Andafu v Akhulunya (Civil Appeal 70 of 2019)
[2025] KECA 714 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 714 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 70 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

APRIL 25, 2025

BETWEEN

JAMES THOMAS ANDAFU ..... APPELLANT

AND

JOSEPH MAKOKHA AKHULUNYA ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Kakamega (Matheka, J.) dated 17th May, 2018 in ELC Case No. 619 of 2014)

JUDGMENT

1. This appeal stems from an originating summons by Joseph Makokha Akhulunya (the respondent), who claimed proprietary interests by way of adverse possession in Land Parcel No. Butsotso/ Indagalasia/248 (suit property) measuring 7.5 acres. In the originating summons, he sought for orders and/or determination of the following main questions:

    1. Whether the applicant herein is entitled to the whole Land Parcel No. Butsotso/ Indagalasia/248 by way of adverse possession.

    2. Whether the applicant has satisfied all the statutory requirements and the prerequisites entitling him to the said land by way of being in adverse possession for a period of over 12 years.

    3. Whether the respondent's proprietary interests on the said land have been extinguished by virtue of the applicant's adverse possession of the same.

    4. Whether the title deed issued in the names of James Thomas Andafu as the sole proprietor of Land Parcel No. Butsotso/Indagalasia/248 be cancelled and or revoked and the same be transferred to the applicant herein as the sole proprietor.

    5. That the costs of this summons be provided for.

2. Through his supporting affidavit sworn on 19th April, 2006 in support of the originating summons of even date, the respondent claimed that while the appellant herein was the registered proprietor of the parcel of the suit property, he and his family have "peacefully, continuously and/or quietly occupied, developed and utilized" the land since 1974. His occupation, he deponed, was uninterrupted and notorious. In view of that, he believed that the appellant's interests in the suit property had been extinguished by operation of law and prayed for a declaration that he (the respondent) had acquired interest in the suit property by prescription.

3. The appellant resisted the suit by way of a replying affidavit sworn on 3rd August, 2006 in which he admits that the suit property is registered in his name, but points out that the respondent had failed to disclose to the court that he (the appellant) bought it from him (the respondent) vide a Sale Agreement dated 5th September, 1974 and thereafter transferred it to him. Further, the appellant deponed that the respondent had failed to disclose that he (the respondent) had filed a claim at the Lurambi Lands Disputes Tribunal aiming to reverse the sale agreement but that his claim was dismissed even though it proceeded ex parte. Similarly, that the respondent's appeal to the Provincial Appeals Committee was dismissed. The appellant attached a copy of the Sale Agreement and copies of the proceedings from the Lurambi Land Disputes Tribunal and the Western Provincial Appeals Committee to his replying affidavit.

4. The appellant also attached a bundle of documents respecting Kakamega Chief Magistrate's Misc. Application No. 65 of 2000. In that case, the appellant applied for the adoption of the verdict of the Provincial Appeals Committee as a judgment of the court in accordance with the Land Disputes Tribunal Act, 1992.

5. The appellant, therefore, prayed for the originating summons to be struck out with costs.

6. Directions on the hearing of the originating summons were initially given by G.B.M. Kariuki, J (as he then was), to the effect that it was to be canvassed by viva voce evidence in addition to a consideration of the filed documents. After a few adjournments, hearing took place before E.C. Mwita, J. on 24th July, 2014 when the respondent and his witness testified and the respondent closed his case. On the same day, the appellant testified. Counsel for the appellant, then, requested for an adjournment to give him time to call the court archivist to attend court to produce the entire file in Kakamega Chief Magistrate's Misc. Application No. 65 of 2000. The prayer for adjournment was granted. However, by the time the matter was ripe for further hearing, the Supreme Court had handed down its decision in Republic v Chengo & 2 others [2017] KESC 15 (KLR) whose import was that E.C. Mwita, J., as a judge of the High Court, could no longer hear environment and land matters.

7. Thereafter, the parties' advocates appeared before the Environment and Land Court (ELC) Judge, N. Matheka, J., on 16th March, 2017 and agreed by consent that the matter was to be re-heard de novo. The hearing was scheduled for 19th July, 2017. On that day, both the appellant and his advocate were absent. Displeased, the court allowed an adjournment but marked it as the last one for the appellant. Even so, both the appellant and his advocate were missing, despite admitted service, when the matter came up for hearing on 7th December, 2017. The learned Judge directed the hearing to proceed ex parte.

8. The respondent and his witness testified on that day.

9. In his testimony, the respondent conceded that he entered into a sale agreement with the appellant for the suit property. The sale agreement is the one dated 5th September, 1974 (the same one attached to the appellant's replying affidavit). He produced it as evidence. His testimony was that the consideration for the sale was Kshs. 6,000.00/=. However, at the time of the agreement, the appellant paid a deposit of Kshs. 3,000.00/=, leaving a balance of the same amount. He testified that the appellant fraudulently

proceeded to transfer the land to himself before paying the full amount. He further testified that he has lived on the land with his family since 1974. He produced a copy of the Green Card for the property showing that it was registered in the name of the appellant on 26th September, 1974 and a certificate of ownership issued on 28th September, 1974. Finally, the respondent told the court that since the appellant did not pay the balance, he decided to refund the deposit paid which he claimed he sent via money orders by registered mail to P.O. Box No. 63, Yala on various dates in 1981. He produced copies of the money orders as exhibits.

10. The respondent's witness was Alphone Tsikungu Murunga, a neighbour. He adopted his witness statement dated 6th January, 2015 and testified that the respondent lives in the parcel adjoining his as a neighbour; and further that the appellant has "never stepped" on that land.

11. The respondent closed his case and the learned Judge gave directions on the filing of submissions. When the case came up on 19th February, 2018, Mr. Elung'ata for the appellant was present. He made an oral application for the case to be re-opened so that he could cross-examine the respondent and present his witnesses. Amidst a robust objection from Mr. Getanda appearing for the respondent, the court rejected the application – but allowed Mr. Elung'ata to file written submissions.

12. After analyzing the evidence on record and outlining the applicable principles, the learned judge found that the respondent had proved his case to the required standard. Consequently, in the impugned judgment dated 17th May, 2018, the learned Judge made the following orders:

    1. A declaration that the defendant's/respondent's proprietary interests in the said land have been extinguished by virtue of the plaintiff's/applicant's adverse possession of the same.

    2. That the title deed issued in the names of James Thomas Andafu as the sole proprietor of land parcel No. Butsotso/Indangalasia/248 be cancelled and or revoked and the same be transferred to the plaintiff/applicant herein as the sole proprietor.

    3. That costs to be borne by the defendant."

13. Aggrieved by the decision of the Environment and Land Court, the appellant filed a Notice of Appeal dated 22nd May, 2018, and a Memorandum of Appeal dated 29th April, 2019, in which he raised eight (8) grounds of appeal. These are that:

    1. The learned judge erred and misdirected himself in law in arriving at the conclusion that the respondent had become entitled to the whole of the suit parcel of Land Number Butsotso/Indagalasia/248 when the respondent has not established that he was in law so entitled in view of the principles of law applicable to the doctrine of adverse possession.

    2. The learned judge in finding for the respondent ignored the available evidence that the occupation of the suit land by the respondent was with the consent and/or concurrence of the appellant.

    3. The learned judge also ignored the evidence that disclosed that the occupation of the suit land by the respondent was neither peaceful nor uninterrupted. In particular, the learned judge erred by not appreciating and taking into account the evidence tendered that there had been legal challenge to his occupation of the suit land by various suits in Tribunals and courts of law namely the District Disputes Tribunal, the Provincial Appeals Committee and Kakamega

CMMisc. A. No. 65 of 2000, which had jurisdiction to hear and determine their rights to the suit land thereby interrupting his adverse occupation of the suit land.

4. The learned judge further erred and misdirected himself in law and evidence in finding for the respondent when the respondent's case was that he was occupying the suit land as of right and not as a trespasser wherefore such occupation could not be adverse to the appellant's title.

5. The learned judge erred in finding for the respondent in adverse possession without the respondent tendering evidence in proof of the fact that his facts constituting adverse possession were done with the knowledge of the appellant.

6. The learned judge erred in law by failing to determine the issue submitted to him that the suit was res judicata and in failing to so find in view of the proceedings in the Land Disputes Tribunal, Provincial Appeals Committee and Kakamega CMMisc. C.A. No. 65 of 2000.

7. That the learned judge shifted the burden of proof to the appellant.

8. The decision of the learned judge is against the weight of evidence.

14. Consequently, the appellant prayed that the appeal be allowed with costs, and judgment and decree of the learned judge be set aside and replaced with a decree dismissing the respondent's suit.

15. During the virtual hearing of the appeal, learned counsel Mr. Wasuna appeared for the appellant, whereas learned counsel Mr. Okali held brief for Mr. Getanda for the respondent. Both parties entirely relied on their written submissions and opted not to orally highlight them.

16. In his submissions the appellant contended that there were two main issues that arose for determination namely:

a. Whether the respondent's occupation of the suit land L.R. No. Butsotso/Indangalasia/248 amounts to adverse possession.

b. Whether or not the respondent has been in occupation and in possession of the suit land for an uninterrupted period of 12 years and without consent of the appellant.

17. On the first issue, the appellant started by outlining the ingredients of adverse possession as were established by this Court in Mtana Lewa vs. Kahindi Ngala Mwagandi, [2015] eKLR. He also cited Kaswe vs. Mwaani Investments Limited & 4 Others, 1 KLR 184 and Mate Gitabi vs. Jane Kabubu Muga & Others, Nyeri Civil Appeal No. 43 of 2015 (unreported). The appellant submitted that he took legal action in interrupting the respondent's possession of the suit property through the District Land Dispute Tribunal, Provincial Appeals Committee and the Kakamega Misc. Appl. No. 65 of 2000.

18. According to the appellant, the respondent did not satisfy the requirements for adverse possession, in particular, he did not have uninterupted occupation of the suit property without protest. As such, the learned Judge's decision was in violation of his right to acquire property as enshrined under Article 40 of the *Constitution*.

19. The appellant submitted that every attempt by the respondent to interfere with the proprietorship of the suit property was thwarted by the Land Dispute Tribunal and the Provincial Appeals Committee. Conversely, the appellant also submitted that he tried to stop the respondent's illegal occupation of the suit property through the already stated legal processes in the Tribunals and the court, but the respondent persisted in remaining on the suit property and defiantly refused to give him vacant possession.

20. The appellant also argued that in view of Kakamega Chief Magistrate's Court CM Misc No. 65 of 2000, the case before the ELC was incurably defective, bad in law and abuse of the court process as the same were res judicata since there had been a determination of the issue in the previous case.

21. Additionally, the appellant further submitted that the respondent's occupation of the suit property was with his license as he had given him express consent to occupy it in 1980's when the respondent faced problems. According to the appellant, the respondent vacated the suit property in 1974 and only returned in the 1980's but with his express and tacit consent. Consequently, the appellant argued that the respondent's claim that his stay in the suit property was peaceful, uninterrupted and without the knowledge of the appellant is false. According to the appellant, the respondent's continued stay in the suit property amounted to trespass the moment the transfer had been effected and the title registered in the appellant's name as the bona fide owner of the land. In this regard, he relied on the case of Jandu vs. Kirplal & Another (1975) EA 225 and Mbira vs. Gachuhi (2002) IEALR 137 wherein consent in adverse possession was discussed.

22. The appellant pointed out that paragraph 8 of his replying affidavit had made the claim that the respondent requested to remain on the suit property as he looked for alternative accommodation. This deponement was not controverted at all and, therefore, the respondent could not, in the same breath claim adverse possession.

23. Finally, on this issue, the appellant argued that the fact that the respondent claimed that he remained on the property because the appellant had not finished paying the purchase price; and that he had refunded the deposit paid defeats the respondent's claim that he occupied the suit property adversely. This is because, if the narrative is true, then he remained on the suit property as a matter of right.

24. Regarding the second issue, the appellant contended that the respondent had sold and transferred the suit property to him and, therefore, he could not turn around later and claim adverse possession in order to benefit twice as that would amount to fraud. He contended that the respondent did not come to equity with clean hands; but rather, with allegations which have not been credibly proved.

25. Opposing the appeal, the respondent argued that he had established through evidence, including the Green Card of the suit property, that he was in possession and occupation of the suit property since 1974. The question, the respondent posited, was whether the "notice to move" which the appellant implies was given to the respondent amounts to constructive interruption of continuous possession, occupation and utilization of the suit property. Additionally, the suit presented the question whether the filing of Kakamega Chief Magistrate's Court Misc. No. 65 of 2000 amounted to interruption of continuous possession of the suit property.

26. The respondent argued that a claim for adverse possession prevails against a title owner who fails or neglects to "take action" against persons asserting rights of his title. According to the respondent "to take action" must mean an action at law i.e. an ordinary proceeding in a court of justice. He cited this Court's decision in Mwathi Githu vs. Livingstone Ndeete [1980] eKLR for the proposition that a land owner can only succeed to interrupt possession against a person asserting adverse possession by either asserting his right or when his right is admitted by the adverse possessor. On the other hand, assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The respondent argues that in the present case, the appellant never took any legal proceedings or effectively entered the land. In particular, the respondent argues that Kakamega CMC Misc. No. 65 of 2000 could not amount to an assertion of the appellant's rights to the suit property because it was "merely procedural (sic) for adoption of orders made by the last tribunal which orders were made on 29th December, 1999."

27. We have considered the pleadings in the record of appeal, the ruling of the Environment and Land Court, the appellant's grounds of appeal and written submissions by both parties. Being a first appeal, we are obligated to re-consider and re- evaluate the evidence and come up with independent conclusions – see Selle vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123 and Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.

28. The sole issue for determination in this appeal is whether the learned Judge was correct in concluding that the respondent proved all the elements of adverse possession to justify the proprietary rights of the appellant being extinguished and his title deed being cancelled and/or revoked and transferred to the respondent as the sole proprietor.

29. Ownership by adverse possession has been given statutory underpinning in sections 7, 13, 17 and 38 of the Limitations of Actions Act (Cap 22 of the Laws of Kenya). 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."

30. Section 13, on the other hand, 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.
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> 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.
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> 2. 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".

31. Section 17 goes on to provide as follows:

> " 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".

32. Finally, Section 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.

33. Courts, on the other hand, have judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession. The leading cases from this Court in this regard include: 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.

34. The principles distilled from these cases are that in order to establish a claim of adverse possession, the possession must be:

a. Adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;

b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;

c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;

d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;

e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;

f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years.

See Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa, Kisumu Civil Appeal No. 149 of 2022; Titus Mutuku Kasuve (Supra); Titus Kigoro Munyi (Supra); Wambugu vs. Njuguna(supra) and Karuntimi Raiji (supra).

35. Before delving into the substantive question, it is imperative to deal with three brief preliminary issues.

36. First, as rehashed in the procedural history of the case above, hearing had taken place before E.C. Chacha, J. and two witnesses testified for the respondent and one for the appellant. However, following the decision in the Karisa Chengo Case, the case started de novo before N. Matheka, J. It is important to restate the legal position that when a matter begins de novo (afresh), the judge cannot take into account the evidence heard before the case was restarted. The rationale for this is that a trial de novo essentially wipes the slate clean, and the new judge must hear all the evidence again and make a fresh determination. All the witnesses must testify again and be subjected to cross- examination. It is impermissible for the judge to rely on transcripts or notes from prior proceedings. We raise this point because it is readily obvious that in arguing his appeal, the appellant has copiously cited evidence that was adduced by the appellant when he testified before E.C. Mwita, J. For example, the evidence that the appellant allowed the respondent to return to the suit property in the 1980s when the respondent got

"problems" is one that was tendered before E.C. Mwita, J. and was not re-tendered before N. Matheka, J. and cannot, therefore, be relied on to reach a determination in this appeal.

37. Second, it is important to clarify that the case at the ELC proceeded ex parte, that is, only the respondent adduced testimonial evidence. There was no testimonial evidence from the appellant because he did not attend court during the date the case was scheduled for hearing; and the court declined to reopen the case upon application by his advocate. Even then, it is also important to recall that this was a suit commenced by way of originating summons – supported by a supporting affidavit of the respondent sworn on 19th April, 2006 and contested by a replying affidavit of the appellant sworn on 3rd August, 2006. These affidavits and their annextures, therefore, form part of the body of evidence the trial court was obligated to look at in determining the case.

38. The final preliminary point regards the supplementary record of appeal filed by the appellant. That supplementary record of appeal contains documents which were never produced as documentary evidence at the trial court. As such, these documents are additional evidence filed without the leave of this Court. These documents cannot be relied on by this Court in determining the appeal at hand. The three documents which have been impermissibly included are: the transfer of land forms for the suit property dated 7th September, 1974; certificate of official search for the suit property; and a copy of the official search. These documents are expunged from the supplementary record of appeal.

39. With the preliminary points out of the way, we will now consider the substantive question presented in the appeal. As aforesaid, the learned Judge was persuaded that the respondent satisfied all the six ingredients to prove adverse possession. In pertinent part, the learned Judge reasoned as follows:

> "In applying these principles to the present case, it is not disputed that the registered owner of land parcel Butsotso/Indangalasia/248 is the defendant one James Thomas Andafu. It is also not in dispute that sometimes in 1974 he agreed to sell 7½ acres to one James Thomas Andafu at an agreed purchase price of Ksh. 6,000/= PEx1 is a copy of a sale agreement dated September, 5, 1974. The plaintiff testified that the defendant paid a deposit of Ksh. 3,000/= leaving a balance of Ksh. 3,000/=. The Plaintiffs testimony is that he made up follow-ups for payment of the balance but the same was not forthcoming and after long follow-up and none payment of the said balance, the Plaintiff decided to cancel the sale agreement and the amount he had deposited as down payment of the purchase price. The Plaintiff produced copies of money order to show the said refund sent to the Defendant (PEx2). The plaintiff has since the alleged sale, continued to live on the said land with his family as he continues to carry on agricultural activities without any interruption from the defendant. The Plaintiff has continued to develop the said land and has constructed various houses on it, has food crops such as bananas, beans, maize, sugarcane fruits, trees and vegetables which his family uses. The Plaintiff contends that he has never appeared at any land control Board to give consent to transfer the land to the Defendant as he maintains that the balance of the purchase price was never paid and that whatever deposit paid was refunded to the Defendant. Plaintiff has buried some of his deceased family members without any interruption from anybody including the defendant herein.
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> PW2 confirmed that he is a neighbour and he resides on his land parcel Butsotso/Indangalasia/240 which borders with the plaintiff's suit land parcel Butsotso/Indangalasia/248. In his testimony he confirmed that it is the plaintiff who resides on the land and that the defendant has never stepped on the said land despite being the registered proprietor.

> In the instance case I find that the plaintiff has been in continuous occupation of the suit land from the time he purported to sell the land to the Defendant in 1994 he has continued to remain on the land uninterrupted with the full knowledge of
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> the Defendant who has never occupied the said land despite being the registered proprietor. The Plaintiff has proved from his evidence that he has been in exclusive occupation of the suit land uninterrupted with the full knowledge of the defendant. Where an occupation of property (land) inconsistent with the right of a true proprietor continues for a long period, a reputable presumption arises either that the adverse possessor (trespasser) is the true owner of the land or alternatively that the true owner (proprietor) has abandoned the land. Thus, adverse possession has the effect of either debarring the right of the owner and or converting the adverse possessor into the owner, or of depriving the true owner of his right of action to recover his property by efflux of time. I find that the plaintiff has proved his case on a balance of probabilities. The defendant's/Respondent's right to own the suit land herein has been extinguished by lapse of time and hence the land should be ordered transferred to the plaintiff the title deed held by the Defendant is held in trust for the occupier (Plaintiff)."

40. On our part, upon considering the extant evidence in its totality, we are not satisfied all the elements for adverse possession were established. While we are satisfied that the respondent was able to demonstrate that his possession was open and notorious; that it was actual; and that it was exclusive and peaceable, we are not satisfied that legally his interest was adverse to that of the appellant. We are also not satisfied that the respondent's possession was continuous and un-interrupted for a period of more than twelve years.

41. The uncontested evidence adduced at trial showed that the respondent and the appellant entered into a sale agreement for the sale of the suit property but that the appellant remained in possession of the suit property. The respondent's own evidence is that at some point, he decided to reverse the sale and return the purchase price. He even exhibited copies of the money orders he allegedly sent back to the respondent. The respondent denies ever receiving the money orders. The bottom line, though, is that at the very moment at which the respondent decided to reverse the sale, he reclaimed the suit property for himself. He believed that he was claiming the suit property as a matter of right. Indeed, so strong was the respondent's belief that he decided to make his claim at the Lurambi Land Disputes Tribunal. The very act of filing the suit was a recognition that the appellant was the true owner.

42. Additionally, in his replying affidavit, the appellant deponed that he permitted the respondent to remain on the land after the land sale agreement went through. Though expressly deponed, the respondent did not contradict that assertion in any filed court document or in his own testimony before the court. On the available, uncontradicted evidence, therefore, the position is that after the sale agreement had been executed, the respondent remained on the suit property with the permission of the appellant. One who enters or remains on land at the invitation of or with the permission of the title owner cannot, subsequently, claim adverse possession.

43. Justice Kuloba explained this aspect of permissive possession perspicaciously in Gabriel Mbui vs Mukindia Maranya (1993) eKLR, where he said:

> (3) The occupation of the land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the

owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession."

44. In the present case, since there was evidence that the respondent's initial possession was with the permission of the appellant, adverse possession could only begin when that permission is expressly or impliedly withdrawn. See, for example, Wambugu v Njuguna [1983] eKLR. It was incumbent upon the respondent to demonstrate the revocation of that permission but he offered no such evidence.

45. For partly the same reason, we are not satisfied that the respondent was able to demonstrate that he was in adverse possession of the suit property for a continuous and un- interrupted period of more than twelve years. This is because, as established above, there is evidence that the respondent remained on the suit property initially under permissive possession. Since he did not demonstrate when that permissive possession ended and adverse possession began, it is difficult to know when the period of twelve years began to run. In any event, as the respondent concedes, wherever that period began to run, it was certainly interrupted by the filing by the appellant of Kakamega Chief Magistrate's Court Misc. No. 65 of 2000. The filing of that suit was as aggressive an interruption as an owner can mount to thwart the legal implications of adverse possession. With the assertion of ownership through this action in 2000, even though the respondent remained in the suit property, twelve years had not elapsed before he brought the action for adverse possession in 2006.

46. Differently put, the respondent failed to demonstrate that he was in continuous and un-interrupted possession for a period of twelve years. This is because, for the period between 1974 and 2000, the respondent did not demonstrate when his permissive possession morphed to become adverse while for the period after 2000 (when admitted interruption occurred), the twelve-year prescriptive period was not reached.

47. The conclusion we reach, therefore, is that the respondent did not establish all the elements of adverse possession to be entitled to the orders that he sought in the originating summons dated 19th April, 2006. Consequently, we reverse and set aside the judgment dated 17th May, 2018 in ELC Case No. 619 of 2014. In its place, we enter judgment dismissing the originating summons dated 19th April, 2006 in its entirety. The appellant shall have the costs both in this Court and at the Environment and Land Court.

48. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR