EQUITABLE ACCESS TO LAND FOR POVERTY REDUCTION IN AFRICA: EXPANDING THE ORTHODOX JUSTIFICATIONS FOR THE ADVERSE POSSESSION DOCTRINE

Taiwo Ajala[*]

Abstract

There is a relationship between lack of access to land and poverty in African countries. Poor people are mostly excluded from access to land. Since the dawn of post-colonialism in Africa, an enduring question has been how to achieve equitable access to land for poverty reduction and sustainable livelihoods. Adverse possession doctrine allows the transfer of title to land to a person occupying land without the owner's consent throughout a period of time prescribed by a limitation statute. In spite of the justifications for the doctrine, there are critics that call for its abolition or substantial amendment. Critical questions are posed about the fairness and justice in a legal doctrine that rewards a wrongful, or even criminal, act of trespass that ought to be sanctioned. The criticisms are now finding more meanings in the contexts of constitutionally entrenched right to private property, and the introduction of title registration system. Thus, adverse possession doctrine may be potentially drowned by the growing criticisms that reference these realities, unless a more utilitarian justification is advanced for its continued application. The objective of this paper is to propose an access to land justification for adverse possession doctrine in African countries.

Keywords: Access to land, adverse possession, limitation statute, acquisitive prescription, poverty reduction

1. Introduction

It is now well established and generally acknowledged that land is central to human productivity and sustainable livelihoods.[1] In Africa, one key aspect of the land question is how to ensure that land effectively plays its central role in the continent's socio-economic development process.[2] More particularly, in ensuring equitable access to land for equal economic opportunities, increased productivity, poverty reduction and shared prosperity. Increased productivity, whether in the form of subsistence or commercial agricultural practices, requires access to land. There is abundance of development economics literature on the role of agriculture in poverty reduction, including robust empirical research evidence which indicates that agricultural productivity can deliver

[*] **T Ajala,** PhD (Leeds), Faculty of Law, Lagos State University Ojo, Lagos, taiwoajala01@gmail.com

[1] K Deininger, *Land Policies for Growth and Poverty Reduction*, (World Bank and Oxford UniversityPress, 2003); L Cotula L, C Toulmin & Quan J, *Better Land Access for the Rural Poor : Lessons from Experience and Challenges Ahead*, (4IIED, FAO) 2006.

[2] FFK Byamugisha, 'Securing Africa's Land for Shared Prosperity: A Program to Scale Up Reforms and Investments', *Africa Development Forum Series*, (Washington, DC: World Bank. doi: 10.1596/978-0-8213-9810-4) 2013.

poverty reduction in African countries.[3] More so, if there is equity in access to land to include vulnerable groups such as women, the poor and landless minorities.

The modes of acquiring land or title to land have significant impact on overall access to land, particularly for agricultural production.[4] In Africa, one mode of acquiring title to land is through adverse possession doctrine. This doctrine allows the transfer of legal title to land to a person occupying land without the owner's consent and after a period of time as prescribed by relevant limitation statute. While adverse possession has roots in the old common law equitable doctrines of laches and acquiesces, it is now mostly derived from Statutes of Limitation which prescribe the periods within which to bring action for the recovery of land from squatters or trespassers. Failure to bring such action within the statutory limitation period extinguishes the land owner's right to recover while the adverse possessor is conferred with ownership rights over the land.

In spite of these justifications for adverse possession doctrine, there have been excoriating criticisms and commentaries that call for its abolition or substantial amendment[5]. Critical questions are posed about the fairness and justice in the doctrine which allows the law to effectively reward a wrongful, or even criminal, act of trespass that ought to be sanctioned. In contemporary times, criticisms of the doctrine are finding more meanings in the contexts of constitutionally entrenched right to private property, and the introduction of title registration system. Thus, adverse possession doctrine may be potentially eclipsed by the growing criticisms that reference these realities, unless a more utilitarian justification is advanced for its continued application.

The objective of this paper is to propose an access to land justification for adverse possession doctrine in African countries. It is argued in this paper that the doctrine enhances opportunity for equitable access to land for majority of poor rural people and peri-urban squatters who utilize vacant lands that are long abandoned by their legal owners. The paper is structured into five sections. After this introductory section, section two reviews the underlying philosophy and principles of adverse possession as a mode of acquiring land in African countries. In section three, the justifications of adverse possession doctrine are critically examined while section four discusses the trends which

[3] B Losch, S Fréguin-Gresh and ET White, *Structural Transformation and Rural Change Revisited: Challenges for Late Developing Countries in a Globalizing World* (World Bank: DC) 2012; B Dafflon and T Madiès, *The Political Economy of Decentralization in Sub-Saharan Africa: A New Implementation Model* (Washington DC: World Bank) 2013; M Hallward-Driemeier and T Hasan, *Empowering Women: Legal Rights and Economic Opportunities in Africa.* (Washington DC : World Bank) 2013; M Hallward-Driemeier, *Enterprising Women: Expanding Economic Opportunities in Africa*. (Washington DC : World Bank) 2013.

[4] This point is expatiated in Section Five on Access to Land Justification for Adverse Possession Doctrine

[5] H Conway and J Stannard, 'The emotional paradoxes of Adverse Possession', *ibid*; S. Swanson, 'Sitting on Your Rights: Why the Statute of Limitations for Adverse Possession Should Not Protect Couch Potato Future InterestHolders', *Florida Coastal Law Review*, (2011) 12(2): 305-336.

pose existential threats to the continued application of the doctrine. The paper's approach in sections two to four is analytical review of relevant literature and jurisprudence in order to establish the applicability of the doctrine in Africa countries, including the trends in how it is appraised, particularly in light of contemporary legal realities. The final section five argues the case for access to land justification for the continued application of adverse possession doctrine in African countries.

2. Adverse Possession Doctrine: Philosophy and Principles

As noted by Burns, adverse possession doctrine was first developed in England in a legal era when the idea of property and the philosophical basis of title were deeply rooted in the physical possession of land.[6] From that era, property in land has been more about fact than about right; in the often quoted words of Gray and Gray, ownership of land derives ultimately not from 'words upon parchment' but from the elemental primacy of sustained possession[7]. Thus, claim to rights and interests in land on the basis of possession have been recognized under English common law. Also, under statute of limitation possession of land that endures for a prescribed period of time is capable of conferring right of ownership of the land on the possessor.[8] Statutory prescription of limited periods for land owners to recover possession from trespassers is the definitive essence of adverse possession doctrine. The combined effect of the doctrine under common law and statute of limitation is that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title within the period prescribed by the applicable Statute of Limitation, his right is forever extinguished and the possessory owner acquires an absolute title[9].

An underlying philosophy of adverse possession doctrine is that the English system of land law which avoids the concept of absolute ownership, and based on possession and relativity of title, has a significant weakness. There is always a danger that a person

[6] F Burns, Adverse possession and title-by-registration systems in Australia and England, (2011)35 MELB. U. L. REV. 773, at p. 783. The author notes that under the principle of seisin, the English common law did not subscribe to a notion of absolute ownership of property (which was more characteristic of the Roman law). Even an entitlement to the land based on seisin was only relative. Therefore, in an action to recover the land, the question was whether the claimant possessed an earlier and legallybetter seisin than the defendant. Possession thus underpinned the notion of 'seisin' as a person could only claim seisin if he or she possessed the land or was in a position to possess the land.

[7] KJ Gray and SFGray, Elements of Land Law (5th edn, OUP, 2009) 1159

[8] For example, the first English Limitations Act 1623 barred the right of true owner of land to recover possession after the time limit for recovery. The current law is the Limitation of Action Act 1980 which provides a period of 12 years for the recovery of unregistered land and 30 years for recovery of Crown land. See c 58, s 15

[9]Judicial Committee of the Privy Council in *Perry v Clissold* (1907) AC 73, at 79; Adverse possession is thus actuated under the combined effect of common law and statute. See Butt. The author explains that the law governing possessory title is a mixture of common law and statute. Common law determines the required nature of possession. Statute determines the required duration of possession.'

exercising possession and control over the land may be subject to a claim based on prior events by an earlier possessor who the law deems to have the better title. In order to deal with this danger, claims to land have to be barred by a statutorily based concept of limitation[10]. Therefore, the historical importance of possession in the English common law constitutes a philosophical foundation for adverse possession doctrine. And the doctrine finds practical expression through some essential principles that set conditions or define factual circumstances that must exist before an adverse possessor can rely on applicable limitation statute in order for his possessory right to be transformed into ownership right.

For example, the adverse possessor must show factual possession (*factum possessionis*) and a clear intention to possess (*animus possidendi*) the land in a manner that is inconsistent with the right of the legal owner.[11] The factual possession must be exclusive, open, continuous and without the consent or permission of the legal owner. Exclusive factual possession implies that the adverse possessor must be in control and dealing with the land as an occupying owner[12]. The adverse possessor's control and use of the land must be notorious and without any concealment, open enough to be capable of being known by any parties interested in the land. In addition, the adverse possessor's use of the land must be continuous over a period prescribed by the relevant statute of limitation. Also, the adverse possessor's intention to possess the land is to the exclusion of all other persons, including the true owner.[13]

Uninterrupted or uncontested exclusive possession and intention to possess the land throughout the statutorily prescribed period extinguishes the right of the true owner to recover the land from the adverse possessor. The initial adverse possession is thus transformed into legal ownership hence the doctrine is a veritable mode of acquiring legal title to land. This doctrine is recognized with the same philosophy, principles and effect in African countries that received the English common law and statutes of limitation during the period of colonialism. The doctrine is the functional equivalent of acquisitive prescription in civil law jurisdictions.[14] In those jurisdictions, title by acquisitive

[10] FBurns, Adverse possession and title-by-registration systems in Australia and England: *ibid.*
[11] Per Hoffman J in *Buckinghamshire County Council v Moran* [1989] 2 All ER 225
[12] Per Slade J in *Powell v McFarlane* (1979) 38 P & CR 452, 470–2
[13] It should be noted that the requisite intention is that of the adverse possessor and not that of the legal owner, irrespective of the owner's intention of future plans for the land. And the requisite intention of the adverse possessor is only the intention to possess and not intention to own the land. See the judgement of Lord Browne-Wilkinson in *Pye (JA) (Oxford) Ltd v Graham* [2002] UKHL 30; [2003] 1 AC 419, 435–6
[14] Prescription is a means whereby legal rights may be gained or lost through the passage of time. Whereas acquisitive prescription creates rights, extinctive prescription extinguishes them. For a comparative analysis of the two types of prescription, see DM Walker, The Law of Prescription and Limitation of Actions (2002: 6th edition, W.Green)

prescription is acquired based on physical possession (*civilis possessio*) of the land with the intention of an owner (*animus domini*) during the prescription period[15].

In some African countries with legal systems based on civil law tradition,[16] or a combination of both civil and common law traditions like in South Africa, acquisitive prescription is an original mode of acquiring title to land by means of open and undisturbed possession for an uninterrupted period of time as provided in the applicable Prescription Act. For example, the South African Prescription Act[17]provides that a 'person acquires ownership over property that has been possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years'. In the case of *ZF Stoffberg& others v City of Cape Town*[18],the South African Supreme Court of Appeal held that the continuous possession required by this section is the common law *civilispossessio*, that is, the physical detention of the thing (*corpus*) with the intention of an owner (*animus domini*). In addition, that possession must be peaceably, must not have been a grant on the request of the possessor, and must be open, particularly 'so patent that the owner, with the exercise of reasonable care, would have observed it.'[19]

Like in adverse possession doctrine, in order to create a prescriptive title in civil law jurisdictions the occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognizes the ownership of another. But unlike in adverse possession, the concept of 'adverse user' in acquisitive prescription does not constitute an additional requirement but refers to the element of *civilis possessio* or physical possession of land.[20] That is, what is required is physical possession which is exclusive of the true owner. In African countries with common law tradition, the applicable limitation statutes for adverse possession are mostly adaptations of the United Kingdom Limitation Act.[21]

For instance, the Kenyan Limitation of Action Act[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

[15] For a comprehensive and comparative discourse on acquisitive prescription and adverse possession in civil law and common law traditions respectively, seeYaëll Emerich, Comparative Overview on the Transformative Effect of Acquisitive Prescription and Adverse Possession:*ibid*

[16] Due to colonial history, adverse possession is the legal term mostly in use in Anglo-phoneAfrican countries that received the English common law while acquisitive prescription ismostly the termrecognized in the laws of Franco-phone African countries that were colonized by civil law European countries such as France, Portugal and Belgium.

[17] Section 1 of the Prescription Act 68 of 1969 ; Seealso section 6

[18] (1325/2017) [2019] ZASCA 70 (30 May 2019)

[19] Per Van der Merwe, JA. At page 5

[20]See judgment of Jansen, JA in the South African case of *Bisschop v Stafford* 1974 (3) SA 1 (A) at 8D-F

[21]1980, c 58

[22] 2003 Cap 22 Laws of Kenya, section 7

which the right of action accrued to him.[23] In a long line of casessuch as *Muhena v Registar of Titles & Land Officer*[24],*Gitu v Ndungu*[25], *Mutiso v Mutiso*[26], and *Malcom Bell v Daniel TorotichArap Moi & Anor*[27], Kenya courts have interpreted the provisions of this Act in accordance with the underlying principles and the effect of adverse possession doctrine. Provisions of the Kenyan Limitation of Action Act are exactly worded like that of the Limitation of Action Laws in Nigeria[28]. And like in the UK Limitation Act, both Kenyan and Nigerian laws provide that at the expiration of the prescribed period the title of the true owner of the land is extinguished, and the consequence is that the adverse possessor is entitled to be registered as the legal owner[29].

In most African countries like Kenya and Nigeria, adverse possession was initially applied mostly in cases of boundary encroachment and equitable purchasers with colour of title. But it has since evolved to apply in all cases of possession of land that is inconsistent with the owners' right for a period long enough to satisfy the applicable limitation statutes, after which title rests on the adverse possessor. Therefore, adverse possession doctrine constitutes an established mode of acquiring title to land in African countries[30].

3. Orthodox Justifications for Adverse Possession Doctrine

The principles and effect of adverse possession doctrine are crystallized in the applicable provisions of limitation or prescriptive laws. These laws impose a period of time, typically 12 years in common law jurisdictions and 30 years in civil law jurisdictions, during which owner of land can recover possession from an adverse possessor. At the expiration of the prescribed period, the adverse possessor becomes entitled to legal

[23] This is the samewording of section 15(1) of the UK Limitation Act 1980 whichprovides, *inter alia*: ''No action shallbebrought by anyperson to recoverany land after the expiration of twelveyearsfrom the date on which the right of action accrued to him …''

[24] EACA No.20 of 1948

[25] (2001) 2 EA 376

[26] [1998] LLR 3268 (CAK)

[27] (2012) KLR civil appeal no.129 of 2006

[28]Section 16(2) (a) of the Limitation Law, Laws of Lagos State. This law is representative of the Limitation of Action Laws in Nigeria. Like in Kenya and South Africa, case law in Nigeria also affirms the principles and effect of adverse possession doctrine. See *Ogunbiyi v Adewunmi* (1988) 5 NWLR (Pt. 93) 215; *Tewogbaid v Obadina* (1994) 4 NWLR (Pt. 338) 326; *Davies v Ajibona* (1994) 5 NWLR (Pt. 343) 234; *Amobi v Amobi* (1996) 8 NWLR (Pt. 469) 638; *Madumma v Jambo* (2001) 15 NWLR (Pt.736) 461

[29]See section 17 of the Kenya Limitation of Action Act 2003 and section 21, Limitation Law, Laws of Lagos State, 2003; Under the English Limitation Act 1623 the only effect of the expiration of the limitation period was that the owner's right to bring an action to recover the land was barred. But the English Real Property Limitation Act 1833 radically changed this approach, and the extant UK Limitation Act 1980 has retained the 19th century innovation that at the end of the limitation period, both the right of action to recover the land and the original owner's title are automatically extinguished. See Burns, F. Adverse possession and title-by-registration systems in Australia and England: ibid

[30] In the context of thispaper, adverse possession doctrine necessarilyimplies acquisitive prescription in civil lawAfrican countries

ownership of the land[31]. This effect of adverse possession doctrine has been described a century ago as "an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law''[32]. It is indeed curious why the doctrine disentitles a land owner in favour of a squatter or trespasser merely on the passage of time.

But just as its underlying philosophy and principles, adverse possession has been jurisprudentially anchored on certain justifications since it became a functional doctrine in English common law. In this paper, these justifications are considered as orthodox in that that they were the reasons adduced for the application of the doctrine in the earliest cases where the doctrine was recognized and applied. For example, the justifications can be gleaned from the reasons given by Lord Chancellor Eldon in the early nineteenth century case of *Cholmondeley v Clinton*[33] thus;

> The public have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he had long been allowed to consider as his own, and on the faith of which, the plans in life, habits and expenses of himself and his family may have been (as it is alleged in the present instance they were) unalterably formed and established.

What stands out from the above quote are that: a) Title should be withheld from the negligent owner who slept on his right by refusing to assert same within the prescribed period of limitation; b) There should not be endless opportunity for litigation on claims that have become stale with no evidence and witnesses of the facts due to the passage of time; and c) It is in the public interest to confer title on adverse possessors who have become entirely dependent on the land throughout the prescribed period of limitation[34]. Through the centuries since these reasons for adverse possession were stated in

[31]This usually by the adverse possessor applying to the court for declaration of title in his favour.
[32] HW Ballantine, "Title by Adverse Possession" (1919) 32 Harvard Law Review 135-159 135
[33] [1820] EngR 550 ; In reachingthis holding, Lord Eldonevenreferred to older cases decided in the eighteenth and seventeenth centuries such as *Bonney v Ridgard* (1 Cox 145), per Lord Kenyon;*Andrew v Wrigley* (4 Bro. C.C 138), per Lord Alvanley;*Hercy v Dinwoody* (2 Ves. Sen 87) per Lord Alvanley; and *Stackhouse v Barnston* (10 Ves. 466)
[34]These justifications are furtheremphasized by the Lord Chancellor, to wit; ''The quiet and repose of the kingdom, the mischiefarisingfromstaledemands, the laches and neglect of the rightfulholder, and all the otherprinciples of public policy, takeaway the remedy, notwithstanding the title "veridomini," and the tortious holding of the possessor''.

Cholmondeley v Clinton, there have been formulations and re-formulations of ''justifications for adverse possession''in relevant literature[35]. But flowing fromLord Eldon's holding, and from the relevant literature, this paper distils three main orthodox justifications for adverse possession: a.) the punishment justification; b.) the legal certainty justification; and c.) the public interest or utilitarian justification[36]. These are briefly discussed below in order to highlight their scope.

Punishment Justification: This orthodox justification is deducible from Lord Eldon's statement to the effect that; title should be withheld from the negligent owner who slept on his right by refusing to assert same within the prescribed period of limitation. This has been reiterated by Merrill[37] who argues that owners who fail to monitor or make use of their land for a long period should be 'punished for sleeping on their rights'. According to Stern[38], this justification is based on the understanding that if owners fail to enforce their rights, they cannot complain if, after a while, the law follows their example. Adverse possession doctrine is thus justified as it serves as a penalty for a land owner who neglects what is his own, and shows contempt by his negligence.[39] The doctrine thus serves as incentive for owners to look after their land as failure to so do would attract the punishment of losing their property to strangers.[40]

Legal Certainty Justification: Also gleaned from Lord's Eldon statement in *Cholmondeley v Clinton* is that there should not be endless opportunity for litigation on claims that have become stale with no existing evidence and witnesses of the facts due to the passage of time. This approximates to legal certainty justification as formulated in the

[35]M Dockray "Why do we Need Adverse Possession?" 1985 Conveyancer 272-284 274; Stake, JE, 'The Uneasy Case for Adverse Possession', Geo. L.J. Vol. 89, 2011,
pp. 2419-2474;Ellickson, RC, 'Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of PropertyRights', Washington University Law Quarterly, Vol. 64, 1986, pp. 725-734; Singer, JW, 'The Rule of Reason in Property Law', UC Davis Law Review, Vol. 46, 2012-2013, pp. 1375, 1399-1400.
[36]Stern uses these three justifications but states that '[T]he main attempts to justify the doctrine come from three different angles: the first focuses on the owner, the second deals with the possessor and the third looks at society at large'. The author's categorization is obviously compatible with this paper's three formulations from Lord Eldon's statement in Cholmondeley v Clinton. See
[37] TW Merrill, 'Property Rules, Liability Rules, and Adverse Possession', NorthwesternUniversity Law Review, Vol. 79, (1984-1985), pp. 1122, 1130.
[38] Stern, Shai, David. *Against Goliath: The Distributive Justification for the Adverse Possession Doctrine: New Perspectives on Acquisitive Prescription* (Bjorn Hoops and Ernst Marais eds, 2019). Available at SSRN: https://ssrn.com/abstract=3447130.
[39]EJ Marais Acquisitive Prescription in View of the Property Clause. (2011) Dissertation presented in partial fulfilment of the requirements for the degree of Doctor of Laws at Stellenbosch University. Available at Stellenbosch University http://scholar.sun.ac.za. Retrieved 10 March 2020
[40] One of Dockray's three justifications for adverse possession – to encourage owners not to sleep on their rights – obviously derives from this orthodox justification except that the author does not state punishment as a consequence if they do 'sleep on their rights. See M Dockray, "Why do we Need Adverse Possession?" ibid

literature. For example, Dockray[41] justifies adverse possession by explaining that it promotes legal certainty by protecting long-term possessors from stale claims, hence it helps to 'quiet titles'.In the analysis of Stake,[42] adverse possession is justified on the grounds that it promotes legal certainty and avoids unnecessary litigation concerning ownership of land thereby preserving the peace. Adverse possession doctrine thus prevents lawsuits where evidence pertaining to ownership has been lost and parties would find it difficult to prove their claims or defend their ownership in situations where the events occurred long ago[43].Gray and Gray[44] also noted that long-term possession of property can create an impression of ownership that is able to mislead third parties, therefore it is best to grant *de iure* status to *de facto* scenarios that have existed for some time.

Public Interest or Utilitarian Justification: It is in the public interest to confer title on adverse possessors who have become entirely dependent on the land throughout the prescribed period of limitation.This is the third orthodox justification as gleaned from the statement of Lord Eldon in *Cholmondeley v Clinton*. Dockray explains under this justification that adverse possession ensures that a possessor can feel confident that an incident which might have led to a claim against him is finally closed, and that his right cannot be called into question after a certain period of time has elapsed. A case for acquisitive prescription has also been made on this justification that the adverse possessor who has taken care of another person's property "should be confirmed in his possessory situation without the risk of being evicted" by the owner after the prescribed period of time has come and gone[45]. Stern[46] has pointed out that this third justification focuses not solely on the interests of the owner or the adverse possessor, but examines the situation more broadly, through the eyes of society at large.

This third orthodox justification is the foundation for the emergent utilitarian justification of adverse possession doctrine as it encourages the use, maintenance and improvement of natural resources for the overall benefit of the greater number of people that make up the society.[47]The doctrine is thus seen to be in the public interest because it rewards the resourceful possessors who make constructive use of available land. In this sense, the doctrine promotes effective land use, since it is in the public interest to promote the use

[41] M Dockray "Why do we Need Adverse Possession?", ibid
[42] JE Stake, 'The Uneasy Case for Adverse Possession':ibid
[43] DK Irving, "Should the Law Recognise the Acquisition of Title by Adverse Possession?" (1985) 2 AustralianProperty Law Journal 112-119 114
[44] JK Gray & SF Gray Elements of Land Law:ibid
[45] E Steiner, French Law – A Comparative Approach (2010) 395. Cited in Jacobus
[46]Stern, Shai, David. (2019) Against Goliath: ibid
[47] Jacobus identifies Mill'stheory of utilitarianism to justify adverse possession, statingthat the transfer of ownership to a long-termpossessor serves the cause of greater justice than to permit the absent owner to reclaim the propertyafterhavingleftitidle for long period of time. See Ernst Jacobus Marais (2011) Acquisitive Prescription in View of the Property Clause. ibid

of limited resources.[48] For contextual clarification, modern justifications for adverse possession doctrine based on the analysis of the Lockean labour theory, Radin's personality theory and Singer's reliance theory are derivable from this third orthodox justification[49]. Lockean labour theorists postulate that an adverse possessor is justified to claim the land if he occupied land and invested his labour in land that would otherwise lie abandoned by it owner[50]. Radin's personhood theory of property recognizes the contribution of certain resources to the development of their owner's or possessor's personhood[51]. Thus, priority, or at least consideration, should be given to the development of bonds of personhood when deciding thequestion of who ought to be granted the property. In a situation where the owner has been absent from the land for many years, but the possessor uses it frequently and continuously, the bonds of personhood may justify transferring the title of ownership from the owner to the possessor[52].

4. Trends in Adverse Possession Doctrine

In the preceding section, adverse possession doctrine is traditionally justified on the grounds that it rewards a diligent trespasser and penalize the indolent and negligent land owner for sleeping on his rights. It avoids multiplicity of law suits as a result of stale claims that have been overtaken by events, brings certainty to land titles and encourages the use of land for the benefit of society. However, the functional effect of the doctrine is that it transforms a trespasser into a legal owner after the running of the applicable statute of limitations. The assertion has been made that the inception of adverse possession brings about one of the larger paradoxes of the law of realty – an uncompensated shift of economic value to the squatter or interloper – as estate ownership is fundamentally determined by behavioural fact rather than by documentary record[53]. Conway and Stannard pointed out that the first paradox lies in the doctrine itself; a wrong becomes a right, such that what was originally a tort committed against the land owner becomes the basis of the trespasser's legal title[54].

Adverse possession doctrine is thus one of the most unusual concepts in the law in that it rewards a wrongdoer for successfully carrying out his wrongful act hence, it has been variously described as land piracy or acquisition of title by theft, and a primitive method

[48] M Dixon, "The Reform of Property Law and the Land Registration Act2002: A Risk Assessment" 2003 Conveyancer 136-156 151-152.
[49] For a comprehensiveanalysis of thesetheories in justifications of acquisitive prescription and adverse possession doctrine, see Ernst Jacobus Marais (2011) Acquisitive Prescription in View of the Property Clause. ibid
[50] Ernst Jacobus Marais (2011) Acquisitive Prescription in View of the Property Clause. ibid
[51] M.J. Radin, 'Time, Possession, and Alienation', Washington University Law Quarterly, Vol. 64, 1986, p. 739
[52] Stern, Shai, David. (2019) Against Goliath:ibib
[53] KJ Gray and SF Gray, Elements of Land Law:ibid
[54] Heather Conway & John Stannard. The emotional paradoxes of adverse possession:ibid

of acquiring land without paying for it[55]. The value of the doctrine has long been questioned on both moral and legal grounds. For instance, Merill and Smith[56] noted that someone who deliberately takes the property of another should not be rewarded for such behavior because the immorality of the original act of deprivation trumps all considerations of utility that can be argued on the other side.

It has been arguedthat there is an overwhelming sense in which adverse possession is morally and legally wrong, and that laws which allow it are unjust, unfair and in urgent need of change[57]. In addition to justice and fairness, adverse possession doctrine is now increasingly criticized in light of contemporary legal realities such as constitutional provisions on right to private property, and statutory provisions on land and title registration system. These are briefly examined below so as to appraise their effect on the doctrine and its orthodox justifications.

a. Justice and Fairness

Adverse possession doctrine is considered to be manifestly unjust and unfair in its harshness on the land owner, an illogical and a disproportionate consequence for the innocent owner's neglect of his land[58]. The height of the injustice and unfairness is that in its effect the doctrine does not even consider the honesty or good faith of the adverse possessor. Thus, a dishonest trespasser who deliberately occupies another person's land (for example, with knowledge that the owner is abroad or outside jurisdiction) is eventually rewarded with title to the land after the limitation period. It has been argued that justice and fairness can be introduced into the doctrine by allowing the acquisition of title only through good faith possession and preventing it in cases of bad faith possession[59].

Indeed, across jurisdictions justice and fairness considerations now find a role in adverse possession cases through the notion of reasonable belief on the part of the adverse possessor. For instance, in *Zarb& Anor v Parry & Anor*[60] the English court determined that the adverse possessors had to show that they held a reasonable belief that the parcel of land in question was their property.The court found that the possessor's belief was

[55] ME Rosser & EM Guse, 'Adverse Possession in Oklahoma: An IdeaWhose Time Has Come and Gone?' (2001) *Oklahoma Bar Journal* Vol.72, No 9

[56]TW Merill, Property Rules, Liability Rules, and Adverse Possession, 79 NAW. U. L. Rev. 1122 (1984-1985), at p. 1123

[57]Stern, Shai, David. (2019) Against Goliath: ibid

[58]See the judgment of Neuberger J in the case of Pye (Oxford) Holdings Ltd vs Graham(2000) ch 676. According to the Justice; ''I believe the resultisdisproportionate, becauseitdoesseemdraconian to the owner, and a windfall for the squatter."

[59]YaëllEmerich (2015) Comparative Overview on the Transformative Effect of Acquisitive Prescription and Adverse Possession:

[60] 2011 EWCA Civ 1306

reasonable, as they were under the honest impression that a dispute with respect to the boundaries of the land since their purchase of the land had been resolved in their favour.

In many common law jurisdictions in the United States of America (US), reasonable belief is a condition for adverse possession. In other jurisdictions in the country only those that are determined as innocent possessors, who mistakenly occupied another person's property throughout the period of limitation, can acquire ownership by adverse possession[61]. An example is *Halpern v Lacy Investment Corp*[62] where a court in the US State of Georgia held that those who knowingly occupy land of others are trespassers or squatters and cannot obtain title by adverse possession because they have not entered the land with a good faith claim of right. In Australia, some States have enacted Prohibition Acts that bar the loss of ownership through adverse possession[63]. Thus, in the interest of justice and fairness there is a trend in judicial and legislative efforts at reducing or avoiding the unfair and unjust effect of adverse possession doctrine.

b. Constitutional Right to Private Property

The application of adverse possession doctrine is strongly questioned on the ground that it undermines the constitutional right to own property in modern and democratic society of today. Most national constitutions across Africa and the world at large contain provisions that protect private property rights which the adverse possession doctrine negates and violates. For example, provisions for the protection of private property can be found in section 25 of the South African Constitution[64], section 40 of the Kenyan Constitution[65] and section 44 of the Nigerian Constitution[66]. In similar wordings, the sections respectively provide that every person has the right to acquire and own moveable or immovable property. The sections further provide that no law should permit the State or any person to arbitrarily deprive another person of his property, or restrict the enjoyment of this right. At international level, Article 14 of the African Charter on Human and Peoples' Rights[67] also protects the right to private property[68].

[61]See Helmholz RH, ''Adverse Possession and Subjective Intent'' (1983-1984) 61 WASH. U. L. Q. 331, 331; and Goodman MJ, (1989) Adverse Possession: Morality and Motive », 88 Modern L. Rev. 281 (1970), at p. 283

[62] 379 S.E.2d 519 (Ga. 1989)

[63] F Burns, Adverse possession and title-by-registration systems in Australia and England

[64] 1996

[65] 2010

[66] 1999 (as amended)

[67]1981; It came intoeffect on 21 October 1986 and itis in honour of this date that 21 Octoberwasdeclared "African Human Rights Day''.

[68] It providesthat : ''The right to propertyshallbeguaranteed. It mayonlybeencroachedupon in the interest of public need or in the generalinterest of the community and in accordance with the provisions of appropriatelaws''.

The trend is that limitation statutes that bar owners from claiming their land from adverse possessors are contested as inconsistent with the constitutional provisions on property rights. In the Kenyan case of *MtanaLewa v KahindiMwagandi*[69] 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 Kenyan Limitation of Action Act. The true land owner argued that the Limitation of Action Act was contrary to the Kenyan Constitution as such the court could not make such declaration since it would arbitrarily deprived him of his property in violation of the Constitution. The court however held that the Limitation of Action Act was not inconsistent with the Constitution and the ruling was upheld on appeal. But as *obiter dictum*, Asike-Makhandia JA stated that no court will lend its aid to a person who found his cause of action upon an immoral or illegal act[70]. This Kenyan case re-echoes the landmark English case of *JA Pye (Oxford) Ltd v Graham*[71] which terminated at the Grand Chamber of the European Court of Human Rights (ECHR)[72].

Pye's case exemplifies the debate around the continued relevance of adverse possession doctrine, particularly in view of constitutional provisions on right to private property, which is now considered as a human right. In the case, at the first instance the court held that the possessors could rely on the doctrine of adverse possession because they had had factual possession of the land for the period of 12 years as provided by the UK Limitation Act. This decision was upheld by the House of Lords[73] but reversed by the ECHR which held that adverse possession violates Article 1 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms[74], the equivalent of Article 14 of the African Charter on Human and Peoples Rights. Upon further hearing by the Grand Chamber, it held that the land owner was affected by laws pertaining to the 'control of use' of the land, rather than the deprivation of possessions in violation of property rights[75]. Although, MtanaLewa and Pye lost their land to their adverse possessors, the cases however represent the trend towards contesting adverse possession doctrine on the ground of human right to private property.

[69] (2015) eKLR
[70] The land ownerhadalsorelied on the doctrine of *ex turpi causa non oritur action* and or *ex dolo malo no oritur* (no cause of action can befounded on immoral or criminalact. The court agreedwith the land ownerthat adverse possession ispotentiallywrongful and criminal.
[71] [2000] Ch 676, 709–10
[72] *JA Pye (Oxford) Ltd v Graham* (2008) 46 EHRR 1083
[73] [2002] UKHL 30; [2003] 1 AC 419, 442–4
[74] *J A Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHHR 43. The Protocol came into force 18 May 1954. Article 1 providesthat: 'No one shallbedeprived of his possessions except in the public interest and subject to the conditions provided for by law and by the generalprinciples of international law.'
[75] *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 1083

c. Land and Title Registration System

Land registration system became popular in post-colonial African countries as part of land reform measures to achieve equity in access to land and land use. Land registration system provides a public system of records of legal rights to land and other interests in land. It provides safe and secure transactions in land as relevant information used in the land registration process are based on a comprehensive cadastral survey with details of the owner, location, plot size and boundaries of land.[76] A registered land thus has relevant and necessary information in a public record which is accessible to any persons.[77] Most African countries have even started migrating from deeds registration to Torrens system of title registration which assures conclusive proof and indefeasibility of title that is guaranteed by the State. For example, the land registration law in Nigeria enacted in 2015 is based on title registration system with provisions largely influenced by the provisions of the UK Land Registration Act 2002.[78]

The Kenyan Land Registration Act 2012 provides that registration vests in that person the absolute ownership of the land together with all the rights and privileges belonging or appertaining thereto[79]. Upon registration the land owner is issued a certificate of title which constitutes a *prima facie* evidence that the person named as the owner of the land is the absolute and indivisible owner subject only to encumbrances, easements, restrictions or any conditions endorsed on the certificate, and the title cannot be challenged except on ground of fraud or illegal misrepresentation[80]. In South Africa, the Electronic Deed Registration System Act 2019 now provides for internet-based filing and searching of deeds of title with the aim of discontinuing the manual registration procedures under the Deeds Registries Act[81] and the Sectional Titles Act[82]. Under these prevailing registration systems in African countries it is only registration that confers or extinguishes title to land, and not the effect of adverse possession doctrine.

Thus, critics find the doctrine incompatible with the system of land and title registration where by title to land is conferred by registration only and not by possession[83]. Burns[84] noted that in view of some of the 'classic' features of an ideal title-by-registration system, it would be expected that adverse possession doctrine would have little role to play in

[76]Hanstad, T. (1998) Designing Land Registration Systems for Developing Countries. American University International Law Review 13, no. 3, 647-703

[77] CS Ibekwe, Outline of Property Law and Essential Land Reforms for Nigeria, (2018)5(2)NAU.JCPL,13.

[78]See the Lagos State Land Registration Law 2015 whichis the latest land registration law in Nigeria

[79]See section 24

[80]See sections 25 and 26

[81] No. 47 of 1937

[82] No. 95 of 1986

[83] M Dixon, ''The Reform of Property Law and the Land Registration Act2002: A Risk Assessment'' CONV 136 (2003), SSRN, at p. 27

[84] F Burns, Adverse possession and title-by-registration systems in Australia and England: ibid

land law. The reason is that unlike registration system, the doctrine is based on possession (rather than registration), relative title (rather than absolute and indefeasible title) and non-compensation (rather than an assurance scheme). Accordingly, the emerging view is that the publicity and dependability features of systems of land and title registration make adverse possession doctrine no longer relevant and desirable. For instance, since the UK Land Registration Act 2002, it is believed that continued application of adverse possession doctrine is no longer justified in that country, and may only be limited to unregistered land.[85]

5. Access to Land Justification for Adverse Possession Doctrine

The trends in adverse possession doctrine gravely challenge the continued application of the doctrine. From criticisms that it lacks justice and fairness, that it violates constitutional private property right, and that it is incompatible with land and title registration system, the doctrine is increasingly subject to existential appraisals. African countries remain largely influenced by legal developments in the original civil and common law jurisdictions. The trends in adverse possession doctrine would sooner than later have judicial and legislative effects in African countries. In particular, the issue of constitutional provisions on right to private property is likely to pose an existential threat to the doctrine by the time the issue receives judicial consideration and incites legislative action. There is a strong likelihood that the Pye's case would reverberate with the potential to instigate a re-thinking of the doctrine in African countries. For instance, in the Kenyan *MtanaLewa's case* counsel to the parties cited the Pye's case in their submissions, and in their judgments both the trial and appellate courts quoted copiously from the judgments in that case.

Before the axe falls on adverse possession doctrine in Western jurisdictions, there is a need to identify a justification that is more relevant in the African context more than the orthodox justifications. However, one of the orthodox justifications provides a utilitarian consideration for the application of the doctrine. According to Lord Eldon in *Cholmondeley v Clinton*, ''[T]he statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility''. As noted in section three, the utilitarian value of adverse possession doctrine has been projected as a modern justification for the doctrine. Utilitarianism seeks to maximise "the greatest happiness of the greatest number" through legal rules that ensure maximum utility of resources[86]. Adverse possession doctrine is thus in the public interest because it rewards the resourceful possessor who makes effective use of available land.

[85]YaëllEmerich. Comparative Overview on the Transformative Effect of Acquisitive Prescription and Adverse Possession: ibid.
[86] JM Kelly, A Short History of Western Legal Theory (1992) 317.

The implication of the utilitarian justification for the doctrine is that it ensures access to land, particularly land that is unutilized or abandoned by the owners such that anybody can afford to move in and occupy. In Africa, the existing land ownership and tenure systems have not ensured equitable access to land and effective use of available land. And decades of post-colonial land reforms have not solved the problems. Lack of equity in access to land for productive uses has caused livelihood problems and deepened poverty especially among the vulnerable groups such as women and poor families who constitute the majority of African population. Since the dawn of post-colonialism in Africa, an enduring question has been how to achieve equity in access to land while resolving colonial legacies which suppressed indigenous land ownership rights, displaced communal land administration structures and marginalize poor majority in access to land.[87]

But the colonial legacies have been re-invented in most African countries in the forms of nationalization, class and gender differentiation, including elite capture, in land ownership. In the search for an approach towards maximizing access to land resource as a function of public welfare, economic productivity and quality of life for the vulnerable majority in Africa, adverse possession doctrine has much to recommend it. For instance, amongst the legally recognized modes of acquiring title to land in Africa include: acts of long possession and use of land and; acts of ownership extending over a long period of time sufficient to warrant the inference that the possessor is the owner[88]. These modes of acquiring title to land are indigenous to African customary land law existing before the period of colonialism and the introduction of common law adverse possession doctrine. The doctrine is thus compatible with a fundamental principle of African customary land law.

Statutory interventions to reform land ownership in Africa countries through nationalizing land and introducing land registration system have not been able to sweep away customary land ownership systems, particularly in rural and peri-urban areas where vast and unused land suitable for agriculture is mostly found. For example, land reform policies and legislations in post-apartheid South African included the formalization of communal land holdings under customary systems in rural communities where lands were held in trust by community leaders on behalf of the people. The objective was to ensure registration of communal land by giving the implementation of land administration procedures to traditional councils and local committees[89]. In Nigeria,

[87] P Bond, 'Elite Transition:From Apartheid to Neoliberalism in South Africa.' (2000) University of Natal Press and Pluto Press, Pietermaritzburg and London

[88]See the landmark Nigerian Supreme Court case on mode of acquisition of title to land ; *Idundun v Okumagba* (1976) 9 – 10 S.C 229. From the case, thiswas the position throughout West Africa

[89]M Aliber, M Themba, M Tshililo, P Gaynor and B Cousins, 'Land Reform and Livelihoods:Trajectories of Change in Northern Limpopo Province, South Africa' (2013) Human Sciences Research Council, Cape Town.

despite the post-colonial Land Use Act 1978 which nationalized land, original family and communal land owners across the country continue to assert ownership rights, particularly in rural and peri-urban areas. There is now a formal recognition of customary land ownership by the States in Nigeria in that they require land purchase receipt issued by the original family or communal land owners before application for Certificate of Occupancy is approved, even with respect to land in urban areas[90].

Customary land ownership system has proved tenacious and statutory interventions to ensure State's total control over land has proved unsuccessful. The result is that in rural and peri-urban Africa where family and communal trustees are in control and management of land, access to land is mostly dictated by availability and need; people are granted access to occupy vacant land for farming, grazing of livestock, harvesting of fruits and for other purposes that support livelihood. Owners of land fully know that long abandonment of their vacant land would make it liable to be occupied – upon the authority of the communal trustees – by persons who are in need of land for immediate agricultural use. In urban areas this also applies to land sold or allocated to people for residential or industrial purpose, if such land is left vacant and abandoned without building structures for a long period of time[91].

The underlying objective is to grant access to land to people who need land for immediate uses rather than to acquire title. There is no intention to ''punish'' the negligent owner or to ''quiet'' the owner's title because in such cases the affected owners do not suffer total loss; they are offered the option of alternative plots of land in another part where land is available. Essentially, the laws in African countries do not prohibit the occupation of vacant and abandoned land by persons other than the owner. Rather, adverse possession doctrine encourages such occupation. Therefore, in African countries, even the poor landless and homeless people can occupy vacant and abandoned property anywhere they find it. The reason is that in the absence of the owner's assertive action or delegated authority to prevent or retrain trespassers and squatters, nobody plays that role. The need for land and the availability of such vacant land offer the opportunity for access to land to those who cannot afford it but need land for a better life.

However, in all cases, long occupation and use by the possessor may raise the presumption of ownership in favour of the possessor when available witnesses may not know the true owner but can only testify to the facts of years of exclusive possession by the possessor. This is the point where adverse possession doctrine becomes conducive to equitable access to land as the erstwhile landless persons who occupy land are presented with legal justification by the doctrine. The doctrine thus prevents the dispossession of

[90]This is from the author'sprofessional knowledge. And it is a common knowledge among property law practitioners and experts

[91] This is from the author's professional knowledge as property law practitioner and expert

persons who gained access to vacant and abandoned land at a time they were landless and in places they lacked requisite capacity to acquire land. Especially, vulnerable groups such as rural women and non-indigenes with no entitlement to land are able to access vacant and abandoned land for agricultural uses. Also, the urban poor with no financial capacity to acquire land are able to squat in vacant land for residential purpose or commercial activities like petty trade and crafts.

There is therefore access to land at a minimal or no cost to this group of disadvantaged people in rural, peri-urban and urban areas. It is in this sense that adverse possession doctrine is more justified because it fortifies poor people to move into vacant land and occupy same so long there is no resistance from the owner. The doctrine does promote equitable access to land as members of the socially and economically disadvantaged group are not totally excluded from the land resource. Without the State's positive action or pro-poor land policy, this vulnerable group is able to occupy and use land when and where the opportunity of vacant and abandoned land offers itself.

Contrary to the trends in 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. 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 title from the owners. For this category of poor people, the doctrine can only serve as a shield and not as a sword.

5. Conclusion

There is a relationship between lack of access to land and poverty in African countries. Poor people are mostly excluded from access to land. Adverse possession is a legal doctrine that enhances the opportunity for poor people in African countries to have access to land for agricultural uses, such as the production of food crops and livestock, and other activities that support livelihood and improve the quality of life. From its orthodox justifications, adverse possession doctrine can mostly be justified by its potential to contribute to equitable access to land for the poor and vulnerable group in African countries. This justification fits into the public interest or utilitarian orthodox justification in that it serves the interest of the poor majority. Access to land justification for adverse possession doctrine produces justice and fairness to the poor in the society. It does not threaten constitutional right to private property and it can survive the regime of title registration system.