



**Omar & 51 others v Jailaikhani (Environment & Land Case 244 of 2020)
[2024] KEELC 13881 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 244 OF 2020
LL NAIKUNI, J
DECEMBER 17, 2024**

BETWEEN

MARIAM OMAR & 51 OTHERS PLAINTIFF

AND

ABDILLAHI EBRAHIM JAILAIKHAN DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement by this Honourable Court pertains to a suit instituted by Mariam Omar and 51 Others, the Plaintiffs/ Applicants herein against Abdillahi Ebrahim Jailaikhani, the Respondent herein by way of Originating Summons on the 24th December, 2020 filed on 28th December, 2020 premised under the provision of Order 37 Rule 4 of the Civil Procedure Rules 2010; Section 38(1) of the Limitation of Action Act and all enabling provisions of the law.
2. Upon service of the Originating Summons, the Defendant/ Respondent responded through filing of the Replying Affidavit sworn on 24th March, 2021 and the Plaintiffs/Applicants responded to the Replying affidavit through a response sworn on 4th May, 2021.

II. Court directions before the hearing

3. On 20th September, 2022, directions were taken under the provision of Order 37 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010. The Originating Summons was converted to a Plaint. Court conducted a Pre – Trial Conference whereby all parties ascertained having fully complied with the provision of Order 11 of the Civil Procedure Rules 2010. Hence, the Honourable Court set the hearing date on 24th November, 2022 which date was adjourned to 1st March, 2023. The Plaintiffs called PW - 1 on the same day and closed their case thereafter. The Defendant/ Respondent called his witnesses on 31st January, 2024 after which he closed his case.



III. The Plaintiffs/Applicants' case

4. The Plaintiffs/Applicants claimed entitlement of the suit property known as plot number MN/11/4056 CR. NUMBER 21862 (Hereinafter referred to as "The Suit Land") by virtue of land adverse possession. Thus, he sought for the following orders:-
 - a. That the Plaintiffs/Applicants are entitled to ownership of all that parcel of land known as plot No. MN/11/4056 with CR NO 21862 by virtue of adverse possession of land and a vesting order to be issued in favor of the Plaintiffs/Applicants over the said plot No.MN/11/4056 with CR NO 218662 situated in Utange area of Mombasa County.
 - b. That costs of this application be awarded to the Plaintiffs /Applicants.
5. The Original Summons was based on the following grounds, testimonial facts on the face of it and the averments made out under the 10 paragraphed supporting affidavit sworn by MARIAM OMAR, the 1st Plaintiff/ Applicant sworn on the same day with the Originating summons. She averred: -
 - a. The Plaintiffs/Applicants and their families had been in continuous and uninterrupted occupation of the suit property over twelve (12) years.
 - b. The Plaintiff/Applicants had taken care of the suit property for more than twelve (12) years, developed the same with the full knowledge of the Defendant/Respondent as per copies of sets of photographs annexed in the affidavit and marked as "MO - 2".
 - c. The suit property had a title and known as Plot No. MN/II/4056 CR No. 21862 situated at Utange, Mombasa County annexed in the affidavit were copies of the title deed and marked as "MO - 3".
 - d. The Plaintiffs/Applicants moved into the suit property more than twenty years ago with the Respondent's knowledge and the Plaintiffs/Applicants had not seen the registered owner since then.
 - e. They did not have any other home now and do their families known of any other home other than suit property.
 - f. They had been advised by their advocates on record; V. Chokaa & Co. Advocates that pursuant to provisions of the Limitation of Action Act Cap. 22 of the Laws of Kenya they were entitled to claim ownership of the property by virtue of being in uninterrupted possession for over twenty years.
 - g. It was therefore in the interest of justice that we pray that this Honourable Court grants the Plaintiffs/Applicants legal ownership to the suit property by allowing the prayers herein
6. The Plaintiffs/Applicants also responded to the Replying Affidavit through a 17 Paragraphed responses of the Replying Affidavit sworn on 4th May, 2021 by MARIAM OMAR, who deponed that:-
 - a. All those photos annexed herewith as annexures "MAJ - 3" in the said Replying affidavit were fake and edited photos just in order to mislead this Honorable Court in knowing the truth of the matter in the ground.
 - b. They had been living in the said plot No. 4056/11/MN for many years some of them for almost over 30 years with the full knowledge of the Respondent herein as per our statements in the Originating Summons herein.



- c. It was true that the Respondent left them sometime back many years and went to live at Kuze in Mombasa Island as evidenced in under Paragraphs 7 and 8 of the Maryam Abdallahi Jailaikhan affidavit.
 - d. It was not true that at any one time the Respondent had threatened to evict them with intervention of Bamburi Police Station as there was no proof of any such report that was reported at the said Police Station or any Occurrence Book (OB) Number that was exhibited herein.
 - e. She would challenge the Respondent under the contents of Paragraph 11 of her affidavit to proof that it was indeed that the police on 5th February 2017 whom delayed in taking action but she is just lying and tarnishing the good Police men and women they had in this Country as they were first in acting in any eventuality.
 - f. The Respondent was advised very well by his Advocates on record to file suit in order to evict them by then but the deponent choose not by alleging that she had no money not knowing that he could be also been advised to sue as paper Under the provision of Order 33 of the Civil Procedure Rules, 2010 of the Laws of Kenya due to the urgency of the matter.
 - g. The Respondent was also well advised by Police that she should seek court order for eviction as in her Paragraph 16 of her affidavit but still she opted not for reasons only known to her.
 - h. On 28th December, 2020, they filed this suit under Originating Summons dated 24th December 2020 seeking to be duly recognized by this Honorable Court as the bona fide owners as per the provision Order 37 of the Civil Procedure Rules, 2010 and Section 38 (1) of Limitation of Actions Act, Cap. 22 of the Laws of Kenya.
 - i. On 22nd January 2021 the Respondent was served with the said Originating Summons at Kuze in Mombasa Island where they knew there before and the same was acknowledged receipt as per annexed affidavit of service herewith and marked as “MO - 1”.
 - j. The Respondent stayed for almost for over two months since he was served and was supposed to file his reply before the expiring of 15 days as it is required by Law and only to file his reply on 29th March 2021.
 - k. By that delay the Respondent had shown that he had no interest on the said property and not knowing that the Respondent knew over their presence in that land for long time as he just left them on the same property and they had invested heavily on it now.
 - l. It showed that either the way the Respondent behaved having known our presence and time they had lived there for many years it would be very wrong for the Respondent to state that they be evicted now after their investing heavily on that property with his ‘full’ knowledge.
 - m. She denied all the contents of the Replying affidavit of Maryam Abdallahi Jailaikhan dated 24th March 2021 save for the few contents that she had stated.
 - n. She therefore prayed that this Honorable court to dismiss the Respondent’s Counter - Claim with costs and enter Judgment as prayed in the Originating Summons
7. The Plaintiffs/ Applicants called PW - 1 on 1st March, 2023 at 2 P.M. and he testified as follows:-



A. Examination in Chief of PW - 1 by Mr. Gitonga Advocate.

8. PW - 1 was sworn and testified in Swahili language. She identified herself as MARIAM OMAR MAINGU, a Citizen of Kenya holding a national identity card with all the particulars showed to Court. She lived in the Utange area of the Constituency of Kisauni of the County of Mombasa. She was a resident there on the suit land. Her father was an employee of Mzee Abdulahi; she did not know the years but it was a while. All her children and grandchildren were born there; her father had also died in the suit property. She had built a house and she lived there up to the time of the trial.
9. According to PW - 1 she had never seen anyone claiming the land as his. The police had never called her as a result of any complaint lodged. She had never been interrogated. This was her place and she occupied. According to her Mzee Abdullahi who had employed her father left to an unknown place. They had neighbours. Her father was buried on the land. Her plea was to be granted the land; to continue staying on the suit land. She never wanted to be blamed for having encouraged others to live on the land.
10. PW - 1 intimated to the court that she had filed a statement dated 21st December, 2020 and filed the documents attached to the OS – 3 documents produced as Plaintiff Exhibits numbers 1 to 3. The photographs had no certificate of production.

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

11. According to the witness, her evidence showed she was born in Kilifi. She had not engaged a land surveyor to show her her land. With reference to “MFI - 2 and 3” photographs; she had not pointed out or shown her house. Her father was an employee of Abdullahi as a caretaker; he had his stand shed within the land. She had never brought any photographs to Court.
12. PW - 1 further stated that she had built a house on the suit property. It did not have an approval plane. She knew Mzee Abdullahi; he had brought some photographs – from the Replying Affidavit of the Respondent; she could not see the House of Abdullahi. These photographs were not taken from the land which they were claiming. She refuted that she knew Mzee Abdullahi. She stated that she was not lying. She had no photographs for the burial grave but she knew it was there and where it was.

C. Re - examination of PW - 1 by Mr. Gitonga Advocate

13. PW - 1 confirmed that she was born on the suit land but her identification card showed as per customs that it was Kilifi. She had no case for the building without a plan. She made claims for the suit land. She did not recognize nor know the photographs. From the photograph; there was no house for Mzee Abdullahi.
14. On the same day the Plaintiff called PW - 2 who testified as follows:-

D. Examination in Chief of PW - 2 by Mr. Gitonga Advocate.

15. PW - 2 was sworn and testified under oath in Swahili language. He identified himself as SALIM MZEE FADHILI, a citizen of Kenya and with all the particulars in the national identify card shown to Court. He got there in year 2002. It was full of grass. He built a temporary house. He was now had a permanent house in the year 2006. From the time he was building and he never got any interruption; he did not know the person. He had sued; he had never been harassed and he recorded the statement on 24th December, 2021. According to him he was no longer living there as he was renovating his house. That his place; he had over 51 neighbours and he knew PW - 1 – Mariam; he thought it was her land. There was a few burial sites.



E. Cross Examination of PW - 2 by Mr. Abubakar Advocate.

16. PW - 2 confirmed that he had been on the land since year 2006. He did not know Mzee Abdullahi. He did not want to dispose any one's land. He did not have the approved plan of his house. He had not brought any photographs. PW - 2 stated that they had not invaded the land. It was true that he had built a temporary shelter but later on a permanent one. There were burial sites. They were not covered.
17. According to PW - 2 they had spoken the truth. He knew all the Petitioners as they lived there. With reference to the photographs from the replying affidavit by the Respondents; he did not know. They were not from that land.

F. Re - examination of PW - 2 by Mr. Gitonga Advocate:-

18. PW - 2 confirmed that he was a resident and that he only left the property so as to enable renovation.
19. On 1st March, 2023 the Plaintiffs through their Legal Counsel Mr. Gitonga marked their case closed.

IV. The Defendant/ Respondent's case

20. The Defendant/ Respondent responded through a 28 paragraphed replying affidavit of MARYAM ABDILLAHIJALALKHAN, a daughter Abdillahi Ebrahim Jalalkhan, the Respondent herein, and a holder of a General Power of Attorney registered on 10th December, 2018 sworn on 24th March, 2021 who averred that:-
 - a. She confirmed that the Respondent was the registered proprietor as owner of a freehold interest of Plot No. 4056 Section 11 Mainland North in respect of which he held a Power of Attorney. Annexed in the affidavit and marked "MAJ - 2" a copy of the Title Deed and the deed plan.
 - b. The Respondent inherited a portion of the original Plot N0.389 section 11 Mainland North from his aunt Fatma Said together with his two sisters Rukia Mohamed Said and Fatma Abdulwahab.
 - c. As a consequence of the said inheritance, Plot No 389/11/MN was subdivided and the Respondent was bequeathed the subdivision No. 4056/11/MN which is the suit property and was duly issued with Title Deed on 27th September, 1991.
 - d. The Respondent used to live on the suit property when he was young which was used as a farm by his Aunt who had planted coconut trees and other crops. Annexed in the affidavit and marked as "MAJ - 3" were photographs showing the house in which he lived and the crops taken in 2018 by himself using my camera make NIKON D5500 DSLR and processed at CAMEOTO STUDIO.
 - e. The Respondent shifted to Kuze in the Island and left a care taker at the farm house to take care of the farm but he used to visit the farm on weekends and on holidays.
 - f. It was not until sometime on 5th February, 2016 when unknown persons entered the suit property and started harvesting and selling it to constructors who started mining sand for sale.
 - g. The Respondent reported the matter to Bamburi police station about the invention and the police assured him that they would take action against invaders. Annexed in the affidavit and marked as "MAJ - 4" a flash drive containing a video taken by himself using his mobile phone



Samsung SM-A710E and copied into a flash disk by himself using his desk top make HP as proof of the said invention.

- h. The police delayed in taking action and on 5th February, 2017, the Respondent was informed by phone by the caretaker that some people had started constructing houses on the suit property and the Respondent sent me and my husband Hassan Taib and his cousin Mohamed Ahmed to go to the suit property and confirm.
- i. They went to the suit property and found the farm empty save for about three people who had constructed houses on the suit property and took a video of the farm on the said day.
- j. By the time the Respondent was ill and incapable of active running up and down and he tasked her to follow up the issue on his behalf.
- k. They went to the suit property and found the farm empty save for about three people who had constructed houses on the suit property and took a video of the farm on the said day.
- l. She then sought advice from Messrs. Aboubakar, Mwanakitina and Company Advocates on how to tackle the invaders and she was advised as follows that:-
 - i. Her father donated a Power of Attorney to him to enable him file suit on his behalf which advice she duly followed.
 - ii. She was to pay a deposit of a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-) to file suit seeking eviction of the invaders.
 - iii. She was to file that suit within twelve (12) years from the date of invasion which was 5th February, 2017.
- m. Because she did not have the money she sought time to fundraise from family and friends.
- n. She also sought police help who informed him that they had been advised by their superiors that they should not evict squatters without court orders.
- o. It was while she was gathering funds to institute suit for eviction of the invaders that she was served with the summons.
- p. It was therefore clear that the Applicants had not been on the suit property for more than four (4) years and therefore their claim is based on falsehoods and was intended at misleading this Honorable court as to the truth of the matter.
- q. The Respondent and herself had protested their invasion of the suit property to the police from the first day they stepped foot on the suit property but the police have taken no steps to protect their interest.
- r. The Applicants were not therefore entitled to the orders sought and the summons should be dismissed with costs.
- s. Considering the aforesaid she wished to counter – claim against the Applicants as follows.
- t. This Honourable Court did not declare the occupation of the suit property by the Applicants as trespass and thus illegal, null and void.
- u. This Honourable Court did order the Applicants to quit, vacate and or handover vacant possession of the suit property to the Respondent.



- v. In the alternative, this Honorable court did order for forcible eviction of the Applicants from the suit property.
- w. This Honourable Court did grant a permanent injunction against the Applicants, their employees, agents, servants or people authorized by them from entering and/ or occupying the suit property.
- x. In essence, she denied the contents of the supporting affidavit of Mariam Omar save for those facts she had admitted herein above.
- y. She therefore pray that this Honourable Court do dismiss the Originating Summons and do enter Judgment in the terms of the Respondent's Counter - Claim with costs.

21. The Defendant/Respondent called DW - 1 on 31st January, 2024 who testified that:-

A. Examination in Chief of DW - 1 by Mr. Abubakar Advocate.

- 22. DW - 1 was sworn and he testified in Swahili language. She identified herself as MARYAM ABDULLAHI JALALKHAN that she knew the 1st Defendant/Respondent who was her father. The Defendant was at home. He was not well health wise. The Defendant donated authority to her to plead on his behalf. She filed a Replying Affidavit dated 24th May, 2021 and filed 26th May, 2021. The witness told the court that he would like to respond to the replying affidavit and the attached annexures. There was documentary evidence in support of their case. According to the witness the suit property belonged to the 1st Defendant.
- 23. She told the court that she had explained how the 1st Defendant had acquired the Plot until he fell ill and he had to move to the township. In the year 2016 they were informed that there were people who had invaded the land and there was a video to that effect. The people were wasting the land. The witness and her father reported the matter to the police and who advised them to they institute the case by engaging an advocate. They did and she filed the suit. In the year 2017, they went back to the land and found some people digging foundation – one person holding a jembe attempted to hit her with it but he was accosted them.
- 24. She stated that she was referred to the documents – she wished to rely:-
 - a. Power of attorney
 - b. Title deed
 - c. Photographs – No. 1 to 21 showing the Swahili houses and some coconut trees plot No. 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19 and 20 showed houses being under construction and were not complete. Plot No. 20 was a semi-permanent.
- 25. With reference to the electronic VIDEO (Which this Court watched using the tele – conference devices) which she took in the year 2016 – it showed foundation. In the year 2016; she took a video – showed the DW - 1 holding a conversation with the inhabitant on the land. There were some construction having taken place on the land. It was a man and a lady. They were caretakers for her father. There were plantations i.e. coconut trees. She urged the court to give them back their land. They urged that the Plaintiffs be evicted with costs.

B. Cross - Examination of DW - 1 by Mr. Gitonga Advocate.

- 26. DW - 1 confirmed that she did not know the name of the caretaker. She had never met him as she was young. He had been hired by her father. With reference to paragraph 7, the witness stated that



he left the land in the year 2015 after he fell ill. The caretaker informed his father through a call of the happenings – From the year 2015 to 2020 which was 5 years there was a construction. There were people constructing structures. They reported the matter to the police but they were never issued with the OB details.

C. Re - Examination of DW - 1 by Mr. Abubakar Advocate.

27. DW - 1 confirmed that they reported the matter to the police and the police advised them to file a suit. The caretaker informed her that the police officers would be visiting the land. The court belonged to her aunty Fatma Said. But each person got their portions. Others sold their portions but her father retained his portion. With reference to the contents of paragraphs 5, 6 and 7 of the Replying Affidavit.
28. The Defendant also called DW - 2 on 31st January, 2024 who testified as follows:-

D. Examination in Chief of DW - 2 by Mr. Abubakar Advocate.

29. The DW – 2 testified under oath and in Swahili language. He identified himself as HASSAN SWALEH TAIB. He stated that he knew DW - 1 who was his wife. He recorded a statement dated 24th March, 2021. In 2017 he escorted his wife to Utange to the land. While there they saw the construction – some were complete and others were under construction. They recorded the incident through a video using their cell phone. They found a man and a lady on the land. They reported the matter to the police. They advised them to file a suit in court and obtain a court order. His wife had already gone to the police there before.

E. Cross examination of DW - 2 by Mr. Gitonga Advocate.

30. DW - 2 confirmed that when they got there, there some foundations. He did not know whether there had been homes before the visit. He saw three(3) houses on the ground but no complete building.

F. Re -Examination of DW - 2 by Mr. Gitonga Advocate.

31. DW - 2 reiterated that if there were houses he would know. He saw three houses which were under construction. There were no other houses.
32. On 31st January, 2024 the Defendant herein through their Counsel Mr. Abubakar marked their case closed.

V. Submissions

33. On 31st January, 2024, immediately after the closure of the Plaintiffs/Applicants' and the Defendant/ Respondent, the Honorable Court directed the parties to canvass the originating summons through written submissions. Thereafter, on the 15th May, 2024 the Applicants having fully complied and the Honorable Court reserved a date for delivery of Judgement on 10th December, 2024 accordingly.

A. The Written Submissions by the Plaintiffs/ Applicants

34. The Plaintiffs/Applicants herein through the Law firm of Messrs. V. Chokaa & Company Advocates filed their written submissions dated 11th March, 2024. Mr. Gitonga Advocate commenced his submissions by stating the before the Honourable Court was an originating Summons dated 24th December 2020. It filed before this Honourable Court on the even date by the Applicants herein. The summons were premised on the provision of Order 37 of the Civil Procedure Rules, 2010 and Section 38(1) of the *Limitation of Actions Act*.



35. According to the Learned Counsel, the Summons sought orders that the Plaintiff/Applicants herein were entitled to ownership of land known as plot No. MN/11/4056 with CR NO 21862 by virtue of adverse possession of Land, and an order be issued to the same effect by this Honourable court, and that cost of this application be awarded to the Plaintiffs/Applicants. The summons were premised on 6 grounds and supported by an affidavit of Mariam Omar, who was given authority to plead for the other 51 Applicants. They had an Authority to Plead dated 24th December 2020. It was filed on 28th December 2020. The Respondent replied to the summons vide the Replying Affidavit of Maryam Abdillahi Jalalkhan sworn on the 24th March 2021 and filed on 29th March 2021.
36. In the Replying Affidavit, Maryam deponed that she was the daughter of the Respondent herein and a holder of a General Power of Attorney registered on 10th December 2018, giving her powers to swear the replying affidavit herein. On the 4th May 2021, Mariam Omar on behalf of the other Applicants did swear an affidavit in reply to the Replying affidavit of Respondent herein. The reply to the replying affidavit was filed on 10th May 2021. When the matter came up for hearing, the Applicants in support of their case called Mariam Omar and Salim Mzee Fadhil to testify. The two adopted their statements and gave sworn statements in support of the applicants' case. The Respondent in support of his case called two witnesses Maryam Abdillahi Jalal and Hassan Swaleh Taib, who adopted their statements and gave sworn testimony.
37. According to the Learned Counsel from the Originating Summons, Replying affidavit by the Respondents and from the Reply by applicants to the Replying affidavit herein; they humbly relied on the issues left for this Court to determine were as hereunder:
- a. Whether the applicants herein are entitled to ownership of all that parcel of land known as Plot No. MN/11/4056 with CR NO 21862 by virtue of adverse possession.
 - b. Whether the court should award the plaintiffs/applicants costs of this application.
38. The Learned Counsel on analysis told the court that having identified what they believed were the issues that should be determined by this Honourable Court, they humbly proceeded to submit as hereunder. On whether the applicants herein were entitled to ownership of all that parcel of land known as Plot No. MN/11/4056 with CR NO 21862 by virtue of adverse possession, the Learned Counsel submitted that in Kenya, the principle of Adverse Possession drew support from the provision of *Limitation of Actions Act* Cap.22 Laws of Kenya. The Learned Counsel relied on the Court of Appeal decision in “Malindi App No.56 of 2014 Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR”, observed that:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years.”
39. The period of 12 years is provided for in the provision of Section 7 of *Limitation of Actions Act* Cap 22 Laws of Kenya. According to the Learned Counsel, the Courts had over time developed essential elements that had to be proved by any applicant claiming right over land on grounds of adverse possession. The Court of Appeal in the case of:- “Kisumu Civil App. No. 110 of 2016 Richard Wefwafwa Songoi – Versus - Ben Muniyifwa Songoi [2020] eKLR” opined that:
- “A person claiming adverse possession must establish the following
- I. On what date he came into possession.



- II. What was the nature of his possession?
- III. Whether the fact of his possession was known to the other party.
- IV. For how long his possession has continued and
- V. That the possession was open and undisturbed for the requisite 12 years

40. The Learned Counsel submitted that on the elements set down by the court of appeal in “Kisumu Civil Appeal No 110 of 2016 (Supra)” as follows:-

I. The date the applicants came into possession of Plot No. MN/11/4056 with CR NO 21862.

41. Mariam Omar Maingu, the 1st Applicant herein, gave sworn testimony before this Honourable court and adopted her statement dated the 24th December 2020. It was her statement that she was born and raised in Utunge and more specifically Plot No. MN/11/4056 with CR NO 21862. She further stated that since 1963, Plot No. MN/11/4056 with CR NO 21862, was the only known home to her. As per her statement, Mariam has lived in Plot No. MN/11/4056 with CR NO 21862, for over 30 years. It was her statement that here parents died and wereburied in the suit Plot. Additionally, Mariam was blessed with 4 children and 12 grandchildren, some of whom live with her in the said Plot.

42. Salim Mzee Fadhil equally testified and adopted his statement. It was Salim Fadhili’s testimony that he has lived in the said Plot from 2006 and without any harassment and or interference. From the testimony of the two applicants who testified before this Honourable court, and from the witness statement of the other 50 applicants filed before this Honourable court, it is evident that Most of the applicants, moved into plot No. MN/11/4056 with CR NO 21862 before the year 2006.

43. It was the Learned Counsel’s contention was that as per the testimony and witness statements of the applicants herein, they had been in occupation of the suit land for a period of at least 14 years, which was beyond the statutory claim as per Section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.

44. According to the Learned Counsel submitted that the nature of the Applicants’ possession and relied on the case of “Kisumu Civil Appeal No.27 of 2013 Samuel Kihamba – Versus - Mary Mbaisi [2015] eKLR” the court held:

Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent conversion of the land owner. These elements were dispossesses in the Latin phraseology, nec vi, nec clam, nec precario. The contained additional requirement is that of animus possidendi, or intention to have the land.”

45. Being guided by the above case, it was their humble submission that the Applicants herein had lived in the suit Land without license or permission of the respondent herein. The Applicants had the intention to have the suit land and that is why they have made developments on the suit piece of land, as per their testimony and witness statement. The intention to have the suit piece of land by the applicants herein is also evident by the fact that most of them, got their children and raised them in the suit piece of land, making their children know the suit piece of land as their only home.

46. It was the Learned Counsel’s assertion was that the Applicants herein openly occupied the suit piece of land without force and they have lived in the suit piece of land without any interference from any person.



47. On whether, the fact of the Applicants' possession was known to the Respondent. The Learned Counsel averred that the Respondent herein was aware of the Applicants' presence in the suit piece of land. The Respondent as per Mariam Omar's Reply to the replying affidavit and Mayam Abdallahi Jailaikhani's Replying affidavit, used to stay in the suit piece of land but moved and relocated to Kuze in Mombasa. The Respondent relocated to Kuze and left the applicants in the suit piece of land, and failed to take action against the applicants in asserting the title for the suit piece of Land for more than 12 years as is required by Law.
48. The Learned Counsel further averred that sometime in 2016, some other people invaded the suit piece of land and started harvesting sand. The Respondent purported that the matter was reported to Bamburi police station, yet no evidence as to the same was adduced before this court.
49. It was their humble submission that some of the Applicants started moving to the suit piece of land when the Respondent was still living in the land and that he did nothing to assert his right over the said piece of land. From the foregoing, it was clear and evident that the Respondent was fully aware of the Applicants' occupation of Plot No. MN/11/4056 with CR NO 21862. For the period of his possession and if it continued the Learned Counsel submitted that all the Applicants as per their witness statements started living in the suit piece of land before 2006. The case at hand was filed before this court in 2020 which is exactly 14 years after most of the applicants started living in the suit property.
50. Some Applicants started living in the suit property as early as year 1985 as per their witness statement. It was their humble submission that the period the applicants have lived in the suit property was more than enough to warrant the instant suit.
51. On whether the possession was open and undisturbed for the requisite 12 years. The Applicants had lived without any disturbance from the Respondent herein for more than 12 years they have been in occupation of the suit piece of land. The foregoing was evident from the applicants' witness statement on record, and from the Replying Affidavit of Marya Abdillahi, who to some extent admitted that they made a report to the police station, yet the police did nothing.
52. The Learned Counsel opined that the Applicant had quiet enjoyment of the suit property for more than 12 years, with full knowledge of the respondent herein. It was therefore their submission that the applicants herein, had satisfied the elements set down by the court of appeal in "Richard Wefwafa Songoi – Versus - Ben Munyifwa Songoi", in matters adverse possession. The Applicants herein under the provision of Section 38 (1) of the Limitations of Actions Act, applied to this Honourable court through the instant suit for an order to be registered as proprietor of Plot No. MN/11/4056 with CR NO 21862 in place of the respondent herein. It was the Learned Counsel submission and prayer that this Court allowed the instant application and issues an order to the same effect.
53. In conclusion and on whether the Court should award the Plaintiffs/Applicants costs of this suit. The Learned Counsel submitted that it was trite law that costs follow the events, and the successful party is always awarded costs. The Applicants be registered as the proprietors of Plot No. MN/11/4056 with CR NO 21862 and that, costs be awarded to the Applicants herein.

B. The Written Submissions by the Defendant/Applicant

54. While defending the suit, the Defendant/Respondent through the Law firm of Messrs. Aboubakar, Mwanakitina & Company Advocates filed their written submissions dated 28th March, 2024. Mr. Aboubakar Advocate commenced by providing a brief background of the matter. The Learned Counsel submitted that before the Court was a claim for land adverse possession by the Plaintiffs. The



law on the doctrine of adverse possession was incurred on Section 17 of the [Limitation of Actions Act](#). This provision stated that:

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

55. Section 18 of the Act states that:-

“ 18. Equitable interests

- (1) Subject to section 20(1) of this Act, this Act applies to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as it applies to legal estates, and accordingly a right to action to recover the land, for the purposes of this Act but not otherwise, accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.
- (2) Where land is held upon trust, including a trust for sale, and the period of limitation prescribed for an action by the trustees to recover the land has expired, the estate of the trustees is not extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but when the right of action is so barred the estate of the trustees is extinguished.
- (3) Where any land is held upon trust, including a trust for sale, an action to recover the land may be brought by the trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act, notwithstanding that the right of action of the trustees would apart from this subsection have been barred by this Act.
- (4) Where land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land accrues during such possession to any person in whom the land is vested as trustees or to any other person entitled to a beneficial interest in the land or the proceeds of sale.

56. It followed from the above provisions of the law that for a person to succeed on a claim of adverse possession he or she must prove the following:-

- a. The registered owner had been dispossessed of the Suit property by another.
- b. The registered owner was therefore under a legal obligation to recover his property from the person who disposed him or her.



- c. The registered owner is obligated to bring an action to recover the land within the period provided by the [Limitation of Actions Act](#) which by virtue of the wording of Section 7 thereof is 12 years.
 - d. That the said period of 12 years has expired and the registered owner has not brought any claim to recover the land.
57. According to the Learned Counsel, it should be noted that the provision of Sections 107, 108 and 109 of the [Evidence Act](#), Cap. 80 strictly places the burden of proof of the above facts on the Plaintiff. These provisions state that:-
- “107. Burden of proof
- (1) 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 it 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 fact
- The burden of proof as to any particular fact lies on the person who wishes 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.”
58. The Learned Counsel submitted on the issue of whether the Plaintiffs discharged the burden of proof that the Plaintiffs pleaded in their Originating Summons dated 24th December, 2020 that:
- a. That the plaintiff/Applicants have been in physical occupation and or possession of the suit property known as Plot No. MN/11/4056 with CR NO. 21862 situated in Utange area, Mombasa County for over 12 years.
 - b. That the Plaintiff/Applicants occupation has been open, uninterrupted and continuous for over 12 years to the exclusion of any other party with the knowledge of registered owner.
59. The Learned Counsel averred that these averments were repeated in the Supporting Affidavit of Mariam Omar, the 1st Plaintiff. At paragraph 6 of the Affidavit Mariam Omar states that:-
- “the Plaintiff/Applicants moved into the suit property more than 20 years ago (as at 2020) with the Respondents knowledge and the Plaintiffs/Applicants have not seen the registered owner since then.”
60. In her witness statement Mariam Omar states that she was born on the suit property in the year 1963. Her parents died and were buried on the suit property. She has been on the suit property for 57 years. She gave birth to 4 children while at the suit property and she now has 12 grandchildren some of whom she lives with them at the suit property. When Mariam Omar testified on 1st March, 2023 she said her father was an employee of the Defendant. They lived on the suit property then the Defendant left. She got her children at the suit property. Her father died and was buried at the suit property. She said she knew the Defendant.



61. Is Mariam Omar's testimony believable? This was the person who swore that they moved into the property (see paragraph 6 of the Support Affidavit) but she stated in her Witness Statement and her testimony that she was born at the suit property. This was a material contradiction that raised doubts to the veracity of Mariam's evidence. To Compound the problem was that her own national identity card betrayed her. Clearly, it showed that Mariam was born in Kilifi. This established that she was a liar. She lied on oath twice when she swore the affidavit and when she testified in court.
62. The Learned Counsel submitted that the 2nd witness was Salim Mzee Fadhili. In his Witness Statement he stated that he had stayed at the suit property for the last 14 years. He had been in the suit property since the year 2006. However, when he testified in court on 1st March, 2023 he confirmed that he lived in Spaki. He left the suit property about one year ago (that was in 2022). He also said there were graves on the suit property. He claimed that Mariam was his neighbor.
63. Salim's testimony was also not believable. He said he entered the suit property in the year 2006 and only left in the year 2022. However, his National Identity card showed that he it was issued to him in the year 2013 and the details showed that he was living in Majengo Spaki by then. He was thus lying when he said he entered the suit property in the year 2006. The evidence showed, even by the year 2013, he was in Maengo Spaki where he lived to date. In essence the evidence points to the fact that he has never been on the suit property. The other Plaintiffs chose not to testify. This was significant for it was a requirement of the law that as a Plaintiff one had to testify in support of their claim. They failed to do so.
64. However, a quick perusal of their national identity card established the following facts.
 - a. ALI MOHAMED YUSUF - He never provided a copy of his National Identity Card nor did he file a witness statement. His case failed as unproven.
 - b. SALIM MUTAI- Similarly he never provided a copy of his ID nor file a witness statement his case fails too.
 - c. PAUL KIPKOECH KORIR- His ID showed he was born in the year 1979 in Bomet. He was issued with the ID in in the eyar 1997 at Bomet. The evidence showed that he was a resident of Bomet. He had not brought to court any evidence to show he lives in Utange Mombasa. A business permit, a Certificate of Birth of his child or something else. There was nothing to show he lived in Utange let alone on the suit property. His case also fails. His witness statement is thus unsupported.
 - d. CLATON NZUKI- His ID showed he was born in the year 1973 in Vihiga. He was issued with the ID in the year 2008 at Mombasa Island but the particular shows he comes from Vihiga. There was no evidence that he lives in Utange. His case fails too. His witness statement is unproved.
 - e. SHEHI NZAI KALUME - He never provided a copy of his ID nor did he file a Witness Statement.
 - f. YVES SAFARI NGUMBAO- His ID showed he was born in the year 1994 in Mombasa but he came from Wundanyi Taita Taveta. He was issued with the ID in year 2016 at Mombasa. This was only 4 years before filing of the suit. The particulars suggested that he came from Taita Taveta. There is no evidence showing he lives in Utange on the suit property. He states in his witness statement that he has lived with his family at the suit property for 6 years. There was no evidence to support that he was on the suit property but even if he was true then his claim has not crystallized. His case failed.



- g. CHARLES KIDEVU-He never provided a copy of his ID nor did he file a witness statement. His case failed.
- h. WINNIE MKAWUGHAGHA- She also never provided a copy of her ID. She never filed a Witness Statement. Her case failed.
- i. SOSPETER KUNGURU ODONGO - His ID showed he was born in Butere in the year 1990. He was issued with the ID in year 2011 at Matungu 9 years before filing of this suit. In his Witness Statement he stated that he had been living in the suit property for 10 years with his entire family. There was no proof that he lived on the suit property. Even if he was to be believed that he had lived on the suit property for 10 years his claim had not yet crystalized when this suit was filed. His case failed.
- j. CAROLYNE AKINYI AGAWO - Her ID showed she was born in the year 1974 at Kisumu East. She was issued with the ID in year 2015 at Bima. This was 5 years before filing of this suit. She did not file a witness statement. There was no proof that she lived on the suit property and the particulars of her ID indicate she could not have been on the suit property 5 year from the date of filing this suit. Her case therefore failed.
- k. MUMBA SINDO NDUNE - His ID indicated he was born in year 1970 in Kilifi. He was issued with the ID in year 2019 at Bima. This was just one year before filing this suit. The ID showed he originated from Mwingi in Kitui County. In his Witness Statement he never stated the date he entered the suit property. There was therefore no evidence to show he was on the suit property. His case failed.
- l. MWANAMKUU MWERA - She never provided a copy of her ID nor did she filed a witness statement. Her case failed.
- m. ESTHER CHIZI CHAKA-likewise she never provided a copy of her ID neither did she file a witness statement. Her case was unproven.
- n. MOSES WANJE - He never provided a copy of his ID. In his witness statement he alleged that he had resided on the suit property since year 2017. This was only 3 years before filing of this suit. There was no evidence that he lives on the suit property but even if he was to be believed his case had not crystalized as he would have been on the suit property for only 3 years. His case failed.
- o. INNOCENT KULABI - His ID indicated that he was born in year 1982 in Kakamega. He was issued with the ID in year 2002 at Kakamega Municipality. He hailed from Shinyalu. In his witness statement he claimed that he had stayed on the suit property for over 5 years. There was no evidence that he resided on the suit property “but even if he was to be believed his case had not yet crystalized. His case failed.
- p. TOM KARISA - He never provided a copy of his ID. In his witness statement he says he has lived on the suit property for 7 years. There was no evidence that he actually lived on the suit property but even if we believe him his case had not crystallized. His case failed.
- q. SUSAN NDIRANGU - Her ID showed she was born in year 1982 at Nakuru. The ID was issued in year 2010 at Mombasa Island. She comes from Nakuru. In her witness statement she claimed she entered the suit property in year 1985. She had lived for 35 years. If she had been living at the suit property for that long why did she apply for issuance of an ID in MOMBAS island in year 2010 just 10 years before filing of this suit. The evidence shows up to year 2010 she was living in Mombasa Island and she could not have lived on the suit property for over 12



years. There is no evidence supporting her assertion that she was living on the suit property. Her case failed.

- r. MARY MUNGAI - Her ID showed she was born in year 1982 in Bungoma. She was issued with the ID in year 2017 at HDM Mombasa. This was just 3 years before filing this Suit. She hailed from Bungoma. In her witness statement she claimed that she entered the suit property in year 2010. There is no evidence that she lived on the suit property but even if they believed her, her case had not crystalized as she is just lived for 10 years and not 12 as is required by law. Her case failed.
- s. JULIAH KAMAU WAMBUI - Her ID showed she was born in year 1979 in Kiambu. The ID was issued in year 1997 at Makadara Nairobi. She comes from Kiambu. In her witness statement. She claimed that she started living on the suit property in year 2007, that was 13 years up to the date of filing this suit. However, there was no evidence that she actually lived on the suit property. Her case failed.
- t. JORAME KAPALLA - He never provided a copy of her ID neither did he file a witness statement. His claim failed.
- u. MAIMUNA MBARAK ALI - Her ID indicated she was born in year 1972 in Mombasa Island. She was issued with the ID in year 1998 in Mombasa Island. The ID showed that she hailed from Mokowe in Lamu County. In her Witness statement she claimed that she started living on the suit property in December, 2008. There was no proof that she was on the suit property at all. Her case failed.
- v. ROSEMARY KHASIALO - She never provided a copy of her ID. In her witness statement she alleged she had been living on the suit property for 17 years. There was however no evidence whatsoever to support her allegation. Her case failed.
- w. FAUZIA MOSSEEN - She never provided a copy of her ID nor did she file a witness statement. Her case failed.
- x. HAMISI CHIRAU - He never provided a copy of his ID nor did he file a witness statement. His case failed.
- y. MAHMOUD MOHAMED - He never provided a copy of his ID he did not file a witness statement. His case failed.
- z. ISIAH MATIMU - His ID indicated he was born in year 1972 in Mombasa. He hailed from Emuhaya. The ID was issued in 2013 at Mombasa Island just 7 years before filing of this suit. In his witness statement he claims that he started living on the suit property in year 2014 that was 6 years before filing of this suit. There was no evidence to prove that he is actually on the suit property but even if we believe him his case has not crystalized as he would have been on the suit property for only 6 years. His case failed.
- aa. JANE MELINDA MUEMA - Her ID indicated she was born in year 1986 in Kwale. The ID was issued in year 2013 at Msambweni. This was 7 years before filing of this suit. She did not file a witness statement. It was apparent from the ID that by year 2013 she was still in Kwale. She could not have lived on the suit property for 12 years. In any event she did not file a witness statement so no evidence is on record to support her case. Her case failed.
- ab. JOHNSON KAZUNGU - His ID showed he was born in year 1977 in Kilifi. The ID was issued in year 2015 at Changamwe that was 5 years before filing this suit. He hailed from Magarini. He did not file a witness statement. It was clear that by year 2015 he was living in



Changamwe. He could not have lived on the suit property for 12 years. In any event there was no evidence on record to support his case as he filed no statement. His case failed.

- ac. SALIM PAULO - He never provided a copy of his ID nor did he file a witness statement. His case failed.
- ad. CECILIA WANJIKU BOKO - The copy of her ID was very faint but it showed she was born in Kiambu. The ID was issued in 2005 in Makadara Nairobi. In her witness statement she claimed to have started living on the suit property from year 2010. This was 10 years before filing the suit. There was no evidence that she was on the suit property but even if we believe her assertion her claims have not crystalized as she would be on the suit property for 10 years. Her claim failed.
- ae. MAGONGO JUMA SIMBA - His ID indicated he was born in year 1980 in Kilifi. The ID was issued in year 2020 at Huduma Centre Mombasa. In his witness statement he claimed that he had been living on the suit property for 5 and 1/2 years. There was no evidence that he was actually living on the suit property but even if one believed him his claim had not crystallized for he would have lived on the suit property for 5 years. His case failed.
- af. KANIVA MADHUGHA MUKUNGU- His ID indicated that he was born in year 1946 in Kaloleni. His ID was issued in year 2016 at Kisauni 4 years before filing this suit. He did not file a witness statement. There was no evidence to prove that he is actually living on the suit property. Since he did not file a witness statement there is nothing in support of his case. His case failed.
- ag. OMAR ABDALLA JUMA - He never provided a copy of his ID. In his witness statement he alleged that he started living on the suit property in year 2016 that was 4 years before filing this suit. There was no evidence that he was actually on the suit property but even if we believe him his case has not crystallized as he would have been on the suit property for only 4 years. His case failed.
- ah. MWALIMU KATANA CHARO - His ID showed that he was born in year 1980 in Kilifi. The ID was issued in year 2019 at Bahari in Kilifi. This was 1 year before filing of this suit. He did not file a witness statement. The ID clearly showed that by year 2019 he was still living in Kilifi. He could not be living on the suit property. In any event he did not file witness statement therefore there is no evidence in support of his claim. His case failed.
- ai. CYRILAH OWANO OYALOH - Her ID showed she was born in year 1985 in Kakamega. It was issued to her in year 2006 in Lurambi where she came from. She did not file a witness statement. There was no evidence that she was on the suit property. Her claim failed.
- aj. JESCA CHARO THOYA - She never provided a copy of her ID neither did she file a Witness Statement. Her case failed.
- ak. HASIA HASSAN ANADA - Her ID showed she was born in year 1966 at Mombasa. It was issued in year 2016 at Mombasa Island. She did not file a witness statement. It was thus clear that by year 2016, that was 4 years before filing this suit she was living in Kingorani Mombasa Island. She could not be living on the suit property. In any case she did not file a witness statement. There was no evidence in support of her claim. Her case failed.
- al. NICHOLAS MUTUA KITHUKA - He never provided a copy of ID nor did he file a witness statement. His case failed.



- am. CHRIS MWAI - His ID indicated he was born in year 1988 in Starehe Nairobi. The ID was issued in year 2016 at Nairobi Huduma Centre CBD. He came from Mbooni East in Ukambani. In his witness statement he alleged that he had been staying on the suit property from year 2001. This could not be true. This was because if indeed he was on the suit property from year 2001 then in year 2016 he would have obtained his ID from Kisauni. Why did he get it from Nairobi? It was clear by year 2016 he was living in Nairobi that is 4 years before filing this suit. His case failed.
 - an. CHRISTINE SIDI KENGA - Her ID indicated she was born in year 1972 in Kilifi. The ID was issued in year 2014 at Kisauni. In her witness statement she claimed that she had been living on the suit property for 20 years now. However, she has brought no evidence to support this allegation. Her case failed.
 - ao. FATIMA FARUK MOHAMED - Her ID showed that she was born in year 1986 at Lamu. The ID was issued in year 2005 at Faza Lamu. In her witness statement. She claimed to have stayed on the suit property for 11 years. There was no proof in support of this assertion. However, even if it were true her case has not crystallized as she would have lived for 11 years and not 12 years.
 - ap. MATANO OMAR MAINGU - He never provided a copy of his ID neither did he file a witness statement. His case failed.
 - aq. NIVA JUMA - He never provided a copy of his ID nor did he file a witness statement his case failed.
65. It was without doubt that the suit property was registered in the name of the Defendant. What was in doubt was:-
- i. Whether the 45 Plaintiff were in occupation of the said property? If yes,
 - ii. Whether the alleged occupation was for more than 12 years? And
 - iii. Whether this occupation was all along known to the Defendant and
 - iv. Whether despite this knowledge he did not in any way protest against this occupation?
66. On the issue if the Plaintiffs in occupation of the suit property. The Learned Counsel submitted that ordinarily in seeking to discharge their burden of proof under Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80. The Plaintiffs ought to have conducted a survey and produce in court a survey report which showed that indeed the suit property is developed, identify the developments including their numbers. The report ought to establish that there were 45 houses or so built on the suit property and identify the owners of the said houses, or structures. The plaintiffs had failed to do so. There was no evidence on record showing the house of any of the Plaintiffs on the suit property. This fundamental evidential failure was sufficient to move this Honourable Court to dismiss this case.
67. Assuming the Plaintiff were indeed in occupation of the suit property then was the occupation for more than 12 years.? The provision of Section 9 of the Limitation of Action Act provides instances where the obligation of the owner to institute an action to recover his land begins. This was where time starts running out and eventually extinguishes his title and the right to acquire the land by adverse possession accrues. Basically, this began on the date the owner was dispossessed of the land. This section must be read together with the provision of Section 13 of the Act which added that the person who dispossesses the owner of the land must be in occupation of the same for the right to acquire the land by adverse possession to materialize.



68. The Learned Counsel submitted that they had already analyzed the evidence of each of the 45 Plaintiffs and concluded that they had failed to tender evidence that show they entered the suit property on a particular date. Out of the 45 Plaintiffs, the following, even from their unproven allegations in their witness statements, had lived on the suit property for less than 12 years and the right to adverse possession had not accrued to them:-

- i. Paul Kipkoech Korir - 9 years;
- ii. Clayton Nzuki - 8 years;
- iii. Sospeter Kunguru Odongo -10 years;
- iv. Moses Wanje - 3 years;
- v. Innocent Kulabi - 5 years;
- vi. Tom Karisa - 7 years;
- vii. Mary Mungai - 10 years;
- viii. Isiah Matimu - 6 years;
- ix. Cecilia Wanjiku Boro - 10 years;
- x. Mgongo Juma Simba - 5 years;
- xi. Omar Abdalla Juma - 4 years;
- xii. Fatima Faruk Mohamed - 11 years;

69. The following never presented any evidence of when they entered the suit property:-

- a. Ali Mohamed Yusuf.
- b. Salim Mutai.
- c. Matano Omar Maingu.
- d. Shehi Nzai Kalume.
- e. Charles Kidevu.
- f. Winnie Mkawughagha.
- g. Mwanamkuu Mwera.
- h. Esther Chizi Chaka.
 - i. Jorame Kapalla.
- j. Fauzia Mosseen.
- k. Hamisi Chirau.
- l. Mahmoud Mohamed.
- m. Salim Paulo.
- n. Cyrillah Owano Oyaloh.
- o. Jesca Charo Thoya.



- p. Nicholus Mutua Kithuka.
 - q. Matano Omar Maingu.
 - r. Niva Juma
70. The Learned Counsel submitted that the following never gave the date they entered into the suit property but provided copies of ID's which provided important facts against their claim. The IDs showed that by certain dates they were living elsewhere therefore discounting the possibility of having been in occupation of the suit property for 12 years or more. These were: -
- i. Carolyne Akinyi Agawo-issued ID at Bima 5 years before suit.
 - ii. Mumba Sindano Ndune-issued ID at Bima 1 year before suit.
 - iii. Jane Melinda Muema-issued ID at Msambweni 7 years before suit.
 - iv. Johnson Kazungu-issued ID at Changamwe 5 years before suit.
 - v. Kaniva Mudhunga Mukungu-issued ID at Kisauni 4 years before suit.
 - vi. Mwalimu Katana Charo-issued ID at Bahari in Kilifi 1 year before suit.
 - vii. Hasia Hassan Awadh-issued ID at Mombasa Island 4 years before suit
71. From their own evidence or lack of it 37 Plaintiffs case failed the evidentiary requirement that they were in occupation of the suit property for 12 or more years. Their cases collapsed on that fact. That left the case of the six (6) Plaintiffs:-
- a. Mariam Omar-57 years.
 - b. Salim Mzee Fadhil-14 years.
 - c. Julian Kamau Wambui-13 years.
 - d. Maimuna Mbarak Ali-12 years.
 - e. Chris Mwai-19 years.
 - f. Christine Sidi Kenga-20 years
72. The Learned Counsel argued that should be noted that from her testimony in court, PW - I, that is Mariam Omar's entry to the suit property, if she was to be believed, was through her father who was employed by the Defendant as a caretaker. This excluded her from claiming adverse possession. Further, Julia, Maimuna, Chris and Christine never testified in court. Their Witness Statements were not adopted as evidence and was therefore inadmissible in law. So there was no evidence to prove their case.
73. However, of fundamental importance was the evidence of the Defendant. Through his daughter Mariam Abdillahi Jalalkhan he produced material evidence that would assist this court to make cogent findings of fact. She first produced a bundle of Photographs showing the house that the Defendant used to live in. The house was still in existence. These photographs were taken on 24th November, 2018. Two years before filing of this suit. It showed the plot had not been invaded save for a few constructions. It was still open. The plot is 1.496 hectares an equivalent of 3.697 acre. Photographs 1, 2, 3, 4, 5 and 6 showed the Defendant's house, the open space and one temporary small house and about 3 new constructions. No house that was ready for occupation. Photographs no. 7 showed an empty space and a footpath, Photographs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 showed incomplete constructions,



- while Photographs 20 and 21 showed a temporary mud and makuti house. All these houses were under constructions in the year 2018. They were not occupied save for the one temporary mud house for the caretaker. This was clear evidence that even by year 2018 none of the Plaintiffs were on the suit property.
74. According to the Learned Counsel, the Defendant also produced two video clips taken at the suit property. One clip was taken on 5th February, 2016. This clip showed that there was sand harvesting going on from the suit property. No construction of houses had started by year 2016 which was 4 years before filing of this suit. The second clip was taken on 5th February, 2017. It showed that some few individuals had started construction of structures but no one was in occupation of any complete structure. It should be noted that the Defendant had employed a caretaker which was proof that he had taken steps to protect his property. According to the Learned Counsel, the Defendant reported the matter to the police. This was confirmed by the caretaker who said, as captured by the video clips, that the police had visited the suit property and chased the invaders but they kept coming back. In fact it was the police who advised the Defendant to get a court order to evict those who were constructing the houses.
75. Therefore, the Plaintiffs had failed to prove their case on a balance of probabilities to the effect that they were entitled to orders of adverse possession and their suit should be dismissed with costs.
76. To buttress his point, the Learned Counsel relied on the “Court of Appeal Civil Appeal No.110 of 2016 Richard Wefwafwa Songoi – Versus - Ben Muinyifwa Songoi”, the Court of Appeal reiterated that a person who claims adverse possession must inter alia show:-
- i) On what date he came into possession.
 - ii) What was the nature of his possession?
 - iii) Whether the fact of his possession was known to the other party.
 - iv) For how long his possession has continued, and
 - v) That the possession was open and undisturbed for the requisite 12 years
77. The court further held that since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit the plea of adverse possession was not available to the appellant. This is also true against the 1st Plaintiff Mariam Omar who came into the land through his father who was an employee of the Defendant as a caretaker. This was only in the unlikely event that this court believed her. The court also held that from the time the appellant entered the suit property 12 years had not lapsed for the appellant’s claim of adverse possession to succeed.
78. The Learned Counsel also relied on the case of “Court of Appeal, Civil Appeal No. 27 of 2013 Samuel Kihamba – Versus - Mary Mbaisi”, the Court of Appeal found, among other findings, that no right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession was after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together see the provision of Sections 9 (1) and 13 of the [*Limitation of Actions Act*](#). So where the use and enjoyment of the land are possible there could be no dispossession of the registered and rightful owner enjoys it.
79. The Defendant had his house and caretaker intact. He was still in possession. The invaders were constructing and were not in occupation. They had not yet dispossessed the Defendant. The Plaintiffs



were using the pendency of this suit to complete their construction and occupy the houses. This did not amount to adverse possession.

