



REPUBLIC OF KENYA



KENYA LAW
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**M'Riria & 5 others v Muthomi (Civil Appeal 253 of 2019)
[2025] KECA 951 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KECA 951 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 253 OF 2019
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
APRIL 4, 2025**

BETWEEN

**KIMATHI M'RIRIA 1ST APPELLANT
PAUL GITUMA 2ND APPELLANT
MUTUMA M'RIRIA 3RD APPELLANT
MURIITHI M'RIRIA 4TH APPELLANT
KINOTI M'RIRIA 5TH APPELLANT
MWITI M'RIRIA 6TH APPELLANT**

AND

HARUN MUTHOMI RESPONDENT

*(An appeal against the Judgment of the Land and Environment Court,
Meru (J.G Kemei, J) dated 8th April 2019 in ELC Case No. 187 of 2011)*

JUDGMENT

1. In this appeal, it is important to appreciate the routes the parties adopted in their quest to seek justice before the trial court. By a plaint dated 16th December 2011 filed in ELC Case No. 187 of 2011, the respondent, claiming ownership rights over parcel of land known as Ntima/Igoki/2004 (the suit land) sued the appellants for trespass. They sought permanent injunction restraining the appellants either by themselves, their agents, employees, assigns or anyone claiming or acting on their behalf from trespassing, occupying, cultivation, building on or entering the suit land and in the alternative an order of eviction of the appellants therefrom and the costs of the suit and interest at court rates.
2. The respondent's claim was that he was the registered and beneficial owner of the suit land and had always been in possession and occupation of the same and that the appellants, who are brothers, lived



- on the parcel bordering the suit land. The appellants had, however, encroached on a portion of the suit land and occupied it without right or the respondent's consent.
3. The appellants, on their part, filed an originating summons dated 13th February 2012, being OS No. 18 of 2012, seeking orders that they had become entitled to the suit land by way of adverse possession.
 4. The two suits were consolidated with ELC No 187 of 2011 being the lead file. The respondents' claim was treated as the main claim while the appellants' originating summons was treated as the counterclaim.
 5. In their defence and counterclaim, the appellants denied the allegations made in the claim and asserted: that they had been in occupation of the suit land since 1968 and their entire lives thereafter; that the remains of their parents were interred on the suit land; that their occupation of the suit land was open exclusive and uninterrupted since 1968; and that they had made various developments thereon including construction of over 6 houses and planted more than 200 trees of coffee and eked a living out of the suit land. They identified the issues for determination as: whether the appellants occupied the suit land for more than 12 years; whether the appellants' occupation was open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years; whether the respondents had been in occupation of the suit land since the year 1968; whether the respondents were entitled to the suit land by way of adverse possession; and whether the appellants ever occupied the suit land. They sought: a declaration that they had become entitled by way of adverse possession to the suit land; an order for the rectification of the register and the said respondents be registered as sole proprietors of the suit land; an order that the respondent executes all the required instruments and/or documents to effect the transfer to the appellants of the suit land and in default the court empowers the Deputy Registrar to so execute the transfer instrument on the respondent's behalf; that the court do makes further or other orders it deems fit and expedient to meet the ends of justice; and that the costs be borne by the respondent.
 6. The Originating Summons was supported by the affidavit of the 1st appellant who reiterated the contents of the summons on the face of it.
 7. At the hearing, the respondent testified as PW1, and stated: that he was the registered owner of suit land while the appellants were his neighbours who trespassed on his land in 2011 and constructed some structures thereon; that he was however unaware of the person residing there; that contrary to the allegations by the appellants, there were no graves or coffee trees planted by the appellants on his land; that the photographs produced by the appellants were of buildings erected on their own land and not on the suit land; and that the suit land is less than an acre and therefore too small to accommodate all the structures shown on the photos. He sought eviction orders against the appellants and produced a green card for the suit land and demand letter dated 4th September 2011.
 8. The 3rd appellant, Joseph Mutuma M'Iriria testified as DW1 and stated: that he was born on the suit land in 1960 and his parents lived and died there; that all his siblings and their families have lived there all their lives, they farm on the land and raise their families and have always known the land to be theirs; that the acreage of the land they occupy is 2.5 acres whilst the respondent is claiming 0.3 acres; that they cultivate the entire land; and that the respondent is not known to them as he has never occupied or farmed the land and he just met the respondent in court. The evidence of the 1st appellant, who testified as DW2, was that he was born in 1972 and had lived on the suit land since birth with his siblings and their families; and that the total land occupied by them was 2.5 acres and there were no boundaries to show the land the respondent was claiming to be his. He produced a bundle of photographs in which he identified an old house as their father's house.
 9. On 29th May 2025, the parties consented to the suit land being visited by the Deputy Registrar, in the company of the District Surveyor for the purposes of determining the boundaries of the suit land



and to compile a report on who was in occupation of the suit land and the developments thereon and when they were put up. From the report filed in court, that visit took place on 17th October 2018 in the presence of the parties and their respective advocates. According to the report, the homestead on the suit land which the 1st appellant claimed to have been residing with his family, seemed not to have been in use. Outside the compound was a stand-alone house which was approximately 5 years in age which was locked and seemed not to have been in use lately and which the 3rd appellant claimed was being used by his son. There were some neglected sugarcane trees and a hedge as well as a bushy coffee stem in the property. According to the report, the 1st and 3rd appellant were in partial and occasional occupation of the suit land.

10. In the judgement, the learned Judge identified the issues for determination as: whether the appellants had occupied the suit land openly, peacefully, uninterrupted and exclusively; whether the appellants trespassed onto the respondent's land; what orders should the Court grant; and who should bear the costs of the suit.
11. In the determination, the learned Judge found: that the suit land was registered in the name of the respondent in 2005 having purchased it from the previous owner, Hezekiah Gichuru; that the size of the suit land was 0.3 acres; that the parties were neighbours, the appellants occupying the adjacent land that bordered the suit land; that the respondent's evidence that someone lived on the land sometimes agreed with the site report which stated that the 3rd appellant's son sometimes used the seemingly abandoned house; that the respondent's averment that there were no graves on the suit land also agreed with the site report and contrasted the appellants' who claim that there were graves of their parents and relatives dotted on the suit land; and that the evidence of the respondent that the pictures produced by the appellants referred to their 2.5 acres land and not the suit land was consistent with the evidence of DW1.
12. The learned Judge found: that the evidence cast doubt on the appellants' claim that they had been on the land since 1968 as the site visit report described a stand-alone 2 roomed houses as being about 5 years old; that the timing or age of the house coincided with the evidence of the respondent that the appellants trespassed onto his land around 2011; that the report stated that even then the houses seemed not to have been used of late as seen by the undergrowth and neglect in the structures on the suit land; that there was no evidence that the respondent had been dispossessed of the land nor did he relinquish possession thereof; that since the respondent became registered owner of the suit land in 2005 and the suit was filed in 2011, 7 years later, on the basis of section 38 of the *Limitation of Actions Act*, the statutory time for claiming adverse possession had not matured; that the fact that the appellants did not know that they are occupying the respondent's land could not accord them adverse possession because of the absence of *animus possidendi*, that is the right to occupy the land adverse to the rights of the owner; and that the appellants had not asserted a right that was in conflict or adverse to the respondent.
13. Accordingly, the learned Judge found that the appellants' evidence was shaky and fell short of the threshold for proof of adverse possession. As regards the respondent's claim for trespass, the learned Judge found that respondent led evidence that the appellants trespassed onto his land in 2011 and constructed structures thereon which were sometimes occupied. He was however, unaware of the person who lived therein. Based on section 24 of the Registered *Land Act* (since repealed) that vests in the registered owner the absolute ownership of the land together with all rights and privileges thereto and section 26 that mandates the courts to take a certificate of title as the *prima facie* evidence that the person named therein is the absolute and indefeasible owner of the land as well as section 25 that provides that the rights of the registered owner shall not be liable to be defeated except as provided in the Act, the learned Judge found that the respondent was the registered owner of the land and was



entitled to protection of the law from trespassers. It was therefore held that the appellants had been in trespass of the respondent's suit land.

14. In the result, the learned Judge found no merit in the counterclaim by the appellants but found merit in the respondent's claim. An order of injunction was therefore issued permanently restraining the appellants either by themselves, their agents, employees, assigns or anyone claiming or acting on their behalf from trespassing, occupying, cultivating, building on or entering the suit land being land parcel number Ntima/Igoki/2004. The appellants were ordered to vacate the suit land forthwith and in default be evicted as provided under section 152G of the Land Act. The appellants were further ordered to meet the costs of the suit.
15. When the appeal was called out for virtual hearing on 16th October 2023, learned counsel, Mr Mwanzia, appeared for the appellants, while learned counsel, Ms Nyokabi, appeared for the respondent. Both counsel relied on their written submissions with minimal highlighting.
16. On behalf of the appellants it was submitted: that the evidence on record satisfied the doctrine of adverse possession which was demonstrated by the appellants; that, based on the decision in the case of *Leonola Nerima Karani v William Wanyama Ndege* [2012] eKLR and *Githu v Ndeete* (1984) KLR 776, the trial court failed to appreciate that time continues to run even after change of ownership as long as there is no dispossession of occupation by the owner; that the learned Judge failed to appreciate the appellants' case even though the scene visit report was clear as to who was in occupation of the suit land; and that this Court should take notice of the fact that the appellants are still in occupation courtesy of the order of stay issued by the Court on 4th December 2020 in Civil Application No. 149 of 2019.
17. On behalf of the respondent, the cases of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR and *Wambugu v Njuguna* [1983] KLR 172 were cited and it was submitted that from the evidence adduced, the appellants were not in occupation of the suit land at the time the respondent purchased the same in 2005 and only trespassed thereon in 2011. According to the respondent, the appellants failed to prove their claim of ownership to the suit land by way of adverse possession. We were urged to dismiss the appeal for lacking in merit with costs.
18. We have considered the record of the proceedings and submissions placed before us.
19. This being a first appeal, this Court's mandate was espoused in *Ng'ati Farmers' Co-Operative Society Ltd. v Ledidi & 15 Others* [2009] KLR 331 as follows:

“An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

20. This mandate was reiterated in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

21. We are, however, conscious as cautioned by the predecessor to this Court in *Peters v Sunday Post Ltd* [1958] E.A 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

22. We must however be cautious when interfering with the findings of fact by the trial Judge since we can only interfere with those findings of fact if it is shown that the trial Judge took into account facts or factors which should not have been taken into account, or that there was a failure to take into account matters which should have been taken into account or that there was a misapprehension of the effect of the evidence or that in reaching the findings arrived at it is demonstrated that wrong principles were acted upon. See *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183.

23. In our view, the only issue that falls for determination before us is whether, based on the evidence adduced before the trial court, the learned Judge erred in finding that the appellants had failed to prove that they were entitled to the suit land by way of adverse possession and that the respondent proved that the appellants had trespassed onto his land.

24. Section 38(1) of the *Limitation of Actions Act*, states that:

“Where a person claims to have become entitled by adverse possession to land 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.”

25. This section, ought to be considered along with sections 7 and 13 of the same Act. Section 7 provides:

“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.”

26. Section 13, on other hand provides that:

“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 section 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.”



27. This Court in *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR set out the circumstances under which the title of a registered owner may be defeated by a claim of adverse possession as follows:

“A registered owner of land, may not, by the provisions of section 7 of the *Limitation of Actions Act* bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner’s title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner’s permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner’s enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner.”

28. In *Ndolo v Kitutu & 8 others* (Civil Appeal 394 of 2018) [2022] KECA 1289 (KLR) (18 November 2022) (Judgment), the Court held that:

“For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted use of the land. The physical fact of exclusive possession and the animus possidendi to hold as owner to the exclusion to the actual owner are important factors in a claim for adverse possession. The principles stated in the above holding are also encapsulated in the local legislation referred to elsewhere in this judgment. The direct import of these two provisions is, firstly, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued, which is the date of dispossession. Secondly, after the expiration of the said twelve years the title of the registered owner shall be extinguished. Thirdly, the person in adverse possession is entitled to a title by possession.”

29. What constitutes 'adverse possession' was described in the case of *Jandu v Kirpal & Another* [1975] EA 225 in which the court, while relying on the case of *Bejoy Chundra v Kally Posonno* [1878] 4 Cal 327 at p 329, held that:

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner.”

30. To determine the nature of possession, this Court is guided by the decision in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR where this Court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of animus possidendi, or intention to have the land.”

31. The case of *Wambugu v Njuguna* [1983] KLR 171 laid down the following guiding principles as regards adverse possession:



1. The general principle is that until the contrary is proved possession in law follows the right to possess.
 2. In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
 3. The *limitation of Actions Act*, in adverse possession contemplates two concepts, disposition and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.
 4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.
 5. The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.
 6. Adverse possession means that a person is in possession in whose favour time can run.
 7. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to rum in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can only become adverse once the contract is repudiated.
 8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.
32. From the above decisions, the ingredients of adverse possession are: ownership of the land by the person against the claim is made; open, continuous and exclusive possession of the land by the claimant for at least 12 years; assertion of right by the dispossessor which must be inconsistent with the rights of the owner. All these ingredients must be proved and where the claimant fails to prove any one of them, the claim to land, based on adverse possession, must fail.
33. The claimant must also prove open, continuous and exclusive possession of the land for at least 12 years. In this regard, it was held in *Mbira v Gachuhi* [2002] I 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....”



34. It was therefore explained in *Mtana Lewa v Kahindi Ngala Mwamgandi* [2005] eKLR that:

“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.”

35. The claimant must prove that he was in possession openly and that his possession was not through stealth or force. Possession arising from an order of the Court, therefore, does not amount to adverse possession since, in those circumstances, the owner of the land is prevented from asserting his rights. The possession, however, must be continuous and a break in the chain of possession, such as where the owner asserts his rights midway, creates a break in the running of time such that even if he loses possession the period prior to his regaining possession is not counted for the purposes of adverse possession. As held by this Court in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR:

“For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.”

36. Exclusivity of possession must also be proved by the claimant and therefore where the land in question under joint use by the claimant and other people, unless the claim is by all those in possession, the claimant cannot, on his own, unless he can identify a portion of the land exclusively occupied by himself, claim adverse possession of such land. It is also important that where the whole land is not occupied by the claimant, the claimant must identify what portion or part of the land is claimed by way of adverse possession. Regarding the need to identify the portions occupied, this Court in *Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another* [2015] eKLR stated that:

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession.”

37. The assertion of right by the dispossessor must be inconsistent with the rights of the owner. It does not suffice to simply aver that the claimant was in possession for more than 12 years. The claimant must adduce evidence of the steps or action taken with a view to asserting rights, which must be shown to be adverse to or inconsistent with the title of the valid owner. In other words, there must be an adverse incident in the possession, and that incident must be shown to be present right from the time the claimant takes possession of the land. In *Ndolo v Kitutu & 8 others*, the decision of the Supreme Court of India in AIR 2008 SC 346 *Annakili v A Vedanayagam & Ors*, was cited in which it was held that:

“Claim by adverse possession has two elements:

- (1) the possession of the defendant should become adverse to the plaintiff; and
- (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the



true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title.”

38. Where therefore, the claimant’s entry into the land was as a licensee, then there must be evidence of the incident or the point at which the licence was terminated and the continued possession became adverse to that of the owner. In *Alfred Welimo v Mulaa Sumba Barasa*, [*CA No 186 of 2011*](#), this Court expressed itself thus:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his *Megarry’s Manual of the Law of Property*, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit land and went to live at Ndalul scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”

39. In light of the foregoing decisions, we disagree with the learned Judge in expressing the view that:

“It is also not in dispute that the Plaintiff became registered owner of the suit land in 2005. There is no evidence that the Plaintiff has been disposed of possession of the land nor has he relinquished possession of the land. In accordance with section 38 of the [*Limitation of Actions Act*](#), adverse is claimed against the registered proprietor of land. Taking that the Plaintiff became registered owner in 2005, the suit was filed in 2011, 7 years later. The statutory time for claiming Adverse Possession has not matured.”

40. That position may not necessarily be correct since the law on the limitation period for the purposes of adverse possession is that if the owner of land loses title by way of adverse possession, it will not matter that a third party obtains title after the period of limitation has run its course. This is so since a party, who has lost its interest in land through adverse possession cannot pass a better title than the one he had lost to a third party who purchases the said land from him.

41. Regarding the period of possession, it is important to note that adverse possession runs against the land rather than the owner. Therefore, a person who acquires land against which adverse possession has begun to run ought to take action to bring such possession to an end. Otherwise, just like the original owner, he might find himself caught up with the doctrine of adverse possession. That is our understanding of *Platt, Ag. JA in Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR* where he held that:

“The significance of that situation is this, that the owner of registered land acquires an absolute and indefeasible title, to such an extent that he can immediately put any squatter or trespasser off the land. Any person else who has a right or interest in the land must be named as an encumbrancer. The adverse possessor stoutly possesses the land, but he has not the slightest interest until the twelve years has been completed. Now he emerges as the owner, and however absolute and indefeasible the title is, it is lost for ever. What logic is



there in saying that this concept of the absolute and indefeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner's predecessor. How is it lost at all? Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession."

42. The case of *Githu v Ndeete* [1984] KLR 776, was even more explicit. This Court, in that case, held inter alia that:-
1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession.
 2. Where the person in possession has already began and is in the course of acquiring rights under section 7 of the *Limitation of Actions Act* (cap 22) and by virtue of section 30(f) of the Registered *land Act* (cap 300) those rights are overriding interests to which the new registered purchasers' title will be subject.
 3. Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possession assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the limitations of Action Act.
 4. A Title by adverse possession can be acquired under the *Limitation of Actions Act* to a portion of the piece of land which the owner holds"
43. See also *Leonola Nerima Karani v William Wanyama Ndege* (supra); *Eliud Nyongesa Lusenaka & Another v Nathan Wekesa Omocho* Civil Appeal No. 134 of 1993 and *Peter Thuo Kairu v Kuria Gacheru* [1988] KLR 297; [1988- 92] 2 KAR 111; [1986-1989] EA 215.
44. Nothing however, turns on this point.
45. In this case, DW1, in his evidenced stated that they lived in the neighbouring land which measured 2.5 acres. They only realised that they were occupying the respondent's land when they received a demand letter to vacate. He was not certain where the 0.3 acres, which they claimed by adverse possession, was and in his evidence stated that:
- "the 0.3 acre land is part of 2.5 acres. I need to check it out. I do not know where the 0.3 acres is."
46. Just like DW1, DW2 was unsure of the location of the 0.3 acres and which structures were located on the 0.3 acres. As we have stated above, for the claimant to succeed in a claim of land by adverse possession, he must point out to the court the exact land or portion of land he is occupying adversely. In this case, the appellants were occupying the neighbouring land. It was necessary for them to point out the boundary of the two parcels of land and then proceed to show that they were not only within the boundary of their land but had crossed over to the suit land. In this case it was clear that they were not sure whether they were occupying the suit land and could not tell, with certainty, whether the part occupied by them was the respondent's or their own land.



47. The respondent’s evidence that someone lived on the land but only intermittently was supported by the report of the site visit which stated that the 3rd respondent’s son sometimes used the house. However, no graves were found on the suit land, and the property was in a state of disuse. This aspect of the report tallied with the evidence of DW1, who stated that the photos produced were in respect of their 2.5 acres of land, and not the suit land. The stand-alone house was found to have been constructed not too long ago.

48. In order to extinguish a registered owner’s title to land, the evidence must be watertight as regards the ingredients to be proved before such allegations will be upheld. A decision extinguishing rights protected by the law ought not to be arrived at merely on the basis of allegations without tangible evidence. In this case, the evidence presented was not satisfactory. We agree with the learned Judge that:

“The totality of the evidence adduced by the Defendants is shaky and short of the requirement to proof (sic) adverse possession.”

49. The appellants’ case having failed, it followed that the respondent’s claim had to succeed. By claiming the land based on adverse possession, the appellants were implicitly acknowledging that they had some form of possession of the land, even if their possession did not meet the threshold of adverse possession. Having failed in their claim, they became trespassers on the suit land, which the respondent was entitled to absolute ownership pursuant to section 24 of the repealed Registered Land Act (now section 26 of the Land Registration Act).

50. We find no merit in this appeal, which we hereby dismiss with costs.

51. We so order.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF APRIL, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. v ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

