



REPUBLIC OF KENYA



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**Alifan & 14 others v Zumzum Investment Limited (Civil Appeal
E125 of 2022) [2025] KECA 1209 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1209 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E125 OF 2022
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JULY 4, 2025**

BETWEEN

CHIDZAYA NDEGWA ALIFAN 1ST APPELLANT
CHARO MUMBA MASHA 2ND APPELLANT
FLORENCE KALAMA 3RD APPELLANT
**WILSON NGALA KASSIM (SUING AS THE COMMITTEE OF NGUUNI
POWER RESIDENTS AND ON BEHALF OF 821 OTHERS) 4TH APPELLANT**
NDEGWA NDORO 5TH APPELLANT
JOSEPH KITSAO SHIDA 6TH APPELLANT
FRANCIS KANJA 7TH APPELLANT
KITHI KALU 8TH APPELLANT
KATANA KIBWANA 9TH APPELLANT
HASHIM LOWA MAKAZI 10TH APPELLANT
JUMA RUWA ALIAS BOLUDO 11TH APPELLANT
FREDRICK CHARO 12TH APPELLANT
KAZUNGU KAINGU 13TH APPELLANT
JEFWA BAYA 14TH APPELLANT
NGAWA NDORO 15TH APPELLANT

AND

ZUMZUM INVESTMENT LIMITED RESPONDENT



(An Appeal from the Judgment of the Environment and Land Court (N. A. Matheka, J.) delivered on 27th September 2022 in Mombasa ELC No. 242 of 2017)

JUDGMENT

1. The Respondent filed a suit against the Appellants herein seeking:
 - a. A declaration that the Respondent is entitled to exclusive and unimpeded rigid possession and occupation of all that parcel of land known as LR No MN/II/8408 (Original No 1482/994) (the subject property)
 - b. A declaration that the Respondent is the lawfully registered owner of all that parcel of land known as the suit property
 - c. A declaration that the Appellants, whether by themselves or their servants or agents and are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
 - d. A declaration that the Appellants, whether by themselves or their servants or agents and are not entitled to remain on the suit property.
 - e. An order that the Appellants and all other trespassers do forthwith vacate and deliver vacant possession of the suit property to the Respondent.
 - f. An order of eviction against each of the Appellants, their agents, servants, as well as any other parties to whom the Appellants have permitted to occupy any part of the suit property.
 - g. A permanent injunction restraining the Appellants whether by themselves or their servants or agents from remaining on or continuing in occupation of the suit property.
 - h. General damages for trespass.
 - i. Mesne profits for the wrongful occupation of the suit property as trespassers.
 - j. An order directed to the Officer Commanding Police Division (OCPD), Kisauni Division to execute the orders of this Court and evict all trespassers and unauthorized occupants of the suit property including the Appellants' and their servants and agents.
 - k. Costs of this suit together with interest thereon at such rate and for such period of time as this Court may deem fit to grant, and any such other or further relief as this Court may deem appropriate.
2. It was the respondent's case that it has been the registered absolute owner and/or proprietor of all that land known as the suit property. By a charge dated 18th May 2010, the respondent charged the suit property to Habib Bank Limited to secure a loan facility of Kshs 100,000,000. This facility was later varied to Kshs. 60,000,000.00 and thereafter the Respondent issued a Corporate Guarantee in the sum of US Dollars 2,700,000.00 to Habib Bank Limited to secure loan facilities to a maximum of US Dollars 1,800,000.00; that, when the property was being charged to Habib Bank Limited in 2010, the Bank conducted a due diligence, which included the appointment of Tysons Limited to value and inspect the property which was vacant and with no development on the land.
3. It was claimed that the Appellant's have since trespassed and illegally occupied the suit property and proceeded to unlawfully: erect and build dwellings of both a temporary and permanent nature on



- the suit property; subdivide the suit property for illegal sale; utilize the resources of the suit property including the flora, fauna and water resources; carried out development projects on the suit property, all of which was without their consent or authority from them.
4. It was their case that, on noticing the developments, they wrote to various State agencies, including the National Land Commission and the County Administration to remedy the situation on the suit property; that, upon request, they submitted the title documents for verification to the National Land Commission, which confirmed them as the registered and rightful owner of the suit property and directed that there be a stop to any invasion, physical developments and/or transactions. Acting on the findings of the National Land Commission, the Deputy County Commissioner, Kisauni Sub-County wrote to the representative of the Appellants to stop further developments on the suit property, but the Appellants, their servants, agents, employees and/or persons claiming under them, in total disregard to the law, and despite being aware of the findings of the National Land Commission, refused to vacate the suit property thereby occasioning great loss to them and hence the suit.
 5. In support of their case, Abdulkarim Swaleh, PW1 testified that he bought the suit property in 1998 and was issued with a title in 1999 and that the Appellants invaded the land in 2014 whereupon he made several reports to the National Land Commission. He denied that the suit property was an ancestral land and asserted that the Appellants were trespassers.
 6. Richard Kiambi, PW2 a valuer working with Tyson Limited, testified that he was instructed by Habib Bank in 2009 to value and inspect the land; that in 2009 the land was vacant; that in 2013 he was further instructed to do a further valuation which confirmed that the land was vacant and had no developments.
 7. In support of its case, the Respondent produced a Certificate of Title of the suit parcel issued in 1999, a valuation report by Tyson Limited dated 11th November 2009 indicating that the suit property had no developments together with pictures showing that the property had no occupants; a charge document to Habib Bank and several letters to the NLC between 2014-2016 complaining of the trespass and an eviction notice to the Appellants issued in 2016.
 8. In response, the Appellants filed their Defense and Counter-Claim dated 28th May 2018 in which they claimed that they have acquired the portion of the suit property measuring approximately 100 acres by way of adverse possession after occupying the parcel of land for over 12 years. They prayed for a declaration that they have acquired the ownership of the suit property by way of adverse possession and for the Respondent's suit be dismissed with costs.
 9. In support of their case Charo Masha DW1 testified that about 3000 families including the Appellants occupy the land; that together with his family he had occupied the land for 40 years where had put up his house in 1979. He stated that he heard that the land had been charged.
 10. Chidza Ndegwa DW2 testified that his family had lived on the suit property for as long as he lived. He stated that he was born in 1971 on the suit parcel. His evidence was similar to that of Wehor Ngala Kassim DW3 who stated that his family moved to the land in 1970 and that in 2013 they were arrested and asked to move out of the land.
 11. The trial Judge upon considering the evidence allowed the Respondent's claim and dismissed the Appellants' counterclaim on the basis that the Appellants failed to prove that they are in actual possession of the suit property in an open, visible, notorious and exclusive manner or for a continuous and uninterrupted period of 12 years.
 12. Aggrieved the Appellants has filed an appeal to this Court on grounds that; the learned Judge was in error in finding that the Respondent had proved its case on a balance of probability; in finding that



the Appellants had not acquired the suit property by way of adverse possession, despite overwhelming evidence to the contrary; in finding that the Appellants had not proved their claim in the counter-claim and proceeded to dismiss it; and in failing to analyse the Appellants' evidence, which showed their long occupation and use of the suit land well over twelve years.

13. Both parties filed written submissions and when the appeal came up for hearing on a virtual platform, learned counsel Mr. Okanga for the Appellants submitted that the Appellants proved on a balance of probability that they had been in occupation of the suit property for a period of over 12 years having moved onto the suit property before 2009; that the entry of the Appellants was gradual as it is impossible for 281 people to simultaneously enter the land at the same time and carry out massive developments as shown in the photos. It was submitted that Richard Munya Kiambi, PW2, was not an expert in satellite imagery and photography so as to conclusively state that in the year 2009 none of the Appellants were in the suit property given its size of about 34.72 Hectares or approximately 86.5 acres.
14. On their part, learned counsel for the Respondent, Mr. Wafula submitted that if the Appellants were indeed claiming adverse possession of the Respondent's land, it was incumbent upon them to plead in the defense and Counter-claim, their claim for adverse possession by indicating in their pleadings the specific time they entered the suit property for purposes of computation of the 12 year period required by law and that failure by the Appellants to specifically plead the claim of adverse possession by specifying the date of their alleged entry onto the Respondent's land was fatal to their claim.
15. Counsel further submitted that there was no evidence that the Appellants acquired the suit property by adverse possession by occupying the Respondent's land for 12 years as alleged or at all; that the Appellants three witnesses failed to prove that they had been in occupation of the suit property for 12 years. It was also submitted that the Appellants' stay on the suit property was interrupted by the Respondent severally and that the Court was proper in dismissing their claim.
16. This being a first appeal, it is the duty of this Court to analyze and re- assess the evidence on record and reach independent conclusions in the matter. This approach was adopted in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* [2015] eKLR, where this Court cited the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 and held that:

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

17. Having considered the evidence on record, submissions by the parties, case law cited and the law, the central issue for determination is whether the doctrine of adverse possession was proved.
18. adverse possession to be established, as was stated in *Mbira vs. Gachuhi* [2002] 1 EALR 137:

“a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non- permission or non-consensual actual, open, notorious, excusive and adverse use by him or those under whom he claims for the statutory period without interruption.”



19. The essential elements of the doctrine of adverse possession are that there must be a sufficient degree of physical contact on the land and that possession of the land must be actual, notorious, exclusive and continuous, and apparent and manifest to the actual landowner.
20. The burden of proof lies on the person alleging the occurrence of adverse possession. Owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher and lays squarely on the person claiming adverse possession to demonstrate that he has met the requirements for grant of an order of adverse possession. (See Civil Appeal No. 95 of 2014, Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui [2017] eKLR)
21. The doctrine of adverse possession is underpinned by statute in sections 7, 13, 17 and 38 of the Limitations of Actions Act.

Section 7 of the Act states that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

22. Section 13, on the other hand, stipulates:

1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

23. Section 17 further provides that:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

24. Finally, Section 38(1) further states that:

1. Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”



25. In the case of *Littledale vs Liverpool College* [1900] 1 CH at P.21, Lindley MR held that:

In order to acquire by the statute of limitations a title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it... two things appear to be contemplated by that enactment, dispossession and discontinuance of possession... the question becomes, 'has the claimant proved that the title holder has been disposed or has discontinued his possession, of the land in question for the statutory period? rather than, has the claimant proved that he (through himself or others on whose possession he can rely, been in possession for the requisite number of years... the next question therefore is what constitutes dispossession of the property? ... to defeat a title by dispossessing the former owner, 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.'"

26. This Court in the case of *Richard Wefwafwa Songoi vs. Ben Munyifwa Songoi* [2020] eKLR opined that a person claiming adverse possession must establish:

- i) On what date he came into possession;
- ii) What was the nature of his possession;
- iii) Whether the fact of his possession was known to the other party;
- iv) How long his possession continued; and
- v) proof that the possession was open and undisturbed for the requisite 12 years.

27. See also *M'Mikua v Muchiri & another* [2024] KECA 1882 (KLR); *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 others* [2004] eKLR; *Titus Kigoro Munyi vs. Peter Mburu Kimani*, Civil Appeal No. 28 of 2014; *Wambugu vs. Njuguna* [1983] KLR 172); and *Karuntimi Raiji vs. M'makinya* [2013] eKLR.

28. So, when did the Appellants come into possession of the suit property? It was the Appellants' case that they moved into the suit property in the 1970s. It should be noted that the certificate of title issued to the Respondent shows that the Respondent's became owners of the suit parcel in 1999. As a consequence, time for computing possession would therefore have only begun to run from the date of issuance of the title.

29. The Appellants claim to have taken up occupation of the suit property prior to 1999 which was when the Respondent's title was issued. The suit comprises over 800 Appellants, and counsel for the Appellants admitted in his submission that their occupation was not simultaneous. This was buttressed by DW1, DW2 and DW3, who all stated that their occupation occurred at different times. Save for the 3 witnesses who testified, the court was not privy to evidence that showed when each of the other about 818 Appellants allegedly came to be in possession of the suit property.

30. On the other hand, the Respondent adduced evidence in the valuation reports and photographs taken at the time, which showed that the suit property was vacant and unoccupied in 2009 and 2013 when the property was surveyed and valued for purposes of a bank charge.

31. Since the evidence regarding the dates when the Appellants allegedly occupied the suit property was distinctly lacking, we find that the trial Court, and for good reason, rightly disbelieved their claims for adverse possession.



32. Furthermore, there was no evidence detailing the exact portions that the Appellants' occupied. This Court in *Kamau & 42 others vs Leonid Limited* [2023] KECA 1221 (KLR) held 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.....

The appellants were obliged to identify or describe the portions of the property they were allegedly occupying which they did not do.”

33. Notwithstanding that the Appellants argued that the Respondent's photographs of the suit property cannot be relied upon, given that they did not produce any evidence to controvert the Respondent's evidence, we find that nothing turned on their assertions. Consequently, without any evidence proving continuous and uninterrupted possession for a period of 12 years or at all, as did the trial court, we too find that nothing pointed to the Appellants having been in possession of the suit property.

34. From the foregoing, it is clear that the Appellants utterly failed to prove their claim of adverse possession to the required standards and, on this basis, we are satisfied that the trial Judge rightly allowed the Respondent's claim and dismissed the Appellants' counter claims.

35. In sum, the Appeal has no merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original Signed

DEPUTY REGISTRAR

