

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: NYAMWEYA, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E050 OF 2022

BETWEEN

ABDALLA MOHAMMED ISSAH.....APPELLANT

AND

CHRISTOPHER MUMBA KAMBU 1ST

RESPONDENT KATANA MWILO

2ND RESPONDENT

SHIDA THOYA 3RD

RESPONDENT SANGA MULUKI.....4TH

RESPONDENT

EMMANUEL KAHINDI.....5TH RESPONDENT

CHARE MWAMBUA 6TH

RESPONDENT KATANA VUKO KALAMA

7TH RESPONDENT MARY KADZO KALELI

... 8TH RESPONDENT CHARO MWAMBUA...9TH

RESPONDENT

KAHINDI YONGI 10TH

RESPONDENT KALELI NGALA.....11TH

RESPONDENT

SAMMY KABUKA 12TH

RESPONDENT LAST KABWERE

13TH RESPONDENT MARGARET K. KALELI 14TH

RESPONDENT

KALUME BINGARI 15TH

RESPONDENT MKARE ANDAU

16TH RESPONDENT NYEVU KARISA KALOMBA 17TH

RESPONDENT

KAHINDI NGOWA 18TH RESPONDENT

RIZIKI FRED 19TH RESPONDENT

*(Being an appeal against part of the decision and decree of
the Environment and Land Court of Kenya at Malindi (Olola, J.)
dated 22nd September 2022*

in

ELC Case No. 8 of 2016)

JUDGMENT OF THE COURT

1. This appeal is from part of the Judgment in **Malindi ELC Case No. 8 of 2016** delivered on 22nd September 2022 by **Olola, J.** In the impugned judgement, the learned Judge held that Christopher Mumba Kambu & 18 others (**the respondents**) were entitled to continue being in occupation of 5.3382 Hectares (Ha), being a portion of Portion No. 371, Malindi (**the suit property**) while Abdallah Mohammed Issah (**the appellant**), was entitled to possession of the rest of the vacant portion of the suit property measuring 6.2052 Ha.
2. In a plaint dated 14th January 2016, the appellant pleaded that he was the sole registered owner of the suit property measuring 30 acres by transmission as the rightful heir following succession proceedings in **Malindi Kadhi's Court Succession Cause No. 3 of 1995** which was subsequently confirmed by Malindi High Court in **Succession Cause No. 55 of 2007**. The deceased in respect of whom the appellant inherited the suit property was named as Omar Sheikh Bin Athman.
3. It was further pleaded that, prior to the year 1995, the suit property was allegedly occupied by one Mohammed Abbas

Abdulla illegally; that the appellant challenged the

occupation by the said Mohammed Abbas Abdulla before Chief Kadhi's Court in the succession proceedings, which issue was determined in his favour; that the respondents started encroaching onto the suit property by inviting their relatives to occupy it and, without consent, started subdividing and selling portions thereof; that the appellant interrupted the respondents' occupation of the suit property on 18th January 2006 through the District Officer, on 21st May 2008 and 19th August 2005 through the Chief, and on 27th April 2011 through an advocate; and that, on 24th August 2013 and 13th July 2015, the respondents offered to purchase an area to be allocated to them by the appellant after survey, but that they later reneged on this offer which made it impossible for the parties to enter into an amicable settlement.

4. The appellant pleaded that, due to the alleged unlawful acts of the respondents, his right to own the suit property was greatly prejudiced. He thus prayed for judgment against the respondents jointly and severally for vacant possession of the suit property.
5. In their joint statement of defence dated 22nd February 2016, the respondents denied that the appellant was the registered owner of the suit property. They stated that some of them were born on the suit property and had lived thereon for over forty (40) years and others for over seventy (70) years without disruption; and that they were strangers to the appellant until when he proposed to sell to them the portions of which they were respectively in occupation.

6. The respondents stated that the appellant failed to prove that he had a cause of action against them, and that he further failed to lay any basis for grant of the orders sought in the plaint or at all. They prayed that the suit to be dismissed with costs.
7. At the hearing of the suit, the appellant testified as PW1. He adopted a very brief undated witness statement as his evidence in chief. He also produced a list of documents dated 18th September 2017 as **PEXH 1 - 20**, which we need not restate here, but shall make reference to any of them if need arises. His testimony basically reiterated the facts of the case as set out in the plaint that he inherited the suit property measuring 30 acres through succession proceedings; that, prior to the year 1995, no one was residing on the suit property except one Mohammed Abbas Abdulla; and that he successfully challenged the occupation by the said Mohammed Abbas Abdulla in **Malindi Kadhi's Court Succession Cause No. 3 of 1995.**
8. In cross-examination, the appellant conceded that there were people living on the suit property, but that he had unsuccessfully tried to negotiate with them to leave.
9. On behalf of the respondents, **Christopher Mumba Kambi (DW1)**, the 1st respondent, testified that there were more than 600 families who, as at the time, were occupying the suit property, but that only the 19 respondents had been sued; that, in 1941, there were five

original occupants on the suit property who were paying rates to one Kapilipili Omari

Borafiga; that, after Kapilipili died, the 5 original occupants started paying rates to one Omar Makanyira; that, in 1962, the five original occupants agreed to purchase the suit property from Omar Makanyira for a consideration of Kshs.7,930 with each occupant making varied contributions; that no surveyor came to demarcate the land that they had bought; and that these original occupants continued living on the suit property and, over time, developed it by planting trees, cashew nut and mango trees.

10. It was further testified that, due to social problems, some of the families started selling portions of the suit property; that this is how the number of the settlers had increased to 600; that the appellant is a stranger to them, and that he has never called them to discuss the suit property; that the 600 families have lived thereon for more than 50 years; that it was factual that the appellant had attempted to evict them from the suit property; that, even if the title to the suit property belonged to the appellant, all the occupants had nowhere else to call home; and that, as such, the court should find no merit in the suit.
11. Prior to rendering his decision, the learned Judge conducted a *locus in quo* visit to the suit property on 30th April 2021. The observations made were that the suit property was largely occupied with semi-permanent houses and cultivated field of cassava; and that there were numerous finished and unfinished homes. The impression the court made was that the suit property was comprised of a well settled village.

12. The trial court examined all the evidence on record and considered the observations made from the visit on the suit property after which it held that, while it was factual that some of the respondents approached the appellant in the year 2015 to purchase a portion of the suit property, it did not change the fact that the respondents and many other squatters who had not been sued had lived on the suit property for a period of more than 12 years; and that the respondents and the other squatters were entitled by way of adverse possession to the portion measuring 5.3382 Ha of the suit property which they were occupying. Consequently, the appellant was granted a portion measuring 6.2052Ha, and each party was ordered to bear their own costs.

13. Dissatisfied, the appellant proffered the instant appeal, which is hinged on three (3) grounds, namely that:

“ i. the learned Judge erred in law and in fact when he relied on the doctrine of adverse possession to find that the respondents had acquired an adverse title over the appellant’s property when the same was never pleaded nor proved;

ii. the learned Judge erred in law when he failed to allow the plaint as prayed and failed to uphold the legal principle on the sanctity of title in respect to the appellant’s property that was illegally occupied by the respondents; and

iii. the learned Judge erred in law and in fact when he found that the respondents had been in occupation of the suit property for

over twelve years without any evidence in support of any such assertion.”

14. We heard the appeal on 28th April 2025. Learned counsel **Mr. Otieno Willis** appeared for the appellant while learned counsel **Mr. Omwancha** appeared for the respondents. Parties relied on their respective written submissions which counsel also highlighted orally. Those of the appellant are dated 10th July 2023 while of the respondent are dated 15th August 2023.
- 15.** The appellant submitted on three main issues. Firstly, he took issue with the learned Judge's finding that the appellants were entitled to 5 Ha or thereabouts of land when, in fact, the issue of adverse possession was never pleaded; that, therefore, the finding of the learned Judge was not based on the pleadings before him; that the Judge went against the well settled principle that *parties are bound by their pleadings*; and that, furthermore, no evidence was led to prove the appellants' ownership of a portion of the suit property by way of adverse possession. For this submission, reliance was placed on this Court's decisions in **Chalicha Farmers Co-operative Society Limited vs. George Odhiambo & 9 Others (1987) KECA 70 (KLR)**; **Dakianga Distributors (K) Limited vs. Kenya Seed Company Limited (2015) KECA 14 (KLR)**; and **Kenya Commercial Bank Limited vs. Sheikh Osman Mohammed (2013) 61 (KLR,**
16. Secondly, it was submitted that the sanctity of the title was not challenged; that the doctrine of adverse possession cannot be used as a shield to defeat the lawful registered proprietor of a title; that the appellant

demonstrated that he

acquired the suit property through inheritance; that Section 26 (1) of the Land Registration Act upholds the sanctity of a title to be conclusive evidence of ownership; and that, since his title was not challenged, he ought to have been given an opportunity to enjoy his property as provided for under Article 40 of the Constitution.

17. The third and final issue on which the appellant submitted relates to failure by the learned Judge to consider the threshold and requirement of adverse possession. According to the appellant, the learned Judge erred in finding that there was sufficient material to support the notion that the respondents had been in occupation of the suit property for a period of over 12 years while, in fact, the evidence adduced by the respondents did not prove the elements of adverse possession as enunciated by the Supreme Court of India in the case of **Karnataka Board of Wakf vs. Government of Indis & others (2004) 10SCC 779** that *adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner*; and this Court's cases of **Kasuve vs. Mwaani Investments Limited & 4 others (2004) eKLR** for the proposition that the claimant must be in *exclusive possession of the land openly and as of right without interruption for a period of 12 years after dispossessing the owner or discontinuation of possession by the owner of his own volition*; and **Gulam Miriam Noordin vs. Julius Charo Karisa (2015) KECA 188 (KLR)** where the Court cited with approval the decision in **Joseph Gachumi Kiritu vs. Lawrence Munyambu**

Kabura (1996) eKLR, submitting that time stops to run when the owner asserts his rights over

the property, or when his right is admitted by the adverse possessor.

18. It was submitted that the respondents' stay on the suit property was challenged several times, the last time being in the year 2011; that the suit having been filed in 2016 means that the respondents had only occupied the suit property or a portion thereof for only 5 years and not 12 years as the law requires; and that every time the appellant attempted to evict the respondents, including by filing a criminal complaint, they offered to purchase the portions they had occupied.
19. In view of the foregoing, the appellant contended that the learned Judge was in error in awarding the respondents a portion of his land when their occupation by way of adverse possession had not been proved. We were accordingly urged to allow the appeal.
20. On the part of the respondents, it was submitted that the trial court rendered sound judgment based on facts and the applicable law; that the appellant had neither settled nor developed any portion of the suit property, nor in actual control and/or management thereof; that the appellant defended his title by referring to a succession process in which he inherited the suit property; and that adverse possession overrides proprietary rights. The respondents relied on this Court's decision in ***Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR*** where adverse possession was defined and the

circumstances under which a person is entitled to claim land by way of adverse possession spelt out.

21. On the contention that the respondents did not plead or prove adverse possession, it was submitted that the learned Judge appreciated that there was looming displacement of over 600 persons in occupation, small business enterprises, worship centres and other social amenities, which were constructed on the suit property; and that the appeal does not raise weighty issues, and that the actions complained of were frivolous. We were accordingly urged to dismiss the appeal with costs.
22. As the first appellate court, **rule 31(1) (a)** of this **Court's Rules, 2022** dictates that our role is limited to re-appraising the evidence adduced in the trial court and draw our own inferences of facts. It is also a cardinal principle that, in doing so, we have to bear in mind that we neither saw nor heard the witnesses give evidence and, therefore, have to give due allowance therefor. In **Kenya Ports Authority vs. Kuston (Kenya) Ltd (2009) 2 EA 212**, the role of a first appellate court was explained as follows:
- “This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”***
- See also **Selle vs. Associated Motor Boats Co. Limited & Others (1968) EA 123** and **Peters vs. Sunday Post Limited [1958] EA 424**.
23. We have considered the record of appeal, the submissions

by both counsel and the law. What emerges as the sole issue for

determination is *whether the learned Judge erred in holding that the respondents were entitled to continue occupation of part of the suit property on account of having acquired title by way of adverse possession.*

24. To begin with, it is uncontested that the appellant is the absolute owner and lawful holder of indefeasible title to the suit property whose measurement is 30 acres. The appellant's acquisition of the suit property was through inheritance. A copy of the Grant of Letters of Administration and a copy of the Certificate of Confirmation of Grant dated 29th April 2025 confirm that he inherited the estate of Omar Sheikh Bin Athman (deceased) as the sole beneficiary. There is, therefore, no dispute as to the origin of the title to the suit property. In his testimony in chief he stated as follows:

"...I also filed a list of documents on 18th September 2017. I wish to adopt the same..... the owner of the land is myself as shown in the documents. I pray that the defendants be removed from my land wherein they have trespassed." Emphasis ours

25. We have scrutinised the documents that the appellant produced in evidence, which are 11 in number. Among them is a Deed of Assent dated 3rd July 2015 by which the appellant is proclaimed as the personal representative of the estate of Omar Bin Athman (deceased) through whom, by succession, he had acquired the suit property.

26. A Deed of Assent is a legal document used to transfer ownership of property or land from a deceased person's estate to a beneficiary named in their Will, or entitled under intestacy rules. It is executed by executors or administrators after a grant of probate, formalising the transfer without sale. (<https://legal-resources.uslegalforms.com>). A similar definition is accorded to the instrument 'Deed of Assent' under the Black's Law Dictionary. Ultimately therefore, a Deed of Assent transfers the legal title of real property from the executor to the beneficiary, and is used at the end of a probate process to finalise the distribution of assets.
27. Also included in the List of Documents is a Certificate of Ownership. We pose to note that the Certificate of Ownership is dated 20th December 1913, and was issued to the late Omar Bin Athman. As earlier noted, it is not contested that the appellant was the sole beneficiary of the estate of Omar Bin Athman, and that the only property he owned was the suit property which the appellant inherited.
28. Also produced in evidence by the appellant as proof of ownership of the suit property is a Certificate of Postal Search. It is dated 24th November 2025, and the land in issue is Portion No. 371 Malindi measuring 30 acres. The type of tenure is freehold registered in the appellant's name as beneficiary. It is signed by the Registrar Coast Land Titles.
29. All said and done, it is trite that the appellant did not, *per*

se, produce the actual Title Deed or Certificate of Title that was transmitted to him upon execution of the Deed of Assent.

And, in fact, none constituted part of his List of Documents. However, from a scrutiny of the above referenced documents, there is no doubt that the appellant owned the suit property by way of inheritance. Although the respondents in their joint defence and counterclaim denied that the appellant was the registered owner of the suit property, that fact is that they did not oust the strong indisputable evidence to the effect the appellant is the indefeasible owner thereof, having acquired it by way of inheritance. Be that as it may, of paramount importance is the fact that the respondents did not oust the evidence that the appellant was the indefeasible owner of the suit property save to assert that they acquired a portion of the same by adverse possession.

30. **Article 40** of the **Constitution** protects an individual's proprietary interest, except where, as provided for under **Article 40 (6)**, the property has been found to have been unlawfully acquired. The Supreme Court in **Rutongot Farm Limited vs. Kenya Forest Service & 3 Others** (2018) eKLR stated that:

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.”

31. **Section 24(a)** of the **Land Registration Act, 2012**

provides that:

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

32. **Section 26** of the same Act affirms the sanctity of a title and its indefeasibility thereof and that the same can only be impeached if it is proved that the title was acquired by way of fraud, illegality, misrepresentation or through a corrupt scheme. The Certificate of Title therefore, is to be held as conclusive evidence of proprietorship. The section reads:

“(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

33. This Court in **Embakasi Properties Limited & Another vs. Commissioner of Lands & Another (2009) eKLR** held that:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,” it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme.”

