IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, M. WARSAME & K. M'INOTI, JJ.A)

CIVIL APPEAL NO. 82 OF 2014

BETWEEN

WILFRED KEGONYE BABU................APPELLANT

AND

HENRY MOSE ONUKO......................RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kisii,

(Asike Makhandia, J.) dated 26th November, 2010

in

H.C.C.C. NO. 120 of 1999)

****

JUDGMENT OF THE COURT

[1] The first page of the Record of Appeal shows that this appeal is against the judgment and decree of the High Court at Kisii dated 26th November, 2010 and delivered by **Makhandia, J**. Indeed, on 26th November, 2010, Makhandia, J. *(as he then was)* delivered a ruling prepared and signed by **Musinga, J.** *(as he then was)* on 26th November, 2010, dismissing an application for stay of the execution of a judgment delivered on 23rd February, 2010, pending appeal. However, the Notice of Appeal, the Memorandum of Appeal and other documents included in the record of appeal refer to the substantive judgment of Musinga, J. *(as he then was)* delivered on 23rd February, 2010 which judgment and decree thereof are included in the record of appeal.

The reference to the judgment of Makhandia, J. dated 26th November, 2010 is therefore an inadvertent error which has not occasioned any prejudice to any party. Thus, the appeal shall be deemed as an appeal from the judgment of Musinga, J. dated 23rd February, 2010.

[2] The appellant is the legal representative of **Babu Siko** also known as **Matoke Babu Siko** who died on 14th February, 2012 after the delivery of the impugned judgment. ***(Babu Siko)***

On 4th May, 1999, the respondent herein **Henry Mose Onuko** filed Civil **Suit No. 120 of 1999** ***(O.S)*** against Babu Siko.

By the originating summons *(O.S)* filed under **Section 38** of the Limitation of Actions Act and **Order XXXV Rule 3(1)** and **7** of Civil Procedure Rules, the respondent asked the High Court to determine the three main questions namely:

> "(i) Has the plaintiff/applicant acquired good title of three acres in respect of that parcel of land known as plot No. 460 Nyansiongo Settlement Scheme *(suit land)*.
>
> (ii) Whether the plaintiff/applicant was entitled to be declared the legal owner of three acres by adverse possession of the suit land.
>
> (iii) Whether the defendant/respondent should be ordered to execute transfer of three acres of the suit and in default the Executive officer of this Court to execute the transfer."

[3] The O.S was supported by the respondent's affidavit. A further affidavit was filed with the leave of the court.

Babu Siko filed a replying affidavit and a further affidavit with the leave of the court. Meanwhile, Babu Siko issued a notice dated 6th November, 2007 of intention to institute proceedings against the Attorney General indicating that he intended to join the Attorney General as party to the proceedings.

He stated in the notice thus:-

> "The circumstances giving rise to liability are that the District Land Registrar Nyamira without the authority, knowledge and/or consent of the registered owner sub-divided Nyansiongo/Settlement Scheme/318 into three portions namely Nyansiongo Settlement Scheme458, 459 and 460. The relief sought is damages for wrongful and unlawful subdivision of land parcel No. Nyansiongo/Settlement Scheme/318 and rectification of the register."

A further replying affidavit was filed by Babu Siko which contained a counter-claim against the Nyamira District Land Registrar and the Attorney General. Finally on 20th March, 2008, the respondent filed a further supporting affidavit. On 20th May, 2008, the High Court issued the following directions:-

> "1. The applicant's affidavit to be treated as a plaint.
>
> 2. The affidavits by the respondent be treated as a defence and Counter-claim.
>
> 3. The plaintiff's affidavit filed on 20/3/2008 be treated as the defence to the counter-claim.
>
> 4. Parties to do discoveries within 30 days from the date hereof."

[4] Thereafter the suit was heard by *viva voce* evidence. The respondent gave evidence and called two witnesses, **Lemos Omari*(PW2)***a former Assistant Chief of Nyansiongo, Isoge sub-location and **Annah Nyabonyi Oigo** ***(PW3)***, a widow of **Taratio Oigo** who was a brother to Babu Siko. Babu Siko gave evidence but did not call any witnesses.

[5] The respondent's case was briefly as follows:

By agreement of sale dated 3rd January, 1980, Babu Siko sold to him three acres of land from plot No.73 Nyansiongo Settlement Scheme at a consideration of Shs. 21,000/=. He paid Shs. 9,224/= before the agreement was signed and the balance of Shs. 12,376 was to be paid by two monthly instalments of Shs.8,000/= and Shs.4,376/= respectively. The last payment was to be paid on 31st January, 1980. He was put in possession in 1980 and he constructed a permanent house and six other houses. He however paid the balance of purchase price in six instalments the last payment being made on 7th October, 1983.

On 8thFebruary, 1984, the respondent made an application for consent of the Land Control Board which was granted on 15th February, 1984. The land was surveyed and mutation form dated 1st March, 1985 was prepared by the surveyor. However, the mutation forms were misplaced in the office of the District Settlement officer. Fresh mutation forms *(dated 16th April, 1993)*, were prepared and the respondent paid Shs. 1,450 for the new mutation vide a receipt dated 1st September, 1993.

The appellant however failed to sign the transfer. Later the respondent discovered that the suit land had been sub-divided into two portions, **Nyansiongo Settlement Scheme/318** and **319** and parcel No 319 transferred to **Daniel Onkangi Paul**. Land parcel No. Nyansiongo Settlement Scheme/318 was later sub-divided into land parcel **Nos. Nyansiongo Settlement Scheme/458, 459 and 460**. Parcel No. 458 was also registered in the name of Matoke Babu Siko, parcel No. 459 in the name of Matoke Babu Siko but later registered in the name of Taratio Oigo Siko and later in the name of Anna Nyabonyi Oigo. Parcel No. 460 was registered in the name of Matoke Babu Siko.

The respondent has been in peaceful occupation of the land now comprised in title No. Nyansiongo Settlement Scheme/460.

[6] Babu Siko's case was partly as hereunder. He entered into an agreement with the respondent for the lease of 3 acres out of the suit land for one year at a consideration of Shs. 20,000/=. At that time, the land was registered in the name of Settlement Fund Trustees*(SFT).* He gave the respondent possession. However, the respondent paid only Shs. 9,000/= and did not pay the balance of the money. He did not sell any land to the respondent and did not take him to Land Control Board for consent. Later, he subdivided his land and sold one portion parcel No. 319 to **Daniel Onkangi** and remained with parcel No. 318. The respondent refused to move from the land, and he, Babu Siko instructed his sons to make a complaint against the respondent. He produced a letter dated 8th March, 1984 from the Chief Land Registrar addressed to his son **Wilfred Kegonye Babu** asking him to present the problem about the land to the District Settlement officer. His son Siko Babu was assaulted over the same land and his two sons - Babu Siko and Wilfred Babu were charged with a criminal offence of malicious damage relating to the suit land. His wife was also assaulted by the respondent. At one time the respondent vacated the land but later he came back with some people and forcefully took back the land.

Ultimately he discovered that his land parcel No. 318 had been sub-divided into three portions without his permission and by fraud. He stated in the replying affidavit that the respondent has never had a quiet and uninterrupted occupation of the land.

[7] Upon analyzing the evidence, the High Court made findings *inter alia* that:-

(i) Babu Siko and the respondent entered into agreement for sale of three acres of land on 3rd January, 1980.

(ii) The contention by Babu Siko that he only leased the land for a period of one year was untenable.

(iii)Babu Siko appeared before the District Settlement officer Kisii and signed an application for consent to sub-divide plot No. 73 and transfer 3 acres to the respondent.

(iv) Consent was given but shortly thereafter, Babu Siko did not co-operate with the appellant any longer.

(v) There was sufficient evidence that the appellant entered into possession of the suit land in 1980 with the consent and approval of Babu Siko. Although Babu Siko alleged that the appellant moved out the land after sometime but made a forcible re-entry thereafter that allegation was not proved.

(vi) The respondent has undertaken various developments on the land, has put up a permanent house thereon, planted gum tree and lives on the land with his family.

(vii) It was not until 1984 that Babu Siko started behaving in a manner that implied that he wanted to renege on the agreement and that is when time began to run under the doctrine of adverse possession.

(viii) Babu Siko did not demonstrate that he had ever made any attempt to evict the respondent from the land and criminal case No. 735 of 1998 where Babu Siko son Wilfred Babu was charged with interfering with boundary features was not a case for recovery of land instituted by Babu Siko.

(ix)The claim by Babu Siko for compensation against the District Land Registrar and the Attorney General has no merit as it was evident that Annah Nyabonyi Oigo *(PW3)* obtained an order from the court that enabled her to procure registration of parcel No. 459 in her name and as a result parcel No. 318 was lawfully sub-divided and three titles issued.

(x) The respondent is entitled to a parcel of land measuring three acres which is now known as plot No. 460 Nyansiongo Settlement Scheme and Babu Siko should execute documents of transfer failing which the Deputy Registrar is authorized to execute documents of transfer.

[8] The appeal is based on six grounds in essence that:

1. The trial judge erred in law and misdirected himself in not finding that the respondent was in possession of the suit land in pursuance of an agreement of sale which was not subject to Land Control Board consent.

2. The trial judge erred in law and in fact in not holding that the respondent could not lay a claim for adverse possession over the suit land during the period of validity of the contract.

3. The trial judge erred in law and in fact when reckoning time when adverse possession started.

4. The trial judge erred in law and in fact in not holding that the respondent's case was at variance with his pleadings.

5. The trial judge erred in law and in fact in not holding that the respondent had not proved a claim of adverse possession.

6. The learned judge misdirected himself fundamentally by sanctioning and perpetuating the unlawful creation of title No. Nyansiongo Settlement Scheme/460; in allowing the respondent to take advantage of his own wrong and in misapprehending the documentary evidence.

In support of the grounds of appeal, **Bosire Gichana** for the appellant submitted *inter alia*, the respondent took possession pursuant to a agreement for sale of land; by **Section 6(3) (b)** of the Land Control Act, the sale was not subject to the consent of the Land Control Board as Settlement Fund Trustees, was a party; the long use between 1980 and 1990 was with permission of the appellant and such possession was not adverse; the respondent was not entitled to specific performance of the contract of sale as he did not prove that he paid the balance of purchase price; time started running for adverse possession in 1990 when problems arose; the consent of Land Control Board authorizing the sub-division of parcel No. 318 was not produced and that the respondent created title No. 460 measuring 3.4 acres by fraud.

[9] On behalf of the respondent, **Mr. Momanyi** submitted, among other things, that, the suit land was subject to the provisions of the Land Control Act; an application for consent was made and consent granted; according to **Section 8(1)** of the Land Control Act, the appellant was supposed to take the respondent to the Land Control Board for consent within six months which he did not and the agreement of sale became void in July, 1980; that time for adverse possession started running from August, 1980; the respondent had peaceful and uninterrupted possession since August, 1980; parcel No. 318 was sub-divided into three portions through a Court order and sub-division No. 460 fell on the portion that the respondent was occupying and that the appellant did not adduce evidence to show that it was the appellant who caused parcel No. 318 to be sub-divided.

[10] By **Section 7** of the Limitation of Actions Act *(the Act)*, an action to recover land may not be brought after the end of twelve years from the date on which the right of action accrued. By **Section 17** of the Act, if a person does not bring an action to recover land within the stipulated twelve years, his title to the land is extinguished. As **Section 37** of the Act provides, the Act applies to land registered under the Government Lands Act, Registration of Titles Act or Registered Land Act *(now repealed)* and to land not so registered subject to exceptions

stated therein.

Further, as **Section 38(1)** of the Act provides, a person who had become entitled to land registered as stipulated in **Section 37** may apply to the High Court for an order that he be registered as proprietor in place of the person then registered. **Section 41***inter alia* excludes public land *(Government land)* from the operation of the Act and the definition of *"Government"* in **Section 2** of the Act includes *"the Corporations"*.

[11] The respondent claimed that he entered into possession of the land in pursuance to an agreement of sale. In **Wambugu v. Njuguna [1983] KLR 172**, this Court held in part:-

> **"where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated"**

The Court further held:

> **"Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have been adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment".**

The appellant also relied on the **Supreme Court Application No. 1 of 2013 – Malcolm Bell v. Hon. Daniel Toroitich Arap Moi & Another.** In that case, the decision of this Court in **Samuel Miki Waweru v. Jane Njeri Richu – Civil Appeal No. 122 of 2001** in which the Court held that where sale agreement being subject of Land Control Act becomes void under **Section 6(1)** for lack of consent of the Land Control Board, then time starts running from the moment the transaction becomes void.

[12] In his written submissions in the High Court, the appellant submitted partly thus:

> "The defendant became the actual owner of the original parcel of land known as Nyansiongo Settlement Scheme/73 in the year 1991 and since limitation period does not apply against the Settlement Fund Trustee land transactions then the plaintiff cannot claim adverse possession as against the defendant during a period in which land was still under the Settlement Fund Trustee."

The copy of Registrar in respect of Nyansiongo Settlement Scheme/73 shows as follows:

The land measured approximately 6.4 Hectares *(about 15 acres)*. The SFT were registered as the first proprietor on 21st May, 1982. On 14th January, 1986, Babu Siko was registered as the proprietor and a land certificate was issued to him on 20th January, 1986. On 12th August, 1991, Matoke Babu Siko was registered as proprietor through change of name and on the same day the title was closed on sub-division to numbers 318 and 319. There was a charge of favour of SFT which was discharged on 15th August, 1990.

Land Title No. Nyansiongo Settlement Scheme 319 measured approximately 6.0 Hectares. On 12th August, 1991, it was registered in the name of Matoke Babu Siko and on 10th September, 1993, the title was closed upon sub-division to sub-titles Nos. 458, 459 and 460. On 10th September, 1993, sub-division No. Nyansiongo Settlement Scheme/458 comprising of 4.098 Hectares was registered in the name of Matoke Babu Siko. Sub-division No. 459 comprising of 2.412 Hectares was also registered in the name of Matoke Babu Siko on 2nd September, 1993 but on 30th July, 2002, Taratio Oigo Siko was registered as proprietor and on the same day Anna Nyabonyi Oigo was registered as proprietor. Sub-division No. 460 comprising of 1.357 Hectares was registered in the name of Matoke Babu Siko. On 10th September, 1993, sub-division No. 458 comprising of 0.4 Hectares was registered in the name of Matoke Babu Siko on 12th August, 1991 and on 19th August, 1991, the land was registered in the name of **Daniel Onkangi Paul**.

[13] The Settlement Fund Trustees was established by **Section 167(1)** of the Agriculture Act *(Cap 318)* and by **Section 167(2)**, SFT is a body corporate which had power, *inter alia,* to purchase, hold, manage and dispose of immovable property. The Agriculture Act has now been repealed by the **Agriculture and Food Authority Act– No 13 of 2013**. The Agriculture and Food Authority established under **Section 3** thereof is the successor of SFT.

By **Section 6(2)** of the Land Control Act, the stipulated transactions affecting agricultural land which includes sale of agricultural land are void for all purposes unless consent to the transaction is given by the Local Land Control Board. However, **Section 6(3) (b)** provides that the requirement for consent of the Land Control Board does not apply, *inter alia,* to transaction to which the Government or the SFT is a party.

[14] The broad issue raised in this appeal is whether the High Court erred in law and in fact in finding that the respondent was in adverse possession of the suit land for the statutory period of 12 years.

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."**

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. For instance, **Section 152A** of the Land Act, Revised Edition, 2017 provides:-

"A person shall not unlawfully occupy private, community or public land"

and **Section 152B** provides:-

"An unlawful occupant of private land, community or public land shall be evicted in accordance with this Act."

In **Wambungu v. Njuguna (supra) Hancox, JA***(as he then was)* said in part at page 179 paras. 1 – 5:

> **"It is my judgment evident that a person must have effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract or other valid permission or licence which has not been determined."**

[15] In the instant case, the respondent in his several affidavits to support the O.S and in his oral evidence relied heavily on the agreement of sale dated 3rd January, 1980 to show that the appellant indeed sold three acres from parcel No. 73 to him with vacant possession. He also relied on other subsequent documents such as the consent of SFT to the sale, the application to the Land Control Board for consent, the consent itself, allegedly the mutation forms executed by the appellant. His evidence was essentially that having bought the land and paid the full purchase price and the appellant having given him vacant possession and executed the necessary documents, the appellant, ultimately failed to transfer the land to him.

The appellant's case was essentially that although he sold 3 acres to the respondent and put him in possession, the respondent failed to pay the full purchase price. He denied that he executed the application for the consent of the Land Control Board or gave consent to the sub-division of Nyansiongo Settlement Scheme/318 to create three parcels including Nyansiongo Settlement Scheme/460 which the respondent claimed in the High Court.

[16] The consent of the Land Control Board on which the respondent relied is dated 15th February, 1984.

The last mutations form that the respondent relied and which he produced as exhibit 7 is dated 16th April, 1993. The receipt which he produced as exhibit 8 is dated 15th September, 1993.

The registration of parcel Nos. Nyansiongo Settlement Scheme/458, 459 and 460 were effected in September, 1993.

In para 8 of the further supporting affidavit sworn on 17th March, 2008, the respondent stated:

> **"I know of my own knowledge that the 1st defendant was supposed to transfer to me plot No. 460 but he refused to do so and thus, I came to court".**

In his evidence in cross-examination, he stated that he never cancelled the agreement of sale and further that:

> **"The problem with Babu Siko started in 1990. There was a time we went to the area Assistant Chief when Babu Siko started complaining that I was cutting a tree that was in the boundary. I am not aware that Babu Siko was charged in criminal case. But when he started clearing part of the land along the boundary, I made complaint against him. In 1990 Babu Siko never told me to take back the money. I had to make a report at Keroka Police Station when Babu Siko started threatening me".**

[17] Whereas the evidence is clear that the appellant caused the original title Nyansiongo Settlement Scheme/73 to be sub-divided into two portions Nos. 318 and 319 and he transferred parcel No. 319 to Daniel Onkangi Paul retaining parcel No. 318, it is not clear how parcel No. 318 was sub-divided into three portions, Nos. 458, 459 and 460.

However, there was evidence that Taratio Oigo Siko, a brother of the appellant had filed a suit in Kisii Senior Resident Magistrate's Court – **Civil Suit No. 12 of 1980** against the appellant to recover part of the land. The evidence of Annah Nyabonyi Oigo *(PW3),* widow of Taratio was that after her husband died, she obtained a decree and thereafter used it to get a title deed. Although the appellant claimed that the sub-division was through fraud, the High Court made a finding that the land was lawfully sub-divided after Annah Nyabonyi Oigo obtained an order from the court. The decree was not produced at the trial. Since the dispute in the Resident Magistrate's Court was between the appellant and his deceased brother, the court could only have given a decree for the sub-division of parcel No. 318 into two portions. It is still a mystery how three titles were created from parcel No. 318. The copies of the mutation forms in respect of the sub-division of parcel No. 318 into three portions were produced by the respondent. The respondent in his evidence stated that he was following his title at lands registry and he paid Shs. 1,450/= for the new mutation and that the mutation form was signed on 16th April, 1993.

Annah Nyabonyi Oigo was a witness for the respondent. She stated in her evidence in cross-examination:

> **"I was taken to Nyamira by Henry (the plaintiff) to get my title deed. The decree was given in my favour."**

From the foregoing, it is clear that it is only the respondent who had an interest in having the parcel No. 318 sub-divided in three portions. The only reasonable inference is that it is the respondent who caused parcel No. 318 to be sub-divided into three portions thereby creating from the appellant's land a portion which was the subject of the sale agreement. That portion, although bigger in acreage than the portion of the three acres the subject of the sale agreement, was registered as Nyansiongo Settlement Scheme/460. We further find that portion was created by the appellant in furtherance of the agreement of sale with the intention of facilitating the transfer of that portion to him.

[18] The respondent submitted that time started running for purpose of adverse possession in 1984 when the appellant changed his mind.

The High Court agreed and said that it is in 1984 that the appellant *"started behaving in a manner that he implied that he wanted to renege on the agreement."*

In this appeal, the appellant's counsel submitted that time started running in 1990 when problems started and that the long use between 1980 and 1990 was with the permission of the appellant.

On the other hand, the respondent's counsel submitted that time started running from August, 1980 when the agreement of sale became void for lack of consent of the Land Control Board or from 7th October, 1983 when the last instalment of the purchase price was paid.

As already stated, the respondent's case in the High Court was that time started running in 1984. The issue of the validity of the agreement of sale for lack of the consent of the Land Control Board or the question of the date of the **last** payment of the last instalment were not raised at the trial nor adjudicated upon by the trial court.

Indeed, it was not the respondent's case that the agreement of sale had become null and void. On the contrary, the respondent has treated the agreement of sale as subsisting even up to 1993 when he paid for new mutation and caused sub-division No. 460 to be created.

[19] Although the respondent was put in possession in 1980, the copies of the register produced show that the original parcel No. 73 was still registered in the name of SFT. It is on 14th January, 1986 that Babu Siko was registered as the proprietor.

As **Section 41** of the Limitation of Actions Act stipulates, adverse possession could not have accrued against land registered in the name of a corporation. The respondent could not have been in lawful possession of the appellant's land before the registration of the appellant as a proprietor. It follows that the finding of the learned judge that time started running in 1984, is, with respect, erroneous.

[20] The claim by the respondent that he has enjoyed continuous, peaceful and uninterrupted possession of the suit land was denied by Babu Siko who produced various documents.

In his further replying affidavit, Babu Siko stated *inter alia* that in 1986, the respondent wrongfully used the provincial administration particularly the area chief who forcefully curved out a portion of his land and put respondent in possession; that he always protested against the respondent's occupation of his land which resulted to various acts of violence. Babu Siko stated that he instructed his sons to make complaints. Documents were produced showing Siko Babu and the present appellant have had confrontation with the respondent over the land and indeed, the present appellant was charged in Criminal Case No. 735 of 1998 with the offence of interfering with boundary features. The respondent admitted that problems started in 1990 and that Babu Siko started clearing part of the land along the boundary and threatening him.

In paragraphs 8 and 9 of the affidavit sworn by the respondent on 5th January, 2000 in support of the application for interlocutory injunction, the respondent stated that the Babu Siko had threatened to forcefully evict him from the land and had in December, 1999 forcefully entered into his portion of the land.

Having regard to human conduct, it is not likely that Babu Siko after changing his mind in 1984 to sell the land and having claimed that full purchase price was not paid, he would have allowed the respondent to keep possession of the land. The Court is bound to presume under **Section 119** of the Evidence Act that Babu Siko took steps to dispossess the respondent of the land in 1990. However, the respondent believing that he had lawfully bought the land set in motion criminal process but even then skirmishes between the respondent and Babu Siko's sons continued and in 1998, the present appellant was prosecuted.

We find from the analysis of the evidence in this paragraph that the respondent would only have been in lawful possession of the three acres the subject of the sale agreement from 14th January, 1986.

We further find that the respondent enjoyed continuous, uninterrupted and peaceful possession until 1990 which is a period of approximately four years. However, the respondent possession was disrupted by Babu Siko and his sons from 1991 who asserted a claim of right to the portion that the respondent was occupying and took positive steps to regain possession. This was thwarted by the respondent who used the chief and the police to retain possession, such possession retained by force or by protection of the law is not adverse possession. We find that possession by the respondent from 1991 to 1999 was not adverse in the legal sense.

[21] We conclude by saying that on analysis of the evidence as a whole, the case presented by the respondent in the High Court was essentially that of a purchaser in possession pending completion of the agreement of sale entered into on 3rd January, 1980. The respondent believed that he had lawfully purchased the suit land as the requite steps including obtaining the necessary consents and mutations had been

done. It is the delay in the execution of the agreement caused by the conduct of the appellant which has enabled time to run in his favour. When execution failed, the respondent claimed the land by adverse possession. There was no finding by the High Court that the agreement was invalid. In addition, the evidence does not show that the respondent repudiated the agreement of sale or that he accepted the appellant's alleged termination of the contract. The respondent has over the years treated the contract as subsisting and as late as in 1993 the respondent was taking steps, such as paying for the mutation and causing the sub-division of the appellant's land to be effected in furtherance of the agreement of sale.

As **Section 39(1) (a)** of the Limitation of Actions Act provides, a period of limitation does not run if:

> **"that the person attempting to plead limitation is estopped from doing so".**

From the respondent's conduct of pursuing the execution of the agreement of sale as late as 1993, he is estopped from claiming that his possession was not under the agreement or from claiming adverse possession.

Furthermore, the evidence did not show that the respondent was in adverse possession for the entire statutory period of 12 years. Rather, the evidence shows that his possession has been continuously interrupted since 1990.

In a nutshell the respondent did not prove adverse possession.

[22] For the foregoing reasons:

> **1. The appeal is allowed with costs to the appellant.**
>
> **2. The judgment and the decree of the High Court dated 23rd February, 2010 is set aside.**
>
> **3. The respondent's claim in the High Court to land title No. Nyansiongo Settlement Scheme/460 by adverse is dismissed with costs to the appellant.**

Orders accordingly.

Dated and Delivered at Kisumu this 28th day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR