

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: GATEMBU, MURGOR & OCHIENG, JJ.A.)

CIVIL APPEAL NO. E015 OF 2023

BETWEEN

BENDERA KARISA KARIMA.....APPELLANT

AND

KENYA AIRWAYS LIMITED.....RESPONDENT

*(Being an appeal from the Judgment and Decree of the
Environment and Land Court at Malindi (M. A. Odweni, J.)
delivered on 31st January, 2023*

in

ELC Case No. 50 of 2016)

JUDGMENT OF THE COURT

1. The appeal before us originates from the appellant's Originating Summons dated 8th March 2016, concerning the parcel of land Plot No. L.R. 5786 Malindi, hereinafter, "the suit land". The appellant sought orders that he be declared 'the legal representative of the suit land' on behalf of the deceased, Samson David Magambo, and that the suit land be registered in his name on behalf of the deceased.

2. The appellant claimed that the suit land was vacant when the deceased moved in and that they had lived thereon peacefully without interruption from the respondent. The appellant was of the view that although the suit land is registered in the name of the respondent, the deceased was entitled to be registered as the owner by virtue of adverse possession.
3. The appellant stated that the deceased was in occupation of the suit land with his family since 1983 until his demise on 25th March 2013. After his death, the appellant continued to occupy the suit land. She stated that they had depended on the suit land for subsistence, and even built a matrimonial home thereon. She further stated that they lived thereon peacefully without any interruptions until August 2006, when the respondent claimed ownership.
4. The appellant submitted that the claim for adverse possession had crystallized after 33 years of undisturbed possession, making the property theirs.
5. The respondent's case was that it was allotted the suit land by the Commissioner of Lands, and a Certificate of Title was issued on 4th July 1994. Thereafter, the respondent formally accepted the terms and conditions of the offer and remitted the required sums. On 26th August 2006, the respondent wrote a letter to the deceased, asking him to vacate the suit land.

6. At the time when the title was issued, the deceased was one of the squatters on the suit land. However, the respondent became aware that the deceased was residing on the suit land in 2006.
7. The respondent disputed the claim of adverse possession, stating that there were squatters on the land when the Certificate of Title was issued. Following the letter to vacate the suit land, all the property on the suit land was demolished, and all the squatters were evicted, including the deceased, as confirmed by the letter dated 18th October 2006.
8. The deceased was given three months to find an alternative place. The respondent also alleged that the relatives of the deceased were aware that his occupation of the suit land was not peaceful and quiet. However, the deceased continued staying on the suit land with the respondent's permission and consent.
9. The respondent further asserted that it had erected a perimeter fence around the suit land and employed guards to take care of the plot, and continued to pay all land rent and rates. The respondent's position was that since it obtained title to the suit land in 1994, it was trite law that adverse possession could not run against Government land before that date.
10. The respondent emphasized that the appellant's stay was not uninterrupted and peaceful since the respondent entered and

evicted squatters and demolished structures, offering the deceased three months to vacate and look for alternative land. These actions interrupted the deceased's possession.

11. The trial court's analysis focused on whether the applicant had established the requirements for adverse possession. While citing the case of **Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Muhambi Katana & 15 Others [2018] KECA 402 (KLR)**, which defines adverse possession as requiring possession to be actual, open, non-permissive, non- consensual, notorious, exclusive, and uninterrupted for 12 years.
12. The court also cited **Sisto Wambugu vs Kamau Njuguna [1983] KECA 69 (KLR)**, which states that the person seeking title must prove dispossession by the true owner or discontinuance of possession by the true owner for the statutory period.
13. The court found that the deceased had been in peaceful and uninterrupted occupation of the plot since 1983, a period spanning over 30 years, and that the respondent was aware of his occupation. However, the court noted that the suit property was owned by the Government prior to allocation to the respondent, who was issued a Certificate of Title in July 1994.
14. The court emphasized that the respondent had written a letter on 26th August 2006, asking the deceased to vacate, followed by the demolition of all the structures on the suit land, and the eviction of squatters on 18th October 2006, and a request for the deceased to find an alternative place within three months. This was found to be an interruption of

possession.

15. The court stated that time did not run while the appellant was occupying land that belonged to the government.
16. The court found that the appellant's possession was interrupted by the respondent's entry, demolition of structures, fencing, eviction of squatters and safeguarding the suit land by engaging guards. The respondent's letter permitting the appellant three (3) months to look for alternative land further supported the claim that the appellant's occupation was not peaceful and quiet.
17. The court held that the appellant failed to prove that their occupation was with the permission and consent of the respondent, having produced correspondence in which he was requesting for permission from the respondent to look for alternative land.
18. The court further noted that the respondent made an effective entry by evicting squatters, erecting a fence, and appointing guards, stopping the time for adverse possession from running between 1994 and 2006.
19. Consequently, the court held that: the appellant had not proved her case; the appellant's application was dismissed; and the costs of the suit were awarded to the respondent.
20. Being aggrieved by the judgment of the ELC, the appellant lodged the present appeal seeking to overturn the said decision. The appellant raised the following grounds of appeal:

- a) *The learned Judge erred by not appreciating that title to the suit land by way of adverse possession had already accrued and vested in favour of the appellant's deceased husband, Samson David Magambo.*
- b) *The learned Judge erred by failing to appreciate that there was no evidence that the respondent ever took possession of the suit land or successfully dispossessed/ousted the appellant from the suit land.*
- c) *The learned Judge erred by failing to appreciate that the assertion of a right by the owner only occurs when the owner initiates legal proceedings or makes an effective entry into the land.*
- d) *The learned Judge erred by failing to appreciate that the appellant enjoyed exclusive possession of the land openly and as of right without interruption for a period exceeding 12 years since 1994, thus inferring acquiescence on the part of the respondent.*
- e) *The learned Judge erred by finding that the appellant's occupation of the suit land was not adequate in continuity, publicity, and extent to sufficiently demonstrate possession adverse to the title owner.*
- f) *The learned Judge erred in law and fact by concluding that the appellant had not proven animus possidendi (intention to possess) and corpus possessionis (actual possession).*
- g) *The learned Judge failed to appreciate the salient principle that adverse possession relates to the*

"control of use" rather than "deprivation of possessions".

h) The learned Judge erred by failing to appreciate that it is in the public interest and the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such a time when the commodity is scarce.

21. Based on these grounds, the appellant is seeking the following prayers from this Court:

- 1. That the appeal be allowed and the judgment dated 31st January 2023 be set aside.*
- 2. That the costs of this appeal and in the superior court be paid by the respondent.*

22. When the appeal came up for hearing on 5th March 2025, Mr. Mwadilo, learned counsel, appeared for the appellant, while Mr. Ouma, learned counsel, appeared for the respondent. Counsel relied on their respective written submissions, which they orally highlighted.

23. Mr. Mwadilo submitted that the appellant and her husband were residing on the suit land before its allocation to the respondent on 4th July 1994. Nonetheless, the period from 4th July 1994 to 26th August 2006, when the appellant and her husband were evicted, constituted over 12 years. Therefore, the appellant contends that they had already acquired title by adverse possession before the eviction occurred on 26th August 2006, and the eviction itself was wrongful.

24. Opposing the appeal, Mr. Ouma invited the Court to examine letters found at pages 152 to 157 of the Record of Appeal, written by the appellant's late husband. Counsel pointed out that the letters of 18th and 19th October 2006 contained the deceased's acknowledgments that: his house had been demolished, and all the squatters had been evicted; the title and ownership of the suit land was held by the respondent; and the appellant made a request for a reward, for having watched over the plot for many years.
25. Counsel further referred to the undated letter on page 154, in which the deceased acknowledged being stopped from planting beans. While also requesting a reward of about 7.5 million, he sought to contest that the plot was now his due to occupation since 1983.
26. Counsel submitted that the impact of these letters is profound, as the acknowledgements were effective in light of **Sections 23(1), 24 and 25** of the Limitation of Actions Act. He contended that where a person who is or claims to be entitled to property by adverse possession acknowledges the ownership of the registered title holder, then the time for adverse possession starts running after such acknowledgement and not before.
27. Counsel was of the view that any claim by the appellant that adverse possession accrued between 14th July 1994 and 26th August 2006 was extinguished by the deceased's express written and signed acknowledgement. Counsel further pointed

out that

the period between 1983 and 14th July 1994 cannot be counted by virtue of **Section 41(1)** of the Limitation of Actions Act.

28. Counsel reiterated that the deceased's acknowledgement of the respondent's title on 18th October 2006, along with his request for accommodation, extinguished any claim of adverse possession regarding the title. He emphasized that the acknowledgement acted retrospectively, nullifying any claim prior to 18th October 2006. Counsel pointed out that the appellant, in her examination-in-chief, acknowledged that she did not even know that the respondent had a title in the first place.
29. Counsel concluded by submitting that the superior court did not err in its judgment, and he prayed that the judgment be upheld and the appeal be dismissed with costs.
30. As the first appellate court, our mandate is to re-evaluate, re-assess, and re-analyze the evidence presented before the trial court and arrive at independent findings, while bearing in mind that we did not see or hear the witnesses. This principle was reaffirmed in **Abok James Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where this Court restated this requirement as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions

reached by the learned trial Judge are to stand or not and give reasons

either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2EA 212 wherein the Court of Appeal held, inter alia, that: - “On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

31. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issues for determination are: whether the deceased acquired title to the suit land by adverse possession before his death; whether the occupation of the land between 1983 and 1994 can be considered for purposes of adverse possession; whether the respondent effectively interrupted the possession through eviction and demolition; and whether written acknowledgments by the deceased extinguished or reset the period for adverse possession.
32. The doctrine of adverse possession is governed by the Limitation of Actions Act, specifically **Sections 7, 13** and **38**. Under this statutory regime, a person who has been in continuous, open, and exclusive possession of land, without the permission of the registered owner, for an uninterrupted period of 12 years, may apply to be registered as the legal

proprietor of the said land.

33. **Section 7** of the Act provides that:

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

34. Further, **Section 38(1)** provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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 proprietor of the land.”

35. The essential elements that must be satisfied for a claim of adverse possession to succeed have been reiterated in numerous decisions of this Court. In **Andafu vs Akhulunya [2025] KECA 714 (KLR)**, this Court articulated the principle as follows:

“Courts, on the other hand, have judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession. The leading cases from this Court in this regard include: Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 others [2004] eKLR; Titus Kigoro Munyi vs. Peter Mburu Kimani, Civil Appeal No. 28 of 2014; Wambugu vs. Njuguna [1983] KLR 172) and Karuntimi Raiji vs. M'makinya [2013] eKLR.

34. The principles distilled from these cases are that in order to establish a claim of adverse possession, the possession must be:

***a. Adverse to the interests of the owner -
meaning that the claimant is in possession
as owner in contradistinction to holding in***

recognition of or subordination to the true owner or to a recognized superior claim of another;

b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;

c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;

d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;

e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;

f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years. See Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa, Kisumu Civil Appeal No. 149 of 2022; Titus Mutuku Kasuve (Supra); Titus Kigoro Munyi (Supra); Wambugu vs. Njuguna(supra)

and Karuntimi Raiji (supra).”

36. Similarly, in **Mtana Lewa vs Kahindi Ngala Mwangandi** [2015] KECA 532 (KLR), this Court restated the doctrine thus:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

37. In ***Wambugu vs Njuguna*** (Supra), this Court held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. Further, the said court held that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed of, or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that that he or she has been in possession for the requisite number of years.

38. Importantly, the doctrine does not apply to land that is still held by the government. This is clearly stipulated under **Section 41(1)(a)** of the Limitation of Actions Act, which

provides that:

“This Act does not -

(a) enable a person to acquire by adverse possession any estate or interest in, or any right

to, land which is for the time being in the possession of the Government...”

39. It is not in dispute that the appellant’s late husband entered into occupation of the suit land in 1983. However, as the evidence before this Court confirms, the land was at that time public land, held by the Government of Kenya.

40. Adverse possession cannot run against government land. In **Sammy Mwangangi & 10 others vs Commissioner of Lands &**

3 Others [2018] KECA 800 (KLR), this Court held that:

“It is not in dispute that the suit property otherwise known as LR. No 209/11543 and LR. No. 209/11546 is Government land. This is also acknowledged by the appellants in their letter addressed to the Minister for Lands dated 6.4.98 at paragraph 7 where they stated as follows;-

“Since we are settled on Government Land, we use sewer water...”.

It is trite law that one cannot claim adverse possession against Government land by virtue of Section 41 of Limitation of Actions Act.

34. It is noteworthy that under the Government Lands Act (now repealed), which was enacted to regulate the leasing and other depositions of Government Land it is only the President and/or the Commissioner of Lands who were authorised to make grants or disposition over unalienated Government land.

35. It is a well settled principle that a claim for adverse possession can only be maintained

against a registered owner; nor can one claim adverse possession against public land”.

41. Accordingly, the statutory clock could not begin to run until 4th July 1994, when the suit land was alienated and a Certificate of Title issued to the respondent, a private entity. From that date, the suit land ceased to be government land and became susceptible to claims under adverse possession.
42. The appellant contends that the deceased remained in possession of the suit land from 4th July 1994 until 26th August 2006, a period of approximately 12 years and 53 days, and that this uninterrupted occupation gave rise to a right by adverse possession.
43. However, the record clearly shows that on 26th August 2006, the respondent took definitive action to assert its proprietary rights. It issued a notice to vacate and subsequently, on 18th October 2006, undertook demolition of structures and eviction of squatters, including the deceased.
44. These actions, in our view, constituted an effective interruption of possession. This is consistent with the principle established in

Mwangi Githu vs Livingstone Ndeete [1980] KECA 35 (KLR), when this Court held that:

“Time ceases to run under the Limitation of Actions Act either when the owner takes legal proceedings or makes an effective entry into the land.”

45. Moreover, the deceased, in his letters dated 18th and 19th October 2006, acknowledged that he had been evicted and that the land

was owned by the respondent. In one such letter, he appealed for compensation, stating that he had taken care of the land on behalf of the respondent, and requested a reward.

46. This conduct is material. Under **Section 24** of the Limitation of Actions Act, such acknowledgment of ownership has the legal effect of resetting the limitation period. In **Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016] KECA 227 (KLR)**, this Court held that:

“We have dealt with the issue of assertion of title by the owner of land and have shown what, in terms of assertion of title, interrupts time from running in adverse possession. We now focus on acknowledgment by the trespasser of the owner’s title. It is not enough for the trespasser to merely say or acknowledge that the owner is the proprietor of the land which the trespasser is occupying. The word “acknowledgment” is defined by Black’s Law Dictionary, Ninth Edition, to mean -

“1. A recognition of something as being factual;

2. an acceptance of responsibility

3. the act of making it known that one has received something;

4. a formal declaration made in the presence of an authorized officer such as a notary public, by someone who signs a document and confirms that the signature is authentic.”

27. In law, for a trespasser to be said to have

acknowledged the title of the owner of the land, the trespasser must be shown to have accepted by conduct or by declaration before the period of

twelve year of adverse possession has run out that he, the trespasser, accepts he is on the land with the owner's permission, consent, or acquiescence and is not on the land adversely to the title of the owner. An acknowledgment that falls short of this or does not amount to acceptance by the trespasser that he is on the land with the consent, tacit or otherwise, of the owner will not do, nor will it be acknowledgement if the period of adverse possession has run its course and adverse possession has crystallized and the title of the owner has been extinguished. It is precisely because adverse possession does not arise where a person is on another's land with the latter's consent or permission that a trespasser's acknowledgment of the owner's title must clearly show that the trespasser has accepted that he is on the land with the knowledge and permission of the title holder."

47. Accordingly, any period that had accrued prior to 18th October 2006 was extinguished by the deceased's express acknowledgment of the respondent's title. A fresh 12-year period could only begin from that date. Since the Originating Summons was filed in March 2016, only 10 years had passed, falling short of the required threshold.
48. The learned trial Judge also addressed the qualitative aspects of possession, namely, whether it was hostile, exclusive, and with the intention to possess (*animus possidendi*), and whether the possession was actual and effective (*corpus possessionis*).

49. The evidence produced, including correspondence authored by the deceased, reveals that rather than asserting ownership as of right, the deceased sought to negotiate or plead with the respondent, acknowledging its ownership and seeking consideration. This negates the requirement of hostile possession.
50. Furthermore, following the eviction and demolition of structures, the respondent took steps to reassert control over the land by erecting a perimeter fence and deploying guards. These actions disrupted any claim to exclusive or continuous possession by the appellant.
51. In the circumstances, we find that:
- a) Time for purposes of adverse possession could not begin to run until 4th July 1994, when the land ceased to be government land;**
 - b) Possession was effectively interrupted on 18th October 2006, both by physical eviction and the deceased's written acknowledgment of the respondent's title;**
 - c) Even if a new limitation period began to run from that date, the suit filed in 2016 fell short of the required 12-year period;**
 - d) The evidence did not establish the necessary elements of adverse possession, including exclusive, continuous, and hostile occupation.**
52. The trial court properly applied the law and correctly evaluated the evidence. There is no merit in this appeal.

53. Consequently, we find that the appellant failed to meet the statutory threshold for adverse possession. The appeal is dismissed in its entirety.

54. As costs follow the event, the costs of this appeal are awarded to the respondent.

55. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this judgment is delivered in accordance with **Rule 34(4)** of the Court of Appeal Rules.

Orders accordingly.

Dated and delivered at Mombasa this 21st day of November, 2025.

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....
JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR