



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CIVIL APPEAL NO.11 OF 2014**

**BETWEEN**

**WILSON KAZUNGU KATANA & 101 OTHERS ..... APPELLANTS**

**AND**

**SALIM ABDALLA BAKSHWEIN ..... 1<sup>ST</sup> RESPONDENT**

**ALI ABDALLA BAKSHWEIN ..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 23<sup>rd</sup> October, 2013***

***in***

***H.C.C.C. No.40 of 2008)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The odyssey to this Court by the parties to this appeal commenced with the filing of an originating summons (O.S) by the appellants on 20<sup>th</sup> June, 2008 in the High Court of Kenya at Malindi. The appellants then totaling 103 filed the O. S. against the respondents pursuant to the provisions of the then order **XXXVI rule 3(D), sections 3** of the Civil Procedure Act, **38** of the Limitation of Actions act and all other enabling provisions of the Law. In the O. S., the appellants sought orders that:-

“They be declared as proprietors of their respective plots within portion No.20 Malindi Title No. LT27 folio 374 file 3520 “*the suit premises*” by way of adverse possession having lived on and worked on the same for over 12 years since late 1950’s peacefully and without any interference whatsoever from the respondents and/or their predecessors.

They be registered and issued with certificates of title over the same in place of the respondents, and

Costs of the suit.”

The O. S. was supported by the affidavit of Emmanuel Mlewa Mkare, the 3<sup>rd</sup> appellant which he swore

on his own behalf and on behalf of all the other appellants. In essence, he deponed that the appellants and their families had been occupying, cultivating and utilizing the suit premises situate in Ganda, Kisima cha Magogo, in Malindi measuring about 359.91 acres. Prior to them, their forefathers had lived on the suit premises in similar fashion. Consequently, they were born, bred and brought up on the suit premises. Their forefathers, fathers, mothers and all their relatives who had passed on had been buried in the suit premises. Prior to their death, some of them had planted cashew nuts and mango trees that were over 50 years old. Prior to the respondents' father's acquisition of the suit premises in 1955 or thereabouts their forefathers had long occupied the suit premises though paying personal tax to the colony and protectorate of Kenya at Ganda station. They had thereafter continued to live in the suit premises peacefully and had all along enjoyed quiet possession and occupation thereof. Their forefathers passed on this legacy when they died. They too remained in long occupation and peaceful possession thereof and cultivated the same. They knew of no other home and/or land other than this one. For all this time the respondents had not demonstrated any interest in the suit premises and hence their claim based on adverse possession.

Upon the respondents being served with O. S. they reacted by filing a replying affidavit through the 1<sup>st</sup> respondent. Basically they deponed that the O. S. was bad in law, res judicata and supported by a defective affidavit. Otherwise they denied that the appellants' forefathers planted mango trees in the suit premises. If anything the mango trees and all the developments thereon were planted by their late father, Abdalla Salim Bakshwein "*the deceased*" in 1955 whilst others had been planted by them. That the portions of the suit premises purchased by the deceased in 1955 and the portion purchased by them in or about 1972 had at all times never been occupied by the appellants or any of their relatives in a manner adverse to their title. They also countered the deposition that the appellants had no other parcel(s) of land anywhere by showing that in fact the 1<sup>st</sup> appellant owned a 12 acre piece of land in Gede Mjomboni Kilifi being title No. Gede/Mjomboni/598. They denied that the appellants had been in continuous occupation of the suit premises for an uninterrupted period of more than 12 years. That indeed they (i.e. respondents) had on several occasions asserted their title to the suit premises through several means. At some point, the appellants filed a similar O.S. in 1989 being **Mombasa Misc. App. No.71 of 1989** "*the Mombasa O. S.*" which was dismissed on 4<sup>th</sup> May, 2005. When the respondent thereafter attempted to evict them, the appellants rushed to the High Court and filed the suit leading to this appeal having threatened them with bloodshed. By leave of court, the appellants filed supplementary affidavits in which they annexed bundles of documents to demonstrate how the appellants should not be granted the prayers sought in their O.S.

On 10<sup>th</sup> September, 2008, Omondi, J. with the consent of the parties directed that the O. S. and the affidavits in support thereof as well as the replying affidavits be treated as the plaint and defence respectively and that the O.S. thereafter proceeds by way of *viva voce* evidence. However, before the formal hearing of the O.S. could commence, the respondents filed a counterclaim to the O. S. in which they sought vacant possession of the suit premises and eviction of the appellants therefrom.

The hearing commenced before Omondi, J. on 13<sup>th</sup> June, 2011 when she took the evidence of 3 witnesses before she left the station on transfer. Thereafter the O.S. was taken over by Meoli, J who heard the remaining 4 witnesses of the appellants, two witnesses of the respondents, crafted and delivered judgment. Through the 7 witnesses, the appellants' case appears to be that though the suit premises are registered in the names of the respondents, the appellants and their forefathers had occupied and cultivated the suit premises long before the deceased acquired it in 1955. Their occupation was continuous and uninterrupted until 1970 when the deceased passed on. Since then they had known no peace; the respondents had all along attempted to evict them at times using brute force with fatal consequences. In a bid to contain the escalation, some 10 of the appellants and 14 others instituted Mombasa O.S. against the 1<sup>st</sup> respondent in which they sought to be declared to have become entitled by virtue of adverse possession to the suit premises. It would appear that the Mombasa O. S. for reasons that are not readily apparent was never prosecuted. By an application dated 31<sup>st</sup> January, 2005 filed by the 1<sup>st</sup> respondent the Mombasa O. S. was on 4<sup>th</sup> May 2005 dismissed by Maraga, J. (as he then was) for want of prosecution. The appellants testified that they were all born on the suit premises between 1937 and 1962. They had lived and cultivated continuously the suit premises and knew of no other home. They had even buried their loved ones on the suit premises without the deceased raising a finger. They conceded though

that they entered the suit premises as tenants of the deceased and had planted mango and cashew nut trees over the years, besides growing seasonal crops for their sustenance. As tenants, they had been paying rent otherwise known as Ijara to the deceased. Their peaceful occupation and cultivation of the suit premises was however rudely interrupted by the respondents upon the appellants refusing to pay the rent to them when the deceased passed on demanding documents of title. This standoff led to at times acrimonious and violent confrontations between the appellants and the respondents. It was the appellants' case therefore that the foregoing notwithstanding, they had established open, peaceful, exclusive and uninterrupted possession of the suit premises for a period of more than 12 years with regard to various portions in their occupation ranging from 10 to 25 acres respectively. On this basis they prayed for the orders in the O. S.

The case for the respondents through their 2 witnesses was that the deceased who was the father of the respondents first acquired a portion of the suit premises in 1950s but the bulk of it was acquired by them in 1970s. The deceased had leased part of the suit premises to the appellants' forefathers who paid him rent and/or Ijara in order to occupy and work the portions of the suit premises. The deceased passed on in 1970, thereafter many of the lessees refused to pay rent claiming that the respondents were not the proprietors of the suit premises since they lacked the requisite documentation. The respondents were forced to resort to court cases both civil and criminal and the provincial administration in a bid to oust and evict the lessees who had refused to pay the rent. At times those means turned violent. Though the respondents kept on the suit premises cattle, cattle dip, water tanks and shades, the appellants continued to utilize the portion of the suit premises. The entry into the suit premises by their forefathers having been by the consent and concurrence of the deceased, their payment of rent thereby making them tenants, the many arrests and prosecution of some of the appellants for the offences of criminal trespass, interventions by the provincial administration, institution of the Mombasa O.S. for forceful evictions of some of the tenants, violent confrontations leading to loss of life as well as destruction of their crops by the respondents; all these went to show that the respondents had all along asserted their title to the entire suit premises, and time for purposes of adverse possession stopped to run. They also testified that in the light of the foregoing the occupation and/or possession of the suit premises by the appellants was not as of right and exclusive but rather permissive.

In a reserved judgment delivered on 3<sup>rd</sup> October, 2013, Meoli, J. dismissed the appellants' claim but entered judgment in favour of the respondents on the counterclaim. The court further ordered that due to the large number of the appellants, the order requiring them to give vacant possession of the suit premises would take effect at the expiry of 6 months from the date of judgment. In making this determination the trial court reasoned thus:-

*"133. On a careful analysis of the evidence on record, one can hardly say that the requirement to prove peaceful and exclusive possession after dispossession of the owners have been fulfilled in this case. What there seems to have been is a long drawn out, even violent struggle and concurrent use of the land between the defendants and persistent "trespassers" or "squatters," including the plaintiffs. While Pw1 – 7 gave evidence apparently on behalf of all the 103 claimants, there is no way of telling whether each of the claimants' circumstances of claim are similar to those of the witnesses, and/or how much land they assert to possess either directly or indirectly. In court PW1 to PW4 claimed 10, 32, 20, 10, 25 acres respectively while PW6 and 7 did not indicate any acreage. It does not appear that these pieces were ever measured or surveyed or that they are clearly defined.*

134. Furthermore some of the claimants e.g. plaintiff no.12 and 84 are minors aged 13 and 14 years according to PW3. PW3 stated that when the initial sketch plan representing occupation was drawn, the claimants had believed parcels no.120 and 121 are to be one land parcel. Subsequently, no further plan was drawn although PW3 said that other claimants e.g. his own son Harrison Mlewa (Plaintiff 16) had since come up. He said he and six brothers are plaintiffs herein each claiming in his own right.

*A casual look at the plaint would suggest that other claimants are equally related as they bear similar apparent family names. This renders the claim by the entire group rather amorphous and*

confusing, (See **Kimani Ruchine & Anor vs Swift, Rutherford & Co. & Anor, (supra)**: who is claiming for whom, through who? Is it siblings/families claiming in their own right or through fathers and grandparents? Still, there were contradictions regarding which portions were occupied by which family, and different witnesses had different views about the original and only occupation sketch plan drawn prior to filing the 1989 suit in Mombasa.

116. Although it is possible for the adverse possessor to successfully claim a portion of a larger whole, the former must be specifically identifiable (see **Gatimu Kinguru v Muya Gathangi (1976-1980) 1 KLR 317**). From the record of the scene visit and the trial, it is not possible to accurately tell what specific portion is possessed by which claimant(s) and how so. PW3 upon being pressed on this matter said that the plaintiffs claimed the entire 359.91 acres in adverse possession. Even if the plaintiffs' claim were found to be proved, on what basis would the entire land parcel be distributed among the claimants? A court of law would be loath to issuing orders that are certain to cause fresh friction between the claimants themselves and possible breach of peace. The scenario is not remote given the emotions displayed in this case. In conclusion, the nature of the plaintiffs' evidence is such that it fails to establish their case on a balance of probabilities.

Regarding the defendants' counterclaim I have already noted that no defence or objection was raised thereto until the final submissions...

The period of limitation is reckoned "from the date on which the right of action accrued ..." To understand this phrase, it is necessary to read **section 13(1) and (2)** of the Act which states...

"120. Thus, as a matter of fact it cannot be said that the Defendants have lost their right to bring an action (counterclaim). It would have been prudent for the plaintiffs to answer the counterclaim and raise objections earlier to enable the court make a determination. Because of their failure to do so, the counterclaim remained on record unchallenged. In retrospect, perhaps that enabled the court to view the counterclaim in perspective of the entire case, and to determine the issue upon proven facts that would not have been available earlier. Regrettably, the plaintiff's feeble protest came too late."

The appellants were not at all amused with the turn of events. Accordingly, on 8<sup>th</sup> April, 2014 they lodged the instant appeal on 9 grounds. They complained generally that the trial court tailor made the judgment to suit the respondents; erred in computing time for purposes of adverse possession; failed to appreciate that the respondents' title to the suit premises had been extinguished between the years 1972 and 1989; wrongly took it for granted that there existed a court order in **Mombasa O.S.** for 16 years which barred the respondents from evicting the appellants from the suit premises and thus time did not run; that the respondents' counterclaim was an abuse of the court process the same being statutory barred; that the trial court imposed on the appellants a higher standard of proof than the normal standard of proof on balance of probability and finally that the trial court failed to appreciate the appellants' constitutional right to residence by failing ascertaining if they had alternative residences before issuing an eviction order against them, having lived on the suit premises since 1950s.

When the parties appeared before us on 27<sup>th</sup> November, 2014, they agreed to canvass the appeal by way of written submissions. Subsequently respective written submissions were filed and exchanged. We have carefully read and considered them alongside cited authorities.

In brief, the appellants' submissions are that it was clear from the evidence that they were born on the suit premises some time in 1950s and others much earlier, well before the deceased staked claim to the suit premises in 1950s. That they represented more than 350 families who had openly lived on the suit premises, cultivated it, built their houses and buried their relatives on it. Having appreciated that the Limitation of Actions Act came into effect on 12<sup>th</sup> December, 1962, they conceded that time for purposes of adverse possession could only be computed from 1962. That evidence had shown that the appellants only paid rent out of coercion and the fear of the resultant 6 months jail term for non-payment. It was not out of acknowledgement of the respondents' father's title. According to the appellants therefore by the time they filed the Mombasa O.S., they had been in possession of their respective portions of the suit

premises for an uninterrupted period of 22 years. In the alternative they submitted that should this Court find that the appellants were indeed paying rent from 1955 to 1972 and therefore were on the suit premises by the permission of the deceased then time in their favour began to run soon after the death of the deceased and by 1989 when they filed the Mombasa O.S., they had been in uninterrupted occupation for a period of 19 years. While they conceded as well that warrants had been issued to a bailiff to remove some of the appellants from the suit premises there was however no evidence to show that they had been sued as representatives of the appellants. For this submission they called in aid the case of **Public Institute Trustee & Mrs Beatrice Muthoni v Kamau Wandura (1982-88) eKLR 498**. The appellants further submitted that even if they had been sued in their representative capacity, time did not stop to run; neither was there a break in time between 1970 and 1989 as there was no proof that the decree was ever executed. The appellants also referred to another suit between the 1<sup>st</sup> respondent and one, **Said Saro**, an appellant herein, being Malindi District Magistrate's court **Civil Suit No.347 of 1979** in which a consent order was recorded on 14<sup>th</sup> February, 1978 by which the appellant undertook to vacate the suit premises within 6 months. The appellants' submissions on this question, is that the consent was entered into in their individual capacities. Despite the consent, the said appellant continued in open possession as there were no subsequent eviction proceedings. The appellants further submitted that they filed the Mombasa O. S. on 8<sup>th</sup> June, 1989 and the same was dismissed for want of prosecution on 4<sup>th</sup> May, 2005 which was a period of 16 years from the date of filing. During the pendency of the Mombasa O. S. there was no evidence that the respondents filed any suit for the eviction of the appellants. To them therefore time did not stop running in their favour because of the pending Mombasa O.S. Relying on the cases of **Joseph Gachumi Kivita v Lawrence Munyambu Kabura (1996) eKLR** and **Njuguna Ndatho v Masai Itumo & Anor (2002) eKLR**, the appellants submitted that for the period before filing of the Mombasa O.S., the actions of the respondents towards them and their families was anything but peaceable, but that notwithstanding, time did not stop running in their favour. With regard to various criminal cases that some of the appellants were subjected to following complaints by the respondents, they maintained that this did not stop time from running as well. With regard to the counterclaim, the appellants submitted that it having been filed when the respondents' title to the suit premises had already been extinguished, it was time barred and should not have been entertained by the trial court.

Opposing the appeal, the respondents commenced their attack by dealing with the contention by the appellants that the counterclaim having been time barred it ought not to have been entertained. The respondents submitted that the counterclaim was filed pursuant to the leave granted by court on 3<sup>rd</sup> November, 2010. The appellants too were granted similar leave to file and serve their defence on the counterclaim within 14 days of service. The appellants filed no pleading raising any issue on time limitation nor was it ever raised during examination of the witnesses, hence the trial court was right in refusing to entertain the issue of limitation at the written submissions stage. By dint of **Order 2 rule 4(1)** of the Civil Procedure Rules which mandatorily requires a plea of time limitation to be by way of pleadings then the appellants were barred from raising it at final submissions stage. With regard to other grounds of appeal, the respondents submitted that the trial court had found that the evidence of PW3, 4 and 5 was not candid nor credible as compared with other witnesses. The trial court considered all that was said before it, assessed the credibility of the witness and in the end preferred the respondents' version. They submitted further that as a first appellate court we should be reluctant to disturb the findings of the trial court on matters of fact. For this proposition, the respondents referred us to the cases of **Peters v Sunday Post (1958) EA 429** and **Kiruga v Kiruga & Anor (1988) KLR 348**.

On the concept of adverse possession the respondents submitted that the totality of the evidence of PW1,2,6,7 and DW1 demonstrated that the possession and occupation of the appellants' forefathers was permissive as it was on the basis of payment of rent. They referred to the case of **Wambugu v Njuguna (1983) KLR 172** for this proposition. Upon refusal to effect payment of rent, the respondents went out of their way to assert title at times subjecting the appellants to great misery and suffering leaving them with no alternative but to lodge the Mombasa O.S., which suit restored calmness during its pendency, but soon after its dismissal, disputes and violence erupted once more. In the premises, the trial court's computation of time cannot be faulted. That there had never been dispossession nor did the respondents discontinued possession of the suit premises throughout the period that the deceased was alive as the respondents and family members reared a large herd of cattle which grazed freely on the suit premises, they had even constructed a cattle dip, water tank and other buildings and/or structures for their use and that of their

workers on the suit premises. In view of the foregoing the appellants never had exclusive possession of the suit premises and therefore the trial court was right in dismissing the claim on that account as well. They made reference to the following authorities, **Wambugu v Njuguna** (supra) and **Wanje v Saikwa (No.2) (1984) KLR 284**. The respondents submitted further that the appellants' possession or occupation of the suit premises cannot be said to have been adverse as they had all along been subjected to endeavours of interruption and eviction. In other words the appellants had continuously been subjected to forceful acts with intention of evicting them including peeling/stripping of crops, trees and forceful harvesting of their crops and destruction through grazing on them by the respondents' cattle. Many of the appellants had been arrested and successfully prosecuted criminally over disputes relating to their occupation of the suit premises which at times turned criminally violent. They further submitted that the appellants did not discharge the burden of proving and specifically describing portions; their location in the larger whole, in their occupation that they sought to be decreed in their favour as contemplated in the case of **Kasuve v Msuanni Investments Ltd & 4 Others (2004) KLR 184**. Finally, the respondent submitted that the trial court rightly accepted the un rebutted and uncontradicted defence and testimony of the respondents that during the pendency of the Mombasa O.S., they were not allowed to evict the appellants from the suit premises but they repulsed any new invaders and/or squatters.

We have anxiously considered the pleadings, the evidence adduced at the trial, the numerous exhibits, the judgment of the trial court, the grounds of appeal before us, rival written submissions by both learned counsel and the law. We are also keenly aware that this is a first and perhaps last appeal. As the first appellate court, we are enjoined by **Rule 29(1)(a)** of this Court's Rules to re-appraise the evidence and to draw inferences of fact. This requirement has been elucidated in several decisions of this Court, suffice to mention but **Selle & Anor v Associated Motorboat Co. Ltd & Others** (1968) E.A. 123, **Ogol v Muriithi** (1985) KLR 359 and **Seascapes Ltd v Development Finance Company of Kenya Ltd** (2009) KLR 384. In all these cases the principle has been restated that our duty as a first appellate court is to revisit the evidence that was tendered before the trial court afresh, analyse it, evaluate it and arrive at our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving due allowance for that.

It is common ground that this dispute has been raging for a very long time. It is common ground that the suit premises are currently registered in the names of the respondents. It is also common ground that the suit premises was acquired through two transactions involving the deceased and subsequently the respondents themselves. Further, it is common ground that the appellants and indeed their forefathers entered the suit premises with the consent or concurrence of the deceased as tenants paying rent for their utilization of the portions of the suit premises that they occupied. It is also common ground that throughout the lifetime of the deceased, there was no challenge to his title to the suit premises by the appellants and or their forefathers. It is also common ground that things came to a head with the passing on of the deceased in 1970. The appellants and or their forefathers refused to pay rent to the respondents allegedly on the ground that they did not have the title documents to the suit premises. It is also not in dispute that from this time henceforth, the respondents were engaged in all manner of proceedings both orthodox and unorthodox against the respondents in a bid to assert title to the suit premises. There were both civil and criminal proceedings involving the parties and the enlistment of the provincial administration to resolve the dispute. The most memorable of the civil proceedings was the Mombasa O.S. by ten of the current appellants against the respondents based on adverse possession. Having failed to take steps to prosecute the said O.S. the same was on the application of the respondents dismissed for want of prosecution on 4<sup>th</sup> May, 2005. Finally, it is also not disputed that for the sixteen years that the suit was pending in court the respondents made no efforts to evict the appellants from the suit premises. However, as soon as it was dismissed, the respondents moved with speed to re-assert albeit violently their title to the suit premises. Infact on 19<sup>th</sup> November, 2005 and 27<sup>th</sup> January, 2006 during one of the incidents, one of the respondents' brother, **Said Abdalla** Bakshwein was attacked by some of the appellants, and set ablaze as well as his motor vehicle. He sustained severe burns. Earlier on, there had been a confrontation in which one of the occupiers of the suit premises and two employees of the respondents were killed. All these incidents led to criminal charges being preferred against some of the appellants which resulted in convictions. These skirmishes subsequently led the appellants to file the suit that is the subject of this appeal.

The appellants anchored their claim in the main on **section 38** of the Limitations of Actions Act. This section provides inter alia:

*“...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 the proprietor of the land”.*

As correctly observed by the trial court, beyond prescribing the limitation period, the Act does not expressly define “adverse possession” as a term. **Section 13(1)** however, provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession). Tied to this, is **section 7** of the Limitation Act which bars an owner of a parcel of land from an action to recover it at the expiry of twelve years. From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, **Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184** and **Wanje v saikwa (2)** (supra). In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another’s persons land with that person’s consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of **Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR)**, this court delivered the following dictum:

*“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”*

How do the above principles relate to the facts of this case? It is not disputed that the entry into the suit premises by the appellants and or their forefathers was with the consent of the deceased. They were tenants paying to the deceased rent and/or Ijara for the occupation and use of the various portions in their

occupation. The situation remained this way until the deceased passed on in 1970. Following the said death the appellants and or their forefathers stopped paying the rent to the respondents believing that they had no proof that they owned the suit premises. This far, it has been demonstrated that the forefathers and through them the appellant, entered the suit premises with the permission and consent of the deceased. The entry was thus not adverse to the title nor did they enter as trespassers. Accordingly time for purposes of adverse possession did not start running in their favour.

The respondents came into the picture in 1970 or thereabouts with the passing on of their father. They took possession of the suit premises having bought the remaining 2/3 portion. When the appellants and their forefathers refused to pay the rent but continued to remain in occupation, one can then say that time for purposes of adverse possession started running in their favour as they had become trespassers. Did however the respondents just sit by and watch helpless as the appellants continued and or maintained their trespass on their suit premises? Did the respondents take any steps at all to assert their title to the suit premises and stop time from running in favour of the appellants? Evidence is galore on what the respondents did to assert their title. Sample this:

**Charo Kiti Chengo alias Charo Bisiya** testified as PW1 thus:

*“... the late Mzee Bakshwein (i.e., the Patriarch...) used to receive rent from us, yes were paying rent because he said land belonged to him. After Bakshwein died, we continued paying rent to Salim, then we stopped because he did not have any documents to prove he owned the land... Earlier on they attempted to illegally and forcefully harvest our cashew nuts and mangoes but we repulsed them. I had no problem with the Patriarch of the family, but the children are the ones tried to harass us...I am aware that in the years gone by Samuel Katana Nzunga. Served time at Shimo La Tewa even Wilson and Emmanuel were imprisoned at one time and the people behind them being put in jail were the Bakshweins...Yes at one time the Bakshweins used brute force to evict families from the suit land, they used police and hired persons to forcefully remove people. They used DC, DO and Chief...”*

With regard to **Francis Kazungu Katana**, (PW2), this is how he testified with regard to the respondents' efforts to evict them:

*“Even as recent as last year, I was again arrested and put in cell because of occupation of the land. That harassment was there even in the 70's- they could use the chief, police, Do, DC claiming that the land is theirs...The Bakshweins have constantly harassed us over the land many times, and the DO had to come to our rescue by saying they ought to show title. The defendants have harassed us every year... Yes I admitted that the land belonged to Bakshwein and all that we wanted with my brother was compensation then we could vacate. My brothers and I are on land by virtue of our father's earlier occupation. Salim is the one who began causing trouble always telling us to vacate the land yet he has no title. Salim begun harassing us the minute his father died, while his father lived we paid rent and all was calm... Two years after Bakshwein died, Salim begun causing trouble.”*

How about **Emmanuel Mlewa Mkale** (PW3). This is what he testified to:

*“The Bakshwein's removed their cattle from the land in 2010. I do not know how many cattle they had but they were many. I used to see animals graze on the land on Bakshwein's property but they had later be drawn (sic) to their farm in Ganda. It was a grazing field for cattle not the cattle boma. I have not built a dip. The court was told there is a dip in that fenced portion. I do not know when it was build. I do not know when the structures on the land or water tank was built or by who, I do not know whether any of the other plaintiffs claim ownership of the cattle dip... Bakshwein son threatened me with a gun. Yes I was charged and later placed on a non-custodial sentence. I am aware Bakshwein's family attempted to throw us out many times, even destroyed our crops, stripped barks from trees to kill them. It has been a long struggle... They even tried to strip the trees in a bid to evict us. Yes, once there was a bad accident in which the said Bakshwein was set on fire. Yes, there is a dip on the land and tanks. They belong to the*

*Bakshweins and were used by their cattle..”*

This suffices to demonstrate that the possession and occupation by the appellants as well as their forefathers was permissive upon payment of rent to the deceased which they faithfully did. On his demise however, the respondents using every means and avenue available to them, attempted albeit unsuccessfully to evict the appellants from the suit premises at times with disastrous consequences. All these happened because the respondents were in law asserting their title to the suit premises which action had the effect of stopping the time from running for purposes of adverse possession. In the premises, the appellants’ possession or occupation of the suit premises between 1970 and the filing of the Mombasa O.S. cannot be said to have been peaceful and uninterrupted as all along there were attempts to evict the appellants from the suit premises. As stated by this Court in the case of **Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)**:

*“...the possession must not be broken, or any endeavours to interrupt it.”*

The appellants in this case have continuously been subjected to forceful acts by the respondent with intention to evict them, some have been arrested and successfully prosecuted over disputes relating to their occupation, violent incidents have occurred from time to time leading to serious injuries and loss of life, while disputing over the suit premises including one where the respondents brother **Said Abdalla Bakshwein** was seriously injured and some workers and a squatter killed.

In a nutshell, there was no evidence that the appellants’ occupation of the suit premises was continuous and uninterrupted for a period in excess of twelve years. Neither was there evidence of dispossession or discontinued possession of the suit premises by the respondents throughout the period leading to the filing of the Mombasa O.S. By the appellants’ own admission the respondents reared a large herd of cattle which grazed freely on the suit premises at times even feeding on their crops. The respondents too had constructed a dip water tank and buildings and or structures for their use and that of their workers. From the foregoing, it is quite apparent that the appellants never had exclusive and peaceful possession of the suit premises. If anything, the respondents continued to exercise and enjoy proprietary rights over the suit premises. As held in **Wambugu vs Njuguna** (supra):

*“... if the owner has little present use of the land, much may be done on it by others without demonstrating a possession inconsistent with the owners title.”*

It is therefore quite apparent that the appellants did not prove that the respondents ever lost their rights to the suit premises either by being dispossessed or by having discontinued possession of the suit premises for a continuous statutory period of twelve years to entitle them to title to the suit premises by way of adverse possession. The trial court was therefore right in rejecting their claim on that basis.

The appellants too have argued that even if they were wrong on the basis of the foregoing they should benefit from the concept of adverse possession since for over sixteen years that the Mombasa O.S. was pending in Court, the respondents never attempted to assert their title to the suit premises. If anything they acquiesced to their presence on the suit premises. Therefore time in their favour began to run the moment they filed the Mombasa O. S. In our view, this is a spurious submission. It is trite law that time stops running the moment a suit is filed anchored on adverse authority. In any event there is evidence that there was an order barring the respondents from evicting the appellants. That evidence was not controverted at all. Further the respondents had counterclaimed for the appellants’ eviction in the O. S. and it would not have made sense for the respondents to take the law into their own hands and forcefully evict them when they had already sought the court’s assistance to do so.

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of **Githu v Ndele [1984] KLR 776**. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old Civil Procedure Act and the rules made thereunder that when

taking out and O. S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application. Indeed, the then **Order XXXVI Rule 3D(2)** specifically provided:

*“ ...The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed...”*

That requirement no doubt was couched in mandatory terms failing which it would render the O. S. incompetent. We have perused the entire O. S. and nowhere have we come across a certified extract of the title of the suit premises. Thus, the O.S. was incompetent and liable to be struck out. We are surprised that the trial court and counsel involved did not notice this fatal omission.

The appellants too have challenged the entry of judgment against them on the counter claim on the basis that it was time barred and ought not to have been entertained. The record, however, shows that the counterclaim was filed pursuant to leave of court granted to the respondents on 3<sup>rd</sup> November, 2010. The appellants were in turn also granted liberty to file and serve a defence within 14 days. The counterclaim was duly filed and served on the appellants who opted not to counter it by filing a defence. Indeed, the issue was never even raised during the examination and cross examination of the witness by the appellants. The issue only reared its head as a stand-alone submission at the tail end of the appellants' written submissions. There having been no challenge mounted against the counterclaim on account of time limitation at the trial and in the absence of a pleading of time limitation by way of defence to the counter claim, or affidavit, by dint of **Order 2 Rule 4(1)** of the Civil Procedure Rules which mandatorily requires a plea of time limitation to be by way of pleadings then the appellants were barred from raising that aspect in their final submissions. That act was more or less an ambush on the respondents who could have been denied a chance to rebut it. In any event, it is an old truism that a party is bound by his pleading. In the premises the trial court was right in rejecting that submission.

We think that we have said enough to demonstrate that the fate of this appeal lies in its dismissal. Accordingly, it is dismissed with costs to the respondents.

**Dated and delivered at Malindi, this 24<sup>th</sup> day of March, 2015.**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**