IN THE COURT OF
APPEAL AT MALINDI

(CORAM: MURGOR, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E042 OF 2023

BETWEEN

NJEKI AGENCIES LIMITED.....APPELLANT

AND

SAUMU OMAR KILALO.....RESPONDENT

(Being an appeal from the Judgement and Decree of the Environment and Land Court of Kenya at Malindi (E. K. Makori, J.) delivered on 28th September 2023

in

ELC No. 20 of 2021 (OS))
****

JUDGEMENT OF THE COURT

1. The ***respondent***, Saumu Omar Kilalo, by way of an Originating Summons dated 17th June 2021, sued ***the appellant***, Njeki Agencies Limited, seeking the following orders:

> ***"i. That the respondent is entitled to be declared as the proprietor of all that portion of the land measuring 0.6702 Ha or thereabouts known as Parcel No. 5054/271 Kilifi CR 22165 which she has acquired by adverse possession having lived and worked thereon in her own right for over 12 years from the year 1968 beyond the statutory 12 years using the same openly, peacefully and uninterruptedly without any interference from the appellant or its predecessors in title;***

ii. That the respondent is entitled to be registered and issued with a Certificate of Title over the same in place of the appellant;

iii. That on the premises, the appellant, its agents or servants be restrained by a permanent injunction from alienating, sub dividing, taking possession, selling, transferring, charging, or in any manner whatsoever interfering with the said parcel of land occupied by the respondent; and

iv. That the respondent be granted costs of the suit."

2. In the affidavit supporting the Originating Summons and sworn by the respondent on even date, she deposed that her deceased mother occupied Parcel No. 5054/271 Kilifi CR 22165 ***(the suit property)*** from the year 1962 until her demise on 11th December 2020, while then in employment of Kilifi Cashewnut Factory; that she was born on the suit property in the year 1968; and that, since then, she and her siblings have known the suit property as their only home.

3. The respondent went on to state that, in the year 2013, she took the initiative to formalize, regularize and legalise her family's occupation on the suit property; that, in particular, on 15th July 2013, she lodged made an application with the National Land Commission and The County Physical Planning Officer for grant of the suit property, receipt of which was acknowledged on 26th July 2013 and 17th July 2013 respectively; that, by a letter dated 7th November 2013, the National Land Commission

relayed the progress made on her request; that the same was done by an enclosure of a letter from the County Physical Planner recommending a

proposal for regularization of her (the respondent) settlement on the suit property; that, on 16th March 2016, she wrote a letter to the National Land Commission requesting for the relevant documents to enable her regularise her occupation of the suit property; that she had lived on the suit property since 1968 without any interference which, as at the date of filing of the suit, amounted to a period of 53 years; and that she and her family had built houses without any interference by the appellant, the registered proprietor.

4. It was the respondent's further contention that the appellant had never visited the suit property, and yet it had knowledge or ought to have known that she had been in continuous occupation for a period exceeding 12 years; and that, by the time the appellant was issued with the Grant Title in the year 2012, she had already been on the suit property for 23 years.

5. It was the respondent's case that, having been in open and continuous occupation of the suit property for a period exceeding 12 years as provided for under the Limitation of Actions Act, Cap 22 it was in the interest of justice that she be registered as the lawful proprietor.

6. In response, the appellant filed a replying affidavit sworn on 3rd November 2021, and a further affidavit also sworn on 8th April 2022by one John Njenga Mungai, a director of the appellant company who deposed that the appellant was the registered owner of the suit property, having met all the regulatory requirements, including payment of

annual rent and rates; and that, not too long before the suit was filed,

unknown persons, including the respondent invaded the suit property and erected various structures thereon.

7. The appellant denied that the respondent and/or her mother had lived on the suit property for a period of 53 and 59 years respectively. The appellant contended that the suit was defective as the respondent's claim was brought on behalf of her mother who allegedly passed on in the year 2000; that, the respondent having failed to take out grant of letters of administration in respect of her deceased mother's estate, she had no *locus standi* to file the suit; and that the respondent took the initiative to legalize ownership of the suit property on behalf of the whole family, yet the suit as filed was not a representative suit.

8. The appellant deposed that the correspondence with the National Land Commission and the Ministry of Lands did not support the allegation that the Commission proposed issuance of title to the respondent; that neither of the entities had jurisdiction to allocate to any person privately owned land; that it (the appellant) exercised its right of proprietorship, and had used the suit property to secure credit facilities from Equity Bank Limited; and that it attempted on several occasions through the National Police Service and other national government entities to evict the invaders, but that the attempts were in vain due to use of violence and trickery by the trespassers, including the respondent.

9. The suit was heard by way of *viva voce* evidence. The

respondent testified as PW1. Her testimony was that she had

lived on the suit property for a period of 54 years; that her mother had also been living on the suit property prior to her demise and that, indeed, she had also built a house and connected electricity; that she had four siblings one of whom was deceased, all of whom knew the suit property as their home; that, although she was not married, she had one child who also lived with her on the suit property; that she had tried in vain to have the land allocated to her family; and that, for all the period she and her family had been on the suit property, no one came forward to claim ownership.

10. On behalf of the appellant, one Peter Nganga, its CEO, testified as DWI. It was his evidence that the appellant acquired the suit property in the year 1992; that it took possession of the property in the year 1993 and fenced it off; that they were farming thereon in the year 2014, but that they stopped at some point in time; that the respondent had not been living on the suit property since the 1950's as alleged, but that she and others invaded the suit property in the year 2017 and, thereafter, built semi-permanent homes; and that, since 2017, the appellant had been trying to take possession of the suit property to no avail.

11. In a Judgment dated 28th September 2023, and on the issue as to whether the respondent had the *locus standi* to file the suit, the learned Judge ***(Makori, J.)*** held that the suit was filed by the respondent as a matter of right; and that, therefore, she had the *locus standi* to commence the suit as an individual without her sibling's consent or grant

of letters of administration in respect of her deceased mother’s estate. As to the appellant’s contention that the respondent did not

attach a Grant title in respect to the suit property, the trial court held that the anomaly was corrected by the respondent in her further affidavit dated 3rd December 2021 to which she attached the Grant, which confirmed that the appellant was the title holder of the suit property.

12. As regards the appellant's assertion that it occupied the suit property, the learned Judge held that the appellant had produced nothing to show its actual occupation, such as evidence of farming or any structure that may have been built thereon over time, or better still, any photographs to show occupation thereon by the alleged squatters since it took possession in the year 1992 when the suit property was allocated to it; that, the suit property being having been public land before allocation to the appellant in the year 1992, time started to run from that year, 1992; and that the appellant took no steps to evict the so called 'squatters' and, by the time the suit was filed, 29 years had lapsed.

13. The learned Judge frowned upon lack of the appellant's exercise of due diligence to inspect the suit property before and after taking ownership. He thus found that the appellant's title was extinguished by operation of law. The trial court accordingly declared the respondent as the proprietor of the suit property by way of adverse possession, and that she should be registered as the absolute owner thereof. The court also issued an order of permanent injunction restraining the appellant or its agents from alienating, sub-dividing, taking possession of, selling, transferring, charging, or in any manner

whatsoever from

interfering with the suit property. Costs of the suit were to be borne by the appellant.

14. Aggrieved with that decision, the appellant preferred this appeal premised on rather long and repetitive 17 grounds. ***Rule 88(1)*** of the ***Court of Appeal Rules, 2022*** clearly prescribes the format in which grounds of appeal should take, that is, they should be concise, without argument or narrative as in the instant scenario. Nonetheless, those grounds may be aptly summarised as follows, namely that:

    i. ***the learned Judge erred in fact and in law in failing to find that the respondent lacked locus standi to institute the proceedings for adverse possession on behalf of her siblings and other third parties purportedly on the suit property without written authority;***

    ii. ***the learned Judge erred in fact and in law in failing to appreciate that the respondent's alleged possession was not distinct, independent but was tied to alleged licence to stay on the property from her mother who had died in the year 2020;***

    iii. ***the learned Judge erred in finding that the respondent had been on the suit property for more than 12 years despite her own admission to the effect that she took possession after her mother's demise in the year 2000; and***

    iv. ***the learned Judge erred in failing to appreciate that the respondent had not proved the nature of possession she enjoyed on the suit property and awarding her the entire property when there was no evidence that she had occupied the entire suit property if at all.***

15. The appellant accordingly prayed that: the appeal be allowed; the trial court's judgement and decree issued on 28th September 2023 be set aside; the respondent's suit be dismissed; costs of the appeal and those in the superior court be awarded to the appellant; and that any such further orders as the Court deems just to issue.

16. At the virtual hearing on 14th May 2025, learned counsel ***Mr. Guandaru Thuita*** was present for the appellant while ***Ms. Otieno*** represented the respondent. Counsel relied on the respective parties' written submissions which they orally highlighted. Those of the appellant are dated 6th May 2025 while of the respondent are dated 9th May 2025.

17. The appellant submitted that the respondent in the trial court testified that she instituted the suit on behalf of her deceased mother's family; that , therefore, the suit was a representative suit and, as such, the respondent ought to have obtained the authority as well as grant of letters of administration *ad litem* to enable her file the suit on behalf of the deceased, but that this was not done; and that, accordingly, the respondent did not have the *locus standi* to institute the suit, and, consequently, the suit ought to have been allowed. Reliance was placed on the decisions of this Court in ***Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama (2014) KECA 250 (KLR);*** and ***Narankaik vs. Ahmed (Administrator of the Estate of Ahmed Abdi Murasa) & Another (2024) KECA 648 (KLR)*** for the proposition that one must have had the legal capacity by obtaining a grant of letters of

administration *ad litem* to empower him or her to initiate legal action in respect of a deceased person’s estate.

18. On the issue of authority, it was submitted that, on the alleged concession by the respondent that she was suing on her behalf and on behalf of her other family members, she ought to have complied with Order 1 rule 8 of the Civil Procedure Rules; that the rule provides, *inter alia,* that *where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them*; that such authority ought to be in writing; that the respondent did not get any such authority as stipulated under Order 1 rule 8 allowing her to file an action on behalf of her siblings, relatives and friends living on the suit property; and that, for want of the authority, the trial court erred in not allowing the appellant's claim. To buttress the submission, reliance was placed on the High Court case of ***Kahindi Katana Mwango & Another vs. Cannon Assurance (K) Limited (2013) eKLR***. *Judge, by "superior court", do you mean the High Court, ELC or this Court?*

19. It was further submitted that the respondent's case was that she only occupied a portion of the suit property while the rest of the portion was occupied by other people; that, based on this evidence, it was an error on the part of the trial court to award the entire suit property to the respondent, thereby denying the appellant its right to property under Article 40 of the Constitution.

20. The appellant also contended that the respondent failed to

exhibit a copy an extract of the title deed to the suit property,

which failure was a violation of Order 37 Rule 7 (ii) of the Civil Procedure Rules, 2010, and yet the doctrine of adverse possession runs against title to land. The decisions in ***Abdirashid Adan Hassan vs. The Estate of WHE Edgley*** ***(2022) KEELC 1114 (KLR);*** and ***Ali Mwadhi Mulewa & 40 Others vs. Giuseppe Galgalo (2022) KEELC 1722 (KLR);*** and this Court's decision in ***Johnson Kinyua vs. Simon Gitura Rumuri (2011) KECA 175 (KLR)*** were cited for the proposition that production of a title, the official search and/or extract of green card were proof of ownership; that, therefore, for want of production of these documents, the respondent's claim was defective; that, in any case, when the respondent was applying for allotment of land, she was second-guessing on land in which she was interested; and that the trial court failed to ascertain whether the suit property which the respondent was suing for is one and the same land as the one belonging to the appellant.

21. It was also the appellant's contention that it could not have obtained a loan facility from the bank on the security of the suit property if indeed there were other persons already in occupation thereof.

22. Finally, the appellant submitted that, on all fronts, the respondents did not prove all the ingredients of the doctrine of adverse possession as enunciated by this Court in ***Mtana Lewa vs. Kahindi Ngala Mwagandi (2015) KECA 544 (KLR);*** and in ***Mbira vs. Gachuhi (2002) 1 EALR 137*** that a claimant must prove that he/she has been on the land openly, notoriously, exclusively and in

adverse use to the owner; that the respondent was claiming the suit property

by virtue of the fact that her parents lived thereon and that, after their demise, she took over possession; that the respondent did not call independent evidence to attest that she lived on the suit property; that the trial court neither made a *locus in quo* visit to confirm that the respondent was in its occupation; and, as such, the respondent did not prove adverse possession; and that, for all the foregoing, the appeal should be allowed.

23. On the respondent's part, it was submitted that she has been in possession of the suit property from 1968; that, as at the time of the institution of the suit, 53 years had since lapsed, which was before her mother passed on; and that the respondent brought the suit in her personal capacity by virtue of having lived on the suit property for more than 50 years.

24. As regards the failure to produce the title deed at the trial, it was submitted that it was the appellant who was in its possession; that, furthermore, the appellant acquired the title deed when she (the respondent) was already in occupation of the suit property; that, as such, there had been no interruption of the respondent's occupation of the suit property; that, in any event, the appellant had never undertaken any activity on the suit property; that, as was held by this Court's in ***Gachuma Gacheru vs. Maina Kabuchwa*** ***(2016) KECA 526 (KLR),*** *adverse possession is a matter of fact to be observed on the land, but not to be inferred from a title.* While she (the respondent) produced photographic evidence to prove that she had fully settled on the land, say by building structures, the

appellant had

nothing to show for its alleged occupation, including the alleged agricultural activities.

25. Finally, while relying on the decisions of ***Mtana Lewa (supra);*** and ***Mombasa Teachers Co-operative Savings & Credit Limited vs. Robert Muhambi Katana & 15 Others (2018) KECA 402 (KLR)***, the respondent submitted that she proved that she owned the suit property by adverse possession since her occupation was open, notorious, exclusive and uninterrupted for a period of over 50 years. We were accordingly urged to dismiss the appeal.

26. We have considered the appeal, the oral and written submissions by the respective counsel and the law. As the first appellate court, our mandate is dictated by ***rule 31(1)***
(a) of this ***Court's Rules, 2022***, which is by way of a retrial. We are required to re-appraise the evidence adduced in the trial court and to draw inferences of facts and thereby come up with our own conclusions. However, we are also required to bear in mind that we did not have the advantage of seeing or hearing the witnesses testify, and so observe their demeanour for which we should give due allowance.

27. In ***Ratilal Gova Sumaria & Another vs. Allied Industries Limited (2007) KECA 501 (KLR)***, this Court expressed itself thus:

> ***"Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind***

that a court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or

that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did."

28. Taking to mind the above principles, we deduce that the issues which fall for our determination in this appeal are: *whether the respondent had the locus standi to file the proceedings before the trial court; and whether the respondent was entitled to the suit property by way of adverse possession.*

29. The respondent's claim before the trial court was for the award of the whole suit property, Parcel No. 50532134/271 Kilifi CR 22165 measuring approximately 1.6 acres or 0.6702 Ha or thereabouts. The respondent's case was that she was born on the suit property in the year 1968, and that that was the only land which she and her siblings knew and called home. It was not disputed that, even after the respondent mother's demise in the year 2000, they (the family) continued living on the suit property. It was her claim that she was entitled to the suit property by way of adverse possession having lived thereon for a period of over 12 years.

30. On the other hand, the appellant's entitlement to the suit property was through a Grant issued to it in the year 1992. It contends that the claim for adverse possession crystalized in the year 2000 after the respondent's mother died, consequent to which time started running.

31. As to whether the respondent had the *locus standi* to file the suit, the appellant's argument was that the

respondent lacked capacity to file the proceedings since she brought the

action on behalf of her late mother's estate and that of her siblings.

32. *Locus standi* is the right of a person to appear in court. The Black's Law Dictionary (10th Edition) defines *Locus Standi* as ***"The right to bring an action or to be heard in a given forum",*** while the Concise Oxford Dictionary (12th Edition) defines it as ***"The right or capacity to bring an action or to appear in a court."***

33. Flowing from the above definitions, it can be concluded that *locus standi* gives a litigant the legitimacy to commence court proceedings before any dispute resolution forum. A person who lacks *locus standi* cannot be heard if they have no right to appear in court. This Court in ***Alfred Njau & 5 others vs. City Council of Nairobi (1983) KECA 56 (KLR)*** explained the meaning of the term *locus standi* in the following terms:

> ***"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."***

34. In ***Aga Khan University Hospital vs. Kenya Private Universities Workers (2024) KECA 1950 (KLR),*** this Court, while defining what constitutes *locus standi,* had this to say:

> ***"17. … Locus standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a court of law. Therefore, locus standi means the right to appear before and be***

heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard.

Locus standi is so important that in its absence, the party has no basis to claim anything before the court. See the Supreme Court case of Okoiti & Another v Attorney General & Another (Petition No. 29 of 2020) [2021] KESC 28 (KLR).”

35. A grant of letters of administration is what empowers an individual to make any dealings or to act on behalf of a deceased’s estate. We add though that different grants of letters of administration have different functions. In this case, the appellant contends that the respondent ought to have taken out grant of letters of administration *ad litem* so as to enable her file the suit on behalf of the estate of her deceased mother. The justification for this is that, according to the appellant, she was suing on behalf of her deceased mother so as to enforce her right and that of her siblings of ownership to the suit property. This Court in ***Trouistik Union International & Another vs. Jane Mbeyu & Another (1993) KECA 89 (KLR)*** rendered itself as follows as regards the purpose of grant of letters of administration, more so grant *ad litem*:

“The administrator is not entitled to bring an action as an administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception.”

36. The suit property in question did not belong to the respondent’s deceased mother. The respondent’s deceased mother could not have issued a licence or have the capacity to transfer the property to which she did not have title. Therefore, it cannot be said that the respondent was beneficially entitled to the suit property by dint of

being a

beneficiary and/or heir to warrant the taking out of grant of letters of administration *ad litem* which, would have given her the power to represent any interest on behalf of her deceased mother's estate. Neither has it been shown that the respondent's deceased mother nor siblings have the intention to claim the suit property.

37. Therefore, it can only be concluded that the respondent brought the claim for adverse possession in her personal capacity. She did not seek beneficial interest in the suit property as the deceased's daughter. If this were the case, obtaining grant of letters of administration *ad litem* would have been necessary. It then follows that the decision of ***Narankaik*** (supra) which was cited by the appellant is distinguishable from the instant scenario. The 1st respondent in that appeal who happened to be the plaintiff before the trial court sought orders, not on his own behalf but on behalf of his deceased father's estate. And, since he was seeking a beneficial interest, he was required to have obtained grant of letters *ad litem* before instituting the suit.

38. For the foregoing, we cannot fault the learned Judge for finding that the respondent filed the suit in her own right. To our mind, the finding and reasoning that the respondent had the *locus standi* to file the claim was sound, and we hereby uphold it.

39. Turning to the second and last issue as to *whether the respondent was entitled to the suit property by way of adverse possession,* ***Section 7*** of the ***Limitation of***

Actions Act, Cap 22 provides:

7. Actions to recover land

"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 first accrued to some person through whom he claims, to that person."

40. On the other hand, ***section 13*** of the ***Act*** states:

(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land".

41. ***Section 17*** further provides that:

"Subject to section 18 of this Act, at the

expiration of the period prescribed by this 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".

42. Finally, ***Section 38(1)*** and ***(2)*** stipulates that:

> ***(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."***

43. The above provisions presuppose that, for a person to bring an action to recover land, it must be established that the title holder has lost his/her right to the land either by being dispossessed of it, or having discontinued his/her possession of it as was held by this Court in ***Samwel Nyakenogo vs. Samwel Orucho Onyaru (2010) KECA 307 (KLR)*** that:

> ***"The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession.***
>
> ***The proper way of assessing proof of adverse possession will then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the***

claimant has proved that he has been in possession for the requisite period."

44. It is trite law that a claim of adverse possession runs against a title. The respondent sued to be declared the owner of the suit property, having acquired the same by way of adverse possession. The particulars of the suit property as pleaded by the respondent was Land Reference No. 5054/271 Kilifi Cr. 221165. The Grant that was issued to the appellant on 1st December 1991 bears the same particulars as those pleaded by the respondent. The suit property which the respondent sought to be an adverse possessor of, undoubtedly belonged to the appellant. It then follows that the question as to whether the respondent was suing for the same property to which the appellant holds a title, is settled.

45. For a claim of adverse possession to succeed, the onus lies with the person claiming the title to prove the essential elements that he/she has occupied the land openly, without force, licence and/or permission from the landowner, the sole intention being to dispossess the land from the actual owner.

46. In ***Kim Pavey & 2 others vs. Loise Wambui Njoroge & Another (2011) KECA 342 (KLR),*** this Court observed:

> ***"Thus, to prove title by adverse possession it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law possession is a matter of fact depending on all circumstances – see R.E. Megarry & Wade – The Law of***

Real Property 4th Edition page 1014.”

47. In the case of ***Chevron (K) Ltd vs. Harrison Charo Wa Shutu [2016] KECA 248 (KLR),*** this Court set out the key ingredients of adverse possession thus:

> ***"Therefore, the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See Littledale vs. Liverpool College (1900)1 Ch.19, 21."***

48. The requirements for adverse possession were also spelt out in the case of ***Mbira vs. Gachuhi, [2002] I EALR 137*** where it was held that:

> ***"…. a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non- permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption…."***

49. In the case of ***Mtana Lewa vs. Kahindi Ngala Mwagandi [2015] eKLR***, this Court was clear that adverse possession cannot arise where occupation is under licence. As the Court observed:

> ***"Adverse possession is essentially a situation where a person takes possession of land and***

asserts rights over it and the person having title

omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. <u>The essential prerequisites being that</u> <u>possession of the adverse possessor is neither by</u> <u>force or stealth nor under the license of the owner</u>. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner." (emphasis ours)

50. It must also be established that there was actual possession by the characteristic of the land. In ***<u>Teresa Wachuka Gachira vs. Joseph Mwangi Gachira</u> (2009) KECA 445 (KLR),*** possession was described as follows:

> ***"Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land."***

51. The Supreme Court of India in ***<u>Chatii Konati Rao & Others vs. Palle Venkata Subba Rao</u> (2010) 14 SCC 316,*** in summarising the doctrine of adverse possession, held that:

> ***"In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The***

possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff

proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter."

52. We therefore summarise the requirements that one must prove in a claim of adverse possession as: a) the date on which the claimant came into possession; b) the nature of the possession; iii) the fact that his possession was known to the other party; c) the length of the continued possession; and d) the possession was open and undisturbed for the requisite 12 years.

53. The respondent came into possession of the suit property by dint of having been born and brought up on it. This is an undisputed fact. The second undisputed fact is that the title to the suit property was issued to the appellant in the year 1991. Under Section 7 of the Limitation of Actions Act, a claim for adverse possession would crystalise after 12 years, in the year 2003. The respondent started asserting her right to the suit property in the year 2013 by writing letters to the National Land Commission seeking to be allotted the land. For its part, the appellant contended that it was in actual possession of the suit property, and that it has been cultivating thereon since the year 2014, which would have been after the lapse of the 12 year period. According to the appellant, its attempt to evict the appellant and other persons who invaded the suit property

since 2017 had been futile.

54. The appellant asserted its right of ownership as opposed to its right of possession since it only pursued issuance of the title, which it obtained. In the trial court, it did not mount a counterclaim for recovery of possession or eviction of the respondent and/or her other family members from the suit property. The appellant did not adduce any evidence as alleged that it fenced off, or that it had been cultivating on the suit property. On the other hand, the respondent demonstrated that there were already permanent structures on the suit property owned by herself and other family members.

55. In the circumstances, continuing possession by the respondent remained uninterrupted, open and hostile to the ownership by the appellant. In our view, only a suit by the appellant asserting possession would have stopped the adverse possession, but there was none and, therefore, the respondent was justified to obtain the suit property by way of adverse possession. In ***Benson Mukuwa Wachira vs. Sisters of Nairobi Registered Trustees (2016) KECA 227 (KLR),*** this Court held that:

> ***"As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in adverse possession will run."***

56. The appellant's other argument was that, if the respondent was entitled to the suit property, she can only be given the portion she currently occupies. A successful claim in adverse possession entails a total ouster of the owner from the title to the suit property. It is all or nothing

as her evidence proved that she was that she adversely occupied the entire suit

property, which was wholly owned by the appellant. Notably, in the respondent's Originating Summons, she claimed a stake in the whole property, and not a portion thereof.

57. In conclusion, and having carefully considered the evidence on record and the grounds of appeal, we are satisfied, and in agreement with the findings of the learned Judge, that the respondent made out a proper case that she was entitled to be pronounced as the owner of the suit property by way of adverse possession.

58. Accordingly, we uphold the Judgment of the Environment and Land Court at Malindi ***(E. K. Makori, J.)*** in ELC Case NO. 20 of 2021 (OS) delivered on 28th September 2023. The appeal therefore lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 5th day of December, 2025.

A. K. MURGOR
.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.
.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA
.....
JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY

REGISTRAR