



Mwangangi & 10 others v Deposit Protection Fund Board (Liquidator of Thabiti Finance Company Limited); National Bank of Kenya Limited & another (Interested Parties) (Environment and Land Case Civil Suit 1010 of 2013 & 122 of 2012 (Consolidated)) [2024] KEELC 13469 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT
1010 OF 2013 & 122 OF 2012 (CONSOLIDATED)**

OA ANGOTE, J

NOVEMBER 20, 2024

BETWEEN

SAMMY MWANGANGI & 10 OTHERS & 10 OTHERS & 10 OTHERS PLAINTIFF

AND

DEPOSIT PROTECTION FUND BOARD (LIQUIDATOR OF THABITI FINANCE COMPANY LIMITED) DEFENDANT

AND

NATIONAL BANK OF KENYA LIMITED INTERESTED PARTY

NATIONAL BANK OF KENYA LTD INTERESTED PARTY

JUDGMENT

1. The dispute herein concerns two suits which were consolidated, ELC Civil Suit No. 122 of 2012 (OS) and ELC Civil Suit No. 1010 of 2013 (O.S).

ELC Civil Suit No. 122 of 2012 (OS)

2. The Plaintiffs in this suit filed an Originating Summons application dated 6th March 2012. They aver that they are entitled to ownership and registration of titles in their favour by adverse possession of suit properties, LR No. 209/11544, registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913. The Plaintiffs have sought determination of the following questions:

a. Whether the Plaintiffs are entitled by virtue of adverse possession to all the parcels of land known as LR No. 209/11544, registered as Grant No. 54610 and LR No. 209/11545



registered as Grant No. 60913 which are registered in the name of the 1st Defendant and in which the 2nd Defendant has interest.

- b. Whether the plaintiffs should be registered as proprietors of all those parcels of land situate in Nairobi County and known as LR No. 209/11544, registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913.
 - c. If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the 3rd Defendant to give effect to the said findings.
 - d. Whether the Plaintiffs should be paid costs of this suit.
3. The application is based on the grounds set out in the affidavit sworn by Sammy Mwangangi, the coordinator of Mwingeny Settlement Scheme (the group). These grounds are that the 1st Defendant is the registered owner of the suit properties and that the group, which has a membership of more than 5,000 members, has been in continuous and uninterrupted use of the suit properties for more than twelve years, since their birth.
 4. It was deposed by the Applicants that their forefather's history of living on the suit property goes back to 1923; that their forefathers were workers in a farm on the suit land owned by a settler known as Martpoy, and later another one known as Nicko, and that after colonial settlers left, the un surveyed land was bequeathed to their forefather known as Mwingeny and his brother, Kyania.
 5. Sammy Mwangangi averred that while the Plaintiffs were living on the suit land, the 3rd Defendant, without carrying out proper survey, issued certificates of title to the 2nd Defendant on 10-1-1991, which the 2nd Defendant went on to charge to the 1st Defendant; and that they discovered about the issuance of the title in 2000, yet the government had promised that the title would be issued to them. They averred that they moved to court to claim the land through HCCC No. 298 of 2003, which was dismissed on 9th July 2012.
 6. The deponent claims that the Defendants have had knowledge of the their adverse possession of the land for all the aforesaid period; that they have developed the land and heavily invested in the suit land adversely to the Defendants and with their knowledge; that the 1st and 2nd Defendants have never used or stepped on the suit property at any time even when they were issued with the certificates of title and that the 2nd Defendant's interest on the suit land is equal and takes priority to that of the 1st Defendant.
 7. They assert that on 1-03-2012, the 2nd Defendant put up an advertisement in the newspaper giving them up to 31st March 2012 to move out of the suit property failure to which they would evict them; that when the 2nd Defendant accepted the 1st Defendant's charge on the property, it was aware that they were on the land and that the charging of the suit land was fraudulent and they had superior priority to the Defendant when the charge was registered.
 8. The 2nd Defendant filed a Defence and Counterclaim dated 22nd April 2013. The 2nd Defendant averred that at all material times, the 1st Defendant was its customer and maintained an account with them; that the 1st Defendant is the registered proprietor of the suit land for a leasehold term of 99 years from 1st December 1991 and that the 1st Defendant lawfully charged the suit to the 2nd Defendant for a sum of Kshs. 15 million together with costs and interests through a legal charge dated 9th September 1993 and registered on 11th November 1993.
 9. It was averred that the 1st Defendant has completely defaulted in servicing the disbursed loan facilities which stood at 25 million as at December 1997 and that the 1st Defendant is presently insolvent having



