



REPUBLIC OF KENYA



KENYA LAW
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Adakala & 8 others ((Suing on their behalf and on behalf of 664 other members of Saika-Maile Saba, Siranga and Mwingenye residents)) v Morven Developers Limited; Kiratu (& another (Interested Parties) (Suing on his own behalf and on behalf of 1000 other members of Maili Saba Settlement /Siranga, Ogopa and Mwingenye Scheme)) (Environment and Land Case Civil Suit 483 of 2012) [2023] KEELC 917 (KLR) (20 February 2023) (Ruling)

Neutral citation: [2023] KEELC 917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 483 OF 2012**

JA MOGENI, J

FEBRUARY 20, 2023

**IN THE MATTER OF: SECTION 7 AND 38 (1) OF THE
LIMITATION OF ACTIONS ACT CAP**

22;

**IN THE MATTER OF: ORDER 37 RULE 7(1) OF THE CIVIL
PROCEDURE RULES, 2010**

AND

IN THE MATTER OF: I.R NO. 52764 ON L.R NO.

15172 OF LAND

REGISTRATION ACT, 2012:

AND

IN THE MATTER OF: ARTICLES 159, 162 (2) (B) AND

40 OF THE

CONSTITUTION OF KENYA

=BETWEEN=

BETWEEN

MUSA IBUSA ADAKALA & 8 OTHERS PLAINTIFF

**(SUING ON THEIR BEHALF AND ON BEHALF OF 664 OTHER MEMBERS OF
SAIKA-MAILE SABA, SIRANGA AND MWINGENYE RESIDENTS)**

AND



MORVEN DEVELOPERS LIMITED DEFENDANT

AND

**WAWERU KIRATU (SUING ON HIS OWN BEHALF AND ON BEHALF OF
1000 OTHER MEMBERS OF MAILI SABA SETTLEMENT /SIRANGA, OGOPA
AND MWENGENYE SCHEME) INTERESTED PARTY**

ATTORNEY GENERAL INTERESTED PARTY

**SUING ON HIS OWN BEHALF AND ON BEHALF OF 1000 OTHER MEMBERS
OF MAILI SABA SETTLEMENT /SIRANGA, OGOPA AND MWENGENYE
SCHEME)**

RULING

1. The Plaintiffs filed an Originating Summons on their own behalf and on behalf of other members of the Saika, Mailisaba, Siranga and Mwenyenge resident on 7/08/2012 under Section 7 & 38(1) of the Limitations of Actions Act Cap 22 and under Order 37 Rule 7 (1) of the Civil Procedure Rules and Articles 159, 162 (2) b and Article 40 of the Constitution seeking the following Orders;
 - a. That the Plaintiffs/applicants have been in adverse possession of land Grant number I.R 52764 situated in Nairobi area containing measurements, two nought decimal three two (20.32) hectares or thereabout that is to say Land Reference (LR) No. 15172 on land survey plan Number 155456 deposited in the survey record at Nairobi be declared the absolute owners thereof and the same be registered in their names.
 - b. That Morven Developers Limited the defendant/respondents herein who is the registered owner of land title Grant number LR 52764 Land Reference (LR) No. 15172 on land survey plan Number 155456 do transfer the said parcels of land to Plaintiffs as the beneficial owner thereof by virtue of adverse possession from 1960 or from 2nd March 2000 when the title was transferred to the respondent.
 - c. That the deputy registrar of this honorable court be authorized to sign all the requisite documents on behalf of the respondents herein to facilitate the transfer of land Reference(LR) No. 15172 on land survey plan Number 155456 to the Plaintiffs.
 - d. That cost of this application be borne by the defendant.
 - e. That cost of this application be provided for.
2. The summons is premised on the grounds cited in the application and particularly in the Supporting Affidavits of the Plaintiff/Applicant dated 27/3/2017. There are other affidavits filed by other plaintiffs namely Joseph Thiong'o Maina, Peter Irungu, Joseph Mbiti, Peter N. Nthiwa, Patrick Miruka Makori, Tabitha Muthoni Wairimu, Inosenti Angwenyi Ondari and Melechi Mwangi Ngugi on behalf of other members of the Saika, Mailisaba, Siranga and Mwenyenge residents.
3. The Plaintiffs aver that they have been staying on the suit property without any interruptions since 1960s and on the land there are permanent residences, schools and churches.
4. The 1st Interested Party who is seeking ownership of the suit property by way of adverse possession was enjoined to the suit through an application dated 16/10/2012. He was finally enjoined on 19/09/2019.



5. Further the 2nd defendant through the defendant's application dated 11/02/2021 which sought to have them enjoined were finally enjoined to the suit on 07/06/2021.
6. The Summons is opposed through various Replying Affidavits filed by the 2nd Interested Party dated 28/08/2012, 16/12/2014, a further replying affidavit sworn on supplementary affidavit dated 14/09/2012, and a supplementary affidavit dated 14/09/2012.
7. The Defendant also filed a counter claim seeking the following orders;
 - a. A declaratory Order that the Defendant is the absolute legal registered proprietor of the Suit Property, I.R No. 52764 L.R No. 15172
 - b. A declaratory Order that the Plaintiffs and 1st Interested Parties unlawfully and illegally trespassed the Suit Property, I.R 52764 L.R 15172, and constructed structures thereon without the knowledge and consent of the Defendant
 - c. An Order of eviction directed at the Plaintiffs and 1st Interested Parties from the Suit Property, LR No. 52764 L.R No. 15172, and removal of structure thereon.
 - d. In the alternative of the above, compensatory damages in the sum of the current market value of the Suit Property, I.R No. 52764 L.R No. 15172.
8. During the hearing of this suit on the plaintiffs called two witnesses, the Defendant had one witness and the 1st Interested Party also called one witness.
9. During the hearing PW1- Joseph Thiongo Maina adopted his witness statement dated 17/11/2014 and testified on behalf of others and stated that they have stayed on the land for over 40 years and it is only when they did a search that they discovered the suit property is registered in the name of the defendant but that for the 40 years he has been on the suit property he has never seen the defendant
10. In cross-examination he stated that he has no survey map. He testified that the suit property was owned by a white man by the name Dominic and it was a sisal farm where his father worked. The workers had been allocated living quarters. He stated that he paid water and electricity bills. It was his testimony that the Provincial Commissioner helped them to subdivide the land into 30 by 60 portions but they never received title documents but they got ballot papers for the plot and his was No. 163 and that the beacons for each portion are there.
11. He testified that the surveyors who subdivided the land were from the government through the office of the Provincial Commissioner not Moven Developers. He stated that he did not know Bristar Investment Limited. He also testified that the pictures that they took and produced in court were not dated.
12. PW-2 Tabitha Muthoni Wairimu who is witness number 7 testified and stated that she had stayed on the suit property for 26 years. She adopted her witness statement dated 17/11/2014 as her evidence in chief and exhibits numbers 1-4. She stated that she entered the suit property when she was 20 years in 1996 and now she is 53 years old. It was her testimony that they never bought the land but they were allocated by wazees known as Musyoka and Musa Ibusa Atakala who is since deceased.
13. She testified that she was given a certificate which bore the number of the plot. Further that a surveyor by the name Caro is the one who sub-divided their plots and allocated her one measuring 30 by 60 feet and she gave her an allotment letter after they made payments. She had built a mad house and a mabati house but after allotment she build a stone house.



14. During cross-examination she testified that they held a meeting with 664 persons but she is of the view that no one should be evicted from the suit property. She stated that she does not pay rent and rates. She stated that she got to know about the Defendant in 2012. She testified that she is authorized to testify on behalf of the others since they gave her authority which she has filed in court.
15. With the testimony of these two witnesses the plaintiffs closed their case.
16. The Defendant testified through its Director – DW1 Jignesh Navichandra Desai who filed a replying affidavit and a supplementary affidavit dated 28/08/2012 and 14/09/2012 and a further affidavit dated 16/02/2014. He produced 14 exhibits marked as DW1Exhibits 1-14.
17. During cross-examination DW1 confirmed that he was authorized to represent the company. He testified that the company was transferred to the company on 2/03/2000 from Bristar Limited for a consideration of Kesh 20 million. He testified that he visited the suit property and bought the same as vacant possession but he did not submit any evidence in court to show that the property was vacant possession when he purchased it.
18. It was his testimony that he discovered illegal encroachments around 2010 to 2011. He then approached the District Commissioner of the area who advised against evicting those who had encroached onto the suit property and instead he held meetings with the representatives of those who had settled on the suit property.
19. He testified that discussions were held between 2011-2012 and jointly with those who had settled on the land they submitted to the City Council their subdivision plans and there is an approval dated 4/07/2012. Since this matter was filed on 15/08/2012 he stated that he has never visited the suit property.
20. He also testified that from the time he purchased the suit property to the time when the suit was filed he never interfered with the plaintiff's occupation. He stated that he had no loan documents nor a lease agreement that he presented in court since he never took a loan to purchase the suit property. It was his testimony that Bristar Limited cleared the loan and then transferred the suit property to the defendant.
21. When cross-examined by the 1st Interested Party he stated that when he visited the suit property he never saw anyone on the property. Further that he had been paying rates, he started paying in 2012 despite having bought the land in 2000. He further testified that he only realized in 2011 that there were settlements. He testified that the Defendant catered wholly for the sub-division. He stated that he did not know that the people on the suit property were squatters.
22. Further he stated that they never called Bristar Limited as witnesses to testify that they were the previous owners. He stated that they sent letters of offer to those willing to buy the land from the Defendant and there were only two persons who showed interest.
23. Upon cross-examination by the Advocate of the 2nd Interested Party, he stated that he had no sale agreement before the court neither did he produce Change of User document as required under Special Condition Number 5.
24. With this the Defendant closed his case.
25. The 1st Interested Party testified that he had lived on the suit property since he was young and the Defendant found them on the suit property. He stated that he got to the suit property in 1962 but to date he has never received the title. That he met the defendant at the office of the District Commissioner and he informed him that he never purchased the land since there were people settled on the land. Further that he never accepted any letter from Defendant to purchase the land.



26. He contended that when the plaintiffs filed the suit they did not explain to him but when he got to know what was going on he then applied to be enjoined as an interested party. He testified that the whiteman of Greek origin is the one who gave them the land and the subdivision was done by Caro. He stated that he has constructed a stone house on the suit property.
27. He also testified that Movern, the Defendant wanted the plaintiffs to buy the land but they rejected the offer because he found them on the suit property. He further stated that he sought to be enjoined to the suit on his behalf and on behalf of those who had been left out. He stated that allotment letter for the people of Maili Saba was applied for in 2001.
28. With this the 1st Interested Party closed his case.
29. On the part of the 2nd Interested Party the advocate submitted that noting that there is no dispute on the Registered Owner of the suit property then the 2nd Interested Party chose not to call any witness. With this the 2nd Interested Party closed their case.

Analysis and Determination

30. This court has carefully considered the evidence and submissions made by the plaintiffs and the 1st defendant. I would like to take this opportunity to thank the counsels for making submissions that were well researched and concise. The defendant states that he bought the suit property sometime in 2000 for a consideration of Ksh 20 million. He states that he bought the said land and obtained vacant possession in that same year and that there were no people occupying the suit property.
31. The plaintiffs on the other hand and the 1st Interested Party claim to have obtained ownership of the land through adverse possession. Some testified to have entered the suit property in the 1960s with their parents who worked for the owner of the land who they termed as a white man of Greek origin. Some testified to have been born on the land and to have stayed there to date. They have produced water bills and electricity bills to show that they are connected to the amenities.
32. In the matter herein the defendant claims to have involved the local administration in dispute to try and resolve the conflict on the ownership of the suit property but there is no evidence brought before the court to show that there were any minutes documenting this meeting. Neither did the defendant call the Area Chief or someone else who could independently corroborate their claim to have made attempts to interrupt the stay of the plaintiffs on the suit property. At the same time, the defendant claims to have bought land that was vacant. In his testimony he stated that the land was vacant though he later said he saw that the land was inhabited. He has not brought any photographs that he had relied upon that show vacant suit property.
33. The Defendant also filed a counterclaim seeking to have the plaintiffs evicted from the suit property in the alternative compensation at the market rate of the price of the suit property. Now, the interests of an adverse possessor and those of a registered proprietor are mutually exclusive. They cannot flourish together. Therefore, since the Plaintiffs filed a claim for adverse possession, through the Originating Summons, the defendant's counter claim with regard to the suit property became obliterated and cannot stand.



34. I must also point out that even if the defendant's counter – claim fails in law and collapses because it is statute barred. This is because, Section 7 of the [Limitation of Actions Act](#) states that:-
- “Subject to Section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption clause), the title of that person to the land is extinguished.” Emphasis added.
35. The above provision must be read together with the provisions of Section 7 of the [Limitation of Actions Act](#) referred to earlier in this judgment as well as Section 13 of the same [Act](#). And as was held in Benjamin Kamau .v. Gladys Njeri C.A Civil Appeal No. 2132 of 1996 :
- “The combined effects of the relevant provisions of Sections 7, 13 and 17 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.” Emphasis mine.
36. In a more recent exposition on the doctrine of adverse possession, the Court of Appeal had the following comments in [Mtana Lewa .v. Kabindi Ngala Mwagandi](#) 2015 Eklr [C.A Civil Appeal No 56 Of 2014 [Malindi]
- “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, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential pre requisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#)
37. I will be guided by the above precedents and statutes among others in determining whether the plaintiffs have made out a case to warrant the grant of the orders sought in their amended Originating Summons. The Counter-Claim came after the Plaintiffs filed their case of adverse possession.
38. The defendant has not demonstrated that he made any efforts to evict the defendants in a manner that can be said to have interrupted their possession of the suit land. Unless the plaintiffs were effectively evicted from the suit land, their possession thereof is to be deemed as continuous and adverse to the defendant's title.
39. I find that in this case the plaintiffs have exhibited evidence of their physical possession of the suit land. In their evidence on cross examination the plaintiffs admitted that they have settled on this land without requisite documents at different periods starting 1960s but in any case not later than 2000 when the defendant allegedly bought the suit property. Therefore, after the plaintiffs did a search to establish the owner of the suit property they must be deemed to have continued occupying the land with the intention of dispossessing the defendant of the land. Their occupation was therefore adverse to his title.
40. On his part the 1st Interested Party to prove his claim to the suit property, he filed a number of documents in his bundle of documents also claiming ownership of the suit property. He stated that he was authorized to represent Maili Saba, Ogopa and Mwengeny groups who are settled on the suit property. Who he submits were allotted the suit property and had been paying rent and rates to the



City Council of Nairobi. It was also his testimony that the Commissioner of Lands gave him and his team the allotment letter following a survey undertaken in 1998 commissioned to allocated residents of Maili Saba plots. Further, that this finalization of this process began somewhere between 2007 and 2008.

41. He also stated that both the plaintiffs and the Defendant do not have any legal standing to pursue the suit property and that the settlement of Maili Saba Squatters started through the initiation of Kayole Estate Limited as early as 1966.
42. The letter produced by the 1st Interested Party on page 80 of his bundle dated 25/02/1966 refer to squatters being settled on Maili Saba as early as 1966. He also produced another letter dated 5/04/2006 which is written to the Commissioner referring to an allotment letter to Ogopa Team Jua Kali Association referring to payment of prescribed amount.
43. The Letter of Allotment produced dated 5/01/1999 to Ogopa Team Jua Kali Association of P.O. Box 72309 Nairobi refers to un-surveyed plot and the allotment was to run from 1/1/1999. An earlier letter had been written by the same group of Ogopa Team Jua Kali Association of P.O. Box 356 Nairobi. This letter has no relationship with the letter of acceptance dated 5/04/2006 and further the amount of money paid to the Commissioner of land is different from the money that the group was meant to pay for the Letter of Allotment dated 1/1/1999.
44. The 1st Interested Party I note did not produce any proof of payment of rates. In the bundle of documents there were electricity bill payments of 1989, 1990, 1992, 1993 and 1986 these are on pages 60, 62, 63, 66 and 67 all of which payments were made in the name of the 1st Interested Party. It is not clear why the 1st IP was paying for electricity bills for land which was not allocated to them. Nor is it clear why Maili Saba, Siranga, Ogopa Jua Kali Association were paying for consumption of electrical services before allocation.
45. The 1st IP also produced in his bundle of documents a letter dated 8/07/2012 which he wrote to the Defendant and he states in it that he is not settled on the defendant's land LR 15172 which is the suit property.
46. He contends that the plaintiffs are masqueraders and they have not come to equity with clean hands and they went to reap where they did not sow. Further that the 1st Plaintiff is not on the sit property and that the 2nd and 3rd plaintiffs are strangers, the 4th plaintiff does not live on the suit property and neither does the 5th plaintiff live on the suit property having sold her portion of land that she was living on.
47. I am not persuaded that the 1st Interested Party's claim for adverse possession can succeed having submitted documentation to put a case for Allocation of the Suit Property. One cannot claim to have obtained land by adverse possession and also through allocation.
48. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
49. Section 26 (1) of the [Land Registration Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute



and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

50. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

51. Both the Plaintiffs, the 1st Interested Party and the 2nd Interested Party agree that the suit property is registered in the name of the Defendant. On his part the Defendant testified that he was aware that there were people on the suit property when he bought it in 2000 but he never made any attempts to evict them nor disturb their occupation of the suit property until when he filed the counter-claim. Infact in my opinion the counter-claim is an after-thought and does not in any way make the defendant’s claim plausible.

52. The court in the case of *Elijah Makeri Nyangw’ra –v- Stephen Mungai Njuguna & Another* (2013) eKLR held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* stated as follows: -

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

53. It is not in dispute that the registered owner of land parcel in question is the defendant. The issue is whether or not he holds a good title by virtue of the plaintiff’s claim of adverse possession. During the hearing, no party questioned the authenticity of the title and if I start to address myself to whether the title is good or not I will delve into questions that were not asked at trial.

54. Counsel for the 2nd Interested Party Mr. Allan Kamau noting that the issue of authenticity of title did not arise chose not to call any witnesses though he had three witnesses lined up for this case. I will therefore choose to go with the observations made by the plaintiff, the 1st Interested Party and 2nd Interested Party on the issue of title. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of *Gerald Muriithi v Wamugunda Muriuki & Another* (2010) eKLR while referring to the case of *Wambugu v Njuguna* (1983) KLR page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been



dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The *limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.
3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

55. The court was also guided by the case of *Francis Gicharu Kariri - v- Peter Njoroge Mairu*, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of *Kimani Ruchire -v - Swift Rutherford & Co. Ltd.* (1980) KLR 10 where 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)”.

56. So the plaintiff must show that the defendant 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 purposes or any endeavors to interrupt it. In applying these principles to the present case, the plaintiff's states that they have had exclusive use of the suit land from 1960 as they were settled there with their parents who were on the farm of the white man. Some were claim that they were born on the land. For example, Peter N. Nthiwa claims to have been the inhabitant of the suit property for over 40 years the same for Patrick Miruka Makori, whereas Tabitha Muthoni Wairimu claims to have been on the land for 35 years, and Inoseti Angwenyi Ondari claims to have been born on the suit premises in 194.

57. The plaintiffs testify that it is not true that their members signed a sale agreement dated 26/6/12 and signed on 29/6/12 with the defendant. Further that they never attended a consultative meeting to discuss issues touching on ownership of the suit property. The plaintiffs attached sworn affidavits of Jacob Kyalo, Gideon Muthengi, James Bosire Kemosi, Gabriel Kinyanjui and Kinuthia who have had disputed the allegations of the 1st Interested Party and the Defendant.

58. I find that indeed the Defendant was registered owner of the suit property. In the case of *Wanyoike v Kabiri* [1979] KLR at page 239 Justice Todd (as he then was), held that in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase. In the case at hand time started running from the time Brighstar Limited bought the land and allowed the Plaintiffs to settle on the suit property. By the time the Defendant was purchasing the suit property from Brighstar in 2000, the Plaintiffs were settled on the suit property. Essentially it is my interpretation that by the time the Defendant took possession of the suit land and the title was extinguished.

59. If one chooses to give the Defendant the benefit of doubt, then allow time to start to run from year 2000 then the Plaintiffs were settled on the suit property for 12 years and therefore got possession by adverse possession at the lapse of 12 years.



60. In the case of *Joseph Gabumi Kiritu v Lawrence Munyambu Kabura* CA No 20 OF 1993 Justice Kwach JA (as he then was) stated as follows;

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in *Githu v Ndeete* is important and deserves to be read in full. Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must either make a peaceable and effective entry, or sue for recovery of the land.”

61. It is therefore the view of the Court that the right to Adverse Possession accrued and vested in the Plaintiff as at 1960 so much so that by the year 2000 when the Defendant is changing the title in his name, title had been extinguished in favour of the Plaintiffs and he therefore held the title to the suit land in trust for the Plaintiffs. There is no evidence that the Defendant ever retook possession of the suit land nor that he successfully removed or ousted the Plaintiffs from the possession of the suit land. The Court is of the meetings held with the local administration by the Defendant in 2012 did little to stop time from running nor dislodge the Plaintiffs from the suit land. The cases cited in the defendant’s case are not helpful either in assisting the Defendant to assert title to the suit land because title by way of Adverse Possession had accrued and vested in favour of the Plaintiffs.

62. In my view the Plaintiffs led evidence that they have been in exclusive control of the suit land and demonstrated their animus possidendi in developing the suit land through construction of permanent houses, construction of permanent amenities like schools and churches. This has been done since the 1960s to date openly and without interruption by anyone, least of all, the Defendant, is not under challenge. Evidence was led that the Defendant had knowledge of the Plaintiff’s occupation of the suit land.

63. In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts” *Kweyu v Omutu*, C A Civ Appeal 8 of 1990 (as yet unreported). This Court is satisfied that the Plaintiffs have proved Adverse Possession and their case is for granting. The title of the suit land is being held in trust for the Plaintiffs.

64. The totality of the evidence above is that the Plaintiff has proved their case. Though the Defendant had preferred evidence that he had even offered the plaintiffs the suit premises but at a cost for each occupied plot. I find that the plaintiffs have been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portions of land for a period in excess of 12 years. I find that the plaintiffs have established that their possession of the suit land was continuous and not broken for any temporary purposes or any endeavors to interrupt it for a period of 12 years.

65. In conclusion, I find that the plaintiffs have established their case on a balance of probabilities against the defendant and I grant the following orders;

1. That the plaintiffs be and are hereby declared the absolute owners of Grant Number I.R 52764 situated in Nairobi area containing measurements, two nought decimal three two (20.32) hectares or thereabout. That is to say Land Reference (LR) No. 15172 on land survey plan Number 155456 deposited in the survey record at Nairobi thereof and the same be registered in their names.



2. That Counter-Claim having been dismissed, Morven Developers Limited the defendant herein who is the registered owner of land title Grant number LR 52764 Land Reference (LR) No. 15172 on land survey plan Number 155456 do transfer the said parcels of land to Plaintiffs as the beneficial owners thereof by virtue of adverse possession from 2nd March 2000 when the title was transferred to the defendant.
3. That in default of the defendant transferring the same voluntarily, the court do hereby authorize the deputy registrar of this honorable court to sign all the requisite documents on behalf of the respondents herein to facilitate the transfer of land Reference(LR) No. 15172 on land survey plan Number 155456 to the Plaintiffs.
4. The costs is awarded to the Plaintiffs.

It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIVASHA ON THIS 20TH DAY OF FEBRUARY 2023.

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MOGENI J

JUDGE

In the virtual presence of :-

Mr Ondiek for Plaintiff

Mr Kago for Defendant

Mr Thuo holding brief for Mr. Muiruri for 1st Interested Party

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

