



**Gitonga & another v Machakos Ranching Company Limited (Civil Appeal  
103 of 2017) [2025] KECA 1722 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1722 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 103 OF 2017  
W KARANJA, LA ACHODE & JM NGUGI, JJA  
OCTOBER 24, 2025**

**BETWEEN**

**JANE WANJIRU GITONGA ..... 1<sup>ST</sup> APPELLANT**

**WAMBUA MWITHI KILOVOO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MACHAKOS RANCHING COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and orders of the High Court at  
Machokos (Angote J) delivered on 31st March 2017 in ELC No. 89 of 2008)*

**JUDGMENT**

1. Jane Wanjiru Gitonga and Wambua Mwithi Kilovoo, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively, are before this Court seeking to upset the judgment of Angote J, delivered on 31<sup>st</sup> March 2017 in Machakos ELC No. 89 of 2008, in favour of Machakos Ranching Company Limited, the respondent herein.
2. The matter commenced with an Originating Summons dated 19<sup>th</sup> June 2008 filed by the appellant and amended on 8<sup>th</sup> September 2006 seeking determination of the following issues:
  - a. Whether the applicants should be registered as the proprietors of all that parcel of land situated in Athi River Township, known as Plot No. 337/648 by adverse possession.
  - b. Whether the respondent's title to the suit property has been extinguished by the applicant's adverse possession thereof.
  - c. Whether the applicants should be registered as the proprietors of the suit property in place of the defendant.
  - d. Whether a permanent injunction should restrain the respondent by themselves, their agents, their servants and/or employees from trespassing, entering, breaking into or in any other



way interfering with the applicants' quiet possession and enjoyment of all that parcel of land situated in Athi River Township, known as plot No. 337/648.

- e. In the alternative, to (1) to (4) above, whether the respondent should be ordered to pay the applicants the market value of the suit property and the developments they have effected thereon amounting to Kenya shillings thirty million (Kshs. 30,000,000/-).
3. The application was supported by the 2<sup>nd</sup> appellant's affidavit sworn on 19<sup>th</sup> June, 2008. In it, he deposed that he and his family have been in possession of the suit land from 1965. That in 1975, the suit land was registered in favour of the respondent, but the respondent has never been in possession of the suit land. Further, that the appellant did not obtain the respondent's permission to occupy the suit land. He deposed that his four children and the 1<sup>st</sup> appellant's eight children were all born on the suit land, which has been their main source of income. That they have extensively developed the suit land by erecting permanent houses and planting a variety of trees and other seasonal crops.
4. In response, the respondent filed a defence and averred that the suit is bad in law because the subject matter is res judicata Machakos CMCC No. 175 of 2005. That it is the respondent who has been in occupation of the suit land all along and if the appellants are in occupation, then they are trespassers.
5. During the hearing, Fred Gitonga Kamau, testified as PW1 and stated that the 1<sup>st</sup> appellant is his parent and that he was born in 1962, and his parents came into the suit land in 1965. They put up a home, (showed photos of their houses) and they do business on the land. In 2005, they received a letter from the respondent claiming that the land was theirs. It was his evidence that they paid the water and electricity bills, and that it was his father who requested His Excellency the President to allocate him the suit land.
6. PW2 was Wambua Mwithi. He testified that he came into the suit land in 1965, got married later and raised children on the land. Also that he had licenses for the shops that he runs on the land and the water and electricity bills he pays for the suit property. He clarified that he is not related to PW1 but they all live in the same land. In cross - examination he stated that he has business permits for the businesses he has on the suit land. However, he did not have the permits in court and the water bills that he produced in evidence were not in his name.
7. Jane Wanjiru who testified as PW3 was the mother to PW1. She stated that she moved into the suit land with her late husband in the 1960's and her seven children were born on the land. She stated that there are many people living in the suit land and she has more than ten neighbours. However, she and the 2<sup>nd</sup> appellant occupy 2 acres.
8. In response, General Jackson Mulinge, a director in the respondent's company testified as (DW1) and informed the court that the respondent was issued with title to the suit land in 1979 and has been paying the requisite land rates since then. That in 2005, the respondent sued the appellants for vacant possession of the suit land.
9. Upon considering the evidence before him, the learned Judge found that the appellants had failed to prove that they have been in occupation of the entire suit land continuously, for more than twelve years, to the exclusion of the respondent, and without the respondent's permission. He dismissed the suit.



10. The appellants were unhappy with the judgment, hence this appeal. In the memorandum of appeal lodged in this Court on 21<sup>st</sup> April 2017, they alleged that the learned Judge erred in law and in fact on the following grounds:
  - a. By holding that the appellants had failed to prove that they had been in occupation of the entire suit land continuously for more than twelve years to the exclusion of the respondent.
  - b. By disregarding the fifty years that the appellants had lived on the suit property.
  - c. By disregarding the year the appellants entered on the suit property.
  - d. By disregarding the circumstances under which the appellants entered upon the land.
  - e. By failing to appreciate the fact that the respondent has never been in occupation of the suit property, neither has it ever attempted to enter the suit property since it was issued with the title deed in 1979.
  - f. By disregarding the appellant's photographic evidence showing the buildings and homes constructed on the suit property.
  - g. By disregarding the acreage of the suit property that the appellants occupy.
  - h. By requiring the appellants to explain to court what would happen to their neighbours in the event that the title was issued to them.
11. Kituo Cha Sheria filed written submissions dated 24<sup>th</sup> March 2022 on behalf of the appellants. They urged that it is common ground that the appellants were in the suit land in 2005 when they were notified of the intention of the respondent to evict them. The respondent knew of their open and continuous occupation of the suit property and they did not show any notices they sent to have the appellants vacate the suit property since they acquired title in 1979. The appellants tendered evidence that they were in actual possession and occupation of the suit property and proved to the court through evidence of pictures of the buildings constructed, payments made for water supply going as far back as the year 1993 and business permits that showed that they had dispossessed the respondent.
12. The appellant submitted that the water supply documents they relied on bear the name of Kisumu Dogo, an informal settlement in the area where the suit parcel is located. The documents do not bear the title number of the suit property and they were provided and filled by the staff of Mavoko Municipal Council Water and Sewerage Supply themselves. The appellants did not fill them. The forms from the Municipal Council and Sewerage Supply had no section where the title number could be inserted, hence the indication of the market area known as Kisumu Dogo.
13. It was urged that the fact that both appellants could not state the exact acreage of the suit property, proved that they had not carried out a survey on the suit parcel. That the inability to state the exact acreage should not disqualify the appellants who had met all the grounds set out for a claim of adverse possession to succeed.
14. They submitted that the appellants were only able to ascertain the year they entered the suit land because it was long time ago. They could not give the exact dates. Further, that they brought before the court evidence to show that they had previously, written letters to the Commissioner of Lands and the President of the Republic of Kenya, in 1979 and in 1981 respectively, seeking allocation of the suit



- land in their names. All the while, they were in continuous, open and uninterrupted possession of the land, while discontinuing the possession of the respondent.
15. Upon the appellants being served with the notice of intention to evict them by the respondent, they moved the court to get an injunction against the respondents and to assert their claim for adverse possession. They urged that the Court should not penalize them for the inaction of the other occupants of the suit land who did not assert their rights.
  16. In rebuttal, the respondent filed written submissions dated 5<sup>th</sup> November 2021, through the firm of M/s Aming'a, Opiyo Masese & Co Advocates. It contended that the appellants could not tell how they first occupied the suit land, neither did they produce Birth Certificates to show when and where their children were born, after claiming that they were born on the suit land. It contended that the business permit produced in evidence by the appellants refers to Athi River Old Town, Plot No. 205, and the copies of the water bills refer to Kisumu Dogo, which is a different property from the suit land. Further, that the photos produced in evidence show semi-permanent structures on the suit land, which indicates that the appellants were aware that the land was not theirs and they could be evicted at any time.
  17. The respondent posited that the appellants did not even attempt to apply to the County Government to be issued with the letters of allotment if their alleged claim over the suit land had become due. This clearly demonstrates lack of animus possedendi (the intention to possess), which is an ingredient that must be proved in a claim for adverse possession.
  18. It was urged that the respondent's witness testified that he knew as a fact, that his parents (then the directors of the respondent), frequently demanded that the appellants vacate the suit land, but the appellants always asked for more time to look for an alternative. When they failed to vacate the suit land, the respondent filed Machakos CMCC No. 175 of 2005; Machakos Ranching Company Ltd vs Kamatu Mwathi in which they were granted orders of eviction and demolition against the appellants. That this was supported by the evidence of the 2<sup>nd</sup> appellant who stated that she became aware of the eviction order in 2005 from the District Officer.
  19. In the respondent's view, the appellants failed to prove that their possession was without the true owner's permission, that the owner was dispossessed of the land, that they carried out acts on the land, which were inconsistent with the owner's enjoyment thereof, for the purpose it was intended. They posed the question how the appellants adversely occupied the land if they did not know the registered owner.
  20. The respondent submitted that it proved to the trial court by production of a title deed, and the latest land rates receipts issued by the County Government in respect to the suit land dated 23<sup>rd</sup> February 2015, and 19<sup>th</sup> February 2016, that there was no outstanding land rate due and it has actively been in possession of the suit land.
  21. The appeal came before us for hearing via the virtual platform on 1<sup>st</sup> April 2025. Mr. Bigambo, learned counsel for the appellant was absent, although duly served with the hearing notice through Kituo Cha Sheria. Ms. Wambua learned counsel, was present for the respondent. She relied on the filed submissions fully and opted not to highlight.



22. This is a first appeal. The mandate of this Court on first appeal is stipulated in Rule 31 (1) (a) of the Court of Appeal Rules, 2022 as follows:
- “On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re- appraise the evidence and to draw inferences of fact.”
23. This Court addressed the duty of the Court on first appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as follows:
- “[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
24. With that in mind, we have considered the record of appeal, the rival submissions before us, and the law applicable. The only issue that falls for our determination is whether the appellants satisfied the requirement for the grant of adverse possession.
25. Before we delve into the issue for determination, we note that the respondent averred in its defence, that the suit is bad in law because the subject matter is *res judicata*, having been litigated in Machakos CMCC No. 175 of 2005. However, neither the respondent nor the appellant submitted on this issue. They appear to have abandoned it and the learned Judge did not pronounce himself on it.
26. We turn now to the contested claim of adverse possession before us. Adverse possession is a legal principle that allows a person to acquire ownership of land they have occupied, without the owner’s permission, for a continuous period of 12 years. This requires open, continuous and exclusive occupation, sometimes known as “squatter’s rights.”
27. Concerning adverse possession, Section 38(1) and (2) of the *Limitation of Actions Act* (Cap. 22) provides as follows:
1. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
  2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
28. This Court has consistently set out what is required to prove a claim for adverse possession in a long line of decisions. For example, in *Kasuve vs Mwaani Investments Limited & 4 Others* [2004] 1KLR, the Court stated that:
- “In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”



29. The requirements for the proof of adverse possession were discussed in the case of *Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others* (2017) eKLR where this Court stated as follows:
- “For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*.”
30. Also, in a case of two litigants with the wondrous names of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] KECA 942 (KLR), the Court went further to enumerate that a person who claims adverse possession must, inter alia demonstrate the following:
- a. on what date he came into possession
  - b. what was the nature of his possession?
  - c. whether the fact of his possession was known to the other party.
  - d. for how long his possession has continued and,
  - e. that the possession was open and undisturbed for the requisite 12 years.
31. The foregoing decisions indicate that for a claim for adverse possession to succeed, the claimant must demonstrate that he is in actual possession of the suit land. That is, he must be physically present and using the land not just occupying it without permission. The possession must be open and notorious, that is, obvious and visible, such that the true owner and others can easily become aware of it. See- *Titus Kigoro Munyi -vs- Peter Mburu Kimani* [2015]eKLR, where it was held that for a claim of adverse possession to succeed, it must be proved that the registered owner had knowledge of the occupation.
32. Further, the claimant must possess the land to the exclusion of the true owner and other individuals demonstrating control over the land. The possession must be continuous and uninterrupted for the period of 12 years. It must also be without the consent or permission of the registered owner. Where possession is consensual or contractual in its inception, adverse possession cannot arise. (See *Gabriel Mbui -vs- Mukindia Maranya* [1993]eKLR). Lastly, the possession must be with hostile intent, that is, inconsistent with the true owner’s rights.
33. In the case before us, the appellants urged that they moved into the suit land in the 1960s and lived there for about 60 years. They posited that they proved that they had developed the land by putting up structures including permanent buildings and homes, and growing varied crops. They only received a notice to vacate the land in 2005 and that is when they filed this suit. On the other hand, the respondent urged that the appellants could not tell when they first entered the suit land, and the photographs they tendered in evidence, showed that the erected structures were temporary in nature, signifying that they were aware that they could be evicted anytime. Additionally, that it is the respondent who has been in possession of the suit land.
34. The 1<sup>st</sup> appellant produced in evidence a letter dated 9<sup>th</sup> February 1981 in which it is purported that her husband (deceased), had applied to be allocated the suit property. The said letter states that the 1<sup>st</sup> appellant and others had lived “in Athi River” for the last twenty (20) years, and that they had been granted plots on the basis of temporary occupation licences. In the said letter, the 1<sup>st</sup> appellant’s husband (deceased), stated that he “bought all the interests in Plot No. 3 which included a business for Kshs. 200,000 in 1964.”



- 35. The 1<sup>st</sup> appellant did not produce any document in evidence to show the nexus between Plot No. 3 that her husband had applied to be allocated, with the suit property which was registered in favour of the respondent in 1985. Further, the 1<sup>st</sup> appellant deposed that they had erected permanent buildings on the suit land. However, the photographs of the buildings produced in evidence were of semi-permanent structures and not the permanent structures adverted to.
- 36. Upon reappraising the evidence in totality and evaluating it afresh, we find that apart from the appellants’ testimonies that they entered the suit property in the 1960s, there is no other evidence to support this allegation. The appellants failed to explain the nature of their adverse entry. By their own admission, the appellant’s late husband applied to be allocated the land. For adverse possession to apply they should have believed that the land belonged to the respondent. They also failed to state the date they entered the suit land or the acreage of the area claimed.

In the end, we find that the appellants have not satisfied the requirements for us to grant the order for adverse possession and, therefore, there is no basis to upset the finding of the learned Judge. Reasons wherefore, the appeal is found to lack merit and is dismissed with costs to the respondent.

It is so ordered.

**DATED AND DELIVERED IN NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER, 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**DEPUTY REGISTRAR.**