been placed under liquidation by the Deposit Protection Fund Board since 19th December 1994 on appointment by the Central Bank of Kenya.

10. The 2nd Defendant averred that this suit is statute barred by res judicata following dismissal of the Plaintiffs' ancestral claim to the land by this court in Nairobi HCCC No. 298 of 2003, which suit is materially similar to the one before this court, as it involves similar parties and reliefs and that this Court has conclusively evaluated and dismissed similar evidence on merit in the previous proceedings.
11. It was averred by the 2nd Defendant that the Plaintiffs have on several occasions acknowledged the Defendant's title to the suit land and this claim is an afterthought aimed at stealing a march against them; that the 2nd Defendant's interest in the suit land, as chargee, ranks in priority in law to that of the Plaintiffs by virtue of registration, and that the said interest was procured before any genuine claim based on adverse possession could set in.
12. The 2nd Defendant alternatively asserts that the claim of adverse possession has been prematurely invoked as 12 years have not lapsed since April 2003, when the 1st and 2nd Defendants were served with court papers in HCCC No. 298 of 2003, and were therefore deemed by law to be aware of the Plaintiffs alleged interest in the suit land.
13. It was averred that at the time of the institution of Nairobi HCCC No. 298 of 2003, the Plaintiffs were not in occupation of the suit land and there were no developments thereon, as the occupation and developments have only recently taken place, during the subsistence of court proceedings, with the full knowledge of the 2nd Defendant's legitimate interest.
14. In the Counterclaim, the 2nd Defendant asserted that it has notified the Plaintiffs about its interest in the land but the Plaintiffs have persisted in continuing to carry out acts of trespass, torts and fraud.
15. In their counterclaim, the Defendant has sought the following reliefs:
 - a. A temporary injunction restraining the Plaintiffs by themselves, their families, agents, servants, employees, and/or any person claiming any right whatsoever under them from entering upon, remaining thereon, removing from, wasting, subdividing, digging on, excavating, fencing, erecting any building, development and/or structure whatsoever thereon or otherwise dealing with the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 11545 registered as Grant No. 60913 in any manner interfering with the 1st Defendant's ownership, possession, use and enjoyment of the same and/or the 2nd Defendant's proprietary interest as a chargee thereof until the hearing and determination of this suit.
 - b. A permanent injunction restraining the Plaintiffs by themselves, their families, agents, servants, employees, and/or any person claiming any right whatsoever under them from entering upon, remaining thereon, removing from, wasting, subdividing, digging on, excavating, fencing, erecting any building, development and/or structure whatsoever thereon or otherwise dealing with the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 11545 registered as Grant No. 60913 in any manner interfering with the 1st Defendant's ownership, possession, use and enjoyment of the same and/or the 2nd Defendant's proprietary interest as a chargee thereof.
 - c. A mandatory interlocutory injunction compelling the Plaintiffs by themselves, their families, agents, servants, employees and/or any other person claiming on their behalf to vacate forthwith the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913 and to forthwith remove all the building materials and machinery from the said property and to demolish all illegal structures erected



thereon and remove all debris thereon at their own cost failure upon which the Defendant is at liberty to demolish and remove all illegal structures erected thereon and debris at the Plaintiffs cost pending the hearing and determination of this suit.

- d. A mandatory permanent injunction compelling the Plaintiffs by themselves, their families, agents, servants, employees and/or any other person claiming on their behalf to vacate forthwith the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913 and to forthwith remove all the building materials and machinery from the said property and to demolish all illegal structures erected thereon and remove all debris thereon at their own cost failure upon which the Defendant is at liberty to demolish and remove all illegal structures erected thereon and debris at the Plaintiffs cost.
- e. An order of eviction of all the Plaintiffs, their families, agents, servants, employees and/or any person claiming any right whatsoever under them, from the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913.
- f. That the Officer commanding Buruburu Police Station do provide adequate security and protection for the Defendant and its contractors during the demolishing of all illegal structures erected on the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913 and during the construction and/or development of a perimeter wall at the Plaintiff's own cost and expense.
- g. General and aggravated damages for trespass against the Plaintiffs to be assessed by this Honourable Court.
- h. Costs of this suit.
 - i. Interest on (g) and (h) above at court rates until payment in full.
- j. Any other relief that this Honourable Court may deem fit and just to grant.

ELC Suit No. 1010 of 2013

16. The Plaintiffs in this matter filed an Originating Motion dated 20th August 2013 against Deposit Protection Fund Board, which is the liquidator of Thabiti Finance Co. Ltd. The Motion raised identical questions to those in ELC Suit No. 1010 of 2013, only specifying that Thabiti Finance Co. Ltd is under liquidation. These are:
 - a. Whether the Plaintiffs are entitled by virtue of adverse possession to all the parcels of land known as LR No. 209/11544, registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913 which are registered in the name of the Thabiti Finance Company Limited (under liquidation).
 - b. Whether the plaintiffs should be registered as proprietors of all those parcels of land situate in Nairobi County and known as LR No. 209/11544, registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913.
 - c. If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the 3rd Defendant to give effect to the said findings.
 - d. Whether the Plaintiffs should be paid costs of this suit.



17. The grounds of the Motion are that the Defendant, Deposit Protection Fund Board, is the liquidator of Thabiti Finance Company Limited, which is the registered owner of the suit land; that the Plaintiffs have been in continuous and uninterrupted use of the suit land for more than twelve years and that the Defendant and the Company have had knowledge of the Plaintiff's adverse possession of the suit land.
18. It was deposed by the Plaintiffs that they have developed and heavily invested in the land adversely to the Defendant's interest; that the company and Defendant have never used or stepped on the suit land at any time and they have therefore acquired title to the suit land by effluxion of time and they are entitled to ownership.

Hearing and Evidence

19. Sammy Mwangangi, PW1, stated that he is the Chairman of the Mwengenyere Settlement Scheme and that he lives on the suit property in Mwengenyere, in Njiru. He produced the Annexures to the Affidavit in support of the Originating Motion as PEXB1. He also adopted the Supporting Affidavit as his testimony in chief.
20. In cross-examination, he asserted that his great grandparents were on the land; that they asked the government to give them the land; and that they later learnt that titles to the land had been issued to the 1st Defendant. He averred that before the 1st Defendant acquired title, the land was previously government land. He asserted that he is 72 years old and has been on the land throughout his life and was born on the land.
21. The 1st Defendant adduced the testimony of one witness, DW1, Stanley Muliro, who works at the Deposit Protection Fund Board. He relied on his statement and produced a bundle of documents as DEXB1.
22. In cross-examination, DW1 asserted that the land was charged in 1993; that he did not know the state of the land in 1993, neither did he know if the 1st Defendant visited the land before they acquired the land in 1991, and that Thabiti never developed the land, and it went into insolvency in 1994, one year after charging the property.
23. The 2nd Defendant also presented one witness, DW2, Onesmus Mhuri, a Credit Revenue Analyst working for the 2nd Defendant, who adopted the statement by Paul Chelangat, who was unavailable. He produced a bundle of documents as DEXB2.
24. He testified that the loan to Thabiti Finance is still outstanding and was Kshs. 24 million as at 31st December 1997; that the company went under and they were left with the security, which they were to sell; that they found that the land was occupied by squatters; that before charging the land, the valuer visited the land, and that the valuation report of 1993 met the threshold, and it did not indicate that the land had squatters.
25. It was the evidence of DW2 that he only had a valuation report of 2011, which was at page 109. He asserted that they never filed any suit for eviction of the squatters and that is the liquidation of Thabiti that has inhibited them from realizing the security.

Submissions

26. The Plaintiff's Counsel submitted that the circumstances of this case have satisfied the conditions for a successful claim of adverse possession. They relied on the case of Celine Muthoni Kithinji vs Safiya Binti Swaleh & 8 others (2018) eKLR citing Mbira vs Gachuhi (2002) IEALR 137.



27. Counsel submitted that the 1st Defendant is the owner of the suit properties which he acquired on 10th January 1991 and charged it to the 2nd Defendant in 1993; that the Plaintiffs have been in active use of the suit land, having constructed on the same and lived on the land since 1923, and that the Defendants confirmed that they were aware that the Plaintiffs were on the land.
28. Counsel submitted that no suit against the Plaintiff was filed for eviction nor trespass; that the charge over the land was done when the Plaintiffs were on the suit land; that the occupation of the land by the Plaintiffs was adverse to the Defendants' interest and that the Defendants admitted that the Plaintiffs have constructed on the land and no notice was issued for the Plaintiffs to be evicted from the lands.
29. Counsel for the 2nd Defendant submitted that the suit property is registered in the 1st Defendant's name and that the legality of the titles have not been challenged. He argued that the Plaintiff's statements that the suit properties were ancestral lands are unsubstantiated.
30. It was Counsel's submission that this suit is res judicata and ought to be dismissed in its entirety as the parties had litigated over the suit property in HCC No. 298 of 2003 and that there was a binding decision rendered by a competent court, which has not been set aside or varied. He relied on the Court of Appeal case of Bank of Africa Kenya Limited & another vs TSS Investment Limited & 2 Others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment).
31. Counsel submitted that the Plaintiffs have not proved any of the elements to establish they have acquired title through adverse possession. He relied on the cases of Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Muhambi Katana & 15 others [2018] eKLR and Loise Nduta Itotia v Aziza Said Hamisi [2020] eKLR.
32. Counsel for the Defendants asserted that because the title was issued on 1st December 1991, and prior to the issue of title, the suit property was public land, adverse possession cannot lie over public land. Counsel relied on Ravji Karsan Sanghani vs Peter Gakunu [2019] eKLR.
33. It was submitted that the period of twelve years had not lapsed before the filing of HCC No. 289 of 2003 on 26th March 2003, because the lapse of 12 years was on 1st December 2003. This, they argue, taints the Plaintiff's claim and interrupts the continuous duration of occupation, if any.
34. Moreover, Counsel submitted that the Plaintiff's occupation has not been peaceful as evidenced by the attempts to realize the suit property, numerous notices to vacate and the several cases between the parties. They urge that the Plaintiffs are therefore not entitled to the prayers they have sought.

Analysis and Determination

35. The following issues arise for the determination by this court:
 - a. Whether this suit is res judicata.
 - b. Whether the Plaintiffs have obtained title to the suit properties. by way of adverse possession.
 - c. Whether the 2nd Defendant's counterclaim is merited.
36. The Defendant in this matter has asserted that this suit is barred by the doctrine of res judicata as the Plaintiffs' ancestral claim to the land by this court in Nairobi HCCC No. 298 of 2003, which suit is materially similar to this suit, as it involves similar parties and reliefs, has been determined.



37. This court is guided by Section 7 of the *Civil Procedure Act* which provides as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

38. The Supreme Court expounded on the concept of res judicata in the case of John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), as follows;

“...The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:

“... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”.

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction; and
- (v) finality of the previous decision.”

39. The Plaintiff's claim is that this suit is res judicata, pursuant to the judgment of the court in Nairobi HCCC No. 298 of 2003. In its bundle, the 2nd Defendant has attached a copy of the documents filed in HCCC No. 298 of 2003, particularly the Plaintiff, the 2nd Defendant's Defence, a copy of the ruling striking out the 2nd Defendant from the suit and a copy of the judgment.



