



**Hamadi & 149 others v Safaricom Investments Co-operative Society Limited & another
(Civil Appeal E026 of 2023) [2025] KECA 2104 (KLR) (5 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2104 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E026 OF 2023
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
DECEMBER 5, 2025**

BETWEEN

KIBWANA HAMADI & 149 OTHERS APPELLANT

AND

**SAFARICOM INVESTMENTS CO-OPERATIVE SOCIETY LIMITED 1ST
RESPONDENT**

JOHN KIMOGUT KIPTOO 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (E. Makori, J.) delivered on 26th April 2023 in E.L.C Case No. 5 of 2022)

JUDGMENT

1. By a Plaint dated 1st February 2022, the appellants, Kibwana Hamadi & 149 others, filed suit against, Safaricom Investment Co- operative Society Limited the 1st Respondent and John Kimogut Kiptoo, the 2nd Respondent, over several parcels of land praying for:

- “ a) Spent.
- b. An order of cancellation of the titles known as Title Number CR 37354 ... which was bought from the 2nd [Respondent] and also Plot number MN/III/6224 whose registered owner is the 2nd [respondent] being also a sub-division stemming from Plot No. 248 and subsequent sub-divisions thereafter from Plot No. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/8222, MN/III/8223, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR 56690 Subdivision No. 8221 (Orig 6224/2) acreage being 38.4 Ha (94.89 acres) and Plot No MN/III/6224 Subdivision of Plot MN/III/6224 being six namely MN/III/8220, MN/



III/8221 subdivisions thereof including CR 64260 Plot No. MN/II/9911 ... acreage being 31.43 Ha. (77.66 Acres), MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225, and further sub-divisions thereafter as the process used in the transfer was a void ab initio and thus null and void.

In the alternative

- c. A declaration that they are not in occupation of all that parcel of CR 64260 Plot No. MN/II/9911 ... acreage being 31.43 Ha (77.66 acres).
- d. A declaration that any eviction concerning the [Appellants] herein concerning various portions of land they occupy of about 99.4 acres spanning from Title Number CR 37354 ... which was bought from the 2nd [respondent] and also plot number MN/III/6224 whose registered owner is the 2nd [respondent] being also a sub-division stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR 56690 subdivision No. 8221 (Orig 6224/2) acreage being 38.4 Ha (94.89 acres) and plot No MN/III/6224, Subdivision of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 subdivisions thereof including CR 64260 ... acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225, and further sub-divisions are time-barred as per the provisions of Section 7 of the Limitation of Actions Act Cap. 22.
- e. A declaration that the [appellants] have acquired title to the various portions of land they occupy of about 99.4 acres spanning from Title Number CR 37354 ... which was bought from the 2nd [respondent] and also plot number MN/III/6224 whose registered owner is the 2nd [respondent] being also a sub-division stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR 56690 subdivision No. 8221 (Orig 6224/2) acreage being 38.4 Ha (94.89 acres) and plot No MN/III/6224, Subdivision of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 subdivisions thereof including CR 64260 ... acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225, and further sub-divisions by way of prescription as per section 7 of the Land Act No. 6 of 2012.
- f. A declaration that the [appellants] are the owners of the land they occupy of about 99.4 acres spanning from Title Number CR 37354 ... which was bought from the 2nd [respondent] and also plot number MN/III/6224 whose registered owner is the 2nd [respondent] being also a sub-division stemming from Plot No. 248 and subsequent sub- divisions thereafter from plot No. MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR 56690 subdivision No. 8221 (Orig 6224/2) acreage being 38.4 Ha (94.89 acres) and plot No MN/III/6224, Subdivision of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 subdivisions



thereof including CR 64260 ... acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225, and further sub-divisions.

- g. Consequent to the grant of prayers above, an order of sub-division of the land they occupy of about 99.4 acres spanning from Title Number CR 37354 ... which was bought from the 2nd [respondent] and also plot number MN/III/6224 whose registered owner is the 2nd [respondent] being also a sub-division stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No.MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR 56690 subdivision No. 8221 (Orig 6224/2) acreage being 38.4 Ha (94.89 acres) and plot No MN/III/6224, Subdivision of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 subdivisions thereof including CR 64260 ... acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225, and further sub-divisions are to be directed at the Mombasa Land Registrar to transfer the Land to the [appellants] of their various portions of land they occupy spanning as per their occupation spanning 99.94 acres.
- h. An order that the Deputy Registrar of this court is hereby authorized where necessary to sign any documents required to ensure the transfers order under this judgment is realized, to that end the Land Registrar shall accept such documents signed by the Deputy Registrar as being sufficient to effect the transfer.
- i. A permanent injunction restraining the [respondents] or any person purporting to act on his behalf, servants, workmen, licensees or agents from howsoever dispossessing, harassing the [appellants] or interfering with their peaceful entitlement occupation and possession of their portions spanning 99.4 acres spanning from Title Number CR 37354 ... which was bought from the 2nd [respondent] and also plot number MN/III/6224 whose registered owner is the 2nd [respondent] being also a sub-division stemming from Plot No. 248 and subsequent sub-divisions thereafter from plot No.MN/III/6224 being six namely MN/III/8220, MN/III/8221, MN/III/822, MN/III/8224, and MN/III/8225 and further subdivisions thereafter including Title No CR 56690 subdivision No. 8221 (Orig 6224/2) acreage being 38.4 Ha (94.89 acres) and plot No MN/III/6224, Subdivision of plot MN/III/6224 being six namely MN/III/8220, MN/III/8221 subdivisions thereof including CR 64260 ... acreage being 31.43 Ha. MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225, and further sub-divisions.
- j. An order of cancellation of the Three Months' notice from the 25th November 2021 which sought the eviction of the [appellants] with regard to occupation in title Number CR. 37354 pursuant to a sub- divisions registered as CR 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-division number 4379 (Original No. 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No 37354/1.
- K. Costs of the suit”



2. But for the foregoing mind-boggling description of the suit properties, the appellants' case was that the suit properties more particularly known as Plot No. 86 Section IV Mainland measuring approximately 624 acres and Subdivision No. 284 Section III Mainland North measuring approximately 1,590 acres were originally owned by one Salim Bin Hero; that the appellants were since time immemorial in occupation of Subdivision No. 284 Section III Mainland North (Plot No. 284) having been born in the area; that the suit properties were distributed by order of the Supreme Court on or about 6th February 1957 as listed in the schedule to the order; and that the schedule had 57 names whose shares were noted thereon and constituted the registered owners of the land.
3. The appellants claimed that, in or about the year 1965, one William Kiptoo Baraka (the 2nd respondent's deceased father) bought a parcel from one of the individuals listed in the schedule, namely Momo Binti Abubakar Bin Rashid, who had a portion comprised of a 429/1600th share of Plot No. 284; that the parcel sold was about 16 acres and comprised a 5/16th share of the 429/1600th share; that, in 1966, the 2nd respondent's father also purchased a parcel from one Radhia Binti Abud Rabbi, who had a 1/126th share; that the second parcel sold was about 10 acres and comprised 5/6th share of the 1/126th share; that, as the transactions proceeded, there was no survey process conducted as the parcels existed without title deeds; that the 2nd respondent's father managed to evict some of the occupiers of the various portions of the parcels aforesaid while others remained in occupation of their portions; and that the 2nd respondent's father died in or about the year 2000.
4. The appellants averred that they were in undisturbed occupation of their respective portions of land together comprising 99.4 acres in the approximate until the 2nd respondent illegally, unlawfully and unprocedurally obtained title to the land; and that the 2nd respondent produced the following 7 titles to the land in Shanzu Criminal Case No. 112 of 2016:
 - i. Title No. CR 56690 Subdivision No. 8221 (Original 6224/2) measuring 38.4 Ha (94.89 acres), issued on or about 20th June 2012;
 - ii. Title No. CR 64260 Plot No. MN/III/9911 Subdivision Original No. 8221/2 measuring 31.43 Ha (77.6 acres), registered on 24th August 2010;
 - iii. CR No. 37358 Subdivision No. 4384 Original No. 563/6 measuring 2.024 Ha, issued on or about 27th February 2004;
 - iv. CR No. 37357 Subdivision number 4381 Original No. 563/5 measuring 53.64 Ha, issued on or about 27th February 2004;
 - v. CR No. 37356 Subdivision no 4381 Original No. 563/3 measuring 2.026 Ha, issued on 27th February 2004;
 - vi. CR No. 37355 Subdivision No. 4380 Original No. 563/1 measuring 2.024 Ha, issued on or about 27th February 2004; and
 - vii. CR No. 37354 Subdivision no. 4380 Original No. 563/2 measuring 4.047 Ha, issued on or about 27th February 2004.
5. The appellants further averred that Plot No. 284 was "charted" (presumably on the survey plan) on or about 28th February 1984 and the parcel indicated as having been subdivided; that Plot No. MN/III/563 was a product of the subdivision of Plot No. 284, its original number being MN/III/284/9 measuring 68.62 acres and registered as at 8th August 1980; and that Title No. CR 37354, issued



pursuant to a subdivision registered as CR 35955/4 being Subdivision No. 4379 (Original No. 563/1) Section III Mainland North, sat where the appellants were in occupation.

6. The appellants contended that they were in occupation of about 99.4 acres of land spanning Title No. CR 37354 measuring 4.047 Ha; Plot No. MN/III/6224, stemming from a sub-division of Plot No. 248; and the six subsequent subdivisions of Plot No. MN/III/6224, being MN/III/8220, MN/III/8221, MN/III/8222, MN/III/8223, MN/III/8224 and MN/III/8225, and subsequent subdivisions thereof, including Title No. CR 56690 Subdivision No. 8221 (Original No. 6224/2) measuring 38.4 Ha (94.89 acres); and that their occupation had never been in relation to Title No. CR 64260 Plot No. MN/III/9911 Subdivision Original No. 8221/2 measuring 31.43 Ha (77.66 acres) which was the subject of another suit in Malindi ELC No. 44 of 2020 (Kibwana Hamadi & 319 others v John Kimogut Kiptoo).
7. The appellants further contended that the process by which the subdivisions resulting in the aforesaid Titles and parcels of land was shrouded in illegalities, which they particularised as: non-ownership of the titles and parcels stemming from unknown methods of transfer to the 2nd respondent in the absence of sale agreements and land transfers; transfer of portions belonging to the 2nd respondent's father apparently without the requisite process of succession to the 2nd respondent; the purchase by the 1st respondent of a portion of the land subject to an ownership dispute and occupation by the appellants; and the eventual process of issuance of deed plans and title deeds to the 1st respondent without any colour of right.
8. In response to the appellants' claims, the 1st respondent filed a Statement of Defence and Counterclaim dated 19th April 2022 denying the allegations as set out in the appellants' Plaint. The 1st respondent averred that it was the registered proprietor of the parcel of land known as Title No. CR 37354 as delineated on Land Survey Plan No. 25120, having acquired it from the 2nd respondent for valuable consideration; that, at the time of execution of the sale agreement dated 11th December 2015 made between the 1st and 2nd respondents, execution of the transfer dated 27th October 2016 and the subsequent registration of the transfer on 5th December 2016, the property was vacant; that prior to acquisition of the property, the 1st respondent had conducted extensive due diligence, including conducting an official search from the land registry, site visit to verify the condition of the land and valuation with the result that it satisfied itself that the property was in vacant possession without any third party claims or interests noted in the register; that, upon registration of the property in its name, the 1st respondent embarked on subdivision of the suit property in order to allocate the subdivisions to its members; and that, at the time of subdivision and establishing beacons on the ground, the property was still vacant.
9. The 1st respondent further averred that from 2017, immediately after the general elections, the appellants started wandering about and trespassing onto the property, claiming ownership thereof; that the appellants put up makeshift structures randomly within the property to prop up their claims of ownership; that, in consequence of the appellants' illegal occupation and trespass on the suit property, the 1st respondent was deprived of its use and of the benefits accruing therefrom; that the 1st respondent issued and served the appellants with eviction notices dated 25th November 2021 pursuant to section 152E of the [Land Act](#); that the notice was also published in the Daily Nation and Taifa Leo and served upon the appellants by placing it on five conspicuous locations on the property and the Kilifi County Offices on 15th December 2021; that the notice was for a statutory period of 3 months which ran uninterrupted and lapsed on 25th February 2022; that, accordingly, the 1st respondent was entitled to pursue an application for eviction of the appellants; and that the appellants had chosen to



continue their illegal occupation, and to file the suit in order to deprive the 1st respondent of its right to property.

10. By reason of the matters aforesaid, the 1st respondent counterclaimed against the appellants for orders that:

- “ a) A declaration be and is hereby issues that the 1st [Respondent] is the lawful proprietor of all that parcel of land known as Title No. CR 37354 as delineated on Land Survey Plan No. 25120;
- b. An eviction order be and is hereby issued against the [appellants] directing them to immediately deliver vacant possession thereof of all that parcel known as Title No. CR 37354 as delineated on Land Survey Plan No. 25120 to the 1st Defendant;
- c. An order of injunction be and is hereby issued restraining the [appellants] ... from entering, interfering with the 1st [respondent’s] entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with the 1st [respondent’s] quiet enjoyment of all that parcel of land known as Title No. CR 37354 as delineated on Land Survey Plan No. 25120;
- d. The Officer Commanding the Police Division in Kilifi Sub-County area do provide security to ensure that the order (b) and (c) hereinabove are complied with.
- e. Any other relief that this Honourable court may deem just and fair to order.
- f. Costs of this suit.”

11. The appellants filed a Reply to the 1st respondent’s Defence and Counterclaim dated 25th May 2022 reiterating the allegations set out in their Plaintiff and denying the contents of the 1st respondent’s counterclaim.

12. On his part, the 2nd respondent filed a Statement of Defence dated 16th March 2022, which was subsequently amended in terms of the Amended Statement of Defence & Counterclaim dated 31st May 2022. By an oral application made and allowed on 21st November 2022, the 2nd respondent obtained leave to amend paragraph 26 of the Amended Defence & Counterclaim.

13. The 2nd respondent denied the allegations set out in the appellants’ Plaintiff and stated that, his father, William Kiptoo Barkoria, bought for valuable consideration shares in Plot No. 284 from the beneficiaries in the following terms:

- “ a) Through transfer registered as CR 7172/60 purchased from MOMO BINTI ABUBAKAR BIN RASHID 5/16 undivided share out of her 429/1600 that is 429/5120 share of Plot 284/III/MN equivalent to 133. 224 acres.
- b. Through transfer registered as plot number 284/III/MN purchased from RADHIA BINTI ABDULKADIR RABBI 1/126 that is 5/765 share equivalent to 10.515 acres.



- c. Through transfer registered as CR 7172/392 purchased 1765/3024 of 2/63 share equivalent to 29.46 acres from NYINYI daughter of BWANAMKUBWA MAALIM.”
14. The 2nd respondent averred that the total acreage purchased by his father for valuable consideration from the registered owners was 173 acres; that his father took possession and occupied the property until his demise in 1999; that the portion purchased was subsequently surveyed and delineated as Plot No. 563 (Original No. 284/9) Section III Mainland North; that the 2nd respondent and his family had resided thereon for over 50 years, and that the 2nd respondent was born and raised on the said parcel; and that, upon his father’s demise, the requisite proceedings were instituted in Succession Cause No. 87 of 2001 whereupon the 2nd respondent was registered as owner of the suit property, which he held in trust for their family.
15. The 2nd respondent further averred that he had disposed of most of the subdivisions of the property; that, to date, he retained interest in the following parcels, namely part of the subdivisions resulting from LR No. 9911/III/MN, LR 9914/III/MN, LR 9915/III/MN, LR 9916/III/MN and LR 9921/III/MN; that LR No. 4379 (Original No. 563/1) was transferred in favour of the 1st respondent in vacant possession and free from any encumbrances on 5th December 2016; and that the accused in Shanzu Criminal Case No. 112 of 2016 attempted to invade parcel MN/III/9911 (Original No. 8221/2) measuring 31.43 Ha (77.66 acres), which was a product of Plot No. 563 (Original No. 284/9), and which was lawfully bought and transferred to the 2nd respondent’s father.
16. In addition to the foregoing, the 2nd respondent contended that the suit ought to be restricted to LR No. 4379 (Original No. 563/1) over which the notice was issued; that the issues raised in the appellants’ suit were sub judice the issues pending in Malindi ELC Case No. 44 of 2020 – Kibwana Hamadi & 291 others v John Kimogut Kiptoo & another.
17. In his counterclaim, the 2nd respondent reiterated the contents of his defence and averred that, sometime in the year 2020, the appellants invaded portions of subdivisions of Plot No. 563/III/MN previously transferred to third parties. The 2nd respondent therefore prayed for orders that:
- “ a) That the suit by the [appellants] against the 2nd]respondent] be dismissed.
 - b. A declaration that the 2nd [respondent’s] father WILLIAM BARKORIA KIPTOO acquired 173 acres of LR 284/III/MN for valuable consideration and the 2nd [respondent] was properly registered as the owner of LR 563/III/MN and the consequent subdivisions thereof and transfer of portions passed property and are protected by Law.
 - c. A permanent injunction be issued restraining the [appellants] ... from encroaching, entering into any portion of land being a resultant subdivision of LR 563/III/MN.
 - d. An Order of eviction against the [appellants] do issue to evict any of the [appellants/defendants] to the counterclaim and their assignees or beneficiaries [from] any portion of land being a resultant subdivision of LR 563/III/MN.
 - e. Costs of the suit and counterclaim awarded to the 2nd [respondent]/counter-claimant.”



18. The suit proceeded to full hearing on 21st November 2022 where the parties called their witnesses and closed their respective cases.
19. In its judgment dated 26th April 2023, the learned Judge held that the appellants did not dispute that the 2nd respondent's father acquired portions of the land from the original shareholders; that the appellants could not claim to dispute the purchases as they were never privy to the transactions; that the 2nd respondent's father legally and regularly acquired the land comprised in Title No L.R 563/III/MN, being subdivision from the original Parcel No LR 284/111/MN; that the acreage of land acquired was 68.62 hectares; that the 1st respondent legally purchased a portion of the land being, Title No. CR 37354 from the 2nd respondent in a valid transaction supported by documentation, due diligence, and registration, and which was not impugned by any credible evidence; that the eviction notices issued by the 1st respondent were valid and enforceable; and that the 1st respondent had a right to proprietary protection as envisaged in *the Constitution* and the *Land Act*.
20. With regard to the adverse possession claim by the appellants, the trial court held that the appellants had failed to prove continuous, open, exclusive and adverse occupation for the requisite period; that the evidence showed that the appellants' possession was recent and contested and, therefore, inconsistent with adverse possession; that the appellants did not specify which portions of land they occupied, failed to bring sufficient witnesses, and primarily contested land subdivision and title issues, rather than possession itself; and that the appellants' claims of fraud and illegality in acquisition and subdivision of the land by the respondents were unfounded and unsubstantiated.
21. In its judgment, the court (E. Makori, J.) dismissed the appellants' suit with costs; allowed the respondents' counterclaims with costs; issued a declaration of the respondents' lawful ownership of their respective parcels of land; issued a permanent injunction restraining the appellants from trespassing, entering into or remaining on the respondents' parcels of land, or on any portion of the land comprised of a resultant subdivision of LR 563/III/MN; and issued eviction orders allowing the respondents to evict the appellants from the 1st respondent's parcel or any portion of land being a resultant subdivision of LR 563/III/MN.
22. Aggrieved by the learned Judge's decision, the appellants lodged the instant appeal vide a Memorandum of Appeal dated 16th August 2023 on the following 12 grounds:
 - “ 1. That the learned Judge erred in law and in fact by failing to find that Plaintiff's prayers were [couched] in alternative terms.
 2. That the learned Judge erred in law and in fact by finding that the entire suit was grounded on adverse possession as a backbone and cause of action and determining the same in the absence of pleaded prayers for such finding.
 2. That the learned Judge erred in law and in fact by finding that despite the Appellants seeking to impeach the titles that the claim that was before him was for adverse possession despite the doctrine of possession requiring the applicant to recognize the title owner as the right owner.
 3. That the learned Judge erred in law and in fact by failing to find that there was no partition of the land as indicated by the evidence there was no survey and the pointing out of portions by the Sellers and therefore no specific titles could be issued to the 2nd Respondent's deceased father without participation of the other land owners and erred in making a finding that the 2nd Respondent's



deceased father acquired the Land comprised in Title No LR 563/III/MN being a subdivision of Plot Number 284.

4. That the learned Judge erred in law and in fact by finding that there was no break in the title chain.
 5. That the learned Judge erred in law and in fact by making a finding that the 2nd Respondent/Defendant could pass good title to the 1st Respondent/Defendant or any title in subdivision despite there being no evidence of registration or transmission in certificate of title produced for Plot No. 284/III/MN from the estate of the 2nd Respondent/Defendant's deceased father and absence of individual certificates of title procured by the 2nd Respondent/Defendant's deceased father during his lifetime.
 6. That the learned Judge erred in law and in fact by failing to reach a finding as to the period of occupation of the Appellants and whether any eviction with regards to the Plaintiff was time barred as sought in prayer D of the plaint as an alternative to prayer B of the Plaint.
 7. That the learned Judge erred in law and in fact by dismissing the Appellants' prayers and allowing the Respondents' counterclaims.
 8. That the learned Judge erred in law and in fact in failing to appreciate the adopted witness statements of the Appellants' witnesses and issues that came up during cross-examination of both the Respondents' witnesses.
 9. That the learned Judge erred in law and in fact [in] finding that the other Plaintiffs did not testify to prove occupation despite there being an authority to conduct the suit being filed, an admission that the Appellants being known to the 2nd Respondent residing nearby and as born in the area and prayer G of the Appellants' Plaint seeking transfer of land on the various portions they occupy.
 10. That the learned Judge erred in law and in fact in failing to appreciate that Shanzu Criminal Case No. 112 of 2016 had paid due credence to the occupation of the Appellant despite the court order being produced in evidence by the Appellants and basing the same to make a finding of invasion and incursion into the subject matter land.
 11. That the learned Judge erred in law and in fact in failing to consider the Appellants' submissions in its entirety and also making findings on issues brought out by the parties to the suit."
23. On the grounds aforesaid, the appellants pray that this Court allows the appeal; set aside the impugned judgment; allow the appellants' prayers as sought in their plaint with costs; dismiss the respondents' counterclaims with costs; and condemn the respondents to bear the costs of this appeal.
24. In support of the appeal, learned counsel for the appellants' M/s. Mwangunya & Company, filed written submissions and a list of authorities dated 11th December 2024.
- 245 On their part, and in rebuttal to the appellants' submissions, learned counsel for the 1st respondent, M/s. Wanjohi & Wawuda, filed written submissions and a list of authorities dated 7th February 2025



while learned counsel for the 2nd respondent, M/s. Mathew Nyabena & Co., filed written submissions dated 11th February 2025.

26. Counsel relied on their respective submissions in respect of which they made oral highlights when the appeal came for hearing on the Court's virtual platform.

27. This Court's mandate on 1st appeal was espoused in *Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others* [2009] KLR 331 as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 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.”

28. Be that as it may, we are conscious as cautioned by the predecessor to this Court in *Peters v Sunday Post Ltd* [1958] EA 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

29. In our considered view, three main issues commend themselves for our determination, namely: (i) whether the learned Judge erred in failing to find/appreciate that the appellants' prayers were couched in alternative terms, and in finding that the appellants' entire suit was grounded on adverse possession; (ii) whether the learned Judge erred in finding that the 2nd respondent's father and, subsequently, the 2nd respondent held good title to the suit property; and (iii) whether the learned Judge erred in holding that the appellants were not entitled to 99.94 acres of the disputed land by way of adverse possession.

30. On the 1st issue as to whether the learned Judge was at fault in failing to consider the appellants' alternative reliefs, or in concluding that their suit was founded on adverse possession, the learned Judge observed thus:

“22. The issues arising for determination are:

a.

b. Whether the 2nd defendant is the lawful owner of 173.99 acres of land and whether his late father William Kiptoo Barkoria properly acquired the same comprised in title L.R 563/III/MN.

c. Whether the 1st defendant lawfully purchased all that parcel of land known as Title Number CR 37354 as delineated on Land Survey Plan Number 25120 from the 2nd defendant.

d. Whether the eviction notices issued by the 1st Defendant were lawful regular and in order.

e. Whether the plaintiffs are entitled to [99.94] acres of land by way of adverse possession.



... ..

- 23 ... The plaintiffs lay claim on the suit property through prescription. They, however, averred that they have been on the land for over 20 years and the *Limitation of Actions Act* limits the defendants from recovering land. Prescription is a non-possessory interest in land through the long continuous use of the same. The plaintiffs seek in one of their prayers a declaration that they have acquired titles to the various portions of land that they occupy. In my view, this is a prayer for adverse possession as opposed to prescription
24. From the couching of the pleadings and evidence, the plaintiffs seek to impeach the titles in this matter hence we are dealing with adverse possession.”
30. Taking issue with the learned Judge’s decision, counsel for the appellants submitted: that the prayers in the Plaint were couched in alternative terms; that prayer (b) sought cancellation of the eviction notices and of the contested titles on the ground that the process of their transfer and registration was null and void ab initio; that the alternative prayers, such as prayer (c), sought confirmation that the 2nd respondent was in occupation of 77.66 acres; that prayer (d) sought a declaration that eviction of the appellants was statutorily time barred; and that prayers (e) to (j) were based on the appellants’ claim that they acquired titles to their various portions by way of “prescription”.
31. Counsel submitted that, in the event that the court had found the prayer for cancellation of the titles unmerited, it ought to have proceeded to determine the other prayers. According to counsel, the court misdirected itself by not determining all the issues in contention, thereby setting ground for what it stated as solely a suit for adverse possession. In their view, a claim for adverse possession requires an appellant to recognize the registered owner as the rightful proprietor, but that at no point of the proceedings did the appellants concede the propriety of the respondents’ titles. In conclusion, and to our understanding, counsel posited that the appellants’ position was that their claim was not founded on adverse possession.
32. On their part, counsel for the 1st respondent submitted that, in their pleadings, the appellants did not claim to have acquired an easement over Title No. CR. 37354 by way of prescription; that, rather, they claimed to have acquired proprietary interest averse to that of the 1st respondent; that the suit was filed in 2022, long after the enactment of the *Land Registration Act* and the *Land Act*; that, under the two statutes, there is no distinction between acquisition of proprietary rights to land by way of adverse possession and prescription; and that the appellants’ attempt to claim prescriptive rights over the suit property rather than in adverse possession may not assist the court in reaching a just determination.
33. Counsel cited the case of *Solomon Muathe Mitau & 787 others v Nguni Group Ranch* [2017] eKLR for the proposition that the goal of adverse possession is to acquire title to real property while an easement by prescription is directed towards acquiring a non- possessory interest to use the land of another; and that the concept of acquisition of proprietary rights to land through prescription was introduced in the *Land Act* and the *Land Registration Act*, both of which were enacted in 2012.
34. Counsel for the 2nd respondent submitted that the appellants appear to concede that their prayers were a fishing expedition, and that they were not concise or precise as to what orders they were seeking; that a finding that the prayers were in the alternative was not necessary; that the learned Judge rightly set out the issues for determination; that, by their grounds of appeal, the appellants seek to run away from their pleadings; that, in prayer (e), the appellants sought to be declared as owners of the suit property; that the learned Judge properly held that part of the appellants’ claim was founded on adverse possession;



and that to hold otherwise would amount to allowing the appellants to amend their plaint on appeal after judgment.

35. We take to mind that in paragraph 22 of the impugned judgment, the learned Judge identified the issues for determination as including, inter alia, whether the appellants' claim over the suit properties by prescription or adverse possession was merited; whether the respondents lawfully acquired the suit properties; and whether the eviction notice was lawfully and regularly issued. The learned Judge then proceeded to make a finding on each of the issues identified.
36. In our considered view, the appellants' contention that the learned Judge failed to appreciate that the appellants' prayers were couched in alternative terms, and that the learned Judge viewed the suit as one solely based on adverse possession, is unfounded.
37. With regard to the issue as to whether the learned Judge erred in categorizing the appellants' claim as one of adverse possession rather than prescription, section 7(d) of the *Land Act* (Cap. 280) and section 28(h) of the *Land Registration Act* (Cap. 300) identify prescription as one of the methods of acquisition of title to land. However, Ouko, JA. (as he then was), had this to say in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] KECA 532 (KLR):

“Similarly Section 7 (d) of the *Land Act*, 2012 recognizes prescription as a method of acquiring title to land. Interestingly the Act does not provide how this acquisition is to be realized. (I think this goes back to the *Limitation of Actions Act*.)”

38. In the same vein, Angote, J. elucidated on the distinction between acquisition of land through adverse possession and prescription in *Benina Ndugwa Kunyumu & 4 others v National Land Commission* [2015] KEHC 2406 (KLR) (which was cited with approval by this Court in *Solomon Muathe Mitau & 787 others v Nguni Group Ranch* [2017] KECA 731 (KLR)) in the following words:

“18. There is a difference between acquiring a title to land by way of adverse possession and prescription. Of course, it has been said that the similarities between the doctrine of adverse possession and prescriptive easements far outweigh the differences because both result from the operation of the statute of limitation for trespass.

19. The difference between the two doctrines lie primarily in determining what is accomplished. With adverse possession the goal is to acquire title to real property.

20. Acquiring an easement by prescription however, is not directed towards the goal of acquiring title to property. Rather, it is directed towards acquiring an easement. So, if one uses, rather than possesses, the land of another, and the use is open and notorious, adverse, continuous and uninterrupted, for the statutory period, then one acquires an easement and can continue to use that land.

21. Unlike adverse possession, prescription is a non possessory interest in land through the long, continuous use of the land.

22. The law now provides that one can acquire title to land even when he has not been in possession of such land if he can show that he has used the land for a long period of time.



23. The statutory period for one to acquire land by prescription, which is an easement, is twenty years.
24. Section 32(1)(c) of the *Limitation of Actions Act* provides that where an easement has been enjoyed, peacefully and openly as of right, and without interruption, for twenty years, the right to such access is absolute and indefeasible.” [Emphasis added]
39. The Black’s Law Dictionary (9th Edn 2009) defines an easement as:
- “An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road). The land benefiting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land. The primary recognized easements are (1) a right-of-way, (2) a right of entry for any purpose relating to the dominant estate, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to water, (6) a right to do some act that would otherwise amount to a nuisance, and (7) a right to place or keep something on the servient estate.”
40. The Black’s Law Dictionary also defines a prescriptive easement as:
- “An easement created from an open, adverse, and continuous use over a statutory period.”
41. In his exposition of how the law on prescription in England developed, Lord Hoffmann held as follows in *R v Oxfordshire County Council Ex parte Sunningwell Parish Council* [2000] 1 AC 335:
- “Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment
-
- The emphasis ... shifted from the brute fact of the right or custom having existed in 1189 or there having been a lost grant (both of which were acknowledged to be fictions) to the quality of the 20 year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner.”
42. The pleadings and prayers sought by the appellants in the *Plaint* reveal that the aim of their suit was not to acquire an easement to use the subject property but, rather, to acquire actual title, ownership and possession of the property. They claimed to have been in occupation of about 99.94 acres of the suit property for a period exceeding 20 years. Accordingly, they sought, inter alia, a declaration that they were the owners of the land which they occupied; cancellation of the respondents’ titles; sub-division of the land of which they were allegedly in occupation; and transfer to them of the sub-divided portions thereof.
433. It is not lost on us that the appellants’ claim as pleaded was that they were in “undisturbed occupation” of their respective portions of the suit property together comprising 99.4 acres in the approximate until the 2nd respondent “illegally, unlawfully and unprocedurally obtained title to the land”. In view of the foregoing, we find that the appellants’ suit bore all the features of a claim founded on adverse



possession artfully disguised as a claim based on prescription. Accordingly, the learned Judge was not at fault in concluding that the appellants' suit was principally grounded on adverse possession.

44. Turning to the 2nd question as to whether the learned Judge erred in finding that the 2nd respondent's father and, subsequently, the 2nd respondent, held good title to the disputed property, the learned Judge held that:

“29. Whether the 2nd defendant is the lawful owner of 173.99 acres of land and whether his late father William Kiptoo Barkoria properly acquired the same. I have looked at the various sale agreements to which the 2nd defendant's father acquired the land from the original shareholders. The plaintiffs in their averments do not dispute that the late William Kiptoo Barkoria did legally acquire the said portions of land in question. The plaintiffs were never privy to the purchases and cannot claim to dispute whether such purchases ever existed. When PW1 and PW2 testified, they acknowledged the purchase. PW1 questioned the acreage purchased but as I have said, he was never privy to the same and cannot question the manner of sale or the manner in which the land passed on to the 2nd defendant by transmission. The 2nd defendant in his exhibits produced letters of administration which confirm that he did acquire the same procedurally. The persons who would have questioned the acquisition perhaps were the siblings of the 2nd defendant. They have not complained. On this strength, I find and hold that the father of the 2nd defendant legally and regularly acquired the land comprised in Title No L.R 563/III/MN being subdivision from the original Parcel No LR 284/111/MN. The acreage of the land acquired as depicted in the 2nd defendants exhibit 7 is 68.62 hectares.

30. Whether the 1st defendant lawfully purchased all that parcel of land known as Title Number C.R 37354 as delineated on Land Survey Plan Number 25120 from the 2nd defendant. Vide a sale agreement dated 15th December 2015, the 1st defendant purchased 10 acres from the 2nd defendant being subdivision No 4379/III/MN. A transfer was subsequently done and during the hearing, DW1 told the court that the 1st defendant had already fenced the plot when the plaintiffs invaded the land. Due diligence was done and there were no occupants on the ground. The root of the title can be traced from the purchase by the father of the 2nd defendant and subsequent transmission to the 2nd defendant and sale to the 1st defendant. Further, the 1st defendant did a search at the land office and established the legal ownership of the land in question. The plaintiffs have not tendered any evidence to impugn the sale agreement and the subsequent subdivisions and transfers. In the absence of such evidence, it is my finding that the 1st defendant lawfully purchased the land Title Number 37354 in a market overt for valuable consideration from the 2nd defendant who had a good title to pass to the 1st defendant.”

45. Counsel for the appellant submitted that the evidence shows that there was no partition and survey of the land; that the portions sold by the sellers to the 2nd respondent's father were not pointed out; that caveats had been placed on the existing mother title; and that, therefore, no specific titles could be issued to the 2nd respondent's father without participation of the other land owners.



46. Counsel cited the case of *Godfrey Njogu Mungai v Francis Kagiya & 3 others* [2021] eKLR for the proposition that tenants in common hold in undivided shares; and that, while the tenancy in common lasts, no one can say which of them owns any particular parcel of land. According to counsel, the learned Judge erred in his conclusion that the 2nd respondent acquired the suit properties through transmission. Counsel submitted that, in cross-examination, the 2nd respondent confirmed that his deceased father did not have titles to the land; that he was unaware whether there was any transmission done; and that the land never passed to the other beneficiaries who were to get the land by transmission.
47. Counsel further argued that the distribution of the 2nd respondent's estate was not adhered to, and that the land was wholly passed to the 2nd respondent; and that, if there was a break in title, then no good title could be passed to the 1st respondent since the titles of the 2nd respondent were snatched out of the air and later transmitted to the 1st respondent.
48. Counsel cited the case of *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina* [2019] eKLR for the proposition that an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means that the owner continues to hold title to the property while the person who received the invalid title owns nothing.
49. In rebuttal, counsel for the 1st respondent submitted that the 1st respondent produced a certificate of title demonstrating that the 2nd respondent became a registered owner of Title No. CR 37354 on 27th February 2004 and transferred it to the 1st respondent on 5th December 2016 after subdividing it from Title No. CR 35955/3; that the 2nd respondent confirmed that this was the position; and that the appellants did not present a rival title document to assert their right over Title No. CR 37354 but that, instead, they asserted that they did not recognize that the 1st respondent had proper title over the land. In conclusion, counsel submitted that the 1st respondent's interest as a proprietor of the said property is a matter of law and did not depend on recognition by the appellants.
50. On their part, counsel for the 2nd respondent submitted that the appellants conceded in the plaint that the 2nd respondent's father bought some shares in respect of LR No. 284/III/MN; that the 2nd respondent produced the original title with the entries of transfer of the land to his father as well as transfer documents executed in his father's favour, thereby demonstrating how his father bought a total of 68.62 hectares, the equivalent of 173 acres; and that his evidence remained unchallenged. As counsel further submitted, the appellants were and still are bound by their pleadings on the basis on which they challenged the respondents' titles as set out in the particulars of the alleged illegalities; that the particulars of the alleged irregularities were not proved; and that the issues raised by the appellants relating to succession of the estate of the 2nd respondent's father are issues for the succession court and that, in any event, the 2nd respondent's family had not raised any concerns thereon.
51. We take to mind the provisions of section 26 of the *Land Registration Act*, 2012 on the indefeasibility of title to land except in certain circumstances, and which reads:
26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
52. It is noteworthy that the 2nd respondent produced the mother title to the disputed property, to wit, LR 284/III/MN (Plot No. 284) measuring approximately 1,590 acres as well as transfer documents demonstrating that his father purchased approximately 29.46 acres of the property held by Nyinyi, daughter of Bwankubwa Malim Hero in the year 1967, and which property was transferred to him on 6th June 1996; that his father purchased 5/6th of the 1/126th share in the property (10 acres) held by Radhia Binti Abdu Rabbi, who transferred the same to him on 2nd May 1977; and that his father purchased 5/16th of the 429/1600th share in the property (133 acres) held by Momo Binti Abubakar Bin Rashid, who transferred the same to him on 23rd July 1977. Counsel submitted that, all in all, the foregoing evidential documents demonstrated that the 2nd respondent's father had acquired approximately 173 acres (69.79 hectares) of Plot No. 284.
53. In addition to the undisputed evidential documents aforesaid, the 2nd respondent produced the grant of letters of administration and the confirmed grant issued in Mombasa Succession Cause No. 87 of 2001, clearly demonstrating that the property purchased by his father was transmitted to the estate of the 2nd respondent's father upon his demise. He also produced a Certificate of Title No. CR 35955 issued to him in respect of the purchased portion of Plot No. 284, which was described therein as Subdivision No. 563 (Orig. No. 284/9) Section III Mainland North as delineated on Land Survey Plan Number 114669 and measuring 68.62 hectares (Plot No. 563). The entries on the Certificate of Title No. CR 35955 indicated that Plot No. 563 was later subdivided, thereby resulting in the issuance of new titles for the said subdivisions, namely CR 3721, CR 37354, CR 37355, CR 37356, CR 37357 and CR 37358.
54. We hasten to observe that, apart from merely alleging that the title documents produced by the 2nd respondent were fake, and that the 2nd respondent's father only bought 26 acres of Plot No. 284, the appellants did not produce any evidence to support their bare allegations. Furthermore, none of the appellants demonstrated that they were privy to any of the transactions resulting in the transfer of various shares of Plot No. 284 to the 2nd respondent's father.
55. We also take to mind the testimony of the appellants' first witness (Kibwana Hamadi), who stated in cross-examination that he was born in 1962, and that he was admittedly not one of the shareholders listed on the title to Plot No. 284 or on the schedule to the court order issued by the Supreme Court, and as a result, he was not competent to testify.
56. Likewise, the appellants' second witness (Kahindi Bowato) admitted in cross-examination that he could not tell the acreage of the land purchased by the 2nd respondent's father, or how he acquired the land. Notably, Kahindi conceded that some of the transactions took place before he was born, a fact that leads to the inescapable conclusion that he (Kahindi) had no basis, short of hearsay, on which he could impeach those transactions.
57. Having carefully considered the evidence on record, we find that the appellants had no legal standing or valid grounds to question the manner in which the distribution of Plot No. 563 was undertaken and the eventual issuance of its title in the name of the 2nd respondent. Indeed, no evidence was adduced to dislodge the 2nd respondent's claim that he was registered as owner of the said property in trust for his family. In the absence of any evidence of fraud or illegality, the respondents established the root



of the titles issued to them. Accordingly, we find that the appellants had no basis for their claim that the 2nd respondent could not pass good title to the 1st respondent with respect to the sale and transfer of Title No. CR 37354; or that the 2nd respondent could not pass good title with respect to any of the subdivisions derived from Plot No. 563. Consequently, the grounds of appeal on this issue cannot stand.

58. Turning to the 3rd issue as to whether the learned Judge erred in holding that the appellants were not entitled to 99.94 acres of the suit property by way of adverse possession, we first take note of the learned Judge's observation, namely that:

“ 35. The Plaintiffs presented evidence that they have had uninterrupted and open possession of the land for over 20 years. This claim was disputed by the 1st and 2nd defendants who were categorical that the plaintiffs invaded the 1st and 2nd defendants' land in the year 2016 through 2018 and became more hostile when the 1st defendant commenced fencing of the acquired portion of land to subdivide to its members. They started to construct structures in 2020 after obtaining status quo orders in Malindi ELC No 44 of 2020. The plaintiffs admit and state in their pleadings that there have been subdivisions on the said land, well within their knowledge... Further, the plaintiffs admit and state that there was an existing case of trespass - Shanzu Criminal Case No.112 of 2016 in which they were charged with trespass. In my view, this is not what I would term an uninterrupted occupation but purely an invasion and incursion unto the defendants' properties without colour of right.

36. The plaintiffs claim 99.94 acres in what I can say was in the abstract. No evidence was adduced to show the occupation of the said land. No attempt was made to exactly point out what portion the 149 plaintiffs including PW1 occupied. Much of what was prosecuted in this case revolved around the subdivision of the parent title, acreage and on cancellation of titles emanating from the subdivisions on allegations of fraud - which was never proved than possession...

37. Evidence tendered by PW1 and PW2 was not enough to establish possession whether interrupted or uninterrupted PW2 admitted he was just a neighbour supporting the plaintiffs' case. PW1 dwelt on the manner in which the 2nd defendant acquired the title in question and the acreage than possession. He did not refer to the other 148 plaintiffs' occupation of the land with exactitude.”

59. Faulting the learned Judge for his decision, counsel for the appellants submitted that the trial court proceeded on a trajectory of adverse possession despite the appellants' pleadings pointing to a claim to the property by way of prescription; that the pleaded issues therefore remain undetermined to date; that the appellants were in occupation of the suit property in good faith as their occupation did not displace any one, and that there was no adverse claim against their possession in view of their having been born in the area; that the appellants' second witness, a neighbour, confirmed that there were houses on the suit property erected about 20 years ago; and that the appellants produced photographs showing their alleged occupation.

60. According to learned counsel for the appellants, the 2nd respondent confirmed that he was not present when the land was bought by his father, but that he was aware that there were people who periodically



entered the land; that the 2nd respondent's father had only taken a portion of the 99.94 acres claimed by the appellants; that the 2nd respondent was the complainant in Shanzu Criminal Case No. 112 of 2016 where some of the occupiers of the land were maliciously prosecuted and charged with trespass, but were eventually acquitted; that the court issued an order dated 7th February 2017 ordering the 2nd respondent to restrict himself to Parcel No. 9911/III/MN, and directed the District Land Surveyor Kilifi to resurvey the said parcel; and that a survey sketch of occupation was produced by the appellants, and which demarcated the 99.94 acres occupied by the appellants.

62. Affirming the trial court's decision, counsel for the 1st respondent submitted that the appellants failed to discharge their duty to prove adverse possession to the required standard. Counsel cited the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR for the proposition that a party claiming adverse possession must prove that his possession is *nec vi, nec clam, nec precario*, that is, peaceful, open and continuous; that the possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner; and that it must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.
63. Counsel further submitted that the appellants did not plead a definitive date from which their alleged occupation commenced; that they did not prove actual occupation of the land; and that they did not prove the exact portions that each of the 150 appellants claimed to have allegedly acquired an interest in. According to counsel, the appellants did not successfully demonstrate a break in the chain of possession by them of the 1st respondent's property for a period of 12 years preceding the civil suit. Counsel aptly argued that the appellants' alleged occupation of the undivided portion of land was broken when the appellants were charged with trespass in Shanzu Criminal Case No. 112 of 2016 thereby resetting the period of limitation from the date when time started to run for purposes of their claim in adverse possession or prescription, as the case may be; and that 12 years had not passed since the 1st respondent discovered the invasion by the appellants and took action by serving them with notices to vacate in 2021, thereby asserting its proprietary interest in the suit property.
64. On their part, counsel for the 2nd respondent submitted that the appellants failed to prove their case as by law required; that the totality of the appellants' evidence demonstrates that they entered the suit property less than 2 years before filing suit; that the existence of the Shanzu criminal case clearly demonstrates that the appellants' attempts to invade the land was successfully repulsed, and that there had been no occupation thereof.
65. As already concluded in determination of the 1st issue before us, the appellants' claim bore all the hallmarks of a claim in adverse possession rather than one founded on prescription. The doctrine of adverse possession is set out in sections 7, 13 and 38 of the *Limitation of Actions Act* (Cap. 22) in the following terms:

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.

66. With regard to the time when, and the circumstances under which, the right of action accrues, section 13 of the Act provides:
 13. Right of action not to accrue or continue unless adverse possession
 - (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.

67. Section 38(1), which makes provision for registration of land on adverse possession or of an easement on prescription reads:

38. Registration of title to land or easement acquired under Act

(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.

68. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] KECA 402 (KLR), this Court held that:

“18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* (1975) EA 225.

In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173.”

69. As *Kuloba, J.* correctly held in *Mbira v Gachuhi* [2002] 1 EA 137:

“Broadly, and in so far as it suffices to dispose of the present suit without examining all other aspects of the doctrine of adverse possession, a person who raises that doctrine for a statutory acquisition of title to land must satisfy the Court on the normal standard of proof in civil cases:

- a. that there has been absence of possession by the true owner through abandonment (discontinuance);
- b. that the adverse possessor has been in actual possession of the same piece of land;
- c. that the adverse possessor has no colour of right to be there, other than his entry and occupation;
- d. that he has openly and without permission or agreement of the true owner, done acts which are inconsistent with the enjoyment by the true owner of the land for purposes for which he intended to use it;
- e. that there was sufficient *anumus* to dispossess and an *animo Possidendi*;



- f. that all this has lasted for the statutory period, in his case, twelve years, since the adverse possession began;
- g. that the nature of the property was such that in the light of the foregoing acts, there resulted adverse possession;
- h. that throughout the twelve years which tolled, there was no interruption of the adverse possession.”

69. In the present case, the 1st respondent produced a valuation report dated 3rd November 2015 in which the valuers stated that they inspected the suit property on 30th October 2015; that there were no structural improvements thereon; and that the suit property was covered by natural vegetation. The photographs attached to the valuation report showed no buildings or structures erected on the property.
70. It is noteworthy that the appellants did not challenge the valuation report, which lent credence to the respondents’ assertion that the appellants began invading the suit property in 2016, and that they began erecting structures thereon in 2020 soon after a status quo order was issued in Malindi ELC Case No. 44 of 2020 filed by the appellants against the 2nd respondent.
71. Compounding their failure to prove adverse possession, the appellants were also unable to identify, with a reasonable degree of specificity, the sizes and locations of the specific portions in respect of which the individual appellants were allegedly in possession. The survey sketch prepared in December 2021 and produced by the appellants merely depicted an area of 99.94 acres which was superimposed on Plot No. 6224/III/MN. Otherwise, no further evidence was tabled to establish the context in which the survey sketch was produced, or the findings of the survey on which the sketch was based.
72. With regard to the fundamental requirement to identify property claimed in adverse possession, this Court pronounced itself in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] KECA 728 (KLR) thus:
- “The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”
73. In addition to the appellants’ failure to meet the requisite 12 years period of occupation and to identify with a degree of specificity the portions sought to be decreed in their favour, the appellants’ brief occupation of the suit property was interrupted when some of them were charged with the offence of trespass in *Shanzu Criminal Case No. 112 of 2016*. In the circumstances, the learned Judge cannot be faulted for finding that the appellants were not entitled to 99.94 acres of the suit property by way of adverse possession, or for dismissing the appellants’ suit.
74. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed in its entirety.

Consequently, the judgment and decree of the ELC (E. Makori, J.) delivered on 26th April 2023 is hereby upheld.



75. The appellants shall bear the costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF DECEMBER 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

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