



REPUBLIC OF KENYA



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**Meuli (Suing as Administrator of the Estate of Aisha Ali Mohamed)
v Kiti & another (Environment & Land Case 270 of 2018)
[2023] KEELC 16895 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 270 OF 2018
LL NAIKUNI, J
FEBRUARY 27, 2023**

BETWEEN

**FAIZA OSCAR MEULI (SUIING AS ADMINISTRATOR OF THE ESTATE OF
AISHA ALI MOHAMED) PLAINTIFF**

AND

GIDEON NASSIM KITI 1ST DEFENDANT

THE REGISTRAR OF TITLES, MOMBASA 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. This Judgment herein regards a Suit that was instituted by M/s. Faiza Oscar Meuli (Suing as the duly appointed Legal Administratrix of the Estate of AISHA ALI MOHAMED), the Plaintiff herein. The suit was through a Complaint filed in Court on 20th November, 2018 and dated 19th November, 2018 against the 1st and 2nd Defendants herein. Essentially, at this early juncture, it is important to note that the Plaintiff filed this particular suit seeking for a declaration of ownership of her suit properties and the eviction of the Defendant from it.
2. Upon effecting service of the Summons to enter appearance dated 22nd November, 2018, the 1st Defendant entered appearance dated on 10th December, 2018, a Defence and Counterclaim filed dated 25th January, 2019 and 30th January, 2019 respectively. In addition to this, on 25th January, 2019, the 1st Defendant filed a Notice of Preliminary Objection raising three (3) objections. These were: -
 - a. That the Plaintiff's claim against the 1st Defendant was time barred by virtue of Section of the [Limitation of Actions Act](#) Cap 22;



- b. That the Notice of Motion application dated 19th November, 2018 and the Suit was an abuse of the Court; and
 - c. That the Court had no jurisdiction to grant any orders on a claim which was time barred.
3. Subsequently, after the Court hearing the objections as a matter of precedence, on 8th May, 2019 dismissed the Preliminary Objection to wit: -
- “..... the issue cannot however merely be considered through evidence tendered from the bar or submissions. The Court needs to be moved appropriately or the issue is decided upon trial to determine clearly when the cause of action arose.....”
4. In the course of time, with the leave of Court, the Plaintiff filed an amended Plaint dated 31st October, 2019. Thereafter, on 18th May, 2022, upon all the Parties having fully complied with the Provisions of Order 11 of the Civil Procedure Rules, 2010 the matter was fixed for hearing both the Plaintiff and 1st and 2nd Defendants herein.

II. The Plaintiff's case

5. This matter has had along winding historical background. The Plaintiff averred that the 1st Defendant was a squatter on part of the parcels having encroached on their land. He had constructed some temporary structures on the land. He would be filing numerous civil suit in different Courts of law seeking for declarations of ownership of the suit Plots but all the filed Suits would get dismissed.
6. She informed Court that, for instance, the 1st Defendant filed an Originating Summons No. 104 of 1999. He claimed to have been on the land since the year 1981 and constructed a permanent home on it. The matter came up before a Commissioner of Assize (as she then was) Justice Khaminwa who granted vesting orders on 8th October, 1999 as there was no opposition and by concealing material facts. He proceeded to present the said Court order to the 2nd Defendant who registered the said order against Plots Nos. 567, 568 and 569. Indeed, the Plaintiff stated that the 1st Defendant caused the 2nd Defendant to issue new title documents in the names of the 1st Defendant on the above said three (3) plots – Plots Numbers 567, 568 and 569 respectively. As a result, he had been advertising them for sale holding himself to be the lawful owner of these parcels of land.
7. The Plaintiff further informed Court that, on learning of this development, on 3rd May, 2000, the Plaintiff herein applied to set aside these orders. She asserted that the Defendant had not accrued any proprietary right to the properties either by way of purchase or any other manner. He was a trespasser taking that he had no consent of the owners of the land, ought to be evicted, had no overriding interest in the said properties and who had put up some structures and was in the process of disposing off the suit properties to other third parties. Upon hearing the case, on 13th September, 2002 the High Court set aside the said prohibitory orders. It ruled that the Deed plans relied be cancelled. It further held that parcels Nos. 2057, 2058, 2059, 2060, 2061 and 2062/111/MN were already in existence having been issued on the 4th December, 1992. It found that the Prohibitory Order registered on a non- existent title No. 259/111/MN was not pursuant of any Judgment or Decree in favour of the 1st Defendant.
8. Further, the High Court not only did they find that the 1st Defendant had no legal interest in the properties but also made a declaration that the properties belonged to the Plaintiff. Thus, based on all these proceedings, the Plaintiff held that the 1st Defendant had not acquired any proprietary right to the Properties either by way of purchase or any other manner and concluded that he was a trespasser and ought to be evicted. She stated that the 1st Defendant had already put up structures and was in



the process of disposing them to third parties. She provided particulars of trespassing under Paragraph 11 of the Plaintiff.

9. On 25th May, 2007, the High Court having heard all the evidence from the originating summons filed by the Defendant herein delivered a Judgement by dismissing the suit. Being aggrieved, the Defendant instituted an appeal at the Court of appeal – Civil Appeal Numbers 35 of 2013. On 27th November, 2014 the appeal was dismissed.
10. From the filed Amended Plaintiff, the Plaintiff averred that at all material times to this suit, she was the Legal Representative as well as the beneficiary of the Estate of Aisha Ali Mohamed her mother (hereinafter referred to as “The Deceased”). Further, she indicated that the deceased and herself were registered owners of all that property known as parcels Nos. 567, 568 and 569 Kikambala together with Sub - divisions 2057, 2058 and 2062/111/MN all being Sub-division of the parcel Land Reference No. 284/111/MN (hereinafter referred to “The Suit Properties”). She held having acquired the suit properties by both purchasing and inhering from her late biological mother, the deceased. Based on the Amended Plaintiff, the Plaintiff sought for the following orders from Court: -
 - a. A Permanent Injunction restraining the 1st Defendant by himself, Servants, Agents from encroaching upon/ trespassing/ occupying the Suit Property and/or in any other manner interfering with the indefeasible rights of ownership of the Plaintiff over the Suit Property Nos. 567, 568 and 569 Kikambala together with Sub-divisions 2057, 2058 and 2062/111/MN all being Sub-division of the Parcels Land Reference No. 284/111/MN.
 - b. An Order of Eviction of the 1st Defendant from the Suit Properties No. 567, 568 and 569 Kikambala together with Sub-division 2057, 2058 and 2062/111/MN all being Sub - division of the parcel Land Reference No. 284/111/MN.
 - c. An Order for demolition of the illegal structures put up by the 1st Defendant in the Suit Properties Sub - division 2057, 2058 and 2062/111/MN all being Sub - division of the parcel Land Reference No. 284/111/MN at his costs.
 - d. Costs of the Suit.
11. On 18th May, 2022, the Plaintiff summoned one Witness – PW-1 who testified as follows and closed her case. The matter proceeded on by virtual exclusively taking that she was abroad in Switzerland.