80. In conclusion, for the said reason, the Defendant urged the Court to dismiss the Plaintiffs suit with costs and allow the Counter -Claim with costs.

VI. Analysis and Determination

81. 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 myriad of cited authorities made by the parties herein, the relevant provision of *the Constitution* of Kenya, 2010 and the law.
82. For the Honorable Court to arrive at an informed, reasonable and fair decision, it will rely on the following three (3) key issues for determination. These are:
- a. Whether the Plaintiffs have made out their claim?
 - b. Whether the Plaintiffs are entitled to the prayers sought?
 - c. Who meets costs of the suit

ISSUE No. A: Whether the Plaintiffs have made out their claim

83. Under this sub – heading, the Honourable Court has deciphered that the main issue is whether the Plaintiffs/Applicants are entitled to ownership of all that parcel of land known as plot No. MN/11/4056 with CR NO 21862 by virtue of adverse possession of land and a vesting order to be issued in favor of the plaintiffs/applicants over the said plot No.MN/11/4056 with CR NO 218662 situated in Utange area of Mombasa County. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the *Evidence Act* Cap 80 laws of Kenya which provides as follows:-

“107. Burden of Proof (1) 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 it is said that the burden of proof lies on that person.”

84. Order 37 rule 4 of the Civil Procedure Rules pursuant to which the application was brought provides that:-

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.”

85. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period.



In Kenya, the prescribed period is 12 years. The doctrine is anchored on Sections 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:

“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.”

86. Section 13 of the *Limitation of Actions Act* provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is 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.

87. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the *Limitation of Actions Act* and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides;

- (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 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.

88. And Order 37 Civil Procedure Rules provides:

- “(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.”

89. The provision of Article 162 (2) of *the Constitution* of Kenya 2010, Sections 3 & 13 of the *Environment and Land Court Act*, No 19 of 2011 and Section 38 of the *Limitation of actions Act* confer jurisdiction on this court to handle claims premised on adverse possession.

90. In the present case, the Plaintiffs and their families are said to have been in continuous and uninterrupted occupation of the suit property over twelve years. The Plaintiff /Applicants had taken care of the suit property for more than twelve years, developed the same with the full knowledge of the Defendant /Respondent. The suit property had a title and known as Plot No. MN/II/4056 CR No. 21862 situated at Utange, Mombasa County. The Plaintiffs/ Applicants moved into the suit property



more than twenty years ago with the Respondent's knowledge and the Plaintiffs/ Applicants had not seen the registered owner since then.

91. In the case of: “Kimani Ruchure – Versus - Swift Rutherfords & Co. Ltd (1980)KLR 10” Kneller J held that:

“ the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion).”

92. Similarly, in the case of “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” adverse possession was defined as

“the non - permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

93. PW - 1’s evidence was that her father was an employee of Mzee Abdulahi; she did not know the years but it was a while. All her children and grandchildren were born there; her father had also died in the suit property. She had built a house and she lived there up to the time of the trial. According to PW - 1 she had never seen anyone claiming the land as his. The police had never called her as a result of any complaint lodged. She had never been interrogated. This was her place and she occupied. According to her Mzee Abdullahi who had employed her father left to an unknown place. They had neighbours. Her father was buried on the land. Her plea was to be granted the land; to continue staying on the suit land. She did not want to be blamed for having encouraged others to live on the land.

94. According to the Defendant the Respondent was the registered proprietor as owner of a freehold interest of Plot No. 4056 Section 11 Mainland North in respect of which he held a Power of Attorney. The Respondent inherited a portion of the original Plot N0.389 section 11 Mainland North from his aunt Fatma Said together with his two sisters Rukia Mohamed Said and Fatma Abdulwahab. The Respondent shifted to Kuze in the Island and left a care taker at the farm house to take care of the farm but he used to visit the farm on weekends and on holidays.

95. It was not until sometime on 5th February, 2016 when unknown persons entered the suit property and started harvesting and selling it to constructors who started mining sand for sale. The Respondent reported the matter to Bamburi police station about the invention and the police assured him that they would take action against invaders. The police delayed in taking action and on 5th February, 2017, the Respondent was informed by phone by the caretaker that some people had started constructing houses on the suit property and the Respondent sent me and my husband Hassan Taib and his cousin Mohamed Ahmed to go to the suit property and confirm. They went to the suit property and found the farm empty save for about three people who had constructed houses on the suit property and took a video of the farm on the said day. By the time the Respondent was ill and incapable of active running up and down and he tasked her to follow up the issue on his behalf.

96. In this instant case, the PW - 1 did not state from which year she was in possession of the land. PW - 2 told the court that he started living in the suit property in the year 2002. But had no proof of the same.



In the case of “M’ikiara M’rinkanya & Another – Versus - 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 – Versus - 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 – Versus - 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.’

97. Further, in the case “Mbira – Versus - Gachuhi [2002] 1 EALR 137” the court stated as follows;

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

98. Therefore, to determine whether the Applicant’s rights accrued the Court will seek to answer the following

- i. How did the Applicant take possession of the suit property?
- ii. When did she take possession and occupation of the suit property?
- iii. What was the nature of her possession and occupation?
- iv. How long has the Applicant been in possession?

99. By all means, the Plaintiffs fails to satisfy the requirements to be declared in adverse possession as they have not demonstrated to be in actual possession of the land. To this effect, therefore, their claim fails outrightly.

ISSUE No. b). Whether the Plaintiffs are entitled to the prayers sought

100. The Plaintiffs sought for the ownership and entitlement of the suit property known as plot number MN/11/4056 CR. NUMBER 21862 by virtue of adverse possession. Where a party has not satisfied the principles to be considered when granting a claim for adverse possession then the same fails. In this instant case, the Plaintiffs are not entitled to the prayers sought. To this end I make a finding that the suit fails in its entirety and should be dismissed.



ISSUE No. c). Who will bear the costs of the suit

101. It is now well established that costs are at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action 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”

102. The provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the events. Section 27 (1) provides as follows:-

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

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

104. 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 – Versus - Evrest 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.”

105. In this case, as this Honourable Court has opined above, the Defendant/Respondent shall have the costs.

VII. Conclusion and Disposition

106. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiffs have not established their case against



the Defendant herein. Thus, for avoidance of doubt the Court proceeds to make the following specific orders:-

a. THAT the suit by the Plaintiffs/Affidavit as per the originating summons dated 24th December, 2020 filed on 28th December, 2020 fails in its entirety and should be dismissed.

b. THAT there shall be no orders as to costs.

IT IS SO ORDERED ACCORDINGLY.

**JUDGMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS
SIGNED AND DATED AT MOMBASA THIS...17TH DAY OF.....DECEMBER.....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. No appearance for the Plaintiffs/Applicants.

c. No appearance for the Defendant/Respondent

