



REPUBLIC OF KENYA



**KENYA LAW**  
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**Baya & 2 others v Nazerali & 6 others (Civil Appeal E106 of 2022)  
[2025] KECA 1081 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1081 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E106 OF 2022  
SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA  
JUNE 20, 2025**

**BETWEEN**

**MASELINA KAZUNGU BAYA ..... 1<sup>ST</sup> APPELLANT  
JUMAA KATANA CHARO ..... 2<sup>ND</sup> APPELLANT  
KACHE CHENGO KARISA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**HUSSEIN AHMED NAZERALI ..... 1<sup>ST</sup> RESPONDENT  
MARIYAM HUSSEIN NAZERALI ..... 2<sup>ND</sup> RESPONDENT  
GRISHCHANDRA DEVISPRASAND BHATT ..... 3<sup>RD</sup> RESPONDENT  
ANAND GRISHCHANDRA BHATT ..... 4<sup>TH</sup> RESPONDENT  
NIRANJANA GRISHCHANDRA BHATT ..... 5<sup>TH</sup> RESPONDENT  
MINISTRY OF LAND AND HOUSING ..... 6<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Mombasa (N. Matheka, J.) dated 28th June 2022 in ELC Cause No. 10 of 2015 (OS))*

**JUDGMENT**

1. This appeal arises from the judgment of the Environment and Land Court (the ELC) at Mombasa (N. Matheka, J.) delivered on 28<sup>th</sup> June 2022, dismissing the appellants' suit for adverse possession.
2. The appellants instituted suit before the ELC at Mombasa by way of an Originating Summons (O.S) dated 22<sup>nd</sup> January 2015 seeking orders: that the respondents' interest in the parcels of land situated



in Mombasa and known as subdivision Number 6262 of Section 1 Mainland North and subdivision Number 6263 of Section 1 Mainland North (the properties) comprised in Certificates of Title dated 12<sup>th</sup> April 1991 and registered at the Land Titles Registry at Mombasa as Number CR 20752/1 and CR 20753/1 respectively have been extinguished; that the appellants be registered as proprietors thereof in place of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents by reason of having become entitled to the properties by adverse possession; and for an order that be issued with certificates of title for the properties.

3. The appellants pleaded that they have been in uninterrupted exclusive physical occupation of the properties for more than 20 years; and that they had constructed permanent and semi-permanent makuti houses, and that they were living, cultivating and carrying on business on the properties, and that they had done so for more than 20 years.

4. A standard statement appearing in each of the appellants', witness statements, was that:

“I have been in physical occupation and possession of the suit properties for over 20 years peacefully and without any interruption. That I carry on business on the suit land with my family and cultivate the same and have also constructed permanent and semi-permanent Makuti/Marara houses. That I have lived on the suit property, and developed it openly and without hindrance or interruption for more than 20 years and do not have any other place to call home. That I stand to suffer irreparable loss and damage and rendered homeless if not heard and granted the suit property.”

5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents who were served with the O.S by substituted service as they could not apparently be found, did not defend the suit and an interlocutory default judgment was entered against them. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents demonstrated through a witness statement and affidavit of the 4<sup>th</sup> respondent that the properties were transferred to them by the 1<sup>st</sup> and 2<sup>nd</sup> respondents under instruments of Transfer of Lease dated 19<sup>th</sup> August 2013. They also filed affidavits sworn by Mercy Muthoni, Kadzo Kahundi and Francisca Nzisa Masha who deposed to having been on the properties. The Land Registrar, Mombasa, one Dick J. Safari filed an affidavit demonstrating the transactional history of the properties that culminated in the registration of the 3<sup>rd</sup> to 5<sup>th</sup> respondents as the proprietors.

6. At the trial, only Maselina Kazungu Baya, the 1<sup>st</sup> appellant testified adopting her witness statement as her evidence in chief. She maintained that she had stayed on the properties for more than 20 years; that “in 2008 a Rwandese man came and told us to continue living till he came ...”; that in 2014, “the Asians came around...and burnt down our houses.” She stated further that she moved into the properties in 1991 and built “houses with [her] family and [her] business was there”; that she was not given notice to vacate, but that she would have done so had she been asked. She stated further that “we were forced to sign some documents to agree to leave” and that “the plots are two” and belong to the 1<sup>st</sup> and 2<sup>nd</sup> respondents” but “the owner is now 3<sup>rd</sup> to 5<sup>th</sup> [respondents]”.

7. Under cross examination, the witness stated that she was “selling mnazi” on the properties and had a licence to do so, but that she did not have it in court; that the structures on the properties were temporary, made of mud and makuti and were burnt in 2015; and that the land was fenced.

8. The 4<sup>th</sup> respondent, Anand Grishchandra Bhatt, a Certified Public Accountant, testified for the defence. He similarly adopted his witness statement as his evidence in chief. He denied that the 1<sup>st</sup> appellant was forced to sign the agreement at the D.C#s office in which she had agreed to vacate the properties; that after the 3<sup>rd</sup> to 5<sup>th</sup> respondents bought the properties, the appellant refused to leave, but that, after an injunction that was in place was lifted, they took possession.



9. Under cross examination, the witness stated that there was a sale agreement with the 1<sup>st</sup> respondent; that, as purchasers, they carried out due diligence, paid stamp duty and had the properties transferred; that they visited the site in 2013 and saw temporary structures, makuti houses, but there were no people on the properties; that the appellants informed him that they were on the properties for about 7 to 8 years; that they had an agreement with the appellants at the D.C#s office and had offered to pay the appellants “for their moveable costs”; and that they had filed ELC Case No. 20 of 2015 seeking eviction orders but he was not aware of the outcome of that case. With that, the case for 3<sup>rd</sup> to 5<sup>th</sup> respondents was closed.
10. No other witnesses were called by either side and after considering the evidence and submissions tendered before her, the learned trial Judge dismissed the suit in her impugned judgment delivered on 28<sup>th</sup> June 2022.
11. The appellants have challenged that judgment on grounds that the learned Judge: misinterpreted and misapplied the legal principles in relation to adverse possession; failed to consider that the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ title to the property was extinguished by the time they transferred the same to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents; failed to note that, contrary to the requirements of Section 3(3) of the Law of Contract Act, there was no sale agreement or other evidence of sale in respect of the properties between the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the one part and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents on the other part; and failed to consider the existence of ELC Case No. 20 of 2015, and whether it interrupted the running of time.
12. During the hearing of the appeal before us on 4<sup>th</sup> February 2025, learned counsel Mr. Mwaniki Gitau appeared for the appellants. Learned counsel Mr. Obura appeared for the 4<sup>th</sup> and 5<sup>th</sup> respondents. Learned counsel Ms. Saru appeared for the 6<sup>th</sup> and 7<sup>th</sup> respondents.
13. At the request of Mr. Gitau for the appellants, and there being no objection by the other counsel, the appeal as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents was marked as withdrawn.
14. In support of the appeal, Mr. Gitau relied entirely on the appellants written submissions. Although, in their submissions, the appellants urged that the averments in the plaint made against the 1<sup>st</sup> and 2<sup>nd</sup> respondents should be deemed as admitted because those respondents did not defend the suit, having withdrawn the appeal as against them, this Court would have no basis for making adverse inferences.
15. That said, it was submitted that the appellants did establish before the trial court that they were in occupation of the properties from 1991 to 2013, a period of 22 years, and that the title of the 1<sup>st</sup> and 2<sup>nd</sup> respondents had been extinguished by effluxion of time by the time the 3<sup>rd</sup> to 5<sup>th</sup> respondents obtained title to the properties. Moreover, it was submitted the 3<sup>rd</sup> to 5<sup>th</sup> respondents did not produce the sale agreement on the basis of which they claimed to have purchased the properties; and that, in the suit filed by the respondents for eviction of the appellants, it was acknowledged that the appellants were in illegal occupation.
16. On the other hand, counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the trial Judge correctly applied the law and the facts in concluding that adverse possession was not proved; that the appellants did not explain how they came to occupy the properties, either as trespassers or otherwise, but merely mentioned having been allowed to stay by an un-named Rwandese; that no evidence of continuous occupation for twelve years was presented; and that, although the appellant claimed to have been carrying on business on the properties, she did not produce any business licence to support that claim.
17. It was submitted that the question of production of the sale agreement did not arise as it was not an issue before the trial court; that, in any event, the evidence tendered by the Land Registrar conclusively



established that the 3<sup>rd</sup> to 5<sup>th</sup> respondents' title to the properties is regular and not impeachable under Section 24 and 26 of the *Land Registration Act*.

18. We have considered the appeal and the submissions in accordance with our mandate under Rule 31(1)(a) of the Court of Appeal Rules. Although the appellants raised numerous complaints in their memorandum of appeal, counsel for the appellants in his submissions narrowed the grievances to two, namely that the Judge erred in failing to find that adverse possession was proved; and secondly, in failing to appreciate that the respondents did not produce the sale agreement on the basis of which they purchased the properties from the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

19. We begin with the question as to whether adverse possession was proved. In *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] KECA 532 (KLR), Asike-Makhandia, JA, explained 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.”

20. As the Court stated in the case of *Watuko v Busolo & 3 others* (Civil Appeal 129 of 2017)[2022] KECA 171 (KLR):

“Adverse possession commences in a situation where an intruder who is in wrongful occupation makes a claim of ownership against a right of the true owner by alleging that due to clear and unequivocal evidence he/she has been in possession was not permissible, open, with the knowledge of the true owner, and excluded the true owner from the enjoyment of his property. The onus is on the person claiming adverse possession to prove, in the words of Kneller J. (as he then was) in *Kimani Ruchine v Swift, Rutherford & Co. Ltd* [1980] KLR 10 that: -

The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec precario* (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 purpose or by any endeavours to interrupt it or by any recurrent consideration.”

21. Did the appellants present “clear and unequivocal evidence” of their occupation of the properties for the period they claimed? In her witness statement and affidavit filed before the trial court, the 1<sup>st</sup> appellant asserted that she and the other appellants “have been...in physical occupation and possession of all the two parcels of land” where they lived and carried on business with their families and that they had done so openly and without hindrance or interruption for more than 20 years.

22. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants did not testify before the trial court but filed witness statements which are in material respects replicas or „carbon copies“ of the 1<sup>st</sup> appellant's witness statement. It is not clear from the record of proceedings forming part of the record of appeal before us whether directions were given dispensing with their attendance in court for purpose of testifying, and whether their witness statements and those of the other witnesses were to be admitted without calling the makers. They were however referred to in the submissions tendered before the trial court.



23. There are also on record, as already mentioned, affidavits sworn by Mercy Muthoni Njeru and Kadzo Kahindi and Francisca Nzisa Masha, which were also referred to in the appellants' submissions before the trial court. Those three deponents claimed in those affidavits to have occupied "the plot" at the behest of the 2<sup>nd</sup> appellant, Jumaa Katana Charo, who claimed to have been a "caretaker" and "in charge of the plot" and charged a fee to allow them to put up temporary structures, and that while there, "in 2009" the 1<sup>st</sup> appellant "Maselina Kazungu moved in and put up temporary structures for selling Mnazi alcoholic drink." Francisca Nzisa Masha, a food hawker in her affidavit deposed that she put up a temporary structure on the property in October 2005 when the plot was empty, and that 2<sup>nd</sup> appellant moved into the plot in the year 2008 and started putting up a temporary structure.
24. Although the makers of those affidavits did not testify, it would appear that if indeed the 1<sup>st</sup> appellant moved into the properties in 2009, by the time the O.S was instituted in 2015, 12 years had not lapsed. Even if those affidavits are to be disregarded, it was imperative for the appellants to establish when, and under what circumstances they occupied the properties as the burden lay squarely on them to establish their claims to the required standard.
25. Furthermore, while the 1<sup>st</sup> appellant claimed to have been conducting licenced business on the properties, when challenged under cross examination to produce her business licence, she was unable to do so, and neither did she establish which portion of the two properties she claimed to have occupied.
26. Based on the material before the trial court, there was no clear and unequivocal evidence of the appellants' possession of the properties for a period of 12 years. The appellants did not therefore establish their claim for adverse possession. We are therefore fully in agreement with the learned Judge's pronouncement that:

"From the evidence before me I find that the Plaintiffs only had temporary structures on the suit property. I find that the Plaintiffs have not proved that they have been in occupation of the suit land for over 20 years. PW1 testified that in 2008 a Rwandese man came and allowed them to live there until his return claiming to have bought the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. If this was true, and this has not been established, then they were licensees and cannot claim the land. Indeed, PW1 in her testimony seems to be more interested in compensation than in getting the land registered in her name. I find that the Plaintiffs have failed to establish that their possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the Plaintiffs have failed to prove their case on a balance of probabilities and I dismiss the same with costs."

27. We respectfully agree.
28. Regarding the complaint that the sale agreement in favour of the 3<sup>rd</sup> to 5<sup>th</sup> respondents was not produced, their title to the property was acknowledged and the manner in which they acquired the same was not a matter or issue before the trial court. There is no merit in that complaint either.
29. The appeal fails and is hereby dismissed with costs.

**DATED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF JUNE 2025.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**



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

**JUDGE OF APPEAL**

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**G.W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