34. A careful perusal of the record reveals that there was no evidence produced insinuating fraud or misrepresentation on the appellant’s entitlement to the suit property. Thus, the appellant’s ownership and sanctity of the title to the suit property was not impeached in any manner whatsoever. Thus, it is correct to conclude that the appellant is the *bona fide* owner/proprietor of the suit property.

35. The main factors that influenced the learned Judge's conclusion that the respondents were entitled to the portion

of the suit property they occupied were firstly, the visit to the *locus in quo*. He observed that part of the suit property was occupied by the respondents and other inhabitants; finished and unfinished homes were constructed thereon; and there were crops thereon. Secondly, another observation was deduced from the Surveyor's Report dated 12th June 2018, which is not part of this Court's record, but which indicated that the portion occupied by the respondents was 5.3382Ha while the unoccupied part measured 6.2052Ha. The Judge then concluded that the respondents were entitled to the portion of land that they were already occupying by way of adverse possession.

36. It is now well settled law that parties are bound by their pleadings, and that the trial court should not go beyond the pleadings before it to give an un-pleaded relief. This was the observation of this Court in **Robinson Kiplagat Tuwei vs. Felix Kipchoge Limo Langat (2020) KECA 224 (KLR)** where it was held, *inter alia*, that a trial court should avoid temptations to determine issues that parties have not placed before it for determination.
37. The predecessor to this Court stated thus in **Kenya Ports Authority vs. Kuston (K) Ltd (2009) 2EA 212:**
- “[T]he 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.”***
38. In **Baber Alibhai Mawji vs. Sultan Hasham Lalji & another (2010) KECA 306 (KLR)**, the Court explained:

“A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination.”

39. Given the adversarial nature of litigation in our jurisdiction, parties control their own narrative in the pleadings, and the judges, magistrates, chairpersons of tribunals, arbitrators and/or any other fact finders are expected to adjudicate the dispute without traversing into independent fact-finding missions as is common in inquisitory proceedings unknown to the adversarial system in common law jurisdictions.
40. In ***Gulam Miriam Noordin vs. Julius Charo Karisa (2015) KECA 188 (KLR)***, this Court held that a claim of adverse possession can be raised either in a defence or a counterclaim. In the instant case, the respondents did not plead or claim that they were entitled to the portion of the suit property which they occupied by way of adverse possession either in their defence or in a counterclaim.
41. Inasmuch as the learned Judge visited the suit property and as a consequence made some salient observations on the status then obtaining, it should be noted that a court’s observation of the state of affairs of a matter cannot constitute evidence. A party’s case is founded on the pleadings and, at the hearing of a case, the evidence adduced only supports the pleadings filed. Indeed, a party cannot go outside its pleadings when adducing evidence; it cannot purport to bring evidence at this stage which is

not hinged on the pleadings before the court. In the circumstances, and

with profound respect to the learned Judge, he was at fault by concluding that the respondents were entitled to the portion of the land they occupied when no pleadings or evidence existed or adduced to that effect.

42. We take to mind the fact that the purpose of pleadings is to bring to the notice of the court and the parties the question or issues in dispute, which objective can only be obtained when each party states his case in their pleadings with precision and particularity. In this regard, in **Knox D'Arcy AG and Another vs. Land and Agricultural Development Bank of South Africa (654/12) [2013] ZASCA 93; [2013] 3 All SA 404 (SCA) (5 June 2013)**, it was held as follows:

'It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. ...'

43. We find and hold that the issue of adverse possession was literally plucked from the air, as there was no foundational basis upon which the learned Judge was to make a finding on. Put differently, it was neither pleaded nor left for the trial court to determine.
44. That aside, even assuming that the respondents in their defence had pleaded adverse possession, it is trite law that a plea of adverse possession must stand on its own feet. Adverse possession being a matter of fact, it follows that it must be pleaded with proper particulars, such as, when the possession became adverse. The claimant must

lead cogent

evidence to prove entitlement to the land or a portion claimed. As earlier noted, the respondents only made a mere denial in their defence that the appellant was the registered owner of the suit property, which would otherwise defeat any claim or relief for adverse possession.

45. It is also settled law that, in a claim for adverse possession, a party must identify and state with specificity what portion of the land, in terms of the boundaries that they are entitled to. It is not enough for a party to merely state in court that they have been occupying a portion of a property without specifying the actual demarcation of the part they occupy. In ***Titus Mutuku Kasuve (supra)***, a claim of adverse possession failed due to the uncertainty in stating the area claimed. This Court held:

“Further, the portions which the Appellant was claiming were not clearly demarcated. There was no concrete evidence that the appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres, hence the claim for adverse possession would fail through uncertainty.”

46. We are further persuaded by the decision of Kneller, J. (as he then was) in ***Daniel Kimani Ruchine & Others vs. Swift, Rutherford Co Ltd & Another (1977) KEHC 30 (KLR)*** where he held that, in a claim founded on adverse possession, there must be definite evidence as to the area and time of the alleged occupation.
47. In this instance, the respondent’s witness merely testified

that the respondents and many other persons who were
in

occupation of the suit property had occupied it for between 50 and 70 years. He did not tell the court with specificity how much land each of them occupied, which ultimately would have made it difficult to apportion a specific acreage of land that each individual occupied. Again, with respect to the learned Judge, he erred in holding that the portion of 5.3382Ha. belonged to the respondents by way of adverse possession when, in actual sense, that portion was not demarcated to them, or no evidence to that effect was pleaded.

48. We acknowledge the definition of what constitutes adverse possession as per ***the Black's Law Dictionary 10th Edition*** as:

"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious",

as well as by this Court in ***Mate Gitabi vs. Jane Kabubu Muga alias Jane Kaburu Muga & 3 Others (2017) KECA 596 (KLR)*** where it was stated:

"For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the landowner, with the intention to have the land. There must be an apparent dispossession of the land from the landowner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario."

49. However, having reanalyzed and re-evaluated the evidence adduced before the trial court, and for the foregoing reasons, it is clear that the learned Judge was in error in holding that the respondents were entitled to the 5.3382Ha of the suit land by way of adverse possession. The learned Judge also erred in law in his interpretation of what constitutes the elements of the doctrine of adverse possession and thereby ended up finding in favour of the respondents and dismissing the appellant's suit. He also erred in failing to uphold the legal principle relating to the sanctity of the appellant's title, which was not impeached.
50. We form this view bearing in mind that the appellant pleaded and adduced evidence that he had unsuccessfully tried to evict the respondents from the suit land. He stated that, any time he tried to do so, he was met by uncooperative respondents who, to us, were hell-bent to continue in illegal occupation of the appellant's land. Since the main question for determination is whether the trial court determined the issue of adverse possession based on unpleaded facts, and which issue we have adequately addressed, we think we should say no more.
51. In the end, we arrive at the inescapable conclusion that the appeal is merited and is hereby allowed. We accordingly set aside the Judgment and Decree of **Olola, J.** dated and delivered on 22nd September 2022 in **Malindi ELC No. 8 of 2016**, and substitute therefor an order that the appellant's claim in **Malindi ELC No. 8 of 2016** is allowed in its entirety,

and the appellant is entitled to vacant possession of the entire portion of land known as Portion No. 371, Malindi.

52. As regards the issue of costs, since it is the trial court that erred in formulating and determining *suo moto* an issue not pleaded or raised in the proceedings, we hereby order and direct that each party bears their own costs of the proceedings in the ELC and of this appeal.

53. Orders accordingly.

Dated and delivered at Mombasa this 27th day of February, 2026.

P. NYAMWEYA

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA Carb, FCI Arb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

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

signed
DEPUTY REGISTRAR