



REPUBLIC OF KENYA



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**Mabwa v Angelei & 3 others (Civil Appeal 35 of 2019)
[2025] KECA 1037 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1037 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 35 OF 2019
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
JUNE 5, 2025**

BETWEEN

SHEILA KABOLE MABWA APPELLANT

AND

JOSHUA ANGELEI 1ST RESPONDENT

ROBERT LOBUR ANG'ELEI 2ND RESPONDENT

GEDION LOITALIM ANG'ELEI 3RD RESPONDENT

ALLAN EGILAE ANG'ELEI 4TH RESPONDENT

(Being an Appeal from the Judgment and Orders of the Environment and Land Court at Kitale (Mwangi Njoroge, J) delivered on 3rd December 2018 in ELC Case No. 118 of 2015)

JUDGMENT

1. This appeal is from the judgment and orders of the ELC at Kitale (Mwangi Njoroge, J) delivered on 3rd December 2018 in Kitale Environment and Land Court Case No. 118 of 2015 which was consolidated with Environment and Land Court Case 87 of 2015 with ELC No. 118 of 2015 being the lead file.
2. The appellant's case was that she was the daughter of Nancy Mabwa (Deceased). Nancy Mabwa was the registered owner of Trans Nzoia/Kaisagat/201 from which land title number Trans Nzoia/Kaisagat/247(suit property) was carved. The carving out of the suit property was pursuant to the decision made in succession proceedings in Kakamega Succession Cause No. 165 of 2010. It was the appellant's case that there two people had purchased part of Land Title No. Trans Nzoia/Kaisagat/201. Further, following the subdivision of the said parcel of land to transfer to those purchasers, the land title in respect of Trans Nzoia/Kaisagat/201 was closed. She consequently became the registered proprietor of the suit property. It was her evidence that she did not know the 1st respondent. However, when she went to the land, she found a person working on the suit land prompting her, in 2012, to write a



demand letter to the said person to stop farming. Although that person, whom she later learned was a brother to the 1st respondent, stopped the cultivation in 2015, the 1st respondent entered the land, prompting her to sue him. She explained that the delay in taking action was because her parents died while she was a minor. It was her case that she was not aware that the respondent bought the land from her father.

3. The appellant therefore prayed for the judgment against the respondents for;
 - a. declaration that the plaintiff is the sole owner of land title number Trans Nzoia/ Kaisagat/247;
 - b. An order of permanent injunction against the defendant, his agents, representatives, workers, employees and or any other person purporting to claim under the defendant from entering, cultivating and/or developing the land title number/ Trans Nzoia/ Kaisagat/247;
 - c. Costs of this suit plus interest.
4. The 1st respondent, as the defendant, filed a Statement of Defence and Counterclaim. Their case as pleaded in the defence, counterclaim and the originating summons was: that the suit property resulted from the subdivision of Land Title No. Trans Nzoia/Kaisagat/201; that prior to her death on 22nd February 2004, their mother, Priscilla Angelei, had on 3rd June 1988 entered into a sale agreement in respect of the said land measuring 10.6 ha with the appellant's late father, Reuben Mabwa and duly paid the agreed purchase price; that although Reuben undertook to obtain the consent from the relevant Land Control Board, he passed away before the transfer could be completed; that since 1988, the respondents have been in occupation of the said land; that their occupation has been open, quiet, uninterrupted but with full knowledge of the appellant; that as a result of their adverse possession the appellant has lost title to the said land which should be registered in their names.
5. The appellant filed a reply to the defence and defence to counterclaim in which she denied the alleged fraud as well as the 1st respondent's entitlement to and or occupation of the said parcel of land. She also denied knowledge of Kitale HCC No. 87 of 2015 (OS) and contended that L.R. No. Trans Nzoia/ Kaisagat/247 having not been registered in her name prior to 22nd January, 2015, could be subject to a claim by virtue of adverse possession. It was her position that land No. Trans Nzoia/Kaisagat/201 having been registered and or first come into existence on or about 23rd January 1996 in favour of one Nancy Mabwa (whose estate she duly succeeded and transmitted without objection), could not have been the subject of an alleged sale agreement between the 1st respondent's parents and the appellant's parents in 1988. It was her contention that the counterclaim was void ab initio for want of certainty and failure to obtain the requisite consent of the Land Control Board.
6. In her evidence, the appellant repeated her averments stated above She insisted that the respondents had not been in possession for 12 years since at the time of the sale agreement the land had not ben registered into the names of her parents. She further contended that since the title to Land Title No. Trans Nzoia/Kaisagat/201 was closed on subdivision, adverse possession could not arise against a non-existent title
7. The respondents' case, on the other hand, was that the appellant obtained title to the suit property fraudulently and by way of concealment of material information. It was their case that they were the rightful and lawful owners of the suit land, their parents having purchased the same from the appellant's parents vide a sale agreement dated 3rd June 1988 hence they were beneficial owners of the suit land which they had been in occupation of and were cultivating since 1988, a fact which was within the appellant's knowledge. It was their evidence that they had the right to cultivate and occupy the suit land since they were the administrators to the estate of Priscillah Yatich Angelei the original purchaser of the suit land. According to them, the appellant had never made any effective assertion over the suit