Examination in Chief of PW – 1 by Mr. Wameyo Advocate.

12. PW – 1 was sworn and testified in Kiswahili language. Her names is Faiza Oscar Meuli. She knew ISHA ALI MOHMAED who was her mother. She died on 23rd December, 2010. She recorded a witness statement dated 19th Nov.2018. She wished to rely on it and the list of Documents dated 19th November, 2019 and filed in Court on 20th November, 2018 as her evidence. She produced them and were marked as “Plaintiff – Exhibit 1 to 4”.
13. PW – 1 stated that the suit property belonged to her mother. PW - 1 knew Mr. Gideon Nassim Kiti, the 1st Defendant. He had had a land dispute over the suit land with her mother. PW -1 brought the suit on behalf of her mother. PW – 1 sued the 1st Defendant. My prayer is for the 1st Defendant to vacate from the suit property. From the pleading, she refuted that the land did belong to the 1st Defendant as it was theirs. The Court of Appeal No. 35 of 2013 granted them the land. She would wish that the 1st Defendant leaves the land. That is all.



Cross Examination of PW - 1 by Mr. Gikandi Advocate:-

14. PW – 1 was born on 17th September, 1959. By then her mother had the suit land. She bought it from Kulthum Ahmed Nasoro the son of the late Chief Ahmed Nasoro. PW – 1 did not have any documents with her in Court. The documents were with her Advocates. She know the 1st Defendant very well. He was born and brought from the 1963. She knew the 1st Defendant from when he entered into the land as a Beach Boy. She knew that he invaded onto the five (5) acres of the land and 9.5 acres. She did not have the surveyor’s report then as all the documents were with he advocates. They were filed in Court.
15. On the property the 1st Defendant had constructed some houses on it. She was referred to the Defence and Counter Claim. She confirmed having seen the photographs marked as “GNK – 1 & 2”. They were of Churches. It is the brother of the 1st Defendant who lived there now. She did not know the other houses. She indicated that the Plaintiffs had three (3) houses on the land. Her mother used to live in one of the houses. Right now there were tenants occupying the houses but they never pay any rent.
16. She refuted that they did not have any houses nor structures on the suit land. The houses were on land No. 62 as the land was big. PW – 1 and the Chief had written several demand letters directed at the 1st Defendant to vacate from the land but he declined. Instead, the 1st Defendant had been filing cases at different places/courts at Kilifi, Mombasa and court of the Appeal. He had been claiming the ownership of the land. She refuted he owned on the suit land. He acquired it illegally and irregularly – for all these years. In those cases, her Advocate filed the Defence and replies to the Counter Claim.

Re - Examination of PW - 1 by Mr. Wameyo Advocate.

17. Her mother was living on the land. She lived in a permanent house. It is still there. She died in side the said house. There was a Judgment delivered by Justice Maraga where he explained the history of this case. The 1st Defendant filed an appeal. The Court of Appeal delivered its decision on November, 2015. By the time she was filing this case 12 years had lapsed. The 1st Defendant had not been on the whole of the land.

III. The 1st Defendant’s Case

18. On 30th January, 2019, the 1st Defendant filed a Defence and a Counterclaim to the Plaint dated 25th January, 2019. He held being the registered owner to all that parcel of land known as Land Reference Nos. 567, 568 and 569 situate at Kikambala together with Sub-division 2057, 2058 and 2062/111/MN all being Sub-division of the parcel Land Reference No. 284/111/MN.
19. He pleaded having been in occupation of the Properties for over twelve (12) years and therefore had acquired prescriptive right over the Suit properties. The 1st Defendant averred that the Suit was time barred having waited for over Thirty Seven (37) years to have been instituted. He pleaded having instituted Mombasa High Court Miscellaneous Application No. 104 of 1999 seeking a declaration that he was the owner of the Suit Property by virtue of his long occupation of the Suit Property but the said application was dismissed by Court which was of the view that the 1st Defendant ought to have instituted for a claim for Land Adverse Possession and not Vesting orders. Being aggrieved by this decision, the 1st Defendant preferred an appeal No. 35 of 2013 but on 27th November, 2014, the said appeal was dismissed. The 1st Defendant further pleaded that the Court of Appeal set aside the declarations made in favour of the Plaintiff since the Plaintiff had not filed a Counterclaim. Infact, according to her, the Court of Appeal was of the view that since the 1st Defendant had instituted the case- Miscellaneous Application No. 104 of 1999, Mombasa the High Court never had jurisdiction to make any other step after dismissing the aforesaid application. As such the Plaintiff could not rely



on the aforesaid Judgment to evict the 1st Defendant's Suit never conferred a positive right upon the Plaintiff to evict the 1st Defendant.

20. The 1st Defendant stated having acquired title to the Suit Properties by virtue of Land Adverse Possession having been in occupation of the Suit Properties for more than twelve (12) years a fact which according to him had been admitted by the Plaintiff in the Pleadings filed herein.

The 1st Defendant averred having erected Permanent structures on the Suit Properties and he denied the allegations that he was illegally occupying the Suit Property.

21. The 1st Defendant further pleaded that the Plaintiff had failed to disclose to Court that she filed an application dated 16th May, 2018 seeking the reconstruction of the Court file for purposes of making similar orders as sought in the Plaint filed herein and hence as such the Plaintiff's Suit was vexatious, an abuse of the Court process and the same ought to be struck out and the Suit dismissed with costs.

22. From the filed Counterclaim, the 1st Defendant reiterated the contents of Paragraphs 1 to 9 of the Defence and prayed for Judgment to be entered against the Defendant by way of Counterclaim as stated below: -

- a. A declaration that the Plaintiff was entitled to the parcel of land known as Plot Numbers 567, 568 and 569 situate at Kikambala together with Sub-division 2057, 2058 and 2062/111/MN all being Sub-division of the parcel Land Reference No. 284/111/MN by virtue of Land Adverse Possession;
- b. An Order that the Plaintiff be registered as the proprietor of the parcel of Land known as Plot No. 567, 568 and 569 situate at Kikambala together with Sub-division 2057, 2058 and 2062/111/MN all being Sub-division of the parcel Land Reference No. 284/111/MN; and
- c. Costs of the Counterclaim.

On 18th May, 2022, the 1st Defendant summoned one Witness DW- 1 who testified as follows: -

Examination In Chief of DW – 1 by Mr. Gikandi Advocate.

23. DW – 1 testified and sworn in the Kiswahili language. He name is Gideon Nassim Kiti. He held the national identity card issued on 14th February, 2013 and bearing numbers 3885362. His dated of birth was 1st November, 1963. He lived at Kikambala within “the Sun and Sand’ tourist hotel. He was a driver. He had eleven (11) children who were all born on the suit land. From the time he started living there, her neighbor was Mama Aisha. She came from Tanzania. She was welcomed there by Mr. Rudin Kwinga. DW – 1 informed Court that both of them had a land dispute but Aisha won. After that she sued DW – 1. The land measured 32 acres. Aisha undertook survey on desk as he would resist. Hence it was not done on the ground. She would be filing suits from one Court to the other. So he also decided to file the cases ELC No. 104 of 1999 where he was granted Vesting order until it went upto the Court of Appeal. There was no Counterclaim. From that case he was seeking for the ownership of the land where he was born. These were Plot numbers 257, 258, 262, 567, 568 and 569. The whole land measured 30 acres. The one occupied by FAIZA measured 11 acres.
24. Before he was born, his father used to rear livestock there. It was bushy. There was a neighbor called TAMBU. He had dug a shallow well, a borehole, houses and reared livestock. He was referred to Photographs marked as “GNK - 1”. He confirmed that they were on Plot No. 568. There was a church on Plot No. 569. The other photographs were his houses on Plot number 568.



He denied having ever received any letter nor demand notice from the police. He had lived there from the year 1963. He wanted to be given the land. He filed a Counterclaim. He had never seen any objections or responses to it.

Cross Examination of DW - 1 by Mr. Wameyo Advocate

25. He affirmed that he was the one who filed the civil case 104 of 1999. He read and fully understood the Judgment of that case. He knew that Case No. 931/1981 was between Aisha and Pauline Kwinga. The Court decided that the portion measuring 11.6 acres belonged to Kwinga. But later one Aisha bought land measuring 11.6 acres from Kunzu Adam Osoro. He was referred to page 7 of the Judgment of HCCC No. 104/1999. The sentence on the last 4 sentences from the bottom.

He stated that all what he had told the Court was the same he stated to Court then in HCCC. No. 104 of 1999. Referred to Page 6 of the Judgement. He sated that he never agreed with the assertion stated there. It was not true on the contents of Paragraph 3 on Page 6. He would like to get justice.

26. With regard to the contents on Page 9, the 3rd Paragraph he stated that there were other cases between Aisha and himself. They were filed before the Magistrate's Court and the Council of elders. He denied having gotten fake Court orders. He preferred an appeal at the Court of appeal on being aggrieved on the Judgement in the case Numbers 104 of 1999. Thereafter, the Court of Appeal decided against him.

Re - Examination of DW - 1 Mr. Gikandi Advocate

27. They had had a case with Aisha on matters of land adverse possession. Hence all these cases of 104 of 1999, he was seeking ownership of the land. The one on the case of No. 931 of 1981 was for Aisha and Kwinga. He was not involved. He had never been summoned by the police in relation to the fake orders.

IV. The Submissions

28. On 18th May, 2022 upon the closure of the hearing by both the Plaintiff and the 1st Defendant herein, the Parties were directed to file their Written Submissions with stipulated timeframe. Subsequently, upon compliance the Parties were on 14th October, 2022 granted brief opportunity to highlight their Written Submissions, a task the Learned Counsels Mr. Wameyo and Mr. Gikandi Advocates executed with robust, excellence, dedication, diligence, devotion and resilience. The Honorable Court expressed its sincere and great appreciation to them in the manner in which they conducted the matter with great diligence, dedication, resilience and decorum. It wished that all colleagues emulated them.

29. Pursuant to that the Court reserved the 8th February, 2023 as the time to deliver its Judgment accordingly through the Microsoft Teams Virtual means.

A. The Written Submissions by the Plaintiff

30. On 17th August, 2022, the Learned Counsel for the Plaintiff the Law firm of Messrs. O.M Robinson & Co. Advocates filed their Written Submissions dated 8th August, 2022. Mr. Wameyo Advocate, submitted by providing brief background of the case and held that the 1st Defendant had irregularly obtained a Prohibiting Order in High Court Miscellaneous Application No. 104 of 1999 (O.S) by concealing certain materials facts and thereafter proceeded to acquire for himself titles Nos .567, 568 and 569 respectively.

31. The Learned Counsel averred that though the Court had made its determination on the said title causing the cancellation of these title deeds, the 1st Defendant had not adhered with the said decision. According to the Learned Counsel after evaluation of the evidence presented before the Court, the



Superior Court held that there was no basis for granting the 1st Defendant Prohibitory Orders without a decree and the Magistrate ought to have realized that the case was still pending and that there was no decree in favour of any Party. There was no Judgment had been given or order in this cause in favour of the Plaintiff. The Learned Counsel cited what the Judge David Maraga (as he then was) held from the ruling thus: -

“..... From the evidence on record, it is clear that even if there was any such claim the same would not have succeeded. The Plaintiff did not prove that he has been in adverse possession for twelve (12) years and over. Before 1995, all the Suit parcels of land belonged to the Defendant and she had title deeds to them. The Plaintiff has no legal interest in any of them and he should stop interfering with the Defendant’s and the 2nd Defendants Interested Party’s quiet possession of them”.

32. The Learned Counsel submitted that the 1st Defendant being aggrieved by the decision by the Superior Court, he filed an appeal before the Court of Appeal Civil Application No. 35 of 2013. They made the following decisions: -

“The Plot No. 567, 568 and 569 were registered in the names of the 1st Defendant pursuant to the Vesting Order by Court on 8th October, 1999 which order was subsequently set aside by the same Court on 13th September, 2002 and the Deed plans relied on cancelled. It further held that parcels Nos. 2057, 2058, 2059, 2060, 2061 and 2062/111/MN were already in existence having been issued on the 4th December, 1992. Court found that the Prohibitory Order registered on a non-existent title No. 259/111/MN was not pursuant of any Judgment or Decree in favour of the 1st Defendant. It held that the Originating Summons did not anticipate the filing of a Statement of Defence or a Counterclaim. It held that the 1st Defendant had no legal interest in any of the Properties hence the Defendant should stop interfering with Aisha’s quiet possession of the same.

33. Based on this, the Learned Counsel averred that since the status of the two (2) sets of the titles held by the Parties herein was determined by the Court of Appeal in the aforesaid Appeal with the Court holding that the titles held by the 1st Defendant were obtained fraudulently and were in effect null and void, this Suit was subsequently filed in order to give effect to the finding of this Court in Miscellaneous Civil Application No. 104 of 1990 (O.S) and the aforesaid Appeal.
34. The Learned Counsel submitted that even after his appeal was dismissed and the status of the title document that he held declared by the Court of Appeal as fraudulent, the 1st Defendant refused to vacate the Suit Properties. The Learned Counsel argued that the only short coming was the Plaintiff had not filed a Counterclaim seeking a relief for the eviction of the 1st Defendant. That the 1st Defendant was still in occupation of the Suit Properties. It’s for this reason that the Plaintiff decided to file this Suit.
35. His contention was that the Court of Appeal made findings that the 1st Defendant herein had no cognizable interest in the Suit Properties- title documents to Plot numbers 567, 568 & 569 were null and void as they had been fraudulently acquired by the 1st Defendant. He noted that at the Court of Appeal, the 1st Defendant had argued that the three (3) sets of title deed Nos. 567, 568 and 569 on one hand and Plots Nos. 2057, 2058, 2059, 2060, 2061 and 2062 were different and distinct parcels of land whatsoever. However, in these proceedings the 1st Defendant once again changed its mind by doing an about turn and urged Court to find these titles to be one and the same.



36. The Learned Counsel reiterated that the Court of Appeal did find the parcels Nos. 567, 568 and 569 which the 1st Defendant was claiming to own were null and void. They never existed since the survey that gave rise to them was cancelled. What currently existed were parcel Numbers 2057, 2058 and 2063/111/MN following the amalgamation and consolidation. Clearly, the 1st Defendant could not be making any claim to these titles. To buttress its point the Learned Counsel relied of the decisions of:- “Omega Enterprises (Kenya) Limited –Versus - Kenya Tourism Development Corporation, Civil Appeal No. 59 of 1997” and “Macfoy – Versus - United Africa Company limited (1961) 3 All ER 1169” where Court held: -

“If an act is void it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and express it to stay there. It will collapse”.

The Learned Counsel over – emphasized that the 1st Defendant held no proprietary interest to the Suit Properties and in particular based on the findings by High Court and Court of Appeal respectively.

37. Additionally, the Learned Counsel vehemently refuted the argument advanced by the 1st Defendant to the effect that the Suit instituted by the Plaintiff had breached the doctrines of Res Judicata under the Provision of Section 7 of *Civil Procedure Act*, Cap 21. The 1st Defendant argued that the High Court Miscellaneous Application No. 104 of 1999 (OS) impliedly made a finding that the 1st Defendant had occupied the Suit Properties for a period well over twelve (12) years.

38. The Learned Counsel controverted this assertion by holding that on the contrary the Superior Court had held that the 1st Defendant had not provided any evidence to the effect that he had lived in the Suit Properties for a period of twelve (12) years or more. Thus, the argument that the Suit was Re Judicata was baseless as already the contention of Land Adverse Possession had been rejected and that rejection was never overturned by the Court of Appeal this meaning it still stood and binding upon the Parties. To buttress on this point, he relied on the decisions of “Kenya Commercial Bank Limited – Versus - Benjoh Amalgamated Limited [2017] eKLR”, “The Independent Electoral Commission (IEBC) – Versus- Maina Kiai & 5 Others (2017) eKLR” and “National Land Commission –Versus- Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another [2019] eKLR” on the principles of Res Judicata.

39. In applying these principles to the instant case the Learned Counsel held that given the Ruling of Court of Appeal. It was clear that the deceased could not have moved the Court through a Counterclaim to evict the 1st Defendant from the Suit Properties. The deceased could not have filed a Counterclaim since the 1st Defendant Suit was in the nature of Originating Summons. After the Court found that the titles obtained by the 1st Defendant were fraudulently acquired the Court could not issue an Eviction Order against the 1st Defendant since the Suit before was in the nature of an Originating Summons. The Court could not make any further finding.

40. Therefore, the issue on the eviction of the 1st Defendant could only be brought in a separate Suit. The issue of eviction of 1st Defendant could not be brought in the Miscellaneous Application No. 109 of 1999 (O.S) as Court had already made its pronouncement. For that reason the argument raised in “Handerson –Versus- Handerson (143) 67 ER 31” on “Res judicata” with respect to issues which ought to have been raised and canvassed in a previous suit could not apply in this Suit. In the case of:- “the Benjoh Amalgamated Limited (Supra)” the Court held that the Court has never accepted “Res Judicata” as an absolute principle of law which applied rigidly in all circumstances irrespective of the



justice of the case. The Superior Court had found that the trial Court had made an error in granting the Prohibitory Orders.

41. On the issue of Land ownership, the Learned Counsel further submitted on the ownership of the Suit Properties was such that both the Superior Court and Court of Appeal had found that the Suit Property belonged to the deceased. Further, Court of Appeal pronounced that the 1st Defendant had obtained these titles through fraudulent means. The trial Court held that the 1st Defendant had not proved he had been on the land for a period of over twelve (12) years hence a claim of Land Adverse Possession could not stand. On whether the Suit was statutory barred. The 1st Defendant argued that he had been in occupation of the land for over twelve (12) years since the year 1988. The Learned Counsel found this argument flawed on two (2) fronts:
 - a. This claim lacked any evidential premises;
 - b. The filed Suit before trial Court was founded on an alleged Decree in respect of which the 1st Defendant had moved the Court for a vesting order. This showed that there had been suits which had been instituted on the ownership of the Suit Properties.

For these reasons, it could not be true that the 1st Defendant had been in continuous and occupation of the properties to enable the 1st Defendant claim prescriptive right on adverse possession. Indeed the 1st Defendant had left the land only returned on it when the deceased was taken ill.

42. He argued most importantly that even if time were to be computed from the year 1988, then it was clear that as the time the Suit was filed in 1999, twelve (12) years had not lapsed. Besides, the suit was not for claim of land adverse possession. The 1st Defendant sought for Vesting Orders in respect to Plot No. 567, 568 and 569/111/MN and on grounds he had a Prohibitory Orders registered in the Land Offices against these parcels obtained from the CMCC No. 1108 of 1996 but which was dismissed with regard to the Counterclaim. The Counsel's contention was that it was without any merit and should be dismissed with costs.
43. The Learned Courts stressed that the Plaintiff herein who was Defendant then was holding title to the suit land. The issues then were which title were correct. The 1st Defendant was projecting himself as a Title holder of the suit property. According to the Counsel, the 1st Defendant was a trespasser. Hence, to compute whether the suit was time barred, then the time did not run. Therefore, he did not qualify for the doctrine of Land Adverse Possession.
44. In conclusion, the Learned Counsel urged Court to enter Judgment in favour of the Plaintiff against the 1st and 2nd Defendants bearing in mind and the pain the Plaintiff has had to bear due to the fraudulent schemes and actions of the 1st Defendant. Further, taking that the 2nd Defendant failed to participate in these proceedings.

B. The Written Submissions by the 1st Defendant

45. On 17th August, 2022 the Counsel for the 1st Defendant the Law firm of M/s. Gikandi Ngubuni & Co. Advocates filed their Written Submissions dated 7th July, 2022. Mr. Gikandi Advocate submitted by citing the Ruling made by Justice David Maraga in the Miscellaneous Application No. 104 of 1999 (OS) and Page 8 of their Written Submission to the effect that the Court recognized that the 1st Defendant started occupying the Suit Land from the year 1988 and hence by the time the Suit was filed in the year 2018, it was a period of over 30 years. This already qualified the 1st Defendant to be granted the title by way of Land Adverse Possession. He argued that by looking at the relief sought by the Plaintiff to the effect that the building structures be demolished and have him evicted from the Suit



Land. Clearly to the extent of the year 1988 to-date there was no single evidence that the Plaintiff had interrupted the 1st Defendant's occupation onto the Suit Land.

46. To that effect his contention was that the law was in favour of the 1st Defendant. He argued to declare the 1st Defendant as the legal owner to the Suit Land with the indefeasible right, interest and title over the Suit Land. To buttress his point he relied on the decision of:- "Joseph Kilimo Chisto –Versus- Geoffrey Karume CA" where even from that decision there was no Counterclaim. The Court held that so long as there was interruption for twelve (12) years they ought to be claimed in the Counterclaim.
47. He further argued that the Suit had offended the doctrine of Res Judicata against the Provisions of Section 7 of the Civil Procedure Act Cap 21. He relied on the decision of:- "Uhuru Highway Development Limited –Versus- Central Bank of Kenya & 2 others (1996) eKLR" which extensively, discussed the issue of Res Judicata. He relied on the decision by Hon. Justice Maraga "Mombasa Municipality Council - Versus - Mombasa Council" . whereby he made a finding that the 1st Defendant started occupying the premises in the year 1988. Hence, the quick computation was that by the time this suit was filed in the year 2018, it was period 30 years. When you look at the relief sought, they are urging for the Defendant's Building to be demolished and evicted. Clearly to the extent from the year 1988 to date there was no Oita or single evidence that the Plaintiff had interrupted the occupation of the 1st Defendant on the suit land. He submitted then the law was in favour for the court to declare the 1st Defendant as the owner of the property. The Learned Counsel relied on the Court of Appeal decision of:- "Kilimo Chilo –Versus- Geoffrey Karume" .

V. The Issues for Determination

48. I have had an opportunity to keenly consider all the filed Pleadings by both the Plaintiff and 1st Defendant taking that the 2nd Defendant never participated in the Proceedings for no apparent good reason despite having been served with Summons to enter appearance whatsoever. These included the Amended Plaint, the Statement of Defence and Counterclaim by the 1st Defendant, the documentary and oral evidence adduced by the summoned Witnesses, the oral and Written Submissions, the cited authorities, the relevant Provisions of the Constitution of Kenya, 2010 and Statutes.
49. For the Honorable Court to arrive at an informed, reasonable, just, fair and reasonable determination, the Honorable Court has condensed the subject matter into the following three (3) issues for determination. These are: -
- a. Whether the Plaintiff's case against the 1st and 2nd Defendants has any merit and hence sustainable;
 - b. Whether the Parties herein are entitled to the reliefs sought from the filed Amended Plaint and the Counterclaim by the 2nd Defendant; and
 - c. Who will bear the Costs of the Suit.

VI. Analysis and Determination

Brief facts

50. Prior to embarking on the framed issues under this sub-heading, it's imperative that the Court extrapolates on the brief facts of this case. From the filed pleadings, the Plaintiff claims to be the registered owner of all the Suit Properties having acquired Plot No. 284 measuring 31.6 acres in the year 1978 through purchase and inheritance from her mother – the deceased but in the course of time it was sub – divided into three (3) portions of Plots numbers 567 (measuring 10 acres); 568



(measuring 16 acres) and 569 (measuring 4 acres). Later on there were further sub – divisions into Plots numbers 2057, 2058 and 2067/111/MN. Resultantly, all the other plots were extinguished by these sub – divisions. Since she resided in Switzerland, she registered these three (3) Plots in the names of her mother, the deceased. Plots numbers 2060 and 2061 were bought by Mr. Omar Mohamud Mohamed Farah from the deceased.

51. She averred that the 1st Defendant was squatter on the said parcels and had been filing several cases in Court seeking a declaration of ownership of the Suit Property but they were all dismissed. In deed he had encroached on the suit properties. He was claiming to be the owner of Plot Numbers 567, 568 and 569. For instance the Originating Summons No. 104 of 1999 where on 8th October, 1999 while before the Commissioner of Azzize, he obtained Prohibitory (Vesting) Orders as there was no opposition and upon failure to disclose all material facts. Pursuant to that, using this orders, he caused the 2nd Defendant to have him register it against the Suit Properties and started advertising the properties for sell to the third parties. On realizing this, on 3rd May, 2000 the Plaintiff moved Court to have the vested orders set aside. She argued that the Defendant had fraudulently and by concealment of material facts obtained the titles in his names. On 13th October, 2000 The orders were set aside. In the course of time, both the High Court and Court of Appeal concurred with these assertion and made a determination to the effect that these parcels were null and void as they were obtained through fraudulent means and hence the 1st Defendant had no proprietary interest over the said parcels. For clarity sake, the Plaintiff now filed this Suit specifically seeking for a declaration on ownership to the Suit Properties and the eviction of the Plaintiff and demolition of the Permanent structure from the parcels.
52. On the other hand, the 1st Defendant averred having been in actual and continuous occupation of the Suit Property from the year 1981 without ever encountering any interruption from anyone. According to him, he was born in 1963 on Plot Number 284 which belonged to his father but his father died before it could be registered in his names. All the Defendant eleven children were born on the suit land. He had constructed some houses and/or structures on it. He held that on 8th October, 1999, the 1st Defendant was granted Ex – parte - Vesting orders by Justice Khaminwa as there was no opposition. On 3rd May, 2000 the Plaintiff applied to set the orders aside. She applied to be joined in the suit. Hence, he argued having acquired a good title and also being entitled to title under the prescriptive rights of Land Adverse Possession. His view was that this fact was well reconised by the Superior Court. Therefore, he urged for a declaration of being the legal registered owner to the land. His contention this Suit was statutory time barred under the Provision of Section 7 of the Limitation of Action Act Cap 22 and Section 7 of the [Civil Procedure Act](#), Cap. 21 on the Doctrine of Res Judicata. That is adequate on facts.
53. Now turning to the issues of analysis under this sub - heading, this Court will only confine itself to the prayers sought in the Plaint and Counter Claim. The background of the dispute between the Plaintiff and the 1st Defendant has been well captured by the evidence adduced by the several witnesses and Honorable Justice David Maraga in his Judgement in the Miscellaneous Application No. 104 of 1999 (OS) delivered on 25th may, 2007. It has been held that the late mother to the Plaintiff in her testimony demonstrated that in the year 1974 while she was working for a Casuarina Hotel in Kikambala one John Alfa a Tanzanian introduced her to one Chief Ahmed Nassor. Mr. Nasir sold to her 11.65 Acres of his shares in Land Reference No. 284/111/MN. By this time, Mr. Nassor had allowed Mr. Alfa to build a bar on the Suit Land. She allowed Mr. Alfa to complete it but later on he sold the structure to Mr. Kwiga who would be paying the deceased rent of Kenya Shillings Thirty Thousand (Kshs. 30,000.00) per month.
54. I strongly feel that the roller Coaster was imaginably created in this matter on 8th October, 1999 when the Court granted Prohibitory Orders to the Defendant and the subsequent events that followed. From the said orders, the Defendant assumed legal ownership by causing the suit properties be registered in



his names and even proceeded to advertise them for sale to other third parties. This false impression was short lived. In the course of time, things took an about turn. The said orders was set aside by same Judge on 13th September, 2002. It followed therefore that anything done in furtherance of that Order was a nullity. Indeed at the time title Nos. 567, 568 and 569/111/MN were issued to the 1st Defendant on 19th January, 2000 title Nos. 2057 to 2062/111/MN were in existence having been issued on 4th December, 1992. Indeed, after evaluating the evidence Justice David Maraga and in its Judgement it held: -

“This case is a clear manifestation of the untold suffering that this Court staff in collusion with Parties, sometimes cause to innocent Parties. From the evidence as summarized above, it is clear as day light that there is no basis for the issue of Prohibitory Orders which is the basis of the case. The Prohibitory Order talks of a Decree having been passed in favour of the Plaintiff in Land Case No. 9 of 1992. No decree had been issued in that case and if the Magistrate had bothered to peruse that file before signing the Prohibitory Orders he would have realized that the case was still pending and there was no Decree in favour of any Party. If anything the Plaintiff in that case who was the Defendant in that case had actually lost before the elders. All he had succeeded was in setting aside the elders’ award on technicality From the evidence on record, it is clear that even if there was any such claim the same would not have succeeded. The Plaintiff did not prove that he has been in adverse possession for twelve (12) years and over. Before 1995, all the Suit pieces of land belonged to the Defendant and she had title deeds to them. The Plaintiff has no legal interest in any of them and he should stop interfering with the Defendant’s and the 2nd Interested Party’s quiet possession of them”.

55. The Court of Appeal found that these title Nos. 567, 568 & 569 were fraudulently acquired and were in effect null and void. Being aggrieved by it the 1st Defendant filed an appeal- Civil Application No. 35 of 2013. The Court of Appeal, by and large, on 27th November, 2014, dismissed the appeal. The Court of Appeal decided that the title deeds to parcel Nos. 567, 568 and 569 which were registered in the names of the 1st Defendant had been acquired through fraudulent means and hence were null and void. The Court of Appeal held that the 1st Defendant had no proprietary interest over these properties. These parcels were non- existent. Indeed, I have noted that the Court of Appeal ran short of making an order for eviction of the 1st Defendant from the Suit Property as it was not pleaded and in any case there existed no Suit. Despite all this the Court has taken cognizance that the 1st Defendant had refused, neglected and/or failed to vacate the properties.
56. The Court now wishes to address itself to the claim of the suit properties through Land Adverse possession as vehemently advocated by the Defendant from the filed Counter Claim and submissions. He claims to have been continuously in occupation of the land from the year 1981 without any interruption from anyone and had caused extensive development on it. According to him, he was born in 1963 on Plot Number 284 which belonged to his father but he died before it could be registered in his names. All his eleven children were born on the suit land. He had constructed some houses and/or strictures on it.
57. The Doctrine of Land Adverse Possession is anchored on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap. 22. 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.”



Section 13 on the other hand provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

21. Finally Section 38 states:-

38. (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

(2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

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

58. The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the *Limitation of Actions Act* by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. Under the provision of Article 162 (2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession.

It should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title, where the land is yet to be registered, it cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim.

59. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under Article 24. The



principles were well set out in the case of “Kahindi Ngala Mwangi - Versus - Mtana Lewa [2021] eKLR” where the Court of Appeal sitting in Malindi held: -

“Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:-

QUOTE

- “7(1) an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The Court shall direct on whom and in what manner the summons shall be served.”

In the case of “Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of:- “Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005,” where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

60. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.

In case of: “Kimani Ruchine – Versus - Swift Rutherford & Co.Ltd (1980) KLR it was stated on this point that:-

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



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

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

61. Further, R.C.N. KULOBA, J in the case “*Gabriel Mbui – Versus - Mukindia Maranya [1993]*” eKLR elaborately enlisted 7 key elements that a person claiming adverse possession must establish. Summarily, according to the retired Judge, the elements that a person claiming a right by adverse possession;
- a. The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. This is because a right of action cannot accrue unless there is somebody against whom it is enforceable.
 - b. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. That is to say, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non - permissive use, ie without permission from the true owner of the land occupied. Acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the dispossessed owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.



- e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies. That is to say the possession and user was such as to give a cause of action or right to sue for possession, throughout the twelve years preceding the suit.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The purpose of this element is to afford the owner an opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose. Possessory acts carried out only under cover of darkness will be insufficient to justify a claim based on adverse possession. Related to the requirement of actual possession, the requirement of openness and notoriety, also calls for the need that the possessory acts must be substantial and leave some physical evidence. If the acts are too insubstantial or temporary, there is no actual possession and the possession will not be notorious
 - g. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. There are circumstances under which adverse possession which has begun to grow may be interrupted. Possession may be interrupted;
 - i. by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or
 - ii. by the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - iii. by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
62. The rightful owner must know that he is ousted, he must be aware he had been dispossessed. The owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted. The land or portion of land being adversely possessed must be a definite, with clear boundaries. Order 37 Rule 7 is mandatory that title to the land must be attached to the OS. The squatters claiming adverse possession must be individually identified, they ought to produce their ID cards when filing suits and not a mere stating Mwanaisha Juma and 300 others.
63. The burden of proving the above elements is on the person seeking title by Land adverse possession, he/she proves it in the usual standard of proof in civil cases i.e. balance of probability. The facts that must be asserted, pleaded and proved are; the date of occupation, the nature of possession, whether the occupation is known to the owner, how long the occupation has been going on, whether possession has been open and undisturbed. All these are questions of facts and unless they are asserted and proved adequately through a trial.
64. Recently, the Supreme Court had an opportunity to further address the issue of the Land Adverse Possession but only in jest in the matter of "Supreme Court Applications No. 16 (E026) of 2021 –



Thomas Muka Maulo & Walter Washington Barasa Nyogensa – Versus – Robert Ouma Oduori”. Briefly, the Applicants had sought the Supreme Court to review the Court of Appeal decision declining to grant Certification of leave against its Judgement of the general importance under the provision of Article 163 (4) (b) of *the Constitution* of Kenya. The subject matter was that the Court of Appeal in its Judgement had ignored critical evidence and facts on record thereby arriving at a decision that would amount to conflicting principles on a claim of Land Adverse possession. In its ruling, on 19th may, 2021 while dismissing the application the Court held:

“ that the jurisdiction of the Supreme Court under Article 163 (4) (b) of *the Constitution* went beyond resolving factual contestations between parties. In any event, the principles of Land Adverse Possession were settled and the Applicants had not demonstrated any inconsistency of findings by the Court of Appeal on the Doctrine. The Supreme was not convinced that there was any miscarriage of Justice or violation of any Constitutional provision as alleged by the Appellant or at all. The Appellant were merely in disagreement with the ultimate Court determination & that did not suffice to invoke the Supreme Court’s jurisdiction or amount to miscarriage of Justice”.

65. From these decisions of Court, for one to qualify for a title by virtue of a claim of Land Adverse possession, one has to have fulfilled the following ingredients. These are:-
- a. There has to be a registered proprietor of the land being claimed;
 - b. The Claimant ought to have occupied the suit land without any interruption and continuously.
 - c. The Claimant ought to have used and taken possession of the suit land for over twelve (12) years.
 - d. The Claimant should not have been granted any permission to use or occupy the suit land by the registered owner, the principle of non permissiveness.
66. In the instant case, and from the surrounding facts and inferences, the Claim for the suit land by Land Adverse possession nor the Doctrine of Res Judicata as alleged do not fit at all. It is not available to the Defendant. The Defendant has failed to demonstrate having met all these requirements as stated herein. Undoubtedly, On prima facie case, it is not disputed that the Plaintiff is the registered owner of the suit property of all the Suit Properties having acquired Plot No. 284 measuring 31.6 acres in the year 1978. She informed Court that the original portion was Plot No. 284 but was sub – divided into three (3) portions of Plots 567 (measuring 10 acres); 568 (measuring 16 acres) and 569 (measuring 4 acres). Later on there were further sub – divisions into Plots numbers 2057, 2058 and 2067/111/MN. Resultantly, the other plots were extinguished by these sub – divisions. Since she resided in Switzerland, she registered these three (3) Plots in the names of her mother, the deceased. Plots numbers 2060 and 2061 were bought by Mr. Omar Mohamud Mohamed Farah from the deceased. It is further admitted that the 1st Defendant has encroached on portions of the properties, and has constructed on it.
67. She averred that the 1st Defendant was squatter on the said parcels and had filed several cases seeking a declaration of ownership of the Suit Property but they were all dismissed. In deed he had encroached on the suit properties. The 1st Defendant refuted to this assertions made out by the Plaintiff. He claimed to be the owner of Plot Numbers 567, 568 and 569.



The submission that the encroachment occurred in 1998 is misconceived. It is instructive that this court expends a little bit of time on certain concepts pertaining to trespass. According to the provision of Section 3(1) of Trespass Act Cap 294, it provides:-

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

From the book “Clark & Lindsell on Torts 12th edition” Paragraph 113, defines trespass as follows

“ trespass to land consists in any unjustifiable infusion by one person or property upon land in the possession of another”

Thus trespass is an intrusion by a person into the land of another, especially wrongful entry on another’s real property who is in possession and ownership. While ‘Continuous trespass’ is trespass in the nature of permanent invasion on another’s rights, such as a sign that overhangs another’s property”.

In the case of “Lutaaya – Versus- Sterling Civil Engineering (Supra) the Court stated as follows regarding the tort of trespass to land:-

“ Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another’s lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he partakes with possession of land” ... where trespass is continuous, the person with the right to suesubject to the law on limitation of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.

Further according to Clerk & Lindsell on Torts, 19th Edition the writer states at Paragraphs 9 - 13:-

“ Proof of ownership is Prima Facie of possession, unless there is evidence that another person is in possession but if there is a dispute as to which of the two persons are in possession the presumption is that the person holding title to land is in possession.”

From the afore going definition of trespass as tort, it appears the legal connotation of the legal terminologies of “Possession”, “Ownership” and “Occupation” of land is a requirement in bringing an action for trespass to land. According to the Black Law Dictionary these terms means:-

“Possession” means “The fact of having or holding control of property in one’s power; the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others”. “Ownership” means “The bundle of rights allowing one to use, manage and enjoy property including the right to convey it to others. The right to possess a thing regardless of any actual or constructive control”. “Occupation” means “Possession, control, or use of real property. The seizure and control of a territory or property.

Now applying these definitions to the instant case. On one part the Plaintiff holds that they took possession of the suit land in the year 1978 when she and the deceased purchased it. She held being continued being possession of it until todate. On the other hand, the Defendant submits to have been born on it in the year 1963 and the land belonged to his late father only that unfortunately the father



never got to register it in his names. There has been no empirical documentary evidence that was paced before this Court to demonstrate these assertions. Indeed, from the records, the High Court and the Court appeal outrightly dismissed this claim and held out that the Defendant was not entitled to any rights on Land Adverse possession as claimed from the Counter Claim. For these reasons, I am satisfied that while the Plaintiff has fully proved its case on preponderance of probability that he is the legal and bona fide owner to the Suit Land the Counter Claim must fail outrightly.

ISSUE NO. (b) Whether the Parties herein are entitled to the reliefs sought from the filed Amended Plaintiff and the Counterclaim by the 2nd Defendant

68. Based on the above, the Honorable Court holds and that it is a foregone conclusion that the Plaintiff is the Legal registered owner to the Suit property under the Provisions of Sections 24, 25 and 26 (1) of *Land Registration Act* of 2012. I reiterate that the Defendant has not demonstrated how he acquired the title deed and besides the vesting orders to the parcels Nos. 567, 568 and 569 and the Deed Plans were set aside by the High Court on 13th September, 2002. Indeed, the Court of Appeal declared that these title deeds were acquired fraudulently and hence no orders would be made on titles that were a nullity. Taking that the Plaintiff could not be granted any Eviction Orders at the Court of Appeal nor could she file the Suit before the Miscellaneous Application No. 104 of 1999 (OS) she was compelled to file a separate suit for these orders. Pursuant to this, the argument that the Suit offends the Doctrine of Res Judicata is baseless and unfounded. I fully concur with the Plaintiff Counsel's argument and citation from the decision of:-

“Kenya Commercial Bank Limited (Supra) Omega Enterprises (Kenya) Ltd and Macfoy (Supra)” – to the effect that:- “The Courts have never accepted Res Judicata as an absolute principle of law which applies rigidly in all circumstances irrespective of the Justice of the case. There is one established exception to this Doctrine and that is where the Court itself has made such an egregious mistake that grave injustice to one or more of the Parties concerned would result if the Court's erroneous decision were to form the basis of an estoppels against the aggrieved Party”.

69. The Plaintiff had to file this Suit in Order to invoke the Court's jurisdiction on the Eviction Orders. On whether the Suit was Statutory barred, I have noted that although the Defendant claimed to have been in occupation of the Suit property from the year 1988, but without any proof, there has been a lot of interruption by his leaving and coming back to it and also the numerous Court Cases that were filed over the same subject matter. For Instance, the deceased filed several cases to have the Defendant vacate the property – Land Case No. 9 of 1992 such that if time was to be computed from 1988 then it was clear that at the time the Miscellaneous Application No. 104 of 1999 (OS) was filed twelve (12) years had already lapsed. The Court has also noted that the Defendant had never filed any Suit for Land Adverse Possession as required by law. Instead, the filed suit sought for Vesting Order in respect of parcel Nos. 567, 568 and 569/111/MN. Therefore, for these reasons, and in the long run, the orders sought under the Counterclaim have no merit and hence dismissed.

ISSUE NO. (c) Who will bear the Costs of the Suit.

70. It is now well established that costs are at all the discretion of Court. Cost is the award granted to the Party at the conclusion of any legal action, process and/or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil Procedure Act* Cap. 21 holds that costs follow the events. By events, it means the result of the legal action, proceedings and/or process of litigation. (See the Supreme Court case of “Jasbir Rai Singh Rai – Versus Tarchalon Singh (2014) eKLR; and the Court Rosemary Wambui Munene – Versus – Ihururu Dairies Co – Operative Limited (2014) eKLR, Kenya



Sugar Board – Versus – Ndungu Gathini (2013) eKLR; and Cecilia Nyayo – Versus Barclays Bank of Kenya Limited (2016) eKLR” where Courts held that:-

“ The basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

71. In the instant case, the Plaintiff has been able to establish its case beyond all preponderance of probabilities. It had to effectively defend itself from the assertions made out in the Defence filed by the Defendant herein. Hence, the Costs of the suit is to be borne by the 1st and 2nd Defendants to the Plaintiff.

VII. Conclusion and Disposition

72. Ultimately, having caused an indepth and elaborate analysis of all the framed issues herein, the Honorable Court is fully persuaded that on a preponderance of probability the Plaintiff has been able to establish its case. For avoidance of doubt these are the Orders of the Court.

- a. That Judgment entered severally and jointly in favour of the Plaintiff and against the 1st and 2nd Defendants with costs.
- b. That an order be and is hereby made dismissing the Counter Claim dated 25th January, 2019 by the 1st Defendant for lack of merit.
- c. That there be an Order of Permanent Injunction restraining the 1st Defendant by himself, Servants, Agents from encroaching upon, trespassing and occupying the Suit Land and/or any other manner interfering with the indefeasible rights, title and ownership of the Plaintiff’s over the Suit Properties numbers 567, 568 and 569 situate at Kikambala together with Sub - division 2057, 2058 and 2062/111/MN all being Sub-division of the parcel Land Reference No. 284/111/MN.
- d. That pursuant to the Provisions of Section 153 E of Land Act No. 6 of 2012, there be an Order of Eviction of the 1st Defendant from the Suit Properties Nos. 567, 568 and 569 situate at Kikambala together with Sub-division 2057, 2058 and 2062/111/MN all being Sub-division of the parcel Land Reference No. 284/111/MN within the next ninety (90) days from the date of the delivery of this Judgment.
- e. That there be an Order pursuant to the provision of Section 152E of the Land Act, No. 6 of 2012 of the demolition of all the illegal structures put up by the 1st Defendant and allowing him to salvage any materials, property and/or items from the fixtures onto the Suit Properties being Sub-division Nos. 2057, 2058 and 2062/111/MN all being Sub-division of parcel No. Land Reference Number 284/111/MN at his costs within the next ninety (90) days from the date of the delivery of this Judgment.
- f. That the costs and interest of this Suit to be borne by the 1st and 2nd Defendants to be awarded to the Plaintiff.

JUDGMENT DELIVERED THROUGH MOCROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA ON THIS 27TH DAY OF FEBRUARY,2023.

.....

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)



ENVIRONMENT AND LAND COURT AT MOMBASA

In the Presence of:-

- a. M/s. Yumnah, the Court Assistant.**
- b. Mr. Mr. Otieno Advocate holding brief for Mr. Malombe Advocate for the Plaintiff;**
- c. M/s Gwahalla Advocate holding brief for Mr. Gikandi Advocate for the 1st Defendant; and**
- d. Non appearance for the 2nd Defendant.**