40. This court has had occasion to review these documents. In the Plaintiff in HCCC No. 285 of 2003, filed on 31st March 2003, the Plaintiffs' claim was against the Commissioner of Lands; Attorney General; Thabiti Finance Co. Ltd; National Bank of Kenya; officials of Wanga Jua Kali Association, James Gamau Wainaina, Lucy Nyawira, Sera Wanjiku; and trustees of Mwituiria Self Help Group, Simon Muturi Wanguo, Raphael Mwangi and Paul Kahuti Kondiah.
41. The Plaintiffs' claim was that them and their forefathers have been residents on the suit property since 1926; that despite being residents on the land, they were informed in 1998 by the chief that the land was government land; that the government through its agents gave them permission to settle and develop the land and that unknown to the them, the Commissioner of Lands secretly and fraudulently demarcated the suit property to the 3rd-10th Respondents.
42. The Plaintiffs prayed for an order compelling the Commissioner of Lands to give priority to them and register the land in their name; an order restraining the Defendants from evicting them or interfering with their quiet possession and a declaration that the suit land is their ancestral land. The Plaintiffs in that suit also sought for an order compelling the 1st Defendant to cancel all the grants or any allocation in respect of the suit land.
43. In the judgment delivered on 20th June 2012, the court held that the Plaintiffs had failed to prove that the suit property was owned by the alleged Europeans or that the land was at any time their ancestral land; that the suit land was government land which was previously unalienated and that the Plaintiffs failed to demonstrate that they had an interest in law in the suit property.
44. It is clear that the earlier suit was a claim of fraud and sought for the title to the land to be issued in favour of the Plaintiffs.
45. In this suit, the Plaintiffs' claim is based on the same factual matrix as was raised in the earlier matter. This is that they have been residents on the suit land, which land their forefathers occupied since 1926 and that the government issued a title to the 1st Defendant in 1991.
46. The Plaintiffs have however sought to take another bite at the apple by relying on the doctrine of adverse possession rather than their ancestral ownership claim. This is evident as the orders sought in the former suit and the one before this court are the same, being ownership of the suit properties in favour of the Plaintiffs.
47. Even if this court were to find that this suit is not res judicata, it is trite that one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. This was held by this court in *Haro Yonda Juaje vs Sadaka Dzenko Mbauro & Kenya Commercial Bank Limited (Land Case 106 of 2007)* [2014] KEHC 6665 (KLR) (16 March 2014) (Ruling). A claimant under the doctrine of adverse possession can therefore not challenge the legality of the Defendant's title.
48. The facts as adduced by the Plaintiffs are that the Mwengenyu Settlement Scheme members have been in continuous and uninterrupted use of the suit properties for more than twelve years, since their birth, and their forefathers' history of living thereon goes back to 1923. They assert that while they were living on the suit land, the 3rd Defendant, without carrying out proper survey, issued certificates of title to the 2nd Defendant on 10-1-1991, which the 2nd Defendant went on to charge to the 1st Defendant.
49. It is apparent that the Plaintiffs do not admit the validity of the 1st Defendant's title. Secondly, the claim that the Plaintiffs were on the property even before the 1st Defendant was issued the title, and that neither the 1st nor the 2nd Defendants have ever been in possession of the suit property, invalidates the Plaintiffs claim for adverse possession.



50. This is because the claim of dispossession by adverse possession, assumes that there was in fact possession by the registered owner of the suit property. The possession of the suit property by the Plaintiffs was therefore without the necessary animus possidendi, a critical element to establish adverse possession.
51. In *Mwatando Mwangambo Wasanga vs Ngaruko Mwangome, Muye Mwangome, Bogosha Ndago, Gambo Kisola, Ndago Mwangome, Dzombo Gulani, Munkgame Angome Shuma, Gambo Muye, Charo Shutu, Balozi Shutu & Mulji Devraj & Bross Ltd* [2014] KEELC 456 (KLR), this court held as follows:

“In the case of *Haro Yonda Juaje vs Sadaka Dzengo Mbauro-Malindi HCCC NO. 106 of 2007* (OS), I held that one cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land, and that the registered owner has never been in possession of such land.

In the said case, I held that the assertion by a claimant that he was not aware that the land was registered in favour of some person against whom time could start running means that the claimant did not have the animus possidendi to acquire the land. That is what section 13 of the Limitation of Action Act requires for one to succeed in a claim for adverse possession.

The computation of time for a claim of adverse possession can therefore only start running from the time that the claimant dispossessed the true owner of the suit property or from the time the true owner discontinued his possession. One can only be dispossessed of his land or discontinue his possession if he was in possession of the land in the first place, which seems, according to the Plaintiff's own deposition, was not the case.

In the case of *WAMBUGU VS NJUGUNA* (1983) KLR 173, the Court of Appeal held as follows:

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

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

The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the animus possidendi to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite animus possidendi to acquire land by adverse possession by showing the circumstances under which he dispossessed the true owner or the circumstances under which the true owner discontinued his possession.

One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averments are that the titles which were issued to the Defendants fraudulently



acquired, then his cause of action would be for the rectification of titles by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession.”

52. On this basis, this court answers the questions raised in the Plaintiff’s Originating summons in the negative.
53. The 2nd Defendant in its counterclaim has asserted that the 1st Defendant is the registered proprietor of the suit land for a leasehold term of 99 years from 1st December 1991 and that the 1st Defendant lawfully charged the suit property to the 2nd Defendant for a sum of Kshs. 15 million together with costs and interests through a legal charge dated 9th September 1993 and registered on 11th November 1993.
54. In support of their counterclaim, the 2nd Defendant has produced a copy of the letter of offer for a facility; a copy of the resolution of the 1st Defendant to borrow and create a legal charge in the 2nd Defendant’s favour; a copy of the legal charge over the suit property and a statement of account of the 1st Defendant between January 1992 and December 1997. On this basis, this court is satisfied that the 2nd Defendant has an interest in the suit properties.
55. This court has already upheld the title in the name of Thabiti Finance Company (Under Liquidation). This is upon the finding that the Plaintiffs have not proved that they obtained title to the suit property by way of adverse possession. On the preponderance of the evidence adduced by the 2nd Defendant, this court is persuaded that the 2nd Defendant has established its counterclaim.
56. The 2nd Defendant has claimed for general damages for trespass. Indeed, this court has found that the Plaintiffs are on the 1st Defendant’s property. However, no evidence of the nature of trespass has been adduced by the 2nd Defendant. This court therefore lacks a basis to award appropriate damages. The claim for damages is dismissed.
57. In conclusion, this court finds that the Plaintiffs have failed to prove their claims in ELC 1010 of 2013 and ELC 122 of 2012. This court has found the 2nd Defendant’s counterclaim in ELC 122 of 2012 to be merited. The following final orders hereby issue:
 - a. The Plaintiff’s two suits are hereby dismissed with costs.
 - b. A permanent injunction is hereby issued restraining the Plaintiffs by themselves, their families, agents, servants, employees, and/or any person claiming any right whatsoever under them from entering upon, remaining thereon, removing from, wasting, subdividing, digging on, excavating, fencing, erecting any building, development and/or structure whatsoever thereon or otherwise dealing with the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 11545 registered as Grant No. 60913 or in any manner interfering with the 1st Defendant’s ownership, possession, use and enjoyment of the same and/or the 2nd Defendant’s proprietary interest as a chargee thereof.
 - c. A mandatory permanent injunction is hereby issued compelling the Plaintiffs by themselves, their families, agents, servants, employees and/or any other person claiming on their behalf to vacate the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913, to take effect upon 90 days of the delivery of this judgment and the Plaintiffs shall at such time, remove all the building materials and machinery from the said property and demolish all illegal structures erected thereon and remove all debris thereon at their own cost.



d. An order of eviction be and is hereby given against all the Plaintiffs, their families, agents, servants, employees and/or any person claiming any right whatsoever under them, from the property known as LR No. 209/11544 registered as Grant No. 54610 and LR No. 209/11545 registered as Grant No. 60913, to take effect upon 90 days of the delivery of this judgement.

e. Each party shall bear their own costs for the suits and the counter claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Plaintiff

No appearance for Defendant

Court Assistant: Tracy

