



REPUBLIC OF KENYA



**Ali v Catholic Diocese of Malindi Registered Trustees o/a Kipini Roman Catholic Church
(Civil Appeal E024 of 2024) [2025] KECA 885 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 885 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E024 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 7, 2025**

BETWEEN

ALI MOHAMED ALI APPELLANT

AND

**CATHOLIC DIOCESE OF MALINDI REGISTERED TRUSTEES O/A KIPINI
ROMAN CATHOLIC CHURCH RESPONDENT**

(An appeal against the Judgement and Decree of the Environment & Land Court at Malindi, (Olola, J.) delivered on 22nd January 2021 in E.L.C. CASE No. 296 of 2016 (O.S.))

JUDGMENT

1. The respondent, Catholic Dioceses of Malindi o/a Kipini Roman Catholic Church, moved the trial court by way of an Amended Originating Summons filed on 7th November 2016 against Ali Mohamed Ali, the appellant, seeking the following orders:
 - a. That they are entitled to be registered (as the) owners of four (4) acres being part of all that parcel of land known as Plot No. 272 CR No. 6290 by dint and virtue of adverse possession and prescription;
 - b. That the Appellant's title or right to four acres of all that parcel of land known as Plot No. 272 CR 6290 Kipini, Tana River County measuring about 64 acres or thereabouts and his claim to the same was extinguished and time-barred by virtue of Section 16 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya;
 - c. That the Respondent has acquired legal possession and ownership rights by prescription and adverse possession of all those four (4) acres of land in all that parcel of land known as Plot No. 272 Kipini CR No. 6290 measuring 64 acres or thereabouts; plus costs of the suit.



2. The suit was premised on the grounds that: Plot No. 272 CR 6290 Kipini (Plot No. 272 Kipini) is registered in the name of the appellant's father Mohamed Bin Ali Dhiyebi (deceased); that the respondent had been in occupation and possession of four acres (the subject portion) since 2001 which it had tremendously developed by establishing a church, sinking two boreholes, constructing four houses for its priests and staff and planted trees; and that the subject portion is currently wholly occupied by the respondent whose entry, occupation and use was without the appellant's permission, but within his knowledge since 2001.
3. In support of their case, Father Anthony Mwanzia Kitema, PW1, a priest at the Catholic Diocese of Malindi and a Trustee of the Diocese, testified that the respondent had been in possession of the subject portion of Plot No. 272 Kipini since the year 2001 and had constructed four houses for the priests and staff. In 2001 when they occupied the property, they did not know the plot number and only came to learn that someone was laying claim to it in 2014. On cross-examination, PW1 conceded that their entry in 2001 followed the purchase of a portion of the land measuring 100 ft by 80 ft from one Jagina on 23rd August 2001. Jagina never showed the church any documents, but he was staying in a house which was on the land. They later demolished the house to pave way for construction of the Church. PW1 told the trial court that they continued buying small portions of land from Jagina until they acquired the subject portion comprising the four acres. They denied that they had grabbed the land.
4. PW1 further stated that they later sought a Part Development Plan from the Tana River County Government and that, at some point, they had leased a portion of the land to Safaricom Limited who built a Base Station. PW1 further conceded that, sometime in 2014, they received a letter from the appellant's advocates informing them that the land belonged to the appellant. It is then that they did a search that confirmed the land ownership status, pursuant to which they decided to file the suit for adverse possession.
5. Mohamed Bin Ali Dhiyebi (deceased) passed away in the year 1982 and, by an application dated 5th June 2017 and filed on 6th June 2017, the appellant was joined in the suit as the defendant and as the appellant in this appeal.
6. In response to the claim, the appellant filed a defence and counterclaim on 18th July 2017 in which he claimed that the respondent had entered onto Plot No. 272 Kipini where it proceeded to erect buildings on a portion purchased from one Jagina Mikaya Lali. He further accused the respondent of proceeding to lease part of Plot No. 272 Kipini to Safaricom Limited who had unknowingly entered into a lease agreement and set up a Base Station. Upon discovery of the developments, he sought to regain possession, and Safaricom Limited terminated the lease with the respondent and instead entered into a fresh one with him. It was his case that the respondent has without any color of right continued to remain in wrongful possession of the subject portion measuring four acres or thereabouts or erect the buildings thereon without his permission.
7. He therefore sought orders for vacant possession of the subject portion of land illegally occupied by the respondent measuring four acres or thereabouts on the parcel of land known as Plot No. 272 Kipini, the eviction of the respondent, its servants or agents, and any person claiming through it and demolition of all its illegal structures or buildings erected thereon together with costs.
8. In support of his case, he testified that he is the Administrator of the estate of his father, the late Mohamed Bin Ali Dhiyebi, who was the registered owner of Plot No. 272 Kipini measuring 64 acres; that, even though his father was registered as the proprietor of Plot No. 272 Kipini on 10th September 1957, the deceased never resided thereon, but instead lived in Milimani, Lamu until his death in 1982.



9. He claimed that at the time of his father's death, the respondent had not yet trespassed onto the property. He would later on 26th May 2006 be appointed the Administrator of the estate, but did not know its physical location and boundaries until sometime in 2014 when he engaged a surveyor to locate and ascertain the boundaries. He then came to realize that the respondent had trespassed onto the land and leased a portion measuring 0.0376 acre to Safaricom Ltd to set up a Base Station; that he immediately took steps to repossess the property including writing several letters, but that the respondent refused to vacate the land.
10. In cross-examination, he conceded that he took about 16 years after being issued with the grant to check on the land as he had no money for a surveyor and that, other than the Church, there were a number of other people living on the land. He told the court that he had also asked the other people to vacate the land. He further conceded that there was a private school on the land, but told the court that the Chief's office was outside the land. He stated that they had not been using the land and were waiting for those on the land to leave.
11. Upon considering the matter, the trial Judge held that the respondent had proved their entitlement to the subject portion of Plot. No. 272 Kipini by way of adverse possession and allowed the respondent's claim and dismissed the appellant's counterclaim.
12. Aggrieved, the appellant filed an appeal to this Court on grounds that: the learned Judge was in error in law and fact in finding and holding that the respondent had proved its claim for adverse possession of the subject portion within all that parcel of land known as Plot No.272 Kipini; in finding and holding that the appellant's title or right to the subject portion within parcel of land known as Plot No. 272 Kipini registered as Title No. CR. 6290 was extinguished and time barred by virtue of section 16 of the Limitations of Actions Act; and in dismissing the appellant's counterclaim.
13. When the appeal came up for hearing on a virtual platform, learned counsel Mr. Shujaa appeared for the appellant while, learned counsel Ms. Oloo holding brief for Kilonzo Aziz appeared for the respondent.
14. Both parties filed written submissions. Relying on their written submissions, counsel for the appellant submitted that, when the respondent entered onto the subject portion, it had no knowledge of the true owner. It also had no knowledge that the Plot No. 272 Kipini was registered land and that the deceased was the registered owner; that, all along, the respondent assumed that Plot No. 272 Kipini was unadjudicated land, which was the reason for the respondent's application for Title documents from the County Government of Tana River on 14th July 2014. It cannot therefore be said that when the respondent entered Plot No. 272 Kipini, it asserted a hostile title to that of the registered owner when, in the first place, it was unaware of the existence of that title.
15. Counsel submitted that, even after being informed by the advocate for the deceased that Plot No. 272 Kipini was registered and owned by the deceased, the respondent refused to recognize the deceased as the true owner of the land. The respondent denied having invaded land owned by the deceased; it was not until the year 2016, after the respondent had conducted its own search at the Land Registry, that it accepted and recognized that Plot No. 272 Kipini was registered in the deceased's name. Counsel submitted that the time from which the period of limitation would run in favour of the respondent was from 1st September 2016 when the respondent accepted the fact that the deceased was the true owner of the suit property, and not from 23rd August 2001 when it purchased the portion of 100 feet by 80 feet from Jagina Mikaya Lali.
16. Counsel further submitted that, by the time of filing this suit, the appellant had already regained possession of part of Plot No. 272 Kipini, which he proceeded to lease to Safaricom Limited; that, by



the time of filing of this suit in court on 7th November 2016, the limitation period within which the appellant could bring an action to recover the subject portion had not lapsed, and that the learned Judge was in error in holding that the appellant's right to the 4 acres of land had been extinguished and was time-barred by operation of law, and in dismissing the appellant's counterclaim and in finding that the period within which the appellant could have brought an action to recover the subject portion had lapsed by the time of the filing of this suit.

17. Counsel submitted that the respondent's case rested on the purchase of the subject portion from Jagina Mikaya Lali, a person who did not have any proprietary interest in the land, and who was incapable of passing on title to the respondent; that, as a result, the respondent's occupation of the subject portion was illegal. As a consequence, and there having been no proof of dispossession of the appellant by the respondent from the subject portion for the statutory period of 12 years, the learned Judge was in error in dismissing the appellant's counterclaim.
18. On their part, counsel for the respondent submitted that the respondent occupied and put up several structures on the subject portion; that the appellant stated that he never knew of the physical location and boundaries of the subject property from the time he was appointed as the administrator in the year 2006 until the year 2014 when he engaged the services of a surveyor; that this would mean that he never at any time occupied the subject property.
19. Counsel submitted that there was no evidence of the appellant ever asserting his title over the land; that he did not at any point seek to eject the respondent from the subject portion, and that neither did he ever take possession of it; that the only attempt was on 25th August 2014 when the respondent's then advocate wrote to the respondent demanding to be given possession of the subject portion since it was clear that the respondent had occupied 4 acres of Plot No. 272 Kipini continuously for a period of 13 years without any interference from the appellant.
20. Counsel further submitted that, since Jagina was never at any point the registered owner of the subject portion, and neither was he an agent of the appellant, he could not give permission to the respondent to occupy the 4 acres' portion without permission; that the appellant failed to establish his claim for trespass; and that, for the reasons stated, the appeal had no merit.
21. Having considered the grounds of appeal as well as submissions by counsel and the authorities cited, and this being a first appeal, the duty of this Court is to analyze and re-assess the evidence on record and reach our own conclusions. In the case of *Selle vs Associated Motor Boat Co. Ltd* [1968] EA 123, it was expressed thus:

“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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses 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 in the case generally (*Abdul Hameed Saif -v - Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”

22. In view of the above, the main issue for determination is whether the trial Judge was in error in finding that the respondent proved adverse possession to the subject portion.



23. Ownership by adverse possession is underpinned by statute in sections 7, 13, 17 and 38 of the Limitations of Actions Act. Section 7 of the Act states that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

24. On the other hand, section 13 stipulates:

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”.

25. Section 17 goes on to provide 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”.

26. Finally, sections 38(1) and (2) states 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.”

27. In the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR, this Court defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner.”



28. The requirements for adverse possession were also reiterated in the case of *Mbira vs Gachuhi*, [2002] IEALR 137 where it was held that:

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

29. The law on adverse possession is well settled. In order for a claim of adverse possession to be proved, the following ingredients must be demonstrated: i) The date on which the claimant came into possession; ii) What was the nature of his possession; iii) That the fact of his possession was known to the other party; iv) How long his possession continued and v) That the possession was open and undisturbed for the requisite 12 years. See *M'Mikua vs Muchiri & another* [2024] KECA 1882 (KLR) *Titus Mutuku Kasuve vs Mwaani Investments Limited & 4 others* [2004] eKLR; *Titus Kigoro Munyi vs Peter Mburu Kimani*, Civil Appeal No. 28 of 2014; *Wambugu vs. Njuguna* [1983] KLR 172) and *Karuntimi Raiji vs. M'makinya* [2013] eKLR.

Did the respondent's claim for adverse possession satisfy the requisite ingredients as set out above?

30. It was the respondent's case that it moved into the subject portion comprising four acres of Plot No. 272 Kipini, where it had been in possession since 2001; and that they had since developed the land and built four houses for priests and staff. They claimed that, in 2001 when they occupied the portion of land, they did not know the plot number and only came to learn that someone was claiming ownership in 2014; and that they bought the subject portion from one Jagina in 2001 only to learn in 2014 through the appellant's counsel that Plot No. 272 Kipini belonged to the deceased's estate.

31. For his part, the appellant testified that Plot No. 272 Kipini belonged to his deceased father who passed away in 1982. He stated that he was aware of the entire property measuring 64 acres and that he visited it often during his father's lifetime. After the death of his father, he obtained a grant to administer the deceased's estate on 25th May 2000, and that, thereafter, it took him another 16 years to check on the subject property.

32. The evidence is clear that the respondent occupied and took possession of the subject portion in 2001, and openly put up buildings including a church, houses for priests and even a school, that were visible, and completed without interference. Their occupancy of the subject portion from 2001 to 2014 when the appellant issued a notice, was over a period of 12 years. They had even entered into a lease agreement with Safaricom. In view of the evidence on the record, and the confluence of the appellant's evidence that he had not visited Plot No. 272 Kipini for 16 years, with the continued and uninterrupted occupation of the suit portion by the respondent for 13 years, resulting in the open and visible development of the subject portion, it can be concluded that the claim for adverse possession was undeniably, and manifestly established.

33. Contrary to counsel for the appellant's assertion that time in favour of the respondent ran from 1st September 2016, when the respondent became aware that the deceased was the true owner of Plot No. 272 Kipini and not from 23rd August 2001 when it purchased the subject portion from Jagina Mikaya Lali, this Court in the case of *Benson Mukuwa Wachira vs The Assumption Sisters Registered Trustees* (Civil Appeal 121 of 2006) [2016] eKLR clarified that:

In law, the fact that a trespasser thinks he is on land of the true owner with the latter's permission when in fact he is on the land of another person whose permission she does not have does not undermine the application of the doctrine of adverse possession. As long as



one is on the land with the knowledge of the owner and without the latter's permission that constitutes in itself trespass and may give rise to adverse possession”.

34. In effect, the respondent having proved on a balance of probability that they were in peaceful and quiet occupation of the subject portion without the permission of the estate of the deceased or the appellant and that they remained in exclusive and uninterrupted possession for 12 continuous years before they filed the suit, then, adverse possession was established. And, it mattered not that the respondent moved onto and took over possession of the subject portion after purchasing it from one Jagina Mikaya Lali, who they initially believed was the true owner. Provided they were on the subject portion without the registered owner's permission, then such continuous occupation would give rise to adverse possession.
35. We have said enough. The trial Judge cannot be faulted for arriving at the conclusion that the respondent's claim for adverse possession was properly established, and in so concluding, for rightly dismissing the appellant's counterclaim in its entirety.
- 36 In sum, the appeal is without merit and is hereby dismissed with costs to the respondent.
It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

