



UNIVERSITY OF NAIROBI

SCHOOL OF LAW

A CRITIQUE ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA

**A RESEARCH PROPOSAL PRESENTED TO THE SCHOOL OF LAW OF THE
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AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)**

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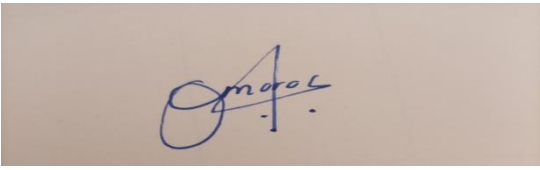
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DEDICATION

To Ben Charles Kutesa Thyme, my son, you are my gift and joy.

ACKNOWLEDGMENT

I am truly thankful and grateful to the good Lord for how far I have come and the gift of wisdom to complete this study. Special thanks to Dr. Scholastica Omondi for being an awesome supervisor. Am grateful for having taken my fumbled ideas and words and turning them into something impressive. For the constant guidance am truly blessed, humbled and honoured to have worked with you as my supervisor on this study. I also thank Samuel Opiyo Owino, the Library Assistant, University of Nairobi for the incessant help and materials that have enabled me complete my study. Lastly, I whole heartedly thank my mother, my sisters (Lillian, Winnie, Miriam and Doreen), brother Charles, other family members, friends, classmates for the overwhelmingly strong support system. Thank you so much Winnie for financially supporting this whole master's programme, I have learnt and loved every second I spent in class learning and reading. All glory goes back to the Lord.

ACRONYMS

Constitution – The 2010 Constitution of Kenya

CPR- The Civil Procedure Rules 2010

ELC-Environment and Land Case

Limitation Act- The Limitation of Actions Act CAP 21

UK- United Kingdom

USA -United States of America

TABLE OF CASES

1. Celina Muthoni Kithinji V Safiya Binti Swaleh & 8 others [2018] eKLR
2. Dowse V Bradford MBC [2020] UKUT 202 (LC)
3. Gabriel Mbui V Mukindia Maranya Civil Case No. 283 Of 1990;[1993]eKLR
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13. State Of Haryana V Mukesh Kumar And Others[2011]Insc 1013

14. Wanyoike v Kahiri [1979] KLR
15. Wilson Njoroge Kamau V Nganga Muceru Kamau [2020] eKLR
16. Zirngibl V Colument Dock Co (1895) 157 430, 447

TABLE OF STATUTES

INTERNATIONAL LAWS

1. Code of Hammurabi
2. The European Convention on Human Rights Protocol No.1 (ECHR)
3. The United Kingdom Land Registration Act 2002
4. The United Kingdom Land Registry Practice Guide 4
5. Indian Limitation Act.

DOMESTIC LAWS

6. The 2010 Constitution of Kenya
7. The Community Act No. 27 of 2016
8. The Land Act No. 6 of 2012
9. The Land Registration Act No. 6 of 2012
10. The Limitation Act CAP 22 (Revised 2012)
11. Trespass Act Chapter 294 Laws of Kenya

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGMENT.....	iv
ACRONYMS	v
TABLE OF CASES	v
TABLE OF STATUTES.....	vi
INTERNATIONAL LAWS.....	vi
DOMESTIC LAWS.....	vi
1 CHAPTER 1	1
1.1 INTRODUCTION	1
1.2 BACKGROUND OF THE STUDY	3
1.3 STATEMENT OF THE PROBLEM	8
1.4 JUSTIFICATION OF THE STUDY	9
1.5 STATEMENT OF THE OBJECTIVE.....	9
1.5.1 Overall Objective	10
1.5.2 Specific Objectives	10
1.6 RESEARCH QUESTION.....	10
1.7 THEORITICAL FRAMEWORK	11
1.8 LEGAL FRAMEWORK.....	13
1.9 RESEARCH METHODOLOGY.....	15
1.9.1 Research Site.....	17
1.9.2 Research Approaches.....	19
1.9.3 Research designs	19
1.9.4 Research tools for collecting data	20
1.10 LITERATURE REVIEW	21
1.10.1 The historical development and rationale of adverse possession laws in Kenya.....	21
1.10.2 The impact of adverse possession on the rights to property	22
1.10.3 The challenges the law on adverse possession presents.....	23
1.10.4 Recommendations	25
1.11 LIMITATIONS.....	25

1.12	HYPOTHESIS	26
1.13	CHAPTER BREAK DOWN	26
2	CHAPTER 2	28
	HISTORICAL DEVELOPMENT AND RATIONALE OF ADVERSE POSSESSION LAWS IN KENYA	28
2.1	ADVERSE POSSESSION.....	28
2.2	THE HISTORICAL DEVELOPMENT OF ADVERSE POSSESSION.....	30
2.3	THE RATIONALE OF ADVERSE POSSESSION	33
2.4	ADVERSE POSSESSION IN KENYA	34
2.4.1	SURVEY FINDINGS ON ADVERSE POSSESSION	38
2.4.2	SURVEY FINDINGS ON RATIONALE OF ADVERSE POSSESSION	38
2.5	Conclusion	40
3	CHAPTER 3	41
	THE IMPACT OF ADVERSE POSSESSION ON PROPERTY RIGHTS	41
3.1	INTRODUCTION	41
3.2	ECONOMIC IMPACTS.....	43
3.3	SOCIAL IMPACT	44
3.4	SURVEY FINDINGS ON THE IMPACT OF ADVERSE POSSESSION	46
3.4.1	FIG 2: PIE CHART SHOWING PARTICIPANTS WITH AND WITHOUT KNOWLEDGE OF THE IMPACT OF ADVERSE POSSESSION	47
3.5	Conclusion	47
4	CHAPTER 4	48
	THE CHALLENGES THE LAW ON ADVERSE POSSESSION PRESENTS VIS A VIS CONSTITUTIONAL PROPERTY RIGHTS	48
4.1	INTRODUCTION	48
4.2	ADVERSE POSSESSION CHALLENGES ON CONSTITUTIONAL RIGHTS.....	48
4.2.1	The right to property	49
4.2.2	Social and Economic Rights	52
4.2.3	Right to life and liberty	52
4.3	OTHER CHALLENGES POSED BY ADVERSE POSSESSION	53
4.4	SURVEY FINDINGS ON THE CHALLENGES OF ADVERSE POSSESSION	57
4.5	COMPARATIVE STUDY OF ADVERSE POSSESSION IN INDIA AND UK.....	58
4.5.1	ADVERSE POSSESSION IN INDIA	59
4.5.2	ADVERSE POSSESSION IN THE UK.....	61

4.6	Conclusion	66
5	CHAPTER 5	67
5.1	CONCLUSION.....	67
5.2	RECOMMENDATIONS	67
5.3	SURVEY FINDINGS ON RECOMMENDATIONS.....	71
5.3.1	Fig 3: GRAPH SHOWING PARTICIPANTS WHO RECOMMEND TO ABOLISH THE LAW ON ADVERSE POSSESSION.....	73
5.3.2	Fig 4: GRAPH SHOWING PARTICIPANTS WHO RECOMMEND REVIEW AND AMMEND THE LAW TO COMPEL THE SQUATTER TO ADEQUATELY COMPENSATE THE TITLE OWNER	74
5.3.3	Fig 5: GRAPH SHOWING PARTICIPANTS WHO RECOMMEND REVIEW AND AMMEND ADVERSE POSSESSION TO APPLY ONLY TO UNTITLED LANDS	75
5.4	Conclusion	75
6	BIBLIOGRAPHY	76
7	APPENDIX.....	81
7.1	QUESTIONNAIRE AND FILLED QUESTIONNAIRES.....	81

1 CHAPTER 1

1.1 INTRODUCTION

The constitutionality of the doctrine of adverse possession was verily tackled in the case of **MTANA LEWA VERSUS KAHINDI NGALA MWANGADI COURT OF APPEAL AT MALINDI**.¹ The Justices of the honourable court namely; Makhandia, Ouko and M'noti JJA found adverse possession not to be inconsistent with the right to property. They were majorly hinging on the notion that Article 40 of the Constitution of Kenya. They noted that the Article is not absolute and confers limitations on the right to property. This in itself triggered this paper that seeks to critique the constitutionality of adverse possession from the view of the title owner. The paper supplicates to illuminate the rights of the title owner that were not considered in the noted notorious case that furthered the use of adverse possession laws.

Furthermore, in the above noted case court argued that adverse possession fell well within the limitations of a right as denoted under **Article 24**. This working paper vehemently differs from this opinion. The researcher demonstrates this by attempting to decipher Article 24 as read alongside Article 40 when using the doctrine of adverse possession and its challenges.

The critique on the constitutionality of adverse possession is also centered on Adverse Possession laws in Kenya being some of the oldest laws. The laws on adverse possession have been used to deprive/dispossess the original registered/unregistered proprietor of his/her land. More so, the law on Adverse Possession has been around unreformed since the Limitation of

¹Mtana Lewa V. Kahindi Ngala Mwangandi[2015] eKLR
<http://kenyalaw.org/caselaw/cases/view/111658/>

Actions Act Chapter 22. This law commenced on the 1st day of December 1967.² The Limitation of Actions Act was later revised in 2012.³

However, the sections providing for adverse possession(Sections 7,13, 37 and 38) remained unrevised. Which begs to question as to whether that law is really doing its function and meeting the desires of the Kenyan people almost a century down the road? Even with the amendment and promulgation of several laws affecting land use such as Article 40 of 2010 Constitution of Kenya, the Land Act, Land Registration Act, Civil Procedure Rules of 2010, the archaic and unconstitutional law on adverse possession has waltzed through it all unchanged.

This has had a very significant impact on land use in Kenya as regards to the land owners. They are losing their constitutional right to property(land) to squatters. This is negatively impacting on the land owners. This paper therefore seeks to examine the historical background and development of adverse possession. This aims at helping the reader understand the rationale of adverse possession in the Kenyan context.

The study also attempts to find out how the law on adverse possession in its current state impacts on the right to property as enunciated under Article 40 of the Constitution of Kenya. The study reads the Limitations as founded under Article 40 alongside Article 24. Upon which the paper further examines the challenges that the law on adverse possession present in protecting property rights within the realm of the constitution. Recommendations proposing to reform the law on adverse possession are also articulated in this paper. A comparative study of the United Kingdom

² The preamble of the Limitation of Action Act CAP 22

³ Now read as the Limitation of Actions Act Chapter 22 Revised Edition 2012{2010}

and India is used to give the two alternative approaches Kenya can use in reviewing the antiquated and out-dated laws governing adverse possession. This is done to make possible the balance between the squatter and title owner's constitutional right to property when applying the law on adverse possession. This raises the need to review the constitutionality of the law on adverse possession in Kenya.

1.2 BACKGROUND OF THE STUDY

Land retains a focal point in Kenya's history and traditionally dictates the pulse of Kenya's nationhood.⁴ We hence note that in Kenya, there are many ways of acquiring land. The Land Act under **Section 7** denotes that "title to land may be acquired through—allocation; land adjudication process; compulsory acquisition; prescription; settlement programs; transmissions; transfers; long term leases exceeding twenty one years created out of private land; or any other manner prescribed in an Act of Parliament."⁵

Article 40 of the Constitution comes in to protect these rights and denotes;

- 1) "Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property.
 - a) Of any description; and
 - b) If any part of Kenya
- 2) Parliament shall not enact a law that permits the State or any person-

⁴ Report of the Land Commission of Inquiry into illegal or irregular Allocation of Land; 2004 www.Kenyalaw.org/k/fileadmin/CommissionReports/A-Report-of-the-Lan-Commission-of-inquiry-into-the-illegal-or-irregular-allocation-of-public-land

⁵ Land Act No. 6 of 2012

- a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b) To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- 3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description unless the deprivation-
- a) Results from an acquisition of land or an interest in land or conversion of an interest in land, or title to land, in accordance with Chapter Five or;
 - b) Is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that-
 - i. Requires prompt payment in full, of just compensation to the person; and
 - ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.
- 4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- 5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- 6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”⁶

Even with such an elaborate law protecting the rights to property, we have seen land owners in Kenya unscrupulously lose their land rights. This is because of prescription of time such as adverse possession. Land grabbing through the traditional and archaic methods of adverse

⁶ Constitution of Kenya 2010

possession has become a thorn in the skin of land owners who leave their land in search for greener pastures. The land owner who has been imprisoned for more than twelve years, inter-alia all are capable of losing their land to mere squatters unjustifiably. Clearly this law is tilted in favour of the squatter who in most cases occupied the land well knowing it was not his/hers and belonged to someone else.

Generally, adverse possession in simple terms means that if a squatter remains in possession of the land for a certain period of time then he will acquire ownership of the land.⁷ The development of the idea of possession came from the idea of inviolability of the person.⁸ The earliest development of the law seems to have consisted of an extension of the meaning of the term person to which the founders of the law on adverse possession were of the view that possessing a thing they said was dealing with it to the exclusion of everybody and a possessor possessed because he had taken the res, i.e. because he had been dealing with it to exclusion of certain adversaries⁹.

The origins of adverse possession can be found in several traditional justifications, all of which aim to explain the transfer of title from the owner to the possessor against the owner's will¹⁰.

One justification seeks to punish owners for 'sleeping on their rights', another justification

⁷ Potsiou, C.A and C. Ioannidis (2006) 'Informal settlements in Greece: The mystery of Missing Information and the Difficulty of Their Integration into a Legal Framework.' Fifth FIG Regional Conference, Accra Ghana.

⁸ Albert S Thayer; Adverse Possession, Journal of the Society of Comparative Legislation Vol . 13 No. 3 1913) Published by Cambridge University Press on behalf of the British Institute of International and Comparative Law page 582

⁹ Ibid

¹⁰ Shai Stern; David against Goliath, The distributive Justification for the Adverse Possession Doctrine

focuses on the possessors and their ongoing connection to the property and finally, a third justification explains the title transfer in utilitarian terms of aggregate welfare.¹¹

Adverse possession in Kenya is governed by **Section 13** of the Limitation of Actions Act that reads “A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession).”

More so **Sections 37** and **38** of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.¹² For a squatter to succeed under adverse possession in Kenya he/she must lead evidence that;

“...adverse possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour (Colour of title is that which is a title in appearance, but in reality), and, second such possession under it as will be adverse to the right of a true owner.

The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be

¹¹ Ibid 10

¹²Mtana Lewa v Kahindi Ngala Mwangandi [2015]eKLR
<http://kenyalaw.org/caselaw/cases/view/111658/>

clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”¹³

Therefore, the impact of adverse possession is that it rewards the squatter who pulls off a successful performance as the true owner of a piece of property, to the disadvantage of the original owner.¹⁴ Initially, Section 75 (6) of the repealed Constitution of Kenya provided for the doctrine of Adverse possession by noting that “a person could lose their property in consequence of any law with respect to limitation of action.” However, with the promulgation of the 2010 Constitution, **Article 40(2)(a)** and **(2)(b)** protects the rights of the property owners and forbids parliament from enacting any law that permits the state or any person to arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description.

It is from the said backdrop that the study herein and denotes that the Limitation of Actions Act is unconstitutional and limits the rights of the title owner. Unfortunately, in the case of **MTANA**

¹³ Gicheru JA, **KWEYU VERSUS OMUTUT [1990] KLR 709** COURT OF APPEAL

¹⁴ Jessica A Clarke, Adverse Possession of identity: Radical theory Conventional Practice (18-nov 05)

<https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/4697/842clarke.pdf?sequence=1>

LEWA V KAHINDI NGALA MWAGANDI¹⁵ as already noted herein, the court shied away from the positivism aspect of Article 40 of the 2010 Constitution of Kenya and held that the Law on Adverse Possession as provided for under the Limitation Act Cap 22 to be in line with the said Article. Therefore the study shall seek to further try and convince the readers that adverse possession contrary to the findings of the **MTANA** case still remains unconstitutional in terms of upholding the title owner's rights.

1.3 STATEMENT OF THE PROBLEM

Despite the existence of the right to property under Article 40 of the Constitution, the law on adverse possession has waltzed through changes of land law in Kenya unreformed and greatly disposing people of their property right. Negating their right to own property.

This working paper is not the first to point out this present but constantly ignored problem. For instance Kuloba J (now retired) in the case of **GABRIEL MBUI V MUKINDIA MARANYA**¹⁶ noted that “adverse possession has surprisingly never captured the public imagination by achieving any prominence in the national newspapers. Indeed, of the numerous waves of organized pressure groups and task forces that are sweeping across the land, none seems concerned with the prevalent taking away of land from unsuspecting land owners by all manner of intruders, squatters and criminal possessors under null and void land transactions. How is this doctrine justified...”

¹⁵ Civil Application 10 of 2016 (UR 2/2016) [2016]eKLR
<http://kenyalaw.org/caselaw/cases/view/122322>

¹⁶ High Court of Kenya at Meru Civil Case No. 283 Of 1990;[1993]Eklr

The said decision was founded way back in 1990 yet up today the law is still being used contrary to **Article 40** and **Article 43** of the Constitution that denote economic and social rights. Yet adverse possession aims at impoverishing the owner. For example in the case of **WILSON NJOROGE KAMAU V NGANGA MUCERU KAMAU [2020] EKLR**¹⁷ even after the defendant proving that there was interruption of the Plaintiff's peaceful stay on the land through a land dispute tribunal case and other numerous cases, the Defendant was still deprived of his land parcel LOC 2/KANGAARI/506 vide adverse possession. This leaves the lingering question as to whether adverse possession law application is just and fair and conforms to the constitutional laws and its limitations under Article 24.

1.4 JUSTIFICATION OF THE STUDY

This study represents a unique approach to the law of adverse possession and its constitutionality. Therefore the study is justified because;

1. The findings of the study will lead to reform of the law on adverse possession in Kenya.
2. The findings of the study will help to develop policies on adverse possession.
3. The study will generate new knowledge and fill the loopholes adverse possession creates when interpreted alongside the Constitution of Kenya.
4. The study will lay a foundation for precedents and further research on the topic.

1.5 STATEMENT OF THE OBJECTIVE

The application of adverse possession has been prominently used in the courts of law as a way of depriving the land owner of his/her land and in a way benefitting the squatter who has done nothing but illegally occupy the owner's land. The study hence will;

¹⁷ <http://kenyalaw.org/caselaw/cases/view/188668/> last accessed at 8:50pm 4/26/2021

1.5.1 Overall Objective

Critically examine the constitutionality of the laws of adverse possession in Kenya as provided for under Section 13 of the Limitation Act and Order 37 of the Civil Procedure Rules of 2010.

1.5.2 Specific Objectives

- i. Examine and understand the historical development and rationale of adverse possession laws in Kenya.
- ii. Find out how adverse possession laws in their current state impact on the right to property as provided for under Article 40 of the Constitution of Kenya.
- iii. Examine the challenges that the law on adverse possession presents in protection of property rights.
- iv. Make recommendations to trigger the reform the law on adverse possession. This can be in two folds; review of the law to protect the land owner and review the law to ensure the squatter earns the right to the land and not to just take hold of it. Or., call for its total abolishment.

1.6 RESEARCH QUESTION

Based on the research problems, the following particular questions are subjects of inquiry of this study;

- i. What is the historical development and rationale of adverse possession laws in Kenya?
- ii. What the impact of adverse possession on the rights to property is as provided for under Article 40 of the Constitution of Kenya?
- iii. What are the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution?

- iv. What measures can be taken to adequately reform the law on adverse possession to align it with the current laws?

1.7 THEORITICAL FRAMEWORK

Most of the traditional justifications for the application of the adverse possession doctrine fail either normatively or positively to justify the continuous application of the doctrine today.¹⁸ In advocating for the review on the laws governing adverse possession the study argues for the application of the “consent theory”. This is because property/land is an agreement among people over a resource, clear communication and community agreement is crucial¹⁹. Rose calls this the “consent theory” of property rights: “The community requires clear acts so that it has the opportunity to dispute claims, but may be thought to acquiesce in individual ownership where the claim is clear and no objection is made.”²⁰

This consent theory is premised on the belief that adverse possession in Kenya has served its purpose especially when it comes to pastoralists who use community land. The consent theory approach will implement the averments of the Community Land Act No, 27 of 2016 that seeks to enforce **Article 40(3)** of the COK in securing the rights of pastoralists to land, grazing and water through devolved governance and greater influence over decisions affecting their livelihood²¹ that adverse possession violates. This has made the doctrine more chaotic than ideal in resolving land issues in Kenya especially on community land which is unregistered.

¹⁸ Ibid

¹⁹ Jessica A Clarke, Adverse Possession of identity: Radical theory Conventional Practice (18-nov 05)

<https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/4697/842clarke.pdf?sequence=1>

²⁰ Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73, 79(1985).

²¹ Land links <https://www.land-links.org/country-profile/kenya/>

The consent theory is valid during claims of adverse possession as it gives the title owner an upper hand to attempt and negotiate. This can pave way for matters compensation.

On the other hand, in a bid to reform/amend the laws governing adverse possession the theory of distributive justice also coins the argument home. This theory also advocates for the squatter's rights as analyzed under Chapter 3 of this paper. Distributive justice simply advocates for the maintenance of adverse possession laws as opposed to abolishing them. Stern argues that distributive justice has the potential to serve as a tool for increasing social justice hence turning adverse possession into a normatively desirable doctrine.²² For instance the doctrine provides an individual with the power to confiscate another individual's property²³

In essence; the adverse possession doctrine serves as a mechanism for the redistribution of property (and therefore wealth) in society with no government intervention permitting a desirable self redistribution of wealth.²⁴ In short, Distributive justice is the cornerstone of Chapter 3 as it supports the presence of squatters. However, the distribution should be done with the consent of the other party. Squatters justifying their adverse possession claims should not be at the detriment of the title owner. We suggest that the only balance between the two theories is if compensation can be made to the title owner as suggested and deliberated on under the recommendations of this chapter.

²² Shai Stern; David against Goliath, The distributive Justification for the Adverse Possession Doctrine

²³ S.B. Richardson, 'Abandonment and Adverse Possession', Houston Law Review, Vol. 52,2015, p. 1385

²⁴ Ibid.,21

1.8 LEGAL FRAMEWORK

The substantive law governing adverse possession was well summarized in the case of **JOSEPH MWANGI VERSUS DUNCAN KIMANI NJOROGE**²⁵ when M.C.Oundo J. noted that “...the doctrine of Adverse Possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

‘An action may not be brought by any person to recover land after the end of 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person’.

62. Section 13 of the Limitation of Actions Act aforesaid further provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under **Sections 9, 10, 11 and 12 (of the 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.

63. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the

²⁵ **ELC NO. 20 OF 2018(OS)** [2020]eKLR

person in Adverse Possession until he shall have obtained and registered a High Court Order vesting the land in him.”²⁶

On the other hand the procedure law governing adverse possession in Kenya is **Order 37(7)** of the CPR and provides that for adverse possession; an application under **Section 38** of the Limitation Act shall be made by originating summons. The summons is to be supported by an affidavit to which a certified copy of the title to the land in question has been annexed. Upon filing the said application, court is mandated to direct on whom and in what manner the summons shall be served. When reading **section 38** of the Limitation Act in its strict and literal sense the jurisdiction of hearing Adverse Possession claims is the Environment and Land High Court.

However, this was contradicted when Justice Ohungo in the case of **PATRICK NDEGWA MUNYUA V BENJAMIN KIIRU MWANGI & ANOTHER**²⁷ noted that Magistrate courts have the jurisdiction to hear adverse possession claims as long as the suit parcel is within the pecuniary and geographical jurisdiction of that court.

The critique on the constitutionality of adverse possession that this paper seeks to delve into rises when it collides with the application of;

- a) **Article 40** of the Constitution that adjudicates for the right to property. This is similarly depicted in **Article 1** of the ECHR Protocol No.1 that provides “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived

²⁶ Environment and Land Case 20 of 2018(OS)<http://kenyalaw.org/caselaw/cases/view/199383/> last accessed at 7:55pm on 5/28/2021

²⁷ Environment and Land Court at Nakuru ELC No. 2 of 2019 [2020]eKLR

of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of International law. Therefore at what tie do these property rights extinguish to grant another right over it as depicted by adverse possession?

- b) **Article 43** that provides for economic and social rights and yet adverse possession impoverishes the owner of the land adversely possessed as he/she might swell the ranks of the squatters. Adverse possession does not make sense in a capitalistic / neo-liberalism economy.
- c) **Article 63** that provides for community land. **Article 64** provides for private land and in particular **Article 64(c)** that empowers Acts of the parliament to declare land private. This is thus implemented by **section 7(1)** of the Land Act that provides for ways through which land can be acquired. Furthermore, **Section 135** of the Land Act is created to settle the landless as it provides for a land settlement fund. Leaving us bewildered with the question why squatters are still depriving land owners in Kenya of their land n with such elaborate law.

1.9 RESEARCH METHODOLOGY

The methodology foundation on the research study of Adverse Possession is hinged on the doctrinal and socio-legal research methodology. The Doctrinal (or “black letter”) methodology refers to a way of conducting research which is usually thought of as “typical legal research”.²⁸ A doctrinal approach to research will focus on case-law, statutes and other legal sources.²⁹ Therefore, statutes such as the 2010 Constitution of Kenya, the Limitation Act, Civil Procedure

²⁸ Research Methodology; Doctrinal Methodology, <https://uweascllmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-methodology/> last assessed at 7:52am on 31st /January/2021

²⁹ *ibid*

Rules 2010 as well as various case-law both binding and persuasive is going to be used to capture the legal foundation of adverse possession.

However, to add more weight to my research study unlike other proponents on adverse possession the doctrine of socio-legal methodology is going to be a major influence on the said research study. This doctrine is a branch of interpretive sociology. Interpretive sociology takes a more holistic approach to adverse possession and enlists other kinds of knowledge, such as history, philosophy and psychology.

The researcher used the interpretive sociology study to give the socio-legal narrative a more holistic approach to adverse possession. By enlisting other kinds of knowledge, such as history, philosophy and psychology of adverse possession laws in Kenya.

The other fond reason for using the socio-legal methodology was to encourage public participation as enunciated under **Article 10** of the Constitution. This was a major part that was overlooked in the case of **MTANA LEWA VERSUS KAHINDI NGALA MWANGADI COURT OF APPEAL AT MALINDI**.³⁰ The court made a very strong stand on the constitutionality of adverse possession without engaging the public that is heavily affected by adverse possession laws. The researcher was of the view that maybe if public participation was used It is from the above foregoing that the study used a field work study. The targeted group was thirty comprising of mostly advocates who were fifteen (15) in number. The Judicial officers who were five (5). The lawyers were seven (7) and one (1) land registrar who constantly

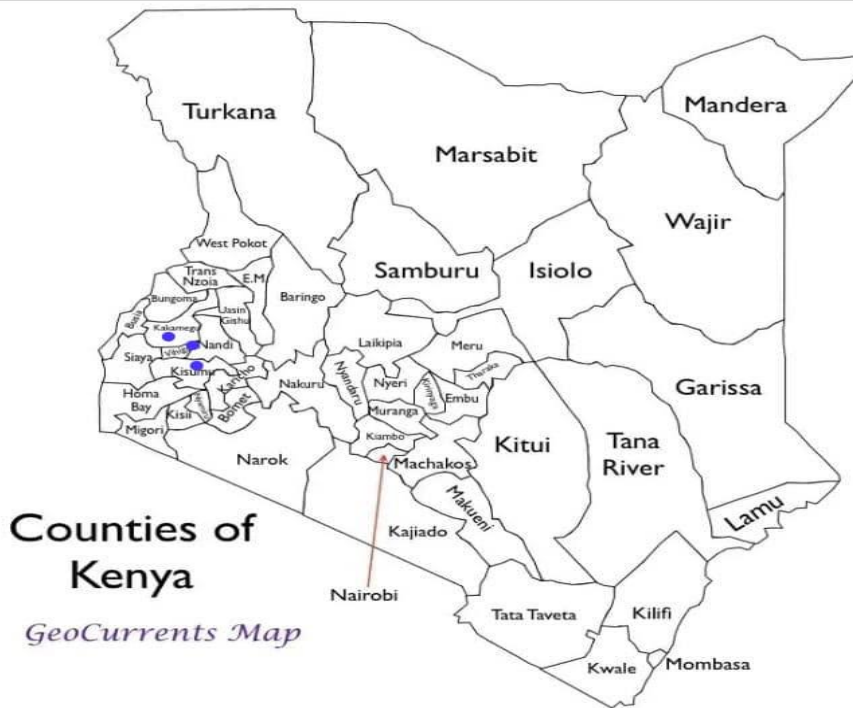
³⁰Mtana Lewa V. Kahindi Ngala Mwangandi[2015] eKLR
<http://kenyalaw.org/caselaw/cases/view/111658/>

litigate or use the notion of adverse possession. This was key in helping us achieve the objectives of the study. We were also able to interview two (2) civil servants who unfortunately had little knowledge about the topic at hand. This negated us from approaching participants outside the legal profession. The participants were male and female. Twenty(20) of them were male and ten(10) female.

1.9.1 Research Site

Cluster random sampling was used as a procedure of collecting data. This type of sampling allowed us to divide the study population in Western Kenya in the cluster regions of Kisumu, Kakamega, Mbale and Hamisi and other surrounding regions. This was the chosen area because it is within the researcher's reach. Secondly, the researcher has had many encounters with adverse possession claims arising from these areas. From the participants it was found that ten(10) hailed from Kisumu, two(2) from Hamisi, five(5) from Kakamega, nine(9) from Mbale and three(3) from other places within Western Kenya. From Vihiga County, we got respondents from Mbale and Hamisi. The map below shows the selected regions where the sampling was done.

MAP SHOWING SAMPLED AREAS



KEY



areas of sampling

SOURCE: Center for economic governance

The research was most conducted from Vihiga Law Courts and Kisumu Law Courts in Kenya all of which are found in the blue dotted regions of Vihiga and Kisumu as per the map. Although some of the participants hailed from Kakamega and surrounding areas of Majengo within ihiga county. These court premises where the designated research sites. The researcher being an advocate of the High Court of Kenya used these vicinities as a way of interacting with all persons. The researcher targeted courts because they are places that collect all types of people

from all professionals; advocates, judicial officers, lawyers and civil servants. The Land registrar who begged to remain anonymous was however interviewed from her workplace.

1.9.2 Research Approaches

Mixed Method approach

The researcher used the mixed method approach of both the quantitative approach and the qualitative approach in doing the research. The quantitative approach was used to help the researcher to know the degree to which the participants/respondents knew adverse possession. It also helped the researcher know how many of the Respondents knew the questions that were put before them. This also helped the researcher structure her findings so as to make the need be conclusions. Under the quantitative approach, the researcher used the inferential research. This research helped the researcher draw conclusions from the selected population to represent an entire population. Bearing in mind that the researcher's limited time and finances could not allow her to do interviews for the whole of Kenya.

On the other hand qualitative approach was used to help provide insights and opinions of how the respondents understand adverse possession as well its constitutionality. This was effective in supporting the researcher's views and also meets the objectives of the study.

1.9.3 Research designs

Surveys were the best suitable design for this type of research. The survey as already denoted above was carried out using questionnaires and face to face interviews. Surveys were also key in collecting numerical data.

1.9.4 Research tools for collecting data

Questionnaires were the most preferred tool for collection of data for the research topic. The questionnaire was a mixed kind of questionnaire containing both open ended and close ended questions. However before a questionnaire was handed out a face to face interaction/interview with the observation of COVID protocols was done. They played an essential part in examining the challenges adverse possession presents vis- a- vis protection of property rights. The use of questionnaires to find the impact of adverse possession on the people of Kenya and whether there is a need to retain it as law. The questionnaire enabled the researcher formulate important principles as to whether Kenyans are aware of their land rights and adverse possession; how it has impacted on them. With this information we were able to find significant solutions and recommendations on matters pertaining adverse possession as well put in the preceding Chapters of this research.

The questionnaire as illustrated under the Appendix section of this paper comprised of nine questions. Question 1 to 3 simply asked the participant about his/her gender, place of dwelling and type of work done. These questions were essential in creating an inclusive range in terms of sex, vicinity and profession. Questions 4 to 9 were the core and pertinent questions. These questions were all based on the specific objective of this research. They were verily answered to the satisfaction of the researcher as envisaged under survey findings of each chapter of this paper.

1.10 LITERATURE REVIEW

1.10.1 The historical development and rationale of adverse possession laws in Kenya.

Abrahams in predicting the rise of adverse possession noted that “Despite man’s unprecedented progress in industry, education, and the science, the simple refuge of affording privacy and protection against the element is still the reach of most members of the human race,...human history has been an endless struggle for control of the earth’s surface and conquest, or the acquisition of property by force, has been one of its more ruthless expedients. With the surge of population from rural lands to the cities, a new type of conquest has been manifesting itself into the cities of the developing world. Its form is squatting, and it is the forcible preemption of land by the landless and homeless people in search of a haven.”³¹ He however did not take into account the fact that the regime would become ineffective and old fashioned as human beings sociologically evolve. The study thus fills in this loophole Abrahams undermined. This is done by examining the challenges that the law on adverse possession presents in protection of human rights.

In supplement to the above, Berger³² sets the bar high for Great Britain. He argues that Great Britain established strong tradition of property and adverse possession rights for the common law countries like Kenya. He further notes that the tradition promoted the value of uniformity, efficiency, and at least attempted impartiality within the property rights system. This paper vehemently disagrees with this assertion when examining the historical development and rationale of adverse possession laws in Kenya under Chapter 2. The adverse possession inherited

³¹ Charles Abrams, *Man’s Struggle for Shelter in an Urbanizing World*(MIT 1964)Pg1 (Republished part) also as Charles Abrahams “Squatting and Squatters” in Janet Abu (L&RHJ) *Third world Urbanization* (Routledge Library 2007) pg 293

³² Curtis J. Berger, *Land Ownership and Use* 513(3d. ed. 1983)

from the British was marred with partiality. Adverse possession in Kenya is attributed to the aftermath of the scrambling and partitioning of Kenyan lands by the colonialists/Great British leaving a bulk of squatters and landless Kenyans.

More so, way back in the 18th Century even before the introduction of adverse possession into Kenyan Law Torrens³³ wrote that there is no rationale for applying adverse possession to undeveloped colonies (Kenya) land of low value compared to long established and developed holdings of greater value. This was not paid heed to and now we can see the repercussions as the study show under challenges of adverse possession.

1.10.2 The impact of adverse possession on the rights to property

It was predicted by the census Bureau that the world population will be approximately 9,368,223,050 by the year 2050.³⁴ The immense growth comes with various scarcities such as food, raw materials and most importantly land creating more squatters. This paper however argues as deliberated on under Chapter 3 that the presence of squatters can socially and economically improve the use of land through distributive justice.

On the other hand, Gardiner memos that low developed countries often face unclear property rights and inefficient property allocation.³⁵ The researcher firmly sees eye to eye with this assertion. This vividly demonstrated through the inevitable presence and increase in the number of squatters under Chapter 3.

³³ Richard R Torrens, *The South Australian System of Conveyancing by Registration of Titles* (A, R&OGPO,1859) Pages 25-26

³⁴ U.S Bureau of Census; <http://www.census.gov/cgibin/ipc/popclockw>>

³⁵ Brian Gardiner; *Squatter's rights and Adverse Possession: A search for Equitable Application of Property Laws*, 1997.

Furthermore, Ellickson recognizes the fact that rules applicable to adverse possession can affect the costs borne by four parties: property owners, adverse possessors, courts (financed by taxpayers) and third parties that might have an interest in the land.³⁶ This, our laws in Kenya tend to undermine and only focus on the squatter as the paper shows under the Chapter 3 that denotes the impact of adverse possession on the rights to property..

1.10.3 The challenges the law on adverse possession presents

In Kenya, we see adverse possession used in such a way to defeat the sociology of law because it has been in play since its commencement in 1967 with no regards to social norms. Sociology denotes that every branch of human learning from physics, chemistry and medicine to philosophy, religion and psychology, producing knowledge about law and society.³⁷ From sociology, we get to appreciate the sociology of law that seeks to understand the social reality of law in all its dimensions.³⁸ Therefore, law in itself encompasses all forms of social controls.³⁹ Were all rules of social reality make law. These rules include both written and social rules, standards and practices not found in law books. This has proved to be a challenge much ignored that the paper brings out.

Adverse possession is used as an overriding objective to defeat the indefeasibility of title doctrine⁴⁰ as against the cries of the land owners. This is in conflict with Article 40 of the 2010 Constitution of Kenya that enunciates to protect rights of land owners from being deprived of

³⁶ R.C. Ellickson, 'Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of

Property Rights', Washington University Law Quarterly, Vol. 64, 1986, pp. 726.

³⁷ Suri Ratnapala, Jurisprudence,(CUP,2009), ISBN 978-0-52106143-2 Page 186

³⁸ Georges Gurvitc, Sociology of Law (KP,T,T &Co 1947) page 48

³⁹ Suri Ratnapala, Jurisprudence,(CUP,2009), ISBN 978-0-52106143-2 Page 186

⁴⁰ Section 26 of the Kenyan Land Act No.6 of the 2012.

their land unscrupulously which adverse possession is good at and the paper seeks to show. To prove adverse possession in Kenya Ojienda in his book⁴¹ notes that “the proper way of assessing proof of adverse possession would then be whether or not the title holder has been disposed or has discontinued in his possession for statutory period and not whether the claimant has proved that he has been in possession for the requisite number of years. What he fails to address is the challenges of Adverse possession which this study does under Chapter 4.

Onyango⁴² connotes that there is a challenge in balancing of rights in land law especially between the borrowed English law and African customary law. The study is using such a challenge to show the link between adverse possession and how it has affected customary land law rights to property especially in community areas.

The study also shall show how other regions have adopted to these challenges adverse possession pose. For instance, in the United Kingdom for instance, following the case of **JA PYE (OXFORD) LTD V UNITED KINGDOM [2008]** the law on adverse possession was reformed to only apply to registered titles and the land owner is given 2(two) years within which to object to the squatter taking the land.⁴³ Whereas in India, a country with common aspects of law with Kenya proposed to do away with the whole notion of adverse possession following the Supreme Court decision of **STATE OF HARYANA VERSUS MUKESH KUMAR AND OTHERS.**⁴⁴

⁴¹ Tom O Ojienda, Principles of Conveyancing in Kenya, A practical Approach (1st edn LAP, May 2007) ISBN 9966723706,9789966723703 length page 131

⁴² Peter Onyango O Balancing of Rights in Land Law; A key Challenge in Kenya Sociology and Anthropology 2(7): 301-308, 2014<http://www.hrpub.org>DOI: 10.13189/sa.2014.020707

⁴³ Part 9, Sections 96 to 98 of the United Kingdom Land Registration Act 2002

⁴⁴ [2011]INSC 1013 delivered on 30th September 2011.

An attempt for reform in Kenya was made in the case of **MTANA LEWA V KAHINDI NGALA MWAGANDI**⁴⁵ that was unfortunately an effort in futility. It is verily believed that the shortcomings of this case where as result of lack of firm recommendations and socio-legal research to convince the court which this study is anchored on. Probably if the case had continued to the Supreme Court there would have been some review on the laws of Adverse possession as this paper proposes.

1.10.4 Recommendations

To adequately reform the law on adverse possession to align it with the current laws, Asike-Makhandia Justice in the case of **MTANA LEWE** states “that proper recourse would be for the statutes to be carefully researched and developed to cover the mischief of unscrupulous squatters in the current state of affairs”⁴⁶ which this study seeks to do. Stern for instance argues that “the only justification for the application of the adverse possession doctrine in current times is that it has the potential to serve as a tool for increasing social and distributive justice. To support this argument, he suggests that it is the doctrine’s distributive potential that turns it into a normatively desirable doctrine.”⁴⁷ The same has not been applied in the Kenyan context and the study will thus try to recommend it as way of reforming adverse possession.

1.11 LIMITATIONS

The research required us to go on ground using field work .i.e. the use of questionnaires and interviews (face to face interactions) however, due to COVID 19 protocol the face to face interaction was limited to a few respondents/participants as most of them preferred to answer the

⁴⁵ Civil Application 10 of 2016 (UR 2/2016) [2016]eKLR <http://kenyalaw.org/caselaw/cases/view/122322> last accessed at 11.30am on 31st/1/2021

⁴⁶ <http://kenyalaw.org/caselaw/cases/view/111658/> last accessed at 11:14pm on 4/26/2021

⁴⁷ Shai Stern; David against Goliath, The distributive Justification for the Adverse Possession Doctrine

questions privately. This negated us from truly forming a rapport with the participants and interpreting their psychology through their expressions. Initially the researcher had hoped to interview people outside the legal profession. This hope was however crumbled when it was realized that majority of them had little or no knowledge of adverse possession. This thus limited our target of participants. Yet, the same did not deter the researcher from pursuing the said research topic.

1.12 HYPOTHESIS

The unconstitutionality of adverse possession is attributed to the challenges fronted by squatters in Kenya. The presence of squatters is inevitable. But the law on adverse possession as provided for under the Limitation Act heavily sides with the squatter. It limits the security of land rights by transferring formal land titles from absentee landowners who leave their land idle to adverse possessors that use the land.⁴⁸ This is inconsistent with the land owner's right to property; right to life as land is his/her only source of livelihood. Especially in circumstances where the land owner is merely absent but not disinterested in his/her land. The Laws on adverse possession need to be revised to cure these abnormalities.

1.13 CHAPTER BREAK DOWN

This research project under Chapter 2 seeks to define adverse possession. The aim is to enable our readers appreciate what it is, the historical development and rationale of adverse possession laws in Kenya. We get to see where adverse possession originated from before adopted it in our Kenyan laws. We further see the foundation of adverse possession in the pre colonial and colonial era. We note that the rise of squatters from those eras paved way for adverse possession

⁴⁸ Tzchak Tzachi Raz; Use it or lose it; Adverse Possession and Economic Development, Working Paper August 2017

claims. This Chapter also helps us appreciate how adverse possession laws has been static and has never revolved since it came to be part of our Kenyan laws. This chapter generally answers the question on the origin and basis of the law of adverse possession and how it came to be part of our land laws. This chapter highlights the concept of distributive justice and how it is applied.

Chapter 3 on the other hand examines the impact of adverse possession on the rights to property. These property rights are provided for under Article 40 of the Constitution of Kenya. We get to understand the reasons behind the influx of squatters. We also get to appreciate and applaud the positive effects the squatters have on property rights. This Chapter in essence gives life to the theoretical concept of distributive justice under the doctrine of adverse possession.

Chapter 4 depicts the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution. We also attempt to show the loopholes Article 40(2) demonstrates when alongside Article 24 that limits rights. Under this chapter, comparative study of India and UK is used to show how adverse possession has been revised in the millennium as lessons learnt from the past use of adverse possession.

Chapter 5 denotes the conclusion and recommendations that can be taken to adequately reform the law on adverse possession to align it with the current laws especially the constitutionality of the title owner/ land owner. Such as review of the laws on adverse possession, compensation for the original land owner. Compensation is premised on the theoretical concept of consent. To the extreme we recommend the abolition of the law on adverse possession in Kenya.

2 CHAPTER 2

HISTORICAL DEVELOPMENT AND RATIONALE OF ADVERSE POSSESSION LAWS IN KENYA

2.1 ADVERSE POSSESSION

Adverse possession is defined as “The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.”⁴⁹ The Limitation Act of Kenya provides for adverse possession but does not define it. The meaning has grown through consecutive and victorious judgments. We thus observe that adverse possession was defined in the case of **MTANA LEWA –V- KAHINDI NGALA MWANGANDI (2005)eKLR** court held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”⁵⁰

The law on adverse possession to stand in the Kenyan context it is mostly based on case law that has paved way for precedents that have outlined the elements of adverse possession. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous.⁵¹ In the case of **MBIRA VS GACHUHI [2002] IEALR 137 AND JANDU VS KIRPLAL &**

⁴⁹ Black’s Law Dictionary 10th edition

⁵⁰ <http://kenyalaw.org/caselaw/cases/view/149694> last accessed at 10:36pm on 15/7/2021

⁵¹ *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018] eKLR <http://kenyalaw.org/caselaw/cases/view/149694> last accessed at 10:36pm on 15/7/2021

ANOTHER [1975] EA 225 That “for the Plaintiff to lay claim of adverse possession to the suit land, he ought to have proved three important facts to which:

- i. That entry to the land in question was adverse and non-permissive but none the less without use of force.
- ii. That the Defendant did not issue a notice to the Plaintiff to vacate.
- iii. That the possession was real and opens for an uninterrupted period of twelve years.”⁵²

This can be contrasted with Ballantine’s⁵³ view on adverse possession who argues that adverse possession requisites include five elements namely;

- “Hostile or adverse
- Actual(has part of the land)
- Visible, notorious ad exclusive,
- Continuous for the statutory period
- Under claim in colour of title as was noted in the case of **ZIRNGIBL VERSUS COLUMENT DOCK CO**”⁵⁴

Adverse possession according to Stern can be applied in the following circumstances namely;

1. Boundary Disputes: when one person constructs or holds real estate other than his own because of an error in relation to the boundary between his own land and adjacent land.⁵⁵

⁵² Environment and Land Case 20 of 2018(OS)-<http://kenyalaw.org/caselaw/cases/view/199383/> last accessed at 7:55pm on 5/28/2021

⁵³ Henry Winthrop Ballantine; Claim of Title on Adverse Possession; The Yale Law Journal Jan, 1919 Vol 28, No. 3(Jan , 1919)pp . 219-235, The Yale Law Journal Company. Inc <https://www.jstor.org/stable/787566>

⁵⁴ (1895) 157, 111, 430 , 447

2. Color of Title: the situation in which there is an occupant holding a document certifying a right in the property, but the document is defective.⁵⁶
3. Hostile Encroachment: the situation in which a person intentionally and knowingly invades another person's property, knowing that he has no right to the property.⁵⁷

2.2 THE HISTORICAL DEVELOPMENT OF ADVERSE POSSESSION

Historically, adverse possession laws date as far as back 2250 BC during the roman times as was well recorded in the Code of Hammurabi.⁵⁸ For instance Section 44 of the Code of Hammurabi limited the waste of land and allowed the squatter to claim where land was not well utilized. Also Section 61 of the Code called for reallocating of space that was not efficiently utilized by the owner during cultivation.

This concept was similar to that of the English. According to them, the concept of adverse possession related to land being taken by force or conquered by feudal lords, barons and conquerors from the poor who could not protect their right and title over those lands and this was mostly done in older times when one country or ruler used to conquer another country then they

⁵⁵ Stern S; David against Goliath, The distributive Justification for the Adverse Possession Doctrine

<https://poseidon01.ssrn.com/delivery.php?ID=759099099100077030016029073018083025023080034035049002106080103067071083022111092005019106107032112124109125115089116007025007061037071049081099027078029071099094026065017064112075071117107124103099006022116028067019118099099075095009080003031113000024&EXT=pdf&INDEX=TRUE>

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Emilie De Laveleye; Primitive Property 6(G.R.L. Marriot trans, 1842) Historo

would simply grab those conquered lands from the original and true owner.⁵⁹ The idea can be traced as far back as the twelfth century England.⁶⁰

It appears that the first recorded instance of adverse possession involved retrospective application regardless of when a claim was brought.⁶¹ The idea of possession was developed for the idea of inviolability of the person and the earliest source of law appears seems to have consisted in an extension of meaning of probably following common understanding.⁶² Possessing a thing, they said, was dealing with it to the exclusion of everybody, and a possessor possessed because he had taken the res .i.e. because he had been dealing with it to the exclusion of some adversaries.⁶³

However, the limitation on real property was applied in England in situations where the right of the claimant accrued before the year 1100- the first year of the reign of Henry 1.⁶⁴ Generally, adverse possession was first established in England as a legal doctrine in 1275 in the statute of Westminster 1 Chapter 39.⁶⁵ This statute fixed 1189 as the earliest date for which plaintiff in a property action could establish seisin of his ancestry.⁶⁶ The key element for adverse possession

⁵⁹ Aakash Sehrawat; Concept of Adverse Possession, its origin and the governing provisions of law. <https://www.latestlaws.com/articles/an-overview-on-the-law-of-adverse-possession/> last assessed at 8:02 on 6/12/2021

⁶⁰ Andriana Mavidis; Retrospective Application of the 2008 Amendments to New York's Adverse Possession Laws (2012) St. John's Law Review

⁶¹ Raleigh Colston Minor and John Wurts, The Law of Real Property 1817(1910)

⁶² Albert S Thayer; Adverse Possession, Journal of the Society of Comparative Legislation Vol . 13 No. 3 1913) Published by Cambridge University Press on behalf of the British Institute of International and Comparative Law page 582

⁶³ Ibid page 583

⁶⁴ Raleigh Colston Minor and John Wurts, The Law of Real Property 1817(1910)

⁶⁵ Charles Harr & Lonnie Liebman, Property and Law 81(2d ed.1985)

⁶⁶ Ibid

here was seisin⁶⁷ .i.e. possession of the land. The limitation period was adjusted from time to time as the throne of England continued to change hands. This made the date of seisin difficult to trace for the applicant. This thus opened a floodgate of law suits and some of the claimants were left dissatisfied as they failed to prove the date of seisin. This left a need to fix a limitation period. The Limitation of time, in every case, was reduced to a fixed interval between the accrual of the right and the commencement of the action.⁶⁸ It was not until 1623 that King James I enacted a comprehensive statute.⁶⁹ This statute was known as the “Statute of Limitations”. It allowed 21 years limitation⁷⁰ before bringing a case of adverse possession.

The doctrine of adverse possession generally arose in an era where lands were vast and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting and the concept of adverse possession exists to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession.⁷¹

From the above, we note that the existence of adverse possession was/is based on the following reasons;

⁶⁷ Ibid

⁶⁸ Andriana Mavidis; Retrospective Application of the 2008 Amendments to New York’s Adverse Possession Laws (2012) St. John’s Law Review

⁶⁹ Ibid

⁷⁰ Curtis J. Berger, Land Ownership and Use 513(3d.ed 1983).

⁷¹ State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 PETITION FOR SPECIAL LEAVE TO APPEAL (CIVIL) NO. 28034/2011(Arising out of CC 9038/2010)

2.3 THE RATIONALE OF ADVERSE POSSESSION

1. Protection of factual possession against stale claims and the encouragement to documentary owners to assert their rights and to make effective use of their land.
2. The concurrence of documentary ownership and the reality of possession (a justification relevant to boundary disputes).
3. Facilitation of conveyancing, in particular the investigation and acquisition of title.
4. Adverse possession exists to cure potential or actual defects in real estates titles by putting a statute of limitations on possible litigation over ownership and possession.
5. Because of it, a landowner can secure a title to his land.
6. It encourages and rewards productive use of the land.⁷²

It is further justified that adverse possession focuses on the owner, or rather, the questionable conduct of the owner.⁷³ Coincidentally, the distributive theory firmly asserts that adverse possession is justifiable. For example adverse possession is justifiable when owners who fail to monitor or make use of their land for a long period should be punished for ‘sleeping on their rights.’⁷⁴ In essence, allowing the proper distribution and use of the land by the squatter.

The other justification deals specifically with the occupant which is based on ‘reliance’ and ‘personhood’.⁷⁵ The reliance argument suggests that if a person occupies property for an

⁷² Irish Scheel Honga; The Law on Adverse Possession

⁷³ Stern S; David against Goliath, The distributive Justification for the Adverse Possession Doctrine

<https://poseidon01.ssrn.com/delivery.php?ID=759099099100077030016029073018083025023080034035049002106080103067071083022111092005019106107032112124109125115089116007025007061037071049081099027078029071099094026065017064112075071117107124103099006022116028067019118099099075095009080003031113000024&EXT=pdf&INDEX=TRUE> last accessed at 11:00pm on 15/7/2021

⁷⁴ O. W. Holmes, ‘The Path of the Law’, 10 HARV. L. REV., 1897, pp. 457, 476

⁷⁵ Ibid 73

extended period without protest from the owner, that person develops a reliance interest in the property through their longstanding possession thereof.⁷⁶

2.4 ADVERSE POSSESSION IN KENYA

Adverse possession roots in Kenya can be traced from the colonial era. During this era, “pressure and confiscation of land was a fundamental feature of colonialism especially in East and Central Africa.⁷⁷ This meant that the land that had been previously occupied by the natives was to be surrendered to the colonial masters or taken forcefully. This left very many Kenyans landless and displaced thus creating squatters.

The influx of squatters and a need to take back their land led to Kenyans rebelling against their Colonial masters. It is such rebellions like the Mau Mau that paved way for Kenyan independence. Upon attaining Independence, the number of squatters did not reduce but rather increased. The “ officials of the newly-formed independent government in Kenya turned the foreign funded settlement schemes into cartels of their own benefit; and bought land in the Rift Valley, among other parts of the white highland.”⁷⁸ This deepened the squatter problem thus paving way for adverse possession claims in the long run.

Kenya, in quintessence inherited colonial land laws that are a hybrid of English and African customary law and the time of independence, there were three substantive regimes in property law' and five registration systems" supported by administrative institutions to effect the objects

⁷⁶ Joseph. W Singer, ‘The Reliance Interest in Property’, 40 Stanford LawReview, 1988, pp. 611, 665-670.12.

⁷⁷ Martin Chanock, Road paradigms, Policies and Property; A review of the Customary Law of Land Tenure; in LAW IN COLONIAL Africa 61 (Kristin Mann & Richard eds. 1991)

⁷⁸ Truth, Justice and Reconciliation Commission Report; Kenya Transitional Justice Network <https://www.knchr.org/portals/0/TransitionalJustice/Kenya-tjrc-summary-report-aug-2013-pdf?ver=2013pdf?ver=2018-06-08-100202-027>

of the regimes.⁷⁹ The net effect of this was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasants.⁸⁰

The Kenyan government has tried in many ways to correct the errors of pre colonial and post colonial era of adverse possession. So as to limit the overpowering number of squatters, the government of Kenya devised means of resettling them. This was through land settlement schemes. A case in point is the Njonjo Land Commission that was formed in 1999.⁸¹ The findings of this Commission that included resettlement of squatters and the constitutionality of land laws were formulated into a National Land Policy. This was put together to read as the Sessional Paper No. 3 of 2009.

Unfortunately, the whole attempt to reallocate land to Kenyans was politicized and made into law. For instance authority to allocate land was denoted in the Crown Lands Ordinance of 1915. This ordinance was later renamed the Governments Land Act CAP 280. In essence, many Kenyans were still left landless. This meant that squatters could only gain possession and title through the use of adverse possession laws.

The law on Adverse Possession in Kenya majorly rotates around the Limitation of Actions Act Chapter 22 commenced on the 1st day of December 1967.⁸² Adverse possession in Kenya is

⁷⁹ Joseph Kieyah and Patricia Kimeri –Mbote; Securing Property Rights in Land in Kenya ; Formal Versus Informal International Environmental Law Research.

⁸⁰ Ibid

⁸¹ Andrew Anika; Baseline Survey of Human Rights Violations along the LAPSSET Corridor: A study of Lamu County-Legal Analysis-Task 6 of 9 ; TJRC, Ndung'u & Njonjo led Commissions; what their reports has on Lam and whether they have nay impact on LAPSSET.

⁸² A reference is made to the preamble of the Limitation of Action Act CAP 22

premised on the principles of limitation of actions and equitable doctrine of laches.⁸³ The Limitation of Actions Act makes the adverse possessor's possession and claim over the land becomes immutable.⁸⁴ The Constitution of Kenya 2010 unlike the Repealed one in **section 75(6)** does not provide for adverse possession however the Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012 and the Limitation of Actions Act Chapter 22 Laws of Kenya, do.

For example, **Section 7(d)** of the Land Act recognizes prescription as a method of acquiring title to land though it does not provide how this acquisition is to be realized. **Section 28 (h)** of the Land Registration Act too recognizes right to land acquired by virtue of any written law relating to the limitation of actions or other rights acquired by any written law.⁸⁵ **Section 38** of the Limitation of Actions Act provides for the procedure an adverse possessor is to follow in order to be registered as the new proprietor of the land in place of the registered owner.

However, **Article 40(2(a))** of the Constitution of Kenya 2010 provides that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description.⁸⁶ Secondly in

⁸³ MMAN Advocates; But It's My Land! – Ways through which the right to land can be lost. <https://mman.co.ke/content/it%E2%80%99s-my-land-%E2%80%93-ways-through-which-right-land-can-be-lost> last visited at 2:02pm on 6/9/2021

⁸⁴ *ibid*

⁸⁵ Linda Awour and Faith Wanjiku; Supreme of Court of India declares the doctrine of Adverse Possession archaic, April 21st 2016 <http://kenyalaw.org/kenyalawblog/court-of-india-declares-the-doctrine-of-adverse-possession-archaic/> last accessed at 2:45pm on 6/9/2021

⁸⁶ *Ibid*

terms of **section 107**, the Government can compulsorily acquire private land and compensate the owner.⁸⁷

Section 3(1) of the Trespass Act provides that any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.⁸⁸ **Part IX** of the Land Act, provides for the establishment of settlement schemes to facilitate access to land, shelter and livelihood; settlement programs to provide for access to land to squatters, displaced persons and establishment of Land Settlement Fund to be applied in the provision of access to land for squatters and displaced persons.⁸⁹

It is such elaborate laws that leave us bewildered with questions as to why adverse possession laws still exist. We argue that the concept of adverse possession has changed with time.⁹⁰ But Kenya remains rigid to such changes and continues to apply the archaic laws of adverse possession passed way back in 1967 much to the land owner's detriment. We note that the constitutionality of adverse possession as seen herein leans towards the squatter. History has constantly painted them as the inferior. But the study reveals that this has not negated the fact that adverse possession has negative impacts on the constitutional rights of a title owner though slow in gaining momentum in this new era as people become more aware of their rights.

⁸⁷ Linda Awour and Faith Wanjiku; Supreme of Ocourt of India declares the doctrine of Adverse Possession archaic, April 21st 2016 <http://kenyalaw.org/kenyalawblog/court-of-india-declares-the-doctrine-of-adverse-possession-archaic/> last accessed at 2:45pm on 6/9/2021

⁸⁸ Ibid

⁸⁹ Linda Awour and Faith Wanjiku; Supreme of Ocourt of India declares the doctrine of Adverse Possession archaic, April 21st 2016 <http://kenyalaw.org/kenyalawblog/court-of-india-declares-the-doctrine-of-adverse-possession-archaic/> last accessed at 2:45pm on 6/9/2021

⁹⁰ Aakash Sehrawat; Concept of Adverse Possession; its origin and the governing provisions of law. <https://www.latestlaws.com/articles/an-overview-on-the-law-of-adverse-possession/> last assessed at 8:0pm2 on 12/6/2021

To further illuminate the research using the socio-legal methodology, the researcher organized an interview around this chapter. This was done by asking the participants about their knowledge on adverse possession. As well as the rationale and historical development of adverse possession laws in Kenya. The study revealed that;

2.4.1 SURVEY FINDINGS ON ADVERSE POSSESSION

All the participants of the study knew the concept of adverse possession in Kenya in its simple term. They noted that it allows the squatter to take the owner's land after the lapse of twelve years. This finding showed that the participants had a good grasp of adverse possession and its application. The researcher was able to align this with the scholarly definition of adverse possession. This finding laid the basis of asking the participant whether he/she knew the rationale of adverse possession.

2.4.2 SURVEY FINDINGS ON RATIONALE OF ADVERSE POSSESSION

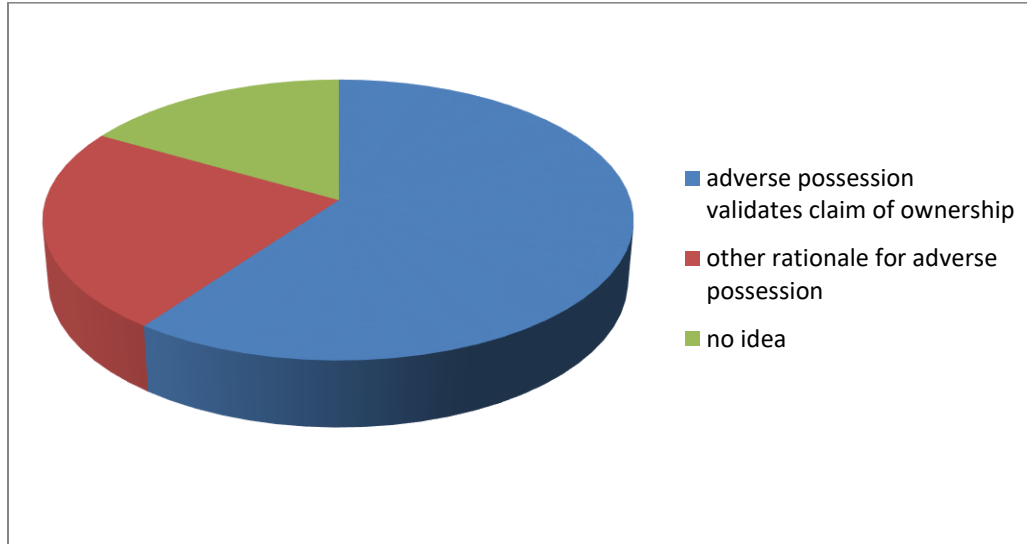
Most of the participants knew the rationale of adverse possession and some of their responses included;

1. Adverse possession validates claim of ownership though not having a title but appreciating the longevity of stay without interference. This was the most alluded to rationale.
2. To ensure that land is used properly/efficiently without leaving it to waste.
3. To help the squatter be registered as the absolute owner.
4. Allows limitation of rights and equitable justification

5. Idle land with land lords who have been absent ought to be utilized especially by people who are landless.
6. In line with the Constitution, adverse possession protects the person in possession of the proper.
7. Rewards the productive use of land.
8. To avoid stale claims because of the realities of fading memories and loss of evidence; that land owners are compelled not to sleep on their rights and ensure that all claims are brought to court promptly.

However, they were some participants who were not aware of the rationale of adverse possession. These were mostly people who had no idea of what adverse possession was and no training in the legal profession. This we argue to be the reason as to why people are not eager to revise the law on adverse possession. Maybe if the people were aware of the foundation of adverse possession in Kenya and its pivoting on selfish intents of the white settlers and post independence government, they would be inclined to revise the archaic laws. Additionally, 60% of the respondents were of the view that adverse possession validates claim of ownership. 23% of the respondents had other responses as to the rationale of adverse possession and 17% had no idea as to the rationale of adverse possession. This can be depicted from the pie-chart below.

2.4.2.1 Fig:1 SURVEY RESPONSE ON THE RATIONALE OF ADVERSE POSSESSION



2.5 Conclusion

The genesis of Adverse possession in Kenya is traced from the colonial era that saw to the displacement of the natives so as colonialists can gain land. In the end, all they did was to create an influx of squatters and landless Kenyans. However, Kenya has had chances to redeem themselves and correct the wrong that was done to them.

We also see that there are numerous and elaborate laws that have come into force to correct this wrong and paving way for resettlement of the squatters. Inevitably, the government has turned a blind eye on its officials who have gobbled up this land meant for resettlement for their own selfish gains. This has left many landless and squatters who have aimed out of necessity to infringe on the constitutional rights of a title owner by forcing themselves on their land. The failure to appreciate and understand the history and rationale of adverse possession can also account for this dilemma adverse possession poses. We thus argue that if we could appreciate the history of adverse possession and the wrongs it came with. As well as have the political will to diligently resettle the squatters then the future of adverse possession will be constitutional.

3 CHAPTER 3

THE IMPACT OF ADVERSE POSSESSION ON PROPERTY RIGHTS

3.1 INTRODUCTION

Ownership of land historically constitutes one of the main categories of property rights conveying a array of rights upon the owner.⁹¹ Property right in relation to land is to say that one has right over, or in respect to the land itself.⁹² Emilie De Laeleye notes that the long history of the property rights emanates from the Greco-Roman Tradition.⁹³

It was noted by Lord Wilberforce that “ Before a right or an interest can be admitted into the category of property or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.”⁹⁴ Generally property rights in land exist against other people with regard to the land, not against other parcels of land.⁹⁵ The right to property is that normatively protected part of our interest in using property, and that part, .i.e. the fraction of our uses of property, is determined by the extent to which others must exclude themselves from our property.⁹⁶

The impact of adverse possession is significant to this study as it paves ground as to why the constitutionality of adverse possession should be reviewed as against its abolishment. The

⁹¹ Patricia K –Mbote, Collins Odote, Celestine Musembi and Murigi Kamande; *Ours By Right Law,, Politics and Realities of Community Property In Kenya*; (2013 FKP)

⁹² EH Burn and J Cartwright, *Cheshire and Burn’s Modern Law of Real Property* eighteenth edition Oxford University press page 4

⁹³ Emilie De Laveleye; *Primitive Property* 6(G.R>L. Marriot trans; 1842)Historo

⁹⁴ *National Provincial Bank Ltd v Ainsworth* [1965 AC 1175, 1247-8

⁹⁵ J Bolcher , *Building on Custom: Land Tenure Policy and Economic Development In Ghana* Vol. 9

⁹⁶ JE Penner; *The idea of Property in Law* (1997 OUP) Pg 72

doctrine tends to favour the squatter and many scholars have argued that the presence of adverse possession laws decreases security of land right. This has had an increase in economic development and effective use of land.

Conversely, squatters are the focal point of adverse possession in Kenya. Squatters emerged during the colonial era. The influx of squatters in Kenya continued as the white settlers increased. The number of squatters became uncontrollable thus pushing the natives to encroach on other people's lands or even the forests. A local farmer in 1949 disillusioned by the colonial era and taking of land once commented that "squatter labour is pouring into the forest reserve, where the conditions are probably so attractive as to make this a squatter's paradise, and a haven of refugee land; land; land; nice fresh virgin land is their every; little or work from their bibis (wives); sheep filling their bellies with green luscious grass; firewood quite handy; pombe(beer) brewing galore- who will visit us in the forest at night... utopia has been discovered..."⁹⁷

Land alienation by the imperialists in Kenya birthed a fanatical sense of loss. Land and land loss lied at the center of Kenya's center of Kenyan political History throughout the colonial period and beyond.⁹⁸ Attempts to mitigate the loss by the Kenyan Land commission of 1930 failed. Upon attaining independence, the new government tried to resettle the displaced squatters through the resettlement schemes.

⁹⁷ David W.Throup; Economic and Social Origins of Mau Mau 1945-53 (1990)

⁹⁸ John Overtur; The Origin of the Kikuyu Land Problem; Land Alienation and Land Use in Kiambu , Kenya, 1895-1920, African Studies Review Vol. 3 No. 2 (Sep 1988) Published by Cambridge University Press

Kanyinga⁹⁹ notes that the settlement schemes were marred with political interest. He notes that “in the Maragani settlement scheme complex started in 1978; local politicians often complained of biases by settlement officers in allocation of the plots and of evictions of local beneficiaries and their replacement with upcountry ones. In 1984, senior government officials listed their constituents and friends and recommended them to be given plots by the settlement officials.”¹⁰⁰

Presently, urbanization and globalization has heavily contributed to people being displaced to create room for commercialization. Squatters still pose a big threat through claims of adverse possession. Though this paper leans towards upholding the rights of the title holder, we cannot deny that adverse possession has positive impacts on property rights. This impact ensures distributive justice. For instance;

3.2 ECONOMIC IMPACTS

Economically, adverse possession sets a limitation on land rights security, brings about reallocation of land titles outside of formal markets, and de facto conditions long run land ownership upon use.¹⁰¹ This resonates with John Locke’s views who famously sets limits on property rights, claiming that the property one can claim is bound to the amount she can use in a beneficial way, such that it will not be wasted.¹⁰² Reallocation allows distribution of wealth between the squatters and the land owners therefore adhering to distributive justice.

⁹⁹ Karuti Kanyinga; Struggles of Access to land. The “Squatter Question” in Coastal Kenya; CDR Working Paper 987, June 1998, <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4484/Keaniyiga.pdf?sequence=1&isAllowed=y>

¹⁰⁰ Ibid

¹⁰¹ Itzchak Tzachi Raz; Use it or Lose It: Adverse Possession and Economic Development, working Paper, This Version: August 2017

¹⁰² John Locke; The Second Treatise of Government, 2002.

In the same it is further argued that impacts on reallocation of property rights through a centralized reallocation of titles enhances efficiency in allocation of land through the market and improves on the market imperfections.¹⁰³ In essence the doctrine helps to achieve an efficient allocation of land rights when formal markets fail due to friction.¹⁰⁴

Another impact is that adverse possession incentives land owners to efficiently use their land and in this way ensuring that valuable land is not left unused¹⁰⁵ thus increasing agricultural output the back bone of Kenya's economy.

3.3 SOCIAL IMPACT

Socially, the doctrine of adverse possession settles the landless/squatters and gives them a livelihood and a place to call home and own. In that was upholding the right to life, right to property and right to economic and social rights as well elaborated under the Constitution. Therefore, adverse possession gives a person a vested property right in the area possessed and once a person meets the statutory requirements for adverse possession, he or she may initiate a quiet title action and obtain legal title to the property.¹⁰⁶

Without prejudice to the above foregoing, it is with great importance to note that adverse possession has an impact on time in such a way that when adverse possession starts running, time becomes limitless. This can best be explained using the case of **WANYOIKE V KAHIRI [1979]** KLR at page 239 Justice Todd (as he then was), held that in a purchase scenario, the

¹⁰³Itzchak Tzachi Raz; Use it or Lose It: Adverse Possession and Economic Development, working Paper, This Version: August 2017

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Justia, Real Estate Law, Adverse Possession, <https://www.justia.com/real-estate/docs/adverse-possession/> last accessed at 7:33pm on 5/9/2021

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 1971 when the Plaintiff and his father took possession of the suit land and the title was extinguished in 1983.¹⁰⁷ We also note that even upon death of the title owner time still runs against that estate of the deceased and change in title to the administrator or beneficiary or third party will not defeat that claim as was highlighted in the **MTANA** case. However, in the case of **JOSEPH GAHUMI KIRITU VS 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 VS 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.”¹⁰⁸

In addition to the above, the Participants of the research also accurately responded to the impact of adverse possession as detailed below.

¹⁰⁷ Quoted in Environment and Land Case Number 20 of 2018 <http://kenyalaw.org/caselaw/cases/view/199383/>

¹⁰⁸ Quoted in Environment and Land Case Number 20 of 2018 <http://kenyalaw.org/caselaw/cases/view/199383/>

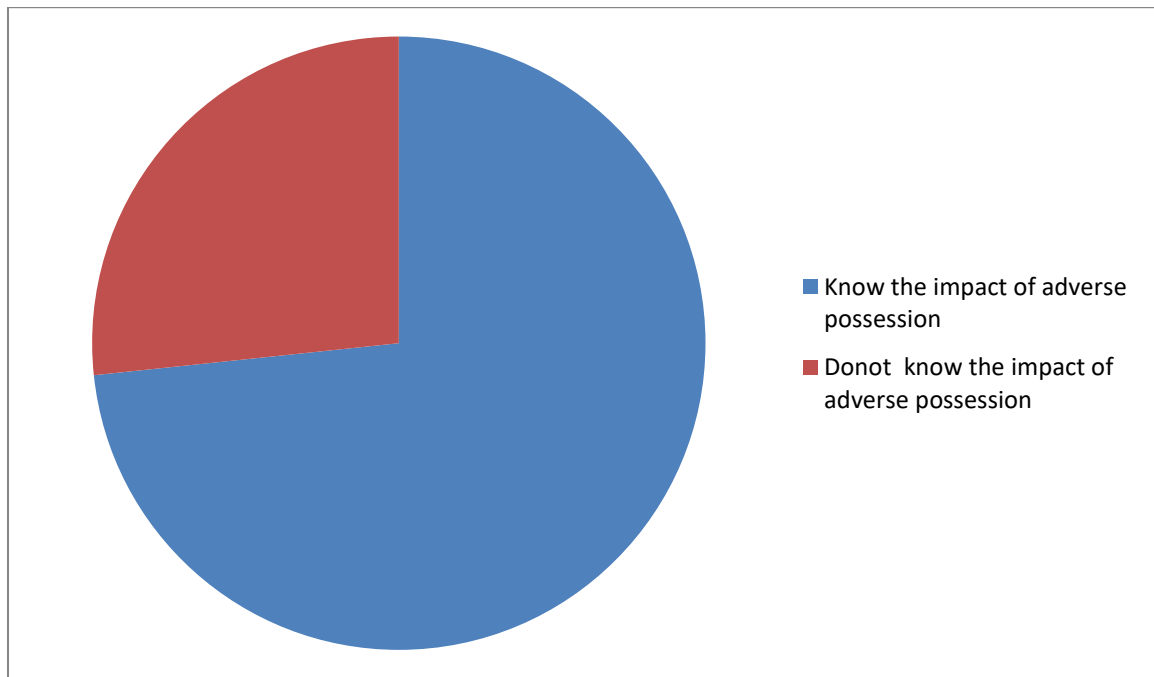
3.4 SURVEY FINDINGS ON THE IMPACT OF ADVERSE POSSESSION

We found that most of the participants were aware of the impact of adverse possession on the rights to property as provided for under **Article 40** of the Constitution of Kenya and some of the impacts included;

1. Protection of land rights under the bill of rights
2. It alienates the absolute title from the property owner and transfers property rights to adverse claimant only on the consideration of his/her long uninterrupted stay on the property.
3. Gives the right to ownership
4. Establishes a superior right over the true owner
5. Conflicts
6. Gives a person without title to land right to get in court
7. Absentee land lords lose ownership while landless people gain possession.
8. Article 40 of the Constitution guarantees right to property which may however they may be limited in terms of Article 24 so long as the requirements of that provision are satisfied. Adverse possession comes in to limit this right under Article 40, a limitation that may sometimes be illegitimate depending on how it may be exercised.

There also some few participants who were not aware of the impact of adverse possession. This we attributed to the minimal discussions centered on adverse possession both in theory and in practice. We noted that there is need for seminars on adverse possession. The pie chart below depicts that from the 30 respondents 73% of the respondents know the impact of adverse possession whereas 27% do not know the impact.

3.4.1 FIG 2: PIE CHART SHOWING PARTICIPANTS WITH AND WITHOUT KNOWLEDGE OF THE IMPACT OF ADVERSE POSSESSION



3.5 Conclusion

According to the distributive justice theory, squatters are an inevitable necessity. They balance out land reallocation and counteract wastage of land. Broadly squatters affect property rights positively as dented above and in that way promoting distributive justice.

4 CHAPTER 4

THE CHALLENGES THE LAW ON ADVERSE POSSESSION PRESENTS VIS A VIS CONSTITUTIONAL PROPERTY RIGHTS

4.1 INTRODUCTION

It was long predicted by Torrens that there is no rationale for applying adverse possession to underdeveloped colonies (like Kenya emphasis ours) whose land is of low value compared to long established and developed holdings of long established and developed holdings of greater value.¹⁰⁹ This though a bit extreme cannot be faulted as the law on adverse possession has long come with challenges. To say that land ownership and matters affecting land in Kenya are sensitive is not merely a cliché – but is an understatement.¹¹⁰

We thus note that adverse possession as immensely affected the land ownership through its constant and archaic use. These have proved to be a challenge on property rights thus affecting the constitutionality of adverse possession.

4.2 ADVERSE POSSESSION CHALLENGES ON CONSTITUTIONAL RIGHTS

In the wake of a new era where human rights are linked to all aspects of life it is of no surprise that archaic law on adverse possession has begun to have visible challenges on constitutional rights such as;

¹⁰⁹ Torren R, The South Australian System of Conveyancing by Registration of Title; Adelaide, Register and observe General Printing Office.

¹¹⁰ Joseph K. Nderitu & 23 others v Attorney General & 2 others [2014] Eklr <http://kenyalaw.org/caselaw/cases/view/95195/>

4.2.1 The right to property

Property rights are enshrined under **Article 40** of the Constitution of Kenya as well other rights that are closely interlinked and interrelated to the right to property. More so, **Article 1** of the ECHR Protocol No.1 provides that “every natural or legal person is entitled to the peaceful enjoyment of his possessions”. The right to property is now considered to be not only constitutional or statutory right but also a human right.¹¹¹ In the case of **MUNICHIKKANNA REDDY V. REVAMMA (2007)** the applicants moved the European Commission of Human Rights (ECHR) alleging that the United Kingdom law on adverse possession, by which they lost land to a neighbour, operated in violation of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention').¹¹²

Article 40 allows every individual or even a union to acquire and own land. However, the Article has exceptions that limit this right. These exceptions have to conform to **Article 24(1)** of the Constitution. This Article allows limitation of a right. The limitation has to be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”¹¹³ The relevant factors include; character of the right and its use, the magnitude of the limitation, how far the limitation goes, the limitation does not prejudice other people’s rights, the use of less restrictive means to achieve the purpose of the limitation. K M’noti J in the MTANA case, summarized these factors with inference to adverse possession. These were formulated in form of issues as;

¹¹¹ State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 PETITION FOR SPECIAL LEAVE TO APPEAL (CIVIL) NO. 28034/2011(Arising out of CC 9038/2010) <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/State-of-Haryana-vs-Mukesh-Kumar-Others.pdf> last accessed at 5:33am on 6/9/2021

¹¹² SCC p. 79, paras 51-52

¹¹³ Constitution of Kenya 2010

- i. *“Is the limitation in question to the right to property set by law?”*
- ii. *Taking into account the nature of the right to property, the importance of the limitation to it by adverse possession, the nature and extent of the limitation imposed by adverse possession, the balance between enjoyment of the right to property and prejudice to the rights of others, and whether the purpose of adverse possession can be achieved by less restrictive means, is adverse possession reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?*
- iii. *Is the limitation by adverse possession clear and specific regarding the right it limits and the extent of the limitation?*
- iv. *Does adverse possession limit the right to property to such an extent as to derogate from its core or essential content?”¹¹⁴*

Fortunately or unfortunately, K M’ionti J found that adverse possession met the factors that allow limitation of property rights. We vehemently disagree and note that adverse possession laws as they are now; fall short of Article 24(1).

To even write or say that the archaic adverse possession laws obey the factors that limit the right to property is a fallacy and more of fictitious tale/challenge. Firstly, the law on adverse possession is not reasonable and justifiable. For instance, the law allows “the prevalent and quiet taking away of land from unsuspecting landowners by all manner of intruders, squatters and

¹¹⁴ Mtana Lewa v Kahindi Ngala Mwangandi [2015]eKLR
<http://kenyalaw.org/caselaw/cases/view/111658/>

criminal possessors under null and void land transactions.”¹¹⁵ This is no way reasonable or justifiable. The word justifiable simply means that something is able to be made just.¹¹⁶ The whole concept is so unjustifiable that it leaves rhetorical questions like; is it reasonable and justifiable for a squatter to take one’s land without consent or compensation? If the government cannot acquire land under Article 40 without compensation, why is the squatter exempted? What happens to the concept of consent as devolved into under Chapter 1? Is it right for unregistered land and community land to be constantly lost to squatters through adverse possession? All these questions loom and enunciate the challenges adverse possession presents to the title owner’s rights.

Furthermore, the present law in Kenya has provisions that allow the squatter to acquire land in less restrictive ways than adverse possession. Adverse possession is in all manners hostile. For example Section 135 of the Land Act provides for a settlement fund for allocation of land to squatters.

Additionally, adverse possession is prejudicial to the title owner’s right. This is not all justifiable under the Rawls’s theory of justice. He argues that “in a just society the liberties of equal rights are taken as settled; the rights secured by justice are not subject to political bargaining. Justice ... depends essentially on how fundamental rights and duties are assigned...”¹¹⁷ The law on adverse possession falls way below this assertion. From the pre colonial era to the post colonial era all stages leading to adverse possession claims were politicized. Adverse possession protects the

¹¹⁵ Gabriel Mbui V Mukindia Maranya Civil Case No. 283 Of 1990;[1993]eKLR

¹¹⁶ <https://www.vocabulary.com/dictionary/justifiable>

¹¹⁷ John Rawls; A theory of justice, the Belknap Press of Harvard University Press Cambridge, Massachusetts, London, England 1971

right to property of over a title owner. Adverse possession in its challenges negates the rights of the property owner and other affiliated rights such as;

4.2.2 Social and Economic Rights

The social and economic rights as enunciated under **Article 43** of the Constitution affected when a person is deprived of his/her land. This is because the land owner is adversely impoverished and might swell the ranks of the squatters causing him to trespass on another's land. In the case **KENYA AIRPORTS AUTHORITY V MITU-BELL WELFARE SOCIETY & 2 OTHERS**¹¹⁸ court noted that “the importance of socio-economic rights cannot be underestimated as they relate to human development; ... they cannot be mere “aspirations” and must be afforded the protection they rightly deserve.”¹¹⁹ This adverse possession verily disregards when the squatter well knowing that he is not the owner infringes on the title holder's social and economic right.

4.2.3 Right to life and liberty

This right is closely linked to the right of property because the deprivation of someone's property automatically affects his livelihood and he/she is left estranged with no property because of a squatter. The right to life is denoted under **Article 26** of the Constitution and **Article 29(f)** of the Constitution.

Bhat in linking the right to property to the right to life and liberty traces the right to property in the bosom of right to life and personal liberty and argues that “amidst the civil rights, it is the

¹¹⁸ Petition 3 of 2018{2021}eKLR

¹¹⁹ CIVIL APPEAL NO: 218 OF 2014 [2016]eKLR <http://kenyalaw.org/caselaw/cases/view/123600/> last accessed at 8:16pm on 5/9/2021

right to property whose image and fate are mostly strewn with the vicissitudes of policy makers and controllers. So when the tension is resolved by denigrating the property right into utter disgrace either through disprement or exclusion, its use aspect also suffers, and in turn, adversely affects the right to life and liberty. Experience shows that the use aspect of property can be better protected by making recourse to the matrix of right to life and liberty vividly enunciated by the Bill of Rights system.”¹²⁰

In essence when the owner’s right to property is affected by taking away his/her right to own property by giving it to the squatter. The title owner’ right to life and liberty to use his/her land at their whelms is verily negated. Land generally, is the basis and foundation for access to food, housing, shelter and development. Adverse possession negates a land owner’s property right leaving him/her without access to land hence the land owner finding himself/herself in a situation of great economical insecurity. He is without other means of resources other than the land that has been adversely claim, In most instances, the title owner merely absents himself but is not disinterested in his land. This land we perceive was for left vacate for future uses, but the squatter still feels entitled to encroach on it. In short, the squatter adversely taking away the title owner’s land is taking away his livelihood and in the long run affecting his right to life.

4.3 OTHER CHALLENGES POSED BY ADVERSE POSSESSION

The doctrine of adverse possession defeats the indefeasibility of a title. This contrary what was argued by court in the **MTANA** case where it was noted that “where land was however registered, it was asserted, that there was certainty of title from the register and therefore adverse

¹²⁰ P Ishwara Bhat, “Tracing right to property in the bosom of right to life and personal liberty; Comparative reflection on recent constitutional development in America. Journal of the Indian Law Institute Vol. 38 NO.1(January March 1996)PP.13-37.

possession served no practical purpose in that regard.”¹²¹ However this is not what is on ground as we see adverse possession used against a title holder.

Adverse possession is incompatible with informal sectors where land is owned communally. Most untitled land in Kenya is owned by communities who rely on the benefits of the informal sector to protect their property rights. However, as means of protecting property rights in land, the informal systems have not worked in Kenya because the post –independence land laws like the Limitation Act have retained an element of hostility to the informal systems which was inherited from colonial land policy.¹²² The assumption was that the customary systems would fall into disuse and be replaced by modern/formal tenure systems. This has not happened and those whose claim to land draws from informal systems have not received sufficient legal protection, leaving much vulnerable to legal usurpation like adverse possession and evictions.¹²³ This is common in areas where the communities are pastoralists and move from one place to another. This is all ironic seeing as **Article 63** of the Constitution provides for the presence of community land that is constantly being encroached on by squatters who use adverse possession to limit the use of community land thus making it unconstitutional.

¹²¹Kipkemoi Sang ; The Doctrine of adverse possession is not inconsistent with Right to Property under the Constitution, *Mtana Lewa v Kahindi Ngala Mwangandi* Court of Appeal at Malindi Civil Appeal No. 56 of 2014 Makhandia,Ouko & M’inoti JJA. July 17, 2015 Kenya Law Weekly | Issue 024/2015; <http://kenyalaw.org/kl/index.php?id=5657> last accessed on 31/8/2021

¹²² Joseph Kieyah and Patricia Kimeri –Mbote; Securing Property Rights in Land in Kenya ; Formal Versus Informal International Environmental Law Research

¹²³ Lynch, O., 1996, 'Legal Challenges Beyond the Americans: Indigenous Occupants in Asia and Africa', *St Thomas Law Review*, 9, 93.

Adverse possession is depicted as “legalized theft” and “a quiet backwater”, the relevance of which is slowly and inevitably drying up.¹²⁴ This notion was emphasized in the case of **STATE OF HARYANA VERSUS MUKESH KUMAR AND OTHERS** when Dalveer Bhandari, J noted that “People are often astonished to learn that a trespasser may take the title of a building or land from the true owner in certain conditions and such theft is even authorized by law. The theory of adverse possession is also perceived by the general public as a dishonest way to obtain title to property. Property right advocates argue that mistakes by landowners or negligence on their part should never transfer their property rights to a wrongdoer, who never paid valuable consideration for such an interest.”¹²⁵

Theoretically, the law on adverse possession as taught to us in class is not applicable to absentee land owners but rather on land owners whose lands are adversely possessed. However, from the practical perspective we have seen the law on adverse possession defeating the notion of justice and often unfair when it comes to title holders who have left for greener pastures in other countries, people who have been incarcerated for more than twelve years. We see that the only exceptions to the limitation of adverse possession are denoted under Part III of the Limitations Act and include; disability, acknowledgment and part payment, fraud, mistake and ignorance of material facts. These defenses against adverse possession are silent on day to day instances of Kenyan citizens leaving abroad or in prisons. This presents a challenge as the title owner is unjustly deprived of his/her land.

¹²⁴ Scott Andrew Shepard, Adverse Possession , Private Zoning Waviver and Desuetude: Abandonment & Recapture of Property and Liberty Interests.

¹²⁵ State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 PETITION FOR SPECIAL LEAVE TO APPEAL (CIVIL) NO. 28034/2011(Arising out of CC 9038/2010) <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/State-of-Haryana-vs-Mukesh-Kumar-Others.pdf> last accessed at 5:33am on 6/9/2021

To seal the deal of challenges, judge made laws on adverse possession are incoherent. The standard of proof in court cases is not uniform. The application of adverse possession is more of a paradox and it is never certain as sometimes it is used as a sword and other times a shield leading to a chaotic regime of legal realism. It is used as a sword to take away the land of the owner and used as shield to justify trespass by the squatter. Courts have also failed to be consistent with their findings on adverse possession. This defeats the notion of justice. A case in point being **WILSON NJOROGE KAMAU V NGANGA MUCERU KAMAU [2020] EKLK¹²⁶** where after court being satisfied that the land in contention had been litigated over in numerous cases and had been interrupted by the said court cases but court still went ahead to award the Plaintiff the land under adverse possession.

In addition, to the above the jurisdiction of adverse possession has also proved chaotic as Section 38 of the Limitation Act calls for the jurisdiction to be the Environment and Land High court. However in the case of **PATRICK NDEGWA MUNYUA V BENJAMIN KIIRU MWANGI & ANOTHER¹²⁷** Justice D.O Ohungo, noted that “So as attain that conformity, **Section 38 (1)** of the **Limitation of Actions Act** must be construed as not depriving magistrates who are duly gazetted and have the requisite pecuniary jurisdiction, of the jurisdiction and power to handle cases involving occupation of and title to land, including adverse possession which is essentially a dispute on title to land. He therefore ruled that this matter (ELC No. 2 of 2019 Patrick Ndegwa

¹²⁶ Environment and Land case No. 20 of 2018(OS) <http://kenyalaw.org/caselaw/cases/view/199383/> last accessed at 11:52 am on 6/9/2021

¹²⁷ [2020] eKLR case number 2 of 2019 Nakuru <http://kenyalaw.org/caselaw/cases/view/188632/> last accessed at 2:11pm on 23/10/2021

Munyua v Benjamin Kiiru Mwangi & Fredrick Maina Mwangi (Nakuru)) is hereby transferred to Chief Magistrates Court Nakuru for hearing and determination.”¹²⁸

To further harness and tie together the challenges as depicted above with how other individuals perceive challenges of adverse possession, the questionnaire made provision for this. The questionnaire under question 8 asked the participants upon acknowledging if they knew challenges of adverse possession to give an example.

4.4 SURVEY FINDINGS ON THE CHALLENGES OF ADVERSE POSSESSION

The survey revealed that twenty two (22) out of the thirty(30) participants knew the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya. The challenges included;

1. If the land has been initially developed by the title owner there is no compensation.
2. At times it may be difficult for a person claiming adverse possession to adduce evidence of how long they have been in occupation of the said parcel since they usually do not have titles to the property but only rely on oral evidence.
3. There is lack of openness and accountability. In most cases some parties forcefully enter another’s land then file for adverse possession thus abusing the process. Also the rich who have money quickly develop the land and o take advantage of the poor and forcefully enter the poor person’s land and claim adverse possession.
4. Adverse possession is a loophole for unscrupulous individuals to invade private land and claim ownership in the process.
5. At times, there is injustice to the title owner in certain circumstances.

¹²⁸ Ibid 127

6. A person who owns land but has been absent loses ownership because of adverse possession.
7. Adverse possession does not give the occupier of property direct right to property but rather through action in court.
8. Resistance to comply with Article 40
9. Adverse possession extinguishes the title of the owner of the land.
10. Those who may not prove adverse possession may infringe on the rights of property owners.
11. Displacement of other people
12. It creates room for people who may not prove adverse possession (.e.g. employer-employee relationship) to trample on the rights of owner's property.
13. Twelve years is a very long period given especially where the buyer has given out his money to the seller.
14. Deregisters the land owner who rightfully acquired his/her title fraud free.

From, the answers given we observed that the twenty two participants shared the same dismay of adverse possession as the researcher when it comes to the title owner. It is from that we sought to seek from other jurisdictions on how they have mitigated or overcome the challenges.

4.5 COMPARATIVE STUDY OF ADVERSE POSSESSION IN INDIA AND UK

The challenges portrayed by adverse possession laws as it is now in Kenya are immense. Some countries have learnt from the challenges and have taken it upon themselves to revise the law to meet human, economic, social and political development as well the constitution provisions. The comparative study of India and UK is used to show how adverse possession has been revised in the millennium and hopefully Kenya will take a leaf.

4.5.1 ADVERSE POSSESSION IN INDIA

Just like all British colonies, India like Kenya borrowed her law on adverse possession from the England. The law on adverse possession is contained in the Indian Limitation Act and **Article 65**, Schedule I of The Limitation Act prescribes a limitation of 12 years for a suit for possession of immovable property or any interest therein based on title.¹²⁹ It is important to note that the starting point of limitation of 12 years is counted from the point of time “when the possession of the defendants becomes adverse to the plaintiff.”¹³⁰

Article 65 is an independent Article applicable to all suits for possession of immovable property based on title i.e., proprietary title as distinct from possessory title.¹³¹ **Article 64** governs suits for possession based on possessory right. 12 years from the date of dispossession is the starting point of limitation under Article 64. **Article 65** as well as **Article 64** shall be read with **Section 27** which bears the heading –“Extinguishment of right to property”.¹³² It lays down: “At the determination of the period hereby limited to any person for instituting the suit for possession of any property, his right to such property shall be extinguished.”¹³³

¹²⁹ Consultation Paper-cum-Questionnaire on Adverse Possession of Land/Immovable Property <https://lawcommissionofindia.nic.in/reports/Adverse%20Possession.pdf> last accessed at 5:35am on 7/9/2021

¹³⁰ Ibid

¹³¹ Ibid

¹³² Ibid

¹³³ Consultation Paper-cum-Questionnaire on Adverse Possession of Land/Immovable Property <https://lawcommissionofindia.nic.in/reports/Adverse%20Possession.pdf> last accessed at 5:35am on 7/9/2021

Generally adverse possession in India does not differ from that of Kenya. However unlike Kenya, the Supreme Court of India has seen the maliciousness and negative impact adverse possession has on the title holder.

It is from that standpoint that the Supreme Court in the case of **STATE OF HARYANA VS MUKESH KUMAR & ORS** took a brave standpoint and firstly opined the abolishment of the law on adverse possession with alternatives of review on the said law. The brief facts are that the Plaintiff being the State of Haryana through the Superintendent of Police of Gurgon brought a suit against the Defendants for prayers that he had adversely possessed the land measuring 8 biswas comprising of Khewat NO.34, Khata NO. 56 and Khasia NO.3673/452 situated in the revenue estate of Hidayatpur Chavni , Haryana. They sought for the orders of adverse possession on grounds that they had purchased the land in the 1990s. In retaliation the Defence confirmed to court that the land has always been vacant and had never been occupied by the Police until it used recently used force and erected a wall prior to bringing the case to court. It is from such findings that the court found the law on adverse possession unscrupulous.

This can be implied when court quoted the case of **A PYE (OXFORD) LTD. V. GRAHAM (2000) 3 WLR 242 : 2000 CH676** and noted that, “The Court held in favour of the Grahams but went on to observe the irony in law of adverse possession. The court observed that the law which provides to oust an owner on the basis of inaction of 12 years is "illogical and disproportionate". The effect of such law would "seem draconian to the owner" and "a windfall for the squatter". The court expressed its astonishment on the prevalent law that ousting an owner for not taking action within limitation is illogical.”

It is from such a backdrop that we saw it fit to use India as the Supreme Court upon calling for the abolishment of the law or review on the law on adverse possession. The Bench further sent a copy of the judgment to the Secretary, Ministry of Law and Justice Department of Legal Affairs, government of India for taking appropriate steps in accordance with law. India has indeed backed on this review through public participation.¹³⁴ The bold move to call for the abolition of the doctrine of adverse possession is one, the researcher wishes the Kenyan government can take into account when revising the law.

4.5.2 ADVERSE POSSESSION IN THE UK

Unlike Kenya where a claim on adverse possession is founded upon the lapse of twelve years and land registered or no registered can be adversely possessed. In the UK adverse possession can be founded after the lapse of 10 years and it can only take place on registered land.

The reform in the laws of adverse possession in the UK is founded on the case of “**A PYE (OXFORD) LTD. V. UNITED KINGDOM (2005) 49 ERG 90**” which concerned the loss of ownership of land by virtue of adverse possession. In the said case, "the applicant company was the registered owner of a plot of 23 hectares of agricultural land. The owners of a property adjacent to the land, Mr and Mrs Graham (the Grahams) occupied the land under a grazing agreement. After a brief exchange of documents in December 1983 a chartered surveyor acting

¹³⁴ Reference is made to Consultation Paper-cum-Questionnaire on Adverse Possession of Land/Immovable Property
<https://lawcommissionofindia.nic.in/reports/Adverse%20Possession.pdf> last accessed at 5:35am on 7/9/2021

for the applicants wrote to the Grahams noting that the grazing agreement was about to expire and requiring them to vacate the land." ¹³⁵

The Grahams continued to use the whole of the disputed land for farming without the permission of the applicants from September till 1999. In 1997, Mr Graham moved the Local Land Registry against the applicant on the ground that he had obtained title by adverse possession. The Grahams challenged the applicant company's claims under the Limitation Act, 1980 (the 1980 Act) which provides that a person cannot bring an action to recover any land after the expiration of 12 years of adverse possession by another."¹³⁶ Though the courts of law in England found in favour of the Graham, the ECHR found that adverse possession infringed on the right to property.

This was further disputed by the UK government and the matter was referred to the Grand Chambers of the ECHR. The majority of 10 to 7, the Court held that "the 12 year limitation period for actions for recovery of land pursues a legitimate aim in the general interest and there is also a general interest in the extinguishment of title at the end of the period."¹³⁷

It is from that above case-law that the law on adverse possession in the UK was reviewed and mended. This was done to strike a fair balance between the demands of the general public and the interests of the individuals concerned.¹³⁸ In 2002, the UK where as already noted the law on adverse possession originated decided to revise their adverse possession laws. The amendment

¹³⁵ State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 Indian Kanoon - <http://indiankanoon.org/doc/290532/8>

¹³⁶State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 Indian Kanoon - <http://indiankanoon.org/doc/290532/8>

¹³⁷ E H Burn and J Cartwright; Cheshire and Burn's Modern law of Real Property 18th Ed, Oxford University Press , 2011 page 1161

¹³⁸ Ibid page 1166

was founded on the case of where the adverse possession regime is based on principles of neutrality and fairness to both parties.

The lesson Kenyans learn from the Land Registration Act 2002 is the procedure that has been adopted by the UK. This procedure overcomes the challenges and clashes between the squatter and title owner's rights. The procedure allows the title owner to first exercise his/her right to property before it is limited unlike Kenya. The procedure applied in the UK is enunciated under Sections 96 to 98 and schedule 6 of the Land Registration Act 2002. Schedule 6 paragraph 1(1) allows the person who has been in possession of the land for more than 10 years to apply to the land registrar and be registered as the land owner. The key element here is that the claimant must be in possession on the date of his application.¹³⁹ "The applicant must demonstrate that they have exclusively possessed the land and that the possession was both intentional and without the owner's consent."¹⁴⁰

Upon receipt of the application, the registrar has to inform the title owner about the application. This is done through a formal notice. In practice, however, the Land Registry Practice Guide 4, paragraph 5.1 provides that the registered proprietor is given an earlier; informal notice because the Land Registry, before accepting that the applicant has an arguable case for registration, will normally require one of its surveyors to inspect the land; both the land registered owner and the applicant are notified of the inspection.¹⁴¹

¹³⁹ Land Registration Act Schedule 11(1)

¹⁴⁰ Zoe Athill, Clara Clint;, *The Challenge of adverse possession of registered land* © BDB Pitmans 2021. One Bartholomew Close, London EC1A 7BL - T +44 (0)345 222 9222

¹⁴¹ E H Burn and J Cartwright; *Cheshire and Burn's Modern law of Real Property* 18th Ed, Oxford University Press , 2011 page 1161

Under Schedule 6 paragraph 4 of the Land Registration Act 2002, the applicant may be registered as the land owner if the Land owner does not object within 60 days. Where the land puts in a counter –notice the matter is referred to the Adjudicator.¹⁴² Schedule 4 paragraph 5 allows rectification of the register where the squatter was registered by mistake on account of the land owner failing to file a counter-notice. This is done in instances where the squatter has not been on land for more than 10 years. The squatter’s application may be rejected where he/she as failed to prove one of the following three conditions.

“Firstly, the applicant has the benefit of equity of estoppels by virtue of which he/she should be registered as proprietor. Secondly, that he/she for some other reason is entitled to be registered. Thirdly, that the land in question is involved in a boundary dispute in relation to the adjacent land belonging to the applicant, and the applicant is in adverse possession on the basis of a reasonable mistake as to title.”¹⁴³

The application of the third condition can better be fathomed from the recently decided case of **DOWSE V BRADFORD MBC [2020] UKUT 202 (LC)**. ‘The Appellants were seeking adverse possession of part of the land adjacent to their residential home but owned by the Respondent (a local authority). The appeal was dismissed and the Judge held that the Appellants had not met Condition A (adjacent land) because the whole (or substantially the whole) of the disputed land would have to be capable of being described as adjacent to the Appellant’s land. In this case, only a small fraction was. The Judge considered that it was unnecessary to consider the other grounds of appeal because, even if adverse possession and a reasonable belief in ownership

¹⁴² Land Registration Act Section 73(1) and Land Registry Practice Guide 4, Paragraph 6.

¹⁴³ Land Registration Act 2002, Schedule 6 paragraph 5

were proven, the appeal could not succeed. This case shows that the third condition will only apply in limited circumstances.”¹⁴⁴

Accordingly, the registered owner has two years from the rejection of the application in which to take steps either to evict the applicant or to legitimize their occupation. Presumably any paper owner who responded to the application by serving a counter-notice will be minded to protect their interest in this way.”¹⁴⁵

Upon the lapse of two years the squatter has right to re-apply for registration. Where he/she proves that the title owner has never taken any step to try and evict him/her then he will have no right of objection.¹⁴⁶

The procedure as depicted above and aligning it with the purpose of the research protects the paper owner/registered owner’s rights. He/she is given a chance to redeem himself /herself within a period of two years on the basis of the importance of land in the neo-liberal economy we are in.

However, if Kenya is to borrow this kind of procedure from their former colonial masters they should take heed and tie up the loose ends. It is argued that the concept of adverse possession of registered land is inherently problematic. The doctrine is not easily reconcilable with the

¹⁴⁴ Zoe Athill, Clara Clint;, The Challenge of adverse possession of registered land © BDB Pitmans 2021. One Bartholomew Close, London EC1A 7BL - T +44 (0)345 222 9222

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¹⁴⁶ Land Registration Act 2002 Schedule 6 paragraph 7

concept of indefeasibility of title that underpins the system of land registration in the UK.¹⁴⁷ The uncertainties as to ownership which may justify adverse possession of unregistered land do not apply to registered land where the legal estate is vested in the registered proprietor who is identified in the register.¹⁴⁸

4.6 Conclusion

We thus conclude and note that application of adverse possession either from the Indian or UK view is useful in triggering a revolution against adverse possession laws in Kenya. This will lay concrete on the review of the constitutionality of adverse possession and show the necessity of reviewing the Limitation Act. The lessons learnt will help mitigate the challenges envisaged from the use of an archaic and outdated law on adverse possession.

¹⁴⁷Zoe Athill, Clara Clint;, The Challenge of adverse possession of registered land © BDB Pitmans 2021. One Bartholomew Close, London EC1A 7BL - T +44 (0)345 222 9222

¹⁴⁸ Ibid

5 CHAPTER 5

5.1 CONCLUSION

Without prejudice to the above foregoing, the challenges denoted above it is clear that adverse possession though a necessary evil needs to be reformed. It is verily unconstitutional, the squatter/trespasser overrides the rightful owner's rights and the same is unfairly applied by courts of law as sword and shield at the same time. It is thus of more importance that an established and peaceable possession should be protected than the law should assist the agitation of old or stale claims and the limitations statute which affects this purpose is "an act of peace, long dormant claims have often more of cruelty than of justice in them."¹⁴⁹ We also conclude and note that our hypothesis was proved.

To make haste peace between the squatter and the title owner the laws have to be balanced. We are of the opinion that the same can be met through the following findings and recommendations.

5.2 RECOMMENDATIONS

We recommend that the law as provided for under the Limitation Act, The Civil Procedure Act is reviewed. The law can be reviewed in two folds were the squatter is made accountable and compensates the original owner or the law is total done away with as was proposed in India. We note that the total abolition of adverse possession will not affect squatters who will be verily catered for under **Section 135(3)(b)** of the Land Act that creates a fund for purposes of purchasing private land for settlement programmes.

¹⁴⁹ Megarry RE and HWR Wade, The Law of Real Property 4th edition(1975) London Stevens

We should however be mindful that there are always two sides of the coin. To which we note that the abolition of adverse possession laws will automatically negate distributive justice as connoted under theoretical framework. Distributive justice simply looks at the positive impact squatters come with such as efficiency in allocation of land as denoted under Chapter 3 of this paper.

In the case of **STATE OF HARYANA VS MUKESH KUMAR & ORS** court noted that “the Parliament must seriously consider at least to abolish "bad faith" adverse possession, i.e., adverse possession achieved through intentional trespassing. Actually believing it to be their own could receive title through adverse possession sends a wrong signal to the society at large. Such a change would ensure that only those who had established attachments to the land through honest means would be entitled to legal relief. In case, the Parliament decides to retain the law of adverse possession, the Parliament might simply require adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere twelve years.”¹⁵⁰ Such a reference and recommendation can be useful for Kenya’s adverse possession regime.

The essence of the long period of time is that it “would help to ensure that successful claimants have lived on the land for generations, and are therefore less likely to be individually culpable for the trespass (although their forebears might). A longer statutory period would also decrease the frequency of adverse possession suits and ensure that only those claimants most intimately

¹⁵⁰ State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 PETITION FOR SPECIAL LEAVE TO APPEAL (CIVIL) NO. 28034/2011(Arising out of CC 9038/2010) <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/State-of-Haryana-vs-Mukesh-Kumar-Others.pdf>

connected with the land acquire it, while only the most passive and unproductive owners lose title.”¹⁵¹

In the same voice, Asike- Makhandia Justice recommends that a proper recourse as regards to adverse possession should be for the statutes to be carefully researched and developed to cover the mischief of unscrupulous squatters in the current state of affairs. In essence the law in Kenya needs to make a bold finding on the applicability of adverse possession on registered and unregistered land and make it a challenge for adverse possessors to deprive registered owners. This can be achieved by borrowing from our previous colonialists their revised laws on adverse possession as well denoted herein above. We can for instance borrow the procedure UK has adopted by allowing a squatter to first lodge a claim at the Lands registry before going to court. In return the title owner is give 60days within which to object and claim back his land. This will address the challenges adverse possession poses.

We also recommend that in order for the doctrine to achieve positive outcomes we need to remove the disabilities that embody adverse possession. These include the hesitancy by theorists to embrace the abandonment and recapture principle that informs the doctrine and a substantial unwillingness of governments and an antiquated and outmoded maxim shielding them from the doctrine’s important work.¹⁵² This will ensure that adverse possessors enjoy the fruit of the

¹⁵¹ State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 PETITION FOR SPECIAL LEAVE TO APPEAL (CIVIL) NO. 28034/2011(Arising out of CC 9038/2010) <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/State-of-Haryana-vs-Mukesh-Kumar-Others.pdf>

¹⁵² Scott Andrew Shepard, Adverse Possession , Private Zoning Waviver and Desuetude: Abandonment & Recapture of Property and Liberty Interests.

doctrine unlike now where the title owner once deprived becomes hostile and the whole adverse acquisition becomes a series of endless litigation.

We also recommend that there be an avenue of compensating the title holder by the squatter at the prevailing market value of the land. This will provide some semblance of justice to those who have done nothing other than sitting on their rights for the statutory period, while allowing the adverse possessor to remain on property.¹⁵³ In instances where the squatter is financially crippled then court can use its discretion to set the amount to be paid for compensation. Compensation verily resonates with the consent theory. This is because by reaching a compensation agreement parties automatically consent to the squatter legally acquiring the title deed and the land itself. Compensation is also a requisite that Article 40 of the Constitution approve when land is compulsorily acquired to negate disputes. This if adopted will balance the rights of the squatter and the title owner.

We further recommend sensitization on land rights and their limits so that absent landowners may be vigilant to ensure that their lands remains unoccupied or are occupied with their consent failing which they stand to lose their claim to the said land.¹⁵⁴ This recommendation is also based on the survey findings where most participants were ashamed of not knowing the law especially the historical development of adverse possession in Kenya.

¹⁵³ State Of Haryana vs Mukesh Kumar & Ors on 30 September, 2011 PETITION FOR SPECIAL LEAVE TO APPEAL (CIVIL) NO. 28034/2011(Arising out of CC 9038/2010) <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/State-of-Haryana-vs-Mukesh-Kumar-Others.pdf>

¹⁵⁴ MMAN Advocates; But It's My Land! – Ways through which the right to land can be lost. <https://mman.co.ke/content/it%E2%80%99s-my-land-%E2%80%93-ways-through-which-right-land-can-be-lost> last visited at 2:02pm on 6/9/2021

Lastly, it we recommend and propose that adverse possession applies to untitled land. However, this recommendation comes with hardships as most untitled land is community land which attracts most of the negative impact on adverse possession.

To further strengthen and give more weight to our recommendations, the paper used closed ended questions to ascertain whether the participants agree with the recommendations of the researcher. This was important as it lays a foundation for precedents and further research on the topic. The survey findings were as follows;

5.3 SURVEY FINDINGS ON RECOMMENDATIONS

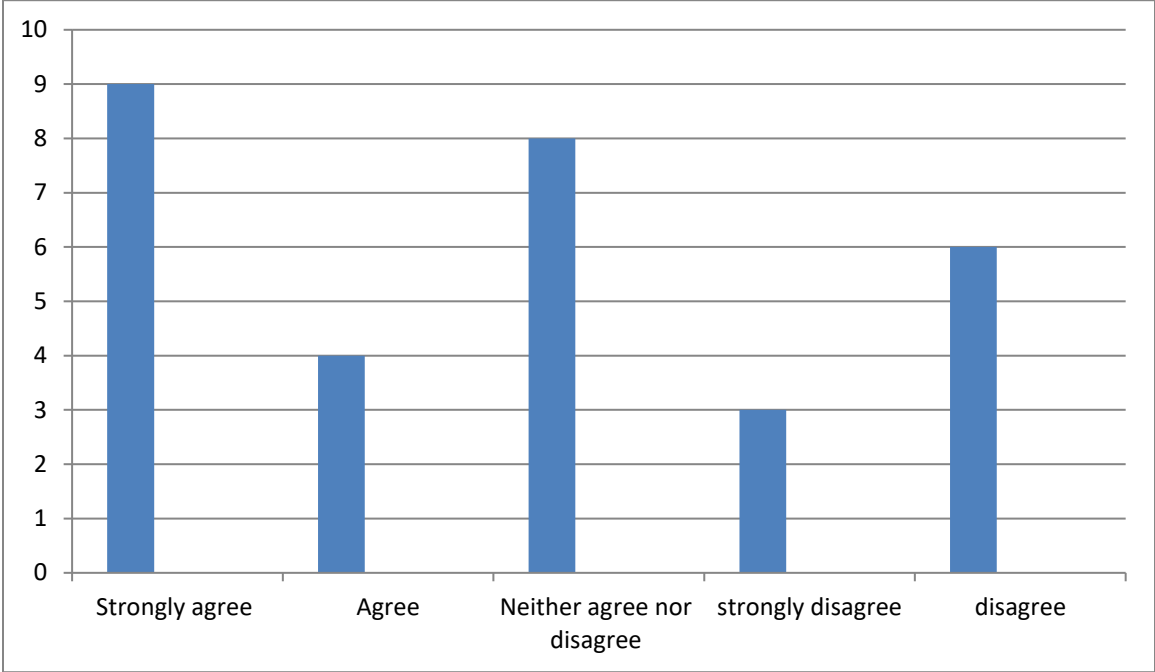
Finally, after filling in the initial questions, the participants were asked to give their views on the most appropriate way forward to the constitutionality on adverse possession to limit the challenges. On the issue of whether to abolish the law on adverse possession, it was observed that 9 out of the 30 participants strongly advocated for its abolishment. These were mostly women who expressed their disgust on allowing a squatter intentionally take someone's land. 4 out of the 30 participants just agreed that it should be abolished. Whereas 8 out of 30 were spoilt for choice and could neither agree nor disagree as to the abolishment of adverse possession. 3 out of 30 strongly disagreed and were of the view that adverse possession should not be abolished. 6 out of 30 participants simply disagreed against the abolishment of adverse possession. Generally the majority favoured for the abolition of adverse possession laws in Kenya.

When it came to reviewing the law on adverse possession and amend the law on adverse possession so that the squatter can adequately compensate the title owner; 14 out of the 30 participants strongly agreed that indeed the squatter should compensate the title owner. 6 out of

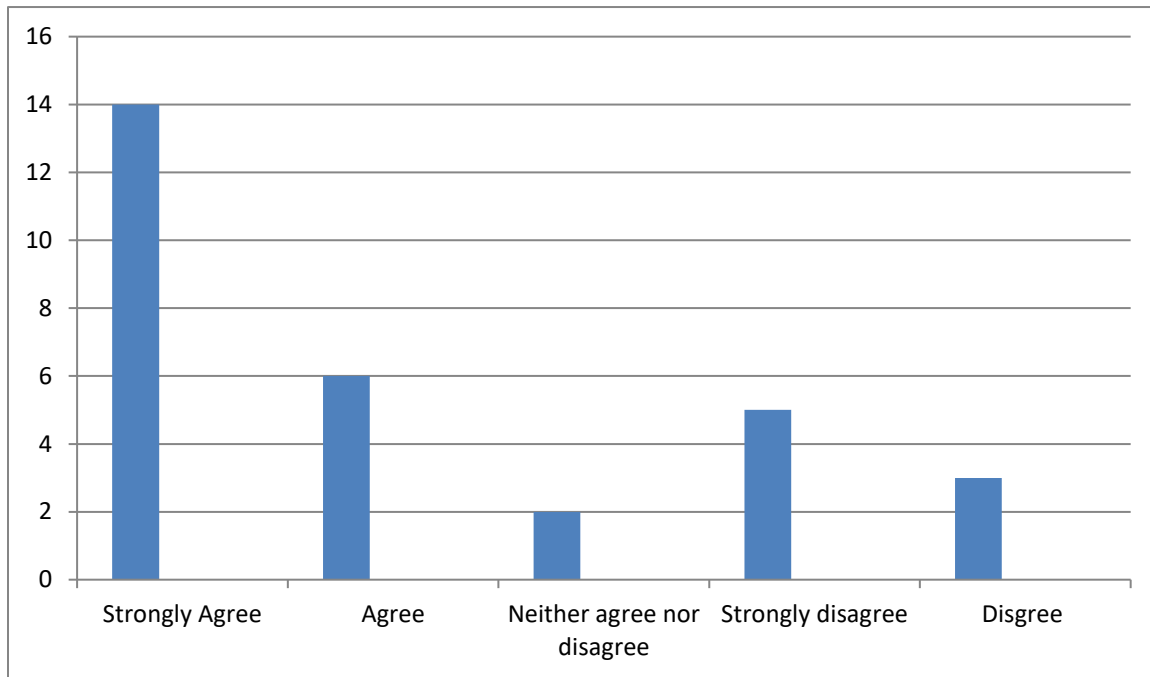
the 30 agreed, 2 out of 30 neither agreed nor disagreed, 5 out of the 30 participants strongly disagreed and 3 out of 30 simply disagreed. The majority were thus of the view that indeed a squatter should compensate the title owner once the case is heard in his/her favour as the squatter.

Lastly as to the notion of adverse possession applying only to untitled land; 7 out of the 30 participants strongly agreed that indeed adverse possession should apply to only untitled land. Furthermore, 7 out of the 30 participants simply agreed, whereas 6 out of 30 were neither in agreement nor disagreement. 5 out of the 30 participants strongly disagreed with the proposal that adverse possession should apply to untitled lands. 5 out of the 30 participants just simply disagreed. This all suggested that the majority were in favour of adverse possession applying to only untitled land.

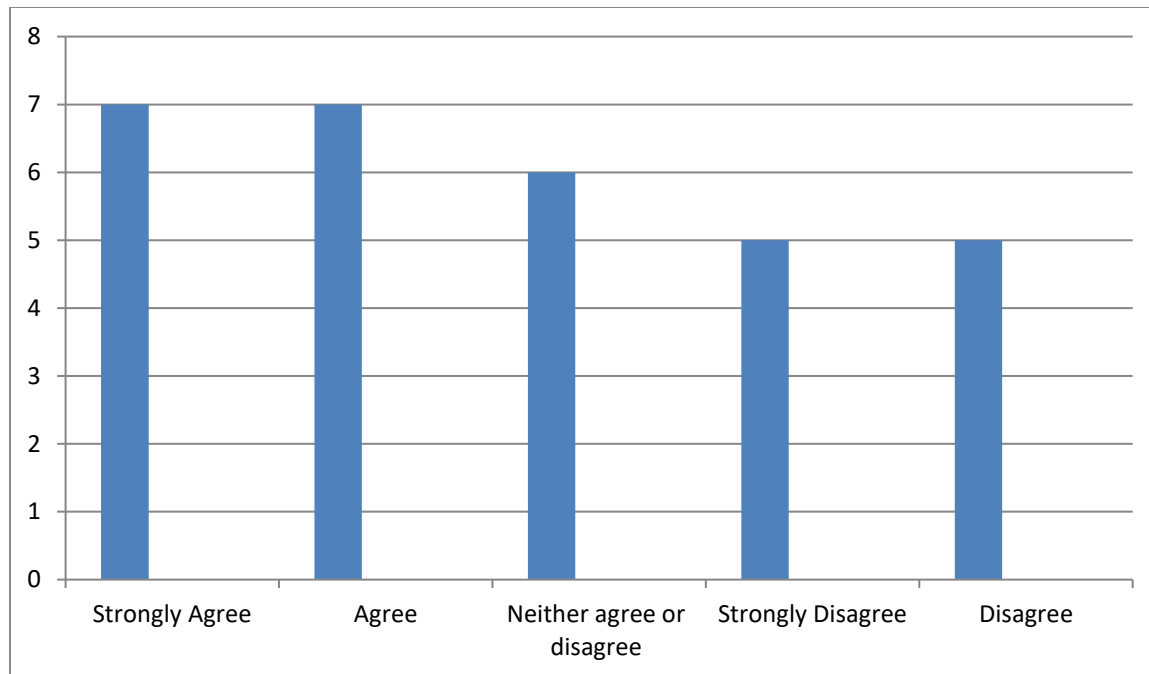
5.3.1 Fig 3: GRAPH SHOWING PARTICIPANTS WHO RECOMMEND TO ABOLISH THE LAW ON ADVERSE POSSESSION.



5.3.2 Fig 4: GRAPH SHOWING PARTICIPANTS WHO RECOMMEND REVIEW AND AMMEND THE LAW TO COMPEL THE SQUATTER TO ADEQUATELY COMPENSATE THE TITLE OWNER



5.3.3 Fig 5: GRAPH SHOWING PARTICIPANTS WHO RECOMMEND REVIEW AND AMMEND ADVERSE POSSESSION TO APPLY ONLY TO UNTITLED LANDS



5.4 Conclusion

From the above foregoing, the survey findings strongly call for abolishment of adverse possession. However, also participants agree that there should be a form of compensation to the title owner by the squatter. We agree with both sentiments as they all tend to realize the title holder's rights as the paper set out to achieve. However, we are in no position to effect such changes. We thus only hope that this paper triggers the attention and the revolution adverse possession laws in Kenya's need to reform. Something that is long overdue.

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7 APPENDIX

7.1 QUESTIONNAIRE AND FILLED QUESTIONNAIRES

Serial No.....01.....

Research title: **A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.**

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male[] Female[] Intersex[]

2. Where do you stay?

Hamisi[] Kisumu[] Kakamega[] Mbale[] Any Other[]

3. What do you do you do for a living?

Advocate [] Lawyer [] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes [] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes []

No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[] No[]

B) If yes, please give any rationale for adverse possession in Kenya

.....
.....

7. A) Do you know the impact of adverse possession on the rights to property as provided

for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

.....
.....

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes [] No []

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

.....
.....

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

2) Adverse possession to apply only to untitled lands

Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

10. Any other information

.....
.....

Thank you

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male [] Female [✓] Intersex []

2. Where do you stay?

Hamisi [] Kisumu [] Kakamega [] Mbale [✓] Any Other []

3. What do you do you do for a living?

Advocate [✓] Lawyer [] Judicial Officer [] Land Registrar []

4. Do you understand what adverse possession means? Yes [✓] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [✓]

No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [✓] No []

B) If yes, please give any rationale for adverse possession in Kenya

.....To utilize land.....

.....

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [✓] No []

B) If yes, please give any impact

To make sure there's proper use of land.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

Title to Ownership

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

Thank you

IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male[] Female[] Intersex[]

2. Where do you stay?

Hamisi[] Kisumu[] Kakamega[] Mbale[] Any Other[]

3. What do you do for a living?

Advocate [] Lawyer[] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes No []

[]

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes No []

B) If yes, please give any rationale for adverse possession in Kenya

Due to the historical land injustices there were a lot of people occupying land without titles. Also to protect squatters.

7. A) Do you know the impact of adverse possession on the rights to property as provided for

under Article 40 of the Constitution of Kenya? Yes No []

B) If yes, please give any impact

Every person has a right to own property. However adverse possession establishes a more superior right over the true owner.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

Adverse possession extinguishes the title of the owner of the land.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

The purpose of A. Possession was to protect the squatters. Each case should be decided based on its merits. The court should strike a balance between protecting property rights and squatters.

Thank you

Omoro Carol

University of Nairobi, School of Law,

P.O Box 30197-00100

NAIROBI.


31/8/2021

To: Participants in the questionnaire

I am the student named above and undertaking a Master of Laws at the University of Nairobi. I am researching on the constitutionality of adverse possession in Kenya. My research aims at examining and understanding the historical development and rationale of adverse possession laws in Kenya. Finding out how adverse possession laws in their current state impact on the right to property as provided for under Article 40 of the Constitution of Kenya. as well as examining the challenges that the law on adverse possession presents in protection of property rights and make recommendations to reform the law on adverse possession. I therefore, humbly request you to assist me in the research by filling the questionnaire which I have attached to this letter. It will take you a short time to fill the questionnaire and the information you give will be handled with confidentiality and your name will not be mentioned anywhere.

Thank you in advance for taking your time to complete the questionnaire and your cooperation.

Yours faithfully,


Omoro Carol

G62/37250/2020

QUESTIONNAIRE

MUKABI JAMES

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male Female Intersex

2. Where do you stay?

Hamisi Kisumu Kakamega Mbale Any Other

3. What do you do for a living?

Advocate Lawyer Judicial Officer Land Registrar

4. Do you understand what adverse possession means? Yes No

5. Do you know the historical development of adverse possession laws in Kenya? Yes No

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes No

B) If yes, please give any rationale for adverse possession in Kenya

To help the owner to be registered as the owner absolute

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

Right to ownership.

3. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

displacement of other people.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

NONE.

Thank you

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male[] Female[✓] Intersex[]

2. Where do you stay?

Hamisi[] Kisumu[] Kakamega[✓] Mbale[] Any Other[]

3. What do you do you do for a living?

Advocate [✓] Lawyer[] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes [✓] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [✓] No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[✓] No[]

B) If yes, please give any rationale for adverse possession in Kenya One of its rationale was to avoid state claims, because of the realities of fading memories and loss of evidence; that landowners are compelled not to sleep on their rights and ensure that all claims are brought to court promptly.

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [✓] No []

B) If yes, please give any impact Article 40 of the constitution guarantee right to property which may however be limited in terms of Article 24 so long as the requirements of that provision are satisfied. Adverse possession comes in to limit this right under Article 40, a limitation that may sometimes be illegitimate depending on how it may be exercised.

3. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya. At times it may be difficult for a person claiming adverse possession ~~must~~ to adduce evidence of how long they have been in occupation of a said parcel since they usually do not have titles to the property but only rely on oral evidence

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

The Court of Appeal in Malindi is Civil Appeal no. 56/2014 between MTANA LEWA (Appellant) and KAHINDI NGALA MWAGANDI (Respondent) illustrates these issues clearly.

Thank you

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

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1. What is your sex?

Male[✓] Female[] Intersex[]

2. Where do you stay?

Hemisi[] Kisumu[] Kakamega[✓] Mbale[] Any Other[]

3. What do you do you do for a living?

Advocate [] Lawyer[✓] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes [✓] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [] No [✓]

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[✓] No[]

B) If yes, please give any rationale for adverse possession in Kenya

A party who seeks to acquire land by adverse possession must have lived on that land for a period exceeding 12 yrs uninterrupted. The stay should be adverse to the proprietary rights of the registered owner.

7. A) Do you know the impact of adverse possession on the rights to property as provided for

under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

I believe that it has been abused in some instances but it should be retained as there are circumstances when it is useful. I would give its attention as part of our land laws.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

There is lack of openness and accountability. In most cases, some parties freely enter another's land and do then file for adverse possession thus abusing the process. The rich who have money do quickly develop land to take advantage of the poor and illegally enter the poor's land and claim adverse possession.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
 Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

The standards of proof in court are not uniform. It depends on the understanding of the presiding judge on the law of adverse possession. There should be uniformity and the best common standards which should be available for reference by all judges and or courts.

Thank you

L.O. Vihiga Court
Mr. Mwangi

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

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1. What is your sex?

Male[] Female[] Intersex[]

2. Where do you stay?

Hamisi[] Kisumu[] Kakamega[] Mbale[] Any Other[]

3. What do you do for a living?

Advocate [] Lawyer[] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes [] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [] No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [] No []

B) If yes, please give any rationale for adverse possession in Kenya

.....It gives land title deed to a purchaser of land after he has stayed peacefully in the land for over 12 yrs

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

.....
.....

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

12 yrs is a very long period given that the buyer has given out his money to the seller

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
 Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

Period be reduced to less than 10 yrs

Thank you

QUESTIONNAIRE

Serial No.

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

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Male [] Female [] Intersex []

2. Where do you stay?

Hamisi [] Kisumu [] Kakamega [] Mbale [] Any Other []

3. What do you do you do for a living?

Advocate [] Lawyer [] Judicial Officer [] Land Registrar []

4. Do you understand what adverse possession means? Yes [] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [] No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [] No []

B) If yes, please give any rationale for adverse possession in Kenya

Settle the landless squatters. Justice is served to the squatters.

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

The right to own and acquire property is realised.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

At times, there is injustice to the title owner in certain circumstances.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree

Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

None.

Thank you

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male[✓] Female[] Intersex[]

2. Where do you stay?

Hemisi[] Kisumu[] Kakamega[] Mbale[✓] Any Other[]

3. What do you do for a living?

Advocate [] Lawyer[✓] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes [X] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [] No [X]

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[✓] No[]

B) If yes, please give any rationale for adverse possession in Kenya

It is where a person takes possession of land rights over it and the person having title to it neglects to take action against him for a certain period of time.

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [X] No []

B) If yes, please give any impact

The person who is not the owner may establish ownership against the true owner after the fulfillment of all the legal requirements

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes [] No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

.....
.....

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree [] Neither agree nor disagree [] Strongly disagree []
Disagree []

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

2) Adverse possession to apply only to untitled lands

Strongly agree Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

10. Any other information

.....
.....

Thank you

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male[✓] Female[] Intersex[]

2. Where do you stay?

Hamisi[] Kisumu[✓] Kakamega[] Mbale[] Any Other[]

3. What do you do you do for a living?

Advocate [✓] Lawyer[] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes [✓] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [✓] No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [✓] No []

B) If yes, please give any rationale for adverse possession in Kenya

In line with the constitution right to property adverse possession protects the person in possession of property

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [✓] No []

B) If yes, please give any impact

Right to property is enshrined in the constitution Article 40 gives a right to a person without title to land right to get in court

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

Adverse possession doesn't give the occupier of property direct right to property but rather through action in court.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

.....
.....

Thank you

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male[✓] Female[] Intersex[]

2. Where do you stay?

Hamisi[] Kisumu[✓] Kakamega[] Mbale[] Any Other[]

3. What do you do you do for a living?

Advocate [✓] Lawyer[] Judicial Officer [] Land Registrar[]

4. Do you understand what adverse possession means? Yes [✓] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [✓] No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[✓] No[]

B) If yes, please give any rationale for adverse possession in Kenya

To ensure that land is used properly/efficiently without leaving its to waste

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [✓] No []

B) If yes, please give any impact

.....
.....

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

..... Having to deregister the land owner who rightfully acquired his/her title (fraud free).....

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

.....
.....

Thank you

QUESTIONNAIRE

Serial No.....

Research title: A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male [] Female [] Intersex []

2. Where do you stay?

Hamisi [] Kisumu [] Kakamega [] Mbale [] Any Other []

3. What do you do you do for a living?

Advocate [] Lawyer [] Judicial Officer [] Land Registrar []

4. Do you understand what adverse possession means? Yes [] No []

5. Do you know the historical development of adverse possession laws in Kenya? Yes [] No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [] No []

B) If yes, please give any rationale for adverse possession in Kenya

.....The same as limitation of action
and equitable jurisdiction.....

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

.....Easement.....

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

..... Res. Power to comply with Article 41

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
Disagree

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

There should be public education on the effects of adverse possession.

Thank you

QUESTIONNAIRE

Serial No.....

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Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

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1. What is your sex?

Male Female Intersex

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Harambee Kisumu Kakamega Mbale Any Other

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5. Do you know the historical development of adverse possession laws in Kenya? Yes No

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes No

B) If yes, please give any rationale for adverse possession in Kenya

To give right of occupation/ownership by virtue of occupying a parcel of land over a long period of time (12 yrs), to a party who alleges ownership of a parcel of land.

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

Has given right (by law), to individuals who do not actually own land, to claim ownership particularly on untitled lands, that go unoccupied over long periods of time by absentee landlords, who also ignore the very important aspect of ownership, which is acquiring title.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya. - A loophole, for unscrupulous individuals, posing as squatters... to invade private land and claim ownership in the process.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

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Strongly agree Agree Neither agree nor disagree Strongly disagree
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2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

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Thank you

Anonymously

QUESTIONNAIRE

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Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

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2) Adverse possession to apply only to untitled lands

Strongly agree [] Agree [] Neither agree nor disagree Strongly disagree [] Disagree []

10. Any other information

There is need to acquire the public with knowledge of adverse possession

Thank you

Lukie. K.
(Anonymous)

QUESTIONNAIRE

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IN KENYA.

Researcher: Omoro Carol, University of Nairobi Kisumu Campus .

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5. Do you know the historical development of adverse possession laws in Kenya? Yes [] No

[✓]

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[] No[✓]

B) If yes, please give any rationale for adverse possession in Kenya

.....
.....

7. A) Do you know the impact of adverse possession on the rights to property as provided for
under Article 40 of the Constitution of Kenya? Yes [] No [✓]

B) If yes, please give any impact

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Strongly agree Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

2) Adverse possession to apply only to untitled lands

Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree Disagree []

10. Any other information

None

.....

.....

Thank you

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5. Do you know the historical development of adverse possession laws in Kenya? Yes [✓] No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [✓] No []

B) If yes, please give any rationale for adverse possession in Kenya

Reward the productive use of land.

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [✓] No []

B) If yes, please give any impact

Perfection of land rights under e. bill of rights

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

if developed - no compensation

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2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

✓
None should be deprived of their property. Everyone should be allowed to use their property when... and as they desire.

Thank you

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6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [✓] No []

B) If yes, please give any rationale for adverse possession in Kenya

Adverse possession validates a claim of ownership, though w/ having title but, approving the legitimacy of stay without interference.

7. A) Do you know the impact of adverse possession on the rights to property as provided for

under Article 40 of the Constitution of Kenya? Yes [✓] No []

B) If yes, please give any impact

It alienates the absolutety of title from the property owner & transfers property rights to the adverse claimant only on the consideration of his/her long uninterrupted stay on the property.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

~~Property~~ Adverse possession deprives the owner/holder of title his right to own property exercised provided under the Constitution.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
Disagree

B. The law on adverse possession be reviewed and amended to;

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Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

Adverse possession should be totally abolished.

Thank you

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Advocate Lawyer Judicial Officer Land Registrar CIVIL SERVANT

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5. Do you know the historical development of adverse possession laws in Kenya? Yes No

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes No

B) If yes, please give any rationale for adverse possession in Kenya

.....
.....
~~N/A~~

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

.....
.....
~~N/A~~

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes [] No

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Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree Disagree []

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Strongly agree [] Agree [] Neither agree nor disagree Strongly disagree [] Disagree []

10. Any other information

People should be taught about adverse possession laws in Kenya.

Thank you

QUESTIONNAIRE

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B) If yes, please give any rationale for adverse possession in Kenya

..... Validates a claim of ownership by appreciating longevity of stay
on land without interference.....7. A) Do you know the impact of adverse possession on the rights to property as provided for
under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

..... Alienates title from absolute owners and gives right to an
adverse claimant:.....

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

Those who may not prove adverse possession may infringe rights of property owners.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree
Disagree

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N/A

Thank you

QUESTIONNAIRE

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5. Do you know the historical development of adverse possession laws in Kenya? Yes No

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes No

B) If yes, please give any rationale for adverse possession in Kenya

...the land with land lords who have been
 ..abuse ought to be utilized especially by people who
 are landless

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

..Absentee land lords lose ownership while
 ..landless people gain possession

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

A person who lawfully owns land but has been absent loses ownership because of adverse possession

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

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Strongly agree Agree Neither agree nor disagree Strongly disagree

Disagree

B. The law on adverse possession be reviewed and amended to;

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Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

Guidelines should be put in place to protect both the existing landlords and the squatters

Thank you

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No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[] No[]

B) If yes, please give any rationale for adverse possession in Kenya

-> Give the state - adequate time to
utilize land

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

->

Ensure that parties are notified
owner can utilize his land and not
just let it be idle

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

→ Adversity can claim any land so long as he has been in possession over the owner might have been sick and not able to visit the adverse

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

B. The law on adverse possession be reviewed and amended to: *to provide exceptional circumstances*

1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

There is need for the *be in stroming* on the laws.

Thank you

QUESTIONNAIRE

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6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [] No []

B) If yes, please give any rationale for adverse possession in Kenya

Land is a finite resource. It must be optimally utilized.
Utilization of land can only be done if its occupied.

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

QUESTIONNAIRE

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No

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B) If yes, please give any rationale for adverse possession in Kenya

To ensure proper use of land by the owners - Help settle the landless

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

Deprives the land owner of his property
this breach of constitutional right

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

A challenge of balancing between the right to peacefully own property & the rights under Article 43 of the Constitution (socio-economic rights)

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

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Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

B. The law on adverse possession be reviewed and amended to;

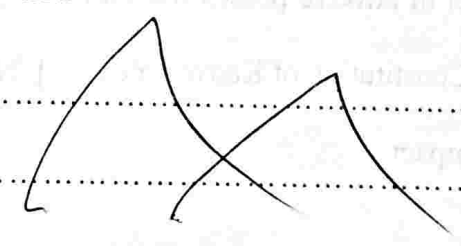
1) The squatter to adequately compensate the title owner

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information



Thank you

THE UNIVERSITY OF KENYA

Social Sci

Research title: **A BILL ON THE ESTABLISHMENT OF ADVERSE POSSESSION IN KENYA**

Researcher: **Cherutich and University of Nairobi Research Centre**

If you accept to participate in this research, please accept the questionnaire below

We thank you for accepting to participate in this important research

1. What is your sex?

Male Female Intersex

2. Where do you stay?

Harambee Kisumu Kakamega Mbita Any Other

3. What do you do for a living?

Advocate Lawyer Judicial Officer Land Registrar

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B) If yes, please give any rationale for adverse possession in Kenya

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No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[] No[]

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.....

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B) If yes, please give any impact

.....
.....
8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes [] No [✓]

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Strongly agree [] Agree [] Neither agree nor disagree [✓] Strongly disagree [] Disagree []

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree [✓] Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

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5. Do you know the historical development of adverse possession laws in Kenya? Yes []

No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes [] No []

B) If yes, please give any rationale for adverse possession in Kenya

To allow a person who has occupied property for land for over 12 years without peacefully and without any interruptions to be registered as the owner

7. A) Do you know the impact of adverse possession on the rights to property as provided

for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

Thank you

Adverse possession denies / displaces the
rightful owners of the property

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

Conflict between the rightful owner and the long term occupier of the property

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

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2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

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Adverse possession should be abolished as it is unfairly applied

Thank you

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No

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes No

B) If yes, please give any rationale for adverse possession in Kenya

To acquire property by adverse possession, a party must show that they made actual use of the property (12 years uninterrupted).

7. A) Do you know the impact of adverse possession on the rights to property as provided

for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

Thank you

.....12 years..... of uninterrupted use of a parcel
.....enables passing of interest by virtue of adverse possession

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes [] No []

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

.....Continuous uninterrupted possession, this denies

.....vested interest in a valid owners parcel, possession whether interrupted is still possession.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

A. The law on adverse possession is abolished.

Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

B. The law on adverse possession be reviewed and amended to;

1) The squatter to adequately compensate the title owner

Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

2) Adverse possession to apply only to untitled lands

Strongly agree [] Agree [] Neither agree nor disagree [] Strongly disagree [] Disagree []

10. Any other information

.....Propose limitation of time on adverse possession
.....Ought to be reduced to 6 years instead of 12 years.

Thank you

QUESTIONNAIRE

Serial No.....

Research title: **A CRITIC ON THE CONSTITUTIONALITY OF ADVERSE POSSESSION IN KENYA.**

Researcher: Omoro Carol, University of Nairobi Kisumu Campus.

If you accept to participate in this research, please answer the questions below.

We thank you for accepting to participate in this important research.

1. What is your sex?

Male Female Intersex

2. Where do you stay?

Hamisi Kisumu Kakamega Mbale Any Other

3. What do you do you do for a living?

Advocate Lawyer Judicial Officer Land Registrar

4. Do you understand what adverse possession means? Yes No

5. Do you know the historical development of adverse possession laws in Kenya? Yes

No

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes No

B) If yes, please give any rationale for adverse possession in Kenya

Undisrupted stay on the piece of land which has to be more than 12 years of stay

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

B) If yes, please give any challenge presented by adverse possession on property rights in Kenya.

Adverse possession laws contradicts with the right to own property especially titled lands. They require the property owner to strictly monitor property owned. encourages encroachment.

9. What strategies do you recommend to ensure that adverse possession laws conform with the constitution of Kenya?

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Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

B. The law on adverse possession be reviewed and amended to;

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Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

2) Adverse possession to apply only to untitled lands

Strongly agree Agree Neither agree nor disagree Strongly disagree Disagree

10. Any other information

None.

Thank you

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B) If yes, please give any rationale for adverse possession in Kenya

~~To enable good development in~~

~~infrastructure agriculture, education etc~~
The servitude has continuously stayed on parcel un-interrupted

7. A) Do you know the impact of adverse possession on the rights to property as provided for under Article 40 of the Constitution of Kenya? Yes No

B) If yes, please give any impact

~~unfair compensation~~ loss of property by bonafide title owners.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes [] No []

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~~Delayed and/or unfair compensation~~
loss of property

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N/A

Thank you

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Strongly agree [] Agree [X] Neither agree nor disagree [] Strongly disagree [] Disagree []

10. Any other information

NIL

Thank you

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No []

6. A) Do you know the rationale of adverse possession laws in Kenya? Yes[] No[]

B) If yes, please give any rationale for adverse possession in Kenya

Rationale behind adverse's that land should be used efficiently.

7. A) Do you know the impact of adverse possession on the rights to property as provided

for under Article 40 of the Constitution of Kenya? Yes [] No []

B) If yes, please give any impact

It does not confer a legal title to the person but only Vested property right in the area possessed.

8. A) Do you know the challenges the law on adverse possession presents vis a vis property rights as envisaged under the Constitution of Kenya? Yes No

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