



**Cheromei v Muigai (Environment & Land Case E005 of 2023)
[2024] KEELC 5604 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E005 OF 2023**

JM ONYANGO, J

JULY 25, 2024

**IN THE MATTER OF LAND PARCEL NO. UASIN GISHU L.R. NO.
11127/112 REGISTERED IN THE LAND TITLES REGISTRY IN NAIROBI
AS GRANT NUMBER I.R. 47166 AND IN THE MATTER OF SECTION
38 OF THE LIMITATIONS OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

BETWEEN

JOSEPH KIPTORTICH CHEROMEI APPLICANT

AND

GITII MUIGAI RESPONDENT

JUDGMENT

1. In the Originating Summons dated 28th March, 2023 the Applicant herein sought for orders;
 - a. A declaration that the Applicant has been in open, continuous and uninterrupted possession and occupation of all that parcel of land known as Land Reference No. 11127/112 and registered in the Land Titles Registry in Nairobi as Grant Number I.R. 47166 measuring six decimal six four six hectares (6.46Ha) for a period in excess of 12 years.
 - b. A declaration that the Respondent's title over the suit land has been extinguished by virtue of the doctrine of adverse possession.
 - c. A declaration that the title to the suit land is being held in trust by the Respondent for the Applicant.
 - d. The Applicant be registered as the proprietor of the suit land in place of the Respondent.
 - e. The Respondent do execute the requisite instruments of transfer of title of the suit land to the Applicant and in default the Deputy Registrar of this Honourable Court do execute the same.



- f. Costs of this suit be provided for.
2. The Applicant, Joseph Kiprotich Cheromei, swore an Affidavit of even date in support of the Originating Summons. He deponed that he took possession of the suit property on 24th October, 1995 after purchasing it from the Respondent who is the registered owner thereof for the sum of KShs.800,000/-. The suit property herein is Land Reference No. 11127/112, which is registered in the Land Titles Registry in Nairobi as Grant Number I.R. 47166 measuring 6.46 hectares (the suit property). He deponed that he has lived on and occupied the suit property, where he erected his homestead and has been utilizing it for agriculture, for a period of 27 years. He averred that the Respondent has full knowledge that he has been in open, peaceful, continuous and uninterrupted possession. By virtue of this, he claimed to have acquired proprietary rights to the suit property by adverse possession. In addition, that the Respondent holds the title thereto in trust for him since his title was extinguished in 2007 after the expiry of 12 years.
 3. The Applicant filed a Chamber Summons Application dated 26th April, 2023 seeking leave to serve the Defendant by way of substituted service, which leave was granted on 8th June, 2023. The Respondent was served via an advertisement in the Daily Nation of 27th July, 2023. However, despite service, the Respondent did appear or not file any response and consequently, the suit was fixed for formal proof hearing.

Hearing and Evidence

4. The matter came up for hearing on 17th January, 2024 where the Applicant herein, testified under oath as PW1 and opted to rely on his Supporting Affidavit sworn on 28th March, 2023 as his evidence-in-chief. PW1 testified that he bought the suit property, which measures 16 Acres and is registered in the Respondent's name on 24th October, 1995. PW1 produced a Certificate of Official Search as PEX1, the sale agreement dated 24th October, 1995 as PEX2, an extract of the Title as PEX3 and copies of photographs as PEX4(a)-(d). PW1 testified that when he bought the land he was based in Italy and he paid the full purchase price when he came back to Kenya pursuant to which the Respondent gave him the title. PW1 testified that he lost contact with the Respondent thereafter, that he looked for him at his home in Langas but was told he had left and no one knew his whereabouts.
5. PW1 added that he has developed the suit property, fenced it, put up 5 permanent houses and also keeps cattle. He testified that he resides on the suit property with his family, and has lived on the land peacefully, without any interruption for 28 years. He asked that he be declared the owner of the suit property and be issued with a title deed. The Applicant then proceeded to close his case.

Applicant's Submissions

6. Upon close of the Applicant's case, the court directed that he file submissions and the Applicant complied, filing his submissions on 20th February, 2024. In those submissions, Counsel for the Applicant reiterated that the Applicant purchased the suit property in 1995 and has been in possession for over 28 years. Counsel acknowledged that the Applicant's entry into the land was permissive, but that the permission ended after payment of the last instalment. Counsel cited the cases of Public Trustee vs Wanduru Ngegwa (1994) eKLR and Hosea vs Njiru & Others (1974) EA 526. Counsel asserted that the Applicant paid the full purchase price on 24th October, 1995 and took possession immediately thus time started running in 1995. Counsel submitted that the Applicant has been in open, continuous and exclusive occupation and the photographs produced in court show the house the Applicant built, trees he planted and the fence he put up as well as crops and animals. Counsel submitted that this demonstrates the Applicant's intention of dispossessing the Respondent with the



sole intention of acquiring ownership. Counsel urged that nothing stopped time from running as the Respondent took no steps to assert rights over the suit land. He relied on *James Maina Kinya vs Gerald Kwendaka* (2018) eKLR and *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR.

7. Counsel pointed out the importance of clearly identifying the suit land, adding that as per the attached title, the suit property measures 6.646 Hectares and the Applicant is in occupation of the entire parcel. Counsel argued that the Applicant has established occupation of the suit property for over 12 years. That from the evidence adduced, the Applicant has been in peaceful, open, continuous and uninterrupted possession and occupation of the suit property from 1995. Counsel concluded that the Applicant had proved beyond reasonable doubt that he had been in possession as aforesaid and was entitled to the same by way of adverse possession. Counsel asked that the OS dated 28th March, 2023 be allowed as prayed.

Analysis and Determination

8. From the pleadings and the evidence adduced, this court frames the following questions as arising for determination;
 - a. Whether the Applicant could claim adverse possession arising from an Agreement for Sale
 - b. Whether the Applicant has met the threshold for grant of orders of adverse possession
 - c. Who shall bear the costs?
 - a. Whether the Applicant could claim adverse possession arising from an Agreement for Sale
9. The doctrine of adverse possession in Kenya is founded under *Limitation of Actions Act*, CAP 22 Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:
 - 1) A right of action to recover land does not unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Section 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - 2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - 3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3), the land in reversion is taken to be adverse possession of the land”.
10. On the other hand, Section 38 of the Act allows a claimant to apply to Court for orders of adverse possession and provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered



as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

11. The Applicant’s case is that he purchased the suit property on 24th October, 1995. He alleged that he paid the full purchase price of KShs.800,000/- on the same day. He also averred that he acquired possession of the suit property on this same date and he moved into the property, built 5 permanent houses and has been residing with his family thereon. PEX2 is a copy of the Agreement for Sale dated 24th October, 2024 which indicates that the Vendor, Gitii Muigai was selling L.R. No. 11127/112 comprising of 6.646 Hectares. The agreed purchase price per the agreement was indeed KShs.800,000/- and Clause 2 of the Agreement provides that:

“The said sum of shillings Eight Hundred Thousand (Shs.800,000/-) shall be deposited with M/s Birech & Co. Advocates on signing hereon as stake holders for the Vendor to be paid out when the Letter of Consent has been issued by Ainabkoi Land Control Board and the transfer has been executed.”

12. Further, under Clause 3, the Vendor undertook the responsibility of applying for the said Land Control Board Consent (LCB) and appearing before the said land control board when the transaction came up for consideration. Notably, the Agreement does not specify when the Purchaser was to take vacant possession of the suit property. It appears that despite the passage of time, the transaction is yet to be completed as the suit property was never transferred to the Applicant. The Applicant averred however, that he has been in open, continuous, uninterrupted occupation and possession of the suit property for 28 years now, way over the 12-year statutory time limit. He has claimed that as a consequence, he has acquired the suit property by way of adverse possession and that he is now entitled to registration as the owner of the suit property.

13. The doctrine of adverse possession was aptly defined in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where the Court of Appeal held that:-

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force of stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

14. From the above definition, adverse possession can only arise out of non-permissive possession. Yet from the facts of this case, the Applicant gained entry into the land by virtue of the Agreement for Sale dated 24th October, 1995. It is not a strange phenomenon to allow a purchaser possession of the property being sold before the transaction is completed. In most instances, this is allowed pending completion of the transaction, which may include compliance with the requisite statutory formalities as appears to have been the case in this instance. Such a purchaser is not allowed onto the property as a trespasser, but they are understood to be on the land with permission from the registered owner. This element of permissive possession was well explained in *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, where Justice Kuloba had this to say:-

“(3) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner



do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land...where possession was consensual or contractual in its inception, it cannot be called “adverse”. Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken... The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession, to emphasize that “hostility” is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (Cobb v Lane [1952] 1 All E R 1199; Denning, MR, in Wallis’s Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd [1974] 3 All ER 575 at p 580; Chanan Singh, J, Jandu v Kirpal and another (1975) EA 225 at pp 233, 234, 237; Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi, 1[1976] Kenya L R 253, at pp 257, 258);”

15. It is a well-known fact that time cannot begin to run even if the purported contract becomes null and void by operation of law, until the permission initially granted to occupy the land is expressly revoked. This revocation may be done by the Vendor, or by the adverse possessor making it clear that they no longer remain on the land under the auspices of the said permission. This is so that the registered owner is made aware of the risk of losing his title if no take steps are taken to evict the purchaser from the land. Furthermore, one of the requirements of adverse possession is open possession, without secrecy and the acquisition of rights in such a clandestine manner would in essence defeat the very important ingredients of openness of possession. Hence, a purchaser in possession cannot sit quietly enjoying rights of possession of land under a contract, and at the same time acquire rights as an adverse possessor over the property without first making it clear to the vendor that they are no longer relying on the permission granted by virtue of the contract.
16. It is this outright termination of the license or permission that turns what would otherwise be a purchaser in possession into an adverse possessor and vests in them the right to claim adverse possession. Termination of possession also gives the Vendor the right to re-enter the land to re-assert his rights thereon or to take steps to evict the adverse possessor. In *Sisto Wambugu vs Kamau Njuguna* (1983) eKLR, namely:

“Hughes vs Griffin has been cited in Megarry’s Law of Real Property on this topic (4th Edn) at p 1013 and, applying its reasoning, it is in my judgment evident that a person (here the appellant) must have an effective right to make entry and to recover possession of the land



in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract, or other valid permission or licence, which has not been determined.”

17. Nevertheless, adverse possession can arise out of sale agreement if nothing subsequent to the sale agreement is in contravention of any law or equity. See *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR. In that case, the court further explained that:-

“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in *Wanyoike v Kahiri* [1979] Kenya LR 236 at 239; also see among others, *Simpson J* (as he then was), in *Hosea v Njiru and others* [1974] E A 526 at 529, 530).”

18. Having been allowed possession under a sale, the Applicant can only claim that his occupation became adverse if he can prove that the license was determined. In such circumstances where an Applicant claims adverse possession arising out of an agreement for sale, courts have held that the purchaser’s possession becomes adverse to the vendor once the purchase price is paid in full. Time starts to run from that point, and on completion of the statutory time limit of 12 years, the purchaser would be entitled to become registered as proprietor of the land under adverse possession. In *Peter Mbiri Michuki vs Samuel Mugo Michuki* (2014) eKLR, the Court of Appeal held that:

“32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee -v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

19. The law as analysed above stipulates that the Applicant is required to pay the entirety of the purchase price before time can start running for adverse possession. Where the purchase price is paid in instalments, time starts to run once the last instalment of the purchase price has been paid. The Applicant testified that he paid the full purchase price of KShs.800,000/-. The Agreement produced as PEX2 states clearly that the purchase price was indeed KShs.800,000/- to be paid on its signing to the Vendors stakeholders, and there is no evidence that the amount was not paid as agreed. For that reason, the Applicant’s interest over the suit property became adverse on 24th October, 1995 when he paid the purchase price in full.

b) Whether the Applicant has met the threshold for grant of orders of adverse possession

20. From the definition of adverse possession given in the *Mtana Lewa Case* (Supra), the essential prerequisites of adverse possession are that the possession

- i. Must not be by force or stealth
- ii. Must not under the licence of the owner.



- iii. Must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner
21. This was also the finding of the Court of Appeal in Mombasa, in the case of Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR, where the court held that:-
- “ 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario. See Jandu vs. Kirplal & Another (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in Wambugu vs. Njuguna [1983] KLR 173.”
22. The element of non-permissive possession has been fully discussed under the previous head, and the finding is that the Respondents permission ended on receipt of the purchase price in full on the date of signing the Agreement for Sale. Further, since the initial entry into the land was through the sale, I can safely conclude that there was no force in the manner of the Applicant’s entry into the suit land. I have seen the photographs produced by the Applicant, they show developments on the land and dwelling houses. These developments are quite apparent to all and sundry, indicating that his possession of the suit property is also not by stealth.
23. Next, the court needs to determine whether the Applicant’s possession has been continuous for the requisite period. Section 7 of the [Limitation of Actions Act](#) sets the time limit for adverse possession at 12 years. This period of 12 years is counted from the date that possession becomes adverse to the title and interests of the registered owner, the general rule being that time cannot run in favour of a permitted occupier of land. Time, therefore, does not run as the occupier/licensee remains in occupation with the permission of the owner.
24. However, this court has already determined that the Applicant’s possession was non-permissive on payment of the Purchase price on 24th October, 1995 thus time started to run from the said date. Twelve years from 24th October, 1995 ended on 24th October, 2007 from which date, the Respondent’s title was extinguished by operation of Section 37 of the [Limitation of Actions Act](#). Needless to say that from 24th October, 1995 to the date of filing of this suit on 28th March, 2023 indeed 28 years had passed. This was well over the required time period of 12 years. It follows therefore that from 2007 when the 12-year limit was reached, the Respondent became a trustee holding the title to the suit property for the benefit of the Applicant. See Peter Mbiri Michuki Case (Supra), where the Court of Appeal further held that:-
- “ 36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the [Limitation of Actions Act](#) applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the [Limitation of Actions Act](#) applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.”



25. Moreover, in a claim for adverse possession the Applicant needs to demonstrate that his occupation of the land has dispossessed the registered owner of the land. The burden of proving this fact to the Court lies with the Applicant. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right, see *Mukindia vs Maranya* (Supra), where it was held that:-

“It is well-known in our law, that the adverse character of the intruder’s possession of another’s land must be proved as a clear fact, and cannot be assumed as a matter of law from mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the Court is to draw legal inferences as to whether there was or there was no adverse possession. The inference one way or the other is a legal one. This means that the acts of possession are factual data from which a legal conclusion may or may not arise as to whether they amount to adverse possession. In the words of Gicheru, JA:

‘In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts’ *Kweyu v Omuto*, CA Civ Appeal 8 of 1990 (as yet unreported).”

26. The Claimant must therefore show that his possession and occupation of the land is not only adverse to the rights of the registered owner, but also that his said possession is hostile and to the exclusion of the said owner. In the case of *James Maina Kinya vs Geral Kwendaka* (2018) eKLR, the court held that:-

“The fact that the Plaintiff has extensively developed the suit property is a demonstration of *animus possidendi*, (intention to possess) to the exclusion of the defendant. He is also using or occupying the land in contrast to the title (hostile) usage to the right of the title owner (Defendant). The open continuous and hostile occupation has not been broken from 1983, a period in excess of 12 years. It has been admitted by the Defendant that the Plaintiff collects rent from the property and has excluded him from possession. This demonstrates exclusive control of the suit property by the Plaintiff which is an essential ingredient in establishing adverse possession.”

27. In the instant suit, the Applicant has claimed that he has been in actual and exclusive possession of the suit property continuously for 28 years to the exclusion of the Respondent. I have looked at the Photographs produced as PEX4(a)-(d) and they indeed show that there are permanent structures on the land, a fence and a gate. One of the photographs shows that the remaining portion of the land has been tilled and there are photographs of cows and sheep, as proof of the allegation that the Applicant has been farming on the land. The existence of buildings, the fence and the animals on the land as showcased in the photographs produced in evidence proves the fact of possession or occupation by the Applicant. The said developments indicate without a doubt his intention to possess the property, which use does not align with the interests of the registered owner. The adverse character of the possession has thus been established as required.

28. As concerns the identity and size of the portion of land sold, the courts have held that the land alleged to be the subject of adverse possession proceedings must be definitely identifiable. In the case of *Gatimu Kinguru vs Muya Gathangi* (1976) KLR 253 the court observed that:

“the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”



29. There is no doubt that the suit property is indeed registered in the name Gitii Muigai (the Respondent herein) as is shown in the Copy of the Grant produced by the Applicant as PEX3. The title indicates that the land is L.R. No. 11127/112 measuring 6.646 Hectares, which is the exact portion conveyed in the sale agreement of 24th October, 2024 to the Applicant. There can be no doubt therefore as to the identity and size of the land claimed in this suit, it is the suit property named in the OS, which is currently in the hands of the Applicant herein.
- c. Who shall bear the costs?
30. Costs normally follow the event, and the successful party is always awarded costs. The Applicant herein is the successful party and ideally, the Court would have awarded him costs. However, the Applicant indicated that he was unable to locate the Respondent herein. He resorted to seeking leave to serve him by substituted service. I do not see how the Applicant will now be able to procure the Respondent to claim costs from him. It is trite that courts do not issue orders in vain, and issuing an order for costs against a person who cannot be found is in my opinion the very definition of issuing orders in vain. It is for this reason that this court shall not make any orders as to costs.

Orders

31. For the above reasons, the Court enters judgment for the Applicant as prayed in the originating summons dated 28th March, 2023 in the following terms:
- a. A declaration is hereby issued that the Applicant has been in open, continuous and uninterrupted possession and occupation of all that parcel of land known as Land Reference No. 11127/112 and registered in the Land Titles Registry in Nairobi as Grant Number I.R. 47166 measuring six decimal six four six hectares (6.646Ha) for a period in excess of 12 years.
- b. A declaration is hereby issued that the Respondent's title over the suit land has been extinguished by virtue of the doctrine of adverse possession.
- c. A declaration is hereby issued that the title to the suit land is being held in trust by the Respondent for the Applicant.
- d. The Applicant be registered as the proprietor of the suit land in place of the Respondent.
- e. The Respondent is hereby directed to execute the requisite instruments of transfer of title of the suit land to the Applicant within 30 days and in default the Deputy Registrar of this Honourable Court do execute the same.
- f. No order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 25TH DAY OF JULY 2024.

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J.M ONYANGO

JUDGE

In the presence of;

SUBPARA 1.

Miss Sielei for the Plaintiff

SUBPARA 2.



No appearance for Defendant

Court Assistant: Brian

ELC.E005 OF 2023 JUDGMENT	0
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