land or denounced his entry, occupation and or possession of the suit land since 1988. They denied that the appellant issued the 1st respondent with a demand notice as alleged and disclosed that there was a pending suit being Kitale HCCC No.87 of 2015 (O.S) over the same subject matter.

8. With respect to the counterclaim, the 1st respondent who testified on behalf of the respondents, contended that having been in quiet and uninterrupted possession of the suit property, Land Title No. Transnzoia/Kaisagat/201 for an aggregate period of and/or exceeding twelve (12) years, the respondents were entitled to a declaration that they were the rightful owners thereof, the appellant's title having been extinguished. They therefore prayed that the appellant's suit be dismissed with costs and that judgment be entered in his favour on his counterclaim for:

- a. declaration that the defendant was the rightful owner of all that parcel of Land Title No. No. Transnzoia/Kaisagat/201; and
- b. Costs of this suit.

9. In support of his case, the 1st respondent produced the sale agreement executed on 3rd June, 1988 and a booklet containing some acknowledgements of receipt and stated that his mother paid for the land but passed on after the agreement.

He also produced a copy of a land control board's consent in respect of Plot Number 111 from which plot no. 201 was hived off. In his evidence, his family had been in possession of the suit land since 1988 till 2016 when he was informed that someone had fenced off the land. He also produced a copy of a demand letter from his mother to Nancy Mabwa dated 3rd April, 1991. Although he admitted that he was aware of Kakamega Succession Cause Number 165 of 2016, he disclosed that he had filed summons for revocation of the grant which were still pending.

10. DW2, Ekai Ekidor, in his evidence stated that he used to work for Priscillah Yatich Angelei who purchased the suit property from Reuben Mabwa. It was his evidence that at the time of the purchase, the family of Priscillah had been in occupation of the land and that in 2000 he was given a portion of the suit land to carry out subsistence farming but surrendered it back in 2006. DW3, Samson Mabonga Wanjala, also testified that he used to work for Peter Angelei the father of the respondents and resided on his employer's farm which was adjacent to that of Reuben Mabwa and that Reuben Mabwa sold his parcel to the 1st respondent's mother in 1988. From that time, the land was partly being cultivated and partly leased out to third parties and that all along, he knew the land to be owned by the respondents' family.

11. In his judgment, the learned Judge found: that the respondents' claim that their mother had bought 30 acres from the appellant's mother in the year 1988 and that the 1st respondent and his other family members were in occupation of the suit land from 1988 up to 2016, was corroborated by the respondents' witnesses; that there was documentary evidence that showed that there was an agreement whose authenticity was not put in doubt; that there was evidence on the record that established the respondents' long occupation of the land during their parents' lifetime and even after their death; that there was no evidence of any interruption of their possession of the suit land until the year 2016 when the appellant took possession; that though the appellant obtained the title to the land by following a legal process, that process never took into consideration the respondents' rights and interest in the suit land and it shut them out despite their lengthy occupation of the suit land; that the appellant had not proved her claim against the respondents on a balance of probabilities while the respondents proved their counterclaim and the Originating Summons on a balance of probabilities.

12. In the end the learned Judge entered judgment against the appellant herein as follows:



- a. A declaration that the subdivision of parcel number 201 into parcels numbers 247, 248, 249 and 250 is illegal null and void;
 - b. An order cancelling all the titles to plots numbers 247, 248, 249 and 250 and reinstating plot number 201 as one undivided whole as was the case before subdivision;
 - c. An order that the plaintiff's title to all that parcel known as 201 has been extinguished and that the defendants are the rightful owners of plot number 201;
 - d. The defendants should be registered as the owners of plot number 201.
 - e. An order that the plaintiff shall bear the costs of this suit and the counterclaim.
13. Aggrieved, the appellant challenges the said decision on the grounds that:
1. The Learned Judge erred in law in finding that the subdivision of parcel number Trans Nzoia/Kaisagat/201 into parcels numbers 247, 248, 249 and 250 is illegal, null and void.
 2. The Learned Judge erred in law by cancelling all the titles to plots number 247, 248,249 and 250 and reinstating plot number 201 as one undivided whole as was the case before subdivision.
 3. The Learned Judge erred in law in finding that the Appellant's title that entire parcel known as Trans Nzoia/Kaisagat/201 has been extinguished and that the Respondents are the rightful owners of plot number Trans Nzoia/Kaisagat/201 when the register had been closed and new numbers created.
 4. The Learned Judge erred in law by purporting to nullify titles deeds Trans Nzoia/Kaisagat/248,249 and 250 created from Trans Nzoia/Kaisagat/201 but registered in the name of the people who are not parties to the suit.
 5. The Learned Judge erred in law in finding that the respondents should be registered as the owners of plot number 201.
 6. The Learned Judge erred in law in finding that the authenticity of the agreement produced was not challenged hence the agreement was valid.
 7. The Learned Judge erred in law in finding that the consent of the Land Control Board granted by the Saboti Kwanza Land Control Board is valid and not challenged.
 8. The Learned Judge erred in law and facts in finding that the acknowledgements of receipt of monies by Nancy Mabwa from Mr. Angelei are valid.
 9. The Learned Judge erred in law in finding that the Appellant did not demonstrate her age when the Appellant availed her identity card to court during the hearing of her case which shows that she was born on 12th December, 1983 and her age on be calculated.
 10. The Learned Judge erred in law and facts in finding that the Respondents were in occupation of the land over 12 years openly, with knowledge of Appellant and without interruption when the Appellant took occupation of the said land after petitioning for letters of administration.
 11. The Learned Judge was biased and considered only one side of Respondents without considering the evidence adduced by the Appellant.
 12. The Learned Judge erred in law by otherwise misinterpreting the law against the facts presented to him by the Appellant.



14. The appellant urged: that the decision be set aside; that the appellant be declared as the sole owner of land parcel No. Trans Nzoia/Kaisagat/247; an order of permanent injunction against the respondents, their agents, representatives, workers, employees and/or any other person purporting to claim under them from entering, cultivating and/or developing the land title number Trans Nzoia/Kaisagat/247; and costs of the appeal.
15. On record is a document titled a “replying affidavit” sworn on 2nd March 2025 by Prof. Richard Onyino Simwa, who described himself as the 1st affected party. In that affidavit was deposed: that the affected parties were granted leave to come into the matter as affected vide Court Orders of 17th July 2023; that he purchased a portion of L.R No. Trans- Nzoia/KAisagat/201 measuring 2.72 Ha from Nancy Mabwa (deceased), the then duly registered proprietor and that upon payment of the purchase price, he openly and publicly entered and took possession of L.R No. Trans-Nzoia/Kaisagat/201; that upon taking possession, he averred, he did cause to be constructed thereon his matrimonial home and also cultivated crops in the remainder of the parcel of land for subsistence of his family and has resided therein since 1992; that Nancy Mabwa passed away before causing his portion of the land portion measuring 2.72 Ha to be formally subdivided and transferred to him; that when in 2011 he established that the appellant had petitioned for and had been issued with letters of administration vide Succession Cause No. 165 of 2010 at the Kakamega High Court, he notified her of his claim and he was included as a beneficiary of the estate of the late Nancy Mabwa during the confirmation of letters of administration at which L.R No. Trans Nzoia/Kaisagat/201 was given to three individuals namely Sheila Kabole Mabwa, Richard Onyino Simwa and Peter Machora Onchwari; that upon subdivision, he was duly registered as the proprietor of one of the subdivisions and was issued with title L.R No Trans Nzoia/Kaisagat/248; that in 2019 or thereabout, he received information that the former L.R No. TransNzoia/Kaisagat/201, from which Trans-Nzoia/Kaisagat/248 was curved, was on sale by the respondents who were claiming to be the registered owners of the same pursuant to a Court Judgement/Decree issued in Kitale ELC 118 of 2015 (as Consolidated with Kitale ELC No. 87 of 2015); that he established from the lands office that his Title Deed to L.R No. Trans-Nzoia/ Kaisagat/248 had been cancelled without his knowledge and or consent pursuant to a court decree in that case; that at no moment was he a party to the two suits, neither was he ever informed of the same, despite the parties being aware that he was the duly registered proprietor and in actual possession of L.R No. TransNzoia/Kaisagat/248 and was thus condemned unheard; that the trial court, vide ruling delivered on the 9th November 2022, dismissed his application for joinder to the suit on the basis that there was already an appeal lodged from the judgement; that the trial Court erred by holding that the respondents had acquired the Parcel of Land L.R No. Trans- Nzoia/Kaisagat/248 vide adverse possession.
16. The deponent urged this Court to allow the appeal, set aside the judgement of the superior court, allow the prayers in the plaint, dismiss the counter claim and the Originating Summons and uphold his title and ownership of Parcel of Land L.R No. Trans- Nzoia/Kaisagat/248. According to him, his joinder to and participation in the proceedings before the trial court will enable the court to conclusively and effectually determine the issues in controversy in so far as the rights and interests of the parties actually before it are concerned.
17. When the appeal was called out for virtual hearing on 10th March 2025, learned counsel, Mr Olwande, held brief for Mr Mukabi for the appellants and appeared for the 1st and 2nd interested parties while learned counsel, Mr Songole, appeared for the 1st to 4th respondents. Both counsels substantially relied on their written submissions with minimal highlighting.



18. On behalf of the appellant, it was submitted: that, pursuant to section 24(a), 25 and 26 of [Land Registration Act](#) No.3 of 2012, she has all the rights and privileges granted to the proprietor since she is the registered proprietor of land parcel number Trans Nzoia/ Kaisagat/247 which was created from Trans Nzoia/ Kaisagat/ 201; that the Learned Judge erred in law by purporting to nullify title deeds for Trans Nzoia/Kaisagat/ 248, 249 and 250 created from Trans Nzoia/ Kaisagat/201 but registered in the name of the people who are not parties to the suit; that upon the registration of Certificate of Confirmation Grant the land number Trans Nzoia/ Kaisagat/201 was closed on subdivision and was subdivided to three people who were Sheila Kabole Mabwa 6.4 Ha, Richard Onyino Simwa 2.72 and Peter Machora Onchwari 1.2 Ha, all of whom have occupied their respective shares and developed the same; that the agreement relied on by the respondent dated 3rd June, 1988 is a nullity and did not confer any right to the alleged purchaser since the register of the land parcel number Trans Nzoia/ Kaisagat /111, was opened on 6th November 1989 in the name of the Settlement Fund Trustees, thus at the time of the alleged purchase, the vendor was not a registered owner; that Col. Reuben Safania Mabwa, the alleged vendor, became a registered owner on 30th January, 1992 while the alleged agreement of purchase was executed on 3rd June 1988; that the vouchers produced by the 1st respondent did not indicate what the payments were meant for; that whereas the 1st respondent told the court in cross examination that his mother purchased the plot number 201, that was not what he was claiming; that that the learned Judge did not take in to account the age of the appellant at the time the mother, Nancy Mabwa passed on, as she was thirteen years old, hence a minor with no capacity to take out Grant for letters of administration thus the reason it took her fourteen years to do so; that on the authority of the case of the case of *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184, since the appellant’s mother who was the registered owner of parcel number Trans Nzoia/ Kaisagat/201 passed on 11 October 1996, time did not run against her estate until after confirmation and distribution of the estate; and that on the authority of the ELC decision in *Lilian Chepchirchir Rotich v Ruth Jemeli Kiplimo & another* (2018) eKLR, the actual size of the land claimed was not disclosed contrary to the decision in the case of *Gatimu Kinguru v Muya Gathangi* (1976) eKLR 253 that the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary.
19. The 1st affected party also filed submissions in which he reiterated his position in the supporting affidavit and contended that the trial court, by entering judgment cancelling his title to Parcel of Land known as TransNzioa/Kaisagat/248 without the same having been pleaded in the pleadings before it, erred in law and in fact and cited the case of *Lamba v National Social Security Fund & Another (Civil Appeal No. E168 of 2021)* [2023] KECA 124 (KLR) (3rd February 2023) (Judgment). According to the 1st affected party, the title to parcel of land known as Trans-Nzioa/Kaisagat/201, having ceased to exist on 21st September 2010 and as at the time of the respondents filed their Originating Summons on the 27th January 2017, there existed no valid title upon which a suit for adverse possession could be anchored. The rest of the submissions mirrored the appellant’s submissions and we need not repeat them.
20. On behalf of the 1st to 4th respondents, it was submitted; that the division of the primary suit parcel, Trans- Nzoia/Kaisagat/201 into parcels 247, 248, 249 and 250 was irregular, improper and without basis; that no single document was filed in court by the appellant to show that a proper legal process was followed in transferring the said parcels; that there was evidence that the respondents’ mother had been in occupation of the said land for long and uninterrupted period; that despite the appellant’s awareness of the respondents’ occupation, she proceeded to obtain the title to the subject matter; that by the time the appellant went into the suit land in 2016, the respondents were already in possession of the suit property and had approached the court in Kitale ELC No. 87 of 2025.



21. We have considered the record of the proceedings and submissions placed before us.
22. Our mandate as a first appellate court was espoused in *Ng'ati Farmers' Co-Operative Society Ltd. v Ledidi & 15 Others* [2009] KLR 331 in the following terms:

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."

23. 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."

24. We are, however cautious, as was held 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."

25. When it comes to findings of fact, this Court in stated in *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982-88] 1KAR 278 at page 292, as follows:

"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 finding he did... The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that the impression based on demeanour of material witnesses was inconsistent with evidence in the case generally."

26. Before we deal with the merits of the appeal, we wish to deal with the participation of the "affected parties" in these proceedings. This Court being a court of record relies on the record of the pleadings and proceedings as presented before the trial court in determining the appeals filed before it. The only avenue through which material other than that placed before the Court may be admitted is by the invocation of rule 31 of this Court's Rules. No person, in whatever capacity, is at liberty to adduce



fresh or additional evidence either by way of an affidavit or otherwise without resorting to the aforesaid rule. Accordingly, the supporting affidavit filed by the 1st affected party and the annexures thereto are not properly before this Court. The mere fact that the Court may have granted leave to the 1st affected party to be joined did not give automatic right to adduce further documents.

27. Rules 77 is the entry point for any person who wants to ventilate his grievances before this Court. It provides that:

A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

28. It is clear that the rule is not restricted to the parties who were before the court from which an appeal is intended since the rule employs the use of the word “a person” as opposed to “a party”. The notice of appeal is then required to be served on all persons directly affected by the appeal who are required to give address of service pursuant to rule 81 of the Rules in which event that rule deems the person. Rule 91(1) of the Rules require that all respondents who have complied with rule 81 aforesaid be served with the record of appeal. Upon such service the person served with the record of appeal is entitled to file a notice of cross appeal in accordance with rule 95 of the Rules. It is that notice of a cross appeal that entitles the person:

“to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, in any event or in the event of the appeal being allowed in whole or in part”.

29. In that notice the respondent is required to specify the grounds of the contention and nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be. Without filing such notice, the respondent is barred from challenging the decision since rule 107(a) of the Rules provides that:

“no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 95 or rule 96”

30. In this appeal, the “1st affected party” neither filed a notice of across appeal nor sought leave pursuant to the above rule. Yet in the replying affidavit and submissions, he contends and seeks that we reverse the decision of the trial court. With due respect to the “1st affected party” we cannot, based on his submissions, disturb the decision being appealed from.

31. In this appeal, the respondents’ case was that by a sale agreement executed on 3rd June, 1988 between the 1st respondent’s parents and the appellant’s parents, the latter sold to the former land No. Trans Nzoia/Kaisagat/201 which originally formed the larger parcel number 111. After that agreement, their parents went into occupation. The appellant did not contest this evidence since, according to her, she did not know the circumstances under the respondents went into the occupation of the suit land as she was still a minor at the time. It was however her case that land No. Trans Nzoia/Kaisagat/201 having been registered and or first came into existence on or about 23rd January 1996 in favour of Nancy Mabwa, could not have been the subject of an alleged sale agreement between the parents of the 1st respondent and the parents of the appellant in 1988.

32. A perusal of the record reveals that there was a sale agreement between the 1st respondent’s parents and the appellant’s parents. The consent of the Land Control Board was duly obtained for that transaction.



This Court in *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR, set out the circumstances under which a registered proprietor of land may be disposed of his interest therein, by a claim of adverse possession, in the following holding:

“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.”

33. 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.”

34. The case of *Wambugu v Njuguna* (1983) KLR 171, laid down the following guiding principles as regards adverse possession in the following terms:

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 run 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.
35. From the above decisions, the ingredients of adverse possession are: ownership of the land by the person against whom the claim is made; open, continuous and exclusive possession of the land by the claimant for at least 12 years; and assertion of right by the dispossessor which must be inconsistent with the rights of the owner. In the judgement appealed against, the learned Judge found that:
- “The evidence on record has in my view established the defendant's long occupation of the land during their parents' lifetime and even after their death. There is no evidence that there was any interruption of their possession of the suit land until the year 2016 when the plaintiff took possession. The plaintiff on the other hand has only succeeded in showing that she came into possession of the land in 2016 – and that is after the institution of proceedings by way of originating summons on 19/6/2015. By the time the defendants filed the originating summons, they were still in possession of the suit land. In my view, the defendants have established that the plaintiffs in Kitale ELC Case No. 87 of 2015 (OS) which was consolidated with this case, are entitled to be registered as the owners of the suit land by virtue of adverse possession.”
36. This being a factual finding, we are not satisfied that the test for interfering therewith has been met. Clearly, the appellant was in no position to seriously contest the circumstances under which the respondents' claim to the suit land came into being. The appellants' claim however is that on the death of her mother, time ceased to run. It is important to emphasise that adverse possession runs against the land rather than the owner. When a court is adjudicating a claim based on adverse possession, it does not set out to determine to whom the land belongs. Rather, it sets out to establish whether there exists a state of affairs that legally militates against the recovery of the land by the proprietor. It is not the court that awards the land to the claimant. The court's duty is to investigate and, if so satisfied, declare the state of affairs as regards the land. Once that is done, the rest of the orders such as the order effectuating the transfer of the land to the claimant are consequential reliefs. The argument that upon the death of the proprietor of land, time for the purposes of adverse possession is frozen, may not therefore be entirely correct if it is made to pursue the line that where the proprietor is unable to take action against the claimant the time ceases to run. In our view, it ought to be shown that absent the intervention of the disabling occurrence, the proprietor of the land would have taken action to remove the claimant from the land. Where it is clear that the proprietor knew of the occupation but was unwilling to take such a step, the alleged disabling event does not necessarily freeze the time.



37. In this case, the evidence was clear that the appellant's mother, Nancy Mabwa, before her death, knew about the respondents' interests in the suit lands but willingly took no action to discontinue the adverse possession. This case is distinguishable from the case of *Lilian Chepchirchir Rotich v Ruth Jemeli Kiplimo & another* (supra) where the claimant went into occupation of the land upon or after the death of the proprietor.
38. It was also argued that since the consent of the Land Control Board was never obtained, the claim by adverse possession ought to have failed. The failure to obtain the consent of the Land Control Board is an omission that may render the transaction null and void. If that happens, then the occupation can no longer be justified on the basis of the transaction. In those circumstances, the failure to obtain that consent within the prescribed time is the trigger that puts into motion the adverse possession. See *William Gatuhi Murathe v Gakuru Gathimbi* Civil Appeal No. 49 of 1996
39. In this case, the appellant admitted that when she first went to the suit land, she found a person assigned by the 1st respondent cultivating that land. Without bothering to check the circumstances under which the cultivation was being undertaken, she proceeded to obtain a grant of letters of administration which was later confirmed and which incorporated the suit land as part of the estate of her deceased mother. The title to the suit land, however, been lost by adverse possession and ought not to have been part of the estate of her deceased mother. That being the position, the 1st affected party could not benefit from the succession proceedings which was based on untrue set of facts and which purported to include in the estate a property that ought not to have been incorporated. The appellant seemed to have been under the impression that adverse possession could not apply to her since she was not part of the agreement and became registered as a proprietor by transmission and time had not run against her. It was also her argument that after the subdivision of adverse possession could not be invoked. The position is, however, that a person who acquires land against which adverse possession has begun to run ought to take action to bring such possession to an end. If the time has run its course, then he will obviously acquire it subject to the interest of the adverse possessors. Mere transfer of land which has been lost by adverse possession does not extinguish the rights acquired by adverse possession unless those in occupation acknowledge the title of the proprietor. In *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR Platt, Ag. JA (as he ten was) held in 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."

40. Same position was adopted in case of *Githu v Ndeete* (1984) KLR 776 where it was 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”
41. See also *Leonola Nerima Karani v William Wanyama Ndege* (supra); *Eliud Nyongesa Lusenaka & Another v Nathan Wekesa Omocha* 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.
 42. Having considered this appeal, we find that the grounds of appeal have no merit and therefore no reason to disturb the judgement of the trial court. In the premises, we hereby dismiss the appeal in its entirety with costs to the respondents.
 43. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF JUNE, 2025.

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

