

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: MURGOR, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E111 OF 2023

BETWEEN

PAUL WANYAMA 1ST

APPELLANT KOMBO HASSAN 2ND

APPELLANT

AND

JOHNSON MWANGERA

NYUKI SHADRACK KIRUKI

M'LAARIA ELIZABETH

KITZAO

JOSHUA MMITHIKA M'IKIAO

SAMUEL NTOITI

M'MBOROTHE SOLOMON

MUKABA MATIRI MICHAEL

BENJAMIN SIMBA LAWI

MUCHAI

JOHN KIPKEMOI KOSKEI (*Registered Trustees of
Methodist Church in Kenya*).....**RESPONDENTS**

*(Being an appeal from the Judgement and Decree of the Environment
and Land Court of Kenya at Mombasa (Matheka, J.) delivered on 20th
June 2023*

in

Mombasa ELC Case No. 121 of 2021)

JUDGMENT OF THE COURT

1. The ***respondents***, as the registered Trustees of Methodist Church in Kenya *vide* a Trust Deed dated 14th July 2017, filed a Complaint dated 28th June 2021 before Mombasa Environment

and Land Court (**the ELC**), being **ELC Case No. 121 of 2021**. They sued the **appellants, Paul Wanyama and Kombo Hassan** together with 3 other persons who are not party to this appeal.

2. It was the respondents' case that they were the duly registered owners of all that parcel of land known as **Mombasa/MN/Block 12/54 (the suit property)**. The respondents pleaded that, on or about May 2021, the appellants, together with other unidentified persons, jointly and severally wrongfully entered and took possession of the suit property, thereby trespassing, and that they continued to trespass thereon.
3. As a result of the alleged trespass by the appellant and others, the respondents stated that they were deprived of their use and/or enjoyment of the suit property, which was misused, damaged, wasted, destroyed, polluted and/or degraded by the appellants and others. The respondents particularised the loss and damage as follows:
 - "i. The appellants have been deprived of the use and quiet enjoyment of the suit property.*
 - ii. The appellants' misuse of the suit property, including occupation has occasioned detriment to the respondents.*
 - iii. Unlawfully purporting to subdivide and illegally sell off portions of the suit property to unsuspecting third parties.*

iv. Further, the appellants have prevented the respondents from access into and/or out of the suit property to carry out any activity thereon."

4. As a result, the respondents stated that they had suffered loss and damage and prayed for:

- "a) A permanent injunction restraining the appellants whether by themselves, servants, agents, employees, relatives, assigns or any other person from remaining on, or continuing in occupation and/or construction of perimeter walls and/or any structure thereon, selling, advertising for sale, leasing, auctioning and/or from in any way or manner interfering with the suit property;*
- b) vacant possession of the suit property; and*
- c) costs and interest of the suit."*

5. The appellants, who were the 3rd and 4th defendants respectively, together with the 2nd defendant, opposed the suit and filed a Statement of Defence and Counterclaim dated 25th March 2022. The appellants denied the claims against them, and further stated that they were not aware of any title issued to the respondents or any person in respect to the suit property. It was their defence that they were born on the suit property, and that they had enjoyed quiet possession thereof uninterrupted for more than 70 years.

6. In their counterclaim, the appellants reiterated that they have lived on the suit property for more than 70 years, on

which they had constructed permanent and semi-permanent houses; that, having lived on the suit property for more than

12 years, the respondents' rights to and interest in it had been extinguished; and that, as a result, they had acquired prescriptive rights over the suit property by way of adverse possession.

7. The appellants thus prayed for the following reliefs:

“i. That the respondents' rights over the suit property had been extinguished by limitation of time.

ii. That the appellants had acquired prescriptive rights over the suit property by way of adverse possession.

iii. That the Registrar of Land Mombasa County be ordered to cancel the title issued to the respondents in respect of the suit property and register the same in the appellants' names.

iv. Costs of the suit.”

8. The suit was heard by way of *viva voce* evidence. The respondents called only one witness, **PW1, Joshua Mithaka Mikiao**, who worked with the Methodist Church as one of the Trustees and a Bishop. He denied that the appellants were the owners of the suit property, and that they had lived there for 70 years as alleged. Referring to photographs which he produced in evidence, he stated that the houses on the suit property had been constructed recently; that there were no mud houses on the property as alleged by the appellants; that they (the Church) bought the land in the year 1888; that a part of the land was distributed to its members; that the appellants were not their members; and that the portion that

the appellants purported to occupy had been set aside for development.

9. Likewise, the appellants called one witness, **DW1, Kombo Hassan Kombo**, the 2nd appellant, who adopted his witness statement dated 25th March 2022. His testimony was that he and others had been in occupation of the suit property for more than 70 years; that he was born in a mud house in the suit property in 1947; that he later built a permanent house in 2012, and his parents used to farm on the land. He stated that those who lived on the suit property built both permanent and semi-permanent houses. He produced in evidence photographs showing the houses on the suit property as proof that he and others were in actual possession.
10. In a Judgment delivered on 20th June 2023, the learned Judge (**Matheka, J.**) held that the respondents, being the Trustees of the Methodist Church in Kenya, were also registered on 10th December 2020 as the proprietors of the suit property. Referring to **Section 26** of the **Land Registration Act, Cap 300** which provides that a registered proprietor has an indefeasible title, the learned Judge held that the respondents are the registered proprietors of the suit property which had no encumbrances registered against its title.
11. As to the claim of adverse possession, the trial Judge dismissed it, holding that the appellants had failed to prove

that they had been living on the suit property for a period of

12 years exclusively, openly, continuously and uninterruptedly. The trial court observed that the photographs exhibited showed recent constructions and unfinished houses that were yet to be occupied, which was an indication that the constructions had started in the recent past.

12. Further, it was the learned Judge's view that the appellants could not be said to have acquired title by adverse possession while, in reality, they trespassed onto the suit property, more so in the recent past; that the appellants failed to demonstrate to the court the exact period and time that they entered into the suit property so that their title became adverse to the respondents; and that, therefore, the appellants were trespassers on the suit property.
13. The trial court concluded by observing that, having failed to prove that the title to the suit property was acquired unlawfully and un-procedurally, the claim of fraud was unfounded for want of evidence in its support.
14. In the end, the appellants' counterclaim was dismissed while the respondents' claim was allowed as prayed. Costs of the suit and of the counterclaim were awarded to the respondents.
15. Aggrieved, the appellants preferred this appeal on the grounds that:

“i. the learned Judge erred in law and in fact in holding that the appellants had not been in occupation and possession for more than twelve (12) years on the suit property;

ii the learned Judge erred in law and in fact in finding that the appellants had failed to prove fraud and un-procedural issuance of the title to the respondents despite sufficient evidence; and

iii. that the learned Judge erred in law and in fact by failing to evaluate all the evidence on record thereby occasioning miscarriage of justice.”

16. The appellants thus prayed that: the appeal be allowed; the Judgment of Mombasa ELC delivered by **Matheka, J.** on 20th June 2023 be set aside; Judgment be entered as prayed in the appellant’s counterclaim; and that they be awarded costs of the appeal and of the suit in the trial court.

17. The respondents filed a Notice of Grounds Affirming Decision dated 14th October 2024 by which they prayed that the appeal be dismissed with costs. They sought orders that the decision of the superior court be affirmed on the grounds that: *they are the bona fide owners of the suit property; the appellants are trespassers having trespassed on the suit property on or about May 2021; the appellants did not prove that they had been in occupation of the suit property for the past 70 years; the title having been issued on 10th December 2020, the appellants failed*

to establish that their possession of the suit property was continuous for a period of 12 years; the appellants failed to prove that they were in occupation of the

suit property save for the photographic evidence of the structures under construction, which were denied by the 2nd respondent in his statement of defence dated 29th October 2021; and that the appellants failed to prove their case on a balance of probabilities.

18. When the appeal came up for hearing on 16th June 2025, learned counsel **Mr. Siminyu** was present for the respondents while there was no appearance by the law firm of **M/s. Khatib & Co. Advocates** for the appellants. Mr. Siminyu entirely relied on the respondents' written submissions dated 28th October 2024. Counsel for the appellants had also filed written submissions dated 4th October 2024.
19. The appellants submitted on the sole issue as to whether the trial Judge erred in law and in fact by failing to find that the appellants had proved their case that they owned the suit property by way of adverse possession. They relied on the decision of this Court in **Wilson Kazungu Katana & 101 others vs. Salim Abdalla Bakshwein & Another (2015) KECA 728 (KLR)** for the proposition that, in a claim of adverse possession, the Claimant must prove exclusive possession for a period of 12 years, either by dispossessing the owner, or by discountenance of possession by the owner on his own volition. In this respect, they contended that, for the period they were in possession, they had never sighted the respondents on the property, and neither had the respondents interrupted their stay thereon; that the

photographs of the finished and unfinished houses were a testament that they had resided there for a substantial period of time; and that, in any event, the respondents had not granted them permission to settle on the suit property.

20. The appellants submitted that, in the absence of a survey report indicating the nature/status of the suit property, particularly as regards the presence of the houses, then the trial Judge erred in finding that there was no proof of when they (the appellants) first entered into the land and, as such, it was difficult to tabulate the period of occupation; and that, on all fronts, the learned Judge erred in law and in fact in finding that the claim of adverse possession was not proved.
21. On the part of the respondents, it was submitted that the decision of the learned Judge was sound, based on law and evidence adduced, and that it ought not to be disturbed by this Court. It was contended that, by dint of the photographs produced in evidence by both parties, it was clear that the appellants had recently trespassed onto the suit property; and that the short stint of trespass and/or encroachment did not dispossess the respondents of their land for the reason that it did not aggregate to a period of 12 years. The respondents referred to the decision of the ELC in ***Alfonse Agutu Dera vs. Fannel Dera Achongo ELC No. 27 of 2021 (OS)***; decision of the High Court in ***Gerald Muriithi vs. Wamugunda Muriuki & Another (2010) eKLR***; and the decision of the Supreme Court of

India in **Karnataka Board of Wagf vs. Government of India & others (2004) 10 CCC**

779 as cited by this Court in **Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR** for the elements that must be proved in a claim of adverse possession. It was their case that the appellants did not meet the legal threshold as advanced in the cited case law to warrant their claim to the suit property by way of adverse possession; and that, for this reason, their counterclaim was rightfully dismissed.

22. The respondents further contended that the appellants did not tender evidence to support their claim that they (the respondents) obtained title to the suit property fraudulently. They cited the decision of this Court in **Kinyanjui Kamau vs. George Kamau (2015) eKLR**, which made reference to the Court's decision of **Ndolo vs. Ndolo (2008) 1 KLR (G&F) 742**, currently cited at *Kenyalaw reports* as **Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR**, for the proposition that allegations of fraud must be pleaded. To the respondents, the appellants did not meet this test.
23. In conclusion, the respondents urged that the trial Judge considered all the evidence on record together with the photographic evidence adduced to arrived at the finding that the respondents had proved their case on a balance of probabilities; that conversely, the appellants had failed to prove their claim of adverse possession as pleaded in the counterclaim; and that, therefore, the appeal lacks merit and should be dismissed with costs and the decision of the trial court upheld.

24. This being a first appellate court, our mandate as dictated under **Rule 31(1) (a)** of this **Court's Rules, 2022** is by way of a retrial, which is to re-analyse and by re-appraise the evidence and draw inferences of fact and, accordingly, arrive at our own independent conclusions. However, we must bear in mind that we did not have the advantage of observing the demeanour of the witnesses who testified before the trial court for which we must give due allowance. The predecessor of this Court correctly stated in **Selle and Another vs. Associated Motor Boat Company Limited & Others (1968) EA 123 (at page 126 para G-1 by Sir Clement De Lestang V.P)** with regard to the mandate of a first appellate court that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

25. Further, this Court in **Ratilal Gova Sumaria & Another vs. Allied Industries Limited (2007) KECA 501 (KLR)** expressed itself as follows:

“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.”

26. We have accordingly considered the record of appeal, the respective parties’ written submissions and the law. The issues that fall for consideration are: *whether the respondents acquired the title to the suit property fraudulently; and whether the appellants were entitled to possession of the suit property by way of adverse possession.*
27. The appellants alleged that the respondents’ title was obtained fraudulently. In our view, this assertion is peripheral, and falls on the wayside for the reason that a party cannot mount a claim for adverse possession and, at the same time, challenge the validity of a title. The presumption is that, at the time when a party approaches the court to assert a claim of adverse possession, there is no question surrounding the title’s ownership, as there is already a known registered owner to the suit property. In so holding, we are persuaded by the decision of the ELC at Malindi in **Haro Yonda Juaje vs. Sadaka Dzengo**

Mbauro

& Kenya Commercial Bank (2014) KEHC 6665 (KLR)

where it was held:

“[29] One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around

28. In the same vein, the ELC at Nairobi in **Njue vs. Matiabe & 3 others (2023) KEELC 17361 (KLR)** rightly emphasised that:

“The moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.”

29. This Court in **Chevron (K) Ltd vs Harrison Charo Wa Shutu [2016] KECA 248 (KLR)** rendered itself 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 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.”
(emphasis ours)

30. In view of the foregoing, and for all intents and purposes, the appellants were estopped from asserting that the respondents allegedly acquired the suit property fraudulently while at the same time fronting a claim for adverse possession. Our view is that they claimed the suit property by way of adverse possession because they had acknowledged the respondents to be the true owners. Indeed, this was the position as one of the documents produced by the respondents is the Title Deed to the suit property. The Registered owners are **Methodist Church in Kenya Trustees Registered** and the title was issued on 10th December 2020, which title the appellants did not impeach by way of evidence. We rest this issue at that.

31. Turning to the second and main issue for determination, the legal foundation of the doctrine of adverse possession is **Sections 7, 13, 17** and **38(1)** and **(2)** of the **Limitation of Actions Act, Cap 22.**

32. Section 7 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.

While **Section 13** 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”.

And **Section 17** stipulates 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.

33. Finally, **Section 38(1)** and **(2)** provide 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.”

34. **Section 7 (supra)** presupposes that it must be established that the title holder has lost his/her right to the land either by being disposed of it or having discontinued his/her possession of it. In **Masambaga & 7 Others vs. Malindi Holdings and Estate Limited**

(2022) KECA 782 (KLR), this Court referred to the judicial text in ***Elements of Land Law***,

5th Edition by Kevin Gray and *Susan Francis Gray* where, at page 1179, they opined:

“Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.”

35. The doctrine of adverse possession obtains where land owned by a person is claimed by a trespasser on the basis that he trespassed on the land with the knowledge of the landowner. Thus, the trespasser occupies the land adversely to its title continuously and uninterruptedly for a period of not less than 12 years. Eventually, the order for adverse possession made in favour of a trespasser is enforceable against the person registered as proprietor whose title is extinguished by reason of adverse possession.

36. For a claim of adverse possession to succeed, certain elements must be established. The elements were succinctly outlined by this Court in the case of ***Kenga & 12 others vs. Mohamed (2025) KECA 2219 (KLR)***: -

“...a claimant must demonstrate the following elements: the date of entry — when possession of the land commenced; the nature of possession — whether it was exclusive, open, and adverse; knowledge by the true owner that such possession was being exercised; duration of possession;

***that it continued for at least twelve 12
uninterrupted years; open and***

undisturbed occupation -that the possession was without secrecy, permission, or interruption (nec vi, nec clam, nec precario— meaning without force, without secrecy, and without permission).”

37. Thus, it is not only for an adverse possessor to claim that they have lived on the suit property for a period of more than 12 years, but that the adverse possessor must also demonstrate that his/her use and occupation of the suit property was non-permissive or non-consensual, actual, open, notorious, exclusive and adverse for a period of 12 years. **Iwalimu & 6 others vs. Halal & another (2025) KECA 1186 (KLR).**

38. The elements of actual possession must also be established as was held in **Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009) KECA 445 (KLR)** thus:

“Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of

39. Therefore, for a claimant to prove adverse possession, he/she must demonstrate that: the date on which he/she came into possession; the nature of the possession; the fact that his possession was known to the other party; the length of the continued possession; and the possession was open and undisturbed for the requisite period of 12 years. That is to say that the claimant must prove that his/her occupation was adverse to the registered owner of the land, and that the occupation by the adverse possessor was for a period of 12 years, *“nec vi, nec clam,*

nec precario" (without permission,

without secrecy and interruption). See also **Titus Mutuku Kasuve vs Mwaani Investments Limited & 4 others [2004] eKLR**; and **Wambugu vs Njuguna [1983] KLR 172**).

40. In the instant case, the appellants claimed to have lived on the suit property for 70 years or thereabouts. The learned Judge declined that proposition by relying on photographs showing the prevailing status on the suit property. We have likewise considered the photographs and are inclined to observe, just as did the learned Judge, that the construction then taking place thereon depicted fairly new and recent structures. In fact, in one of the photographs, a man can be clearly seen on top of a roof undertaking some construction work. In others, even the basic ground walls are incomplete. This leads us to also conclude that there is nothing that would remotely suggest that the appellants had been in occupation and possession of the suit property for more than 12 years. Consequently, the conclusion arrived at by the learned Judge cannot be faulted.
41. Even if it was to be assumed that indeed the appellants had lived on the suit property for more than 12 years, they did not demonstrate precisely when they took up the occupation. Their claim of being on the suit property for '*more than 70 years*' was vague and unsupported by evidence. They were unable to particularly demonstrate when they started occupying the suit property so that the aggregate period of occupation could then be tabulated to

total 70 years as pleaded in their counterclaim. In the same vein, we find and

hold that the counterclaim was lawfully and properly dismissed by the trial court.

42. Conversely, the respondents having proved the root of their title, were properly before the ELC to seek vacant possession against the appellants who were but trespassers, hence the prayer for their eviction in the suit. For each time the appellants continued to unlawfully remain in the suit property, it constituted a fresh actionable tort of trespass. Thus, the appellant's claim of trespass against the respondents could not be termed as time barred since each act of trespass constituted a continuing injury. In *Isaack*

Baraiah v. Mutsunga Mweke (2016) KECA 754 (KLR), this Court stated as follows with regard to continuing trespass:

“Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res judicata simply because the same parties or their parents litigated over the same matter in 1985. It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”

43. To sum it up, the evidence produced by the appellants alleging their prescriptive rights over the suit property by way of adverse possession was not proved in any way. They failed to meet the legal threshold for a claim of

adverse possession as provided under **Sections 7, 13, 17** and **38(1)** and **(2)** of

the **Limitation of Actions Act, Cap 22**. On the other hand, the respondents have satisfied us that they had an indefeasible title and that they were the registered owners of the suit property under and by virtue of **Sections 24 and 26** of the **Land Registration Act, Cap 300**. Consequently, we find no reason to interfere with the decision of **Matheka, J.** delivered on 20th June 2023.

44. In conclusion, we find that the appeal is without merit and is hereby dismissed with costs to the respondents with the result that we uphold the Judgment of Mombasa Environment and Land Court delivered by Matheka, J. on 20th June 2023.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of February, 2026.

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