

**ADVERSE POSSESSION IN KENYA: IS THE DOCTRINE IN NEED OF
LEGAL REFORM?**

**Submitted in partial fulfillment of the requirements of the Bachelor of
Laws Degree, Strathmore University Law School**

By

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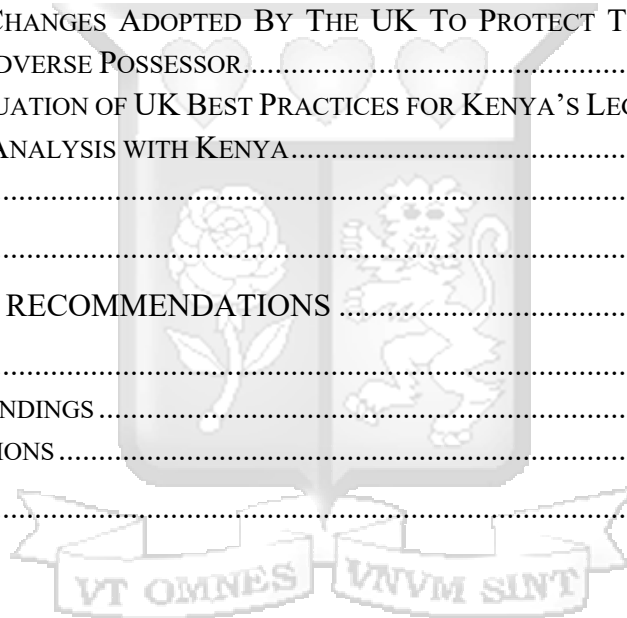
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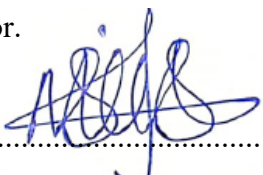
DECLARATION

I, JOYCE NJOKI KARIMI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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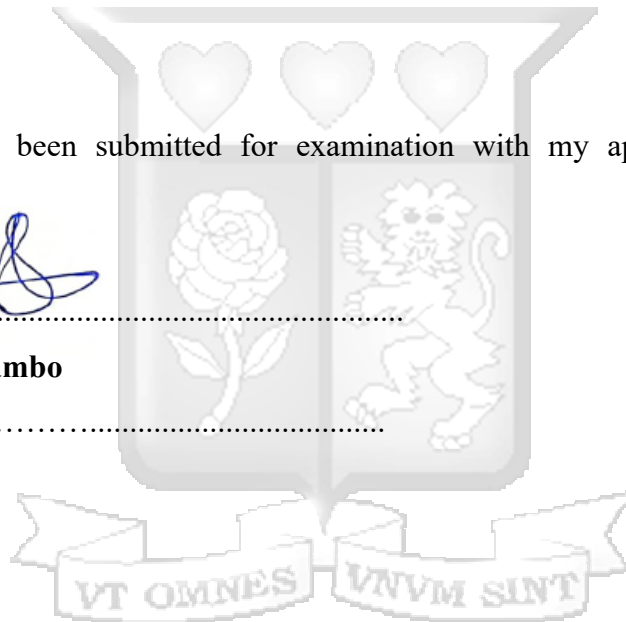
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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Moses Antony Odhiambo

Date:03/04/2025.....



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I am deeply grateful to God for walking with me during this journey. There were moments when I felt like I wouldn't make it, but He patiently held my hand, reminding me to be still and know He is God (Psalms 46:10).

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ABSTRACT

Adverse possession is a legal doctrine that allows individuals to acquire land ownership after twelve years of continuous and uninterrupted possession, even without the consent of the registered titleholder. While this principle ensures land is utilized efficiently, it has raised concerns about its constitutionality, particularly in modern land registration systems that emphasize the absoluteness of title. This raises concerns about whether adverse possession weakens property rights, legal certainty, and economic stability, especially in jurisdictions like Kenya, where the framework lacks key protections.

Using the doctrinal legal research methodology, this study examines the significance of secure land titles in safeguarding property rights and its broader impact on legal stability, economic development, and social order. It also evaluates how Kenya's adverse possession regime affects private property rights and compares it to the structured approach adopted in the United Kingdom. Unlike Kenya, where adverse possession can occur without the owner's knowledge, the UK has introduced safeguards such as mandatory notification, land inspections, an extended objection period, public awareness initiatives, and digital integration in land registration. These measures ensure that adverse possession claims do not result in sudden and unfair dispossession.

By analyzing contemporary best practices in the UK, this study highlights the need for legal reforms in Kenya to enhance transparency and fairness in adverse possession cases. Implementing notification systems, verification processes, and public education initiatives would help protect property owners while maintaining the principle that land should not remain idle indefinitely. Strengthening Kenya's legal framework in this area would create a more balanced system that upholds both land security and responsible land use.

LIST OF LEGAL INSTRUMENT

Kenyan Legislation

1. Constitution of Kenya (2010)
2. Limitation of Actions Act (CAP 22).
3. Government Lands Act (Cap 280).
4. Registration of Titles Act (Cap 281).
5. Land Titles Act (Cap 282).
6. Land Act (Act No 6 of 2012).

Foreign legislation

1. Land Registration Act (UK Public General Act 2002).



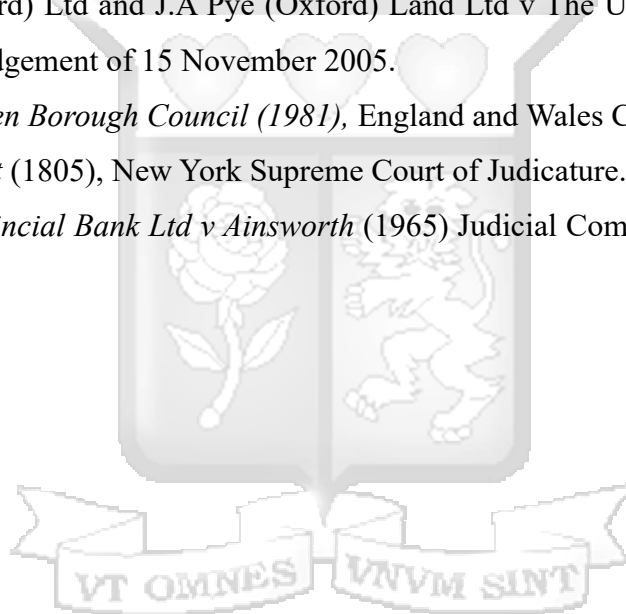
LIST OF CASES

Kenyan Case Law

1. *Mtana Lewa v Kahindi Mwangandi* [2016] eKLR.
2. *Mbira v Gachuhi* (2002) eKLR and *Jandu v Kirpal & Another* (2013) eKLR.
3. *Mutiso v Mutiso* [1998] LLR 3268 (CAK).
4. *Dina Management Limited v County Government of Mombasa & 5 others* (2023)eKLR.
5. *Johnson Musau v Mutunga Mutata and 1 other* (2023) eKLR.

Foreign Case Law

1. *J A Pye (Oxford) Ltd v Graham* [2002], Judicial committee of the House of Lords.
2. *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom* [2005] ECHR 921 Judgement of 15 November 2005.
3. *Lamb v Camden Borough Council* (1981), England and Wales Court of Appeal.
4. *Pierson v. Post* (1805), New York Supreme Court of Judicature.
5. *National Provincial Bank Ltd v Ainsworth* (1965) Judicial Committee of the House of Lords.



LIST OF ABBREVIATIONS

COKConstitution of Kenya 2010
EctH European Court Of Human Rights
LAALimitation of Actions Act
UKUnited Kingdom



CHAPTER 1

INTRODUCTION

1.1 Background

1.1.1. Introduction

Property regarding land is a fundamental part of Kenya's history, where traditionally, it dictates the pulse of our nationhood.¹ As a result, the protection of the right to private property is a key concept embedded in the Constitution of Kenya.² Title to land can be acquired through allocation, compulsory acquisition, adjudication, prescription, long-term leases exceeding twenty years, settlement programs, transmissions, or any other manner as prescribed by an Act of Parliament.³ In the quest of man seeking to protect their private life, it is unfortunate that forceful acquisition of property has been prevalent. This can be attributed to some elements of land acquisition, like prescription of time, such as adverse possession.⁴ Whereby, time begins to run when the owner of the land has been dispossessed or has discontinued his possession (abandoned the premises), and the person claiming adverse possession has now assumed possession in place of the original owner.⁵ Unlike the pre-2010 constitution that exclusively provided for adverse possession in section 75(6)(vi), the post-2010 constitution does not address itself on this matter directly. This poses different interpretations of the doctrine when it comes to the possession of private property that is provided for under Article 64 of COK.⁶ The unconstitutionality of the doctrine has been brought up in courts and legal papers when determining the plight of the doctrine in our current constitution.⁷

1.1.2 Adverse possession and Land registration system in Kenya

Scholars often describe the doctrine as the act of taking possession of property in a way that contradicts the rightful owner's title.⁸ Essentially, it is a way to acquire land without paying

¹ Report of land commission of inquiry into illegal or irregular allocation of land, 2004.

² Article 40, Constitution of Kenya (2010).

³ Section 7, *Land Act* (Act No 6 of 2012).

⁴ Taiwo A, 'Equitable access to land for poverty reduction in Africa: expanding the orthodox justifications for adverse possession in Africa' *Lagos State University* 7, 2020,2.

⁵ Section 7 *Limitation of Actions Act* (Chapter 22).

⁶ Omoro C, 'A critique of the constitutionality of adverse possession in Kenya', Published LLM Thesis, University of Nairobi (Kisumu campus), 2021.

⁷ *Mtana Lewa v Kahindi Mwangandi* [2016] eKLR.

⁸ Smith J, *Adverse possession and its legal implications*, Legal scholars press, 2023.

for it. Despite the original owner's lack of consent, adverse possession can transfer ownership of the land. This happens when a person takes control of someone else's property and occupies it until the original owner's right to reclaim the land expires under the limitation laws (Cap 22), and the person occupying the land is officially registered as the owner. For possession to be considered "adverse," there must be a clear denial of the original owner's rights in some form.⁹

In Kenya, the land registration system ensures that the person listed as the owner in the land register is recognized as the legal owner. This ownership is only subject to interests that are officially noted in the register, along with other legal exceptions.¹⁰ Section 27(a) of the Registered Land Act (RLA) and Section 24(a) of the Land Registration Act (LRA) states that registering someone as the land's proprietor gives them absolute ownership, along with all the rights and privileges that come with it. Moreover, the concept of indefeasibility of title ensures that a registered title under the land registration system is protected from being challenged or set aside, except in specific legal circumstances such as fraud, misrepresentation, or procedural irregularities.¹¹ It also provides security of tenure and ensures that registered landowners can rely on their title without fear of adverse claims.¹²

Section 28(b) RLA further clarifies that the rights of the proprietor—whether obtained through the initial registration, purchased with valuable consideration, or granted by a court order—cannot be easily defeated, except as provided in the Act. These rights are held with all associated privileges and are protected from other claims unless the register specifically states otherwise.

Section 30(f) of the RLA lists overriding interests that can affect registered land, including rights acquired or in the process of being acquired under any law relating to the limitation of actions, such as adverse possession. This means that adverse possession is considered an overriding interest on registered land, as per the Limitation of Actions Act (Cap 22) of Kenya. The act sets a time limit for individuals to take legal action to recover possession of land after the lapse of twelve years, as provided under Section 7 of the Limitation of Statutes Act.

⁹ Mutiso v Mutiso [1998] LLR 3268 (CAK)

¹⁰ *Land Registration Act* (Cap 300)

¹¹ Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' *Strathmore Law Journal* 1, 2023, 73.

¹² Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' *Strathmore Law Journal* 1, 2023, 73.

Essentially preventing the original owner from seeking judicial assistance after the lapse of that period. Therefore, the question of the reasonability of the twelve-year continuous possession is paramount, as the law tries to balance protecting the absoluteness of title ownership of the land and allowing the development of vacant properties.

1.1.3 Setbacks that arise from the application of the doctrine.

The genesis of the doctrine in Kenya was as a result of the scrambling and partitioning of Kenyan land by the British colonial government, which left behind many squatters and landless Kenyans.¹³ Moreover, even before the introduction of the doctrine into Kenyan law, Torrens wrote that there is no rationale for applying adverse possession to undeveloped colonies' land of low value as opposed to long-established and developed holdings of greater value.¹⁴ This rationale was not considered, and therefore, there are several emerging issues concerning this doctrine of adverse possession in modern-day Kenya. As Onyango connotes, there is a challenge in balancing rights in land law, especially between the borrowed English Law and African Customary law.¹⁵ This is a challenge that this paper will endeavor to address by looking at Africa's unique philosophy of property ownership. This differs from the Anglo-American view of property, which advocates for individualist ownership of property. In Africa, property was a form of 'commons' where commons were organised resources available exclusively to specific communities, lineages, or families operating as corporate entities.¹⁶

1.1.4 Modernisation of adverse possession in the United Kingdom.

The landmark case of *Pye v Graham* addressed the requirements for adverse possession under UK law.¹⁷ Initially, adverse possession in the UK required that a person must have been in possession of the land for 12 years without the consent of the landowner to claim ownership. The Land Registration Act 2002¹⁸, which came into force after the decision, resulted in the split of 10 years plus 2. The Act aimed to modernize the law of adverse possession, particularly for registered land, and introduced new procedures to protect the interests of landowners. To

¹³ Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' 73- 88.

¹⁴ Torrens R, *The South Australian System of conveyancing by registration of titles*, The Register and Observer General Printing offices, GreenFell Street, 1859,25-26.

¹⁵ Onyango P, 'Balancing of rights in land law; A key challenge in Kenya Sociology and Anthropology' 2 *Univeristy of Nairobi Kisumu Campus*, 2014, 301-308.

¹⁶ Okoth-Ogendo H, 'The tragic African commons: A century of expropriation, suppression and subversion' 1 *University of Nairobi law journal* (2003).

¹⁷ *JA Pye (Oxford) Ltd v Graham [2002]*, Judicial committee of the House of Lords.

¹⁸ Schedule 6, Land Registration Act (UK Public General act 2002).

achieve this, the adverse possessors must possess the land for 10 continuous years, after which the squatter can apply to be registered as the legal owner of the land. Thereafter, the registered landowner is notified of the squatter's application and has 2 years to object or take action to evict the adverse possessor. If the landowner fails to act within this period, the squatter's application is successful. The main rationale behind this 10+2 year rule is to balance the interests of both parties since it respects the principle of adverse possession by allowing squatters to claim ownership after long-term possession. Additionally, it protects landowners by allowing them to respond before their rights are extinguished.

1.1.5 Court interpretation of the doctrine in Kenya.

New contemporary matters regarding the doctrine of adverse possession continue to knock on the corridors of justice. In the Kenyan case of *Mtana Lewa v Kahindi Mwangandi*,¹⁹ the adverse possessor had approached the court to be conferred with title to the land he occupied peacefully, openly, and continuously without interruption for a period exceeding 12 years as provided by the Limitation of Actions Act.²⁰ The original owner argued that sections 13,37 and 38 of Limitation of Actions Act²¹ were contrary to the constitution of Kenya²² such that the court could not make such a declaration since it would arbitrarily deprive him of his property in violation of the Constitution. The court, however, held that the Limitation of Actions Act was not inconsistent with the Constitution, and the ruling was upheld on appeal.

However, in the *obiter dictum*, Asike-Makhandia JA stated that no court would lend its aid to a person who found his cause of action upon an immoral or illegal act. This was further affirmed in a later case of *Dina Management vs. the County Government of Mombasa*²³, whose main premise was built on article 40(6) of the COK. The Supreme Court's decision now mandates all purchasers to investigate the root of the title to the property before proceeding with acquisition, for no protection will be offered to a purchaser concerning a title whose root is defective or marred by illegality.²⁴

¹⁹ *Mtana Lewa v Kahindi Mwangandi* [2016] eKLR.

²⁰ Section 7, *Limitation of Actions Act*, (Cap 22)

²¹ Section 13 *Limitation of actions act* 2012.

²² Article 40, *Constitution of Kenya* (2010).

²³ *Dina Management Limited v County Government of Mombasa & 5 others* (2023)eKLR.

²⁴ Article 4(6), *Constitution of Kenya* (2010).

1.2 Problem Statement

In Kenya, land ownership under the registration system is ideally founded on the principle of absolute title, particularly for freehold private land. However, applying the Limitation of Actions Act under sections 7 and 13 permits claims through adverse possession, which challenges this fundamental principle and undermines the constitutional protection of property rights under Article 40. The problem with maintaining this situation is that it leads to legal inconsistency, which creates uncertainty, diminishes land values, and erodes investor confidence, as the absence of predictable and secure property laws may prompt investors to seek more stable alternatives. This research explores how adverse possession undermines property rights and identifies successful practices from the United Kingdom to inform strategies for strengthening Kenya's land framework.

1.3 Research Objectives

This study seeks to meet the following objectives:

1. To establish the utility of security of title in safeguarding property rights and how it influences legal certainty, economic development, and social stability.
2. To evaluate how the adverse possession regime affects private property rights in Kenya.
3. To compare and analyse contemporary best practices in adverse possession laws from the United Kingdom in balancing adverse possession and property rights.
4. To propose legal reforms and recommendations to address the key challenges and controversies surrounding adverse possession.

1.4 Research Questions

This study seeks to answer the following questions:

1. What is the utility of security of title in safeguarding property rights and how does it influence legal certainty, economic development, and social stability?
2. How does the adverse possession regime affect private property rights in Kenya?
3. Which contemporary best practices from the UK can Kenya borrow to balance adverse possession and property rights?
4. Which legal reforms and recommendations can address the key challenges and controversies surrounding adverse possession?

1.5 Hypothesis

The current legal framework for adverse possession undermines the absoluteness of title under Kenya's land registration system.

1.6 Justification

This research paper has been influenced by a wide reading of literature and Kenyan case law surrounding this topic. The research seeks to contribute to making positive reforms surrounding adverse possession, which has remained unchanged in Kenya since 1967. Among the beneficiaries of this research include citizens, lawmakers, law enforcers, and lawyers. Furthermore, new emerging issues ranging from the questions of the constitutionality of the doctrine and the human right to private property have been seen to take root in the present-day Kenyan courts. This study is important as it seeks to shed light on the doctrine by providing a better understanding of the doctrine through a study of experiences elsewhere that have worked and see how they can be applied to Kenya. It will also aid policymakers in addressing the defects in the current legal framework.

1.7 Theoretical Framework: The Social Contract Theory.

The justification of adverse possession in this research paper is based on the philosophical foundation of the social contract theory. The theory is espoused by contractualists such as Thomas bes, John Locke, and Jean Jacques Rousseau.²⁵ The main premises of the theory seek to explain the origin of society and the legitimacy of government.²⁶ Furthermore, the theory stipulates that individuals willingly enter into an agreement (a social contract) to form a society and establish governance in exchange for security, order, and protection of their rights.²⁷ The application of the theory to adverse possession can be illustrated through the principles of societal order, legal obligations, and a balance between individual rights and community benefits.²⁸

The Social contract asserts that law should maintain order by protecting property and ensuring societal fairness.²⁹ Therefore, adverse possession reflects the practical reality where, for

²⁵ Laskar, Manzoor, Summary of Social Contract Theory by Hobbes, Locke and Rousseau, April 4, 2013, Available at SSRN: <https://ssrn.com/abstract=2410525> or <http://dx.doi.org/10.2139/ssrn.2410525> on 4 September 2024.

²⁶ Laskar, Manzoor, Summary of Social Contract Theory by Hobbes, Locke, and Rousseau, 4 April 2013.

²⁷ Hobbes T, *Leviathan*, Oxford University Press, 1909 ed The Online Library Of Liberty, 1651,158.

²⁸ Rawl J, *A Theory of Justice*, Harvard University Press, 1971,10.

²⁹ Rousseau J, *The Social Contract*, Penguin Classics, 1762.

instance, the land owner who neglects land for a prolonged period will not be prioritized over the person who actively uses it, thereby promoting social order by productive use of the property. Balancing individual and collective interests is akin to the theory that private rights should be balanced with the common good, as propagated by Rousseau.³⁰ Adverse possession protects communities from inefficiencies caused by absentee landowners by rewarding those who invest their labour and care.³¹ A fair system as enshrined by Locke, addresses inequalities and resolves disputes.³² Adverse possession provides a mechanism for resolving such disputes by allocating long-neglected properties to those who meet the established conditions. Through this specific criteria in adverse possession, the government upholds societal stability and avoids conflicts over land. The ultimate government legitimacy is achieved by enforcing laws that serve collective interests.³³

The main critique of this theory is that it is unhistorical and thus merely fiction since the governments arise from utility and custom rather than explicit contracts.³⁴ Additionally, Macpherson critiques social contract theories as justifications for capitalist ideologies rather than historical realities.³⁵ On legal grounds, it is contended that a legally sound contract implies the prior existence of some authority and sanctions before a contract is entered into. In the case of the social contract theory, there was neither authority nor sanctions before the contract was concluded.³⁶ Philosophically, the theory is deemed as bad history, bad law, and bad philosophy.³⁷ This is because it looks at the state as an artificial contrivance and not a natural process of growth since it is not based on empirical evidence or rationality.³⁸

Based on the application of the theory to the doctrine, it is arguable that the doctrine could violate the original owner's property rights, raising questions about the limits of the social contract in prioritizing social benefits over individual rights. However, despite the criticisms, the application of the theory enhances the productive use of resources, which is essential in finite resources like land. This theory will aid this research by influencing the focus of the study

³⁰ Rousseau J, *The Social Contract*, Penguin Classics, 1762.

³¹ Locke J, *Two Treatises of Government*, Cambridge University Press, 1689, para 124.

³² Locke J, *Two Treatises of Government*, para 124.

³³ Hobbes T, *Leviathan*, 1651.

³⁴ Hume D, *Essays, Moral, Political, and Literary*, Liberty Fund, 1748.

³⁵ Macpherson C, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press, 1962.

³⁶ Hobbes T, *Leviathan*, 1651; Rousseau J, *The Social Contract*, 1762.

³⁷ Bentham J, *The Works of Jeremy Bentham*, William Tait, 1838-43.

³⁸ Bentham J, *The Works of Jeremy Bentham*, William Tait, 1838-43.

and the assumptions made throughout the study.

1.8 Literature Review

Various research and books have dealt with the doctrine of adverse possession. Professor Tom Ojienda in his book; *“Principles of Conveyancing in Kenya”* defines adverse possession as the acquisition of land by the limitation of actions and that adverse possession differs from acquisition by contract and conveyance transfer.³⁹ He reiterates that if the title owner of the property fails within a certain period to secure the eviction of a squatter or trespasser from his land, the owner is statutorily barred from recovering possession thereafter. Title to land being ultimately relative, the intruder or trespasser thus acquires as an indirect effect of the limitation of actions, a title which enables him to remain in possession.⁴⁰ In this book, there is a requirement of proof of adverse possession, the Limitation of Actions Act (CAP 22),⁴¹ on adverse possession, contemplated two concepts: dispossession and discontinuation of possession.⁴² To properly assess proof of adverse possession, it is necessary to establish whether or not the title holder has been disposed of or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.⁴³

In this rigid system of property, the doctrine of adverse possession is an outlier. The doctrine 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.⁴⁴ Berger and Williams in their work set the bar high for Great Britain arguing that the country set strong traditions for property and adverse possession for common law countries like Kenya.⁴⁵ They also argue that the tradition promotes values of uniformity, efficiency, and impartiality. However, Omoro C, in her paper, vehemently disagrees with the assertion by examining the historical development and the rationale of adverse possession laws in Kenya, where she recommends that the law should be abolished due to its inconsistency with the current Constitution of

³⁹ Ojienda T, *Principles of conveyancing in Kenya*, Law Africa Publishers, 2008, 129.

⁴⁰ Ojienda T, *Principles of conveyancing in Kenya*, 129.

⁴¹ Limitation of Actions Act (CAP 22).

⁴² Muli P, ‘Title by adverse Possession’ Published LLB Thesis, Moi University School of Law, Kenya, October 2016, 8.

⁴³ Ojienda T, *Principles of Conveyancing in Kenya*, 129.

⁴⁴ Clarke A, ‘Adverse possession of identity: Radical theory,’ 84 *Oregon law review* 1, 2005.

⁴⁵ Berger C and Williams J, *Property land ownership and use*, Aspen Publishers Inc 3,513,1997.

Kenya 2010.⁴⁶

According to Heather and Stannard, the doctrine of adverse possession manifests many paradoxes, some of which have emotional attachments to them.⁴⁷ Attitudes towards the doctrine range across the entire spectrum, from laissez-faire notions where people are allowed to do as they choose and promote efficient land use to more prevalent feelings of outrage and incredulity that the law is effectively sanctioning land theft.⁴⁸ This is so due to the intrinsic value that property holds in both the parties involved hence the difference in reactions based on the attachment that each individual had towards the property. This shows the emotional aspect of the owners' loss of land as anger and bitterness from the squatters. Adverse possession tends to be viewed as nothing more than 'theft or robbery, a primitive method of acquiring land without paying for it' making it problematic.⁴⁹

Ballantine, in his research, quotes Dean Ames, who in contrasting prescription in the Civil Law with adverse possession under Common Law, remarks that "English lawyers regard not the merit of the adverse possessor, but the demerit of the one out of possession."⁵⁰ This is the current stance in Kenya, where courts and statutes are concerned with the merits of the adverse possessor rather than the actions that ought to have been taken by the title owner, and he did not undertake them.

Eduardo Penalver's book 'Property Outlaws, states that the doctrine of adverse possession is tailored to permit a trespasser who makes sufficiently open and notorious use of another person's property for a specific period to obtain title ownership to the land.⁵¹ He further states that state law usually permits even the knowing trespasser ("bad faith" adverse possessor) to take advantage of the doctrine.

Astoundingly, as stated by Muli, despite not being a criminal doctrine, adverse possession ultimately converts someone who would otherwise be termed as a criminal trespasser into an

⁴⁶ Omoro C, 'A critique of the constitutionality of adverse possession in Kenya',30.

⁴⁷ Heather C and Stannard J, 'The emotional paradoxes of adverse possession' Ireland Legal Quarterly,64(1),75-89, 2013.

⁴⁸ Heather C and Stannard J, 'The emotional paradoxes of adverse possession.' 75-89.

⁴⁹ Heather C and Stannard J, 'The emotional paradoxes of adverse possession.' 75-89.

⁵⁰ Ballentine H, 'Title by Adverse Possession' California Law Review 2, 1949, 171-180.

⁵¹ Penalver E, Katyal S, *Property Outlaws how squatters, pirates, and protesters improve the law of ownership*, Yale University Press, 2010, 23.

owner.⁵² In English law, title to land is predominately founded on possession, among other legal mechanisms. Thus, a person who is in possession of land, although wrongfully, has a title to the land, which is good against all except those who can show a better title. At first instance, title by adverse possession seems like title by theft or robbery, a primitive method of acquiring land without paying for it. However, this doctrine in Kenya and other African countries has been used as an equitable remedy where a squatter who would not necessarily be able to acquire land can do that.

Contrary to the current trends in the adverse possession doctrine, there is a sense of equity, justice, and fairness in a society where the opportunity exists for people at the lowest stratum to have access to land.⁵³ Adverse possession, in the context of offering opportunity for equitable access to land for the poor, does not threaten the property rights of owners. Also, the doctrine can continue to apply in this era of land and title registration in Africa. The reason is that the main intention of the category of poor people is only to have access to land for immediate survival needs, not a long-term plan to wrest the title from the owners. For this category of poor people, the doctrine can only serve as a shield and not as a sword, where the shield will protect the adverse party from being evicted by the original owner who slept on his rights by abandoning their land for a long time. Although the literature discussed above has pointed out some key issues regarding the doctrine, some inadequacies are not addressed as pointed out hereafter.

1.8.1 Gaps in the literature

The literature emphasizes the necessity of establishing dispossession or discontinuation of possession rather than mere occupation for the statutory period. This aligns with Kenyan law, which requires clear evidence that the original owner has relinquished possession. A deeper analysis could explore the evidentiary challenges claimants face in Kenyan courts and how courts interpret "dispossession" and "discontinuation."

Additionally, Omoro C's argument that adverse possession is inconsistent with Kenya's 2010 Constitution presents an opportunity for further exploration. Specifically, how adverse possession aligns or conflicts with constitutional provisions on property rights under Article

⁵²Muli P, 'Title by Adverse Possession' Published LLB Thesis, Moi University School of Law, Kenya, October 2016, 8.

⁵³Taiwo A, *Equitable access to land for poverty reduction in Africa: Expanding the orthodox justification of for the adverse possession doctrine*, 7 Lagos State University Ojo 2, 2020.

40, which guarantees the right to property. Addressing whether adverse possession respects constitutional principles such as social justice, equity, and protection of property ownership is essential to put into context the whole discussion on the unconstitutionality of the provision.

Kenyan courts' current stance focuses on the merit of the adverse possessor rather than the negligence of the titleholder. An analysis of recent case law could help illustrate the evolving judicial attitudes and their implications for landowners and adverse possessors. There is a need to examine potential reforms or judicial precedents that shift the burden of proof or propose more stringent requirements for adverse possessors.

Notably, the persistence of adverse possession despite the advent of land registration laws needs further discussion. Kenyan law has formalized land ownership through systems such as the Land Registration Act (2012), but adverse possessors continue to acquire land through adverse possession. An assessment of whether land registration has effectively reduced adverse possession claims and how legal practitioners navigate conflicting claims is essential.

1.8.2 Contribution

The literature provides a solid foundation for understanding adverse possession in Kenya and beyond, but several gaps need further exploration. A comprehensive review that incorporates legislative reform suggestions, ethical considerations, and judicial trends would provide a more balanced perspective on the future of adverse possession in Kenya. This will be fully illustrated in the subsequent chapters.

1.9 Research Methodology

This study will be conducted using a doctrinal legal research method, primarily relying on secondary data sources such as textbooks, legal articles, and commentaries. Doctrinal research involves systematically identifying, analyzing, and explaining legal frameworks, ensuring a thorough understanding of existing legal provisions.⁵⁴ In addition, primary sources such as the Constitution of Kenya (2010), relevant statutes, judicial decisions, and other legal instruments will be examined to evaluate the legal and regulatory measures governing adverse possession in Kenya.

⁵⁴ Majeed N, Hilal A and Khan A, *Doctrinal research in law: Meaning, scope, and methodology*, 12 Bulletin of Business and Economics 4, 2023, 559–563.

The research will involve a qualitative legal analysis to interpret legal provisions, judicial precedents, and scholarly opinions, identifying patterns, inconsistencies, and the practical application of adverse possession laws in Kenya. A comparative legal approach will be employed, using the United Kingdom (UK) as a comparator due to its historical influence on Kenya's legal system, significant reforms in adverse possession laws, and well-established judicial precedents. The UK's experience, particularly post-Land Registration Act 2002, will provide insights into balancing property rights and social justice. This comparative analysis will help assess the effectiveness of Kenya's adverse possession laws and explore potential legal reforms.

1.10 Chapter Outline

The first chapter of this study will contain the details of the background, research questions, research objectives, theoretical framework, justification of the study, literature review, and thereafter, proceed to form the basis of this study in later chapters and discussions.

Chapter two will focus on the significance of security of title in safeguarding property rights and how it influences legal certainty, economic development, and social stability.

Chapter three will evaluate how the Limitation of Actions Act balances the rights of adverse possessors against those of registered title holders, and to determine how effectively the Kenyan Constitution (2010) safeguards private property rights amid these competing claims.

Chapter four will compare and analyse contemporary best practices in adverse possession laws from the United Kingdom and find out how they can be integrated into Kenya's legal framework to address current challenges and improve property rights protection.

Chapter five will contain a summary of findings, a conclusion, and suggest recommendations on the issues discussed.

CHAPTER 2

THE ROLE OF SECURE LAND TITLES IN PROPERTY RIGHTS PROTECTION

2.1 Introduction

This chapter explores the significance of the security of title as a fundamental safeguard for property rights. It begins by defining key concepts such as property, possession, and title while examining the role of land registration in protecting ownership rights. The discussion is anchored in theoretical foundations, particularly the social contract theory, which serves as the primary framework for this research. Additionally, the chapter addresses the doctrine of adverse possession, analyzing its implications for title registration systems, the controversies it raises, and the justifications provided in legal literature. The research summarizes key findings, highlighting the importance of secure land tenure in property law.

2.2 What is a Property Right?

Land ownership has historically been a central aspect of property rights, giving owners various duties, privileges, and responsibilities over the land they control.⁵⁵ Simply, having property rights over land means recognizing authority over that specific piece of land.⁵⁶ Emilie De Laeleye points out that these property rights trace back to ancient Greco-Roman Traditions.⁵⁷

Lord Wilberforce explained that for something to count as property or a property-related right, it needs to be clearly defined, recognizable by others, transferable, and have some level of permanence or stability.⁵⁸ Property rights in land typically apply to dealings between individuals about a particular piece of land, rather than claims across multiple parcels of land.⁵⁹ In essence, the right to property protects one's legitimate interest in using land by ensuring that others are restricted from interfering with it.⁶⁰

⁵⁵ Kameri-Mbote P, Odote C, Musembi C and Murigi K, *Ours By Right Law, Politics and Realities of Community Property In Kenya*, 2013.

⁵⁶ Burn H and Cheshire J, *Cheshire and Burn's Modern Law of Real Property*, 18ed, Oxford University Press, 2011.

⁵⁷ Emilie L, *Primitive Property*, 6ed G.R L. Marriot trans, 1842.

⁵⁸ *National Provincial Bank Ltd v Ainsworth* (1965) Judicial Committee of the House of Lords.

⁵⁹ Bolcher J, 'Building on Custom: Land Tenure Policy and Economic Development In Ghana' *Yale Human Rights and Development Law Journal* 9, 2006, 168.

⁶⁰ Penner E, *The idea of Property in Law*, Oxford University Press, 1997, 72.

The doctrine of adverse possession is particularly relevant to this study, especially when discussing its legality and whether it should be abolished. While it often benefits adverse possessors, many argue that it undermines land security.⁶¹ On the other hand, supporters believe it promotes economic growth and encourages better use of idle land.

2.3 Possession and Title

Possession refers to using things, whether material or immaterial. The former is the case for land.⁶² Land includes any tenure, minerals held either apart from the surface or not, buildings and easements, privileges, rights, or benefits derived from land. Legally, possession is the authority that a person has over a thing, which is property. Additionally, there must be a desire to own the same property, which is referred to as *animus possidendi*.⁶³ Intention to possess is proved by the acts of control and surrounding circumstances. Possession is a question of fact.⁶⁴

The *Pierson v. Post* case is a classic from the early nineteenth century about a wild animal dispute.⁶⁵ Post was out hunting a fox on an empty beach and was just about to get his shot when someone else showed up, killed the fox, and took off with it. Naturally, Post was outraged and decided to sue, arguing that chasing the fox had already given him ownership rights. But the court didn't agree. They cited old legal rules saying possession only belongs to the person who kills, seriously injures or captures the animal, basically taking full control of it. In legal terms, possession means doing something that clearly shows you're claiming ownership. It's a type of property right connected to the thing itself, not a specific person. This is known as a "right in rem," meaning the right is tied to the object, not anyone else.

Adverse possession refers to possession that is inconsistent with the title of the owner, meaning it is a way to gain ownership of property without paying for it.⁶⁶ Even without the owner's permission, this process can eventually give the adverse possessor legal title to the land. A title, on the other hand, is the foundation for someone's legal claim to ownership or rights over property. According to Lawson and Rudden, it refers to a set of facts that, when proven, allow

⁶¹ Megarry R and Wade W, *The Law of Real Property*, 8 ed, Sweet & Maxwell, 2012.

⁶² Megarry R and Wade W, *The Law of Real Property*, 2012.

⁶³ Black's Law Dictionary, 11 ed.

⁶⁴ Smith J, *Understanding Property Law*, Cambridge University Press, 2020.

⁶⁵ *Pierson v. Post* (1805), New York Supreme Court of Judicature.

⁶⁶ Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' 73- 88.

a person to either reclaim possession of something as a plaintiff or keep possession as a defendant.⁶⁷ Therefore, it is necessary to establish possession of property to claim property rights. However, with the advent of the doctrine of adverse possession, the concept of security of title is threatened since it negates the absoluteness of the owner's title.⁶⁸

2.4 Security of Property Rights in Land.

Under the social contract theory, the state is entrusted with sovereign power in exchange for protecting individual rights, with property rights playing a fundamental role in this balance.⁶⁹ Our socio-economic rights such as the right to life, education, and fair labour conditions are deeply intertwined with property rights. Land is more than just a physical asset; it is a form of capital that sustains livelihoods and opportunities.⁷⁰ Therefore, the government has a duty to guarantee the security of land titles, ensuring stability and fairness for all. The state achieves this by providing the mechanism for public enforcement of property as a public good, ensuring that legal standards regulate property forms and minimize investigative costs.⁷¹

An effective title registration system needs to relate to the social side of property because the acceptance by one's neighbours of the legitimacy of a property owner's claim is quintessential to the enjoyment of that property.⁷² It is this acceptance that makes people keep off and, where people perceive some inalienable rights in the res that is claimed as property by another, the costs of protecting the property rise exponentially.

According to De Soto, developing countries have struggled to fully benefit from capitalism because they lack well-structured formal property title systems.⁷³ Without proper legal recognition of assets, people cannot leverage their property for economic growth, leaving wealth trapped in informality. Research suggests that security of land tenure doesn't necessarily boost agricultural productivity in Africa. A study by Migot-Adholla and Place, using data from Kenya, Ghana, and Rwanda, found no clear link between land rights and farm productivity.⁷⁴

⁶⁷ Lawson F and Rudden B, *The Law of Property*, 3 ed, Oxford University Press, 2002.

⁶⁸ Omoro C, 'A critique of the constitutionality of adverse possession in Kenya', 30.

⁶⁹ Rousseau J, *The Social Contract*, Penguin Classics, 1762.

⁷⁰ Quan J, Tun S, Toulmin C, 'Land in Africa market asset or secure livelihood?' Land in Africa Conference, London, 8-9 November 2004, 35.

⁷¹ Rousseau J, *The Social Contract*, Penguin Classics, 1762.

⁷² Kameri-Mbote P and Kieyah J, 'Securing property rights in land in Kenya,' *Kenya Policies for Prosperity*, Oxford University Press, London, 2010, 320.

⁷³ De Soto H, *The Mystery of capital: why capitalism triumphs in the west and fails everywhere else*, Bantan Press, London, 2000, 170.

⁷⁴ Migot A and Place F, 'The economic effects of land registration on smallholder farms: Evidence from Nyeri and Kakamega.' *The University of Wisconsin Press* 3, 1998, 360-374.

Place and Hazell arrived at similar conclusions after further analyzing the same data.⁷⁵ Likewise, Carter found that having a land title in Kenya did not significantly impact crop yields, farm income, or profit per acre.⁷⁶ Pinckney and Kimuyu compared two coffee-growing communities one in Kenya, where the government promotes individual land titles, and one in Tanzania, where all land is state-owned.⁷⁷ Their findings align with previous studies, showing that land titles had little influence on investment in land or access to credit markets.

However, using district-level data from Kenya, Miceli found that economic factors drive the demand for land title registration.⁷⁸ This contrasts with farm-level studies suggesting that land titles in Africa have not resulted in the anticipated increases in productivity and investment. Nevertheless, research from other countries presents a different perspective. In Brazil, Alston discovered that secure land titles increased property values and promoted farm-specific investments.⁷⁹ Similarly, in Thailand, Feder and Onchan confirmed that secure land ownership significantly enhances agricultural productivity.⁸⁰ The widespread belief that land titling has little or no effect on productivity is concerning, as it goes against economic theory, which posits that secure property rights are vital for land development and broader economic growth.⁸¹

It is widely recognized that private property rights significantly contribute to the growth and stability of market-driven economies.⁸² The most obvious effect of the lack of security of title, which refers to guaranteed land ownership, is heightened uncertainty among owners in this case farmers, about whether they will benefit from the investments they make to maintain or enhance the farm's productive capacity.

Secure legal ownership plays a crucial role in helping farmers access more affordable, long-term, and substantial credit. In many cases, having a land title is a necessary requirement for

⁷⁵ Place F and Hazell P, 'Productivity effects of Indigenous land tenure systems in sub-Saharan Africa,' 75 *American Journal of Agricultural Economic* 1, 1993, 10-19.

⁷⁶ Kameri-Mbote P and Kieyah J, 'Securing property rights in land in Kenya,' 320.

⁷⁷ Pinckney T and Kimuyu P, 'Land registration in East Africa: Good, bad or unimportant?' 3 *Journal of African Economies* 1, 1994.

⁷⁸ Miceli T, Sirmans C and Kieyah J, 'The demand of land registration: Theory with evidence in Kenya' 3 *American law and association Journal* 3, 2001.

⁷⁹ Feder G and Nishio A, 'The benefit of the land registration system: economic and social perspectives' 15 *Pergamon Publisher* 1, Great Britain, 1999,30.

⁸⁰ Feder G and Onchan T, 'Land ownership security and farm investment in Thailand' 69 *American Journal of Agricultural Economics* 2, 1987, 320.

⁸¹ Posner R, *Economic analysis of law*, 6 ed, Aspen Publishers, New York, 2003,31.

⁸² Byamugisha F, World Bank Policy Research Working Paper 2241, November 1999.

obtaining formal bank loans.⁸³ Land is often seen as an ideal collateral asset due to its inherent value and stability.⁸⁴ Without a clear legal title, farmers may struggle to mortgage their land, limiting their ability to secure loans, especially from lenders who lack personal knowledge of their financial reliability. As a result, farmers without secure land ownership face significant financial barriers that can hinder their ability to invest in and improve their agricultural operations.

Additionally, because farmers without secure ownership have reduced access to both variable inputs and capital, their overall productivity is likely to be lower than that of those with secure land rights. Building on this discussion, it is proposed that land ownership insecurity leads to reduced farm productivity. This is primarily due to the lack of investment incentives and restricted access to credit, which are essential for agricultural growth.⁸⁵ It is therefore necessary for the security of title to be guaranteed to ensure that owners of property have the freedom to invest as they would wish. Investors are more confident in putting resources in land tenure systems that are defined and secure, which is promoted by secure title registration systems.

2.5 Adverse Possession and Title Registration System Controversies

Among the many contentious legal doctrines, adverse possession arguably stands out as one of the most problematic in property law, particularly when viewed through the lens of title security. At its core, this doctrine permits someone who occupies another person's land without permission and for a legally defined period to eventually claim ownership, effectively stripping the rightful owner of their title. This raises serious concerns about the reliability and security of land ownership, as it suggests that even a legally registered title is not immune to dispossession if occupation continues long enough.⁸⁶

Critics have strongly condemned the doctrine, arguing that its foundation rests on an illegal act: trespassing.⁸⁷ It has been labeled unjust, draconian, and even a form of legalized land

⁸³ Feder G and Noronha R, 'Land rights systems and agricultural development in Sub-Saharan Africa' Research Unit Agriculture and Rural Development Department Operational Policy Staff World Bank, 1987, <https://documents1.worldbank.org/curated/en/421451468913803450/pdf/Land-rights-systems-and-agricultural-development-in-sub-Saharan-Africa.pdf> on 27th February 2025.

⁸⁴ Binswanger P and McIntire J, 'Behavioral and material determinants of production relations in land-abundant tropical agriculture' 36 *Economic Development and Cultural Change* 1, 1987, 98.

⁸⁵ Byamugisha F, World Bank Policy Research Working Paper 2241, November 1999.

⁸⁶ Omoro C, 'A critique of the constitutionality of adverse possession in Kenya' 48.

⁸⁷ Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' 74.

theft.⁸⁸ Those who benefit from it are often perceived as squatters, invaders, or disruptors of stable communities.⁸⁹ A particularly troubling aspect is that the law not only acknowledges but actively protects an outsider's claim to someone else's property, undermining the principle that title deeds should provide conclusive proof of ownership.⁹⁰

The deep-seated opposition to this doctrine is fueled by the fundamental role land plays in human life it's more than just property; it represents home, culture, inheritance, and economic security.⁹¹ For landowners, the idea that legally acquired property can be lost due to another's unlawful occupation shakes confidence in land tenure systems and threatens investment in real estate and agriculture.⁹² The principle of indefeasibility of title the idea that a registered owner's rights should be absolute is significantly weakened by adverse possession. Nonetheless, the justifications for maintaining this doctrine will be discussed below to explain why most countries still maintain it despite the controversies due to the land registration system in place.

2.6 Justification for Adverse Possession.

Adverse possession fundamentally blends statutory and common law with deep historical roots. Similar to acquisitive prescription, which is mostly under civil law jurisdictions, its statutory basis lies in the limitation period during which the rightful owner must assert their claim to the property.⁹³ Some scholars argue that adverse possession rewards thievery.⁹⁴ However, several justifications support the recognition of the doctrine of adverse possession.⁹⁵ It ensures ownership certainty by eliminating the risk of outdated claims to land, thereby securing the rights of possessors.⁹⁶ Additionally, it promotes the optimal use of land by discouraging neglect and encouraging productive utilization.⁹⁷ The doctrine also plays a crucial role in resolving

⁸⁸J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom [2005] ECHR 921 Judgement of 15 November 2005.

⁸⁹*Lamb v Camden Borough Council (1981)*, England and Wales Court of Appeal.

⁹⁰Goymour A, 'Squatters and the criminal law: Can two wrongs make a right?' 73 *The Cambridge Law Journal*, 2014, 486.

⁹¹Kameri-Mbote P and Kieyah J, 'Securing property rights in land in Kenya' 3.

⁹² Kameri-Mbote P and Kieyah J, 'Securing property rights in land in Kenya' 321.

⁹³Sandra H, Thomas L, Peter W, Michael B, *Property law, cases, materials and problems*, West Group Publishers, New York, 1998.

⁹⁴ Miller K, Milliron M, 'Ownership of property and adverse possession from the Catholic perspective: You've got to have (good) faith!' 20 *Ave Maria Law review* 1, 2022, 141.

⁹⁵ Sprankling J, *Understanding property law*, Carolina Academic Press, North Carolina, 2017,479.

⁹⁶ Miller K, Milliron M, 'Ownership of property and adverse possession from the Catholic perspective, 141.

⁹⁷ Sprankling J, *Understanding property law*, 479.

uncertainties and disputes over ownership, providing clarity and stability in land tenure.⁹⁸ Furthermore, it serves as a form of sanction against absentee owners who have seemingly abandoned their property, reinforcing the principle that land should be actively maintained and utilized.⁹⁹

This aligns with Locke's labor theory, which holds that individuals who invest effort into improving property should have the right to claim property interests.¹⁰⁰ Consistent with the personhood theory, prolonged occupation of property leads to it becoming an integral part of the individual's identity, making it increasingly difficult to justify forcing them to relinquish it.¹⁰¹ By encouraging property development, adverse possession motivates rightful owners to actively assert their rights, warning that neglecting them comes with potential consequences.¹⁰² Some scholars even demonize the rightful owner, arguing that it is "morally wrong" for them to permit the adverse possessor to rely on and build a connection to the land, only to reclaim it later.¹⁰³

Oliver Wendell Holmes presents a compelling argument for adverse possession, emphasizing the significance of long-term possession over the loss suffered by the original owner.¹⁰⁴ He asserts that when someone has used and regarded property as their own for an extended period, it becomes deeply ingrained in their identity. Any attempt to reclaim it, regardless of its initial acquisition, provokes strong resistance. Holmes suggests that the law needs no greater justification than these inherent instincts of human nature. This assertion is in line with Radin's personhood theory, which illustrates the emotional attachment that an adverse possessor might have to the land after occupying it for a significant period. Therefore, despite the controversies and criticisms surrounding it, these justifications underscore the enduring relevance of the doctrine of adverse possession, making it difficult to dismiss its significance in property law.

2.7 Conclusion

This chapter has highlighted the fundamental role of title security in safeguarding property rights by analyzing the rationale behind land registration. The research has demonstrated that

⁹⁸ Brown S, 'Abandonment and adverse possession' 2 *Houston Law Review*, 2015, 1385,1402.

⁹⁹ Brown S, 'Abandonment and adverse possession' 1402.

¹⁰⁰ Locke J, *The second treatise on civil government* Gutenberg Ebook, 2010.

¹⁰¹ Radin M, *Property and personhood*, *Stanford Law Review*, 1982,957-959.

¹⁰² Brown S, 'Abandonment and adverse possession' 1402.

¹⁰³ Singer J, 'The Reliance Interest in Property' 40 *Stanford Law Review* 3, 1988, 665.

¹⁰⁴ Holmes O, *The path of the law*, 10 *Havard Law Review* 4, 1895, 457, 476-77.

a well-structured title system enhances legal certainty, promotes economic development, and fosters social stability by encouraging investment and efficient land use. However, the doctrine of adverse possession raises a critical paradox on whether ownership can truly be secure if it remains vulnerable to dispossession through prolonged unlawful occupation¹⁰⁵ This ongoing tension between preserving legal tradition and upholding the sanctity of registered titles remains a contentious issue in property law. Given these complexities, there is an urgent need for legal reforms to align the doctrine of adverse possession with modern land registration frameworks, ensuring a balance between protecting rightful ownership and addressing historical and social realities in property rights.



¹⁰⁵Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' *Strathmore Law Journal* 1, 2023, 74.

CHAPTER 3

THE IMPACT OF ADVERSE POSSESSION ON PRIVATE PROPERTY RIGHTS IN KENYA

3.1 Introduction

The concept of adverse possession in Kenya presents a legal paradox: it allows a trespasser to acquire legal ownership of land despite the existence of a registered proprietor.¹⁰⁶ This doctrine is primarily governed by the Limitation of Actions Act (*Cap 22*), which provides a statutory framework for claiming land ownership through possession. However, this must be reconciled with constitutional protections for registered landowners under the Constitution of Kenya, 2010, particularly Article 40, which safeguards property rights. This chapter explores the tension between adverse possession, statutory limitations, and constitutional guarantees, aiming to establish a balance between competing land rights claims.

3.2 Legal Framework Governing Adverse Possession in Kenya

In Kenya, property law firmly upholds the rights of registered proprietors, shielding them from unlawful intrusions and recognizing them as the absolute owners of their land.¹⁰⁷ Land registration statutes establish that the individual listed in the land registry as the proprietor is the rightful owner, holding the property subject only to registered interests and specific statutory exceptions.

However, while these laws provide strong protections for landowners, they also allow for circumstances where another party's long-term, continuous, and exclusive occupation of the land without the owner's consent can eventually lead to a legal claim to ownership.¹⁰⁸ This legal framework creates a delicate balance between securing registered land titles and acknowledging the rights of individuals who, over time, have effectively possessed and utilized the land.

¹⁰⁶ Muli P, 'Title by adverse Possession' Published LLB Thesis, Moi University School of Law, Kenya, October 2016, 10.

¹⁰⁷ Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' *Strathmore Law Journal* 1, 2023, 84.

¹⁰⁸ *Johnson Musau v Mutunga Mutata and 1 other* (2023) eKLR.

3.3 Registered Proprietors' Rights and Legal Limitations

Kenyan property law grants absolute ownership rights to registered landowners, this is outlined in the Registered Land Act. According to Section 27(a) of the Act, once a person is registered as a landowner, they acquire full ownership, along with all associated rights and privileges.¹⁰⁹ However, these rights are not entirely immune from legal challenges. One of the most significant limitations arises from statutory provisions that restrict the time within which a proprietor can reclaim their land after another party has occupied it. This legal safeguard prevents indefinite claims and ensures that land disputes are resolved within a reasonable period.

Section 28(b) of the same Act reinforces this principle by stating that a registered owner's rights, whether acquired through first registration, purchase, or a court order cannot be easily invalidated, except as specifically provided by law.¹¹⁰ However, the statute also recognizes that land ownership is subject to certain overriding interests, which may exist regardless of whether they are recorded in the land register.

3.4 Overriding Interests and the Impact of Adverse Possession

One of the key overriding interests affecting registered land is adverse possession, a legal doctrine that allows a person to claim ownership after occupying land continuously and exclusively for a specified period without the registered owner's consent. Section 30(f) of the Registered Land Act explicitly recognizes adverse possession as a valid legal interest, meaning that a proprietor's title can be challenged if another person has occupied the land in a manner that meets the legal threshold.¹¹¹

The Limitation of Actions Act (Cap 22) further supports this principle by restricting the time within which a registered owner can initiate legal proceedings to recover possession of their land. Enacted in 2003, this law prevents landowners from seeking judicial intervention once the statutory period has lapsed. Under Section 7 of the Limitation of Actions Act, a landowner loses the right to initiate legal proceedings to reclaim their land if twelve years have passed since the right of action first arose, either for themselves or for a predecessor in title.¹¹² Once this statutory period expires, Section 17 of the Act states that the registered owner's title is

¹⁰⁹ Section 27(a) *Registered Land Act* (Cap 300).

¹¹⁰ Section 28(b) *Registered Land Act* (Cap 300).

¹¹¹ Section 30(f) *Registered Land Act* (Cap 300).

¹¹² Section 17, *Limitation of Actions Act* (Cap 22).

automatically extinguished.¹¹³ As a result, the adverse possessor who has continuously and exclusively occupied the land effectively gains legal ownership.

3.5 When Does Time Begin to Run for Adverse Possession?

The limitation period for adverse possession does not begin simply because a landowner has abandoned their property. Instead, time only starts running when another person takes possession of the land in a manner that meets the legal conditions for adverse possession. According to section 13(1) of the Limitation of Actions Act, the limitation period for recovering land only begins when another person takes actual possession of the property in a manner that qualifies as adverse possession.¹¹⁴ If no one has occupied the land adversely when the right of action first arises, the statutory clock does not start running until someone enters the land and asserts control in a way that meets the legal threshold for adverse possession.

Additionally, if a right of action to recover land arises under Sections 9, 10, 11, or 12 of the LAA Act, but no one is in adverse possession at that time, the limitation period remains inactive until someone takes possession adversely. This means that if a registered proprietor simply neglects their land, the legal timeframe for adverse possession does not begin. It is only when another party openly, exclusively, and continuously occupies the land without the owner's consent that the limitation period starts running.¹¹⁵ Therefore, the limitation period only starts running when another party physically occupies the land in a way that challenges the owner's rights.

3.6 Balancing Landowners' Rights and Adverse Possession Claims

The legal framework governing land tenure in Kenya reflects a careful balance between protecting registered proprietors' rights and acknowledging legitimate claims arising from long-term occupation.¹¹⁶ On one hand, land registration laws ensure that ownership is clearly documented and safeguarded from unlawful interference. On the other, limitation statutes prevent dormant land claims from being enforced indefinitely, encouraging landowners to be vigilant in protecting their property.

¹¹³ Section 17, *Limitation of Actions Act* (Cap 22).

¹¹⁴ Section 13(1), *Limitation of Actions Act* (Cap 22).

¹¹⁵ Muli P, 'Title by adverse Possession' Published LLB Thesis, Moi University School of Law, Kenya, October 2016, 10.

¹¹⁶ Mutahi S, 'Indefeasibility of title and adverse possession in Kenya: an uneasy relationship?' *Strathmore Law Journal* 1, 2023, 79.

Ultimately, adverse possession serves as a mechanism to resolve land disputes, ensuring that land is put to productive use while preventing registered owners from holding onto property indefinitely without actual possession or use.¹¹⁷ However, given its significant implications, courts continue to interpret and apply these legal provisions carefully, ensuring that claims to land ownership are both legally valid and equitable.

3.7 Adequacy of the Law in Protecting Private Property in Line with the COK.

The Limitation of Actions Act provides that an individual who has acquired ownership through adverse possession may apply to the High Court to be legally registered as the new owner.¹¹⁸ This applies to land registered under various statutes, including the Government Lands Act,¹¹⁹ the Registration of Titles Act,¹²⁰ the Land Titles Act,¹²¹ and the Registered Land Act.¹²² Essentially, this legal process results in the deprivation of the original owner's title in favor of the adverse possessor. However, concerns may arise regarding the constitutionality of this process, particularly under Article 40 of the 2010 Kenyan Constitution, which prohibits arbitrary deprivation of property by the state or any other person. Additionally, Section 27(a) of the Registered Land Act affirms that registration confers absolute ownership along with all associated rights and privileges.

Despite these protections, the law operates on the principle that rights must be exercised within a reasonable time.¹²³ A landowner who neglects their property for an extended period cannot later claim that the statutory time limit for legal action is unfair. The law of limitation does not arbitrarily take away ownership; rather, it eliminates the remedy for recovering the land after prolonged inaction. If an adverse possessor meets the required legal conditions, they have an equally valid claim. This approach aligns with the broader public interest and the spirit of the Constitution, particularly given Kenya's status as a land-scarce nation. Article 60(1) of the Constitution emphasizes that land must be managed in an equitable, efficient, productive, and

¹¹⁷ Sprankling J, 'The antiwilderness bias in American property law', 63 *The University of Chicago Law Review* 1, 1996, 519-537.

¹¹⁸ Section 38, *Limitation of Actions Act*, (Cap 22).

¹¹⁹ *Government Lands Act* (Cap 280).

¹²⁰ *Registration of Titles Act* (Cap 281).

¹²¹ *Land Titles Act* (Cap 282).

¹²² *Registered Land Act* (Cap 300).

¹²³ Section 17, *Limitation of Actions Act* (Cap 22)

sustainable manner.¹²⁴ Allowing land to remain idle indefinitely contradicts these principles and discourages its proper utilization.

The law of limitation is not a tool for arbitrary dispossession but serves several key purposes. It prevents the enforcement of stale claims,¹²⁵ encourages efficient land use, promotes economic growth,¹²⁶ and ensures certainty in property transactions.¹²⁷ By limiting the timeframe within which ownership disputes can arise, the law facilitates land transfers and investments, which are essential in an agrarian-based economy like Kenya's.¹²⁸ Additionally, it protects long-standing occupants from legal disruptions after years of uninterrupted use and enjoyment.

3.8 Case Law on Adverse Possession

The legitimacy of adverse possession under Kenyan law has been reaffirmed in judicial decisions. In *Kahindi Ngala Mwangandi v. Mtana Lewa*, Justice Angote found that Sections 7, 9, 13, and 37 of the Limitation of Actions Act were fully consistent with constitutional principles.¹²⁹ The court provided a clear definition of adverse possession, stating that it occurs when an individual takes possession of land, exercises control over it, and the legal owner fails to take action to reclaim it within the prescribed period of twelve years in Kenya. This interpretation affirms what the statute provides.

For a claim of adverse possession to succeed, the occupation of the land must be peaceful, open, and continuous, adhering to the legal principle of "nec vi, nec clam, nec precario" meaning it must occur without force, secrecy, or permission. Kenyan courts have reinforced this understanding through landmark rulings such as *Mbira v. Gachuhi* [2002] and *Jandu v. Kirpal & Another*.¹³⁰ They emphasize that the claimant's entry onto the land must be unauthorized but not forceful, meaning possession must occur without the legal owner's consent but not through violence or coercion. Additionally, the registered owner must not have

¹²⁴ Article 60, *Constitution of Kenya* (2010).

¹²⁵ Sprankling J, 'The antiwilderness bias in American property law', 63(1), *The University of Chicago Law Review*, 1996, 519-537.

¹²⁶ 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 On 1 March 2025.

¹²⁷ Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 21.

¹²⁸ Kameri-Mbote P and Kieyah J, 'Securing property rights in land in Kenya,' *Kenya Policies for Prosperity*, Oxford University Press, London, 2010, 320.

¹²⁹ *Kahindi Ngala Mwangandi v Mtana Lewa* (2011) eKLR.

¹³⁰ *Mbira v Gachuhi* (2002) eKLR and *Jandu v Kirpal & Another* (2013) eKLR.

issued a formal notice demanding that the claimant vacate, as such action could weaken the claim. Most importantly, the occupation must be open and uninterrupted for at least twelve years, with the claimant using the land as an owner would visibly and continuously without any interference from the legal owner.

In the *Mtana Lewa* case, Justice K. M'not outlined key considerations in determining the validity of adverse possession as a legal limitation on property rights.¹³¹ He examined whether such a limitation was legally grounded and whether it met the standards of reasonableness and justifiability in a democratic society. This required assessing the nature of property rights, the significance of adverse possession in relation to those rights, and the broader impact of such limitations. The analysis also weighed the balance between the rights of registered landowners and those of individuals who have occupied land for an extended period. Another crucial factor was whether adverse possession was clearly defined, both in terms of the specific rights it affected and the extent of its limitations. Furthermore, the court considered whether it undermined the core essence of the right to property or merely imposed a reasonable restriction in line with the public interest.

Ultimately, Justice M'not concluded that adverse possession met the necessary legal standards for limiting property rights as stipulated in Article 24(1) of the COK, affirming that it serves a legitimate function within Kenya's legal framework. From these legal provisions, it is clear that private property is well-protected under Kenyan law. The doctrine of adverse possession does not undermine property rights but rather strikes a balance between ownership and responsible land use. It is a product of time, persistence, and the owner's negligence, rather than an act of land theft. Ultimately, adverse possession enforces the principle that property rights come with responsibilities, including the duty to actively manage and protect one's land within the prescribed legal timeframe.

3.9 Conclusion

The doctrine of adverse possession in Kenya presents legal tension between protecting registered landowners and recognizing the adverse possessors. The Limitation of Actions Act provides a statutory basis for acquiring land through continuous possession, yet this must align with constitutional protections under Article 40, which safeguards private property rights.

¹³¹*Kahindi Ngala Mwangandi v Mtana Lewa* (2011) eKLR.

Courts have played a crucial role in interpreting and applying these laws, ensuring that adverse possession claims meet strict legal standards.

This chapter has examined how the Limitation of Actions Act attempts to balance the rights of adverse possessors with those of registered title holders while assessing the extent to which the Kenyan Constitution (2010) safeguards private property rights. While adverse possession promotes land utilization and prevents dormant claims, its application raises constitutional and ethical concerns, particularly regarding the risk of dispossession. Moving forward, legal reforms or judicial clarifications may be necessary to ensure that adverse possession upholds both equitable land access and the constitutional protection of property rights within Kenya's evolving land tenure system.



CHAPTER 4

REFORMING ADVERSE POSSESSION IN KENYA: LESSONS FROM THE UK

4.1 Introduction

This chapter takes a deep dive into the comparative aspects of adverse possession laws in the UK and Kenya, exploring what Kenya can learn from the UK's best practices. Since Kenya's adverse possession laws are rooted in English common law, the UK provides a natural point of reference for comparison. A key focus will be the landmark case of *JA Pye (Oxford) Ltd v United Kingdom*, which triggered major reforms in the UK's Land Registration Act 2002, reshaping how adverse possession is applied. By looking at the procedural safeguards introduced in the UK, this chapter will examine how Kenya's current system measures up and highlight practical lessons that could help strengthen property rights protection and bring more legal certainty to land ownership in Kenya.

4.2 Why Kenya Should Learn from the UK: Insights from a Landmark Adverse Possession Case

As discussed earlier, the doctrine of adverse possession originated when land ownership was primarily determined by possession.¹³² Arguments favoring adverse possession largely reflect an era of unregistered land systems, where the primary concern was uncertainty in land ownership. However, many jurisdictions have since transitioned to the Torrens system of title registration, which was designed to bring clarity and transparency to land ownership for both individual landowners and society as a whole.¹³³

The core principle of the Torrens system is to eliminate the complexities and costs associated with verifying a landowner's title history.¹³⁴ Under common law, tracing ownership often required tracking records as far back as the Crown grant.¹³⁵ The Torrens system simplifies this

¹³² *Pierson v. Post* (1805), New York Supreme Court of Judicature.

¹³³ Low K, 'The nature of Torrens indefeasibility: Understanding the limits of personal equities' 33(1) *Melbourne University Law Review*, 2009, 205-234.

¹³⁴ Low K, 'The nature of Torrens indefeasibility: Understanding the limits of personal equities' 33(1) *Melbourne University Law Review*, 2009, 205-234.

¹³⁵ Butt P, *Land law*, 5ed, Pyrmont, Thomson Reuters, 2006.

by upholding the doctrine of indefeasibility of title, meaning that once a title is registered, it is considered conclusive, unquestionable, and protected from challenge. This principle is enshrined in Section 26 of the Land Registration Act,¹³⁶ which allows only a few exceptions. These include cases where the title was obtained through fraud or misrepresentation involving the registered owner or where it was acquired illegally, unprocedurally, or through corruption, regardless of whether the current owner participated in the wrongdoing.

Given that the Torrens system guarantees the security of registered titles, the doctrine of adverse possession has sparked considerable debate. The conflict between these two legal principles has been widely discussed, including in the European Court of Human Rights case *J.A Pye (Oxford) Land Ltd v The United Kingdom*, where Lord Bingham acknowledged that adverse possession is generally applicable only in unregistered land systems.¹³⁷ It is argued that the concept of adverse possession of registered land is problematic, as it does not align with the principle of indefeasibility of title that is central to the UK's land registration system.¹³⁸ In this case, the applicant company was the registered owner of a 23-hectare agricultural plot. The Grahams, who owned adjacent land, had been occupying the plot under a grazing agreement. After a brief exchange of documents in December 1983, a chartered surveyor acting for the applicants informed the Grahams that the grazing agreement was about to expire and requested they vacate the land.

The Grahams continued to use the entire disputed land for farming without the applicant's permission from September 1983 until 1999. In 1997, Mr. Graham approached the Local Land Registry, claiming that he had acquired title to the land through adverse possession. The Grahams contested the applicant company's ownership under the Limitation Act of 1980, which stipulates that a person cannot initiate a legal action to recover land after twelve years of adverse possession by another party. While the English courts ruled in favor of the Grahams, the European Court of Human Rights (ECHR) determined that adverse possession violated the right to property.¹³⁹

¹³⁶ Section 26 of the Land Registration Act, No. 3 of 2012

¹³⁷ *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom*, ECtHR Judgement of 30 August 2007.

¹³⁸ 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-Page-r-PMM.pdf> on 31 January 2025.

¹³⁹ *J.A Pye (Oxford) Ltd and J.A Pye (Oxford) Land Ltd v The United Kingdom*, ECtHR Judgement of 30 August 2007.

The UK government further disputed this ruling, and the matter was referred to the Grand Chamber of the European Court of Human Rights (ECHR). By a majority of 10 to 7, the Court held that the 12-year limitation period for actions to recover land served a legitimate purpose in the public interest. Additionally, the Court recognized the general interest in extinguishing title at the end of this period.¹⁴⁰

The above case law prompted a review and amendment of the adverse possession laws in the UK. The changes aimed to strike a fair balance between the interests of the general public and those of the individuals involved.¹⁴¹ In 2002, where adverse possession law initially originated, the UK decided to revise its framework. The amendments were guided by principles of neutrality and fairness, ensuring an equitable approach for both parties in adverse possession claims.¹⁴²

In the same case, Lord Hope commended the notification requirements set out in Schedule 6 of the UK Land Registration Act of 2002. He viewed this provision as a safeguard against unintended loss of ownership, as it requires an adverse possessor to notify the registered owner after ten years of occupation. This notice allows the owner to object or issue a counter-notice, effectively granting them two years to reclaim possession before adverse possession takes effect. This legislative safeguard prevents owners from losing their property due to oversight or inadvertence.

A 2006 report by the British Institute of International and Comparative Law commissioned by the Queen to analyze adverse possession laws across eleven countries on three continents concluded that in jurisdictions with a formal land registration system, the justification for maintaining the doctrine of adverse possession weakens significantly.¹⁴³

While adverse possession is often categorized under the broader legal framework of the limitation of actions intended to prevent the litigation of outdated claims and encourage timely enforcement of rights it goes beyond merely barring claims. Unlike other limitation laws, adverse possession actively transfers ownership to the squatter.¹⁴⁴ This unique characteristic

¹⁴⁰ Burn E and Cartwright J, *Cheshire and Burn's Modern law of Real Property*, 18th Ed, Oxford University Press, 2011, 1161.

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

¹⁴² *Schedule 6, Land Registration Act (2002)*, United Kingdom.

¹⁴³ British Institute of International and Comparative Law, *Adverse possession*, 2006, 27.

¹⁴⁴ Conway H and Stannard J, 'The emotional paradoxes of adverse possession', 75-89.

has led to ongoing debates about whether its justification extends beyond the general rationale for limitation statutes. Some critics argue that, regardless of the practical arguments in favor of adverse possession, the initial wrongful occupation of land outweighs any utilitarian benefits.¹⁴⁵

One of the most controversial aspects of adverse possession is its inherent connection to unlawful entry onto another person's land.¹⁴⁶ In modern registration systems, ownership can be easily verified through official searches, eliminating any mistaken belief in ownership. Kenya has embraced this approach, introducing online land searches as early as 2015. More recently, the launch of Ardhi Sasa has further enhanced accessibility, allowing citizens and stakeholders to interact with land records online.¹⁴⁷ This digital transformation aims to strengthen title security and simplify land transactions, reinforcing the principle that land ownership should be transparent and indisputable.

4.3 Procedural Changes Adopted By The UK To Protect The Registered Title Owner and The Adverse Possessor

Unlike Kenya, the UK procedure prioritizes the title owner's right to property before it is restricted. This approach is outlined in Schedule 6 of the Land Registration Act 2002. Under Schedule 6, paragraph 1(1), a person who has possessed land for more than ten years can apply to the land registrar to be registered as the landowner. Crucially, the claimant must be in possession of the land at the time of the application.¹⁴⁸ Additionally, the applicant must prove exclusive possession of the land, demonstrate that the possession was intentional, and show that it occurred without the owner's consent.¹⁴⁹ This is similar to Kenya, with the only difference in the ten years plus two for registration of an adverse possession

Upon receiving an application for adverse possession, the land registrar is required to notify the title owner through a formal notice. However, in practice, the Land Registry Practice Guide 4, paragraph 5.1, specifies that the registered proprietor is usually given an earlier, informal notice. Before the Land Registry accepts that the applicant has a valid case for registration, a

¹⁴⁵ Bouckaert B and Depoorter B, 'Adverse possession: Title systems', 21.

¹⁴⁶ British Institute of International and Comparative Law, Adverse possession, 2006, 1-14.

¹⁴⁷ <https://ardhisasa.lands.go.ke/account> on 2 March 2025.

¹⁴⁸ Schedule 11(1), *Land Registration Act*, United Kingdom (2002).

¹⁴⁹ Athill Z and Clint C, 'The challenge of adverse possession of registered land' © BDB Pitmans 2021, *One Bartholomew Close*, London EC1A 7BL - T +44 (0)345 222 9222.

surveyor is typically assigned to inspect the land. Both the registered landowner and the applicant are informed of this inspection.¹⁵⁰

Under Schedule 6, paragraph 4 of the Land Registration Act 2002, the applicant can be registered as the landowner if the current title owner does not object within 60 days. If the title owner files a counter-notice, the case is referred to the adjudicator for resolution. Furthermore, Schedule 4, paragraph 5 allows for the rectification of the land register if the adverse possessor was mistakenly registered due to the title owner's failure to file a counter-notice. This applies in cases where the adverse possessor has not occupied the land for more than ten years.

Therefore, the registered owner has a two-year period from the rejection of the application to either evict the applicant or legalize their occupation. It is assumed that any paper owner who responded to the application by issuing a counter-notice would be inclined to take steps to protect their interest in this manner.¹⁵¹ After the two-year period has passed, the squatter has the right to reapply for registration. If they can prove that the title owner has made no effort to evict them, then the title owner will have no grounds to object.¹⁵²

The procedure outlined above is in line with the purpose of the research aims to protect the rights of the paper or registered owner. The owner is given a two-year window to redeem themselves, recognizing the importance of land in today's neoliberal economy. However, if Kenya were to adopt this procedure from their former colonial masters, they should address the existing gaps.

4.4 Critical Evaluation of UK Best Practices for Kenya's Legal Framework

The UK's approach to adverse possession is structured to balance the rights of property owners with the principle that land should not remain idle indefinitely. Unlike Kenya, where adverse possession claims often result in abrupt and sometimes unfair dispossession, the UK has introduced safeguards that mitigate the risk of involuntary land loss.

One of the most significant safeguards is the mandatory notification to landowners. The UK's Schedule 6 of the Land Registration Act 2002 requires adverse possessors to notify registered

¹⁵⁰ Burn E and Cartwright J, *Cheshire and Burn's Modern law of Real Property*, 18th Ed, Oxford University Press, 2011, 1161.

¹⁵¹ Athill Z and Clint C, 'The challenge of adverse possession of registered land' © BDB Pitmans 2021, *One Bartholomew Close*, London EC1A 7BL - T +44 (0)345 222 9222

¹⁵² Schedule 6 paragraph 7, *Land Registration Act (2002)* United Kingdom.

landowners after ten years of continuous occupation.¹⁵³ This ensures that property owners have an opportunity to contest the claim before losing their rights. In Kenya, adverse possession can occur without the owner's knowledge, which leads to unjust outcomes. Implementing a notification system would provide transparency and fairness.

Additionally, land inspection and verification play a crucial role in the UK system. Before an adverse possession claim is granted, land surveyors conduct an inspection to verify the occupation.¹⁵⁴ This measure minimizes fraudulent claims, ensuring that only genuine possessors benefit from the doctrine. Kenya, which has faced cases of fraudulent land grabbing, would greatly benefit from a similar verification process.

Another key difference is the extension of the objection period. In the UK, landowners are given two years after notification to reclaim possession or legalize the occupier's stay. This system acknowledges that rightful landowners may not always act immediately due to lack of awareness, financial constraints, or bureaucratic delays. In contrast, Kenya's adverse possession system does not provide such a structured grace period, often leading to sudden and irreversible losses for property owners.

Beyond legal mechanisms, the UK has also emphasized public awareness. Many property owners are unaware of the risks associated with adverse possession, leading them to neglect legal safeguards.¹⁵⁵ Through public education initiatives, landowners in the UK are informed about their rights and the steps they can take to protect their property. In Kenya, where land disputes are common, targeted awareness campaigns could prevent unintentional land loss and promote responsible land management.

Finally, the UK has embraced digital integration in land registration, ensuring that property owners receive automated alerts when adverse possession claims are made against their land. Kenya's Ardhi Sasa platform could be leveraged similarly to provide real-time notifications to landowners, reducing instances where people lose their property due to ignorance or fraud.

¹⁵³ Schedule 6, *Land Registration Act* (2002) United Kingdom.

¹⁵⁴ Burn E and Cartwright J, *Cheshire and Burn's Modern Law of Real Property*, 18th Ed, Oxford University Press, 2011, 1161.

¹⁵⁵ <https://ardhisasa.lands.go.ke/account> on 2 March 2025.

4.4 Comparative Analysis with Kenya

Kenya's land laws recognize adverse possession under the Limitation of Actions Act, which allows a person to claim ownership of land if they have occupied it openly, exclusively, and continuously for at least 12 years. While the doctrine serves as a means of resolving long-standing disputes and preventing dormant ownership, Kenya lacks the procedural safeguards adopted by the UK to balance the rights of both the adverse possessor and the registered landowner.¹⁵⁶ A critical issue in Kenya is the lack of notification mechanisms to inform landowners of adverse possession claims before their rights are extinguished. In contrast, the UK's Land Registration Act 2002 requires that an adverse possessor notify the registered owner after ten years of occupation, granting them a two-year window to object or reclaim possession. The absence of such safeguards in Kenya has led to cases where landowners lose property due to lack of awareness rather than negligence.¹⁵⁷ Furthermore, the UK's requirement for physical inspection of disputed land by a surveyor before approving adverse possession claims ensures that fraudulent claims are minimized. In Kenya, however, claims are often settled in court without similar verification procedures, creating room for abuse due to the adversarial nature of Kenyan courts.¹⁵⁸

4.6 Conclusion

In conclusion, the UK's approach to adverse possession offers valuable lessons that Kenya can adopt to improve its land governance. By introducing safeguards such as mandatory notification to landowners, land inspection before claims are granted, and an extended objection period, the UK has created a fairer balance between registered owners and adverse possessors. Kenya, facing challenges like fraudulent claims and informal land occupations, could benefit from similar reforms to enhance transparency and legal certainty. Integrating digital tracking through platforms like Ardhi Sasa, raising public awareness, and refining legal procedures would help protect property rights while ensuring land remains productive. By learning from the UK's experience, Kenya has an opportunity to create a land system that is not only fair and transparent but also secures property rights for future generations.

¹⁵⁶Burn E and Cartwright J, *Cheshire and Burn's Modern law of Real Property*, 18th Ed, Oxford University Press, 2011, 1161

¹⁵⁷*Johana Mburu v Jackson Musembi* (2023) eKLR.

¹⁵⁸Ikenga O, 'The jurisprudence of adversarial justice', *African Journal Online*, [THE JURISPRUDENCE OF ADVERSARIAL JUSTICE Ikenga ...](#) On 3 March 2025.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This research highlighted the problem statement where, in Kenya, land ownership is built on the principle of absolute title. However, this certainty is disrupted by the law of adverse possession, which allows individuals to claim ownership of land simply by occupying it for a certain period. Sections 7 and 13 of the Limitation of Actions Act provide the legal basis for such claims, directly contradicting the principle of absolute title and undermining the constitutional protection of property rights under Article 40. As a result, it creates uncertainty in land ownership, discourages investment, and leads to a decline in land values. When property laws are unpredictable, investors may look for more stable markets, slowing economic growth and weakening confidence in Kenya's legal framework. This study examined how adverse possession affects private property rights in Kenya and whether reforms are necessary to create a more secure and predictable land tenure system.

To achieve this, the research focused on four key objectives which aimed to establish the importance of security of title in promoting legal certainty, economic development, and social stability. It also evaluated how the adverse possession regime impacts private property rights in Kenya, highlighting the legal inconsistencies and uncertainties it creates. In addition, the research analyzed best practices from the United Kingdom to understand how adverse possession laws can strike a balance between individual property rights and broader societal interests. Lastly, the study explored potential legal reforms to address the key challenges and controversies surrounding adverse possession, offering recommendations for a more secure and predictable land tenure system. Using doctrinal legal research, this study examined key legal texts, statutes, and case law to assess the extent to which adverse possession undermines land security. The findings were tested against the study's hypothesis that the current legal framework for adverse possession weakens the principle of absolute title under Kenya's land registration system.

5.2 Summary of Findings

In light of the first objective on the utility of security of title in safeguarding property rights and how it influences legal certainty, economic development, and social stability, chapter two established that a well-structured land title system plays a crucial role in enhancing legal

certainty, promoting economic development, and fostering social stability. Secure land ownership encourages investment, prevents disputes, and supports efficient land use. However, the doctrine of adverse possession introduces a fundamental paradox if ownership can be lost through prolonged occupation by another party, then absolute title is not truly secure. This contradiction creates uncertainty for landowners and investors, potentially discouraging long-term investments in land. Given these challenges, the study highlights the need for legal reforms to align adverse possession with modern land registration systems. Such reforms should aim to balance the protection of property rights with historical and social realities, ensuring a just and stable land tenure system.

Chapter three evaluated how the adverse possession regime affects private property rights in Kenya, revealing a legal tension between protecting registered landowners and recognizing long-term occupants. The Limitation of Actions Act provides a statutory basis for acquiring land through continuous possession, yet this must be reconciled with Article 40 of the Constitution, which guarantees private property rights. As court decisions have shown, particularly in *Mtana Lewa v Kahindi Mwangandi*, adverse possession claims must meet strict legal standards. While the doctrine can promote land use and prevent dormant claims, it also raises constitutional and ethical concerns, particularly the risk of dispossession. Moving forward, legal reforms or clearer judicial guidelines may be necessary to ensure that adverse possession aligns with both equitable land access and the constitutional protection of property rights within Kenya's evolving land tenure system.

Chapter four provided a comparative analysis between Kenya and the United Kingdom, demonstrating how the UK's approach to adverse possession offers valuable lessons for improving Kenya's land governance. The UK has introduced safeguards such as mandatory notification to landowners, land inspections before claims are granted, and extended objection periods, all of which create a fairer balance between registered owners and adverse possessors. In contrast, Kenya faces persistent challenges such as fraudulent claims and informal land occupations, which undermine land security. By adopting similar reforms, Kenya could enhance transparency, legal certainty, and property rights protection. Additionally, digital land tracking platforms like *Ardhi Sasa*, increased public awareness, and refined legal procedures could help ensure that land remains both secure and productive. By learning from the UK's experience, Kenya has an opportunity to develop a more balanced, fair, and future-proof land governance system.

These findings underscore the urgent need for legal reforms that address both historical land injustices and the necessity of protecting modern property rights. Moving forward, Kenya must refine its land laws to create a system that is not only legally sound but also transparent, equitable, and economically sustainable.

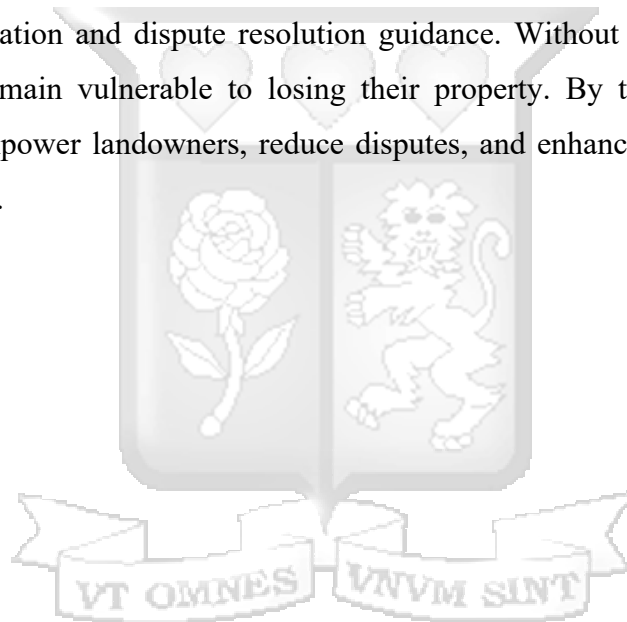
5.3 Recommendations

Based on these findings, the study proved the hypothesis that the current legal framework for adverse possession weakens the principle of absolute title under Kenya's land registration system. In that regard, the study suggests the following recommendations;

- 1) Section 7 of the LAA on the limitation period for actions to recover land within twelve years from the date the adverse possessor took occupation should be amended to require landowners to be notified before the twelve-year period is completed.
- 2) Section 13 of the LAA on the right of action accruing through adverse possession should be revised to require proof of notification to the registered landowner at least one year before the expiry of the twelve-year period. Additionally, circumstances under which a claim can be **challenged** for instance fraudulent claims, improper occupation, and public land, should be clearly stated.
- 3) Section 7 of the Land Act 2012 on methods of land acquisition should be amended to introduce a subsection requiring that any claim of land acquisition through adverse possession must be accompanied by mandatory notification to the registered owner and land inspection by an independent surveyor.
- 4) Section 107 of the Land Act 2012, which gives the Cabinet Secretary of Land the power to oversee land administration, should be amended to introduce a requirement for the Ministry of Lands to establish digital alerts via Ardhi Sasa or other platforms notifying landowners of adverse possession claims.
- 5) Section 32 of the Survey Act (Cap 299) on the authentication of plans should insert a new Section 32A, establishing a mandatory survey requirement for adverse possession claims. Under this provision, any claim of adverse possession shall require a survey inspection conducted by a registered and independent surveyor to ensure accuracy and prevent fraudulent claims. The surveyor must prepare a detailed report verifying the occupation status, boundaries, and any developments on the disputed land. This report shall be submitted to the Land Registrar and the Director of Surveys before the claim can be processed. Furthermore, the landowner must be notified at least 60 days in

advance of the survey and shall have the right to submit objections or counter-evidence. Failure to comply with these requirements shall render the adverse possession claim inadmissible.

- 6) To protect landowners from unintentional property loss, Part VIII of the Physical and Land Use Planning Act 2019 on the Miscellaneous Provisions should be amended to introduce public awareness programs on land rights and adverse possession. The Ministry of Lands, in collaboration with the National Land Commission and County Governments, should lead community outreach, media campaigns, workshops, and education programs to ensure people understand their rights and legal remedies. County Governments should localize and disseminate information, ensuring accessibility for both rural and urban landowners. Additionally, an online platform should provide up-to-date information and dispute resolution guidance. Without these measures, many landowners remain vulnerable to losing their property. By taking proactive steps, Kenya can empower landowners, reduce disputes, and enhance transparency in land administration.



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