



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)**

**CIVIL APPEAL NO. 8 OF 2014**

**BETWEEN**

**NDORONGO GATHERU.....1<sup>ST</sup> APPELLANT**

**GATUNDU & MANGU FARM COMPANY LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NORMAN KARIUKI .....1<sup>ST</sup> RESPONDENT**

**KITIUNGI KARUGU..... 2<sup>ND</sup> RESPONDENT**

**NJOKI WAIRIMU.....3<sup>RD</sup> RESPONDENT**

**RICHARD MBURU KARIUKI..... 4<sup>TH</sup> RESPONDENT**

**WILLIAM GICHERA KIRAE.....5<sup>TH</sup> RESPONDENT**

**JACOB OCHIENG OMBORI.....6<sup>TH</sup> RESPONDENT**

**JUANINA WIATHERA KIARIE.....7<sup>TH</sup> RESPONDENT**

**JOYCE MUTHONI MBAU.....8<sup>TH</sup> RESPONDENT**

**MONICA WANZA WAMBUA.....9<sup>TH</sup> RESPONDENT**

**BEDAN MAINA..... 10<sup>TH</sup> RESPONDENT**

**KIAMUI WANJIRU GIKINYO..... 11<sup>TH</sup>RESPONDENT**

**HELLEN WAIRIMU.....12<sup>TH</sup>RESPONDENT**

**KIIO KAHUHI.....13<sup>TH</sup> RESPONDENT**

**ALFED OWUOR..... 14<sup>TH</sup> RESPONDENT**

MUTHONI WAKARIBA.....	15 <sup>TH</sup> RESPONDENT
STEPHEN MWANGI.....	16 <sup>TH</sup> RESPONDENT
PAUL KANGETHE.....	17 <sup>TH</sup> RESPONDENT
KATHOKA.....	18 <sup>TH</sup> RESPONDENT
MWENI NDORO.....	19 <sup>TH</sup> RESPONDENT
PETER KIARIE.....	20 <sup>TH</sup> RESPONDENT
JANE WANGECHI.....	21 <sup>ST</sup> RESPONDENT
KANUINI KAMAKU MWANGI.....	22 <sup>ND</sup> RESPONDENT
MWANGI NGAHU.....	23 <sup>RD</sup> RESPONDENT
DORCAS NJERI.....	24 <sup>TH</sup> RESPONDENT
PENINAH WANJIRU.....	25 <sup>TH</sup> RESPONDENT
MARGARET NJERI KIARIE.....	26 <sup>TH</sup> RESPONDENT
MARTIN NDEGWA.....	27 <sup>TH</sup> RESPONDENT
PETER KAGOCHI.....	28 <sup>TH</sup> RESPONDENT
SUSAN NYAMBURA.....	29 <sup>TH</sup> RESPONDENT
THE HON. ATTORNEY GENERAL.....	30 <sup>TH</sup> RESPONDENT
PETER KUNGU KAHARI.....	31 <sup>ST</sup> RESPONDENT

*(Being an appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J.)  
dated 26<sup>th</sup> June, 2008*

*in*

*H.C.C.C No. 2794 of 1995 (OS)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This appeal arises from the judgment of Ang'awa J. rendered on 26<sup>th</sup> June, 2008, in which she granted the respondents' originating summons with costs and awarding them seven (7) acres of the portion of land "originally known as LR5569/5" on account of their claim to it by virtue of adverse possession. Before we consider the reasons why the appellants are aggrieved by that decision, we are constrained to say something about the record as presented to us. The hearing started before Ojwang J., as he then was, who heard only one witness. Thereafter Ang'awa, J. took over and directed that she would continue from the stage the trial had reached. She recorded the testimonies of three witnesses called by the respondents and two by the appellants. Her notes are incoherent, unintelligible and confusing as we shall demonstrate in

the course of the judgment. It has taken us considerable time to decode the evidence as recorded. There are incomplete sentences in both the record of appeal and in the original proceedings, which we called for to confirm the status of the record.

In a jurisdiction like ours where stenographic or electronic transcript is yet to be introduced; where proceedings are wholly taken in longhand by the presiding officer, we must underscore the importance of accurate and careful recording of evidence. To achieve this, the trial court must pay attention and remain alert to what is going on every minute of the trial, with more focus on the testimonies of witnesses. There must be clear and logical flow in the recorded evidence. This is because trial notes are important during, and after a trial. They form the bedrock of appellate review of decisions of the courts below. Needless to say, one's property, freedom, liberty and life can sometimes depend on how the evidence was recorded and kept by the trial court.

As we have said, it has been a difficult task to piece together the disjointed record. However from that record we are able to trace the following history of this dispute. The Colonial Government issued to Paris John Sauvage, a settler, a grant to parcel of land known as LR8569, in the area then described as East of Kiambu District (today's Kahawa West, Nairobi County) measuring 875 acres less road reserve of 5 acres for a term of 949 years with effect from 1<sup>st</sup> June 1954. The grant was issued under the then Registration of Titles Ordinance (chapter 160). Between 1954 and 1989 there were many parties claiming the property. For instance there was a caveat by the Crown in 1955. In the same year the property was transferred to Kahawa Quarries Ltd that charged it to the National Bank of India. There was another caveat by the East African Power and Lighting Company Limited in 1956 and yet another one, in the same year by Murphy Chemicals (E.A.). In 1957 some 504 acres was surrendered to the Crown and LR. No.8569/1, a sub-division of the original parcel was created. Later in 1958, 8569/2, yet another sub-division measuring 5.20 acres was created and transferred to Murphy Chemicals (E.A.). LR. No. 8569/4 comprising 7.0 acres was transferred to Mr. Cecil Hillary Greenwood – Penny.

On 19<sup>th</sup> September 1961 Kahawa Quarry Ltd, in whose name the original parcel was registered went into voluntary liquidation. Six years later on 4<sup>th</sup> February, 1966 a total of 359 acres less 5 acres was transferred to Pacon Limited in what became LR. No.8569/5, which is the subject matter of this appeal (the suit land). In April, 1966 Ndorongo Gatheru (the 1<sup>st</sup> appellant) and two others lodged a caveat on the title of the suit land claiming purchasers' interest. But that caveat was removed eight years later in 1974 pursuant to **section 57(6)** of the Registration of Titles Act. Although from the material before us, it is not apparent when exactly Pacon Limited was struck off the register of Companies, on 15<sup>th</sup> July, 1974 the Government acquired 55.5 hectares of LR 8569/5, which most likely comprised the whole suit land. In 1976, two years after that acquisition there was a transfer in 1976 to Gatundu and Mangu Farm Company Ltd, (the 2<sup>nd</sup> respondent) absolutely in consideration of Kshs.180,000.

Ultimately, on 6<sup>th</sup> June, 1989, the Government, by virtue of **Section 8** of the Government Land Act Cap. 280 had LR. No. 8569/5 vested in it *Bona vacatia*. In 1992 in the City Court Ndorongo Gatheru was, in a strange twist, charged as the owner of LR No. 8569 in Criminal Case No. 5834 of 1992, with causing a nuisance by failing to properly maintain the structures on LR 8569 contrary to **section 115 of the Public Health Act**. Having been found guilty and upon his conviction under **section 18(1)(b)** of that Act he was sentenced to a fine of Kshs. 80 or 7 days imprisonment in default. The structures were condemned and declared unfit for human habitation. As a consequence, all the occupants were ordered to vacate immediately. The process was to be supervised by the police. Subsequently, it appears to us that the respondents instituted several other claims. Alluded to are Nbi. HCCC No. 422 of 1995, Rent Restriction Tribunal (the Tribunal) Case Nos. 196 to 231 of 1991 (consolidated), SPM CC No. 97 of 1996, Nbi. HCCC No. 1321 of 1996, among others. It is also apparent that the Tribunal issued an order of vacant possession against the respondents.

Following these events on 4<sup>th</sup> September, 1995 the respondents, by an originating summons, the subject of the impugned judgment applied to be declared the owners of the portions of L.R. Nos. 8569 and 14847 contending that they had been in physical and continuous occupation of the two parcels for a period far in excess of 12 years; that their parents had worked for the original owner, Paris John Sauvage since 1932;

that some of them were born and raised on the property, with the last of the occupants settling on the suit land or born there in 1964; that during that period they made substantial developments on the portions they occupied, the value of which was in excess of Kshs. 2,000,000/=; that the appellants had never occupied the parcels in question or made any development on the same, that as a result they were entitled to be registered as the owners by adverse possession of the portions occupied by each one of them; and that the register be rectified to reflect this position.

In reply, the appellants argued that the originating summons was incompetent and the appellants' claims over the property are vague and misleading; that a claim by adverse possession was incapable of being enforced against the Government; that the 2<sup>nd</sup> appellant was the owner of the suit land and had indeed sold several portions to third parties who had in turn constructed modern houses, hence the respondents could not claim to have had collective and exclusive possession of the suit land; that they had made no developments of their own on the suit land; that all through, they occupied the suit land as tenants and/or as children under the care of their parents who occupied the property either as workers or tenants; that the 1<sup>st</sup> and 2<sup>nd</sup> appellants had been collecting rent from the respondents; and that in any case the portion of the property occupied by the respondents did not exceed one acre as it only comprised the portion where the original owner had constructed workers' quarters.

After hearing evidence from the parties and their witnesses, the learned Judge came to the conclusions that the 2<sup>nd</sup> appellant held a leasehold title issued on 1st July 1989 in respect of parcel LR No. 14847 measuring 70.61 hectares and registered under the Registration of Titles Act; that the original property, LR No. 8569 was sub-divided to create LR8569/1, LR 8569/2 and LR 8569/5; that the sub-division was overtaken by events when the Government took over the suit land under the doctrine of *bona vacantia* in 1989; that the claim of ownership of the suit land by the 1<sup>st</sup> and 2<sup>nd</sup> appellants as purchasers in 1966 was defeated and that they were never registered as the owners of LR No. 8569 or its sub-divisions. For that reason the learned Judge expressed the view that the appellants, not being the owners of LR No.8569 or the sub-divisions, had no colour of right to collect rent from anyone living on the property. In the result she held that the respondents were always on LR No.8569/5 occupying a portion measuring 2½ acres, where the original owner had built workers' quarters.

Relying on the decisions of **Public Trustee V. Wandera** , (1984) KLR 314 and **Kasuve V Mwaani Investments Ltd & 4 Others**, (2004) I KLR 184, for the proposition that in order to acquire land by the statute of limitations the owner must have lost his right to the land either by being disposed of it or by discontinuing his possession; and that if possession is with the consent of the owner, it cannot be said to be adverse, the learned Judge entered judgment with costs in favour of the respondents. She found that the respondents had proved to have been in adverse possession of a portion comprised in an area measuring 7 acres of the parcel of land originally owned by Paris John Sauvage where the workers' camp stood. She accordingly directed that the portion be demarcated and awarded to only the respondents in this appeal who were alive.

The decision aggrieved the appellants who have brought this appeal complaining that;

**“1. THAT the learned Judge erred in both law and fact in finding that the plaintiffs had established a claim for adverse possession against the Defendants and that they were entitled to seven (7) acres to be demarcated from the portion of land originally known as L.R. No. 8569/5. (If it's not theirs why would they be aggrieved?) (sic).**

**2. THAT the learned Judge erred in law and in fact by failing to determine which period, if any, in excess of 12 years that had enabled the plaintiffs to have prescriptive rights against the defendants in regard to their property known as L.R. 8569/5.**

**3. THAT the learned Judge erred in law and in fact by failing to find that the 4<sup>th</sup> defendant was registered as the owner of L.R. No. 14847 from 1<sup>st</sup> July 1989 and that the plaintiffs had not established adverse possession for a continuous period of 12 years between 1<sup>st</sup> July 1989 and the date when they filed the suit.**

4. **THAT** the learned Judge erred in awarding the plaintiffs a portion of seven (7) acres being part of the land known as L.R. 8569/5 without any probative evidence or basis to support that decision and while at the same time finding that the plaintiffs' claim and description of the suit land was vague.

5. **THAT** the learned Judge erred in law and fact by failing to dismiss the plaintiffs' suit for being vague in the description of the property.5.

6. **THAT** the learned Judge erred in law and fact by failing to decide whether the parcel of land known as L.R. No. 8569/5 was the same land as the parcel of land known as L.R. No. 14847.

7. **THAT** the learned Judge erred in law and in fact in finding that the plaintiffs were living on L.R. No. 8569/5 since the year 1989 while the said parcel of land was not in existence then.

8. **THAT** the learned Judge erred in law and in fact in finding the plaintiffs were living on L.R. No. 8569/5 with the consent of the Government of Kenya since 1989 and thereby erred in law by making an order of adverse possession against a property owned by the Government.

9. **THAT** the judgment consists of a grave miscarriage of justice and should be set aside.”

Submitting on these grounds the appellants contended that the respondents did not prove exclusive and continuous occupation of the suit land; that the evidence presented only showed that the respondents entered the suit land either as workers of the original owner or children of those workers; that it was admitted that the respondents were paying rent to the appellants; that, at the time of filing suit title to L.R. No. 8569/5 had been extinguished and designated LR No.14847; that the new title was issued to the 2<sup>nd</sup> appellant; that the learned Judge having confirmed that the respondents' claim was in respect of the 2½ acres erred in awarding 7 acres without evidence.

On behalf of the 1<sup>st</sup> to 29<sup>th</sup> respondents it was submitted that they were born and raised on the suit land; that they have built and lived on it without interruption; that time began to run on 15<sup>th</sup> April, 1966 when the appellants registered a caveat on the title of the suit land claiming purchasers' interest and therefore it was immaterial whether they were registered as proprietors or not; that time that had began to run could not be interrupted by mere change of ownership; that they never paid rent to the appellants; that even if they were paying rent, when they stopped to do so in 1979 time began to run from that date and they acquired the suit land in 1991; that in the alternative, since some of the respondents occupied the suit land in 1946 and the appellants allegedly acquired it in 1966, it would mean that the appellants' title was extinguished in 1978 by operation of the law; that by the time the 2<sup>nd</sup> appellant was issued with documents of title in 1989, title had been extinguished; and that, although the initial possession was with the permission of the original owner, it became adverse when the ownership changed. The respondents were, as would be expected satisfied with the award of 7 acres arguing that that was the portion they occupied even before the original owner sold the suit land. They insisted that parcel Nos. 8569/5 and 14847 constituted one and the same land out of which they occupied 7 acres; that after the Government acquired L.R. No. 8569/5 *bona vacantia* it issued the subsequent title to the appellants as No. 14847; that the declaration of the suit land *bona vacantia* did not change the fact that title had been extinguished; and that in any case at the time of that declaration the immediate former owners, Pacon Limited had already transferred it to the appellants hence there was nothing to be acquired by the Government.

The 30<sup>th</sup> respondent (the Attorney General) throughout the trial in the High Court and before us has maintained that the suit land was and remains the property of the Government; that by merely working on a farm did not entitle the respondents or their children to it; that indeed the learned Judge correctly found that the respondents were on the suit land with the permission of the Government. The Attorney General however faulted the conclusion of the learned Judge on her application of the doctrine of *bona vacantia*, as explained in **section 339(6)** of the repealed Companies Act and as elucidated in the case of **Murita Coffee Estate Limited V Attorney General** Civil Appeal No. 32 of 1978. For these reasons the Attorney

General has urged us to hold that the learned Judge erred by failing to find that the transfer of the suit land to the appellants was unprocedural and irregular.

We have considered these submissions together with the authorities relied on and hold the view that, while considering the broad question of whether the occupation of the suit land by the respondents amounted to adverse possession, it is important to determine the relationship between LR Nos. 8569/5 and 14847, the question whether the portion claimed was sufficiently described in terms of its location, ownership and size and whether the respondents proved that they were in possession for the statutory period.

The originating summons was instituted by twenty eight (28) individuals against Ndorongo Gatheru, the 1<sup>st</sup> appellant as the director of Gatundu & Mangu Farm Company Limited, the 2<sup>nd</sup> appellant and Peter Kungu Kahari, whose capacity is not quite clear and the Attorney General. The 1<sup>st</sup> respondent described himself in one of the many affidavits in this dispute as the Director of the 2<sup>nd</sup> appellant. In that affidavit it is also deposed that the 2<sup>nd</sup> appellant purchased the suit land from Pacon Limited in 1976 and that thereafter the 2<sup>nd</sup> appellant transferred it to its shareholders. As we consider this appeal, we bear in mind the following well established general principles.

Being a first appeal our role is to re-evaluate the evidence on the record in order to determine whether there was a basis for the conclusions reached by the learned trial Judge. See **Kenya Ports Authority V Kuston (Kenya) Limited** (2009) 2 EA 212.

Secondly, for the respondents to succeed in their claim to the suit land by statute of limitations, the burden was on them to prove, on a preponderance of evidence that their possession of the suit land was adverse to the true owner's title; that it was without the authority or permission of the true owner and without use of force; that, without colour of right they had been in actual, open, peaceful, uninterrupted, notorious and exclusive possession for a period of at least 12 years, expressed in the days of old as, *nec vi, nec clam, nec precario*. The essence of these strictures is that the respondents was bound to demonstrate that the title holder lost his right to the suit land either by being dispossessed of it or by having discontinued his possession of it. The title holder would be said to have been dispossessed if the respondents engaged in activities on the suit land that were inconsistent with the owner's enjoyment of the suit land for the purposes for which he intended to use it. Those activities must leave no doubt as to the intention of the respondents to appropriate and use the suit land as their own to the exclusion of all others, including the true owner. See **Edwin G. K. Thiongo & Another v Gichuru Kinuthia & 2 others**, Civil Appeal No. 267 of 2007. See also **Wambugu V Njuguna** (1983) KLR 172.

The adverse possession must be proved as a fact and cannot be assumed as a matter of law from mere exclusive possession, however long.

Having set out these principles, we turn to consider their application to the facts in this dispute. The evidence presented by the respondents was that they occupied both LR. Nos. 8569 and 14847, originally as workers in a quarry owned by a settler, Paris John Sauvage or that they were born to workers and raised on the suit land; that some of them settled on the suit land as early as 1932 while the last among them to settle was in 1963; that they occupied workers' quarters constructed by the settler owner; that when that owner left they continued to live on the portion they had occupied all along; that they continued to live in those quarters even as suit land changed ownership from Paris John Sauvage to Kahawa Quarries Ltd and then to Pacon Limited before it devolved to the Government *bona vacantia*.

We reiterate that the burden was on the respondents to prove all the elements of adverse possession as explained above. Of the 28 original claimants only 4 testified. PW1 Jacob Oyieng, who was listed in the plaint as the 6<sup>th</sup> plaintiff said that he entered the suit land in 1949 at the age of 18 years as a worker to Paris John Sauvage. He and the rest of the workers lived on the portion where their employer had put up houses for them. He explained that in the 1960s after the suit land was sold to an Italian, the previous owner agreed with the Italian not to interfere with the workers' quiet possession of the portion they occupied. He estimated that the workers' camp was on 2½ acres. He emphasized that they were only

interested in that part of the land and no more. He however denied ever paying rent to anyone. Of significance is the fact that out of the 28 respondents the witness only knew seven. He confirmed that the 1<sup>st</sup>, 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 23<sup>rd</sup> respondents were deceased before the hearing commenced. PW 2, Monica Wanza Wambua testified that she settled with her parents who were workers on the land at the age of three years in 1957. In her estimation there were more than 100 workers living in the camp. On her part, she had made developments on the suit land and knew of no other home. She never got to know the owner of the suit land or its reference number. But like the first witness she insisted that they never paid rent for the houses they lived in. To her the camp sat on 7 acres. The only thing we need to add to this is that the witness did not mention any of the respondents.

PW3, Alfred Owuor Kiti was, in the plaint the 14<sup>th</sup> plaintiff. He lived in a house left to him by his father who was a quarry worker. PW4, Peter Kiarie Karani, the 20<sup>th</sup> plaintiff came to the suit land in 1962 with his parents who worked in the quarry; and later on built his own house. Like PW2 and PW3 he maintained that the camp was comprised in 7 acres of the suit land. He too did not know the owner. Again no mention was made of the other respondents.

Like any civil claim, the respondents were bound to prove, on preponderance of evidence that all the elements of adverse possession existed and that each one of them was entitled to the portion of the suit land by adverse possession. As would be apparent from the evidence of the four appellants who testified, they came onto the land separately and in a different years. In **Solomon Muathe Mitau & 787 others V. Nguni Group Ranch** Civil Appeal No. 102 of 2014, where out of 788 appellants claiming adverse possession, only 7 testified, this Court, (Kihara Kariuki, (PCA), Waki & Kiage, JJ.A) said:

**“Only seven out of the 788 appellants testified on their own behalf to establish their claims. As stated earlier, this was not a representative suit as there was no order sought or given to that effect. The only Directions given in accordance with the Rules before Nambuye, J. (as she then was) were that *“the Originating Summons be converted into a plaint and viva voce evidence be taken.”* The seven individuals then testified variously before three different judges (Wendoh, Sitati and Lenaola, JJ.) over a period of about four years.**

**It is clear from the record that 781 out of 788 individuals listed as claimants in the Originating Summons did not testify on the crucial aspect of possession of the disputed land or any part of it. They could easily have presented themselves for such evidence or instructed one or more of the other claimants to tender their evidence before the court in accordance with the rules of procedure.....There was no effort made in this case to have the**

**evidence of the 781 claimants presented and considered in any lawful manner. Whatever the reason the appellants may have had for such omission, it lends credence to the assertions by the respondent that such persons were improperly enjoined in the suit and were properly removed as parties by the trial court; or they were minors who had no capacity to sue; or many were dead; or others hailed from far flung areas and had no interest in the suit. It is our finding, in those circumstances, that there was sufficient basis for the finding made by the trial court that the fact of possession, adverse or not, by those persons was not proved and their case was for dismissal.”**

It must follow that without evidence in support of the claim by the other 24 appellants, the veracity of their claims cannot be ascertained. But even for those who testified, they did not know the parcel number of the property they occupied neither did they know the owner after the settler left. They talked of developments that they had made on the suit land without providing any proof or details of the nature of those developments. Worse still some of them conceded that they occupied the very houses built for them by the settler. While PW1 testified that they occupied 2½ acres, PW2, PW3 and PW4 were agreed that they lived on about 7 acres. Just as PW1 had no basis for saying the area was 2½ PW2, PW3 and PW4 likewise merely guessed the size of the workers’ camp. Despite their assertion that they have lived on the suit land for decades, the respondents provided no scrap of evidence of any steps they have taken in decades, they claim to have occupied the suit land to acquire it. They only moved to court when threatened with eviction in 1992.

The respondents contended that they are occupying both LR Nos. 8569 and 14847. We have seen how LR No.8569 mutated into 8569/1, 8569/4 and 8569/5 following sub-divisions at various stages and in favour of different parties. The question we need to answer is whether the appellants were the rightful owners of the suit land, against whom a claim for adverse possession could be maintained. Of course, from the history of LR No.8569, it is apparent that it initially contained in measurement 865 acres, registered in the name of Paris John Sauvage for a term of 949 years with effect from 1<sup>st</sup> June 1954. On the 22<sup>nd</sup> April 1955 it was transferred to Kahawa Quarries Ltd. and in 1955, the Crown registered a caveat on it. There were two other caveats in 1956 by the East African Power and Lighting Company and M/S Murphy Chemicals (EA) Limited which was claiming 3.5 acres. Some 504 acres was surrendered to the Crown in 1957. Kahawa Quarries Limited remained the registered owner up to 1961 when it was voluntarily wound up. At the same time 7.0 acres of LR No. 8569/4 was transferred to Mr. Cecil Hillary Greenwood – Penny and subsequently 359 acres less 5 acres transferred to M/s Pecon Limited. On 5<sup>th</sup> April, 1966 Ndorongo Gatheru, the 1<sup>st</sup> appellant, Peter Kungu Kahari, the 31<sup>st</sup> respondent, Rufus Wamae and Wilfred Mwai lodged a caveat in respect of 359 acres claiming purchasers’ interest.

It would appear that for many years the caveat remained in place. It was not until 17<sup>th</sup> April 1974 when the Government removed this caveat pursuant to **section 57(6)** of the Registration of Titles Act, which would suggest that the immediate registered owners, Pecon Limited made the application for the discharge of the caveat. A few months later on 15<sup>th</sup> July, 1974 the Government gave an acquisition notice and proceeded to acquire the suit land. Two years later on 7<sup>th</sup> October, 1976 LR No. 8569 was transferred to the 2<sup>nd</sup> appellant, Gatundu and Mangu Farm Company Limited (subject to two caveats) for a consideration of Kshs.180,000.

Thereafter on 6<sup>th</sup> June, 1989 pursuant to **section 340** of the Companies Act (repealed) and **section 8** of the Government Land Act the suit land vested in the Government *bona vacantia*. It is our understanding of the law that upon Pacon Limited being struck off, by operation of **Section 340** of the Companies Act (repealed), the suit land which it owned was deemed *bona vacantia*. The section stipulated that;

**“340. Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before its dissolution (including leasehold property but not including property held by the company in trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court under section 338 or section 339, be deemed to be *bona vacantia*, and shall accordingly belong to the Government”.**

What this history demonstrates is that from the time ownership of parcel LR No.8569 changed from Paris John Sauvage, the original owner in 1955 to 1989 when the suit land was acquired by the Government *bona vacantia*, it was all through claimed by many. For instance Kahawa Quarries Ltd (1955), a caveat by the Crown (1955), caveats by the East African Power and Lighting Company and by M/s Humphrey Chemicals (EA) Limited (1956), a surrender of 504 acres to the Crown in 1957, a transfer to M/s Murphy Chemicals (E.A.) (1958), to Mr. Cecil Hillary Greenwood – Penny (1961), to M/s Pecon Ltd (1966), a claim by the 1<sup>st</sup> appellant, the 31<sup>st</sup> respondent, Rufus Wamae and Wilfred Mwai (1966), another claim by the 2<sup>nd</sup> appellant (1976) and finally the aforesaid vesting *bona vacantia* in 1989. We reiterate the more fundamental question in this dispute is; when did time begin to run and against which title?

In reply to the originating summons on behalf of the Attorney General (the 30<sup>th</sup> respondent), Rosinah Ndila Mule, a Senior Registrar of Titles in the Ministry of Lands sworn an affidavit in which she explained that from their records, the registration of two transactions by the 2<sup>nd</sup> appellant and the other parties alluded to earlier were rejected by the Registrar. She has deposed further that by the last entry (No. 28) in the register;

**“4.....the land comprised in LR 8569/5 belongs to the Government, having vested in the Government as *Bona Vacantia* after PACON LTD was struck off the Registrar (sic) of Companies.**

**5. That in my belief and in view of the above mentioned facts the said land therefore neither belongs to the plaintiff nor the defendants but to the Government of Kenya”.**

In other words from 1989 no claim of adverse possession could be advanced as the suit land had devolved to the Government. (See **Section 41 (a) (1)** of the Limitations of actions Act and **Peter Mwashu & Anu. V. Javan Mwashu & Others** HCCC No. 38 of 2004).

The learned Judge for her part and quite characteristically delivered herself on the question saying;

**“49. The application (sic) herein would have claimed adverse possession against M/s Pacon Ltd especially so when the said company became dissolved and lost their title. The Government had the land for a very brief period indeed.**

**50. The plaintiffs were on the land but it cannot be said that they were there with the consent of the defendants because the defendant 1 and 2 were never registered owners of the land. Defendant No.4 became registered in 1989 as the owner of LR14847.**

**51. It is alleged that the 4 defendant sold the land in question to other persons and or its members. This seem to be areas outside where the plaintiffs reside.**

**52. As to the plaintiffs, if they have since died since the inception of the suit, then the claim by them abates. Where the claim is brought by the children they require to hold grant of letters of administration. Section 16 Limitation of Actions Act applies.**

**53. Thus in order for a person, as stated earlier, to be entitled to a claim to adverse possession, they must show that they are not on the land with the consent of the owner. Where they are tenants, they do not claim adverse possession. If they are squatters as may be seen in this case they must show that they dispossessed the owner of the land. This has to be proved”.**

In the end, from this it is truly difficult to know against which title the claim was made. The learned Judge went on to make conclusions that are as startling as they are confusing regarding which title, in her view the respondents were entitled to. She stated that;

**“42. From the pleading the plaintiffs claim and description of the suit land was vague...**

**43. They claimed LR title No. 8569 LR 10823 which they were aware remitted to the Government of Kenya sometime in 1989. The subsequent land title issued of LR 14847 claimed by the 4<sup>th</sup> defendant has annexed and (sic) identical survey map for LR 8569. This cannot be, as sub-divisions have since taken place and the survey numbers of 56142 for the original title (sic).**

**44. I can only conclude that since 1989 the plaintiff have been on LR 8569/5 (Now repealed) (sic) with the consent of the Kenyan Government.**

**45. Adverse possession cannot be against the Government. Section 41 of the Limitation of Actions Act probabilities acquisition of Government Land or Land otherwise enjoined (sic) by the Government.....**

**46. ...the land belonged to the Government for less than a month or 30 days. The *Bona vacantia* was declared on 6 June 1989 while the 4<sup>th</sup> defendant was issued with a new lease on 1 July 1989 for No. 14847.**

**47. Therefore when in 1992 the medical officer of health sued and charged the 1<sup>st</sup> defendant for nuisance under section 118 (1) (b) of the Public Health Act, Plot No. 8569 was no longer in existence. It ceased to exist in 1989.....From the evidence before court, all along 1, 2 and 4**

**defendants had made out to be the registered owner of the suit land. The area where the plaintiffs claim as a camp for the 1<sup>st</sup> original owner who subsequently sold and left indeed a last owner Pacon Ltd who lost the title.”**

While criticizing the learned Judge in their grounds of appeal for failing to appreciate that the two parcels were not one and the same, the appellants themselves failed to explain the relationship between the two parcels or how the 2<sup>nd</sup> appellant acquired LR No. 14847. This was particularly vital in view of the appellants’ previous persistent claim to No.8569/5, the suit land. They lodged a caveat claiming to have purchased it from Pacon Limited in 1976, the same year the 2<sup>nd</sup> appellant is reflected as having been registered as the owner. But they have equally been persistent before the trial Judge and in this appeal that the two parcels are distinct. In entering judgment, the learned Judge awarded to the respondents 7 acres **“of that portion of land originally known as LR 5569/5”** (ought to have been 8569).

In the evidence of the appellants and their witnesses it was confirmed that there were families occupying some 64 houses on the suit land when the 2<sup>nd</sup> appellant purchased it. From the state of the record alluded to earlier, it is not clear whether the appellants were claiming only 3 acres of the suit land, the whole of it or simply saying that the workers houses were on 3 acres. Of interest was the testimony of the 1<sup>st</sup> appellant, who insisted that he himself bought the suit land but could only guess that that may have been in the 1980s. He had no documents in court to prove this, merely stating that they were at home. At the hearing there was no mention of the property the 2<sup>nd</sup> appellant was claiming to belong to it, whether LR. No.8569 or LR. No. 14847.

For our part we find no evidence that LR. No. 14847 was created in place of LR. No.8569 or in place of any of its sub-divisions. We have demonstrated that the appellants have all along claimed that they were entitled to LR. No.8569 as purchasers. They even caused it to be transferred to the 2<sup>nd</sup> appellant before it vested in the Government. Even after that period, in 1992 the 1<sup>st</sup> appellant was charged before the magistrates’ court at City Hall in Cr. Case No. 5834 of 1992 with causing a nuisance as the owner of the structures on the suit land, contrary to **section 115** of the Public Health Act and was indeed convicted and sentenced. Yet they have conveniently disowned the suit land, insisting that they are the registered owners of LR. No.14847. The grant in respect of LR. No. 14847 was issued barely a month after LR 8569/5 was declared *bona vacantia*. If the two parcels are different, why would the appellants be aggrieved by the decision of the learned Judge granting to the respondents 7 acres **“of that portion of land originally known as LR No. 8569/5”**. At any rate, what comes out clearly from the entire case is that the trial court, counsel for the parties and the parties themselves failed to unravel these puzzles. For example, the court failed to visit the disputed land even after an order to do so was made. Such a visit would have availed the court an opportunity to confirm the nature of structures on the suit land, the habitants and the actual location of LR. No.14847, if it actually existed on the ground.

Going by the register, LR. No. 8569/5 has not changed since it vested in the Government in 1989. It cannot therefore be alleged that the parcels are one and the same. Subsequent transactions confirm this. As recent as the year 14<sup>th</sup> January, 2009 the Commissioner of Lands applied to the Director of City Planning for approval of the sub-division scheme plan in respect of LR No.8569 (should be LR No.8569/5). It follows therefore that any suggestion that LR No. 14847 was created in place of LR No. 8569/5 would be a fraud. We suspect, from the appellants’ previous claims to LR No.8569/5 that this may indeed be so. As individuals in 1966 the 1<sup>st</sup> appellant, the 31<sup>st</sup> respondent, Rufus Wamae and Wilfred Mwai claimed LR No.8569 as purchasers. Subsequently after the incorporation of the 2<sup>nd</sup> appellant in which the 1<sup>st</sup> appellant was a director, another attempt was made to claim LR No. 8569/5 in 1976 when it was allegedly transferred to 2<sup>nd</sup> appellant.

In a nutshell, the claim by the respondents was in relation to LR. No. 8569 and LR No. 14847. There is indeed no evidence, as we have demonstrated that the suit land belonged to the 2<sup>nd</sup> appellant. They also failed to prove how the original LR. No. 8569 became LR No. 14847.

In the end we find no evidence that any tribunal properly directed would have come to the conclusion that

the respondents were entitled to the suit land by adverse possession.

It would also appear that they have been evicted and structures on the suit land demolished allegedly by the 1<sup>st</sup> appellant and the then Nairobi City Council on 23<sup>rd</sup> October, 2010.

Finally, from the latest entry of 6<sup>th</sup> June, 1989 in the title, the suit land is registered in the name of the Government of Kenya.

For these reasons, we allow the appeal by setting aside the decree of the High Court rendered on 26<sup>th</sup> June, 2008 awarding seven acres of the suit land to the respondents. Having concluded that the suit land belongs to the Government, we do not find it necessary to say more regarding the appellant's claim. We make no orders as to costs.

**Dated and delivered at Nairobi this 30<sup>th</sup> Day of June, 2017.**

**ASIKE – MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**