REPUBLIC OF KENYA IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: MUMBI NGUGI, NYAMWEYA & KORIR JJ.A.]

CIVIL APPEAL NO. E354 OF 2024 BETWEEN

MUSA ONSANDO OMARE

.....

APPELLANT

AND

YUSUF GITHINJI.....1ST RESPONDENT

HUSSEIN GITHINJI MWANGI.....2ND RESPONDENT

JOSEPH KAMAU MWANGI.....3RD RESPONDENT

FRANCIS RUHIU MACHARIA T/A CORO BAR & RESTAURANT.....4TH RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Kajiado (M. N. Gicheru J.) dated and delivered on 19th March 2024 in Kajiado ELC No. 814 of 2017)

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JUDGMENT OF THE COURT

1. The two interrelated issues in this appeal, which is a first appeal, are whether the Environment and Land Court (ELC) at Kajiado (***M.N. Gicheru J.)*** properly evaluated the evidence adduced before it, and exercised its discretion judiciously, in reaching the decision in the judgment

delivered on 19th March 2024 in **Kajiado ELC. No. 814 of 2017.** The said case had been filed therein by Musa Onsando Omare (the appellant herein), and the ELC found in its judgment that his claim had no merit, and ordered that

the appellant be evicted from LR. No. 13977 Ngong Town upon the expiry of sixty (60) days if he did not vacate voluntarily.

2. The appellant's claim in the said suit was that he had acquired title to LR. No. 13977 Kajiado Ngong (hereinafter "the suit property") by adverse possession and he accordingly had sought a declaration that the right of Yusuf Githinji, Hussein Githinji Mwangi, Joseph Kamau Mwangi and Francis Ruhiu Macharia T/A Coro Bar & Restaurant (the respondents herein), to recover the suit property was barred by section 7 of the Limitation of Actions Act on the ground that he had openly, peacefully and as of right been in occupation of the said property since December 1980. The appellant also sought an order that he be registered as the proprietor of the suit property in place of the respondents under section 38 of the Limitation of Action Act.

3. A brief background to the appeal is as follows. The appellant's claim in his suit was that he bought LR. 305/167 Ngong measuring 0.25 acres from Manohan Singh Chawla in 1980 for a purchase price of Kshs 40,200/-; the then Olkejuado County Council approved the sale and transfer on 23rd December 1980; and he took possession of the land which he developed and occupied for almost 50 years. However, in 2016, the respondents demanded and claimed ownership of a portion of the land which measured 0.0487

acres known as LR 13977 and for which they were issued with a title deed. According to the appellant, the respondents were seeking to

dispossess him of the said land which he had occupied and developed for nearly 40 years, and any rights they had in the land had been extinguished as he acquired ownership by prescription. He also challenged the legality and propriety of the document presented as the respondents' title deed for the suit property. The appellant accordingly prayed to be declared as the owner of the entire land measuring 0.35 acres, and for orders that the respondents be restrained against interfering with his peaceful occupation and use of the said land.

4. The suit was opposed by the respondents who denied that the appellant had uninterrupted occupations of the suit property for over a period of 12 years, since they had filed **HCCC No. 6323 of 1991** against him claiming the suit property, and seeking that the appellant be declared a trespasser. Furthermore, that it was only fair and just that the appellant's suit be consolidated with **HCCC No. 6323 of 1991. The a**ppellant in rejoinder stated that **HCCC No. 6323 of 1991** was dismissed for want of prosecution and the summons and plaint in the suit were never served upon him and the case was not pending as alleged.

5. The appellant testified in the ensuing trial in the ELC as PW1, and produced his documents as exhibits and then called his two witnesses, his son Musa Junior, and his daughter Regina Moraa. The gist of their evidence was that they had been in

occupation of the suit property since 1980 which is where they lived; the appellant had developed the suit property and

built permanent buildings thereon; the appellant had a title deed to the property which was initially sold to him as Plot No 305/167 and later subdivided to two plots, namely Nos 13977 and 13978 which were adjacent to each other; they lived in plot 13978 which was residential, while plot 13977 was commercial and they had built permanent buildings thereon in 1990; and that they only became aware of **HCCC No. 6323 of 1991** after it was dismissed in 2016.

6. Francis Ruhiu Macharia testified for the respondents as DW1. He stated that their suit in **HCCC No. 6323 of 1991** was dismissed on 14th November 2017 and he had furnished an order to demonstrate this fact; the respondents had tried to get the appellant out of the suit property; when they filed the suit in **HCCC No. 6323 of 1991** the appellant had not built on the suit property, and that the appellant had constructed the buildings thereon while the said suit was ongoing. Further, that Yussuf Githinji was his brother while Hussein Githinji and Joseph Kamau were his cousins, and that Yussuf was alive and lived in Mtwapa but that Joseph and Hussein were deceased. Lastly, that the respondents had a title deed for the suit property. DW1 denied that the title deed was fake, and testified that they got the land from the government.

7. After hearing the parties, ***M.N. Gicheru J.*** found that the appellant had not proved two essential things, firstly that his

occupation of LR 13977 was without force in light of the suit filed by the respondents, **HCCC No. 6323**

of 1991, and it was immaterial whether or not the appellant had been served with the Court process. Secondly, that such occupation without force was not for 12 uninterrupted years, and the appellant was therefore a trespasser on the suit property, and it was also immaterial whether he had built permanent or temporary structures thereon.

8. The different limbs of the two issues in this appeal that we set out at the beginning of this judgment are elaborated in the appellant's Memorandum of Appeal dated 9th May 2024, in which he raises the following eighteen grounds of appeal:

> *1) The Learned Hon. Judge erred in law and fact for failing to note and give a determination that the earlier suit No 6323 of 1991 had been dismissed by a Court of similar competent jurisdiction for want of prosecution and the Respondents had not sought for reinstatement.*
>
> *2) The Learned Judge erred in law and in fact for failure to note that Hon. C. Achieng J sitting at Kajiado Court of similar competent jurisdiction had struck out ELC Case No. 638 of 2017 which raised facts which were similar to HCCC 6323 of 1991 on account of Res Judicata.*
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> *3) The Learned Judge erred in law and in fact in relying on the facts of HCCC No. 6323 of 1991 in ordering that the subject property belonged to the Respondent while the matter had been dismissed.*
>
> *4) The Learned Judge erred in law and in fact by failing to note that though evidence adduced before the Court the Appellant has enjoyed uninterrupted occupation of the subject property, for a period exceeding 12 years since the year*

1980.

5) *The Learned Judge erred in law and in fact to give a determination that despite the Respondents had filed HCCC no 6323 of 1991, the same was never prosecuted and the suit was dismissed for want of prosecution hence there was no interrupted occupation.*

6) *The Learned Judge erred in law and in fact by failing to consider the evidence of the Appellant and the Core witness which evidence was overwhelming*

7) *The Learned Judge erred in law and in fact for failure to critically evaluate the evidence presented before him.*

8) *The Learned Judge erred in law and in fact by failing to establish that the Appellant's evidence had been corroborated and hence sufficient to prove and established the Appellant's case.*

9) *The Learned Judge erred in law and in fact by making a declaration that the subject property was jointly owned by the Respondent in absence of any oral testimony of 1st, 2nd and 3rd Respondent adduced in Court as it is only the 4th Respondent who testified.*

10) *That the proceedings in the superior Court was a nullity on the basis that the Learned Judge erred in law and in fact to allow the suit to proceed on with the full hearing when there was evidence before the Court that the 2nd and 3rd Respondents are deceased and there was no limited grant/ succession that had been taken out for substitution of two witnesses.*

11) *The Learned Judge erred in law and in fact for failure to take into consideration that the Respondents' had earlier filed No. 638 of 2017 which they were seeking eviction orders which was*

dismissed with costs on account of Res Judicata.

12) *The Learned Judge erred in law and in fact to note that the Appellant had adduced overwhelming evidence.*

13) *The Learned Judge erred in law and in fact by failing to note that the Respondents did not adduce any corroborative evidence to prove the authenticity of the title deed produced in Court in support of ownership of the subject property.*

14) *The Learned Judge erred in law and in fact by shifting the onus of proving ownership to the Appellant whereas it was the core responsibility of the Respondent to adduce concrete evidence in support of their claim.*

15) *The Learned Judge erred in law ad in fact by failing to consider the Appellant had conducted due diligence in respect to the authenticity of title deed and there was no valid search issued by the Land Registrar to confirm the authenticity of the subject title produced in Court by the Respondents.*

16) *The Learned Judge erred in law and in fact by failing to consider the documents availed in Court by the Appellant to disapprove the Respondents' claim over the subject property.*

17) *The Learned judge erred in law and in fact by granting orders which the Respondents had not pleaded in their pleadings.*

18) *The Learned Judge erred in law and in fact by failing to note that there was no counter claim filed by the Respondents against the adverse possession claim by the Appellant, therefore the orders and directions issued are underserving.*

9. We heard the appeal on this Court's virtual platform on 25th November 2024. Learned counsel, ***Mr. Lawrence Nyangito,*** appeared for the appellant, while learned counsel, ***Mr. Waweru,*** appeared for the respondents. Both

counsel highlighted their respective submissions dated 8th November 2024 and 12th November 2024. In commencing the determination of this appeal, we are mindful of the duty of this Court as a

first appellate court, which was reiterated and set out in the decision of **Selle and another vs Associated Motor Boat Co. Ltd & Others (1968) EA**

123. We will therefore reconsider the evidence adduced at the trial court, evaluate it, and draw our conclusions. In addition, we will only depart from the findings by the trial court if they were not based on the evidence on record; where the said court is shown to have acted on the wrong principles of law as was held in **Jabane vs Olenja [1986] KLR 661;** or where its discretion was exercised injudiciously as was held in **Mbogo & Another vs Shah [1968] EA 93.**

10. The first limb of the issue before us is whether the evidence adduced by the appellant proved his claim. In this regard, it is notable that the respondents did not contest the appellant's averments and evidence that he was in occupation of and had developed the suit property, and indeed DW1 testified that the respondents had filed a suit to evict him from the property as a trespasser. The appellant's evidence that he had occupied the suit property since 1980 was also not controverted. The appellant produced a transfer to him dated 23rd December 1980 of Plot No. 305/167 Scheme 305, which he claims the suit property is a sub-division of; while the respondents produced title deed issued to them with respect to the suit property with effect from 1st March 1990.

11. Adverse possession is statutorily underpinned in sections 7 and 38 of the Limitation of Actions Act, Cap 22, which 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 its first accrued to some person through whom he claims, to that person, and a person can claim land ownership based on adverse possession, if he or she demonstrates open, continuous, exclusive, non-permissive and uninterrupted occupation of the land for a minimum period of 12 years.

12. Various decisions have settled these requirements of adverse possession, and we refer in this regard to the decisions in **Wambugu vs Njuguna (1983) KLR 173**, **Titus Mutuku Kasuve vs Mwaani Investments Limited & 4 others [2004] KECA 161 (KLR)** and **Mtana Lewa vs Kahindi Ngala Mwagandi [2015] KECA 532 (KLR).** This Court explained as follows in **Titus Mutuku Kasuve vs Mwaani Investments Limited & 4 others (supra) :**

> ***"Section 38(1) of the Limitation of Actions Act chapter 22 Laws of Kenya authorizes a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor. And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of***
> ***12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – Wanje v Saikwa (No***

2) [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see Githu v Ndeete [1984] KLR 776)."

13. The issue in contention in this appeal is whether the suit filed in **HCCC No. 6323 of 1991** stopped the continuity of possession and time running with respect to the adverse possession of the suit property by the appellant. The appellant claimed in this respect that the summons in the suit was not served upon him, nor was he aware of it. It was settled by this Court in **Githu vs Ndeete (supra)** that to amount to interruption to occupation and possession, or to put a stoppage to the running of time, an owner of land must assert his right to title by physically entering onto the property and evicting and ejecting the trespasser from the suit property, or instituting legal proceedings in a court of law against the trespasser and asserting his rights against the trespasser with prayers for his eviction and ejection from the property. Therefore, the mere institution of a suit is not enough**.**

14. Quite apart from the allegation that the process of the suit filed in **HCCC No. 6323 of 1991**was not served on the appellant, it is not contested in this appeal that the said suit was dismissed for want of prosecution, and no orders were therefore ever issued therein stopping the possession of the appellant of the suit property. The appellant also demonstrated that subsequent attempts by the respondents to file new suits were dismissed by the ELC on account of being *res judicata*. In order to be effective, an action for recovery of land must be ssuccessfully pursued. It is not

enough to simply issue a warning letter or notice; the formal court process must be initiated and pursued to an order for possession. It is only when the true owner of land obtains a court order for possession that time stops to run as

it results in the occupier vacating or being evicted and actual interruption of possession. Consequently, therefore the mere institution of **HCCC No. 6323 of 1991** by the respondents did not interrupt the appellant's continuous possession of the suit property, and the learned Judge therefore erred in finding that the appellant's occupation of LR 13977 was without force in light of the filing of the said suit.

15. There are therefore valid grounds to interfere with the learned Judge's discretion, as a relevant fact and legal requirement was not considered, namely that, an action for recovery of land in **HCCC No. 6323 of 1991** would only defeat the appellant's adverse possession claim if the legal action was successfully filed and pursued in court before the expiration of the statutory limitation period of 12 years from the date the adverse possession began. The learned Judge also failed to take into account the fact that the appellant's occupation of the suit property was therefore for an uninterrupted period of more than 12 years from 1980 as at the time of filing suit in the ELC in 2016.

16. We therefore find that this appeal is merited, and accordingly set aside the judgment of the Environment and Land Court at Kajiado (***M.N. Gicheru J.)*** delivered on 19th March 2024 in **Kajiado ELC. Case No. 814 of 2017** in its entirety**,** and substitute it with the following orders:

1. A declaration that the respondents' right to

recover Land Title No 13977 KAJIADO NGONG is barred by section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya, on the

grounds that the appellant has been openly and peacefully in occupation of the said land for a period of over twelve (12) years since December 1980.

2. **The appellant be registered forthwith as the proprietor of Land Parcel Title No 13977 KAJIADO NGONG in place of the respondents herein under section 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.**

3. **Each party shall bear their own costs of the suit in the Environment and Land Court and of this appeal.**

17. Orders accordingly.

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

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.