



REPUBLIC OF KENYA



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**Ndolo v Kitutu & 8 others (Civil Appeal 394 of 2018)  
[2022] KECA 1289 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1289 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 394 OF 2018  
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**ELIZABETH KAMENE NDOLO ..... APPELLANT**

**AND**

**MUEMA KITUTU ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL MUSINGA ..... 2<sup>ND</sup> RESPONDENT**

**EMILY MWEU GATUGUTA ..... 3<sup>RD</sup> RESPONDENT**

**MARIA MUTISO ..... 4<sup>TH</sup> RESPONDENT**

**MATHEW KYEVA MUTETI ..... 5<sup>TH</sup> RESPONDENT**

**PETER KALELI KANYASA ..... 6<sup>TH</sup> RESPONDENT**

**SAMUEL KYALO MUNYAE ..... 7<sup>TH</sup> RESPONDENT**

**JACKSON MUSYOKA KAKUNZU ..... 8<sup>TH</sup> RESPONDENT**

**DAVID MUSEMBEI KATIE ..... 9<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Environment and Land Court (H, Mbigi J) dated 19th March 2018 in Makeni ELC Case No. 233 of 2017 to 241 of 2017)*

**JUDGMENT**

1 We would not hesitate to rehash the lamentations of Gicheru, Omolo & Tunoi, JJA on May 10, 1996 in Civil Appeal No 128 of 1995 pitying the appellant and George Matata Ndolo and which we hope this judgment will put to final rest. They stated:

' That would have been the end of the matter before us, but we were



- 2 Asked or authorized by Counsel on both sides to finally determine the dispute without referring it back to the High court, we think we should do so and put an end to this very unfortunate wrangling.'
- 3 Indeed, the estate of late Major General Joseph Musyimi Lele Ndolo has never exited the corridors of justice since 1985 upon his demise in 1984 with the first salvo being about the distribution of his estate among the widows. Now, we have now third parties, the respondents herein claiming ownership of a portion of his land through adverse possession in yet one of the several suits touching on the estate of the deceased.
- 4 The genesis of this protracted litigation as gleaned from the record is that the late Major General Joseph Musyimi Lele Ndolo a renowned name in Kenya, having served as the Chief of the General staff of the Armed Forces of the Republic of Kenya was married to the appellant and two other wives. Upon his demise, there was contestation about his estate and the same was decided with finality by this Court in 1995, (as no further appeal lay then, this Court having been the highest court in the land then). It was determined that the three wives, the appellant, Alice Katiwa Musyimi and Rose Mutinda Musyimi get a share of the estate in the ratio of 40:30:30 respectively. The Court was very specific as to what that ratio related to, being land parcel Numbers. LR 1756 & 1757 Sultan Hamud popularly known as Mawani Farm, ('the suit property'). The land measured approximately 9,000 acres although 1000 acres had been sold earlier as confirmed in the judgment of this court in the cited case thus leaving 8000 acres. From the record, one Jerome Kaumbulu claimed to have bought and or acquired 3000 acres out of the suit property from the deceased.
- 5 It is these 3000 acres that were the basis of the several suits filed by the respondents against the appellant before the Environment and Land Court ('the ELC') by way of originating summons being ELC Numbers 233-241 all of 2017 praying that the court direct that each and every respondent be registered as the proprietors of their respective acreages of land as per each summons from the suit property on account of adverse possession. They further prayed for an order of permanent injunction against the appellant and or her agents or servants from trespassing into, alienating, or in any manner whatsoever interfering with their quiet enjoyment of their respective parcels of land, and lastly, that the Registrar of Titles be ordered to excise each of the respondents' parcels out of the suit property and the same be transferred to the respective respondents as per their acreage.
- 6 The respondents' case as presented by the 1<sup>st</sup> to 3<sup>rd</sup> respondents respectively cumulatively, hinged on the application of the doctrine of adverse possession. They claimed to have been in occupation of their respective parcels of land for various periods of times but all in excess of 12 years. The 1<sup>st</sup> respondent claimed 40 acres which he had occupied since 1992, the 2<sup>nd</sup> respondent, claimed 52.07 acres and had been in occupation since 1991. The 3<sup>rd</sup> respondent claimed 4.297 acres bought in 1989. The 5<sup>th</sup> respondent claimed to have occupied his 9.7 acres from 1989. The 6<sup>th</sup> respondent in his pleadings claimed to have purchased, settled and developed 8.67 acres from 1989 while the 7<sup>th</sup> respondent claimed 20 acres which he had occupied since 1989 upon purchase. The 8<sup>th</sup> and 9<sup>th</sup> respondents claimed 30 acres and 10 acres respectively which they had settled on and occupied upon purchase in 1989 and 1991 respectively.
- 7 It was their evidence that their entry and stay on the said parcels of land had been with the full knowledge of the appellant, hostile, and uninterrupted by either the appellant and or her agents. The story line as to how the respondents got into the suit property was generally that one, Jerome Mwathi Kaumbulu 'Jerome' had represented to all of them as the beneficial owner of a parcel of land comprised in the larger suit property measuring 3000 acres which said land was a sub-division of the suit property which at the time of the purported sale was registered in the name of the deceased who prior to his death had sold the aforesaid acreage to Jerome's late father one, Jesiah Salvin Kaumbulu.



- 8 That it was on this understanding that each of the respondents purchased their parcels aforesaid and settled and or occupied them. That they sued the appellant as a widow of the late General Ndolo following a judgment of this Court in Civil Appeal No 128 of 1995 [supra] where the appellant was vested with 900 acres which included the respondents' parcels of land aforesaid. That they had in the premises acquired title to their various parcels of land by way of adverse possession having been in occupation in excess 12 years of statutory limitation and were thus entitled to be registered as proprietors thereof under the law.
- 9 The appellant's case was that the purported vendor was not the registered proprietor of the suit property. That Jerome the purported vendor was not connected in any way with the estate of her deceased. Further, even if he was, he had not obtained letters of representation from the court to legalize his actions. That despite their knowledge of the existing court litigation in the Succession Cause No 106 of 1985 [supra], the respondents did not at all make any claim against the estate. That the claim of ownership by adverse possession was a mistake as there was no suit property for alienation, and the said vendor was incapable of conveying any interest in the suit property; and that there had been no continuous and uninterrupted occupation of the suit property as claimed for a period exceeding 12 years. This was because there had been several meetings and court cases hence interrupting the running of time as a requirement. The appellant was categorical that a consent order had been entered on January 18, 1981 between the appellant and Kaumbulu that saw Kaumbulu get 3000 acres of land and which effectuated the land sale agreement between her husband and Kaumbulu, after the said Kaumbulu had sued her in the High court at Nairobi HCCC No 5041 of 1988. It was her evidence that she had seen the respondents on the suit property, and that they were her neighbours, although she never inquired as to how they had occupied a portion of suit property nor could she tell for how long they had occupied or stayed on the same.
- 10 After considering the pleadings and the evidence tendered by the parties, the trial court framed the issues for determination as whether: the respondents had been in occupation of the suit property for a period in excess of 12 years; the respondents had acquired registerable interest in respect of each of their respective parcels of land and whether or not the respondents were entitled to peacefully use and enjoy their respective portions of suit property without interference by the appellant, her agents and or servants. The trial court resolved all the above issues in favour of the respondents and therefore allowed the respondents' claims against the appellant.
- 11 Aggrieved by the judgment and decree aforesaid, the appellant filed this appeal on eight grounds to wit; that the trial court erred in law and in fact in: not appreciating, and accordingly misapplying, the doctrine of adverse possession; holding that the entry by the respondents into their respective portions was hostile when in fact it was pursuant to sale agreements between them and third parties, namely, Josiah Salvin Kaumbulu and Jerome Kaumbulu who had no title to the suit property; in holding that time effectively started running against the appellant on October 4, 1996 when the appellant became registered proprietor of the suit property; in failing to appreciate that the continuous occupation by the respondents was interrupted when the appellant challenged their hostile occupation by calling for a meeting to discuss their occupation in 2006; in failing to appreciate and hold that the respondents' continuous occupation of their respective parcels of land was interrupted when the appellant filed ELC No 226 of 2014 - Elizabeth K Ndolo vs Muema Kitulu & 84 Others; in granting judgment for each of the respondents when they had not been in hostile possession of their respective portions for periods in excess of twelve(12) years as required by the provisions of section 7 of the *Limitation of Actions Act*; in failing to hold that the respondents' right to claim interest in their respective parcels pursuant to the agreements with the Kaumbulus lapsed on or about July 19, 2003, being twelve years after the parties recorded a consent order in HCCC No 5041 of 1998- Estate of Josiah Salvin Kaumbulu vs Estate of



- Major (Retired) Joseph Musyimi Lele Ndolo when their right to enforce the said judgment expired by dint of the provisions of section 4(4) of the *Limitation of Actions Act*; in placing a lot of reliance on the decision of Mutungi, J ELC No 226 of 2014 when the issues in that suit were totally different from the issues in the instant suit and in any event a full trial was not held so as to arrive at a conclusive decision on its merits.
- 12 Parties in the appeal filed written submissions in support of their respective positions. When the appeal came up for a virtual hearing on the July 25, 2022, parties opted to rely on them with limited oral highlights. The appellant submitted that the trial court erred in finding that the entry by the respondents in the suit property was hostile to the appellant's title, yet the respondent's entry was based on a sale agreement between them and Kaumbulu. It follows then that the respondents were bound by the terms of the contract as the said agreements according to the testimony of the respondents in court had provisions for breaches by any of the parties but they never sought to enforce the same. The appellant submitted that the respondents were at liberty to enforce the consent judgment entered on the July 19, 1991 within 12 years which was not done and it is on this basis that the trial court erred in not finding that during the subsistence of the consent judgment, the estate of Kaumbulu and the respondents possessed the respective parcels of the suit property with permission or license of the appellant and that the said possession was not hostile until the lapse of 12 years after July 19, 2003.
  - 13 That by virtue of the existence of sale agreements, entry into the suit property by both Jerome and the respondents was not hostile. Further, that Jerome was on the suit property with the consent of the owner of the suit property. While citing the writings of Prof Tom Ojienda in his book principles of conveyancing Hand Book, Law Africa Vol 11 at Page 97, the appellant submitted that until the license is determined, the occupation cannot be said to be adverse. The appellant buttressed this position by citing the case of *Jacob Mwanto Wangora vs Mary Waruga Wokabi & Others [2018] eKLR* for the proposition that section 13 of the Limitations of Actions Act applies to purchasers of land and that when one claims to be a purchaser, cannot again claim adverse possession. That this is the position that was equally taken by this Court in the case of *Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR*.
  - 14 On the issue as to when time started running, the appellant submitted that at some point, time stopped running on three occasions being when HCCC No 5041 of 1988 was filed, when the consent was entered and adopted by the court, and lastly, when equitable estoppel doctrine is invoked. That the respondents were estopped pleading adverse possession as they were purchasers and had gained entry into the suit property with the consent or permission of the vendor. While citing the case of *Gabriel Mbui vs Mukindia Maranya [1993] eKLR*, the appellant submitted that adverse possession is only available where the party claims to have obtained entry without buying or paying for the land and doing so without the licence of the owner and consciously intending to exclude all persons from the land.
  - 15 That time started running for purposes of adverse possession on July 19, 2003 and not October 4, 1996 as held by the trial court due to the existence of the consent judgment which had created a binding legal relationship between the appellant and the estate of the late Kaumbulu. As to whether the respondents had proved the key ingredients of adverse possession in particular the twelve (12)-year uninterrupted stay and the mode of entry onto the land, the appellant whilst relying on the case of *Kuria Kiarie and 2 Others vs Sammy Magera [2018] eKLR* and *Joseph Gachuki Kiritu vs Lawrence Munyambu Kabura [1996] eKLR*, submitted that the threshold had not been met.
  - 16 The appellant in her supplementary submissions submitted that the appeal should not be struck out for being filed out of time as submitted by the respondents as no application to strike it out was made as contemplated by rule 84 of the Court of Appeal Rules. She relied on the cases of Joyce Bochere



Nyamwanga vs Jemima Nyaboke Nyamweya & Another [2016] eKLR and [Municipal Council of Maroko vs Aristocrats Concrete Company \[2015\] eKLR](#) for this proposition.

- 17 As to the missing documents in the record of appeal being the appellant's letter bespeaking certified copies of the proceedings and the letter from the Deputy Registrar informing the appellant that the proceedings were ready for collection, the appellant submitted that her new counsel had taken over the file from the firm of M/s PC Onduso & Company. That the said law firm had all the documents prior but the same had not been released to her new law firm when it took over the matter. That the court should be guided by the provisions of Article 159 of the [Constitution](#) and allow the appeal to be heard on merit rather than having the same struck out on account of failure of some documents being placed in the record. She placed reliance on the Supreme Court cases of [Lemanken Aramat vs. Harun Meitamei Lempanka & 2 Others \[2014\] eKLR](#) and [Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others \[2015\] eKLR](#) for the proposition that justice should not be sacrificed at the expense or alter of strict adherence to procedural law and or technicality.
- 18 Countering the appeal, the respondents submitted that they had indeed been in occupation of their respective parcels of the suit property for an uninterrupted period of over 30 years which fact had been confirmed in ELC No 226 of 2014, Elizabeth Ndolo vs Mwema Kitulu and 84 Others and HCCC No 2104 of 1999 Mwaani Enterprises Ltd vs Margaret Kyalo & Another (both unreported) and in line with section 7 of the [Limitation of Actions Act](#) at the expiration of the 12-year period, the proprietor's title was extinguished by the operation of the law and by virtue of section 38 of the same Act, they were entitled to apply to the High Court to be registered as the proprietors of those parcels.
- 19 While citing the case of Little Dale vs Liverpool College [1900] 1 CH 19;21 which sets the principles upon which the doctrine of adverse possession is grounded, the respondents submitted that they had met the threshold as they had been in adverse occupation of their portions with her knowledge from October 4, 1996 when she became the registered owner. That the submission by the appellant that they were in occupation pursuant to the appellant's permission emanating from the consent of July 25, 1991 in HCCC No 5041 of 1988 is not true as the appellant had testified that she only came to know of the respondent's occupation of the suit property after being discharged from hospital but she never bothered to find out how they had got into possession. It was clear that the limitation period for purposes of establishing adverse possession started running from the date the appellant was registered as the proprietor of the suit property which was the October 4, 1996.
- 20 Lastly, while placing reliance on the cases of [Mbogo & Another vs Shah \[1968\] EA 93](#) and [Matiba vs Moi & 20 Others \[2008\] I KLR 670](#), on discretion, the respondents urged this Court to find that the trial court properly considered the evidence and properly exercised its discretion in favour of the respondents which this Court ought not to interfere.
- 21 The respondents submitted that the record of appeal was filed out of time contrary to rule 82(1) of this Court's rules. That though the notice of appeal was lodged on March 28, 2018, the record of appeal was filed on November 1, 2018 even though a certified copy of the proceedings were collected on August 24, 2018. That though the certificate of delay was issued on September 5, 2018, the record was filed two months later for no apparent reason. Further, the letter bespeaking typed proceedings is of no help to the appellant as the same was never served on the respondents. Based on the provisions of rule 84, the respondents urged that the appeal be struck out for having been filed out of the required time.
- 22 On missing documents in the court record, the respondents submitted that the appellant's letter bespeaking certified copies of the proceedings and the letter from the Deputy Registrar informing the appellant that the proceedings were ready for collection have not been included in the filed record of appeal and yet they are very crucial documents when rule 87(1) of this Court's rules is considered.



While relying on the case of Salama Beach Hotel Limited (supra) the respondents submitted that failure to include such crucial documents was fatal and rendered the entire record of appeal fatally defective, incompetent and liable to be struck out.

23 We have considered the record, the grounds of appeal, submissions by counsel, the authorities cited and the law. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In *Selle vs. Associated Motor Boat Co*, [1968] EA 123, our mandate was expressed thus:

' 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 (*Abdul Hameed Saif vs Ali Mohamed Sholan* (1955), 22 EACA 270).'

24 In our considered view, there are two issues for determination in this appeal. First, is whether the appeal should be struck out on account of being filed out of time and want of some documents in the record, and secondly, whether or not the respondents are entitled to their respective parcels of land by way of adverse possession.

25 On the first issue, rule 84 of this Court's rules which is the basis upon which the respondents base their argument for striking out a notice or record of appeal provides, inter alia:

' A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.'

26 Our construction of the above rule is that jurisdiction of the Court to intervene on behalf of an aggrieved party under the said rule is dependent on the aggrieved party seeking the requisite court's intervention within thirty (30) days of service upon the aggrieved party of the notice of appeal or the record of appeal.

27 Of relevance is the proviso thereto which has received considerable deliberation by this Court and in particular its import. In *Joyce Bochere Nyamweyavs.Jemima Nyaboke Nyamweya & Another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to rule 84 of the rules and failure to comply with the same renders an application filed thereunder fatally defective. See also *Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associates Advocates & 4 Others* [2016] eKLR; *Pickwell Properties Ltd vs Kenya Commercial Bank Ltd* [2016] eKLR; and *Michael Mwalo vs Board of Trustees of National Social Security Fund* [2014] eKLR

28 Did the respondents, therefore, make the application within the requisite time frame? It is not in dispute that the record of appeal was filed on November 1, 2018 and the same was equally served on the respondents. The respondents had 30 days within which to challenge the same as being filed out of



time which they never did until they raised it in their written submissions. The rule is clear that there must be a formal application for such an order. It does not envisage such drastic action to be raised by way of written submissions as happened here. Accordingly, it is clear that the submissions on the same were an afterthought.

- 29 The respondents have also raised the issue that the record of appeal filed did not include some other relevant documents and in particular, the appellant's letter bespeaking certified copies of the proceedings and the letter from the Deputy Registrar of the High Court informing him that the proceedings were ready. Rule 87(1) of the Court of Appeal Rules stipulates the documents which should be included in a record of appeal from the High Court in its original jurisdiction. If any documents specified in rule 87(1) are omitted from the record, rule 88 permits an appellant to include them in a supplementary record of appeal to be filed without leave within 15 days of the lodging of the record of appeal and thereafter with leave of the Deputy Registrar on application. The appellant did not file a supplementary record of appeal within the stipulated time or at all. However, the documents are not among those required to be on record under the above rule. In any case, counsel has said that there was another counsel who was on record and was unable to avail them the said documents. Further, we are of the view that both parties have a duty to help this Court arrive at a decision that favours proper determination of the dispute before it. It was equally incumbent upon the respondents to avail the same documents. We refuse to ascend to that dais and determine that aspect in favor of the respondents who had to wait till hearing of the appeal to raise the issue and in their submissions.
- 30 Turning on the second issue, the effect of the law of limitation on the appellant's claim for the recovery of the suit property must be viewed against the respondents' concurrent claim of title over the same by adverse possession. This raises the issue of whether it is possible for a person to claim and obtain title to land as against the registered owner by adverse possession. The principle of adverse possession is well settled. Section 7 of the *Limitation of Actions Act* places a bar on actions to recover land after 12 years from the date on which the right accrued. It provides:
- 31 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.
- 32 Further, section 13 of the same Act, provides that adverse possession is the exception to this limitation:
- ' (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.'



33 Finally, Section 38 of the Act provides that:

'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.'

34 Therefore, for us to determine whether the respondents' rights accrued we ask ourselves the following questions:

- i. How did the respondents take possession of the suit property?
- ii. When did they take possession and occupation of the suit property?
- iii. What was the nature of their possession and occupation?
- iv. How long have the respondents been in possession?

35 The case before us provides an interesting scenario of possession. First, there is the aspect of purchase then there is the aspect of adverse possession. However, to bring the issue into proper perspective, the respondents approached the High Court by way of originating summons seeking the court to declare them as having adversely possessed the suit property from the appellant. On the other hand, the appellant's defence was that the doctrine does not support the respondents for they are purchasers of their various parcels of land. From the record, and if it is anything to go by, the sale if at all, was between the respondents and one JS Kaumbulu and Jerome. However, when the sale agreements were entered into in the early 1990's neither the appellant nor JS Kaumbulu or Jerome were registered proprietors of the suit property.

36 The respondents in their pleadings and evidence before the trial court pointed to the fact that they had been in occupation in their various parcels for over 30 years and although they had bought the same, the appellant did not own the title and neither was their possession disrupted by the appellant.

37 In trying to prove that they had been on the suit property for a considerable time, the respondents cited judgments and rulings on the suit property by different judges of the High Court. For instance, in ELC 226 of 2014 Elizabeth K Ndolo vs Muema Kitulu and 84 Others where JM Mutungi, J observed as follows: -

'In the present matter it is not in dispute that the respondents have been in possession and occupation of a portion of the Applicant's parcel of land for periods in excess of 20 years the letter exhibited as 'MK6' from the firm of Mulwa and Mulwa Advocates to M/S Khaminwa & Khaminwa Advocate's way back in 1988 points to the respondent's entry into the suit land at around that time. At any rate, the applicant acknowledges the respondents have occupied suit land for a period in excess of 12 years the applicant from 1984 when her husband died up to 2014 (30 years later) did not take any action to repossess the subject land from the respondent who from the material placed before the court engaged in and undertook various developments on the land they occupied consisted with their being in adverse possession'

38 Further, in the case of Mwaani Enterprise Ltd vs Margaret Kyalo & Another in HCC No 2104 of 1999, where in his ruling dated December 20, 1999 Kuloba, J (as then he was) stated that the applicants in the suit had lied when they claimed that there were no people settled on Josiah Kaumbulu's land



while pictures and evidence supplied showed various developments and farms within clear view of the applicant and members of her family. We are not aware whether these decisions were subject to appeals and the outcome thereof or whether they were reviewed or set aside. If not, then the question of adverse possession is settled in favour of the respondents. After all, the two cases involved the appellant and the parties including some of the respondents who had occupied the suit property. It was very clear that the respondents had possession of the suit property but the appellant was in denial of that fact.

39 At this stage it is worth considering what constitutes 'adverse possession'. In doing so, we revert to the definition of the same in the case of *Jandu vs Kirpal & Another* [1975] EA 225 in which the court relied on the definition adopted in the case of *Bejoy Chundra vs Kally Posonno* [1878] 4 Cal 327 at p 329; it was held that;

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

41 In *AIR 2008 SC 346 Annakili vs A Vedanayagam & Ors* the Supreme Court of India gave the essential elements of adverse possession which were considered in light of the Limitation Act of India, which provisions are similar to the Uganda Limitation Act (Cap 80). It was held that:

'Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. *Animus possidendi* as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have *animus possidendi* and hold the land adverse to the title of the true owner. For the said purpose, not only *animus possidendi* must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title.'

42 This was equally the holding In *Alfred Welimo vs. Mulaa Sumba Barasa, CA No 186 of 2011*, where this Court expressed itself thus:

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

43 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.



- 44 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.
- 45 To us and from the pleadings, it is clear that the appellant does not dispute the fact that the respondents are in possession of their respective parcels of land but she questions their mode of entry and claims that the same was by sale agreement. We have discussed this issue elsewhere in this judgment and concluded that there was no sale agreement between the appellant and the respondents which would form the basis of that argument. Secondly, the respondents elected to pursue their claims on the footing of adverse possession, thus the main issue for determination is whether the tenets that support the doctrine have been proved. We say so because if the appellant did not approve the respondents' entry on the land by way of sale agreement or whichever means it might be, she was at liberty to evict them or file a suit protesting their entry which she never did. We agree with the trial court therefore that indeed from the evidence on record, the respondents occupied their respective parcels way before the appellant was registered as the owner of the suit property.
- 46 On the nature of their possession and occupation, we are acutely aware that mere long possession for a period of more than twelve years without anything more does not translate into ownership by way of adverse possession. In the instant case, besides the period of twelve years, we consider the fact that the respondents have satisfactorily showed their hostile intention to take over, occupy and use the suit property. The respondents *animus possidendi* was open and manifested at the inception of the occupation by acts such as the construction of permanent residential houses, cultivation of land accompanied by growing of crops, and rearing of livestock on their portions of the suit property to the exclusion of the registered owner. The appellant in her evidence seemed to buttress the respondents' *animus possidendi* when she stated that she was aware of the respondents' occupation of their portions of the suit property all along, but only that they had entered the same through a different party via a sale agreement. It follows that the respondents were in open and continuous possession of their parcels of land and remained in that capacity unchallenged by the registered owner far beyond the statutory period of twelve years. They therefore, met all the requirements of an adverse possessor of the suit property.
- 47 As to when time start running, we are in no doubt that either way twelve years had lapsed as at the time the respondents approached the court. The appellant in her grounds of appeal states that the occupation by the respondents was interrupted when a suit was filed in 2014. Which to us even if it is true, the twelve years had already lapsed as at the time of filing that suit. We are in agreement with the reasoning in case of Francis Gitonga Macharia vs Muiruri Waithaka - Civil Appeal No 110 of 1997 where this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. The appellant became the registered owner of the suit property on October 4, 1996. This is despite the fact that by then the respondents had been in their parcels of land for so long. The various originating summons claiming a portion of the suit property were filed on diverse dates in the year 2014 which culminates into 18 years. This clearly points to the fact that the time required by the law, which is 12 years, was met without going back to the several years that the respondents claim to have occupied their parcels of land. The appellant claimed that this period was interrupted as there had been meetings between the respondents and her sons on various occasions. This was however not true since the said meetings were only meant



to ensure that the parties were able to get titles to their various parcels of land. In any case, meetings without more cannot stop time from running or interrupt the flow of time.

48 In the end, we are satisfied just like the trial court, that the respondents proved on a balance of probabilities that: they had possession of their parcels of land long before the registration of the appellant as the proprietor; that the nature of this possession was adverse; that the fact of their possession was known to the appellant; that their possession had continued uninterrupted for over 18 years after registration of the appellant as the proprietor and that the possession was open and undisturbed.

49 The upshot is that this appeal has no merit and is hereby dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of November, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

