IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CIVIL APPEAL 129 OF 2010

HARRISON OYARI & 588 OTHERS ….....APPELLANTS

VERSUS

MAREO ORIAMBU & 22 OTHERS ….....RESPONDENTS

(*Being an appeal against the Judgment of Hon. Justice D. Musinga delivered in Nakuru on 15th November, 2007*

In

H. C. MISC. CIV. No. 416 of 2003 (O.S.)

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JUDGMENT OF THE COURT

1. It is important, in our view, that we state clearly from the outset what the appeal before us is about and, more importantly, what it is not about. From the multiplicity of the respective parties, the hyperbole accompanying the dispute and the historical context, it may easily be mistaken for a contest relating to the common boundary between Transmara/Gucha districts or the Narok/ Kisii districts or Nyanza/Rift Valley Provinces and the communities that occupy those regions. But it is not. We suspect there is such a boundary which has served the administrative and electoral purposes of the region, but even if there was not, it is in the realm of the executive arm of government and the independent Commission tasked with matters of electoral boundaries, to settle it. At any rate, wherever the boundary lay was of no moment when it comes to property ownership since there are constitutional guarantees that Kenyans are at liberty to live and own property in any part of the country. We may also say that the dispute is not about occupation of ancestral lands for hundreds of years and the intermittent tribal conflicts before the lawful ascertainment of land rights and interests through the lawful process of Land Adjudication. So, what is it about?
2. It is spelt out in the **Originating Summons** (O/S) filed before the High Court in Nakuru on 28th November 2003 which was twice amended on 22nd January 2004 and 5th November 2004. The claimants are 589 individuals **('the appellants')** who assert that they are the lawful owners of a registered piece of land known as **Transmara/Keiyan/1('the disputed land')** measuring 847.5 Hectares (about 2,117 Acres) which was registered in the name of Keiyan Group Ranch (**'the respondent'**). They claim such ownership on the basis that they had been in peaceful and uninterrupted possession and occupation of the land for a period of more than 12 years since the Keiyan group was registered as the owners in the year1980 before the appellants were forcefully

evicted in 1993, never to return.

3. They sought two substantive orders in that O/S:-

"1. ***That the plaintiffs be registered as proprietors of parcel No. Transmara/Keiyian/1 measuring approximately 847.5 Hectares and registered in the name of Keiyan Group Rach having become entitled to registration as proprietors thereof by virtue of adverse possession pursuant to their having been in quiet, continuous exclusive and open occupation of the same for a period well in excess of 12 years.***

2. That the plaintiffs be perpetually restrained from interfering with the plaintiffs quiet possession and enjoyment of Parcel No. Transmara/Keiyian/1 measuring approximately 847.5 Hectares having acquired, title thereto by virtue of adverse possession after being in quiet, open, continuous and exclusive occupation of the same for a period of over 12 years."

The only issue for our determination is therefore whether, in point of fact the appellants were in possession of the disputed land as asserted and whether in point of law such possession was adverse. We shall revert to that issue shortly, as we think a short background to the dispute is pertinent.

4. The main character in the drama is one **Mzee Joseph (Yusuf) Oriango Omwoyo (Oriango)** who died in 1984. He owned land at the presumed Kisii/Narok boundary which was ultimately registered in his name in 1975 as land parcel **Botabori South/50** measuring 11.6 Hectares after conclusion of Land Adjudication process in Botabori South registration district in Kisii. There is no dispute over this piece of land. However, Oriango claimed that many years before land adjudication, going back to 1920, his ancestors had been in occupation of a large portion of the disputed land which bordered his land, and he had continued such occupation and use of the land without interruption from anyone. Not until 1976 when the respondents sought and obtained leave of court to privately prosecute him and one other person in **Criminal Case No.16/ 1976** before a magistrate's court in Kisii. The allegation was that the two had entered and trespassed on the private land of the respondent in the year 1976 contrary to **Section 3(1)** of the **Trespass Act,** Cap 294. However, the disputed land had been registered on 5th August 1974 in the name of ten individuals who represented 43 families of Keiyan group ranch, and not the respondent. The respondent itself, which was the complainant, though registered under the **Land (Group Representatives) Act** on 28th August 1974, was not registered as the owner of the disputed land until **4th November 1980**. For that reason, the private prosecution failed.
5. The respondent confronted Oriango again in 1980 when its officials and manager found Oriango clearing a portion of the disputed land in readiness for ploughing with tractors and planting maize. When the officials told him to stop, he is alleged to have told them:

"do not tell me anything otherwise we pour blood in this country".

They complained to the police that apart from Oriango trespassing on their land he had behaved in a manner likely to cause a breach of the peace. He was arrested and charged before a Nakuru District Magistrate who convicted him and sentenced him to pay a fine of Sh. 1,750 or serve 9 months in prison. On appeal to the High Court **(Mead J.)** in **HCCr.A No.525/81**, the appeal was allowed on the basis that no one testified that the words used by Oriango did in fact cause a breach of the peace or were likely to cause a reasonable apprehension of it, which were the necessary elements of the offence charged. An appeal by the State to the Court of Appeal in **Cr. App. No. 42/82** was dismissed. The Court of Appeal noted that the respondent became the registered owner of the disputed land on 4th November 1980 and could not therefore validly be the complainant in an offence allegedly committed on the property in April 1980.

6. The following year, 1981, unsuccessful efforts were made through the provincial administration to resolve the issue of the common boundary between Narok/Kisii in the hope that such determination would also resolve the issue of trespass. No doubt emboldened by his successes against criminal prosecutions, Oriango went to the High Court in Kisii and filed **Civil Case No**

11/1983. He pleaded in part as follows:

7. ***"3 That the plaintiff is and has been the owner and occupier of a piece of Land bordering the Kisii-Narok Districts measuring approximately 650 acres since 1920 upon which land the plaintiff has established a home and on which land he has always depended as a source of his lifelihood.***

4 <u>The defendants on or about 10th November, 1982 without any colour of right on allegations that the said piece of land belongs to them in exclusion of the plaintiff entered into the said piece of land settled</u> <u>therein and built a Manyatta village therein and are now settled therein to the total exclusion of the plaintiff." <u>(Emphasis added)</u>

8. He prayed for two substantive orders:

"(i) A declaration that a parcel of land measuring approximately 650 acres bordering the Kisii/Narok Districts border in South Mugirango is his land.

(ii) A permanent injunction restraining the Defendants by themselves their agents from trespassing on to the said parcel of land".

9. The respondents, in a defence filed in February 1983, contended that the portion of the disputed land claimed by Oriango was neither identifiable nor recognizable in law. At any rate, the respondent was the registered owner of the entire land through an open process of land adjudication and the court had no jurisdiction to make the orders sought.

10. In 1984, the plaint was amended to bring in another 100 plaintiffs who joined Oriango in making the same plea and seeking the same orders save for two additional orders, thus:-

"(***a) Alternative (sic) and without prejudice to the above a declaration that the plaintiffs are the legal owners of the said piece of land by virtue of prescription right.***

(b) A declaration that the adjudication if any was null and void for failure to serve any notice on the plaintiffs".

They also enjoined 22 individuals as defendants, some of whom had no connection with the respondent.

According to the record, that suit was dismissed for want of prosecution ***(Order XVI r. 6, Civil Procedure Rules)*** on 18th January 1990. It is also common ground that Oriango had died way back in 1984 and his estate did not apply for substitution to proceed with the case.

11. In August 1993, a group of 102 individuals sued the same defendants, "T/A Keiyan Group Ranch" as in the earlier dismissed suit and pleaded their cause of action as follows:

"***3. At all material Times, the plaintiffs and their forefathers have been in occupation of a piece of land bordering the Kisii/Narok District, measuring approximately 650 Acres, as far back as 1920 which land the plaintiffs have established homes and upon which they have depended for their livelihood.***

4. That before (1960) the Kisii/Narok District boundaries which was along Keiyan River placed the said piece of land within Kisii District, but after the said date, the District and Provincial Boundaries were adjusted and the larger portion of the plaintiff's land found itself within Narok District, in the Rift Valley Province.

5. That in the late 1970's when the land Adjudication Process was commenced within Narok District, the plaintiffs were not notified of the adjudication exercise, which proceeded on the blind assumption that the Land within Narok District belonged solely to members of the Maasai community.

6. <u>That on or about 1981 the Defendants without any lawful authority or any colour of right, started prosecuting the plaintiffs for allegedly trespassing on the area between Keiyan River and the present Kisii/Narok boundary, which they claimed to be lawful owners but to no avail".</u> (Emphasis added)

They also pleaded acts of violence and war by Maasai tribesmen which culminated in their eviction, thus:

"7. <u>That in the late eighties and early ninety (sic), the Defendants with members of their ethnic group the Maasai unlawfully declared war on plaintiffs and members of their ethnic group the Kisii's wherein the plaintiffs lost several relatives and tribesmen as a resullt of the Land dispute relating to the aforesaid area between Keiyan River and the Kisii/Narok boundary.</u> (Emphasis added).

8. <u>The plaintiff's claim against the Defendants is for trespass on private land in that since 1988/1991 the Defendants have through various acts of violence and war against the plaintiffs forcefully taken possession of the suit land from the plaintiffs without any colour of right, thereby denying the plaintiffs quiet enjoyment of their land and putting them into loss and damage."</u> (Emphasis added).

12. They sought the following orders:-

"a) A declaration that a parcel of land measuring approximately 650 acres along Kisii/Narok District and Provincial Boundary, between Kaiyan River and the present day Kisii/Narok boundary between Kilgoris and South Mugirango location of Kisii District belong to the plaintiffs.

b) That in the alternative, if the plaintiffs are not owners then they have acquired Title by prescription and/or adverse possession by virtue of their occupation of that land for close to 100 years without interruption.

c) Declaration that if any land adjudication took place in Narok in 1970/1980's relating to the suit land then the same was null and void and of no legal effect for failure to serve notice and include the plaintiffs.

d) A mandatory and perpetual injunction to issue against the Defendants.

e) General Damages and mesne profits as a result of trespass by Defendants."

13. That was Nakuru **<u>HCCC NO. 514 of 1993</u>**. It would appear that the suit was thereafter referred to Arbitration which proceeded before one **"Junius Mwalimu Ezekiel Njue, Court Appointed Arbitrator".** Both sides were represented by counsel and the arbitrator heard several witnesses on both sides as well as independent witnesses from the Land Adjudication department in Kisii and Transmara, District Surveyor, and Land Registrar, Kisii. In his findings and award made on 5th March 1999, the Arbitrator found no sufficient evidence to support the claim made by the plaintiffs for adverse possession of a portion measuring 650 acres; found that the plaintiffs were untruthful about being unaware of the land adjudication process in the area even as they argued that they were in possession of the disputed land; found the parcel of land registered in the name of Oriango as **Botabori South/50** was interfered with by the Land Registrar who purported to reduce it in size to keep it fully within the borders of Kisii; ordered rectification of the register to revert the full ownership of the registered land to Oriango's family even though one portion spilled into Transmara; and gave judgment for ownership of the disputed land (excluding Oriango's portion) to the respondents here.

14. It is not clear from the record what became of the Arbitrator's decision. That is because the record of appeal is poorly compiled, contains duplication of numerous documents and omits a number of relevant documents. Whether this was deliberate or not, only the author of the record of appeal, that is the appellants, can explain. Be that as it may, it is clear from the record before us that the plaintiffs in that case attempted to obtain a temporary injunction before the court in February 2000 *"pending the hearing and determination of the main suit"* but the application was dismissed by **Rimita J.** on 17th May 2000.

15. It is also apparent that on 26th July 2001, the respondents made an application to have the entire suit struck out on several grounds and **Lesiit J.** agreed with them and struck it out on 31st October 2003. **Lesiit J.** made the following findings:-

- ***"That the claim for 650 acres out of the disputed land which was registered on 4th November 1980 was time barred under Section 7 of the Limitaion of Actions Act which limited such claims to 12 years, while the suit was filed in August 1993.***
- ***That the alternative prayer for declaration of ownership through adverse possession was incontestably bad since it could not be made by way of plaint as there was a specific provision under Order XXXVI Rule 3(1) of the Civil Procedure Rules which was mandatory.***
- ***That the prayer for nullification of the land adjudication process which was completed in 1973 under the Land Adjudication Act and the disputed land subsequently registered under the Registered Land Act, was incapable of grant since the cause of action was time barred under Section 4(1)(c) of the Limitation of Actions Act as it came 21 years too late.***
- ***That the remaining three prayers in the plaint were ancillary to the first three and had no life of their own to stand."***

16. Once again, it is not clear from the record whether that decision was challenged on appeal or not. What is apparent is that the claimants in the earlier suit did not give up. One year later, they returned to the High Court in Nakuru and filed a fresh suit by way of the O/S referred to earlier in this judgment which gave rise to this appeal. This time round, the number of claimants went up to 588 but the defendants remained the same as in earlier litigation. The size of land claimed also went up from 650 Acres to the entire acreage of 2,117, and they adopted the substance of the same affidavit which supported earlier claims. The respondents for their part maintained as they had throughout, that the suit was bad in law for several reasons, and that they were the registered owners on the disputed land since 1980 through an open process of land adjudication and the appellants had not raised any objections during that process since they were not in possession. They were also not in possession, and admitted it, as at the time of filing the o/s on 5th November 2004. On the contrary, the respondent was in full possession and use of the disputed land where it was carrying out large scale farming in sugarcane, tea and ranching.

17. Musinga J. (as he then was) considered the affidavits on record, the oral evidence from both sides, the submissions of counsel and the authorities cited, before delivering his judgment on15th November 2007, dismissing the O/S. The learned Judge found that although some of the appellants had intermittently crossed into and grown some crops or grazed animals on the disputed land, it was neither continuous for 12 years since 1980 nor dispossessive of the respondent's rights; that the temporary and periodic possession was not peaceful since there were several cases of criminal and civil nature aimed at evicting the appellants; that the appellants were not in possession when they filed the O/S; and that several of the respondents were not properly enjoined in the suit, either because they were dead or had nothing to do with the respondent, the land owner against whom claims of adverse possession can be made.

18. The appellants now challenge those findings on the following 7 grounds which may be paraphrased:

"**The learned Judge of the Superior Court erred in law and misdirected his mind in**:

1. holding that dispossession of land from the title holder was a requisite condition in proofing adverse possession.

2. holding that the Plaintiffs had not proved their entitlement to the land by adverse possession despite the evidence tendered to proof(sic) adverse possession.

3. not addressing his mind to the claim by the Appellants that they had been in uninterrupted occupation of the suit land between 1980 when title was issued to the Respondents to 1993 when skirmishes broke out.

4. holding the suit in favour of the Defendants even if they had not tendered evidence in support of

their case that period between 1980 and 1993 the plaintiffs were not in uninterrupted occupation.

5. finding that the suit was part of the long standing dispute between the Maasai and the Kisii living along the Kisii/Narok boundary.

6. holding that the Plaintiffs were not in occupation of the land in the statutory period of 12 years.

7. misapplied the principles applicable on determination (sic) entitlement to land by adverse possession."

19. Before us, learned counsel for the appellants, **Mr.L.M. Karanja**, intimated that he would urge the grounds as 4 by combining grouns1&2; 3&4; 5&6; and 7, but ended up arguing all the grounds as one. He referred to the pleadings in the O/S and observed that there was no dispute that the respondent was issued with a Title deed to the disputed land in 1980 and that the appellants were forcibly evicted in 1993 and were not in possession by the time they filed their suit. He submitted, however, that the interest of the respondent had already been extinguished by the time of the forcible eviction and the respondent merely held the property in trust for the appellants until they moved to court in 2003 to claim their title. According to counsel, the violent eviction could not amount to dispossession of the property by the aggressor as it came one year too late and their continued occupation of the land amounted to trespass. For this submission, counsel relied on the authority of ***Njuguna Ndatho v. Masai Itumo & 2 Others [2002] eKLR*** to the effect that the sensible step to take in stopping time for purposes of the Act was to file suit for recovery and not going into the disputed land armed to dislodge the adverse possessor and thereby causing a serious breach of the peace or loss of life.

20. As for the finding by the trial court that the appellants were not in continuous possession of the disputed land, Mr. Karanja referred to a letter on record written by the Agricultural Finance Corporation which had advanced a term loan to the respondents to carry out farming activities but who visited the land on 21st August 1980 and found the manager struggling with illegal occupation of about 500 to 600 Acres of the land by people from Kisii who were grazing thereon and planting maize. He was seeking assistance from the District Commissioner to have the Kisii people evicted. Counsel emphasized the possession by Oriango going back to 1920, and the unsuccessful attempts by the respondents to dislodge him through criminal prosecutions. In his view, such occupation was open and adverse and was not opposed by the respondents through any civil proceedings.

21. For his part, learned counsel for the respondent **Mr. Maiyani Sankale** submitted that the respondent was neither dispossessed of the disputed land nor were the appellants in continuous occupation for a period of 12 years. He referred to various authorities including ***Wambugu v Njuguna [1983] KLR 172***, ***"The Law of Real Property"*** by Megarry, and ***Halsbury's Laws of England*** to emphasize that for adverse possession to be established, it was the owner of the land, and not the trespasser, who ought to be dispossessed or discontinue possession of the land. In his view, the appellants never took possession of the disputed land to continuously carry out acts which were inconsistent with the ownership of the land by the respondent. He observed, on the evidence on record, that the disputed land lay within the Keiyan Land Adjudication section between 1974 and 1980 when the acreage was ascertained and the land registered. The appellants thereafter attempted intermittent incursions on portions of the land but were resisted physically and through criminal prosecutions for trespass. Counsel also referred to the attempts by the appellants to file civil suits to assert their alleged rights over the land which were unsuccessful. In sum therefore, counsel concluded, the appellants cannot succeed in their latest claim as they never were in continuous, exclusive, open and peaceful occupation of the disputed land.

22. In a short rejoinder, Mr. Karanja submitted that it was the appellants who filed civil suits to claim the land and not the respondent; that they were seeking 650 Acres but the cases were not determined on merit and the decisions that went against the appellants were neither here nor there; and that the fact of the matter was that the appellants were in occupation of the land and were entitled to the orders sought.

23. We have gone at some length into factual analysis of this case because the parties, on a first appeal, expect us to do so in the manner of a retrial, and to reach our own conclusions on it. Nevertheless, the

first appellate court will not lightly differ from the findings of fact of a trial court which had the benefit of seeing and hearing all the witnesses and assessing their credibility through their demeanor. It will only interfere with them if the findings are based on no evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings it did – see in particular ***Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278*** and ***Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.***

24. As stated earlier, the main issue for us to determine is firstly, whether, on the facts, the appellants were in possession of the disputed land during the time pleaded in the suit and secondly, whether such possession was adverse. As this Court stated in ***Kweyu v. Omuto [1990] KLR 709*** at page 716:-

"In deciding the issue of adverse possession, the primary function of a court is to draw inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of facts, the question of whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts."

Which leads us to a brief consideration of the law on adverse possession.

25. The law on the subject has been considered in numerous decisions at all levels of our courts, sometimes with conflicting appreciation of it. At one point, **Kuloba J.** derided it as an aberration in our land tenure system which has elaborate statutes for determination of interests in and ownership of land. See ***Gabriel Mbui v. Mukindia Maranya [1993]eKLR***. However, unless Parliament intervenes, the common law principle that a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner for a prescribed period and in the process extinguishing the owner's title, shall continue to vex our courts.

26. In a recent decision of this Court similarly constituted in Nyeri, ***Muragori Githitho v. Mathenge Thiongo [2009] eKLR ,*** we examined the issue and cited *in extenso* the case of ***Gideon Mwangi Chege v Joseph Gachanja Gituto [2015] eKLR*** in which **Makhandia J**.(as he then was) stated as follows:-

"T***he law on adverse possession is in my view well settled. It is anchored on sections 7, 13 and 38 of the Limitation of Actions Act.***

Section 7 provides inter alia:-

"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 is first accrued to some person through whom he claims, to that person".

Whereas Section 13 of the same Act is in these terms:

"(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession....."

Finally section 38 is as follows:-

"38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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."

The onus is on the person claiming adverse possession to prove, in the words of Kneller J (as he then was) in Kimani Ruchine v/s Swift, Rutherford & Co. Ltd (1980) KLR 10 that:-

"The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec

clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration;" see Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; See Section 9 (1) and 13 of the Limitation of Action Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (See generally paragraphs 481 and 482 on pages 251, 252 of 24 Halbury's Laws of England (3rd Edition).

More recently, Kariuki J restated the law on the subject in the case of Omukaisi Abulitsa v/s Albert Abulista, Kakamega HCCC No. 86 of 2005 (UR) in these terms:-

"Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejectment but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. For these propositions of law, see Gatimu Kinguru v/s Muya Gathangi (1976) KLR 253, Hosea v/s Njiru (1974) E.A. 526, Sospeter Wanyoike v/s Waithaka Kahiri (1979) KLR 236, Wanje v/s Saikwa (No. 2) (1984) KLR 284, Githu v/s Ndeete (1984) KLR 778, Nguyai v/s Ngunayu (1984) KLR 606, Kisee Maweu v/s Kiu Ranching (1982-88) 1KAR 746, Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002) ".

On this I would also add Kasuve v/s Mwaani Investments Ltd & 4 others (2004) KLR 184, Samuel Miki Waweru v/s Jane Njeri Richu (2007) eKLR."

We think, with respect, that that decision correctly restates the law. What is the application of that learning to the case before us?

27. The appellants, on the basis of the pleadings which are binding on them, set out to prove as facts that they were entitled to ownership of the whole of 847.5 Hectares (2,117 Acres) of land parcel ***Transmara/Keiyian/1*** which:-

- they had been in continuous and uninterrupted possession for 12 years or more;

- the possession was open and notorious to the knowledge of the owner;
- the possession was without the permission of the owner;
- they asserted a hostile title to the owner of the property.

--- See ***Titus Kigoro Munyi v. Peter Mburu Kimani [2015] eKLR***.

28. The date 1980 (4th November 1980, to be precise) is significant because, as correctly submitted by the appellants and supported by the authority relied on, ***Paul Macharia Wangunya vs. Mwangi Macharia Wangunya & Anor [2015] eKLR***, time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In respect of registered land, adverse possession dates from the granting of the certificate of title, for that is when the Title holder is *prima facie* entitled to possession and therefore entitled to take action against any intruder to the land. See also ***Francis Gitonga Macharia v. Muiruri Waithaka CA No. 110 of 1997***.

29. The appellants authorized five of their number to *"**plead, act and testify**"* on their behalf but only two testified before **Musinga J.** The main witness was **Harrison Oyari** (Oyari) who swore several affidavits and was also a party and testified before the Arbitrator in the previous suit (**HCCC. 514/93**) which was struck out by **Lesiit J.** It was clear from his affidavits and oral evidence that the appellants staked their claim on the long occupation of a portion of the disputed land by their ancestors' years before 1980. One of those ancestors was Oriango who alone, and later with 100 others, had their own run-ins with the respondents before 1980 when they laid a claim for 650 Acres. As we have seen in paragraph 7 above, Oriango pleaded dispossession of the land on 10th November, 1982 when the respondents ***"without any colour of right on allegations that the said piece of land belongs to them in exclusion of the plaintiff entered into the said piece of land settled therein and built a Manyatta village therein and are now settled therein to the total exclusion of the plaintiff."***

The other evidence given by Oyari was that before 1963 the land was part of Kisii District but in 1976, it was transferred to Narok District. Beyond those bare assertions, however, there was no supportive evidence.

30. In earlier sworn testimony before the Arbitrator on 22nd April 1998, Oyari stated as follows:-

"In or around 1976 is when the Maasais attacked us and destroyed our crops.We did not report the matter because during clashes it is difficult to report the happenings because that is a time of war.However, during the initial stages we even took custody of their cattle which we handed over to Nyamaiya Police but the same were released after the proprietors of Keiyan Group Ranch were warned by Police not to release their animals to our shambas. This report was made in or around 1984.We left this place totally in 1993 – beginning of the year.The area we are claiming is in Transmara District.Currently the land in dispute is under use by Keiyan Group Ranch who grow Sugar Cane.They started growing sugarcane in 1986.They keep cows on their side that is across Keiyan River."

31. Another witness, **John Getaro Nyaitondi** testified thus:-

"The land under Keiyan is on sugar.They started growing sugar cane from 1976 onwards. They were pushing from time to time. On the side of the Keiyan across the river, some Kisii were employed to cultivate the land of Maasai which was bushy. Since the fight was not on daily basis, that is why when things were cool some Kisiis were getting employed to work for Maasai. If you say Kisiis were employed to work for Maasais because there were no clashes you will be telling lies. We did not go for our titles for the disputed area because we did not see the adjudication work done. We have not known that adjudication took place in the area."

32. Yet another witness, **Onganga Obara,** testified thus:-

"The Kisiis are not currently using the area in dispute.They started leaving the area in 1986 and left the land finally in 1993 when we were overpowered by the Keiyan Group Ranch who are currently occupying the land. I did not know the Keiyan Group Ranch had a title until when I saw it in this

Court."

33. In our assessment of the issue of possession, there was no evidence that the appellants occupied or took possession of the entire area of 2,117 acres of ***Transmara/Keiyian/1*** as pleaded. There is no doubt, however, and Musinga J. was right in so holding, that there were intermittent incursions into a portion of that land after 1980 by persons from the Kisii community some of whom may well have been the appellants. The letter written by AFC in August 1980 seeking the assistance of the District Commissioner in resisting the incursions confirms that. However, in our finding, their occupation was neither continuous nor peaceful, and the owner subsequently forcefully retook full possession to carry out farming activities and has kept them out since 1993. As was held in ***Jandu vs. Kirpal & Another [1975] EA 225:***

"…to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be visible, exclusive, open and notorious."

34. It is common ground that there was a process of land adjudication between 1974 and 1976 when the interests in the land were determined under the **Land Adjudication Act** and subsequently registered under the **Registered Land Act** in 1980. A claim by the appellants, or some of them, in ***HCCC 514/1993*** that the land adjudication was done secretly was rejected by the court and there was no appeal on that decision. At all events, it seems to confirm the assertion by the respondents that the appellants were not in possession of any portion of the disputed land they say they were at the time if they did not notice the process of land adjudication taking place. It was an opportune moment to assert title, if any.

35. The upshot is that this appeal is for dismissal and we so order. As the matter involves a large number of litigants and has elements of public interest, we order that each party shall bear its own costs of the appeal.

Dated at Nakuru this 16th day of June, 2016.

P. N. WAKI-

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR