



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**CIVIL CASE NO 283 OF 1990**

**GABRIEL MBUI ..... PLAINTIFF**

**VERSUS**

**MUKINDIA MARANYA ..... DEFENDANT**

**JUDGMENT**

The plaintiff in this case asks for orders that the defendant excises two acres of land out of his 8.28 hectares and have them registered in the name of the plaintiff as the absolute owner of those two acres, the plaintiff having been in adverse possession of those two acres. The other two orders asked for are consequential ones.

The case is brought by ways of originating summons under order 36 rule 3d of the Civil Procedure Rules, “and section 38 of cap 23”. I think “cap 23” is supposed to read “cap 22”, the plaintiff having intended to refer to the Limitation of Actions Act, the Act usually cited for these kind of actions.

Attached to the originating summons is the supporting affidavit sworn by the plaintiff himself. In the affidavit, the plaintiff stated that on October 24, 1974, he bought two acres out the defendant’s 8.28 hectares of land, from the defendant for Shs 3,000 which he paid in total. Although the plaintiff said that he had annexed and marked as “GM11 a copy of the written agreement between the parties, dated 24th October, 1974, I have searched through the court case-file but I have not seen it anywhere. So I have not had the benefit of reading the alleged agreement, and none was produced in Court at the hearing or on any interlocutory application.

The plaintiff further deponed in the supporting affidavit, that he took possession of the two acres immediately after signing the agreement, the said possession having been given to him by the defendant freely, without force, coercion, fraud or mistake. He said that since October 24, 1974, he has been in actual possession of the two acres, cultivating them extensively. He stated on affidavit, that on several occasions he has requested the defendant to transfer the two acres to him, but the defendant has totally failed to do so, although he has never interfered with the plaintiff’s exclusive possession of the two acres of land, “and he has thus complied with clause 4 of the said agreement”.

The plaintiff said he has been in peaceful possession of the two acres for more than twelve years, upon which he is entitled to be registered as the proprietor of the two acres under the doctrine of adverse possession. If he is not so registered, he said, he would stand to suffer substantially “as all other kinds of legal actions against the defendant are now time barred”. That is why he has come to this Court.

In an affidavit in reply to that of the plaintiff, the defendant said that it is true that by a sale agreement

dated October 24, 1974, he agreed to sell to the plaintiff two acres of land, excisable from his larger land specified. The plaintiff paid Shs 3,000 agreed sale price. But the sale agreement remained subject to the seeking and obtaining of the consent thereto of the relevant Land Control Board for the area. To this day, however no such consent was ever applied for and has never been given.

The defendant also deponed that the plaintiff has never been in actual or continuous occupation of the two acres. What he has done is that over the years, the plaintiff has only done the cultivation for seasonal crops, on and off, and in some years he has never cultivated at all. And, over the years, the defendant has, through the clan elders, offered to refund to the plaintiff the paid purchase price of Shs 3,00 to stop the plaintiff from cultivating the two acres, but the plaintiff has refused to submit. The defendant is ready and willing to deposit that money into Court for the plaintiff.

Saying that the plaintiff has never been in adverse possession of the two acres of land, and that the action is founded on a void written agreement of sale, the defendant finally said that the plaintiff is not a “squatter” *per se*, but is in partial occupation illegally.

As these affidavits show, most of the facts were agreed – the sale agreement, its date, purchase price, payment of the purchase price, taking of possession or partial possession (not the exact date of going into possession and payment ), lack of the consent of the Land Control Board, non-refund of the purchase price, failure to transfer the two acres to the plaintiff.

At the hearing the advocates for both parties agreed that the facts of the plaintiff being in possession of the two acres of the land, and of his having taken possession, were not in dispute and were agreed. As I understood these advocates on this aspect, they seem to be agreed on the plaintiff having been in uninterrupted possession since 1974 on the signing of the land sale agreement. The advocates agreed that the only issues are legal ones, namely;

- (1) whether adverse possession may arise out of a sale agreement;
- (2) whether adverse possession can arise without the purchase price under the agreement having been paid; and
- (3) if the answer to the second issue is in the affirmative, when does time begin to run in favour of the purchaser who has taken possession?

Having agreed that these were the only issues for the Court to decide, the advocates for both parties argued their respective cases as follows. Mr Mithega of Messrs Mithega & Arithi advocates, for the plaintiff submitted that this action was not based on a sale of land, but on adverse possession. Noting that the plaintiff and the defendant had a land sale agreement between them as vendor and purchaser, whereupon the plaintiff as the purchaser entered the land on October 24, 1974, it was conceded that the sale agreement did not receive the consent of the relevant Land Control Board. The transaction “therefore became null and void at the end of three months from the date of the agreement”. Let it be observed here that at that time the law stipulated three months. Let it also be noted that although the advocate does not expressly say so, he necessarily implied that the transaction concerned agricultural land and that it needed the consent of the Board.

Mr Mithega continued, and stated that the plaintiff remained in possession of the land with the full knowledge of the defendant despite the fact that the sale agreement had become null and void, and the plaintiff has been in such possession for about seventeen years before filing the suit. The defendant has never interrupted the possession except after the filing of the suit.

On the purchase price, Mr Mithega submitted that once an agreement for sale of agricultural land becomes null and void on account of no Land Control Board consent, adverse possession begins to mature and time begins to run against the owner (vendor in favour of the purchaser, even when the purchaser, even when the purchaser has not paid the purchase price completely. It is of no consequence not paying in full. He cited the decision of the Court of Appeal in the case of *The Public Trustee and*

*Beatrice Muthoni v Kamau Wanduru*, Civil Appeal No 73 of 1982, at Nairobi, as having held that since the agreement was null and void, the period of limitation and conferring adverse possession title started to run from the date of the signing of the land sale agreement. He said that the instant case fell squarely within that holding. I shall come back to that decision, but presently let me finish recounting Mr Mithega's arguments.

Mr Mithega completed his main arguments by saying that a claim for adverse possession does not require any consent from a land control board. For this proposition, he cited the High Court case of *Gatimu Kinguru v Muya Gathangi* [1976] Kenya L R 253.

These being the standpoints of the plaintiff, Mr Mithega concluded that adverse possession existed in this case on the agreed facts.

Not so, said Mr Mukira Mbaya of Messrs Mukira Mbaya & Co advocates, for the defendant. To him, a plaintiff whose relationship with the defendant arises out of a land sale agreement cannot claim title under adverse possession unless the sale agreement is rescinded or repudiated; for adverse possession cannot arise out of the consent or permission of the owner of the land, and a sale agreement of necessity is such a consent or permission. If the plaintiff relies on a sale agreement then he is saying he was permitted by the defendant to take possession in accordance with the agreement.

Repudiation, according to Mr Mukira Mbaya, is an act of the parties, and may proceed from either the vendor or purchaser. The sale agreement having become void by operation of law and not by act of any party, it is of no relevance when considering repudiation or rescission. That you must rescind or repudiate in order to rely on adverse possession, reference was made by Mr Mbaya to the Court of Appeal case of *Sisto Wambugu v Kamau Njuguna* Civil Appeal No 10 of 1982.

Mr Mukira Mbaya took note of the plaintiff's statement in paragraph 7 of the affidavit supporting the originating summons, that on several occasions the plaintiff had requested the defendant to transfer the two acres of the land to the plaintiff but the defendant has totally failed to do so. Mr Mbaya said that these requests by the plaintiff, of the defendant, were a clear recognition by the plaintiff that he was in possession of the two acres by the permission of the defendant who had allowed the plaintiff to be in possession in pursuance of the agreement of sale of land.

Basically Mr Mukira Mbaya said that sale agreement cannot found a claim of adverse possession; but that were this to be the position, it would have been a basis for an adverse possession claim only after a full payment of the agreed purchase price; in which case, time would run from the date of payment of the purchase price or if payment be allowed to be by instalments, then on payment of the last instalment to complete the full purchase price under the agreement. While conceding that in this case the whole purchase price was eventually paid, "the payment was not made on the date the agreement was made. In that case time did not begin to run until the date of the payment of the balance of the purchase price". As he quite correctly observed, the "pleadings do not disclose when the balance was paid". I may observe that the date of payment of the full purchase price has not been clearly stated – paragraph 3 of the plaintiff's supporting affidavit says a consideration of Shs 3,000 was paid in total, but it is not clear whether it was paid on the signing of the agreement or by subsequent instalments which came to Shs 3,000 "in total". Paragraph 4 of the replying affidavit of the defendant simply says that the plaintiff "paid me shs 3,000 agreed sale price". I have read each affidavit as a whole, and the two together, and then each paragraph, but the date(s) of payment cannot be gathered. And when the defendant's advocate raises an issue out of it and the plaintiff does not dispute or clarify, the matter remains uncertain, unascertained and at least ambiguous.

For these reasons, Mr Mbaya urged the Court to dismiss the suit with costs, saying there is no basis on which a claim can be founded on adverse possession.

Mr Mithega replied. He said that the Land Control Act having provided punitive measures for any transaction in furtherance of a void transaction, the plaintiff was in possession of the two acres illegally, whereupon it was up to the defendant to remove the plaintiff from the land, but he did not do so

notwithstanding that he had knowledge of the plaintiff's occupation of the suit land. On repudiation, Mr Mithega said that it is not necessary to repudiate that which is already null and void in law. On the Court of Appeal referred to by both advocates, Mr Mithega felt that they seem to conflict on the requirement of full payment of the purchase price as a pre-requisite for time to start running. To him, there is no such requirement. He asked the Court to decide in favour of the plaintiff.

That is where the matter stood when this Court was asked to decide the dispute. And I reserve judgment to take time to consider this important subject of adverse possession which has so much endeared itself to our compatriots in Meru that it has sired many a litigation of all guises wherein, I have come to notice, not an inconsiderable number of forensic gladiators wheedle and cheat, gamble and bet. I have been on the civil Court for a very long time. I have decided many land disputes for a very long time. I have read many books for a very long time. I have discussed with, and listened to, many a wise man about land questions for a very long time. The numerosity of the Court decisions I have read over the years on land matters defies my memory of their quantity. I no longer marvel at the tenacity with which litigants persist in land quarrels. Tears for the aged and ignorant who had no rights in law and lost long drawn-out Court battles over land have had to be wiped with the absorbent kerchief of experience, a fabric woven from the threads of law, principle and usage. I have seen the changing styles of presenting land grievances.

When customary law rights failed to unseat rights acquired on the first registration of land titles, there was a shift to the trust concept; when there was a leak in the trust tent, refuge was sought under the umbrella of fraud; when fraud proved too porous a cover, there arose a stampede for the adverse possession edifice at which most land litigation now seems docked, engulfing Courts like wild fire. I have been following all these forensic twists and turns in this area of our jurisprudence. As way back as 1965, adverse possession had been found to be an ailing concept (J C W Wylie, "Adverse Possession: An Ailing Concept," (1965) 16 N I L Q 467); but in this country, law gamblers on the concept seem to have rejuvenated adverse possession into a live seed for explosive land lawsuits, uncontrollable general strife over title to land, the destruction of the indefeasibility of registered title rendering land registration virtually a futilitarian pursuit, and registered title as uncertain as ever before, with attendant commercial paralysis, stifled social development, and smothered (if not wiped out) positive cultural values and practices of indefinitely accommodating the landless until they acquire their own land elsewhere through their own industry and labours.

I have read some court opinions, on adverse possession, which seem adrift and may take us astray, in opposition to sound elementary legal principles. Some of them have been rendered without sufficient attention paid to relevant statute and non-repugnant customary law. The policy or the relevant statutes has sometimes been lost sight of, going strictly by the written word; but forget not that he who sticks to the letter alone sticks to the bark, for he who considers nothing else but the letter merely, goes but skin-deep into meaning of the law or any document: he cannot comprehend its meaning, he never gets at its true inwardness. Was it not said by the wise, and recorded by Sir Edward Coke, "*Qui haeret in litera haeret incortice*"? (See *Coke on Littleton, being the First Institute of Coke's Institutes*, 13th Ed by Francis Hargrave, 1775, and H Broom, *Legal Maxims: Selection of Legal Maxims Classified and Illustrated*, 10th Edn, 1939, maxim 466).

In the midst of such an environment it is always useful to start from first principles, elementary law and the sages, relevant to the given concrete facts. In the instant case the Court-room fight was over a claim of title of land, based on the doctrine of adverse possession, the claim having arisen from the ashes of a null and void contract for sale of land. In 1975, the late Mr Justice Chanan Singh of the High Court of Kenya approved the definition of "adverse possession" given by Mr Justice Markby in the Indian case of *Bejoy Chundra v KallyProsonno* [1878], 4 Cal 1327, at p 329, in the following words:

"By adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf ) of some person other than the true owner, the true owner having a right to immediate possession".

(*Jandu v Kirpal and another* [1975] E A 225, at p 232). While this definition is a fair starting point, from a consideration of the many cases decided, it is possible to define "adverse possession" more fully, as the

nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.

Under our law, the limitations on the bringing of actions for the recovery of land make it possible for title to land to be acquired by adverse possession under certain conditions after the expiry of a certain period of time specified by statute. When a land owner has been out of possession, and a stranger has been in possession, for a statutory period sufficient to bear the owner's right to re-enter or to recover possession by action, the owner's title, if it is unregistered under any of the land registration statutes is extinguished, but if it is registered title it is not extinguished but the registered proprietor holds it in trust for the person who by virtue of the statute has acquired the title, and the stranger acquires title to the land which is good against all the world including the owner. This proposition results from reading together a series of provisions in the Limitation of Actions Act (cap 22). By section 7, an action may not be brought by anyone to recover land after the end of right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. This provision is, of course, subject to the exceptions regarding actions concerning trust property, and provisions for the case of disability, acknowledgment, part payment, fraud, mistake and ignorance of material facts ( see section 3). As a general rule, under section 17, at the expiration of the period prescribed by the Act for a person to bring an action to recover land (including a redemption action ), the title of that person to the land is extinguished (subject, again, to the provisions as to trust property in section 20). By section 37, however, the land not registered under the Government Lands Act, the registration of Titles Act, the Land Titles Act or the Registered Land Act. By that section if land is not registered under any of those legislations the title of the unregistered owner is extinguished after twelve years of adverse possessions; but where the land is registered under any of the land registration Acts, the registered title is not extinguished but instead, it is held by the person registered as proprietor for the time being in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against any person registered as proprietor, but, of course, without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by the Act. Where a person claims to have become entitled by adverse possession to land registered under any land registration enactment he is allowed by section 38 to apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as the proprietor. An order to register an adverse possessor takes effect on its registration, subject to any unextinguished entry on the register. The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising.

Do not forget estoppel under section 39, for a period of limitation does not run if the person attempting to plead limitation is estopped from so doing. He may be estopped by, among others, equitable or promissory estoppel. Public land is excluded from the operation of the statute in relation to adverse possession (s 41).

The statutory provisions show clearly that adverse possession is a statutory method of acquiring title to land by occupation of the land for a statutory period for ones own use in consistent with the owner's interest under certain conditions, without buying or paying for the land in the traditional sense, and doing so not under a licence from the owner, and consciously intending to exclude all persons from the land. It has been held that an order made under section 38 (1) of the Limitation of Actions Act, directing that an adverse possessor be registered as the proprietor of land in place of the person registered as proprietor, is distinguishable from rectification of the land register under section 143 of the Registered Land Act (cap 300), and that such an order can affect a first registration which is normally not rectifiable (Simpson, J, in *Hosea v Njiru and others* [1974] E A 526, at p 529.

It is self-evident from the enactments, that adverse possession extinguishes the title of the dispossessed unregistered owner, while by virtue of adverse possession a registered owner becomes a bare trustee for the stranger in occupation. Consequently, in either case, if the stranger has possession does not transfer title to the stranger. It does not give the intruder any title, but prevents the owner from asserting his title,

and forms a basis for applying to have the title registered in his name. That means that by itself twelve years occupation does not make an intruder the owner of the land; the owner can no longer sue the occupier and the owner's title to land is extinguished (if unregistered) or is held by him as the legal owner but for the occupier as the *cestui que trust* whose legal ownership ripens only upon registration after a court order in that regard after determination of the claim and any other question on application by any person interested (*Bridges v Mees* (1957) Ch 475, *Fairweather v St Marylebone Property Co Ltd* (1963) A C 510 H L; and the aforesaid enactments).

Ever since the doctrine of adverse possession was thought necessary to uphold as founding a claim for title, certain essential requisites were built in it by the courts whenever conventional wisdom and experience rendered it necessary to do so towards this end it was early taught that user as of right, in order to found a title by prescription must be *longus usus nec per vim nec clam, nec precario*, which enjoined that the user shall not be by violence, stealth or permission. And we have now been accustomed to saying that adverse possession to succeed must be one *nec vi, nec clam, nec precario*.

Accordingly, possession taken must not be clandestine; it ripens into a prescriptive title only if it is juridical, and must have none of the *vitia possessionis* such as *clam, vi, aut precario* (by stealth, violence or supplication). If in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right, before it can cause time to run (Chanan Singh, J, in *Jandu v Kirpal and another*, [1975] E A 225 at p 234). As one reads the decided cases clear requirements may be culled from the cases. That is to say, adverse possession in order to be put up as a plea on which title to land may be claimed, or as a defence to an ejectment suit or suit to recover land from a stranger holding it each of the following requirements must be established on a balance of probability by the person who says that by adverse possession a cause of action has arisen or that a suit against him is barred. The elements to be proved are these:

(1) the intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on *de facto* use and occupation by an entrant. The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable. Possession is a matter of fact, depending on all the particular circumstances of the case, and the type of conduct which indicates possession varies with the type of land. That there must be actual possession (which requires some sufficient degree of physical occupation for the requisite period) has been well-established in series of cases, of which *Athman Bwana and Alim Bwanahave v Haji Abdulla Ibrahim and Husein Haji Abdulrehman*, (1948) 15 E A C A 7 (Sir G Graham Paul, C J) at p 9 *Ahmed Adbulkarim and another v Member for Lands and mines and another*, (1958) E A 436, at p 441 (per Forbes, J A ); *Salim v Boyd and another* (1971) E A 550, at p 552 (Kneller, J (as he then was )); *Jandu v Kirpal and another*, [1975] E A 225 at p 233 (Chanan Singh, J); *Gatimu Kinguru v Muya Gathangi* [1976] Kenya L R 253, at pp 257, 258 (per Madan, J (as he then was)); *Ishmael Ithongo v Geoffrey Ithongo Thindiu* C A Civ Appeal No 16 of 1981 (per Law, JA); *Boniface Oredo v Wabomba Mukile*, CA Civ Appeal No 170 of 1989 (per Gicheru JA ), and *Ernest Wesonga Kweyu v Kweyu Omuto*, CA Civ Appeal No 8 of 1990 (per Gicheru, JA), are but a few examples.

(2) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression "colour of title" in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else's power. If he has no semblance or shadow of right to be on the land, he cannot rely on adverse possession (see the cases cited in (1) above, especially the authority quoted by Gicheru, JA, in *Ernest Wesonga Kweyu v Kweyu Omuto* CA Civ Appeal No 8 of 1990)

(3) The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called "adverse". Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner's will accompanied the occupier's possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as "hostile" possession, to emphasize that "hostility" is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (*Cobb v Lane* [1952] 1 All E R 1199; Denning, MR, in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd* [1974] 3 All ER 575 at p 580; Chanan Singh, J, *Jandu v Kirpal and another* (1975) EA 225 at pp 233, 234, 237; Madan, J (as he then was), in *Gatimu Kinguru v Muya Gathangi*, 1[1976] Kenya L R 253, at pp 257, 258);

(4) The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable *animus possidendi*, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the dispossessed owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection of the statute has been in possession with an *animus possidendi* for the requisite time. It must be shown that the owner has ceased to be in occupation and that the claimant is and has continuously been in occupation. An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession. Dispossession is where a person comes in and drives another out of the land; discontinuance of possession is where the person in possession goes out and another person takes possession. The term "dispossession" imports ouster, ie a driving out of possession against the will of the person in actual possession; there is no driving out where the transfer of possession was voluntary, not against the will of the person in possession but in accordance with his wishes and active consent. There must be some element of force or fraud, with some positive and unequivocal acts, on the part of the person dispossessing, which can be referred only to the intention of obtaining exclusive control over the property.

Discontinuance consists in the owner giving up, ceasing to use, and abandonment, of the land, a cessation of occupation. The fact that nothing is done to improve or work a piece of land is not evidence that a person has abandoned the possession or that he has otherwise been eliminated from the land. If a man does not use his land, either by himself or by some person claiming through him, he does not thereby necessarily discontinue possession of it, nor does that fact bring about the elimination of his possession. In our law, the mere fact that for twelve years or more there has been no suit brought against the squatter, or the mere fact that for twelve years the squatter has been in actual possession of the land, is not enough to make the Limitation of Actions Act operative; possession for twelve years cannot *per se* make the Act come into operation against an owner of land. The Act is operative only where there has been exclusive possession for the statutory period by the person to be protected by the statute: it must be shown that the title holder has been dispossessed or has discontinued his possession of the land for the statutory period. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession. It is not sufficient to prove that he enjoyed the use of the land in common with the true owner. It is a fallacy to assume that it is a presumption of law or fact that when two people live on the same land the whole or any part of the land is in view of the law of limitation of actions, in the possession of the person who happens to be using the land for cultivation, building, grazing or howsoever. There is no foundation for such a doctrine either in law or in fact. It is not an extraordinary phenomenon in this country for one person to let another man who has no land of his own, to live on his land for as long as possible, on the clear understanding, express or by customary law, that as soon as the landless is able to get land of his own, he shall vacate the owner's land. Such arrangement may be between clansmen, relatives, or vendor and purchaser under a failed contract. The arrangement does not result in ouster or discontinuance and hence, exclusive possession by the squatter. The adverse possessor must make out a case of an unequivocal exclusive possession, sufficient to deprive the owner of the soil. He makes out such a case by establishing an aggregate of acts of ownership imaginable, for the purpose of excluding the possession by anybody else. It all depends on facts of each individual case. So, in one case, the action of the trespassers in erecting gates at either end of a piece of land, keeping the gates locked and retaining the keys, which would seem to be of such a nature as to establish such exclusive possession as to create title by limitation, was held not to have that effect (see Lindley, MR, in *Littledale v Liverpool College*, [1900] 1 Ch 19 at p 23). The court has, in such cases, first to have regard to the intention with which the alleged occupation was made, and secondly, the nature of the land and whether the occupation made of it excluded the owner. Where it cannot be said that the possession was exclusive, where the true owner and others were free to use the ground in question, and there was no assertion of title, a case of adverse possession is not made out. It is not sufficient that there should be an actual possession by the person claiming title by adverse possession; there must be a discontinuance of possession by the owner, or he must have been eliminated from the land, followed by clear actual possession by the incoming person. A case of unequivocal exclusive possession sufficient to deprive the owner of the soil must be made out on a balance of probability. It is incumbent on the part of the claimant satisfactorily to establish an exclusive possession by himself or through his predecessors in title against the owner or his predecessors in title for the past twelve or more years. It is not enough to show a mere going out of possession by the owner. There must also be exclusive possession for the statutory period by the person to be protected: Sir Joseph Sheridan, P and Law, CJ, in *Hassanali Mamuji v Alibhai Ebrahimji Dar & Sons*, (1935), 12 E A C A 11 at pp 113, 114, 115; Sir G Graham Paul, CJ, in *Athman Bwana and another v Haji Abdulla Ibrahim and another* (1948) 15 E A C A 7 at p 9; Harris, J, in *Karanja Matheri v Kahnji* [1976] Kenya L R 140 at p 141; Simpson, J (as he then was), in *Wainaina v Murai and others*, [1976] Kenya L R 227 at p 231; Madan, J (as he then was), in *Gatimu Kinguru v Muya Gathangi*, 1976) Kenya L R 253 at p 259; Chesoni Ag JA, in *Sisto Wambugu v Kamau Njuguna*, [1982-88]1 KAR 217, at pp 226-227; and Madan, JA (as he then was), in *Public Trustee and Beatrice Muthoni v Kamau Wanduru* Court of Appeal at Nairobi Civil Appeal No 73 of 1982;

(5) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the incroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the

purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies. He must show that his possession was of such a nature, and involved the exercised of rights so irreconcilable with those claimable by the owner of the land, as to give the owner occasion to dispute that possession, ie that the possession and user was such as to give a cause of action or right to sue for possession, throughout the twelve years next preceding the suit. If the possession is susceptible to explanation by reference to a title not inconsistent with the right of the person against whom it is set up, or of one holding on behalf of such person or temporarily entitled to exercise his rights, there can be no necessity to call that possession in question, unless and until interference with the right of the person against whom it is alleged has been manifested by acts affecting his existing right, or has otherwise been brought to his knowledge. There must be some adverse act sufficient to give the person to be affected by it an opportunity of knowing that his rights are being infringed and that occasion has arisen for action by him to protect them. So long as the subject-matter is so protected and the means of protection is still within the control of the owner, it is obvious that his power of dealing with the subject-matter can no more be lost by the mere addition of any subordinate possessor, than a document would be lost merely by its being placed in an enclosure within the owner's safe. The owner would still have the power of reproducing at will his enjoyment of the subject-matters, unless and until on his having occasion to make use of it he found that he was resisted by the protecting agency itself. The same might occur with property in a safe which it was found necessary to force open to get at the property. And if a stranger removed the subject-matter from the safe or other means of protection, but made no attempt to remove it from the owner's possession and control, the owner would not lose his power of using it and would be under no necessity of taking steps to recover possession until the subject-matter was taken, not merely out of the safe, but entirely out of his own possession and control, in which latter case his loss would be as complete and unmistakable as if no means of protection had ever been employed. On this reasoning, it has always been the holding of Courts in the common law world, that acts of user are not enough to take the title out of the true owner unless they are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it; and that acts of user committed upon land which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to adverse possession, and are not evidence of dispossession or discontinuance of possession. Accordingly, when the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some purpose; not even if this purpose continues year after year for twelve years or more (see *Leigh v Jack* [1879] 5 Ex D 264; *Williams Brothers Direct Supply Stores Ltd v Raftery* [1957] 3 All E R 593; *Hayward and another v Chaloner* [1967] 3 WLR 10 68). The reason is not because the user does not amount to actual possession; it may. The line between acts of user and acts of possession is too fine for words. The reason is, because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather, his user is to be ascribed to the implied or actual licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it; and the owner, by not turning him off, impliedly gives permission. And it has been held many times that acts done under licence or permitted by the owner do not give a licensee a title under the limitation statute (*Cobb v Lane* [1952] 1 All E R 1199; and the cases I have cited for the third element above). In *Lord Advocate v Lord Lovat* [1880] 5 app Case 273 at p 288, Lord O'Hagan said that possession must be considered in every case with reference to the particular circumstances. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests – all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of possession. It is impossible to say that there was actual possession inconsistent to that of the owner, where there was no intention of the owner to do other than keep the land until he could use it, and it was land waiting to be developed or otherwise used when the time was opportune ( Morris, L J, in *Willimas Brothers Direct Supply Ltd v Raftery* [1957] 3 All E R 593 at p 599). If the true owner can make no immediate use of the land, as the years go by it cannot be accepted that he would lose his rights as owner merely by reason of acts of trespass or

user which in no way would interfere with a contemplated subsequent user by the owner. Time, therefore, does not run against a true owner whose purposes are not prejudiced by the intruder's acts. And this seems a reasonable conclusion, because the interests of justice are not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is, for good reason, being deferred. (see Denning, MR, and Ormrod, LJ, in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd* [1974] 3 All E R 575). So, if the owner has little present use for his land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title. There is no sin in the owner of the land saying to another person, "I have no immediate use for my land"; use it for your own needs, and when I need it, I shall come back to you over it", land then return after twenty years. In that period, a prudent squatter should use the land to acquire the means withal to get his own land elsewhere, and not to abuse generosity and a good heart of the owner. On this reasoning, the law has always been, that acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a dispossession of the owner, and are not evidence of discontinuance of possession by him, within the meaning of the statute: Sir Joseph Sheridan, P, in *Hassanali Mamuji v Elibhai Ebrahimji Dar & Sons*, [1935] 2 E A C A 111, at pp 112, 113, Kneller J (as he then was). In *Salim v Boyd and another* [1971] E A 550, at p 552; Madan, J (as he then was), in *Gatimu Kinguru v Maya Gathangi* [1976] Kenya L R 253 at pp 254, 255, 259 and 260.

(6) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The idea of open and notorious possession entails possession that gives visible evidence to one on the surface of the possessed land. The purpose of this element is to afford the owner an opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose. Possessory acts carried out only under cover of darkness will be insufficient to justify a claim based on adverse possession. Related to the requirement of actual possession, the requirement of openness and notoriety, also calls for the need that the possessory acts must be substantial and leave some physical evidence. If the acts are too insubstantial or temporary, there is no actual possession and the possession will not be notorious. Seasonal or sporadic use of land whose nature does not ordinarily justify such use, would not readily lend themselves as evidence of open and notorious and continuous actual possession. The nature of the acts on the ground usually determine if they are notorious, but weight may be given also to the possessor's reputation as owner or his having public records evidencing ownership. There must be a denial of the owner's right by an open assertion of a hostile title by the person setting up adverse possession and there must be notice of the denial to the owner, either given directly or inferred from notorious acts and circumstances. So notorious must be the overt acts of ouster that there must be nothing that would lead the owner to suppose that his rights remain intact. And this means, the possession taken should not be clandestine, that there must be notice or intimation to the owner of the hostile acts, and there should be no concealment of the intention to impugn his title. Surreptitious possessory acts do not found a claim of adverse possession. Fraud will destroy that claim: Forbes, JA, in *Ahmed Abdulkarim and another v Member of Lands and Mines and another* [1958] E A 436, at p 441; Kneller, J (as he then was), in *Salim v Boyd and another* [1971] E A 550 at p 552; Chanan Singh, J, in *Jandu v Kirpal and another*, [1975] EA 225 at p 234; Madan, J (as he then was), in *Gatimu Kinguru v Muya Gathang i*[1976] Kenya L R 253 at p 259;

(7) The possession must be continuous, uninterrupted, unbroken , for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. What is a significant interruption depends upon the nature of the land. Brief and ordinary absences, while the adverse possessor goes to town, is gone overnight, or is away working or on vacation, for instance, would surely not break any adverse possession. If the land, by its nature, is suitable and normally used for reasonable pursuits, then seasonal use may be continuous enough. The test is whether the adverse possessor used the land as a true owner would. But breaks caused by the owner's intermittent possession, for a few

days or weeks every now and then, are likely to defeat both exclusivity and continuity of possession. One interesting question within the subject of continuity is tacking, that is to say, the adding together of periods of possession that are continuous but by different persons. Tacking is allowed, provided there is a sufficient nexus, often called "privity", between successors. The nexus will be sufficient if the earlier possessor gives the next one a colourable title document or if the next one is his heir, and there is no interruption. There are four possible situations under the doctrine of tacking (or more commonly described in terms of successive possessors). First, where the adverse possessor dies or transfers his interest to another person before the lapse of the statutory period, the time during which he has possessed is available to his successor in title, and, therefore, a purchaser or devisee who immediately follows him into possession and holds for the remainder of the statutory time acquires as good a right to the land as if he himself had been in possession for the whole period (*Asher v Whitlock*, (1865) L R 1 Q B1). Understand that since possession is *prima facie* evidence of seisin in fee, an adverse possessor holds a transmissible interest in the land that is why he can dispose of it. Accordingly, any person taking a squatter's interest can add the squatter's period of possession to his own. Situation two is, where a squatter is dispossessed by another squatter and there is continuous adverse possession by several different persons each claiming some colour or right in himself, adversely to the other or others. In such a situation, since there is no distinct interval of time during which the possession is vacant, the second or last squatter can add the former period or periods of occupation to his own as against the true owner. This is because time runs as against the true owner from the time when the adverse possession began, and as long as adverse possession continues unbroken it makes no difference who continues it. But as against the first or other preceding squatter, the second or subsequent squatter must himself occupy for the full period before his title becomes unassailable (Kay, LJ, in *Willis v Howe* [1893] 2 Ch 545, 553). Situation number three divides itself into a fourth one. It arises from possession abandoned by the adverse possessor. Under the first limb the adverse possessor leaves the land vacant, ie possession is abandoned by the adverse possessor and it is not retaken by another person. On such abandonment the true owner or previously dispossessed person is in the same position as if he had never been deprived of possession by the squatter. There is no one whom he can now sue. There is no need for him to perform some act or ceremony in order to rehabilitate himself; and the former possession of the squatter out of possession is not available to some casual interloper or lucky vagrant. There is no right to add together two periods of adverse possession if a squatter abandons possession before the full period has run and some time passes before someone else takes adverse possession of the land. During the gap between two squatters, the owner has possession in law, and there is no person whom he can sue. The land therefore ceases to be in adverse possession; and when adverse possession is taken by the second squatter a fresh right of action accrues to the true owner (Lord Macnaghten, in *Trustees, Executors and Agency Co Ltd v Short* (1888) 13 App Cas 793, at 793, Parker, J, in *Samuel Johnson and Sons, Ltd v Brock* [1907] 2 Ch 533, 538). The aspect of the third aspect, and, therefore, the fourth situation, is where the land left vacant by one adverse possessor is taken by another. As noted just now, in such a case the time during which the adverse possessor has occupied the land of the owner is not available to the subsequent possessor, for during a distinct and definite period there was no person against whom the owner ousted by the first adverse possessor could bring an action for the recovery of the land. The later possessor is not a successor in title of the earlier possessor, and his own intrusion causes a fresh right of action to accrue in favour of the true owner dispossessed by the prior squatter. Accordingly, where an intruder without title holds possession for less than the statutory period of twelve years and then abandons the possession of the land, then because there is no person against whom the rightful owner can bring an action, the rightful owner is in the same position as if no intrusion had taken place, and although he is out of possession for aggregate of the statutory period, even if another intruder subsequently takes possession after the break in the running of time caused by the earlier intruders abandonment of possession before the period matured, but does not himself hold for his own statutory period, the title of the rightful owner is unaffected by the statute. When an intruder takes possession of and holds the property for a period and then goes out of possession before the limitation period is reached, the rightful owner who could complain of the intrusion is on the intruder's going out restored to the position in which he was before the intrusion. That means, not that there was any suspension of the right of action, but that the right of action in respect of the

intrusion is gone with the abandonment of possession by the intruder; and, through the land thus becoming vacant is in law deemed to be in the possession of the person against whom the intrusion had been made, so soon as there is a fresh intruder there is a fresh dispossession, and a fresh right of action accrues. In short, therefore, where there is a break in the adverse possession started, as a fresh intruder enters without claiming under the previous one, there is a fresh dispossession and a fresh right of action accrues – there is no suspension of a right which had once accrued, but the old right of action is gone when the preceding intruder goes out, and a new right of action arises when the fresh intrusion occurs. And there are a number of ways in which adverse possession which has begun to grow may be interrupted. Possession may be interrupted

(a) by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or

(b) by the institution of legal proceedings by the rightful owner to assert his right to the land; or

(c) by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognised.

It is in the light of all these principles that it is stated broadly that a person in possession of land is not entitled to the protection of the statute of limitations as against the owner of land where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land, and the adverse possessor remained in actual possession for the whole statutory period without a break in the block period: Lucie – Smith, J, in the Court of Appeal for Eastern Africa, sitting with Sir Joseph Sheridan, P, and Law, CJ (Zanzibar) in *Hassanali Mamuji v Alibhai Ebrahimji Dar & Sons*, [1935], 2 E A C A 111, at p 116; Kneller, J (as he then was), in *Salim v Boyd and another* [1971] E A 550, at p 552; Simpson, J (as he then was) in *Hosea v Njiru and others*, [1974] E A 526, at p 530; Simpson, J (as he the was), in *Wainaina v Murai and others*, [1976] Kenya L R 227 at p 231; and Madan J (as he then was) in *Gatimu Kinguru v Muya Gathangi* [1976] Kenya L R 253 at p 259;

(8) the rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period. If at any time in the course of the running of the time, he had no right to claim possession, or he was under a disability or legal impediment, time does not run against him during that spell. So, possession will not be adverse as against any person who is not for the time being entitled to possession and who is therefore, neither interested in, nor capable of ejecting the person who had taken possession. The true owner must have the right to immediate possession during the whole twelve years. If the true owner has no right to immediate possession, it is practically immaterial to him who is in possession. Having no right himself to possession, he cannot eject the person in possession: *Contra non valentem agere non currit proscriptio*. Hancox, J (as he then was), in *Wandera and another v Attorney General* [1976] Kenya L R 275 at 276; Hancox, JA ( as he then was) in *Sisto Wambugu v Kamau Njuguna*, [1982-88] 1 KAR 217 at p 220.

(9) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession. Just as the adverse possessor cannot succeed if he did not know he was in actual possession of another's land, the owner who had not intended to part with possession or is unconsciously dispossessed, cannot be said to have been evicted or to have quite the land: Chanan Singh J, in *Jandu v Kirpal* [1975] E A 225, at p 237; Simpson, J (as he then was), in *Wainaina v Murai and others* [1976] Kenya L R 227 at p 231.

Throughout the decided cases, the recurrent theme is that possession to be adverse must be actual, open, notorious, regular, continuously uninterrupted, hostile, exclusive occupancy held with a cherished *animus possidendi* under a claim of right held in good faith, without any form of permission from a knowing rightful owner entitled to immediate possession, for the statutory

period. Out of these cases, the typical formulation of the classical requirements for adverse possession to be claimed, has been, that in order to acquire title to land without buying or paying for it in the traditional sense, or through some other legal disposition such as by inheritance or trust, there must be proved or established the elements of

(a) actual possession or occupancy of the land that is, (b) hostile to the current owner with a right to immediate possession, (c) which is visible, open, notorious, and exclusive, (d) exercised continuously and uninterrupted for a statutorily defined number of years, (e) maintain under some colour of right as against everyone else, (f) with an evinced unmistakable *animus possidendi*, (g) held in good faith, without fraud. This statutory method of acquiring title to land by limitation, depends on the intent of the occupant to claim and hold the land opposition to all the world, and embodies the idea that the owner of, or the person interested in the property, have knowledge of the assertion of the ownership by the occupant for the statutorily prescribed period. It consists of actual possession with intent to hold solely for the possessor to the exclusion of all others, and it is denoted by the exercise of acts of dominion over the land, including making of ordinary use and taking of ordinary profits of which the land is susceptible in its present state. Clearly, the typical formulations of the judicial doctrine of adverse possession reveal overlapping pre-requisites, some of which are merely subsets of the others. For example, the elements of claim of right of title, and good faith, are probably subsets of “hostile”.

Be that as it may, over the years Courts in this part of Africa, through their judicial opinions have rendered pronouncements from which certain rules relevant to the instant case are deducible. These are some of those which I have culled from the cases. One relates to the burden of proof. The burden of proving title by adverse possession rests upon the person asserting it. This is to say the burden of proof is upon the person setting up and seeking to prove title by adverse possession (*Mamuji v Dar* [1935] 2 E A CA 111, *Bwana v Ibrahim* (1948) 15 EACA 7; and Forbes, JA, in *Abdulkarim and another v Member for Lands and Mines and another* 1 [1958] EA 436). He proves it on the usual standard of proof in civil cases namely, on a balance of probability. What does he prove? He proves three adequacies: continuity, publicity, and extent. For to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed: the possession must be adequate in continuity, in publicity and in extent, to show that it is adverse to the rightful, paper title owner. It must be actual, visible, exclusive, hostile, open and notorious (*Jandu v Kirpal and another* [1975] E A 225, 232). Rules as to the nature of the interest conferred by adverse possession have also been judicially stated. It is said that when there is a successful claim of adverse possession, there is a total ouster of the owner from the title and there is no room for a tenancy in common or a joint tenancy. It is all or nothing; there are no partial measures, unless the interest of only one out of several joint owners or tenants in common is affected. To make an order that the adverse possessor's name be included in the register of the title of the land as a tenant in common with the owner who is the sole registered owner of the land would be a negation of the right to acquire absolute title to land under the doctrine of adverse possession, because each tenant in common is the owner of the whole land but limited to the extent of his share therein because it is not subdivided, in conjunction with his co-tenant in common or joint tenant who also is similarly owner of the unsubdivided land to the extent of his share therein. Accordingly, a title acquired by adverse possession creates a change in the ownership of the title, not requiring any rectification of the land register. And even where the land affected is agricultural land and there is a change of ownership without the consent of the Land Control Board, the acquisition of title by adverse possession is neither a disposal of nor a dealing in land. It is a transmission of the title by operation of law, and what happens is that a new owner supplant the existing or old owner. The process takes place by operation of law and not by a velvet act or by agreement between parties or by a dealing in land by parties. On this reasoning, it has been held that the consent of the relevant Land Control Board is not required to a change in ownership of agricultural land occurring by adverse possession, for to fall within section 6 (1) of the Land Control Act, a dealing in land must be one arising out of a free and voluntary act of the parties, involving the disposition of the land (*Kinguru v Gathangi* [1976], Kenya L R 253, 261, Madan J (as he then was) and Harris J in *Matheri v Kanji* [1976] Kenya L R 140).

The cases lay down that where a plea of adverse possession of land registered under any of the land registration statutes is upheld, the registered proprietor holds the land in trust for the person who had acquired title against the owner, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by the Limitation of Actions Act. So, at the expiration of the statutory period, the registered owner holds the land in trust for the person who has adverse possession (Simpson, J (as he then was), in *Hosea v Njiru and others* [1974] E A 526 at 531). And according to one judicial view, the creation of a trust, like a mortgage or charge, amounts to a disposal or dealing in land requiring the consent thereto of the relevant Land Control Board under the Land Control Act (Harris, J, in *Githuci Farmers Co Ltd v Gichamba* [1973] E A L 8 at 10, 11; but Madan J (as he then was), disagreed with Harris, J, on this point, in *Kinguru v Gathangi* [1976] Kenya L R 253 at 264).

As to the date from which the period of limitation or prescription begins to run against the owner of land, the Courts have held that it runs from the date when the owner was entitled to immediate possession and the squatter occupied the land under some colour of right. In the case of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is *prima facie* entitled to possession and, therefore, entitled to take action against any intruder to the land (Sir Joseph Sheridan, CJ, in *Alibhai v Alibhai* [1938] 5 E A C A 1 at 3, 4; Miles, J, in *Gathure v Beverly* [1965] E A 514; and Hancox, J (as he then was) in *Wandera and another v Attorney – General* [1976] Kenya L R 275, at 276). Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in *Wanyoike v Kahiri* [1979] Kenya L R 236 at 239; also see among others, Simpson J (as he then was), in *Hosea v Njiru and others* [1974] E A 526 at 529, 530). As a general rule, time does not run against a person who is under some legal disability. Where, however, the right of action first accrued to a person who was not under a disability and through whom a person under a disability claims, time will run against the latter during the period the guardian should have sued (Simpson, J in *Hosea v Njiru and others* [1974] E A 526 at 530). But any act of acknowledgement by the intruder, of the title of the proprietor during the period of possession, before the twelve years run, interrupts the running of time, and destroys adverse possession (*ibid*, at 530; and *Wainaina v Murai and others* [1976] Kenya L R 227 at 231).

The land, or portion of the land, adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain. The absence of a plot or title number need not present any difficulty; nor should it be a bar to establishing a claim of adverse possession (Madan, J (as he then was) in *Kinguru v Gathangi op cit*, at p 260). On the other hand, however, the adverse occupation of a disputed portion of a large piece of land under one title, for twelve years does not, in law, constitute adverse occupation of the rest of the land to which adverse acts do not extend during the statutorily prescribed time (Harris, J, in *Matheri v Kanji* [1976] Kenya L R 140 at 141).

Statements of the rule on adverse possession arising from failed land sale contracts have created an uncertainty in the law pertaining to land. Normally, a person claiming adverse possession is allowed in possession as a purchaser pending completion of the purchase price, or if he has already paid in full, then pending compliance with the requisite statutory formalities; and he is allowed to stay there because he is a purchaser, and not a mere trespasser. The vendor decides by accident or design to allow matters to drift on without taking steps to evict the purchaser from the land after the contract fails on account of non-completion, late performance, or non-compliance with legal requirements, relying on the belief that the purchaser will get out on his own, or on the hope that it will all turn out right in the end. Both the vendor and the purchaser may be ignorant of the legal consequences. The purchaser believes he is in possession as a purchaser, and wishes to remain there and found his title on contract. When things come to a head, the purchaser says in retrospect, that although he looked and acted like a purchaser in possession, but the vendor did not evict him, and although he did not say he no longer relied on the contract and did not

repudiate it, and the vendor was still entitled to look on him as a purchaser and he did not realize it and it might not have suited the purchaser for the vendor to regard him otherwise than as purchaser, the purchaser was in fact a person in adverse possession, quietly picking up the years which are necessary to elapse to bar the owner's title. The obvious rule against this unconscionable approach of the purchaser should naturally be, that the purchaser having been able to go in and stay under the contract, cannot be allowed to repudiate the contract with the hindsight of a fool and claim adverse possession. If, however, at any time, the purchaser made it clear that he was no longer bound by the contract, or that despite the contract becoming null and void he is retaining possession under some other colour of right independently or the land sale contract, then different considerations would apply. For it is only upon making that fact clear, that the vendor can take action against him. Accordingly, the rule should be, that where it is only the fact that a squatter is in possession as a purchaser under a contract which has become in operative, null and void, or unperformed by him, and which has enabled him to claim title by adverse possession, the position is that although the full period required by the statute has elapsed, the squatter's possession remains consensual and does not found a claim of being in adverse possession. This proposition is in accord with what Hancox JA (as he then was), said in *asisto Wambugu v Kamau Njuguna* [1982-88] 1 K A R, 117 at p 222, namely:

“The respondents never repudiated the 1958 agreement, but adopted it by remaining in and cultivating the land, until the appellant made it clear that he was no longer going to allow the respondent to stay there ...the respondent, cannot now be heard to say that this occupation was not under the agreement, but was adverse to the registered owner if the necessary period had elapsed”.

The vendor is at liberty to allow a purchaser to stay on the land, expecting the purchaser to complete payment, or to apply for extension of the time within which the consent of the Land Control Board may be sought and obtained or otherwise to comply with the law; and the vendor is entitled to extend the time for putting things right, including fulfillment of legal requirements; and until the purchaser evinces a clear intention not to rely on the contract but on adverse possession, time does not run. If such repudiation is not shown, the purchaser remains in occupation with the permission of the vendor even if the contract becomes null and void by operation of law. That is the law to be gleaned from the combined three speeches of the Court of Appeal in *Wambugu v Njuguna* [1982-88] 1 KAR 117, Kneller and Hancox, JJ A, and Chesoni, Ag JA. Contrary holdings rendered in unguarded and flabby terminology do not appeal to close reasoning and are not founded on justice, but on arbitrary spar of the moment deception. To claim title by virtue of purchase, and then to turn round and claim it by adverse possession is to set up mutually self-destructive contradictions and a confusion of thought. As was aptly put by Chanan Singh, J, in *Jandu v Kirpal and another* [1975] E A 225 at 233, “Previously title was claimed by virtue of purchase: now, it is by adverse possession. These contradictions do exist”.

It is well-know on in our law, that the adverse characters of the intruder's possession of another's land must be proved as a clear fact, and cannot be assumed as a matter of law from mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the Court is to draw legal inferences as to whether there was or there was no adverse possession. The inference one way or the other is a legal one. This means that the acts of possession are factual data from which a legal conclusion may or may not arise as to whether they amount to adverse possession. In the words of Gicheru, JA:

“In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts” *Kweyu v Omuto*, C A Civ Appeal 8 of 1990 (as yet unreported).

This proposition means that the plea of adverse possession is always based on facts, and the facts must be asserted, pleading and proved. The factual proof requires the person who claims adverse possession to show on what date he took occupation of the premises, the nature of his possession or the possessory acts, whether the factum of his possession was known to the owner of the land, how long the possession went on, whether his possession was open and undisturbed. All these are questions of fact and unless they are

asserted and proved, a plea of adverse possession must fail. It is not necessary that one must prove affirmatively that he was in physical possession of every square inch of the land; but the acts of possession proved must legitimately demonstrate his enjoyment of domain over the land in the manner in which such domain is normally exercised. The facts which suffice in any particular case depend upon (a) the character of the land, (b) the locality, (c) the purpose for which it can ordinarily be used. Facts must be placed before the Court from which it can be concluded that at the time when time was running the seeking to repel the claim of adverse possession was legally in a position to vindicate his title by action, and that the adverse possessor was all along there in wrongful occupation, throughout the twelve years. For a cause of action accrues when there is, in existence, a person who can sue and another who can be sued. The question always is this: when could the owner have first maintained an action to a successful result to repel the actual possession with a notorious hostile claim of exclusive title?

In a country such as ours where there is an elaborate land registration legal regime and where most of the land is registered under one or the other of the many registration statutes, the doctrine of adverse possession is a strange idea, which at best is a judicial gloss on statute, serving as an exception and qualification to the all-important concept of indefeasibility and certainty of title which is the bedrock of land registration systems whose prime objective is to put a stop to interminable strife over title to land. Familiarly known as squatter's title, the technical doctrine of free acquisition of title to land by adverse possession has, surprisingly, never captured the public imagination by achieving any prominence in the national newspapers. Indeed, of the numerous waves of organized pressure groups and task forces that are sweeping across the land, none seems concerned with the prevalent quiet taking away of land from unsuspecting landowners by all manner of intruders, squatters and criminal possessors under null and void land transactions. How is this doctrine justified? Are there any good social reasons for retaining the concept of acquisition of title by adverse possession?

Many learned expositions are found on books attempting to show how the doctrine of adverse possession is usually justified. The books generally say that adverse possession is founded on the fact that with the injustices of men, as with the convulsions and disasters of nature, the longer they remain unrepaired, the greater become the obstacles to repairing them, arising from the after growths which would have to be torn up or broken through. According to this theorem, it is necessary to the security of rightful possessors, that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, or their memories must have irreparably faded, and documents mislaid or lost or destroyed, and the real character of the transaction can no longer be cleared up. That is what I have adapted from my personal old copy of J S Mill, *Principles of Political Economy* 1848, the 1990 Hadley edition, at pp 214-215. And more than one hundred years ago Vice-Chancellor sir James Bacon nicely balanced the pros and cons of the doctrine when he said:

“There may, indeed, be cases in which that protection which the statute extends is hardly reconcilable with strict morality. Nevertheless, the law is established upon principles of the soundest public policy, to which, for the common good, private rights and interest must in all cases yield; and it is unquestionably the policy of the law that it is better in all cases that rights, the assertion of which has been neglected for a long period of years, should be disregarded, than that a course of transactions honestly conducted should be set at nought by permitting a captious chicanery to prevail against the good faith with which they have been conducted”. (*Yardley v Holland* [1875] L R 20 Eq 428 at p 442).

For those who have access to that case report, you will find that in that case the Court found as a fact that the owner's claim was “stale and unreasonable a demand”. It is not possible, in this limited judicial space, to cite all the large literature which I have read on this subject, but I think it is fairly representative of what men of great eruditions say, to state that they give the morality and explanation of adverse possession of land to be, that man, like an Elgon teak or a Meru oak in rock fissures and clefts, gradually and symmetrically adapts, shapes, directs and configures his roots to his surrounding environment, and when the roots have grown to a certain size and taken a certain hold, he cannot be displaced without cutting at his life. Other broader reasons exist in learned treatises on my bookshelves and in profound judicial dicta. They say, that after a long time, uncertain boundaries be stabilized. They say, that persons who have taken interest in the land or dealt with the adverse possessor in reliance upon his apparent

ownership be protected. They say, that those who will keep land productive by using it be given permanence. And overall, adverse possession is best explained as a doctrine of repose.

In the Kenyan context, a lot of the foregoing justificatory moralization of adverse possession can only be *a priori*, ie presumptive and obtained by speculative deduction without practical investigation or other sensory experience. Some reasons for the doctrine are the very reasons for the passing of the Land Adjudication Act (cap 284) and the Land Consolidation Act (cap 283), namely, the ascertainment and recording of rights and interests in, and for the consolidation of, certain lands. Other reasons are the very reasons which led to the passing of the land registration statutes for the registration of title, and for the issuance of certificates of ownership under those statutes. Take the Registration of Titles Act (cap 281), for instance: a certificate of ownership issued under that Act is conclusive evidence of proprietorship, and the person named in the certificate of title is the absolute and indefeasible owner of the land to which the certificate relates – the certificate, therefore, confers an absolute and indefeasible title to the property referred to in it, subject to no other interests than those mentioned in the certificate such as encumbrances, easements, restrictions and conditions contained therein or endorsed on it, and the title of the proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party (section 23 (1)). I would have taken this statutory provision to embody the doctrine of repose, bringing to rest questions of title. Yet the infusion of the doctrine of adverse possession into this statute unsettles the position. Again take the Land Titles Act (cap 282). Its object was to remove doubts that had arisen in regard to titles to land. Towards that end, it is expressly provided, that every certificate of title duly authenticated is conclusive evidence against all persons proof that the person to whom the certificate is granted is the owner, unless there is noted on it a memorandum to the contrary (see section 21, and the long title). Go to the Land Adjudication Act (cap 284): you find there that it is an Act for ascertainment and recording of rights and interest. There you find an elaborate scheme set out for the ascertainment and recording of rights and interests, the determination of claims and objections, appeals by aggrieved persons, ending with the Minister's determination where necessary, after which registration of title follows. All these troubles are taken with a view to achieving rest over land claims. To revive disputes by the side-wind of adverse possession claims is to open the Pandora's box of quarrels otherwise set to rest by registration. One would have expected Courts to hold that one who goes on to another's land and that other person has title under any of these statutes, goes into possession at his own risk and the owner may turn him off at the owner's pleasure at any time he may choose, provided that the owner did not promise not to chase away him and no trust arises. Such holding would make title certain and eradicate disputes over land after they had been settled by registration.

Similar considerations apply to the effect of land registration under the Registered Land Act (cap 300). The rights of a proprietor under the Act are not liable to be defeated, and are to be held by him, together with all privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever. Those rights are subject only to trust obligations, encumbrances shown in the register, and prescriptive rights under the limitation statutes, including the common law adverse possession (section 28 read together with section 30 (f)). But as adverse possession is a common law concept, it extends and applies to Kenya in relation to land, leases and charges registered under the Registered Land Act only as modified by the doctrines of equity, and not in its pure common law form (see section 163). It is for this reason that I shall in due course be testing this doctrine of adverse possession against salient equitable considerations. So, if indiscriminately applied, the idea of adverse possession may unsettle vast land disputes long-settled by registration, and it may be an enemy of its own reputation as a doctrine of repose for the cessation of litigational and social turmoil.

Let me part from the advice against defeating the high ideals of an adjudication and registration by a reckless invocation of adverse possession, on this note: one of the objects of the law of land registration system is to secure indefeasibility of title to all registered proprietors except in cases of fraud and abuse of trust. This is a most important object in achieving certainty of ownership and possessory entitlement. The success of the system is measured by the degree to which that object has been achieved. You do not achieve it by defeating title. This country has spent a lot of tax-payers' money in the successful search for repose by instituting and maintaining a land registration system. Our scanty national resources would have gone down the drain if we undermined the registered title by clouding it in the mist of common law. If our founding fathers' considered it wise to leave title to be settled by adverse possession claims,

public funds would not have been expended on introducing and maintaining a land registration regime. It is high time we disembarked from the merry-go-round in the search for repose through the doctrine of adverse possession. Let us have faith in our land registration statutes. They shall give us rest on this front. Be easy in upholding adverse possession claims in relation to registered title, and you shall be sowing the wind: you shall reap the whirl-wind.

We shall reap the whirl-wind because, as it has been said for the umpteenth time, and it shall for ever be said in perpetuity, land in this country is a very important thing, and one of the most burning issues, Kenyan land, whether barren or fertile, is everything to an African in this part of our continent. To us land alone is equated to a mother, and you can imagine what may happen someone trifling with, or denying you or snatching from you, your mother. It is something which we take very seriously. Any land matter which tends to prejudice title or ownership is a very touchy subject in the country and can be very emotional. No land in Kenya should be played about with by anybody or any office, and as much care as possible has to be exercised on any land question. Land disputes costs people life, time, money, and they cost you everything you have. They consume all your energies. They can leave you an invalid. We must strive not to make titles to land meaningless and insecure in the absence of fraud or breach of trust. Nothing so much retards the growth and prosperity of a country as insecurity of title to land. Labour is paralysed where the enjoyment of its fruits is uncertain. Litigation without limit produces ruinous consequences to individuals. Therefore, my brothers and sisters, when one has litigated before adjudication boards and committees or before Courts of law, and established his title evidence by a land title certificate, let him not be unsettled again and once more be embroiled in some litigation over adverse possession. That situation renders the enjoyment of the land by the title holder uncertain, his labours paralysed, and his funds poured into ruinous litigation defending the very title he might have won after much seat and cost. Most Kenyans holding title to various pieces of land of whatever size will not have plenty of money, some of which will be spend on getting land and title thereto, some for developing that land, and idle money floating around to be used some day to ward off intruders who might otherwise claim adverse possession. My title should be my security against intruders, and an intruder should remain on my land for as long as he wishes, but at his peril, for having failed to respect my title in the first place and having ignored to check the correct position, he should be turned off anytime when I have the time and money to divert to that effect after attending to better priorities. That way, titles shall be respected; titles shall be secure; funds and time shall be used for development; and intruders will work knowing that one day they will have to buy their own land. The owner will develop his land because he is sure he will not be dispossessed or kept out of it. The intruder will acquire and develop his own land because he is certain and sure that squattership is not a virtue, privilege or advantage conferring free land titles, but an inconvenience of which he must consciously endeavour to rid himself by applying fruitful labours.

That title under land registration statutes has been an effective device to quieten land disputes and to bring about certainty of ownership which has precipitated confident land utilization and development is self-evident. For instance, about the years 1960 to 1963 and after, when a large number of people came out of detention, legal practitioners and relevant offices were besieged by people who said, "You know, in 1951 or 1952, just before going to detention, I left my land with my brother, and he promised that when I came out of detention, he would give me the land back, but now that I am back, I have gone to him but found him registered as the proprietor of the land, and he says I can go to hell. Please I want my land back, and I want you to file a suit against him to recover my land". There were cases where persons had taken lots of other people's land while the latter were still babies or were away as labourers, or were simply ignorant.

But whether they had been in Manyani, Lokitaung or Manda Islands and could not even see a lawyer, and whether they had sacrificed a lot for this country and underwent a tremendous amount of suffering and a tremendous amount of injustice, Courts stoutly told these poor people, that the registered title defeated their claims. Judicial literature on this subject is too long and too notorious to require citation. All this stand was so, so that title shall be indefeasible, shall be certain, and ownership shall be respected, so that proper land planning and use for development would be assured. Trouble-free ownership of land is what is in the public eye. It is the basis of registration of title. That is why title to land has assumed greater importance than before. That is why the careful scrutiny of the land registry is always advisable. Unfortunately some adverse possession court decisions have in great measure brought about a situation where title to land is an uncertain matter, and nobody can be quite sure until the last moment, whether he

has any title to land at all. Indeed, even the adverse possessor cannot do any serious development on the land until after twelve years and has obtained a court order officially validating his claim. It is revulsive to conscience to refuse to allow ex-detainees to attack title and get their land back because they were fighting so that Kenya might be free from colonial rule, and to allow Tom, Dick and Harry to attack title and get registered land free by adverse possession.

We have it on respectable judicial authority (Madan J as he then was ) in *Kinguru v Gathangi* [1976] Kenya LR 253 at p 263) that parliament never intends to destroy useful customs of the people of Kenya, and nothing on the statue-book scraps away traditional law and practice which is consonant with the Constitution, justice and morality. Any written law which clashes with the Constitution shall be overridden by the Constitution and shall be void to the extent of the conflict. And Courts do not administer the law alone: they administer justice according to the law, equity, and the usages of the people. Now, in this country go to the countryside, where our largest population resides, and see for yourself, how people are so caring and mindful of one another's welfare. In the countryside a lot of the people are living on other people's land, thanks to the African milk of generosity and kindness. Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.

To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given these things, because the owner knows that it does not matter for how long you borrow these things; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even under void land sale contracts. They do not ever think of claiming or losing title, by adverse possession. As it was stated as long ago as 1968 by Jaramogi Oginga Odinga, if people knew about losing land by adverse possession "you would find that it would cause a row all over the country", for seeing that after a period of twelve years you cannot institute a claim to get back your piece of land, "it would cause a commotion, it would cause a row" (*The National Assembly Official Report*, vol 14, col 1272). And as Thimangu – Kaunyangi stated, if adverse possession is going to be rigidly applied so that a person living on another's land takes title after 12 years and the owner becomes landless, this "situation is going to make African Socialism very difficult" (*ibid*, at col 1132), and suddenly we are going to have a flood of suits to throw off land the landless, and where the law shall fail the owner, *pangas*, bows and arrows may be resorted to as the final solution, very much to the detriment of the country, merely on account of a reckless application of an alien doctrine. On the whole it is not going to be possible to help somebody with a piece of land if you know you cannot recover it after twelve years (and that is the reasonable time within which a squatter can be able to work your land to be able to stand on his own and go away).

It is a well-known customary practice, and it is a prevalent usage amongst Kenyan Africans that people accommodate others on land not immediately required by the owner. Typical of this usage is the sheltering of a *muhoi* (Kikuyu) or *abamenywa* (Luhya), and the equivalent amongst the rest of our communities. This phenomenon is well-recognised and accepted as useful. Ondiek Chillo and Thimangu Kaunyangi expounded it in Parliament in 1968 (see Report already cited above). Courts also know of it (see, among others Madan, J (as at p 263). I would be surprised if anyone pretended to be ignorant of these things. Indeed, ignorance of those things which everyone is bound to know, excuses not, a dictum rendered long time ago in the expression (*ignorantia eorum quae quis scire tenetur non excusat* (Hale pl cr 42). And ignorance on the part of a judge would be a calamity for the innocent, for was it not said by the sages who spoke in the Latin Language, *Ignorantia iudicis foret calamitas innocentis*, which my personal copy of the first edition of *The Dictionary of English Law*, by the Earl Jowitt, interprets as "The ignorance of a judge is the misfortune of the innocent"? The keeping on our land of landless relatives, clansmen, friends and purchasers under avoided arrangements for long periods of time until they are able to buy or otherwise acquire by gift, will, or trust, their own land is custom we all know. And as it is well-known, a custom grounded on a certain and reasonable cause superseded the common law. The authorities prefer to express themselves as (*consuetudo ex certacausa rationabili usitata commonem legem* (Litt s 169). The certain and reasonable foundation of this custom is African socialism, as expounded in this country in Sessional Paper No 10 of 1965. And the doctrine of adverse possession being a common law doctrine, it is superseded by this custom. Moreover any statutory provision on

adverse possession must be looked at through the spectacles of custom, for as wise men of the law said, custom is the best expounder of the laws (*Consuetudo est optimus interpres legum* – 2 Inst 18) adding, that custom is the best interpreter of the law (*Optima Legum interpres est consuetudo* – Plow Com 336); *Cox v Leigh* 43 L J Q B 123. So, the best interpreter of things is usage (*optimus interpres rerum uses* – 2 inst 282). As we interpret the law, let us never overlook the age old adage, that custom and usage overcome the unwritten law if it be special and interpret the written law if it be special and interpret the written law if it be general. That is what is meant by *Consuetudo et communis assuetudo vincit legem non scriptam si sit specialise; et interpretatur legem scriptam, silex sit generalis* (Jenk Cent 273).

The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy our cherished ideals and sound cultural foundations, and distabilise this society. We have been brought up in the firm belief in the sanctity of property and title. I do not see adverse possession claims as promoting such sanctity.

The doctrine stands in the way of equity, and throws its shield over the wrong doer and malefactor. Some decisions which I have read smack of a desire to punish a landowner who is not diligent and to award a wrongful and even claimant in criminal possession. Diligence is a quality society may promote; but hardly should it be championed at the expense of a peaceful law –abiding registered landowner, and end in rewarding one who is in possession in disregard for the tenets of the law and legal procedures. It does not conform to equity, that a person who has not failed in any legal obligation should be penalized for keeping quiet, and to be shut out from the enjoyment of what is otherwise his property, while a lot caster and forensically gladiatorial controversialist, without sweating for it, silently picks title from the lottery – wheel of time by wrongfully staying put on that which is not his.

Some cases which I have been studying with an intensity of care on this subject say that you may claim adverse possession if you have been in occupation for twelve or more years even though you entered or remained on the land as a purchaser of an agricultural land but the sale transaction or agreement becomes null and void because of failure to obtain the consent to the controlled transaction or contract. From the relevant Land Control Board; and that in such a situation, time begins to run against the registered owner from the date you finished paying the whole agreed purchase price and you took possession. If you paid all the agreed price at once and took possession, that is the starting point for the limitation period to run in your favour; if you took possession and paid by instalments later, then time runs from the date of the payment of the last instalment; if you completed paying instalments in full and took possession later, the Courts have not yet had an opportunity to decide. Amazingly, judges who had laid down the foregoing position to be the law have not cared to say whether it matters or not whether the payment of the instalments or the taking of possession or the remaining in possession, is done when the transaction or agreement is void. I do not find in those cases how those judges have avoided the effects section 22 of the Land Control Act (cap 302) which deals with acts in furtherance of void transactions. This is what that provision states to be the law:

“22 Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person –

(a) pays or receives any money or

(b) enters into or remains in possession of any land

in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.”

It is a clear legislative enactment that payment and receipt of the purchase price in furtherance of an avoided transaction or agreement is a criminal offence. It is indisputably clear that to take, or remain in, possession of land in furtherance of an avoided transaction or agreement is a crime for which you incur

specified criminal penal sanctions. In all the cases I have seen, the adverse possessor is always saying that he bought the land, paid for it, and in furtherance of the selling – and – buying transaction he entered the land and has ever since remained in possession of the land he bought as a purchaser for value under the avoided transaction and he has so occupied it for twelve or more years. That way adverse possession arises from entering or remaining in possession of the land in furtherance of an avoided transaction. Money would have been paid by the adverse possessor in furtherance of an avoided deal. A crime would have been committed by the adverse possessor. Do we turn round and reward the criminal by awarding him title to land?

Remaining in the land and holding on to possession thereof after the arrangement under which you entered became void by operation of the law is to persist in an illegality, to commit a crime, and to do that which is prohibited by the law; it is not to acquire title by adverse possession. When anything is prohibited directly, it is also prohibited indirectly. In Latin it is said, *Quando aliquid prohibetur fieri ex directo prohibetur et per obliquum* (Co Litt 2236). This means that nothing will be upheld which is a mere device for carrying into effect that which the legislature has said shall not be done. So, whenever a Court sees attempts made to conceal illegal or void conduct by some fiction it must brush away the cobweb varnish, and lay bare acts or claims in their true light. Do not forget the related doctrine, *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*, whose usual English version is that when anything is prohibited, everything relating to it is prohibited. Quite pointedly, and in relation to the doctrine of adverse possession as it affects agricultural land in relation to the doctrine of adverse possession as it affects agricultural land and controlled transactions which some judges have tended to gloss over, know that happenings and occurrences which are bad from the beginning do not improve by length of time, ie no lapse of time can cure a defect. When legal doctrine used to be commonly expressed in Latin it was said, *Quod ab initio non valet, in tractu temporis non convalescit*. And when you start off as a purchaser whose buying has been avoided, the lapse of time which sees you twelve or more years in possession does not cure the defect and that which was bad from the beginning. And your beginning is when you start holding onto possession in defiance of the statute, when you commit crime of furthering an avoided transaction, agreement or intention.

The statute says, do not enter into, or remain in possession after a controlled transaction has become null and void. That is precisely what a purchase must do. To refuse or fail to obey that legislative enactment is a criminal offence. No crime is greater than disobedience (*Nullum crimen majus est inobedientia* Jenk Cent 77); and there should be no crime without punishment (*Nullum crimen sine poena*) for it concerns the state that evil deeds (which crime is) shall not remain unpunished (*Interest reipublicae ne maleficia remaneant impunita* – Jenk Cent 31. Impunity always invites greater crimes. It is said in 5 Rep 69, *impunitas semper ad deteriora invitata*. But if action is not taken to punish disobedient purchasers under section 22 of the Land Control Act, then the Courts must ensure that from crime like from fraud, a right of action does not arise, for a Court of law will not lend its aid to enforce that which is prohibited by the law of the land. Fraud, deceit and crime ought not to benefit anyone, for crime and justice never dwell together.

No one can improve his condition by his own wrong. The latin of it is *Nemo ex suo delicto meliorem suam conditionem facere potest*, which the Earl Jowitt (op cit) interprets as, no one can improve his position by his own wrongdoing. The wrongdoing is to take or hold to possession after that which entitles you to do so has been avoided. A purchaser who bases his claim on adverse possession after he has contravened section 22 of the Land Control Act founds his claim on his own wrong. Yet it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, *Allegans suam turpitudinem non est audiendus*, 4 Co Inst 279. By which they meant that no one shall be heard in a Court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong, and, in equity, the maxim holds good that he who comes into equity must come with clean hands. *Ex turpi causa non oritur actio* ( No disgraceful matter can ground on action). *Null Prendra advantage de son tort demesne* (2 Co Inst 713) meaning, no man shall profit by the wrong that he does, and *Nullus commodum capere potest de injuria sua propria* (Co Litt 148), which means, no one can gain an advantage by his own wrong. That being the approach of Courts, it has meant in practice, that he who offends against the

law vainly seeks the help of the law, stated by Latin speakers as *Frustra Legis auxilium quaerit qui in legem committit* (2 Hale (386), upon which it became established that an executor *de son tort* must go without remedies which are available for an executor duly appointed. By analogy therefore, a possessor *de son tort* must go without remedies which are available to a purchaser who does not offend against the law. And with regard to an adverse possessor who ought to have got out of the land and given up possession upon the transaction being avoided, the maxim of law, that no one is considered entitled to recover that which he must give up to another, is appropriate. The maxim has its latin expression, *Non videtur quisquam id capere quod ei necesse est alii restituere* (D 50,17,51), which Jowitt (*op cit*) interprets as, no one is deemed to take that which he must give up to another. And as there explained, in these circumstances, he is in fact a mere conduit pipe.

I have read some cases which say something like, after a sale agreement or transaction becomes void, the purchaser in possession becomes some kind of tenant for some time, after which he ceases to be a tenant, becomes adverse possessor in whose favour time starts to run against the vendor. With respect to such a holding, that view is in total disregard of section 22 of the Land Control Act. The man does not become a tenant and afterwards an adverse possessor. The man becomes an offender deserving to be punished. There is no reason why the origin of his possession in the avoided transaction or agreement should be ignored. The maxim of the law has always been, that the origin of a thing ought to be inquired into (*Origo rei inspici debet* – 1 Rep 99). The truth of the matter in these claims of people who began as purchasers is that at their bottom there is a criminal bed-rock, namely, a violation of section 22. Let it be made clear, that crime is not purged by circuitry. In this statement I include any wrongful deed contrary to law; and by circuitry is meant a chain of events and causes, of which the most remote is tainted by crime, or where among these causes and events, there is disobedience of the law. Where there is such a chain, the entire thin is tainted by the original or preceding crime (see Francis Bacon, *Collectin of some of the principal rules and Maxims of the Common Laws of England*, 1737 generally abbreviated as Bac Max, 1). In short, therefore, a criminal foundation destroys the superstructure; and what is done contrary to law is considered as not done.

Unless section 22 is recognized and applied by the Courts, the relevant provisions are going to be a dead letter. Application is the life of a law. In Bulstrode, 2 Reports in King's Bench, 1609-26, at p79, there is a case in which Sir Edward Coke said, "We all here agree in the principles, but we differ in the application; and *applicatio est vita regulae*", and that dictum gave birth to the maxim, application is the life of a rule. Accordingly, it is a bad exposition which gnaws at the vitals of the text. Put it this way, an interpretation which eats out the bowels of a law is like a snake. A judge is just that if he gnaws at the vitals of section 22 or if he negates them. Blessed is the exposition by which the law is saved from destruction: *Benedicta est expositio quando res redimitur a destructione* (4 Rep 25).

Some cases have been decided that as between the Land Control Act and the Limitation of Actions Act, the latter prevails over the former in the event of a conflict between them; and for purposes of adverse possession it is said that it comes about by operation of law and as such the Land Control Act has no place in adverse possession claims. When a law is intended to override an earlier statute on an important subject, such as title to land, the latter statute must expressly refer to the affected earlier legislation and state that notwithstanding the provisions of the earlier statute, the position is now as provided in the new law. And to say that adverse possession is an event which should not be controlled under the land control act because it is not a transaction within section 6 of the Land Control Act is nothing but a play on words, a pun, and an evasion founded on unsubstantial verbal argument. Verbal quibbles are unworthy of a judge (*Aucupia verborum sunt iudice indigna* – Hob 343). And by too much altercation truth has been lost. The truth is that the Land Control Act is to make sure that whoever owns land owns it with the consent of the Government, and whoever owns the land owns it with the consent of the Government, and whoever owns the land owns it economically and in the interest of the country (see Gachago, Assistant Minister for Lands and settlement, in *The National Assembly Official Report*, vol Xiii (Part II), Col 2647.). From the words and intention of that statute there should not be any departure. The Limitation of Actions Act is a general statute; the Land Control Act is a special legislation on a specific subject. To cling to the verbal statements in the Limitation of Actions to override the Land Control Act, is to miss the objects of these two Acts. He who sticks to the letter sticks to the bark. That is to say, he who considers the letter merely, of a statute or even any instrument, goes but skin-deep into its meaning. He cannot comprehend its

meaning; he never gets at its true inwardness. (*Qui haeret in litera, haeret in cortice* – Co Litt 283b). The law on the other hand, concerns itself with intention, with the purpose, with the substance.

By section 163 of the Registered Land Act ( cap 300), the common law of England, as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land registered under the Act. As I have already said, the adverse possession is a common law doctrine. It is, therefore, subject to any modification equity may render necessary. And in equity, a person cannot get title by doing wrong. Even if he has been in possession for twelve or more years, a Court of equity would not allow him to enforce his strict rights under the Limitation of Actions Act. There is a broad principle of equity dating back for more than one hundred years, that where a person has gained advantage by violation of the law, he will not be allowed to enforce rights accruing to him by virtue of his defiance of the law (see *Hughes v Metropolitan Railway Co* [1877] 2 App Cas 439 at 448 per Lord Cairns, L C ). That principle carries out the very object for which equity was first introduced – to mitigate the rigours of the law. It has been applied so as to preclude a party to a contract from enforcing his strict rights under it (See *Central London Property Trust Ltd v High Trees House Ltd* [1947] K B 130; and it has been held that there is no reason why it should not be applied so as to preclude a squatter from enforcing his strict rights under a statute of limitation such as the Limitation of Actions Act (see Denning, MR and Ormrod, L J, *Wallis's Cayton Bay Holiday Camp Ltd v Shell – Mex and B P Ltd* [1974] 3 All E R 575 at 580, 589). Thus, a squatter cannot, by deliberately trespassing on the other's land or by remaining there and lying low and saying nothing, acquire a title to himself. In the case of a purchaser under an avoided sale or transaction, he knows full well or ought to know full well, that after the avoidance the land is not his. He cannot be allowed to seek to take advantage of his own wrong and say that after twelve years of wrong-doing, the land is now his land. This is contrary to equity and natural justice.

The doctrine of acquisition of title to land by adverse possession, has received critical views of courts presided over by eminent judges. I adapt and adopt the judicial views of Lord Denning and Russell, L J, in *Hayward and another v Chaloner* [1967]3 WLR 1068 at 1076, 1077, 1080 and state the position in this country this way. The owner of land in this country is usually mindful of the landless and the unfortunate purchaser whose transaction has become void. For as long as he does not immediately require the land, he is content out of good nature to let it be used by the landless or purchaser, even without payment of any or further money. It is as if he has permitted it to be used under a licence. If by the application of the doctrine of adverse possession, the courts penalize good nature in this way, the sooner they desist the better. Civil justice is remedial and for relief; it is not penal. Since the generous indulgence of land owners and their predecessors in title is said to result in a free accretion at their expense to their land, their reward is left to be in the next world. In this jurisdiction, therefore, we can only qualify such good – natured owners for that reward by dismissing claims founded upon adverse possession whenever the owner is free from fraud.

So, as long as the land in the possession of a squatter is not immediately required by the owner, and as long as the squatter's use of the land in no material way prejudicially affects the owner's practical interests, adverse possession does not arise and the owner need not sue to chase away the squatter. The interest of justice are not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is, for good reason, being deferred.

On the basis of what I have said in the preceding parts of this judgment, I conclude that as the beneficial function of adverse possession is in quieting titles and making the legal title follow the factual situation, and as in registered land titles are quieted upon registration after a long process of adjudication, adverse possession is a doctrine which ought to be recommended as a panacea for the ills of unregistered conveyance and land ownership. Its operation in relation to land title to which has already been settled and ascertained through the elaborate process of registration is misplaced and unassuring. Ailing from the choking effects of land adjudication and registration programmes under legislative enactment, let this concept wither away and die, upon which there will be certainty of registered title and elimination of unnecessary litigation, whereupon intruders shall know that once a squatter always a squatter unless you work to get your own land elsewhere, and a title holder shall spend his resources on development and not on litigation to chase away intruders and squatters.

The law and its underlying principles being as I have attempted to outline above, let us see how this instant case may, injustice, be decided on the given facts, according to the law and legal principles. As I stated at the beginning, there is no dispute that the plaintiff is in possession of the suit land. As we have already seen, being in possession *per se* is not enough to make the possession an adverse one. It must be accompanied by adverse possessory acts which are hostile to the rights of the owner in the land. Such hostile acts performed by or on behalf of the plaintiff must be clearly unequivocal. The plaintiff in this case has not placed before the Court any such acts. Evidence of such acts was required. For example, fencing off the occupied land, and other activities should have been shown to have taken place. Moreover, the fact that the plaintiff was in possession did not necessarily mean that the owner was not in possession in common or jointly with the plaintiff. Evidence that the plaintiff's possession was exclusive, and that nobody else (except one with his licence) was also in possession of the same land, should have been placed before the Court. No such evidence was produced. In this respect, it was the plaintiff's job to bring evidence on these aspects.

The Court has searched for evidence on whether the admitted possession was open and notorious. Acts which would have shown the openness and notoriety of the possession, are not placed before the court by the plaintiff. It was for the plaintiff to show that the possession which is conceded was regular, and with a claim of right. The claim of right of the plaintiff is not revealed. Nor is any good faith shown to have accompanied the possession.

Let no mistake be made that once possession is admitted or established, then its having been adverse is to be assumed. The elements required to make it adverse must be shown to have been present. These being factual matters, evidence is required; and nobody should be hoodwinked to think that if his possession is admitted or proved, then the conclusion is that the other elements must automatically follow. This delusion seems to have been entertained in this case. For I see that after possession was agreed, no evidence on the elements for adverse possession was called. It was not for the Court to manufacture the evidence from the cosmos. It was for he who sought to base his claim on adverse possession to satisfy the court by evidence, on a balance of probability, that the agreed possession was not just possession, but an adverse one. This responsibility has not been carried out.

One issue which the parties required the court to decide was whether adverse possession may arise out of a sale agreement. The answer is this. "Yes", if nothing subsequent to the sale agreement is in contravention of any law or equity. But if the entry or continued possession is in violation of a statute or is not consonant with equity, then such possession cannot be a basis for claiming title by adverse possession. No Court shall aid the breaking of the law, or promote unconscionable conduct. Moreover, if the basis of the claim under adverse possession is a sale agreement, the doctrine will not apply because the sale agreement postulates consent, and consent and adverse possession are not bed-fellows.

The other issue was whether adverse possession can arise without full payment of the agreed contractual purchase price. Decided cases have already answered that question in the negative, and state that time does not start to run against the owner unless and until the date of the payment of the last instalment of the stipulated purchase price. Subject to what I have said about sale agreements as the foundation of a claim of adverse possession, those are the answers to the issues raised for my decision.

In the instant case the plaintiff conceded that the sale agreement did not receive the consent of the relevant Land Control Board, and that the agreement, therefore became null and void. It is also conceded and stated that despite the fact that the agreement became null and void, the plaintiff remained in possession of the land which had been sold under the agreement. The plaintiff does not say under what colour of right he continued in possession. It was a matter of evidence for him to prove the aspect. If he remained there as a purchaser, he was violating the provisions of section 22 of the Land Control Act; and the Court cannot aid him to benefit from his own wrong to break the law. Nor can circuitry and metamorphosis erase the crime that taints his possession. He does not have to be successfully prosecuted to show that he is contravening section 22, given the admission by the plaintiff that the transaction required the consent of the Land Control Board, that the consent was neither sought nor obtained at all that the transaction became null and void, that despite all that, he remained in possession which he had taken in furtherance of the land sale agreement, and that in furtherance thereof he continued to pay the agreed

purchase price stipulated in the agreement. The owner's permission of the plaintiff to remain in possession has not been shown to have been unconscionable. The Court takes judicial notice, and does not feign ignorance, of the prevalent customs and usages under African socialism, whereby relatives, friends, clansmen, the landless and, increasingly, purchasers under annulled and avoided agreements and transactions, are allowed to remain in possession of one's land for indefinite lengths of time for as long as the owner does not immediately require the land so occupied, on everybody's understanding that at one time or other, the person so accommodated shall have to leave and go away. This Court shall not punish African good-naturedness and reward law-violaters, usurpers, and, in short, what I may call, possessors *de son tort demesne*, under nobody's compulsion to do wrong.

As stated by Gicheru, J A, in *Kweyu's case*, *op cit*, in deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts, which inferences are matters of law. Accordingly, while possession is a matter of fact, any proposition reached from that fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on the given facts. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. *De facto* use, and *de facto* occupation must be shown.

I have searched for facts to show all these things, but none have been found, except the admitted mere possession. There is no evidence on the intent. There is no evidence on colour of right. What I have found in this case is a possessor without proved adverse possession, and possession which is not necessarily exclusive with the requisite intent. I cannot manufacture evidence or assume legal consequences in favour of the plaintiff when I have no factual data supportive thereof.

When all these things are carefully considered in the manner of my foregoing endeavour, with a view to do justice to the parties in this particular case without violating the law and the tenets of equity in so far as the circumstances and inhabitants of Kenya permit, and subject to the qualifications to the common law doctrine as those circumstances render necessary, the singular conclusion in the instant case is that the plea of, and the claim of title based upon, the doctrine of adverse possession must fail. It has not been supported by facts.

The inescapable result is that this suit is dismissed. The plaintiff shall pay the costs of this suit. I so decide, and I so order. Orders shall be made accordingly.

Dated and Delivered at Meru this 17<sup>th</sup> day of November, 1993

**R.C.N. KULOBA**

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**JUDGE**