Itiangu v Nguli (Sued as Administrator of the Late Nguli Kisalu) & another (Environment & Land Case E003 of 2022) [2023] KEELC 16542 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16542 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT & LAND CASE E003 OF 2022

LG KIMANI, J

MARCH 23, 2023

BETWEEN

MUTUA KISALU ITIANGU ..... APPLICANT

AND

JOHN KISALU NGULI (SUED AS ADMINISTRATOR OF THE LATE NGULI KISALU) ..... 1ST RESPONDENT

MIKE KISALU NGULI ..... 2ND RESPONDENT

JUDGMENT

1. The Applicant filed the Originating Summons dated April 4, 2022 seeking the following orders:

    1. Spent.

    2. That the Applicant herein be declared to be entitled by adverse possession over 12 years and/or by the trust created to all that parcel of land known as Title No Nzambani/Kyanika/1409.

    3. That the Plaintiff be registered as the absolute proprietor in respect of title number Nzambani/Kyanika/1409.

    4. That the Land Registrar, Kitui County does register the Applicant as the absolute proprietor of Land Title Number/Nzambani/Kyanika/1409 in place of the Respondents.

    5. An order of permanent injunction do issue restraining the defendant, his agents and/or servants from cultivating, alienating, transferring, growing crops, grazing or in any other way interfering with or dealing with Land Parcel Number Nzambani/Kyanika/1409.

    6. That the costs of these summons be awarded to the Applicant.

2. The Originating Summons is supported by the Applicant's affidavit sworn on March 14, 2022 and the supplementary affidavit sworn on July 14, 2022. The applicant claims the suit land No Nzambani/

Kyanika/1409 on the ground that he has enjoyed continuous, uninterrupted and peaceful occupation of the land for the last 50 years since the year 1972 with full knowledge of the defendant. The Applicant claims that prescriptive rights have accrued in his favour and he is entitled by operation of the law to be registered as the absolute proprietor of Land Title No Nzambani/Kyanika/1409.

3. The Applicant states that they sent Kisalu Nguli (deceased) who was the Petitioner's brother home from Mombasa when they heard that all the parcels of land belonging to their father were being surveyed. The applicant and his brother Kilonzi Kisalu (also deceased) had told him to register the properties in their names but instead, Nguli Kisalu registered the land in his name, a fact that the applicant did not know until the title deeds came out in 1985.

4. The applicant stated that in 1987 he reported the matter to the clan after his brother refused to settle the matter amicably and the clan told his brother to give him back his land. He states that he engaged the administrator of the Nguli Kisali's estate after he obtained letters of administration to transfer the property to him but he realized that the property had been fully administered and allotted to the administrator's brother, who is the 2nd Respondent herein.

5. The Applicant states that he has developed the property, by planting trees, utilizing the land and also interring his first wife Priscilla Mulee on the suit property with no objection from the respondents. That all was going well until the year 2021, when the 2nd respondent informed him that the suit property was to be registered in his name after the succession cause and the 1st Respondent told him that he was a squatter in the land and his rights to the land were not recognized.

6. The Applicant states that his occupation of the entire land parcel Nzambani/Kyanika/1409 since 1972 has been continuous, without any secret or force and without interruption and he asserts that he has acquired prescriptive rights over the suit property. He confirmed that he was properly before this court and it did not matter whether he had filed another claim elsewhere since his claim in this suit is very clearly one of adverse possession or trust. He contends that all his children were born and raised in the suit land and he has cultivated the land for many years and that all family members know that the suit property belongs to him.

The Respondents' Case

7. The Respondents filed a joint replying affidavit stating that the suit herein is frivolous, vexatious and an abuse of the court process since the applicant has not clearly stated the basis for his claim to the suit land. At one point he claims ownership dating back to 1972 without stating how he acquired the land or how the trust he claims was created. The Respondents state that the Applicant also makes a simultaneous claim of adverse possession and not in the alternative. They state that one cannot claim ownership while at the same time laying a claim of adverse possession.

8. They also depose that the Applicant has been living in Mombasa for the better part of the period he claims to be in occupation of the suit property and had constructed a house and lived there with his family. The Respondents attached evidence of a reported court case ELC 206 of 2017 Malindi also for adverse possession, where the Applicant successfully laid a claim to plot No Mugumo Pasta/Mazeras/1064. The Respondents thus stated that the Applicant's possession was not continuous since by his own testimony, he was in Mombasa in 2017.

9. According to the Respondents, the suit property was registered to their late father in 1986 and that at no time has their father held the land in trust of the Applicant or anyone else. They stated that the Applicant had also claimed ownership of their father's other land known as Nzambani/Kyanika/1414 where a verdict by the District Land Registrar was delivered on April 16, 1987 to remove the caution lodged by the applicant. They stated that the decision of the land Registrar was not appealed. Further,

the Respondents stated that the Applicant did not lay a claim to the suit parcel of land in Succession cause No 32 of 2018 which involved the estate of their father Nguli Kisalu yet he was a witness in the suit and he filed a witness statement in the suit.

10. The Respondents denied that the Plaintiff has erected a permanent house on the suit property, and instead stated that he has only put up a mud walled house and a temporary toilet since their father kept evicting them from the suit land and did not allow him to build there.

11. It is the Respondents statement that the Plaintiff is using this court to dispossess the 2nd Defendant of his rightful inheritance from his father and oppose the application herein.

12. The parties took directions on the hearing of the matter to proceed by way of written submissions.

Applicant's Submissions

13. The Applicant's Counsel submitted that the Applicant has met the threshold on adverse possession for the reason that he has been on the suit land for over twelve years, has cultivated on the suit land and buried his wife there, while the Respondents' have never interfered with his possession and use of the suit property as he relied on the holding in the case of *Mate Gitabi vs Jane Kabubu Muga & others* Nyeri Civil Appeal No43 of 2015(unreported) where the case of *Mbira v Gachuhi* (2002) I EALR 137.

14. Regarding the allegation by the Respondents that the Applicant has been living in Malindi, he stated that he can live in multiple places, the only issue is that about the possession of the land which is uncontroverted.

15. Counsel for the Applicant quoted from and relied on the case of *Edwin Onesmus Wanjau(suing in her capacity as the administrator of the estate of Kimingi Wariera(Deceased) and of Mwangi Kimingi(Deceased))* and the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* (2016) eKLR.

16. According to the Applicant's submissions, nothing stopped time from running as the Respondent never took any plausible step to assert rights over the suit property. Counsel for the Applicant urged the court to find and hold that the Applicant has, on a balance of probability established that he meets the threshold for adverse possession.

The Respondents' submissions

17. The Respondents submitted that the suit property is the subject of Succession Cause No32 of 2018 at the Chief Magistrate's Court at Kitui, where the 2nd Defendant is named as the beneficiary. They submitted that this claim is riddled with falsehoods, misrepresentations and lies, pointing out that the Applicant in his sworn affidavit states that he was living in Mombasa in 1972, in 1974 and that he was still living in Mombasa in 1985.

18. The Respondents submit that the Applicant has not proven his case and he ought to have brought out the matter of trust when Nguli Kisalu (Deceased) was still alive. They also submitted that the Applicant was in his land at Malindi that he acquired through adverse possession and that he is not a landless person. They also state that the Applicant did not call any relatives as witnesses to support his endeavor.

19. Counsel for the Respondents also stated that the supplementary affidavit filed by the Plaintiff was filed without leave of the court and beyond the time for filing pleadings.

20. Quoting from the case of *Maweu vs Liu Ranching and Farming Co-operative Society* 1985 KLR 430 and the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muthambi Katana & 15 others* (2018) eKLR, the Respondents submitted that the Applicant has not met the

elements required for a claim of adverse possession because he was living in Malindi in 2017 and the preceding 12 years. That he made a successful claim of adverse possession for plot No Mugumo Pasta/ Mazeras/1064 in Malindi, measuring that the period has not been uninterrupted and continuous.

21. It is the Respondents submission that this cause is an afterthought after the Defendants initiated the succession process for their father's properties. They also pointed out that the houses that the Applicant claims to have built are not permanent but they are mud houses. Further, it is the Respondents' submission that the Applicant has failed to demonstrate how he allegedly took possession of the suit property and when he did it. They relied on the case in Kisumu Civ Ap. No 110 of 2016 *Richard Wefwafwa Songoi v Munyifwa Songoi* (2020) eKLR.

22. Further, the Respondents submitted that the Applicant had not proven that the alleged possession was hostile to the Respondent's ownership of the suit property, because the registered owner was a friendly brother to him lending him a helping hand.

23. The Respondents submit that the Applicant's prayer that he be registered as the absolute proprietor of the suit land and his claim of ownership by trust is conflicting and unsustainable and that mere assertions cannot give rise to a substantive claim without cogent evidence.

Analysis and Determination

24. The Applicant seeks to enforce, among other orders, a right of adverse possession over the suit property. Section 7 of the *Limitation of Actions Act* Cap 22 provides that:

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

25. The procedure for making such an application is set out under Order 37 Rule 7 of the *Civil Procedure Rules (2010)* which provides that:

> " An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
>
> (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed."

26. Section 13 of the *Limitation of Actions Act* provides for when the right of action will not to accrue or continue unless there is adverse possession

    1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

    2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land."

26. The first element that a claimant must prove on a balance of probability is that he has made physical entry on the land and is in actual possession or occupancy of the land for the statutory period. Adverse possession rests on the use and occupation by the claimant. It has been held in numerous decisions that possession must be actual.

27. The Applicant has stated that he has been in occupation of the suit land Nzambani/Kyanika/1409 since the year 1972. It was his case that even though he had acquired another parcel of land in Malindi through adverse possession, he was still in possession of the suit property.

28. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwagandi* [2015] eKLR the court of Appeal defined adverse possession as:

> "Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

29. The deceased Nguli Kisalu was registered as owner of the suit land on December 13, 1985 and a land certificate was issued on December 16, 1986. The applicant stated that in 1974 surveying of land was taking place and that they sent their brother Nguli Kisalu to have the land surveyed and registered on their behalf. That instead of having the land registered in their joint names the deceased had it registered in his own name. In my view and it has been held in various cases that before ascertainment of rights and interests in unregistered land under adjudication, land cannot be the subject of a claim for adverse possession since rights and interests in the land are not ascertained until the process is completed. In *Haro Yonda Juaje v Sadaka Dzengo Mbauro & another* [2014] eKLR the court held that;

> "The ascertainment of rights of individuals under the *Land Adjudication Act* was meant to deal with the claims that may arise later under the doctrine of adverse possession. Indeed, the elaborate procedures set out in the said Act on how the rights of people over customary land were to be ascertained to the settlement of the disputes by various bodies during the adjudication process was meant to avoid future claims under the doctrine of adverse possession, specifically where one claims that the land he is occupying is his ancestral land."

30. I am of the view that between the period when the applicant states he constructed a house in 1972 and 1986 when a title deed was issued to the deceased, a claim for adverse possession could be made and time does not run since the rights to the land had not been ascertained and the land has not been declared as owned by the deceased.

31. The Respondents deny the Applicants claim of adverse possession of the suit land and state that the Applicant has been living in Mombasa for the better part of the period he claims to be in occupation of the suit property and had constructed a house and lived with his family. The Respondent relied on the contents of several cases being ELC 206 of 2017 Malindi where the Applicant successfully laid a claim to plot No Mugumo Pasta/Mazeras/1064 by virtue of adverse possession. In the said case the applicant stated that he lived on the land with his family since 1967 to the time he lodged the suit in 2017. The question arises as to whether having made a claim of being in continuous, uninterrupted adverse possession of the land Mugumo Pasta/Mazeras/1064 could the applicant also have been in possession of the land?

32. The Respondents also claim that the applicant never made any claim over land parcel Nzambani/Kyanika/1409 during the lifetime of their father. Instead, the applicant made a claim of beneficial interests in their father's land known as Nzambani/Kyanika/1414 where a verdict by the District Land Registrar was delivered on April 16, 1987 ordering removal of the caution that the Applicant had lodged on the land. The findings of the District Land Registrar show that the Applicant claimed that he had built a permanent house, temporary toilet and other improvements on the land. The District Land Registrar confirmed that there was indeed a house on the land as claimed. The deceased agreed that he had allowed the Applicant herein to build on his land but wanted him to be removed and be given an alternative place to live being Nzambani/Kyanika/1350. The District Land Registrar was not persuaded to direct that the Applicant be given an alternative land to construct on but found that the Applicant did not have a registrable interest in the suit land as he could not show or trace his claim for inheritance.

33. Arising from the findings made ELC 206 of 2017 Malindi where the applicant was awarded land parcel Mugumo Pasta/Mazeras/1064 and the proceedings for removal of the caution on the title to land parcel Nzambani/Kyanika/1414, I do find it strange that the applicant claims that during the same period when he was found by the land registrar and the court to have been on the two land parcels claimed, he also claims to have been living on the suit land. The applicant has not shown any reason that prevented him from lodging a caution against the suit land similar to the caution he placed against title No Nzambani/Kyanika/1414.

34. Further, it appeared from the findings of the District Land Registrar that suggestions were being made for the applicant to be removed from the land parcel he occupied Nzambani/Kyanika/1414 to be given an alternative place in Nzambani/Kyanika/1350. In my view if the applicant already had another home on the suit land, it would have been easier for him to move to the suit land instead of being given the alternative on parcel Nzambani/Kyanika/1350.

35. From the foregoing, in as much I am not ready to find that the applicant could not reside in more than one parcel of land and claim adverse possession in the said parcels, I do find that the applicant has not satisfied the court that he was in actual possession of land parcel Nzambani/Kyanika/1409 at the same time as he was in possession of 1414 and 1064 during the period claimed.

36. It has been shown that the Applicant participated in Succession Cause No 32 of 2018 which dealt with the estate of Nguli Kisalu (deceased) and he recorded a witness statement where he stated that land parcel No Nzambani/Kyanika/1414 was registered in the name of the deceased on trust for the two brothers Mutua Kisalu Ituanga (Applicant) and Kilonzi Kisalu (deceased). It is noted that the applicant did not claim the suit land in the succession cause as would have been expected. Indeed, the proposal made for distribution of the estate of the deceased was that the suit land was to be awarded to the 1st Respondent herein John Kisalu Nguli and not the 2nd Respondent Mike Kisalu Nguli who was to be awarded Nzambani/Kyanika/1414.

37. In my view, the above makes it difficult to ascertain whether indeed during the period claimed, the applicant was in possession of the suit land, it is also difficult to ascertain the time when the applicant moved from land parcel 1414 to the suit land. While it is true as stated by the applicants counsel in submissions that in a claim for adverse possession one must show that he occupied the suit land openly without secrecy and as of right, the applicant also needed to show that such occupation was for a period of over 12 years and there must have been a time of entry onto the land and a point at which time started to run. The applicant did not prove on a balance of probability when the statutory period started running and in my view the mere presence of the applicant on the suit land as shown through photographs of houses is not enough to prove adverse possession of the land.

38. Further, on whether the applicant is entitled to orders of adverse possession, it is trite law that adverse possession contemplates two concepts: possession and discontinuance of possession as was held in the case of *Wambugu –v- Njuguna* (1983) KLR 173, where the Court of Appeal held. The Court held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years. The court stated:

> " In order to acquire by Statute of Limitation title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are consistent with his enjoyment of the soil for the purpose of which he intends to use it for a continuous 12 years. The Limitation of Actions on possession contemplates two concepts; dispossession and discontinuous of possession. The proper way of assessing proof of title is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved he has been in possession for the requisite number of years."

39. In the present case it has not been shown that the deceased or the respondents herein were in possession of the land in the first place. As was held in the *Wambugu* case (*supra*), it is not enough for the Plaintiff to show that he has been in possession for more than 12 years, he must show that the respondent was at some point in possession of the land and could therefore have been dispossessed or discontinued his possession.

40. Further in the supplementary affidavit the Applicant stated that after the death of the deceased he engaged the administrator of his estate who agreed to transfer the suit land to him but he reneged on the promise. This assertion is however not supported by the documents on record since on the applicants witness statement in the succession cause he only claimed beneficial ownership of land parcel 1414 but he did not mention his claim for the suit land. The applicant claims that the suit land was allocated to the 2nd Respondent Mike Kisalu Nguli in the succession Cause However, the confirmed grant has not been exhibited to prove this. The only document availed shows a proposal by the administrator to allocate the suit land to himself while the land parcel 1414 was allocated to the 2nd Respondent.

41. Further the Applicant claims he reported the dispute to the clan in 1987 when it was deliberated upon and it was decided he be given the suit land. However, it is noted that the disputed land the subject of the clan decision exhibited is not identified. This poses a problem considering that the applicant was during the same period claiming beneficial ownership and possession of land parcel 1414. I would agree with the respondents' contention that it is more likely that the claim before the elders was on the same land parcel 1414.

42. I do therefore find that the Applicant has failed to prove the time when he took possession of the suit land to enable the court ascertain whether or not his possession has been for a period of over 12 years.

43. The other element to be proved by the applicant is that possession of the suit land was continuous, uninterrupted and unbroken. In ELC 206 of 2017 Malindi, The applicant claimed to have been in continuous un-interrupted possession of the land parcel Mugumo Pasta/Mazeras/1064 in Malindi. During the same period of time he claims to have been in continuous un-interrupted possession of the suit land. He was also claiming land parcel 1414 and to have built and occupied the same. In the circumstances of the present suit it was upon the applicant to show how he lived during the same period of time with his family in the three parcels of land Nzambani/Kyanika/1409, Nzambani/

Kyanika/1414 and Mugumo Pasta/Mazeras/1064 owned by different people always bearing in mind that the onus was on him to prove his claim. In my view the applicant has not discharged the onus placed on him to prove this part of his claim. The Court in ELC 206/2017 confirmed his claim while the land Registrar confirmed that the applicant had a home on land 1414. On my part, I do find the applicant has not proved that he has been in continuous and uninterrupted occupation of the suit land for the statutory period of 12 years.

44. One of the other requirements for a successful claim of adverse possession is that the owner or the proprietor must not have taken steps to assert his rights over the suit property. In my view assertion of rights is contemplated within the 12 years' window. If one cannot ascertain the time of entry onto the land by the claimant, then it is difficult to say at what point the owner's right to remove the claimant was extinguished.

45. The Respondents acknowledge that the Applicant has been on the suit property, but they have denied that the occupation has been for a period of twelve years or that it was continuous, uninterrupted or unbroken. Possession is a matter of fact and there must be actual possession which requires some sufficient degree of physical occupation.

46. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR stated as follows while commenting on burden of proof in the Kenyan context and noted that:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:-
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> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
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> The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:-
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> > "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
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> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that: -
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> > "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

47. In my opinion, the Applicant's claim of adverse possession is not certain because he failed to prove that his occupation on the suit property was continuous, uninterrupted and unbroken. The Court in *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR found that:

> " ...Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances..."

48. Lastly, the Applicant had an alternative prayer that he was entitled to the suit land by trust but he did not indicate what kind of trust or how when and why a trust would have been created. The Appellant relied on the Court of Appeal case of *Phillicery Nduku Mumo v Nzuki Makau* [2002] eKLR where the court held that:

> " It is trite that trust is a question of fact and has to be proved by evidence. This Court said so in Wambugi v Kimani [1992] 2 KAR 58." In that case, the Court had noted that:
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> The suit land originally belonged to the late Makau Mbwana who had married two wives, namely, Anna Wayua who was the mother of the appellant and Mueni, the mother of the respondent. The appellant, who is married, is the sole surviving child of her mother. By the time Makau Mbwana passed away in or about 1969, his land had not been demarcated nor sub-divided and his two wives continued to occupy and till it in common..... In our view, there is ample evidence to show that Makau owned the original parcel of land, that is plot No 403. His entire family lived on it. The appellant's mother as the first wife of Makau took active part in the demarcation and registration of the suit land since Makau was dead. She was to hold the suit land in trust for the entire family of Makau. She acted fraudulently in trying to deny the house of Mueni of its natural inheritance. On our own consideration of the evidence on record we agree with the learned judge that Customary Law trust had been proved." The Court proceeded to dismiss the appeal before it.

49. For the foregoing reasons I do find that the applicant has failed to prove a claim of adverse possession or trust against the respondents over the suit land Nzambani/Kyanika/1409. The suit herein is found to have no merit and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 23RD DAY OF MARCH, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Judgement read in open court and virtually in the presence of:

C/A Musyoki

Wambua for the Applicant

Kiema for the Respondents