



**Lewa & 3 others v Chairman Land Commission & 4 others (Civil Appeal
E016 of 2022) [2025] KECA 678 (KLR) (11 April 2025) (Judgment)**

Neutral citation: [2025] KECA 678 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E016 OF 2022
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA
APRIL 11, 2025**

BETWEEN

**CHARO LEWA 1ST APPELLANT
KAHINDI CHARO LEWA 2ND APPELLANT
NICHOLAS LEWA 3RD APPELLANT
KADII CHARO LEWA 4TH APPELLANT**

AND

**CHAIRMAN LAND COMMISSION 1ST RESPONDENT
ESTATE OF MOHAMED OMAR BAWALY 2ND RESPONDENT
HON ATTORNEY GENERAL 3RD RESPONDENT
JOGI MOTORS LIMITED 4TH RESPONDENT
MUOKO & COMPANY ADVOCATES 5TH RESPONDENT**

(Being an appeal from the Judgement of the Environment and Land Court of Kenya at Malindi (Olola, J.) delivered virtually at Nyeri on 16th December 2021 in Malindi ELC No. 219 of 2015)

JUDGMENT

1. This appeal arises from the Judgement and Decree delivered virtually at Nyeri (Olola, J.) on 16th December 2021 dismissing the appellants' suit. The central issue in dispute was the entitlement of 5 or 6 acres (the suit portion) from Plot No. 139 (the suit parcel) located at Malindi.
2. The background to the dispute is that, by a Complaint dated 24th November 2015, the appellants pleaded that, as the Tokali family, they had been residing on the suit portion since 1945; and that Mohamed Omar Bawalay (the deceased), whose estate was sued as the 1st defendant (now 1st respondent),



purchased 3 portions from the shares of the administrators of the estate of Abdalla Bin Mohammed Bin Amin as follows:

- a. $\frac{1}{4}$ undivided share from Mohamed Abdalla Amin;
 - b. $\frac{1}{8}$ undivided share from Kamariyah Bint Sheikh Elmaudiya; and
 - c. $\frac{2}{4}$ undivided share from Abdul Karim Bin Sheikh Elamudy and Abdulrazak Sheikh El-amudy.
3. It was pleaded that the suit parcel had a total acreage of 28.76 acres; that the deceased's estate purchased a total of 22.76833 acres or thereabouts, leaving the suit portion which the appellants had been having peaceful enjoyment of even as at the time of filing the suit; that the purchase made by the deceased's estate was between the years 1973 to 1977, a period of over 38 and/or 43 years from the last indenture; that, by the time the 1st respondent threatened the appellants with eviction in 2013, it (the 1st respondent) had been caught up by limitation of time to file a claim over land; and that, therefore, the appellants were entitled to the suit portion by way of adverse possession.
4. The appellants further averred that the 1st respondent could not also claim the remainder of the suit parcel as it was not purchased by the deceased; that the 1st respondent could not therefore purport to have had the right to transfer the entire suit parcel to the 2nd respondent; that the 1st respondent or its agent, workers and servant had no authority to cut down or destroy the appellants' crops and trees on the suit portion; and that the 1st and 2nd respondents had tried to forcefully evict them from the suit portion, yet the same had been sold to the 2nd respondent under mysterious circumstances.
5. The appellants were displeased by the fact that the whole of the suit parcel was alleged to have been sold and transferred to the 2nd respondent, Jogi Motors Limited, by the 1st respondent to their detriment. Accordingly, they prayed for judgment against the respondents as follows:
- a. A declaration that they are entitled to the suit portion by adverse possession;
 - b. That the 1st and 2nd respondents by themselves, their agents, servants, workers and/or employees be permanently restrained from entering, remaining and/or removing the appellants, the appellants' mango, coconut and cashew nut trees and/or destroying the appellants' food crops and/or in any manner which may interfere with the appellants' peaceful stay and occupation of the suit portion;
 - c. Costs of the suit; and
 - d. Any other or further orders the court may deem just and fit to grant.
6. The 1st and 2nd respondents filed a joint statement of defence dated 14th January 2016. They denied the allegations raised by the appellants in their plaint, and particularly that the appellants had been in occupation of the suit portion or had been cultivating it; that the appellants' ancestors were buried on the suit portion; that they destroyed crops belonging to the appellants on the suit portion; that the appellants have any powers over private land registered under private ownership; that they evicted the appellants from the suit parcel or at all; and that the appellants were entitled to the suit portion.
7. The 1st and 2nd respondents averred that the issue of adverse possession does not arise as the appellants had never been in occupation or possession of the suit portion.
8. The 2nd respondent averred that it had never been registered as the proprietor of the suit parcel. According to the 1st respondent, it was legally entitled to, and was registered as the owner of, the suit parcel until the same was devolved to Swaleh Mohamed Bawaly, Omar Mohamed Bawaly, Dahman Mohamed Bawaly and Ahmed Mohamed Bawaly, who transferred it to a different entity.



9. The 1st and 2nd respondents contended that the suit was misconceived, a sham, a nullity and brought in bad faith as they were not presently the registered owners of the suit parcel and had never occupied it.
10. The 4th respondent, the Hon. Attorney General, filed a brief Statement of Defence dated 17th August 2016. It stated that the suit as framed was not a civil proceeding against the Government as contemplated under *Government Proceedings Act*; that it did not disclose any reasonable cause of action against it; and that, for this reason, it prayed that the suit be dismissed against it with costs. It also denied the entire claim raised by the appellants in their Plaint dated 24th November 2015.
11. The 3rd respondent neither entered appearance nor filed a statement of defence. At this juncture, we make some observations. First, the 5th respondent was not a party in the trial. We have combed through the main Record of Appeal and the Supplementary Record of Appeal dated 16th April 2024 and have not seen either an order joining the 5th respondent as a party to the appeal or an application by the party seeking to be joined in the appeal. We are at a loss as to how the 5th respondent, the law firm representing the 1st respondent, became a party in the appeal. Secondly, we have not seen any application or order withdrawing the suit against the 4th respondent. However, what is clear is that the 3rd, 4th and 5th respondents never participated in the trial or in this appeal. Indeed, we were informed as much during the hearing of the appeal.
12. At the hearing, Kadii Charo Lewa (PW1), the 4th appellant adopted her witness statement filed on 1st December 2015. She testified that she was the daughter of the 1st appellant; that she resided on her father's land in Kaoyeni; that the suit parcel belonged to her grandfather, and that she was born thereon; that the 1st and 2nd respondents evicted them; that the 1st and 2nd respondents told them that some people had been paid compensation; and that it was the 1st and 2nd respondents who were paid the compensation.
13. In cross-examination, she stated that none of their family members worked for the deceased; that she could not tell the acreage of the suit portion they were utilizing; that they went to the chief where their names were written down; and that, thereafter, they were instructed to leave the suit portion. She denied signing any document. She stated that she had nothing to show that her father inherited the suit portion from her grandfather; that one Ismael Lewa Mwandenje, her father's brother, must have been compensated to the tune of Kshs.105,000; that, as a family, they were claiming 6 acres; and that the 1st respondent told them that it had sold the suit portion to the 2nd respondent.
14. Nicholas Lewa Mwandje (PW2) adopted his statement filed on 1st December 2015. He testified that he was born on the suit portion, but that the 1st and 2nd respondents evicted them; that he then lived in Kwa Chocha, and that they vacated the suit portion in 2009; that several of their relatives died and were buried on the suit portion; that they used to assist the deceased on the suit portion until the year 2009 when his family came to evict them while claiming that the suit portion belonged to them; that the 1st appellant put up a fence on the suit parcel in the year 2015; that they lived on 6 acres of land; that, in the year 2015, they were only using the suit portion of land, but that there were no houses on it; and that he was in court to claim the suit portion on behalf of his grandfather who came from the Tokali family.
15. In cross-examination, he stated that they sued the 2nd respondent because it is the one that evicted them in the year 2009; that, as at the time he testified, no one was living on the suit portion; and that he had no document or photographs to show that they used to live on the land.
16. Kahindi Charo Lewa (PW3), the 2nd appellant and son to the 1st appellant reiterated that he was a member of the Tokali family; that they had been living on the suit portion; that the suit parcel was in a village known as Kaoyeni which was named by his great grandfathers; that he was brought up on the



- suit portion and has known it to be their ancestral land; that they lived peacefully on the suit portion until the year 2013 when the deceased's family claimed its ownership; that the deceased owned 22 acres of the suit parcel, and that the rest of the portion was being occupied by squatters without interference; and that the Tokali family is entitled to adverse possession of the suit portion having lived thereon for a period of 38 years.
17. In cross examination, he stated that the deceased was staying on the neighbouring land and not on the suit parcel; that there is a road separating the two parcels of land; that he was one of the deceased's workers; that the suit portion is where they worked on and he was not aware if the deceased had sold it; that the 2nd respondent was involved in evicting them; that he left the suit parcel in the year 2008; that there were no beacons marking the boundary of the parcel he used to live on; and that there were no houses on the suit parcel. He denied that they were attempting to take the suit portion from the deceased.
 18. Ahmed Mohamed (DW1) testified on behalf of the 1st respondent that the suit parcel belonged to his father, the deceased; that, after his father died, they (as a family) continued utilizing the suit parcel for dairy farming; that, during his father's lifetime, there were no issues with squatters, but that, in the 1970s, a few squatters troubled his father and were reported to the Chief; and that they left.
 19. DW1 testified that the 1st appellant's father was one of the squatters, but that he later left; that, in 2016, his grandchildren started claiming the suit portion as their own; that they (the grandchildren) tried to stop them from selling the suit parcel; that they were later able to sell the suit parcel; that they reported those who were causing trouble to the chief, who summoned them; that, to settle the issues between themselves and the families on the suit portion, they gave each family some money; and that, for the Charo Lewa family, it is Ismail Lewa who received the money.
 20. It was his testimony that there were no long-term crops on the suit parcel; that only maize and green grams were growing thereon; that it was himself and his brother, Dahman, who were appointed as administrators of their deceased father's estate; that they sold and transferred the suit parcel to Joshua Gitahi Rodrot on 7th December 2015; that the latter was not party to the suit; and that they owned 28.7 acres and not 22 acres of the suit parcel.
 21. In cross examination, DW1 stated that the appellants were not their employees or neighbours, or their neighbours' employees; that evidence of how they paid out the squatters was attested by an agreement signed by Charo Mbisa, Nicholas Lewa and many other persons, as well as payment cheques that were attached to the agreement; that they paid Ismael Kshs. 750,000 and Convad Mwayungu Kazungu Kshs. 750,000 for the sake of peace; and that they no longer had an interest in the suit land since they sold it to Richard Rodrot.
 22. Ahmed further stated that, as a family, they never lived on the suit land; that the houses thereon were for those who were taking care of the cows; that the appellants were not present when the agreement was signed; that he was not present when the appellants were chased away from the land in 2015 by the 2nd respondent; that there were mangoes on the suit parcel, and that it is the 2nd respondent who cut the trees; and that the mango trees belonged to his family and were not planted for commercial purposes.
 23. Richard Rodrot (DW2) testified as the director of the 2nd respondent. His testimony was that the suit parcel was sold to his co-director, Joshua Rodrot. He denied that the suit parcel belonged to the 2nd respondent. He testified that there were no activities taking place on the suit parcel, but that the same was fenced with a chain link; and that, nothing could be done with the land because of the pending court cases.



24. In cross examination, DW2 reiterated that his co-director, Joshua, purchased the suit land in the year 2015. He recalled seeing Bawaly family members coming to the office to discuss purchase of the suit parcel with Joshua; that there were cheques drawn by the 2nd respondent for purposes of compensating some of the squatters; that, nevertheless, it is not the 2nd respondent who was compensating the squatters; and that he was not aware that any trees had been cut from the suit portion.
25. In a judgment delivered virtually from Nyeri on 16th December 2021, the learned Judge (Olola, J.) dismissed the appellants' suit with costs to the 1st and 2nd respondents. The learned Judge held that the appellants had not proved ownership of the suit portion by way of adverse possession; that they did not discharge the burden of proving that their possession was without the true owner's permission, or that the owner was dispossessed or discontinued his possession of the land; and that the adverse possessor had done acts on the land which are inconsistent with the owner's enjoyment of the land.
26. It was held that the parties attempted to settle the dispute between themselves, but that there was no document to corroborate this assertion; that the appellants also failed to call credible evidence, such as of the area Chief to corroborate their assertion that they had stayed on the suit portion for the period claimed; that the photographs presented by the appellants did not show the presence of any house structures as a pointer that they lived on the land; and that, instead, what was visible were only crops growing on the land.
27. The trial court further held that the appellants admitted that, some 4 to 5 years prior to filing suit, they had moved out of the suit portion and that they were then residing elsewhere; and that they only used the suit portion for cultivation.
28. Dissatisfied with the judgment, the appellants have filed the instant appeal and, by a Memorandum of Appeal dated 1st April 2022, they have raised six grounds of appeal as follows:
 - a. That the Court erred in law and fact in failing to consider that the appellants were in physical occupation and possession of a portion on Plot No. 139 Kaoyeni, having been born and brought up on the said piece of land since time in memorial without interruption and or interference from anybody, including the 1st and 2nd respondents;
 - b. That the Court erred in law and in fact by failing to observe that it is the 2nd respondent and his workers, agents, and/or employees who invaded and/or forcefully entered the appellants' portion and started cutting down the appellants' food crops forcefully and caused serious damage to the appellants;
 - c. That the court remained silent on the action of the 2nd respondent for having forcefully entered the appellants' portion forcefully and destroying all the food crops and cutting down all the coconut, cashew nut and mango trees, and uprooting the cassava trees, beans and peas without the consent and/or express authority of the appellants;
 - d. That the Court erred in law and in facts in failing to give any orders to the 2nd respondent action which was unlawful since the appellants were not notified of the intended action by the 2nd respondent, and that there was no order from court for such exercise, an act which is unlawful;
 - e. That the Court erred in law and fact in failing to consider that there was no court order directing the 1st and 2nd respondents to forcefully evict the appellants from the said portion and cut down all the appellants' food crops, mango, coconut trees etc and forcefully evicting the appellants from the said portion; and



- f. That the Judge failed to consider that the initial complaint was against the 2nd respondent and his workers who forcefully entered onto the appellant's portion which they occupied for decades and forcefully evicted them and started cutting down all the appellants' food crops, such as mango, coconut and cashew nut trees, uprooting cassava plants, beans and peas planted thereon forcefully against the appellants' wish without reasonable cause and/or justification.
29. We heard this appeal on 5th November 2024. The firm of Wesley John, Austin & Associates filed submissions dated 13th April 2023 on behalf of the appellants, although there was no appearance on behalf of the appellant despite service of a hearing notice. Learned counsel Mr. Ole Kina appeared for the 2nd respondent and held brief for Mr. Muoko for the 1st and 5th respondents. He wholly relied on their submissions dated 1st November 2024. He also informed us that the 1st and 5th respondents support the 2nd respondent's position in the appeal. The hearing proceeded in the absence of counsel for the appellants as rule 74(b) of this Court's Rules, 2022 allows us to consider written submissions as if they were oral submissions made at a hearing.
30. In their submissions, the appellants raised three issues for determination. The first issue was whether they were licenced by the 1st respondent into the suit land. It was submitted that, after the 1st respondent's father died, the 1st respondent inherited the suit land; that they continued to cultivate on the parcel while that 1st respondent grazed on a portion thereof; that 1st respondent failed to rebut the appellants' evidence that they were the ones cultivating on the suit portion; and that the 1st respondent failed to demonstrate that it tried to evict them from the suit portion. The appellants relied on section 38 of the *Limitation of Actions Act*, Cap 22 which provides that a party who claims to be entitled to land by adverse possession should apply to court to be registered as the proprietor of the land; and the decision of Wambugu vs. Njuguna (citation or case digest not given) where the court expounded on the application of section 38 of the *Limitation of Actions Act*.
31. The second issue the appellants raised was whether they occupied the suit portion without interruption from the 1st respondent. On this, they submitted that they testified before the trial court that, after the death of their father, they continued working on the suit portion until the 2nd respondent trespassed thereon; and that, since they were in possession of the suit parcel, they are entitled to the orders sought.
32. The third issue that the appellants wished the Court determines is whether they were entitled to the orders prayed for. They contended that they had satisfied the provisions of section 38 as read with section 37 of the *Limitation of Actions Act* to warrant the Court to allow the appeal.
33. On behalf of the 2nd respondent, Mr. Ole Kina submitted on three broad headings. First, was on the question of the size of the land in issue on which he submitted that the appellants testified that the 1st respondent owned 22 acres while the rest belonged to them; that there was evidence that the appellants were employees of the deceased; and that, specifically, PW3 informed the trial court that he was one of the deceased's workers who was born on the suit portion.
34. It was submitted that the learned Judge properly analyzed the evidence and came to the correct conclusion that the 1st respondent owned the entire suit parcel measuring 28.76 acres; that the appellants had the onus to delineate the specific area they claimed to own by way of a survey report, which they failed to do; and that the photographs of plants the appellants adduced in evidence did not satisfy the evidential burden of proving adverse possession.
35. The second issue related to the appellants' entry into the suit parcel. While referring to section 13(1) of the *Limitation of Actions Act*, it was submitted that an employee who is given permission to enter land to perform duties associated with his employment is a licensee with permission from the owner



to be on the land, and in whose favour time can only run once such leave/license is determined. In support of this argument, reference was made to the decisions of this Court in *Sisto Wambugu vs. Kamau Njuguna* (1983) KECA 69 (KLR); and *Wilson Kazungu Katana & 101 others vs. Salim Abdalla Bakshwein & Another* (2015) KECA 728 (KLR) for the proposition that a person can only claim adverse possession after the expiry of a contract or license; that, for a claimant to prove a claim for adverse possession, he must show that the registered owner of the land has been dispossessed or had discontinued possession of the suit land; and that it is not enough to show that the claimant has been in possession of the land for the requisite number of years.

36. Thirdly, was whether at the commencement of the suit the appellants were in possession of the suit land. It was submitted that the appellants claimed that they occupied the suit portion before the year 2009; that their stay was interrupted at that time when they all moved out of the land and started living elsewhere; and that, for this reason, their claim for adverse possession was premature and is therefore statute barred. Reliance was placed on this Court's decisions in *Haro Yonda Juaje vs. Sadaka Dzenzo Mbauro & Another* (2014) eKLR; *Mtana Lewa vs. Kahindi Nala Mwangandi* (2015) eKLR as per *Ouko, JA.* (as he then was); and *Malcom Bell vs. Daniel Toroitich Arap Moi & Another* (2006) eKLR where the Court was emphatic that a claim for adverse possession can only succeed where the claimant proves exclusive possession of the land openly, quietly and without interruption for a period of 12 years after dispossessing the owner, or by discontinuance of possession by the owner on his own volition.
37. With those submissions, we were urged to find that the basic ingredients for proof of the doctrine of adverse possession were not satisfied; that we should not disturb the judgment of the trial court; and that the appeal lacks merit and should be dismissed with costs.
38. We have fully considered the record of appeal and the respective rival submissions. This being a first appeal, it is our duty to revisit afresh the evidence adduced before the trial court, re-analyse and re-evaluate it and come up with our own independent findings. However, we must make room for the fact that we did not have the advantage of the trial court of seeing the witnesses as they testified and observe their demeanour for which we should give due allowance. This Court in *Seascapes Limited vs. Development Finance Company of Kenya Limited* (2009) KECA 436 (KLR) held as follows:

“As the first appeal, we are enjoined to revisit the evidence that was before the superior court afresh, analyse it, evaluate it and arrive at our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that.”
39. Our role as a first appellate court was further expounded in *Makube vs. Nyamuro* (1983) KECA 29 (KLR) thus:

“However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
40. This appeal turns on the question as to whether the appellants proved their claim over the suit portion under the doctrine of adverse possession.



41. The doctrine of ownership by adverse possession is codified in sections 7, 13, 17 and 38 of the Limitations of Actions Act. Section 7 of the Act states:

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.

42. Section 13 reads:

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”.

43. On the other hand, section 17 provides 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”.

44. Finally, section 38(1) and (2) stipulates 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.”

45. In *Mtana Lewa (supra) Makhandia, JA.* summarized the doctrine of adverse possession as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

46. A person relying on a claim of adverse possession must prove: the date on which he took possession of the land; lack of consent of the owner; that his possession was known to the other party; and that



the possession was quiet, peaceful, open and undisturbed for the requisite 12 years. This Court held as follows in *Njuguna Ndatho vs. Maasai Itumo & 2 Others* (2002) KECA 324 (KLR) on the claim of adverse possession:

“For the defence of adverse possession to succeed, the possessor(s) must show that the possession was adequate, continuous and exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor.”

47. We are persuaded by the findings of Kneller, J. in *Daniel another* (1977) eKLR where he correctly held that, in a claim for adverse possession:

“The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec plecaro* (No force, no secrecy, no evasion). So, the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration... The plaintiffs have to show exclusive uninterrupted possession of the land without fraud for twelve years before the date of the filing of the plaint.”

48. The appellants’ claim is that they have been in possession of the suit portion since the year 1945 through their grandparents. PW1 to PW3 all testified that they were born and raised on the suit portion. Their contention is that, out of the whole suit parcel measuring about 28 acres, the 1st respondent was only entitled to 22 acres. Their further contention is that the sale of the suit portion to the 2nd respondent was illegal.

49. It is undisputed that the whole suit parcel measures 28.76 acres, and that the administrators of the deceased’s estate purchased it in the following shares:

- i. $\frac{1}{4}$ undivided share on 13th July 1973 from Mohamed Abdalla Amin;
- ii. $\frac{2}{4}$ undivided share on 19th July 1977 from Abdul Karim Bin Sheikh El Amudy and Abdulrazak Sheikh El Amudy; and
- iii. $\frac{1}{8}$ undivided share on 2nd August 1977 from Kamariyah Bint Sheikh El Amudy.

50. There are two competing assertions. According to the appellants, the suit parcel was sold to the 2nd respondent by the 1st respondent while, according to the 1st and 2nd respondents, the suit parcel was sold to one Joshua Rodrot, the 2nd respondent’s co-director. We have not been able to trace the sale agreement or the title issued in the name of Joshua Rodrot. What is presently factual is that the suit parcel is no longer in the 1st respondent’s possession or any of its administrators.

51. The appellants pleaded that they had been in possession of the suit portion, which they described to be measuring 5 or 6 acres. From the evidence adduced in court, there was no certainty as to the acreage they actually claimed. In *Kasuve vs. Mwaani Investments Ltd & Others* (2004)1 EA, the predecessor to this Court considered a claim for adverse possession which was dismissed on ground that the appellant therein was not certain as to the definite and distinct parcel of land he was claiming. The Court delivered itself thus:

“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.”

52. For our determination is the issue whether the appellants acquired ownership as against the registered owner of the suit parcel openly, without force or stealth, or under the licence or knowledge of the owner, and whether they have shown continuity and non-interruption for the period they claim adverse possession. It is trite that the onus of proof of these ingredients remains with the appellants.
53. A property owner cannot be dispossessed or deprived of their property unless in the clearest of cases. Not only should a person who is claiming to be entitled to be registered as an owner of a parcel of land by adverse possession produce cogent evidence that he is in possession, but it is also imperative that he also demonstrates the specific (definite) area of the land he is in possession of.
54. In this case, and more so from the appellants’ evidence, they were unable to demonstrate the specific area of the land they possessed out of the suit portion. Their witnesses could not also, with specificity, account as to which date they settled on, and were evicted from, the suit portion. PW1 testified that they went to the Chief on 11th May 2015 and they were asked to leave the land. PW2 testified that they left the suit portion in the year 2009 while PW3 testified that he left the suit portion in the year 2008. These glaring discrepancies point to persons who were not versed with facts on the ground.
55. Further, other than themselves as directly interested parties, the appellants did not call independent witness(es) to corroborate the fact that they lived on the land for over 12 years. For this reason, we cannot fault the learned Judge for finding that the appellants’ evidence was not corroborated by other material evidence, and that, therefore, they did not prove that they owned the suit portion by way of adverse possession.
56. Another critical observation is that the appellants have already been evicted from the suit portion or that they voluntarily left at different times. They did not deny either of those facts. It is undeniable that the suit parcel was sold to one Joshua Rodrot who asserted his authority by fencing off the suit parcel. In Joseph Gachumi Kiritu vs. Lawrence Munyambu Kabura (1996) KECA 222 (KLR), this Court held:

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him....He must therefore make a peaceable and effective entry or sue for recovery of land.”

57. It was further held in the case of Mbira vs. Gachuhi [2002]1 EALR 137 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....”

58. In dismissing the suit, the learned Judge held:

“In order to succeed in their claim herein the Plaintiffs needed to demonstrate actual possession and a clear intention to dispossess the registered owner of his land and to deal exclusively therewith. Having agreed to make and reside elsewhere it was evidence to me that



any possession and/or occupation they may have had of the property has been disrupted and the period of limitation could no longer run in their favour.”

59. Therefore, the appellants’ possession, if at all it existed, was disrupted the moment Joshua Rodrot fenced off the entire suit parcel. All in all, we are unable to decipher how and when the appellants’ possession of the suit portion began and ended. We have satisfied ourselves that the claim for adverse possession was not proved and therefore no orders could have been made in favour of the appellants.
60. The totality of our re-evaluation of the entire evidence leads us to the inescapable conclusion that the appeal is for dismissal. Accordingly, the same is hereby dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

Deputy Registrar

