted that the Defendants had not met the threshold for the grant of orders of adverse possession as they had not proved their claim and were guilty of trespass. Further, that the Defendants sought to rely on the Ndungu Report that had never been implemented. It reiterated that it was hence entitled to the orders as sought in the Plaint. It further argued that the 51st to 273rd Defendants were non-existent entities and produced a map which was not done by a qualified surveyor. To buttress its averments, it relied on the following decisions: *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR; *Ngoje v Nyanjwa & 2 Others* (Environment & Land Case E 022 of 2022) (2023) KEELC 22307 (KLR); *Gabriel Mbui v Mukindia Maranya* (1993) eKLR; *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 Others* (2004) eKLR; *James Kihui Nganga & Another v Esther Njeri Ngahu & 2 others* (2019) eKLR; *Keiyan Group Ranch v Samwel Oruta & 9 Others* (2021) eKLR; *GA Insurance Limited v AINU Shamsi Automobile & Hardware Ltd & 4 Others* (2022) eKLR; *Park Towers v Moses Chege & Others* (2014) eKLR; *Joshua Ngeno v Kenya Power & Lighting Company Limited & County Government of Kericho* (2021) eKLR; *Rhoda S. Kiilu v Jiangxi Water & Hydropower Construction Kenya Ltd* (2019) eKLR and *Mistry Valji v Janendra Raichand & 2 Others* (2016) eKLR.

The Defendants and Interested Parties' Submissions

16. The 3rd and 4th Defendants in their submissions analyzed the evidence adduced and contended that none of the Plaintiff's witnesses identified or mentioned them. Further, that there was no reply to their Defence. They further submitted that the Plaintiff had not proved their case (trespass) against them. They urged the court to fully rely on the titles, searches, Registry Index Map and any other documents they had presented. They reiterated that they had wrongly been enjoined in these proceedings. They sought to be awarded costs. To support their averments, they relied on the following decisions: *Nguku v Republic* (1985) KLR; *Midroc Water Drilling Co. Ltd v National Water & Conservation & Pipeline Corporation* (2020) eKLR; *Kenya Power & Lighting v Samuel Gathiari Cerere* (2019) eKLR; *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* (1980) eKLR; *Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others* (2014) eKLR and *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* (2014) eKLR.
17. The 51st to 273rd Defendants in their submissions provided the background of the dispute herein and relied on the evidence adduced. They submitted that they have been in open, quiet enjoyment, exclusive, uninterrupted, notorious use and occupation of LR No. 10425. Further, that they have utilized the said land for their exclusive benefit and for that, of their family. They reiterated that their claim for adverse possession was rightfully before the court. They further submitted that the Plaintiff did not controvert their evidence that they took possession in 1999. To support their averments, they relied on the Sections 7, 13 and 38 of the *Limitation of Actions Act* as well as the following decisions: *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR; *Githu v Ndeete* (1994) KLR favourably cited in *Kenya Commercial Bank (suing as Administrator of the estate of Paul Njoroge Muchene) v Sarah Njeri Muchene; Wambugu v Njuguna* (1983) KLR 172; *Mombasa Teachers Cooperative Savings*



&Credit Society Limited v Robert Muhambi Katana & 15 Others (2018) eKLR and Samuel Kihamba v Mary Mbaisi (2015) eKLR.

18. Settle Villagers Scheme in their submissions provided a background of the dispute herein and relied on the testimony of its witness John Mutunga Mwangi as well as the exhibits produced. It submitted that the Plaintiff had previously filed a suit against them being No. 93 of 2009 which was stood over generally on the 17th December, 2010 and costs awarded to it. It submitted that the allegations of fraud was not proved against it. It insisted that the recommendations in the Ndungu Commission Report on public land had been implemented as it recommended that title for LR No. 10425 be revoked and reverted to the Government. Further, that the Plaintiff had not presented sufficient evidence to prove the root of their title and that as per Certificate of Title dated the 9th October, 2019, LR No. 10425 is registered in the name of the Cabinet Secretary, Treasury. To buttress its averments, it relied on the following decisions: Charles Karathe Kiarie & 2 Others v Administrators of the estate of John Wallace Mathare (Deceased) & 5 others (2013) eKLR; Paul Muira & Another v Jane Kendi Ikinuya & 2 Others (2014) eKLR and Musonga v Nyati (1984) KLR 425.
19. The 49th Defendant in its submissions relied on the testimony of its witness Paul Wambua Nzei. It contended that the Plaintiff's claim against them was time barred as it cannot bring an action for claim over land after twelve (12) years. It further submitted that it had established its claim for adverse possession. They argued that even though Dama Mavoko Welfare Association was formally registered in 2015, its possession of the land begun in 2001, which the court should focus on. It reiterated that the Plaintiff had not proved its claim and it should be dismissed. It made reference to ELC Petition No. 20A of 2023 (Formerly HC Petition No. 22 of 2019) East African Portland Cement Company Limited v the Attorney General. To buttress its averments, it relied on the following decisions: Dhaneswar V Mehta v Manilal M. Shah (1965) EA 321; Gathoni v Kenya Cooperative Creameries Ltd (1982) KLR 104; Sohanla Durgadass Rajput & another v Divisional Integrated Development Programmes Co. Ltd (2021) eKLR; Bosire Ongero v Royal Media Services (2015) eKLR; Gulam Miriam Noordin v Julius Charo Karisa (2015) eKLR; Geoffrey Kipserem Kosgei v Simion Kimaru Mugun (2022) eKLR; Kasimu Sharifu Mohamed v Timbi Limited (2018) eKLR and Robbery Shume & 3 Others v Samson Kazungu Kalama (2015) eKLR.
20. The 1st and 2nd Interested Parties in their submissions provided a background of the dispute herein and contended that the Defendants have not acquired prescriptive rights over the suit properties but have acquired a protectable right to housing over the suit properties. They argued that the Defendants settled on the suit properties between 2011 and 2013 and as such they have been in illegal occupation of the said land for over ten (10) years. They further submitted that the Defendants had developed various social facilities such as schools, hospitals/ health centres and houses for shelter within the suit properties. To buttress their averments, they relied on the following decisions: Petition No. 3 of 2016: Mitu – *Bell Welfare Society v Kenya Airports Authority & 2 Others: Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition No. 3 of 2018)* (2021) KESC 34 (KLR) and Petition No. 3 of 2019 County Government of Kitui v Ethics & Anti Corruption Commission (2019) eKLR.

Analysis and Determination

21. Upon consideration of the Pleadings including Plaintiff, Defences and Counter-claim, Originating Summons, testimonies of the witnesses and exhibits, the following are the issues for determination:-
 - a. Who is the owner of the suit properties?
 - b. Whether the Defendants and Interested Parties have trespassed on the suit properties.



- c. Whether the Defendants and Interested Parties are entitled to the suit properties through adverse possession.
- d. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- e. Whether KNOVEC is entitled to the orders sought in the Counter-claim.
- f. Whether the 49th Defendant is entitled to the Orders sought in the Originating Summons.
- g. Whether the 51st to 273rd Defendants are entitled to the Orders sought in the Counter-claim.
- h. Who should bear the costs of this suit.

As to who is the owner of the suit properties?

22. The Plaintiff claims to be the registered proprietor of the suit properties and produced various Certificates of Title to that effect. The Interested Party KNOVEC also claimed to have been allocated LR No. 10425 by the Commissioner of Lands and presented a Letter of Allotment including receipt of payment of premium and stamp duty to that effect. PW3 in his testimony confirmed that from their records it was the Plaintiff who owned the suit properties. DW1 who was the official from KNOVEC could not explain how they had been allocated LR No. 10425 which was still registered in the Plaintiff's name. DW1 insisted that since the said parcel of land was in the Ndungu Commission Report, and had reverted back to the Government, they had applied to be allocated the said land. However, there was no indication on whether the title issued to the Plaintiff had been cancelled. I note all the Defense witnesses except DW1 admitted that it is the Plaintiff that owned all the parcels of land in dispute herein. The Settle Villagers Scheme in their submissions argued that LR No. 10425 is public land, as indicated in the Ndungu Commission Report on Public Land. Further, that vide Gazette Notice No. 6205 page 2395, National Land Commission (NLC) did not indicate that LR No. 10425 was owned by the Plaintiff. I note the Plaintiff was issued with its title for LR No. 10425 before the NLC was established and no party produced proceedings from NLC confirming that the said title had been revoked. Settle Villagers Scheme in their submissions insisted that the Plaintiff had not presented sufficient evidence to prove the root of their titles and that as per Certificate of Title dated the 9th October, 2019, LR No. 10425 is registered in the name of the Cabinet Secretary, Treasury.

23. On proof of proprietorship, Section 26(1) of the *Land Registration Act* provides inter alia:-

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

24. While Section 24 (a) of the *Land Registration Act* further stipulates as follows:-

“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....”



25. In the case of Dr. *Joseph Arap Ngok Vs. Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997* the court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

26. From the facts before Court including the legal provisions I have cited while associating myself with the quoted decisions, I find that since the Plaintiff had produced Certificates of Title to prove ownership of the suit lands, while no witness demonstrated that the Plaintiff's title had been revoked by a Court of law, I opine that the mere mention of the title in the Ndungu Commission report did not result in its cancellation. I note ELC Petition No. 20A of 2023 (Formerly HC Petition No. 22 of 2019) East African Portland Cement Company Limited v the Attorney General was dismissed, but the trial Judge did not revoke the Plaintiff's title for L.R. No. 10425. Further, this court takes judicial notice of the fact that the Plaintiff is a government parastatal and most titles held by government entities are normally registered in the name of the Cabinet Secretary Treasury to hold in trust for them, and the mere fact that title to LR No. 10425 is currently in the name of the said Cabinet Secretary, Treasury does not invalidate the Plaintiff's ownership of the said land. In circumstances, I find that the Plaintiff is indeed the absolute proprietor of the said suit properties.

As to whether the Defendants and Interested Parties have trespassed on the suit lands or if they are entitled to the suit properties through adverse possession.

27. The Defendants including Interested Parties claimed to have entered the suit properties between 1999 and 2001. All the Plaintiff's witnesses were emphatic that the Defendants including Interested Parties had entered the suit properties in 2011 when they stopped rearing livestock thereon. The Defense witnesses contended that they entered the suit properties, put up permanent structures thereon including school, hospitals and churches. All the four witnesses of the Plaintiff confirmed that there were persons on the suit lands. Further, PW1 Arnold Mwamodo, the Farm Manager stated that people started entering the suit properties in 2011. It was his testimony that a portion of the suit properties was sold to Superior Homes while another portion was compulsorily acquired for the Standard Gauge Railway Line (SGR). He insisted that there were no intruders on the suit properties in 2001. He confirmed that there were people still building on suit properties today. PW2 and PW3 explained that persons entered the suit properties in 2011, with some of them putting up permanent structures thereon. Further, efforts to thwart their invasion was met with violence. PW2 was emphatic that they were unable to quell the invasion and had to seek the Police assistance to do so. Settle Villagers Scheme's witness confirmed that the Plaintiff evicted them from the suit properties October, 2023 by demolishing their structures.
28. DW2 Bartholomew Nzili Mutuku who was the 74th Defendant and the Secretary of Mto Mawe Self Help Group testified that their members started entering LR No. 10425 in 1999 and did not seek permission of its owner to do so. Further, that in 1999 they were about 500 members. He confirmed that he did not reside on the suit properties and neither was he carrying on business thereon. He admitted that in 1999 he saw a Crusher, which belonged to the Plaintiff on the suit properties. He claimed when they entered the suit properties, they found other groups including Dama Mavoko



Welfare Society, Kinanie, Settle Villagers Scheme and Kyeni Kya Kanini thereon. He however stated that the formation of the groups were triggered by the court cases. Further, that their association was registered in 2017.

29. DW1 John M. Mwangi in his testimony confirmed that the Settle Villagers Scheme entered LR No. 10425 in 2008 with permission from the Government of Kenya. He confirmed that previously their members were residing in Athi River at Bawaziri Cotton Villages and Kasoito. He insisted that LR No. 10425 reverted to the government of Kenya. He made reference to the correspondence from the NLC dated 19th May, 2015 and actually admitted that it is the local District Officer (DO) who showed them the land, where they settled in 2008. Further, that even though they had requested the government for the land, the government had not allocated them, the same. He further testified that in 2016 their members were arrested and they were not served with any eviction notice. I note the Settle Villagers Scheme did not file any documents of their own but relied on documents filed by KNOVEC. DW3 Anthony Mutune Muthini, the Chairman of Mto Mawe Association Chairman claimed their members entered the suit properties in 1999 and commenced subdivision. It was his testimony that it is a Surveyor who drew for them a plan of the position where their members occupied. However, during cross-examination, he explained that they entered the suit properties in 1999 but got registered on 24th July, 2017. Further, that they were few members when they entered the suit properties but the number is now bigger. He however did not provide the names of the fewer members who allegedly entered the suit property in 1999.
30. DW4 Paul Wambua Nzei who was the 49th Defendant and Chairman of Dama Mavoko Welfare Society testified that they entered the suit property in 2001 when there were only Maasai herders on the said land. Further, that they cultivated land along Mto Mawe, built houses and reared goats thereon. He claimed they paved roads and currently they are 2996 members. He confirmed that in November, 2003, houses were demolished and they were claiming 1000 acres through adverse possession.
31. The doctrine of adverse possession, is governed by various legal provisions within the *Limitation of Actions Act* which are highlighted herebelow: Section 13 of the said Act stipulates that:-
- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land. (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land. (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”
32. While, Section 38 (1) and (2) Limitation of the Actions Act stipulates thus:
- “(1) 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. (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

33. Further, Section 41 of the *Limitation of Actions Act* stipulates that:-

“ 1. This Act does not— (a) enable a person to acquire any title to, or any easement over— (i) Government land or land otherwise enjoyed by the Government; (ii) mines or minerals as defined in the *Mining Act* (Cap. 306); (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307); (iv) water vested in the Government by the *Water Act* (Cap. 372); (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered *Land Act* (Cap. 300); or (vi) land vested in the trustees of the National Parks of Kenya; or (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed.”

34. In Civil Appeal No. 56 of 2014, *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal favourably cited the decision of the Supreme Court of India that had discussed the ingredients of Adverse Possession in the following terms:-

“The Supreme Court of India discussed the essentials of adverse possession in *Karnataka Board Of Wakf v Government Of India & Others* [2004] 10 SCC 779 and stated as follows: “In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

35. In the case of *Wainaina vs. Muarai & others* (1976) KLR 227, the Court observed that:-

“The land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary or identification for this purpose that which can be ascertained is certain that which is definitive. It must at least be plotted that if not certain it can be made certain.”

36. From the decisions I have quoted, it is evident that for a party to be successful in a claim for adverse possession, it has to prove the date it entered the disputed land to enable the court to determine when time started running. Further, it has to prove that, it entered the land without permission of the owner, who was aware of its presence on the said land but failed to act. The said possession of a definitive portion of land has to be open, continuous, notorious and uninterrupted for a period of 12 years.

37. In this instance, the Defendants and some of the Interested Parties have claimed the suit properties through adverse possession. However, from the testimony of their witnesses, I opine that none of them



proved the exact period they entered the suit properties. I note the said witnesses represented several welfare groups/associations. It emerged that most of those groups only got registered around the time this suit was filed, with some even having their registration done in 2017. For instance Mto Mawe Self Help Group was registered in 2017 while Dama Mavoko Welfare Association got registered in 2015, yet the suit was filed in 2015. In my view, the twelve years required for the members to claim the land through adverse possession had hence not crystallized. I further note that there were lists of many persons represented, which KNOVEC in its Defence including Counter-claim disputed their existence and their being on the suit properties. From the testimonies of majority of the Defense witnesses, I find that they failed to demonstrate the exact date their members entered into the suit properties and the definitive portion of land, each member occupied. Further, I note since the Plaintiff is a public entity, its parcels of land are indeed public land which Section 41 of the Limitation of Actions Act excludes from a claim of adverse possession. Based on the facts before me while relying on the legal provisions cited as well as decisions quoted, I find that the Defendants (except the 3rd and 4th Defendants) including the Interested Parties' claim for adverse possession must hence fail.

38. As to whether KNOVEC is entitled to the orders as sought in the Counter-claim. In their suit, KNOVEC claimed they had been allotted LR No. 10425 by the government. They contended that they had paid for the Standard Premium as required. I note DW1 confirmed that they relied on documents filed by KNOVEC. Since by the time they were allegedly allocated the said, the title was still in the name of the Plaintiff, I find that the said land was not available for allotment, hence their alleged allotment was void ab initio. In the foregoing, I find that KNOVEC is hence not entitled to the orders as sought in the Counter-claim.

39. As to whether the 49th, 51st to 273rd Defendants are entitled to the Orders as sought in the Counter-claim. Since I have already made a finding that none of the Defendants except the 3rd and 4th Defendants including the Interested Parties are entitled to the suit properties through adverse possession, I hold that the 49th, 51st to the 273rd Defendants are hence not entitled to the orders as sought in the Counter-claim.

As to whether the Plaintiff is entitled to orders as sought in the Plaintiff

40. The Plaintiff sought for various orders which I have enumerated above. I have already made findings on some orders as sought by the Plaintiff. On the prayer for trespass I wish to make reference to, Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which defines it as follows:-

“Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.”

41. Further, Section 3 of the Trespass Act further provides that:-

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

42. On award of damages for trespass and mesne profits, in the case of Duncan Nderitu Ndegwa v. KP&LC Limited & Another (2013) eKLR, P. Nyamweya J (as she then was) held that:-

“As regards the award of mesne profits, these are special damages which not only need to be pleaded but also proved. The Plaintiff did not bring any proof of the basis for the mesne



profits of Kshs. 50,000 per month, but brought evidence to show that the land was in a state that was unusable, and it therefore could not provide any sort of profits...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000 as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass."

43. Further, in the case of Attorney General v Halal Meat Products Limited [2016] eKLR, the Court of Appeal observed that:-

"It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another..... As was succinctly observed by this Court in Juliet Karisa -v- Joseph Barawa & Another - Civil Appeal No. 108 of 1988 (Unreported);

"Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds."

44. Based on my analysis above, I find that the Defendants including Interested Parties have indeed trespassed on the Plaintiff's land by building houses, school and churches thereon knowing fully well the said suit properties did not belong to them. Since I have held that the Defendants including Interested Parties indeed trespassed on the Plaintiff's land, I find that the Plaintiff is indeed entitled to General Damages and mesne profits. However, I note the Plaintiff did not provide valuation reports on the damages including mesne profits it had suffered. I will hence award it Kshs. 5,000,000 as general damages including mesne profits.

45. It is against the foregoing that I find that the Plaintiff is indeed entitled to the orders as sought in the Plaint. In the circumstances, I find that the Plaintiff has proved its case on a balance of probabilities and will enter Judgment in its favour and dismiss the two Counter-claims including the Originating Summons. I will proceed to make the following final Orders:-

- a. A declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unhindered right of possession and occupation of the parcels of land known as LR No. 12948/17 (I.R 39448/1), LR No. 10425 (I.R 17839), LR No. 8784 (I.R 75467), LR No. 7815/1, and LR No. 8786. ('Suit properties')
- b. A declaration be and is hereby issued that the Defendants whether by themselves or their servants or agents and/or otherwise howsoever are illegally in occupation of the suit properties and are accordingly trespassers on the same.
- c. A declaration be and is hereby issued that the Defendants whether by themselves or their servants or agents and/ or otherwise howsoever are not entitled to remain on the suit properties.
- d. A permanent injunction be and is hereby issued restraining the Defendants whether by themselves or their servants or agents and/ or otherwise howsoever from remaining on, continuing occupation of the suit properties;



- e. The Defendants including Interested Parties do grant vacant possession of the suit properties being LR No. 12948/17 and I.R 39448/1, LR No. 10425 and I.R 17839, LR No. 8784 and 1.R 75467, LR No. 7815/1, and LR No. 8786 ('the suit properties') to the Plaintiff, within ninety (90) days from the date hereof, failure of which eviction order do issue and the Officer Commanding Police Station Athi River directed to assist in peaceful execution.
- f. General damages for trespass and Mesne Profits are awarded to the Plaintiff at Kshs. 5,000,000 to be jointly and severally borne by the Defendants and Interested Parties.
- g. Costs of this suit together with interest on (f) above is granted to the Plaintiff, to be jointly borne by the Defendants and Interested Parties from the date of this Judgement.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms. Tusiime for Plaintiff

Mbulu for 1st and 2nd Interested Parties

Murimi for KNOVEC

Ms. Muriithi for Settle Villagers Scheme

Kosgey for 3rd and 4th Defendants

Ouma for 49th Defendants

Mundia for Plaintiff in 43 of 2011

Court Assistant – Simon/Ashley

