

# Indefeasibility of Title and Adverse Possession in Kenya: An Uneasy Relationship?

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**Abstract:** *The doctrine of adverse possession conjures up deep emotional and philosophical arguments, centuries after its inception. While courts have perpetually been called upon to pronounce themselves on the fairness of the doctrine, a new formidable challenge has now been levelled against the principle-that of its relevance to 21<sup>st</sup> century land law. The debate rages on in courtrooms and parliamentary floors around the world, calling lawmakers, members of the bar and the bench to contribute to the keep or discard dichotomy. This paper makes an argument for the incompatibility of adverse possession with an era characterized by rigorous registration systems. The analysis begins by tracing the history of adverse possession and then proceeds towards an empirical assessment of the arguments in favour of, and against the doctrine. The discourse then contextualizes the discussion to Kenya’s land law and concludes by making an argument against the retention of the doctrine with respect to registered land.*

**Keywords:** *Adverse possession, indefeasibility, land, ownership, registered.*

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## I. Introduction

It would appear that in the arena of problematic doctrines of law, adverse possession carries the trophy in the property law category. In brief, the doctrine posits that where a person enters another’s land, without that other person’s permission and resides therein continually for a stipulated period, they acquire an interest in that land, powerful enough to strip the cloak of ownership from the owner and to vest it in themselves. Sharp criticisms have been leveled against the doctrine. The doctrine’s launching pad is already seen as problematic because it constitutes illegal entry into another’s land.<sup>1</sup> Unsavory labels have been assigned to the theory’s linchpin: possession of wrong,<sup>2</sup> unjust, draconian and illogical<sup>3</sup> and a sanctioning of theft to land.<sup>4</sup> Trespassers have been viewed as squatters,<sup>5</sup> invaders, itinerants and antitheses of a stable community.<sup>6</sup>

The second vexatious component of the doctrine is the approval and protection by the law, of a stranger’s application to be registered in place of the real owner of the land.<sup>7</sup> Perhaps most bizarre, is the fact that this prickly doctrine, challenged in courts of law around the world, somehow manages to remain entrenched in both common law and civil law jurisdictions.<sup>8</sup> The near feverish preoccupation with the injustices of the doctrine is ascribed to the fact that property, and land in particular, is not only a necessary possession for

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<sup>1</sup> Conway H and Stannard J, ‘The emotional paradoxes of adverse possession’ 64 (1), *Northern Ireland Law Quarterly*, 2013, 75-89.

<sup>2</sup> *Buckinghamshire County Council v Moran* (1990), England and Wales Court of Appeal.

<sup>3</sup> *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom* [2005] ECHR 921 Judgement of 15 November 2005

<sup>4</sup> Law Commission, *Land Registration for the Twenty First Century: A Consultative Document*, 1998, 202-236.

<sup>5</sup> *McPhail v Persons Unknown* (1975), England and Wales Court of Appeal.

<sup>6</sup> *Lamb v Camden Borough Council* (1981), England and Wales Court of Appeal.

<sup>7</sup> Goymour A, ‘Squatters and the criminal law: Can two wrongs make a right?’ 73 *The Cambridge Law Journal*, 2014, 486.

<sup>8</sup> British Institute of International and Comparative Law, *Adverse possession*, 2006, 1-14.

human sustenance but is a representation of home, culture, future inheritance and belonging.<sup>9</sup>

It is as stupefying to the lay man as it is to the legal mind, that an activity that started out as an affront to law, as a threat to the right of a proprietor to peaceably hold and enjoy his property, ends up clad in legality, with the full force of law behind it, and only because the illegality persisted long enough.

Nowhere has the internal turmoil of the doctrine been highlighted better than in the very courtrooms in which the doctrine has been placed for reexamination and possible dismissal, and which paradoxically have voted to retain the doctrine in the annals of law. In the *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom [2005] ECHR 921* case, Neuberger J, although ultimately finding in favour of the Defendants, concluded that it was not a decision he arrived at with enthusiasm, adding that the doctrine is unjustifiable by practical considerations.<sup>10</sup> In the Indian case of *State of Haryana v Mukesh Kumar & Others 2011*, Bhandari J expressed the astonishment with which laymen learn that a trespasser is able to take title to land from its true owner, observing that the doctrine constitutes a theft sanctioned by law.<sup>11</sup> Here at home, Kuloba J in *Gabriel Mbui v Mukindia Maranya(1993)eKLR*, regarded the doctrine as an affront to the indefeasibility of title and to the positive cultural practice of accommodating the landless until such time as they are able to acquire their own land.<sup>12</sup> More recently, when the Court of Appeal was invited to determine whether the doctrine was antithetical to the 2010 Constitutional dictates, Ouko J, as he then was, in the case of *Matana Lewa v Kabindi Ngala Mwangandi(2015)eKLR*, struggled to rationalize its relevance in the face of ongoing land reforms and contemporary commercial trends relating to land.<sup>13</sup>

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<sup>9</sup> Stake J, 'The Uneasy case for adverse possession' 89 *Georgetown Law Journal*, 2001, 2420.

<sup>10</sup> *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom*, ECtHR Judgement of 30 August 2007.

<sup>11</sup> *State of Haryana v Mukesh Kumar & Others* (2011) Supreme Court of India.

<sup>12</sup> *Gabriel Mbui v Mukindia Maranya* (1993) eKLR.

<sup>13</sup> *Matana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR.

## II. A Brief History of Adverse Possession

The origins of the doctrine of adverse possession have been traced to medieval England.<sup>14</sup> At the time, the monarch had bequeathed certain properties to feudal barons who had in turn left them to their descendants.<sup>15</sup> Since ownership at the time was not captured in paper title deeds, possession became the singular evidentiary mechanism of safeguarding the underlying interest in land.<sup>16</sup> It was therefore possible for a possessor to stay on another's land for a vast number of years without ever meeting its owner.<sup>17</sup> An owner who was however able to prove prior possession of the land in question would be regarded as its owner.<sup>18</sup>

Gradually, the possession-based evidence of land ownership became problematic for two key reasons: first, the increasing difficult for the dispossessed owner to claim ownership especially in a situation involving a long chain of claims, and secondly, the unconscionability with which the eviction of a possessor who had invested greatly on the land was viewed.<sup>19</sup> In addition, due to evolution within society, it was recognized that a parcel of land was capable of sustaining various rights thereto by various right holders, making simple possession inadequate in addressing societal complexities.<sup>20</sup>

It was against this backdrop that the system of mere possession was replaced by a more vigorous regime of estates and titles.<sup>21</sup> Evidence abounds, in both common law and civil law jurisdictions, that the push towards a registration system was meant to engender security of title for the registered proprietor on the one hand, and to make this ownership transparent to the rest of society.<sup>22</sup>

As already observed, the doctrine of adverse possession is woven into a possession-based fabric of land ownership. That notwithstanding, it has been

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<sup>14</sup> Teo H, 'A critique of the doctrine of adverse possession' 4 *Cross Sections*, 2008, 127-135.

<sup>15</sup> Nicol M, 'The fiction of adverse possession: An alternative conceptualization to the right to control land', Unpublished PhD, Lancaster University, Lancaster, 2017, 13-148.

<sup>16</sup> Petersson S, 'Something for nothing: The law of adverse possession in Alberta' 30(4) *Alberta Law Review*, 1296-1300.

<sup>17</sup> Teo H, 'A critique of the doctrine of adverse possession', 127-135.

<sup>18</sup> Petersson S, 'Something for nothing', 1296-1300.

<sup>19</sup> Petersson S, 'Something for nothing', 1296-1300.

<sup>20</sup> Nicol M, 'The fiction of adverse possession', 16-17.

<sup>21</sup> Nicol M, 'The fiction of adverse possession', 17-20.

<sup>22</sup> British Institute of International and Comparative Law, *Adverse possession*, 2006, 2-4.

found that even after various countries moved onto the registration system of ownership, the doctrine has largely been retained, with minor variances between common law and civil law jurisdictions.<sup>23</sup>

### III. The Implication of the Good Faith-Bad Faith Dyad on Adverse Possession

While the foundational requirements for adverse possession are largely similar in both common law and civil law jurisdictions,<sup>24</sup> the relevance of the possessor's intent, that is, whether founded on an honestly-held erroneous belief or actuated by intentional encroachment, marks the point of departure.<sup>25</sup> Good-faith possessors are usually in possession of another's property by virtue of a mistaken belief in the legality of a void or defective title, which leads them to consider the land in question theirs. Bad faith possessors on the other hand are generally regarded as scoundrels, occupying land they are certain is not theirs.<sup>26</sup> Good faith was one of the requirements for a successful adverse possession claim under ancient Roman law and continues to be so in modern civil law systems.<sup>27</sup> In jurisdictions where the possessor's intention is relevant, the law appears hesitant to award title to the mala fide encroacher, with the opposite being true of bona fide encroachers.<sup>28</sup> The Maine Rule appears to be an outlier in this regard. In the state of Maine-US, bad-faith possessors usually qualify for registration by adverse possession, while good-faith possessors do not, on the basis that a mistaken possession is insufficiently adverse to the owner's rights and that the possessor does not possess the intent to dispossess.<sup>29</sup> In certain jurisdictions including Greece, Iraq, Jordan and Poland, although both good faith and bad faith possessors are equally entitled to be

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<sup>23</sup> British Institute of International and Comparative Law, *Adverse possession*, 2006, 2-16.

<sup>24</sup> Bouckaert B and Depoorter B, 'Adverse possession: Title systems', University of Ghent, Center for Advanced Studies in Law and Economics, 1999, 24-27 <[https://www.researchgate.net/publication/251637684\\_ADVERSE\\_POSSESSION\\_-\\_TITLE\\_SYSTEMS](https://www.researchgate.net/publication/251637684_ADVERSE_POSSESSION_-_TITLE_SYSTEMS)> on 05 March 2023.

<sup>25</sup> Kim J, 'Good-faith error or intentional trespassing in adverse possession' 24 *International Review of Law and Economics*, 2004, 1-13.

<sup>26</sup> Fennell L, 'Efficient trespass: The case for bad faith adverse possession' 100(3) *Northwestern University Law Review*, 2006, 1037-1096.

<sup>27</sup> Helmholz R, 'Adverse possession and subjective intent' 61 *Washington University Law Quarterly*, 1983, 357.

<sup>28</sup> Helmholz R, 'Adverse possession and subjective Intent', 331-358.

<sup>29</sup> Mascolo E, 'A primer on adverse possession', 21(1) *Connecticut Bar Journal*, 1992, 297-326.

registered owners on the basis of adverse possession, good-faith possessors enjoy shorter prescription periods than bad-faith possessors.<sup>30</sup> In Poland for example, the statute of limitation is set at twenty years for good-faith possessors and thirty for bad faith possessors.<sup>31</sup> Other countries such as Belgium, although recognizing the good-faith bad-faith dichotomy in adverse possession claims, prescribes a standard period of 30 years for both categories.<sup>32</sup>

Comparative research shows that common law jurisdictions do not distinguish between bad and good-faith possessors.<sup>33</sup><sup>34</sup> Hemholz puts forth two arguments as to why an evaluation of the possessor's state of mind might be undesirable and sometimes impractical. First, that an additional examination as to state of mind of the possessor would not significantly add any weight to the determination.<sup>35</sup> Secondly, that such investigation would unnecessarily complicate adverse possession claims especially where there exists no evidence to support subjective intent at the time of possession, or where the possessor is deceased.<sup>36</sup> Although Kenyan Law does not subscribe to the good-faith-bad-faith dichotomy, several decisions seem designed to make it more difficult for outright thieves to benefit under the doctrine. This reaction has been described as intuitively emotional, in which certain biological predispositions around the negative moral connotation generated by squatting sway judgements from mechanical applications of the law.<sup>37</sup> In certain instances, subtle manipulations of doctrinal requirements are employed to ensure that land thieves or those parties whose claims appear less meritorious find it more difficult to succeed.<sup>38</sup> The Court of Appeal decision in *Kweyu v Omutut*, (1990) KLR 709 and the High Court in *Gabriel Mbui v Mukindia Maranya* (1993) eKLR lean into the proposition that in order for a claim of adverse possession to be successful, the claimant

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<sup>30</sup> Chang Y, 'Adverse possession laws in 203 jurisdictions: Proposals for reform' 43 *University of Pennsylvania Journal of International Law*, 2022, 374.

<sup>31</sup> British Institute of International and Comparative Law, *Adverse possession*, 2006, 27.

<sup>32</sup> Chang Y, 'Adverse possession laws in 203 jurisdictions', 374.

<sup>33</sup> British Institute of International and Comparative Law, *Adverse possession*, 2006, 27.

<sup>34</sup> Chang Y, 'Adverse possession laws in 203 jurisdictions', 374.

<sup>35</sup> Helmholz R, 'Adverse possession and subjective intent', 357.

<sup>36</sup> Helmholz R, 'Adverse possession and subjective intent', 357.

<sup>37</sup> Guthrie C, Rachlinski J and Wistrich A, 'Blinking on the bench: how judges decide cases' 93(1) *Cornell Law Review* 2007, 3-5.

<sup>38</sup> Cooke E, *The new law of land registration*, 1<sup>st</sup> Ed, Bloomsbury Publishing, 2003.

must come into possession believing that they have some colour of right to the property, borrowing in a subtle way, the good faith ideology.

The ensuing part of the paper evaluates the reasons advanced for the retention of the doctrine of adverse possession and illuminates the growing dissensions to those rationalizations.

## IV. Arguments in Favour of Adverse Possession

One of the primary arguments in favour of adverse possession is the inherent value of land as a precious commodity. The view is that, given the scarcity of this precious resource, efforts towards maximizing its economic potential ought to be rewarded and encouraged.<sup>39</sup> The encouragement of land use as an argument is seen to have fueled the Venezuelan Government to allow peasants to expropriate land that was not in productive use as one of the measures of wealth redistribution.<sup>40</sup>

Closely tied to the first argument, adverse possession is rationalized on its basis, on the one hand of penalizing the indolent owner for sitting on their rights, while on the other hand incentivizing the owner to maximize the value of land by putting it into use.<sup>41</sup>

From a psychological standpoint, adverse possession is justified on the basis of the squatter's, physical, financial and emotional investment on the land, which is translated to reflect a greater attachment and appreciation for the resource in stark opposition to the owner's neglect.<sup>42</sup> Based on this investment-attachment theory, adverse possession favours the squatter by giving effect to the alleged social assumptions held in the public domain regarding the squatter's ownership of the parcel of land.<sup>43</sup>

The doctrine of adverse possession finds economic justification in the fact that it translates to a great reduction in evidence costs.<sup>44</sup> By lifting the requirement of parties to maintain all documents relevant to land litigation, the

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<sup>39</sup> Sprankling J, 'The antiwilderness bias in American property law', 63(1), *The University of Chicago Law Review*, 1996, 519-537.

<sup>40</sup> Smith R, *Property law*, 3<sup>rd</sup> ed, Longman Law Series, 2006.

<sup>41</sup> Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 21.

<sup>42</sup> Beggan J and Brown E, 'Association as a psychological justification for ownership' 128(4) *Journal of Psychology*, 1994, 365-380.

<sup>43</sup> Friedman O and Neary K, 'First possession beyond the law: Adults' and young children's intuitions about ownership' 83(1) *Tulane Law Review*, 2009, 1-12.

<sup>44</sup> Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 20-21.

view holds that significant costs are cut down.<sup>45</sup> In addition, it is felt that under adverse possession, the risks and transaction costs associated with the transfer of title are reduced.<sup>46</sup>

Recent developments in the proposed application of adverse possession as a crime prevention tool are surfacing in some rust-belt cities of the US, including, Detroit, Buffalo and Cleveland.<sup>47</sup> Greatly impacted by the collapse of the housing market in the wake of the Great Recession, millions of houses went into foreclosure, resulting in widespread abandonment of homes.<sup>48</sup> Community supported squatting, leveraging on adverse possession, is being fronted as one of the ways of revitalizing neighborhoods and buffering against crime and disorder.<sup>49</sup>

The arguments in favour of adverse possession have not gone unchallenged. The next part discusses the criticisms leveled against the foregoing arguments.

## V. Arguments against Adverse Possession

The arguments fronted in favour of adverse possession have faced sharp criticism. The view that a landowner has failed to maximize the potential of the land in question by leaving it unutilized has been impugned.<sup>50</sup> It has been noted that the purchase of land for prospective purposes is as valid as its immediate cultivation.<sup>51</sup> The shift in society from agrarian to industrial and service grounded economies demonstrates the changing nature of land use.<sup>52</sup> Additionally, in the present era of climate change interventions, for example, it appears that the preservation of land in its natural unused state portends greater benefits than its development.<sup>53</sup>

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<sup>45</sup> Baird D and Jackson T, 'Information, uncertainty and the transfer of property' 13(2) *The Journal of Legal Studies*, 1984, 8-12.

<sup>46</sup> Baird D and Jackson T, 'Information, uncertainty and the transfer of property', 8.

<sup>47</sup> De Biasi A, 'Squatting and adverse possession: Countering neighbourhood blight and disinvestment' 23 *City*, 2019, 66-82.

<sup>48</sup> Wheeler A, Dae-Young K, Scott P, 'The effect of housing demolitions on crime in Buffalo, New York' 55 *Journal of Research in Crime and Delinquency*, 2018, 390-424.

<sup>49</sup> De Biasi A, 'Squatting and adverse possession', 66-82.

<sup>50</sup> Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 26-30.

<sup>51</sup> Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 26-30.

<sup>52</sup> Petersson S, 'Something for nothing', 1319-1320.

<sup>53</sup> Petersson S, 'Something for nothing', 1319-1320.

The economic justification theory for adverse possession is undone by the reasoning that the danger of land loss increases the owner's monitoring costs, in trying to prevent possession by a squatter.<sup>54</sup> The high evidence costs cited in connection with record keeping can no longer stand considering the myriad of modern-day record keeping technologies.<sup>55</sup>

There is general consensus that adverse possession was built for a possession-centered ownership system, and the vindications presented in support are applicable to unregistered properties.<sup>56</sup> The advances made in developing registration systems, including more recently, e-registrations, are aimed at providing a definitive record of land ownership.<sup>57</sup> It is this observation by the UK 1998 Law Commission that led to major refinements in relation to registered land under the UK Land Registration Act of 2002. Similarly certain states in Canada have removed the applicability of the doctrine to registered land.<sup>58</sup>

## VI. The Law on Adverse Possession in Kenya

The doctrine of adverse possession is embodied under *Sections 7 and 13 of the Limitation of Actions Act, Cap 22*. In summary, the law bars a litigant from approaching it seeking to recover land at the end of twelve years from the date on which the right of action arose. Upon the lapse of twelve years, the person in occupation of the land becomes entitled by way of adverse possession to be registered as the proprietor of the land, in place of its original owner. The doctrine of adverse possession, being a common law doctrine, has been the subject of numerous decisions, each of which has enriched and clarified the considerations to be taken into account by a court called upon to make a determination as to whether or not the doctrine is applicable in the case before them.

The case of *Gabriel Mbui v Mukindia Maranya (1993) eKLR* while noting that the Limitation of Actions Act does not provide a definition for adverse possession, attempted a simplified definition of the doctrine as the non-permissive control of land by a stranger in actual occupation thereof, with the

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<sup>54</sup> Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 21.

<sup>55</sup> Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 21.

<sup>56</sup> Law Commission, *Land registration for the twenty first century: A consultative document*, 1998, 228.

<sup>57</sup> Gray K and Gray S, *Elements of land law*, Oxford, Oxford University Press, 2005.

<sup>58</sup> British Institute of International and Comparative Law, *Adverse possession*, 2006,68.

intent of asserting exclusive ownership of the same as against its registered owner. The ingredients of the doctrine of adverse possession were succinctly captured by the Court of Appeal case in *Wambugu v Njuguna (1983) KLR 173*. It was the court's view that the twin tenets of possession and discontinuance of that possession by the claimant, hold the entire doctrine together.

The law on adverse possession in Kenya has remained largely unchanged and undisturbed since its promulgation, until the Court of Appeal was invited to determine whether the doctrine sat uneasily with the prescriptions of Kenya's 2010 constitution. The analysis and decision in that case is discussed in the next portion.

*The Decision in Mtana Lewa v Kahindi Ngala Mwangandi [2015]eKLR*

The Appellant in the case, Mtana Lewa was the registered owner of Land Parcel No. Tezo/Roka/371. The Respondent, Kahindi Ngala, approached the court seeking to be registered as the suit land's owner under the doctrine of adverse possession. The Court was invited to make a determination on whether *Section 38 of the Limitation of Actions Act, Cap 22* is in conflict with *Article 40 of the Constitution*.

The Appellant's case was grounded on several premises. First the twin Latin maxims, *ex turpi causa non oritur action* (from a dishonourable cause, an action does not arise) and *ex dolo malo no oritur action* (no right of action can have its origin in fraud). Secondly, the fact that while *Section 75(6) (v) of the Repealed Constitution* specifically made provision for the doctrine of adverse possession, the 2010 Constitution had not imported a similar clause. Thirdly, the Appellant contested that adverse possession constituted an arbitrary deprivation of property or interest in property without due compensation, thereby offending *Article 40 of The Constitution of Kenya 2010*. In opposition, the Respondent pointed out that the rights provided for under *Article 40 of The Constitution of Kenya 2010* are not absolute and can be limited by virtue of *Article 24 of The Constitution of Kenya 2010*. The alleged arbitrariness in the deprivation of land was challenged on the basis of a well-defined legal procedure for successful adverse possession claims.

In its determination, the Appellate Court agreed with the Respondent that the rights under *Article 40 of The Constitution of Kenya 2010* are rights limitable in accordance with the provisions of *Article 24(2) of The Constitution of Kenya 2010*. The Court, in interpreting the right to acquire and own property in

any part of Kenya under *Article 40 of The Constitution of Kenya 2010*, noted that adverse possession was one of the ways permitted in law, under *Section 7 of The Land Act No.6 of 2012* and *Section 28 of The Land Registration Act No. 3 of 2012*, in which acquisition and ownership of land could be effected. The lack of an express provision in the Kenyan Constitution similar to the one in the Repealed constitution was attributed to a difference in the drafting styles employed in developing the two documents, but nonetheless did not in any way constitute an abolishment of the doctrine, as opined by the Appellant. The Court in reviewing the procedural requirements for a successful adverse possession claim negated any arbitrariness in the acquisition process. By drawing on the decision in *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom, 921 (ECHR 2005)* and *State of Haryana v Mukesh Kumar & Others, 28034 (Civil 2011)* for comparative analysis, the Court concluded that the doctrine of adverse possession did not offend the right to acquisition of property under the Kenyan Constitution, but was a logical and pragmatic consequence of the barring of the right to bring action after the expiry of the limitation period. The Court was also apprehensive that to find *Section 38 of the Limitation of Actions Act, Cap 22*, unconstitutional would open a Pandora's box in relation to the validity of the entire law of limitation of actions. Even then, Ouko J, suggested the need for reform in the nature of compensation for the dispossessed owner as well as a possible revisiting of the applicability of the doctrine to registered land, as has been undertaken in the UK.

Curiously, the decision dodged the Appeal's first premise, that of the mounting of a legal right upon the foundation of a legal wrong, which as this paper already pointed out is the most problematic aspect of the doctrine. Following in the footsteps of the long line of decisions ahead of it, the court was anxious to skip the illegal entry segment of events, choosing to dwell upon the 12-year aftermath and the crystallization of the trespasser's right to dispossess the original owner.

## VII. The Case for the Incompatibility of Adverse Possession and Indefeasibility of Title to Land in Kenya

As has already been argued, the doctrine of adverse possession was birthed in an era of possession-evidenced ownership of land. An analysis of the arguments in favour of adverse possession are colored to suit an unregistered system of land, with the main mischief to be addressed being the uncertainty of land ownership. The move by a majority of jurisdictions towards the Torrens system of registration of title is meant to ensure transparency and certainty in land ownership, both for the landowner and for society at large. The central idea within the Torrens system of title registration was to dispense with the trouble and costs associated with investigating the register to unearth the history of the owner's title in order to be satisfied as to its validity.<sup>59</sup> Prior to the development of the Torrens System, the common law system demanded a keen tracing of the history of title, sometimes as far back as the Crown grant.<sup>60</sup>

Anchoring the entire Torrens System is the doctrine of indefeasibility of title. Indefeasibility has been interpreted to mean that the title concerned is conclusive, unexaminable or unassailable.<sup>61</sup> This doctrine is captured under *Section 26 of The Land Registration Act No. 3 of 2012*, with the law providing a slim number of circumstances upon which departure from the doctrine is allowed. Fraud or misrepresentation involving the participation of the registered owner on the one hand, and situations where the title was acquired illegally, unprocedurally or by means of a corrupt scheme, whether or not the present registered owner was a party, have been flagged.<sup>62</sup>

The incompatibility of the doctrine of adverse possession under a system guaranteeing indefeasibility of title has been the subject of many discussions. Lord Bingham in the European Court of Human Rights case of *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom 2005* found the applicability of the doctrine as being limited only to unregistered

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<sup>59</sup> Low K, 'The nature of Torrens indefeasibility: Understanding the limits of personal equities' 33(1) *Melbourne University Law Review*, 2009, 205-234.

<sup>60</sup> Butt P, *Land law*, 5<sup>th</sup> Ed, Pyrmont, Thomson Reuters, 2006.

<sup>61</sup> McPhee P, 'Fraud and indefeasibility of title,' McPhee Kelshaw Solicitors, March 2016 — <http://www.mcpheekelshaw.com.au/wp-content/uploads/2016/03/Indefeasibility-of-Title-Paper-PMM.pdf> on 31 January 2022.

<sup>62</sup> *Arthi Highway Developers Limited v West End Butchery Limited & Others* (2013) eKLR.

land to avoid protracted tracings of the original owner and the precise anchorage and positioning of the land.

In the same case, Lord Hope, lauded the notification requirements enshrined under Schedule 6 to the UK 2002 Land Registration Act, and found this legislative position capable of remedying the registered proprietor's oversights or inadvertence and avoiding a harsh result. In his observation, Lord Hope was referring to an amendment contained in Schedule 6 of the UK Land Registration Act of 2002 which provided a notification requirement by the squatter to the owner, following 10 years of occupation, which notice allows the owner to either object or give a counter-notice and affords the owner two years to evict the squatter. This provision provides a safeguard against oversight on the owners' part and prompts them to act in order to forestall the adverse possession.

In a report by the British Institute of International and Comparative Law 2006 commissioned by the Queen to conduct comparative research on adverse possession across 11 countries, spanning 3 continents, the institute concluded that where a system of registration of land is adopted, the rationale for the retention of the doctrine loses vitality and relevance.<sup>63</sup>

While appreciating that the doctrine of adverse possession falls within the greater framework of limitation of actions, whose chief goal is to prevent the litigation of stale claims and to encourage Plaintiffs not to sit on their rights, it must be appreciated that in the singular case of adverse possession, the law does not merely operate to bar claims, but to also confer title upon the squatter.<sup>64</sup> On this basis, the rationalizations for adverse possession have been challenged, of necessity, to go beyond the justifications for the existence of limitation of actions.<sup>65</sup> It is contended that the immorality with which the land was first acquired trumps all the utilitarian arguments that can be advanced in favour of adverse possession.<sup>66</sup>

As already discussed, the most problematic segment of the doctrine of adverse possession is the illegality with which entry into another's land is clothed. Under a registration system, it is possible, by way of a search, to

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<sup>63</sup> British Institute of International and Comparative Law, *Adverse possession*, 2006, 27.

<sup>64</sup> Conway H and Stannard J, 'The emotional paradoxes of adverse possession', 75-89.

<sup>65</sup> Law Commission, *Land registration for the twenty first century: A consultative document*, 1998, 228.

<sup>66</sup> Smith H and Merrill T, 'The morality of property' 48 *William & Mary Law Review*, 2007, 1849-1895.

determine the owner of a certain property, so that the mistaken belief of ownership is disabused. As early as 2015, online land searches in Kenya had been activated. Recently, with the launching of Ardhi Sasa, Kenyan citizens and other stakeholders have been enabled to access and interact online with information relating to land held by the government. The move is aimed at first, strengthening security of title and second, at easing land transactions.

In addition, the operation of the doctrine of adverse possession has been observed to encourage fraudulent dealings. False claims of continuous possession for twelve years may be difficult to disprove and the registered owner's interruption of occupation, say for a short day visit, equally difficult to prove. Further, it is contended that the alienability of land will be discouraged by potential adverse possession claims.<sup>67</sup>

Increasingly also, the view that the exploitation of land through cultivation or real estate accords with its highest and best use is becoming antediluvian.<sup>68</sup> The realities of climate change, water scarcity, energy crises and extinction of certain animals is kicking up the agenda for natural conservation at the top of the 'highest- use' ladder.<sup>69</sup> In any case, if the mere interruption, say by the registered owner's visit upon his land, has the impact of restarting the count, it would appear that the doctrine is not really focused on land use as much as presence or occupation.

That said, the mere presence of a land registration system is not justification enough for dismissal of the adverse possession doctrine. The question as to the efficacy of the registration system upon which the indefeasibility of title rests must be called into question.<sup>70</sup> Although Kenya's registration system is becoming more dependable, cases surrounding irregular land registrations are still coming up for determination.<sup>71</sup> Developing judicial interpretation of Section 26 of the Land Registration Act has the logical consequence of impeaching title transferred fraudulently or through misrepresentation where the transferee is proved to have participated in the illegal conduct, but more importantly, and perhaps more sobering, of defeating the rights of an innocent purchaser for value without notice of the

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<sup>67</sup> Martin S, 'Adverse possession: Practical realities and an unjust enrichment standard', 2008, 3.

<sup>68</sup> Sussna S, 'The concept of highest and best use theory undertakings' 21(1) *The Urban Lawyer*, 1989.

<sup>69</sup> Sussna S, 'The concept of highest and best use theory undertakings'.

<sup>70</sup> Chang Y, 'Adverse possession laws in 203 jurisdictions', 374.

<sup>71</sup> *Peter Njoroge Ng'ang'a v Kenya Reinsurance Corporation Limited (Statutory manager for United Insurance Company) & another* (2018) eKLR.

unprocedural, illegal or corrupt acquisition of the title transferred to him.<sup>72</sup> It is therefore continually being reinforced that the indefeasibility of title was never designed to be absolute.

In addition, there is some credence to the argument that adverse possession could play a role in the curative mechanism for land injustice especially for series of generations which call various possessed lands their home.<sup>73</sup> This strain of argument favours retention of adverse possession on the basis of its distributive justice function in bridging inequalities in property rights within society.<sup>74</sup> Rationalization for the keeping of adverse possession is predicated on the causes of squatting in the first place: inequity in access to land across gender, ethnic and wealth divides, colonial suppression of indigenous ownership rights to land, and post-colonial political injustices in land distribution and ownership.<sup>75</sup> The argument of this paper agrees with the contextual utility of adverse possession and in fact argues for its application to unregistered land, and its limited application to registered land on the anterior precondition of notification to the registered owner of the land.

## VIII. Conclusion

In light of the present developments, the crucible of uncertainty in which the doctrine of adverse possession was forged no longer holds relevance for 21<sup>st</sup> Century Kenya. It seems absurd to have on the one hand, a state-guaranteed form of title, backed by simplified land information inquisition systems, while at the same time retaining a system that rewards a trespasser who never bothered to use the title authentication machinery that the government has gone to so much trouble to develop. The paper therefore proposes for the limiting of adverse possession claims with regard to registered land to instances where prior notification is made to the registered owner of the impending acquisition of their land. This position would mirror the UK's

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<sup>72</sup> *Alice Chemutai Too v Nickson Kipkurni Korir & 2 others* (2015) eKLR.

<sup>73</sup> Manji A, *The Struggle for land and justice in Kenya*, Boydell & Brewer, Suffolk, 2020, 139-159.

<sup>74</sup> Stern S, 'David against Goliath: The distributive justification for the adverse possession doctrine' in Hoops B and Marais E (eds), 1<sup>st</sup> Ed, *New perspectives on acquisitive prescription*, Eleven International Publishing, The Hague, 2019, 159-182.

<sup>75</sup> Ajala T, 'Equitable access to land for poverty reduction in Africa: Expanding the orthodox justifications for the adverse possession doctrine' 7 *Nnamdi Azikiwe University Journal of Commercial and Property Law*, 2020, 17-34.

development discussed above. The import of this legal reform would be to soften the harshness of the impact of a successful claim on the registered owner, while at the same time serving to reinforce their disinterest in the land, bolstering justification for registration of the adverse possessor.

It is further recommended for a prospective application of the proposed legal reform on adverse possession, alongside greater effort towards registration of unregistered land in Kenya and bolstered efforts at preserving and maintaining the reliability of our country's registration systems.