Thika Garissa Road Developers Limited v Mwangi & 4 others (As duly Elected Officials of Gachagi Land Committee Representing Residents of Gachagi) & 4 others (Sued as the Chairman, Secretary and Vice Chairman respectively of Thika Municipality Block 31 Welfare Group) (Civil Appeal 287 of 2019) [2023] KECA 269 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 269 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 287 OF 2019

HM OKWENGU, FA OCHIENG & JM MATIVO, JJA

MARCH 17, 2023

BETWEEN

THIKA GARISSA ROAD DEVELOPERS LIMITED ..... APPELLANT

AND

SIMON KIBE MWANGI, JOSEPH NDUNGU WAIRIMU, GEORGE KIMANI NGANGA, JOYCE WANJIRU THUO & MARY WAIRIMU MUIRURI (AS DULY ELECTED OFFICIALS OF GACHAGI LAND COMMITTEE REPRESENTING RESIDENTS OF GACHAGI) ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

THE NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 4TH RESPONDENT

COUNTY GOVERNMENT OF KIAMBU ..... 5TH RESPONDENT

SUED AS THE CHAIRMAN, SECRETARY AND VICE CHAIRMAN RESPECTIVELY OF THIKA MUNICIPALITY BLOCK 31 WELFARE GROUP

(Being an appeal from the Judgment of the Environment & Land Court of Kenya at Thika, (L. Mbugua, J.) dated 2nd May, 2019 in ELC Case No. 279 of 2017)

JUDGMENT

1. The appeal before us presents the rampant issue of squatters in Kenya. A dispute arose with regard to LR No 4953/1855 within the vicinity of Thika town measuring 15.44 hectares hereinafter, the "suit property" between the appellant, a *bona fide* allottee of government land and the 1st respondent, representatives of a community of squatters. The 2nd, 3rd, 4th and 5th respondents are Government

entities while the 6th respondent are representatives of bona fide purchasers of the suit property. They purchased the suit property from the appellant.

2. This is a matter in which parties have been litigating for over 14 years. Various suits were filed with regard to the suit property. Litigation commenced in 2005 when the appellant sued the 1st respondent in Thika C.M.C.C. 1291 of 2005. The file was transferred to the High Court in Nairobi vide Nairobi High Court cases No 263 of 2009 and 432 of 2009. The application was allowed by the court order dated August 19, 2009 and Thika CMCC 1291 of 2005 became HCCC No 447 of 2009.

3. The 1st respondent then filed JR No. 21 of 2010 against the appellant seeking orders for adverse possession on the suit property. The file was then transferred to the Environment and Land Court at Nairobi on December 5, 2012 and it was registered as ELC case No 110 of 2013. More defendants were enjoined to the suit. The originating summons was then amended to substitute the 3rd, 4th and 5th defendants with the Chief Land Registrar, the National Land Commission and the County Government of Kiambu respectively.

4. Sometime before March 14, 2017 the file was transferred from Nairobi to Thika Environment & Land Court and it became ELC case No 279 of 2017.

5. The 6th respondent filed Thika CMCC No 40 of 2016 against the 1st respondent. Particulars of the said filed could not be traced. They then filed Nairobi ELC case No 1312 of 2016 suing 10 members of the 1st respondent. The file was on February 21, 2017 transferred to Thika and became Thika ELC case No 212 of 2017.

6. At Thika, ELC Case Nos. 279 of 2017 and 212 of 2017 were consolidated. ELC No 279 of 2017 became the lead file. Nairobi HCCC No 447 of 2009 had been consolidated with JR No 21 of 2010 which became ELC No 110 of 2013 and later Thika ELC No 279 of 2017.

7. The specific orders sought by the 1st respondent in their Originating Summons were as follows:

    a. A declaration that the 1st respondent had been in continuous and uninterrupted occupation of the suit property for more than 12 years;

    b. A declaration that the 1st respondent had acquired prescriptive rights to the entire suit property;

    c. An order that the leases issued by the 5th respondent to third parties and any other such leases purportedly issued to members of the 6th respondent over the suit property were illegal, null and void and had no force of law and stand revoked;

    d. An order that the 1st respondent were entitled to be registered as owners and or proprietors of the suit property;

    e. An order directing the 2nd and 3rd respondents to issue title documents in favour of the 1st respondent in respect of the suit property;

    f. An order restraining all the respondents either by themselves, their agents, stooges, servants, officers and or any other persons and or authority connected herewith from trespassing, encroaching, selling, transferring, alienating or in any other manner interfering with the suit property; and

    g. costs of the suit.

8 A brief background of the appeal is that the appellant acquired proprietorship to the suit property on a leasehold title whose interest was to run from August 1, 1991 for a term of 99 years. The suit

property was subsequently subdivided and acquired by members of Thika Municipality Block 31 Welfare Group represented by the 6th respondent.

9. The residents of Gachagi represented by the 1st respondent claim entitlement to the suit property by way of adverse possession. They claimed to have been in occupation of the suit property for decades. The initial litigants were Francis Karatu, Geoffrey Gacheru and Wanjiru until October 26, 2018 when the 1st respondent was elected.

10. The evidence adduced on behalf of the 1st respondent was anchored on the testimonies of PW1 and PW2 who stated that they worked at Anglo French company/Kenya canners Ltd now Delmonte hereinafter, the "company" as casual labourers. In the early 1960s, the company made a decision to evict the workers who were not permanently employed and retained the permanent workers only. The 1st respondent settled in the nearby bushes and uninhabited lands due to desperation.

11. Around the year 1963/1964, the company relocated them to Makenji Area along Thika-Murang'a road. They put up a slum like settlement, but the late President Jomo Kenyatta ordered that they be settled in a suitable alternative settlement. The local administrators relocated them to Mukuru wa Muru wa Mugwe, the current Gachagi village where most of them could still access the company for casual work. They were around 40 families. The area was demarcated into half acre parcels of land. The Thika-Garissa Highway was constructed long after they had settled there.

12. The 1st respondent stated that the residents of Gichagi had lived in the area since around 1964. They had never been evicted nor had anyone laid claim against their occupancy Most people who migrated have since died and it is their children and grandchildren who occupy their parcels. They have never had disputes amongst themselves or with their neighbours. They have been farming and cultivating on the land. They did not follow up on titles due to poverty. They urged the court to order that they get title deeds in respect of the parcels that they occupy.

13. PW3 was born in Gachagi village in 1978. He and his family live at his grandmother's homestead. They do not experience disputes due to the clearly demarcated half an acre portions of land.

14. In response, the appellant's case was that it became a grantee of the suit property on June 14, 1993 and acquired the rights, interests and privileges appurtenant thereto, and that prior to the date aforesaid, the suit property was government land. DW1 faulted the 1st respondent's statements as false and misleading when they stated that they had been in possession of the suit property since 1964. That there was no evidence to support the 1st respondent's claim that the suit property belonged to the company.

15. DWI asserted that the issue of adverse possession could not arise since the 1st respondent claimed to be bonafide owners through donation. That the 1st respondent trespassed and settled on the suit property between January 2001 and 2004. This necessitated the filing of Thika CMCC No 1291 of 2005. He urged that the 1st respondent's claim be dismissed with costs for being baseless and unmeritorious.

16. He stated that the eviction suit filed was in respect of just a small area which had been taken by some people. That they have since subdivided the suit property amongst their members. The appellant also sold a portion of the suit property in form of 250 plots as Block 31 to the 6th respondent who have been in occupation.

17. In response, the 2nd, 3rd and 4th respondent's case through the Land Registrar was that he had records of Thika Municipality Block 31 starting from plot No 1 to 375. He stated that item 2 in the 1st respondent's list was a Certificate of Lease which they had in their records for plot no. 142 in the name of Joseph Nganga Murega issued on August 8, 2013. He had a certified copy of the register and produced a white card for plot No 142; a certificate of lease for plot No 153 in the name of Joseph

Nganga Murega issued on January 8, 2013, a certificate of lease for parcel No 132 in the name of Peter John Mwangi, Joseph Nganga Murega and Elizabeth Njeri Mwangi as trustees of Kanda Warile Investments issued on July 13, 2001; and a certificate of lease for plot No 230 in the name of Kennedy Gathogo Karuru issued on December 8, 2015

18. The Land Registrar further stated that item 1 of the 1st respondent's list showed that the headquarter in Nairobi had active records. That ideally in case of change of user or conversion, the records in the headquarter have to be closed giving way to opening of records in the district registries but parallel records in two registries cannot be maintained. Given that one of the lease was a surrender, it ought to have been noted at the headquarters and if there was a surrender, there should be no records in Nairobi headquarters.

19. No evidence was tendered for the 6th respondent.

20. In her judgment, the learned judge having heard oral arguments and submissions by parties identified the issues for determination as follows:

    a. Whether the claimants in ELC 279/17 (Gachagi Group) are entitled to the suit land LR No 4953/1855 or its subdivisions thereof by way of adverse possession.

    b. Whether the claimants in the suit Thika CMCC No1291/2005 (Thika Garissa group) are entitled to orders of eviction of the Gachagi group members.

    c. What orders should be given.

21. The learned Judge found inter alia that all the parties were in agreement that a party claiming land through adverse possession must prove that the possession of the land was without permission of the owner.

22. That Section 17 of the *Limitation of Actions Atc* on prescriptive rights 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".

23. The Learned Judge noted that the prayer in Thika CMCC No 1291 of 2005 was for the eviction of the 1st respondent and as such proof that the 1st respondent was in possession of the suit property. That while being cross- examined, DW1 stated that their group did not want to mix with the 1st respondent as that could cause chaos.

24. The Learned Judge pointed out that the 1st respondent in their pleadings averred that the suit property had been allocated to them by the company as a token of appreciation. This was exhibited by the letter dated March 20, 2001 requesting the CEO of the company to declare that the suit property had indeed been donated to its former employees as a token of appreciation. The court noted that if indeed it was the company which donated the suit property, there would have been no need for the company to be beseeched to make this declaration. Further, there was no document indicating that the suit property ever belonged to the company and as such the 1st respondent had no permission from the company or anyone else to occupy the suit property.

25. On when the 1st respondent took possession of the suit property, the court noted that the suit property existed long before 2001 when the appellant claimed they had taken possession. The court had the occasion to see PW1 and PW2 who were elderly testify and the corroboration of the said evidence by the paper trail of a list of landless people and helpless squatters with PW1's name in it.

26. That the letter by the MP acknowledged the existence of the suit property before 2001. The court therefore concluded that the 1st respondent had been in occupation of the suit property long before the issuance of the lease certificate to the appellant.

27. That in their suit, the appellant indicated that between 2001 to 2004 the defendants therein who were not members of the 1st respondent had trespassed on the suit property. The court noted that the 1st respondent was consistent in their claim that they had been in occupation of the suit land for a very long time, long before the appellant came into the picture in the 1990s.

28. Under Section 37 of the Law of *Limitation of Actions Act*, the claim for adverse possession runs in respect of land registered under the Acts mentioned therein. The 1st respondent claimed that adverse possession could be claimed on leasehold interest and as such they in essence acquired the suit property for the unexpired period of the lease on the land already alienated for private use and was no longer public land.

29. The leasehold interest in the suit property came into effect on 1st August, 1991 when it was registered under the *Registration of Titles Act*. The land was public land before this period and hence not available to be claimed under adverse possession.

30. While making reference to the cases of *Kweyu v Omutut* [1990] KLR 709; Chevron (K) Ltd (formerly known as Caltex oil Kenya Ltd v Harrison Charo wa Shutu, Civil Appeal No 17 of 2016; and Titus Kigaro Munyi v Peter Mburu Kimani, Civil appeal No 28 of 2014 the court noted that there was no certainty as to when counting for adverse possession began before 1991. According to the appellant, time for adverse possession could only start running from 4th June,1993 when the appellant became a grantee of the suit property and the 1st respondent's claim would not have matured by 2005 when the Thika CMCC No 1291 of 2005 suit was filed.

31. To answer the question as to whether a claimant can only claim adverse possession in respect of registered land, the court made reference to the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees*, Civil Appeal No 121 of 2006 in making a finding that the leasehold interest was to run from 1st August, 1991 which was the date of registration of the suit property. That after the government allocated the land to appellant through the leasehold interest, the government divested itself of interest in the suit property and the appellant became the owner. Therefore, time started to run from August 1, 1991 and by the time the eviction suit was filed in 2005 the statutory period of 12 years had already matured on August 1, 2003. The suit by the 1st defendant did not interrupt the relevant period of prescriptive rights.

32. As regards occupation of the suit property, the court noted that the 1st respondent was in occupation. Photographs of the area showing the nature of occupation of the suit land were availed.

33. The court further held that the intention to possess must be manifestly clear, so that it is apparent that the squatter was not merely a persistent trespasser but was seeking to dispossess the true owner of the land. That it was clear in this suit that the intention of the 1st respondent was always to possess the suit property to the exclusion of the owners.

34. The court made the final finding that the 1st respondent had met the criteria required to succeed in a claim of adverse possession.

35. On eviction, the court held that the suit by the appellant came late in the day and the 1st respondent had already become entitled to the suit property by adverse possession. As such, the prayer for eviction failed.

36. The learned judge therefore made orders as follows:

> "a) a declaration that the 1st respondent had acquired prescriptive rights to the entire suit property;
>
> b. an order to the effect that the lease(s) issued to appellant and any other such leases purportedly issued to third parties or to members of the 6th respondent over the suit property be cancelled;
>
> c. an order to the effect that the 1st respondent was entitled to be registered as proprietors of the suit property for the remainder of the leasehold interest;
>
> d. an order directing the 2nd respondent to issue leasehold title documents in favour of the 1st respondent in respect of the suit property, whereby the parcel is to be subdivided amongst the members of this group;
>
> e. an order restraining the appellant and all the respondents either by themselves, their agents, servants, officers and or any other persons and or authority connected herewith from trespassing, encroaching, selling, transferring, alienating or in any other manner interfering with the suit property; and
>
> f. an order directing each party to bear their own costs."

37. Dissatisfied with the impugned judgment, the appellant has moved this Court seeking to set aside the judgment by the trial court. In its Memorandum of Appeal, the appellant raised 17 grounds. The grounds were later compressed into six to wit: the learned Judge erred in fact and in law in;

a. failing to evaluate the evidence and in making a finding that the 1st respondent had established a case for adverse possession thereby occasioning a miscarriage of justice;

b. failing to establish the issue of whether the 1st respondent had acquired the suit property by way of gift from the company;

c. entertaining the 1st respondent's suit in its present form contrary to the provisions of Order 1 Rules 8 and 13 of the *Civil Procedure Code* and in failing to determine the legal capacity of the 1st respondent;

d. failing to identify the specific persons on the suit property and making a general order contrary to the law;

e. failing to hold that the evidence by the 1st respondent's witnesses was inconsistent with the pleadings; and

f. finding that the 1st respondent was entitled to the whole of the suit property.

38. At the hearing of the appeal, Mr Mbuthi Gathenji and Mr Muturi Njoroge appeared for the appellant. Mr Moses Tumu and Mr Nguima appeared for the 1st respondent. Ms. Kerubo appeared for the 2nd and 4th respondents while Mr Ndegwa Wokabi appeared for the 6th respondent. Counsel relied on their written submissions which they briefly highlighted.

39. The appellant submitted that for the 1st respondent to succeed in a claim for adverse possession, it must be proved that they were in possession of the suit property, for a sufficient length of time and of a sufficiently defined area. That a large group can acquire property by adverse possession.

40. The appellant stated that the trial court in determining whether the 1st respondent had been in occupation of the suit property for 12 years failed to take into account that in their pleadings, the 1st respondent had stated that the suit property was registered in the name of the company which was donated to them while PW1 and PW2 stated that the suit property was given to them by the late President Jomo Kenyatta through a roadside declaration. This information was inconsistent.

41. The appellant maintained that the 1st respondent entered the suit property between 2001 and 2004. It faulted the learned Judge for holding that the 1st respondent had been on the suit property long before the appellant came into the picture and failed to make a finding as to exactly when the entry was made. That the trial court relied on the testimony of two witnesses who could not recall when they entered the suit property and the list of landless people which did not show that they were settled on the suit property. That the second list stated that the landless people would be settled at Ngambo estate and not the suit property.

42. The appellant further stated that PW1 was in the 1974 list of landless people which meant that she was still landless contrary to her testimony on cross- examination that they entered the suit property before independence.

43. The appellant faulted the court's reliance on a letter written on March 20, 2001 stating that the letter did not make it clear when the settlement began but only served to corroborate DW1's assertions that the 1st respondent entered the suit property in 2001. That there was no nexus between the letter and occupation of the suit property by the 1st respondent or the issuance of the certificate of lease to the appellant. That the letter was seeking clarification as to who the registered owners of the suit property were.

44. The appellant maintained that it was consistent in the many suits that the encroachment began in January 2001. The appellant faulted the trial court for relying on conjecture, assumptions and hearsay evidence of 1st respondent's witnesses and thereby occasioned a miscarriage of justice.

45. The appellant further faulted the trial court for being biased and failing to take into consideration the weight of the evidence that the 1st respondent entered the suit property between 2001 and 2004. That the court found the allegations in the defence to be evidence of entry into the suit property in the 1990s.

46. The appellant further stated that the 1st respondent had failed to identify the location of any specific and distinct portions of the suit property they occupied or were entitled to by virtue of adverse possession. They therefore, failed to establish that they had stayed on the suit property for 12 years or more, in exclusive possession of any definite distinct and ascertainable land. To buttress this submission, the appellant relied on the case of *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 Others* [2004] eKLR.

47. The appellant submitted that the memo from the company dated June 7, 2001 indicated that the suit property did not belong to them. The averment that the 1st respondent acquired title by way of gift removed them from adversity as they identified the source of their title hence a transmission by a donor. The trial court held that the 1st respondent did not have permission of the company or anyone else to occupy the suit property.

48. The appellant further stated that parties are bound by their pleadings. The 1st respondent pleaded that they were gifted the suit property by the company and therefore, they cannot succeed in a claim for adverse possession. That there was no wrongful disposition of the rightful owner as held in the case of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR.

49. The appellant submitted that Order 1 Rule 8 gives parties power to institute or defend a suit in a representative capacity while Rule 13 makes it mandatory for a party acting in a representative capacity to file an authority in writing signed by the party giving it authority to act.

50. The appellant contended that no written authority was given to the 1st respondent to act on their behalf. That in the minutes dated October 25, 2018 no minute gave the 1st respondent authority to represent them in court or swear affidavits on their behalf. The appellant stated that it was entitled to be served with the written authority to act in order to get an opportunity to inspect its admissibility. To buttress this submission, the appellant relied on the decision in the case of *Ithenguri Mwireri Women Group v Virginia Wanjiku Kamundia* [2017] eKLR.

51. The appellant further contended that a court cannot issue an order in favour of unknown or unidentified persons. That for one to succeed in a claim for adverse possession, identification of the adverse possessor was key. That it was not clear whether the 1st respondent represented the initial 40 families or the 130 adults. In response to the appellant's suit before the magistrate court, the 1st respondent had listed 36 individuals as members of Gachagi. The appellant referred to the cases of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 Others* [2018] eKLR; *Samuel Katana Nzunga & 102 Others v Salim Abdalla Bakshwein & Another* [2013] eKLR; and *John Ntoiti Mugambi, Emily Mutua K & Isaiah Mwiti Mungathia Officials of the Isiolo Stage View Enterprises C.B.O (Acting In The Interest of its Members) v Isiolo County Government & 2 others; Elijah K. lkuamba & 20 Others (Interested Parties)* [2019] eKLR in support of this submission.

52. The appellant contended that the 40 families each occupied half acre of 20 acres of the suit property. That according to the evidence of PW3, he had settled on his grandmother's half acre and they had no conflicts amongst themselves. The appellant therefore, faulted the learned Judge awarding the entire suit property measuring 38 acres to the 1st respondent without determining the specific location occupied by the 1st respondent.

53. The appellant submitted that the appeal be allowed; a consequential order of eviction of the members of the 1st respondent be issued; and the OCS Thika Makongeni police station ordered to ensure compliance.

54. Opposing the appeal, the 1st respondent submitted that the appellant had acquired the suit property measuring approximately 15.44 hectares. That prior to the suit herein the suit property was subdivided and changed its character and description to Thika Municipality block 31/1-250. The 250 plots were transferred to members of the 6th respondent but the certificate of lease remained active.

55. The 1st respondent stated that their members had settled on the suit property since the 1960's before allotment to individual entities in 1991. That despite the alienation, members of the 1st respondent continued to stay on the suit property to the exclusion of everyone else.

56. The 1st respondent submitted that the appellant made several complaints to the provincial administration about the members of the 1st respondent's occupation of the suit property before they filed the eviction suit.

57. The 1st respondent questioned why Nelson Ndaru testified as the secretary of the appellant and cosigned as a director the letter authorizing the appointment of the advocates to represent the appellant in the appeal. They contended that the appellant was not aggrieved having ceased to have any legal or proprietary interest in the suit property as the suit property had since changed character.

58. The 1st respondent submitted that they were mistaken to think that the suit property belonged to the company since it was adjacent to the company land. That the suit property was government land until 1991 when it was allotted to the appellant. That Gachagi area had many names including Mukuru wa Muru wa Murugwe and Ngambo estate.

59. That the letter by the area MP sought to know who the registered owners of the suit property were as the said registration had been shrouded in mystery and fraud by the appellant. The letter confirmed that the 1st respondent had long settled on the suit property. That the 1st respondent had proved with near precision that they occupied and utilized the whole of suit property as the letter further exhibited that the appellant sought to have the 1st respondent relocated to Ndeiya. Further, the 6th respondent had sued the 1st respondent seeking to evict them from the suit property.

60. They further argued that whether the 1st respondent acquired the suit property as a gift was a non-issue as the same was extinguished when the suit property was alienated in 1991. That the learned Judge was correct in finding that the 1st respondent had acquired the suit property by adverse possession.

61. They maintained that they were given authority as their leaders. That it was the trial court which gave directions on the election of proper representative. That by holding and electing their preferred leaders, they were agreeable to be bound. They relied on the case of *Lucy Miriko Matiri & 2 Others v Shadrack Muriungi Marete & Another* [2020] eKLR to buttress this submission. That the members of the 1st respondent filed their written authority in the Originating Summons.

62. The 1st respondent further submitted that they occupied the entire suit property and their beneficiaries were well known. That the 1st respondent was representing the 40 families and their new generations. That the titles would go to the 131 adults and the two witnesses.

63. They maintained that there were no inconsistencies and that the issue of donation was a mistake. That the rest of the suit property was used for farming, public utilities and sand harvesting. They contended that the issue of acreage did not arise before the trial court.

64. The 1st respondent stated that they would be occasioned misery of untold proportions in the event that judgment is overturned. That all the essential ingredients of adverse possession have been satisfied. They urged the court to uphold the judgement of the trial court and dismiss the present appeal with costs.

65. The 2nd, 4th and 6th respondents were in support of the appeal. There were no submissions by the 3rd and 5th respondents.

66. The 2nd and 4th respondents submitted that under Section 41 of the *Limitation of Actions Act*, one cannot acquire title by adverse possession to government land or land otherwise enjoyed by the government. That government land would presumably fall under the definition of public land in light of Article 62 of *the Constitution*.

67. Relying on the case of *Sammy Mwangangi & 10 Others v Commissioner of Lands & 3 Others* [2018] eKLR, they maintained that the 1st respondent entered the suit property when it was un-alienated government land under the Registration of Titles Act (Now repealed) and therefore the doctrine of adverse possession could not apply. They faulted the learned Judge for holding that the 1st respondent had proved a claim for adverse possession.

68. This being a first appeal, it is our duty to re-evaluate the evidence tendered before the trial court and come up with our own findings and conclusions. In the case of *Abok James Odera & Associates v John*

Patrick Machira t/a Machira & Co. Advocates [2013] eKLR the court restated this requirement as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re- assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited* (2000) 2EA 212 wherein the Court of Appeal held, *inter alia*, that: - "On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind 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."

69. We have carefully and anxiously considered the record of appeal, the grounds thereof, the judgment of the High Court, the rival written submissions and the law. The issues for determination are to wit;

    a. whether the appellant's eviction suit was time barred;

    b. whether the 1st respondent had been in possession of the suit property for more than 12 years and the doctrine of adverse possession established;

    c. whether the 1st respondent acquired the suit property as a gift from the company;

    d. whether the 1st respondent identified the specific people entitled to the suit property;

    e. whether the evidence adduced by the 1st respondent was inconsistent; and

    f. whether the 1st respondent was entitled to the entire suit property by adverse possession.

70. Article 40 as read with Article 64 of *the Constitution* allows citizens to acquire and own property classified as private land, through a freehold or a leasehold tenure. Article 65 on the other hand allows non-citizens to acquire and own property classified as private land, through a leasehold tenure. However, one can also acquire private land through the doctrine of adverse possession.

71. The appellant contended that the trial court erred in finding that the 1st respondent was in adverse possession of the suit property for the statutory period of 12 years. The 1st respondent contended that they had been in possession of the suit property and that neither the appellant nor the 6th respondent had taken possession of the suit property.

72. The *Black's Law Dictionary*, Ninth Edition defines "adverse possession" thus:

> "1. The enjoyment of real property with a claim of right when the enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.
>
> 2. The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specific period of time."

73. It is trite that the phrase; "adverse possession" has a restricted legal meaning. It does not mean that every person in possession of land belonging to another for the statutory period is automatically entitled to the land by adverse possession. The law prohibits a person to unlawfully occupy private, community, or public land and gives a right to the owner to evict such person and also stipulates the procedure for such eviction.

74. In the case of *Elphas Cosmas Nyambaka v Charles Angucho Suchia*[2020] eKLR, this court held 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 period of 12 years or more. The process spirals into action fundamentally by default or inaction on the part of the registered owner of the parcel of land. The essential requirements being that the possession of the adverse possessor is neither by force or secrecy nor 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 registered owner." Emphasis ours.

75. Section 13 of the *Limitations of Actions Act* states that:

> "(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."

76. It is common ground that the appellant became the registered proprietor of the suit property on August 1, 1991 when it was allotted the suit property and issued with a 99-year certificate of lease by the Commissioner of Lands. The 1st respondent claimed that its members had constructed houses, were farming, harvesting sand and had public utilities on the suit property since it was gifted to them by the company in 1964 and that they were settled there by the government.

77. It is also common ground that the 1st respondent were in possession of the suit property long before the appellant became the registered owner in 1991, and that they continued in possession thereafter. The question is whether by the time the appellant filed the suit against the 1st respondent this right was still subsisting. Section 7 of the *Limitations of Actions Act* states:

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

78. It is not in dispute that to date, members of the 1st respondent are in occupation of part of the suit property. The legal issue is whether the 1st respondent's occupation has been adverse to the appellant who is the registered proprietor of the suit property.

79. Section 38(1) of the *Limitation of Actions Act* 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."

80. In the case of *Mate Gitabi v Jane Kabubu Muga & Others*, Civil Appeal No 43 of 2015 (unreported) the court held:

> " 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 secrecy, without force, and without license or permission of the land owner, with the intention to have the land."

81. It follows therefore, that there must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario. The burden was upon the 1st respondent to prove that they had been in exclusive possession of the suit property openly and as of right without interruption for a period of 12 years either after dispossessing the appellant or by discontinuation of possession by the appellant on its own volition". (See also: *Kasuve v Mwaani Investments Limited & 4 Others* 1 KLR 184).

82. The law and requirements for adverse possession was reiterated in the case of *Mbira v Gachuhi* [2002] IEALR 137 where it was held 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...."

83. Similarly, in the case of *Wambugu v Njuguna* [1983] KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is 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 or she has been in possession for the requisite number of years.

84. A person who claims adverse possession must *inter alia* show: on what date he came into possession, what was the nature of his possession, whether the fact of his possession was known to the other party, for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years.

85. In the instant appeal, the 1st respondent in their pleadings claimed that the suit property was gifted and or donated to them by the company as a token of appreciation as former employees. This position was changed when PW1 and PW2 testified to the effect that they were relocated on the suit property from Makenji area by the government in 1964. In their submissions, the 1st respondent contend that it was a mistake on their part to claim the suit property was a gift.

86. Be that as it may, the 1st respondent's entry into the suit property was by permission. The permission was either by the company or by the government. It is evident from the record that if the suit property was not transmitted to the 1st respondent, it was un-alienated government land and as such the 1st respondent could not claim adverse possession over the same until August 1, 1991 when the appellant became the registered proprietor.

87. Section 41 of the *Limitation of Actions Act* stipulates that, adverse possession could not have accrued against government land or land enjoyed by the government. The 1st respondent could not have been in lawful possession of the suit property before the registration of the appellant as a proprietor.

88. We are satisfied from the evidence on record that, by building structures,farming and even harvesting sand on the suit property without obtaining permission from the appellant the 1st respondent

manifested animus possidendi, a clear mind and intention of dealing with the suit property as if it was exclusively theirs and in a manner that was in clear conflict with the appellant's rights. The appellant was, as such dispossessed of the suit premises by those acts. The 1st respondent's acts were not by force, nor secretly and were without permission.

89. It is not in dispute that up until 1991 the 1st respondent occupied 20 acres of the suit property with permission from the government as determined earlier on in this judgment. We are of the view that from the evidence on record, in each of these years, the 1st respondent was in actual and or constructive possession of the suit property; that the possession by the 1st respondent was open, uninterrupted and based on a claim of right and or occupation. Therefore, if adverse possession is computed from the year 1991, as at the time of filing the eviction suit in 2005, 12 years had lapsed and the 1st respondent's right and claim based on adverse possession had arisen, accrued and vested.

90. Our analysis and appreciation of the facts established on the record leads us to the inevitable conclusion that the learned Judge did not err in finding that the 12-year period for adverse possession had been proved.

91. The appellant ought to have exercised due diligence at the time it acquired the suit property by inspecting it. The manner it dealt with the acquisition was evidently contrary to the policy not to acquire land occupied by squatters or one with a dispute. As this court stated in *Mweu v Kiu Ranching & Farming Co-operative Society Ltd*. [1985] KLR 430:

> " Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it."

92. From the foregoing, we find that the appeal must fail on the following grounds:

    a. A right of action for eviction arose in favour of the appellant against the 1st respondent from the time the appellant acquired the suit property. However, at the time of institution the eviction suit in 2005, the appellant's title to the suit property had been extinguished by virtue of Section 7 of the *Limitation of Actions Act*;

    b. The 1st respondent was in continued occupation of the suit property after it was allotted to the appellant for a period of more than 12 years without the appellant's permission. They proved adverse possession;

    c. The 1st respondent did not acquire the suit property as a gift from the company, it was government land which was later allotted to the appellant;

    d. The specific people entitled to the suit property are the first 40 families who occupied the suit property and their generations;

    e. The inconsistencies in facts were immaterial to the outcome of this case; and

    f. The 1st respondent had proved on a balance of probabilities that they were entitled 20 acres of the suit property by adverse possession.

93. Consequently, the appeal is dismissed and the judgment of the trial court upheld save that the orders will only apply to the 20 acres occupied by the 1st respondent. Each party to bear their own costs.

    Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL