



**Chege (Represented by Apollos Mwangi Chege the personal representative) v Kibet & 2 others; Mwangi (Interested Party) (Civil Appeal 116 of 2015) [2023] KECA 932 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 932 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 116 OF 2015  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
JULY 21, 2023**

**BETWEEN**

**MARGARET WANJIKU CHEGE (REPRESENTED BY APOLLOS MWANGI CHEGE THE PERSONAL REPRESENTATIVE) ..... APPELLANT**

**AND**

**DANIEL KIPKEMBOI KIBET ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KIBITOK KEMBOI ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH RONO ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**APOLLOS KENNEDY MWANGI ..... INTERESTED PARTY**

*(Being an appeal from the judgment of the Environment and Land Court in Kitale (E. Obaga J.) dated 23rd September 2015 in ELC Case No. 55 of 2009)*

**JUDGMENT**

**Judgment of Mumbi Ngugi JA**

1. As can be expected with land disputes spanning a half century, the main protagonists in the dispute over ownership of 132.5 acres our of LR No 1800/3 Kaptien Farm are deceased. By the time the trial court heard the dispute, five of the original plaintiffs in the matter were deceased. The appellant, now represented by her son and personal representative, Apollos Mwangi Chege, is also deceased.
2. The appellant's father in law, Apollos Mwangi Muna (Apollos), died on 24<sup>th</sup> September 2001, prior to the judgment in his suit, Kitale HCCC No 35 of 1997 in which he had claimed ownership of the suit property. His estate is represented in these proceeding by Apollos Kennedy Mwangi, said to be



- one of the administrators of the estate, joined as an interested party pursuant to orders issued on 29<sup>th</sup> November 2019. It is not clear from the record whether Apollos Mwangi Chege and Apollos Kennedy Mwangi are one and the same person, and when the appellant was substituted with her son. The 2<sup>nd</sup> respondent is also deceased.
3. We have, however, a fairly accurate record of the dealings relating to the subject land, critical facts relating to which are not in dispute. These facts emerge from the evidence of the respondents' witnesses, among them the two registered proprietors of the suit land, now deceased, Daniel Kipkemboi Bett (PW1) and David Kibitok Kemboi (PW4); Johanna Kiplangat Koross (PW2) named in this appeal as the 3<sup>rd</sup> respondent (actually the sole surviving respondent); Joseph Rono (PW3); Boniface Kapiri Wafula Musa (PW5) who carried out a valuation of the suit property; and Emmanuel Edung Lobolia (PW6), an employee of the judiciary who produced records from the judiciary pertinent to the suit property.
  4. The defence evidence was presented by Margaret Wanjiku Chege (now deceased), as DW1; Stanley Malakwen Musbei (DW2); and Agui Arap Rono (DW3).
  5. What emerges from the evidence before the trial court is that the protracted saga began innocuously and amicably enough. The registered owners of Kaptien Farm, Daniel Kipkemboi Bett and David Kibitok Kemboi, together with sixteen others, had banded together in 1964 to purchase Kaptien Farm ('the farm'), measuring 408 acres, from a settler, one Denis Campbell. They had borrowed the funds for the purchase from the Agricultural Finance Corporation (AFC).
  6. By 1973, AFC was threatening to sell the farm as the members were unable to repay the loan. They therefore sought help from Apollos, the appellant's father in law and owner of an adjacent farm, LR No 1800/4, to whom they agreed to lease 120 acres out of the farm. The condition of the lease was that Apollos would use proceeds from the leased portion to repay the loan to AFC. Thereafter, by agreement with Apollos, they leased to him an additional 12 acres on which a farm house stood, which Apollos allowed his son, Chege Mwangi (deceased) and his wife, the appellant, to occupy.
  7. It appears that the loan was ultimately paid to AFC on or about 1978, but Apollos did not vacate the suit property. Instead, and this is where the divergence in the versions of events begins, Apollos filed Kitale High Court Civil Case No. 35 of 1997 in which he claimed that he was a shareholder in Kaptien Farm and that the land had been sold to him.
  8. The High Court dismissed his claim in its decision dated 19<sup>th</sup> December 2002 but noted that the registered owners had not been joined as parties to the suit. Notable from the pleadings in that case is that the present appellant, Margaret Wanjiru Chege, testified on behalf of Apollos, as PW9, in support of his claim that he had purchased the suit property from the owners. Despite the dismissal of the claim by Apollos, the appellant continued in occupation of the suit property.
  9. The next salvo in the saga was fired by the respondents, the registered owners, who now sought to reclaim the suit property from the appellant. By a plaint dated 16<sup>th</sup> April 2009, the respondents sought a declaration that they were the rightful owners of LR No 1800/3 known as Kaptien Farm; a declaration that the appellant was a trespasser in the 5 acres of the said land; and that an injunction be issued against her restraining her from claiming or encroaching on the 132.5 acres of the suit property.
  10. The respondents' claim was that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the registered owners of the suit property and that they held it in trust for the other respondents. The suit property had been charged to AFC. Since they were unable to repay the loan, they had leased 120 acres to Apollos on the understanding that he would repay AFC in full and vacate the property thereafter. Apollo had,



however, refused to vacate the suit land and had instead filed Kitale HCCC No 35 of 1997 seeking a declaration that he was the owner of a portion measuring 132.5 acres.

11. The respondents further averred that prior to his demise, Apollo had allowed the appellant to reside on the suit property. It was their claim that neither the appellant nor Apollo had any right of ownership over the 132.5 acres of the suit property.
12. In her defence, the appellant denied the existence of a lease between the respondents and Apollo. It was her case that Apollo purchased part of the suit property measuring 120 acres as a consideration for paying off the respondents' loan with AFC. Further, that he had purchased another 12.5 acres from other members of Kaptien farm.
13. Upon considering the respective cases of the parties, the trial court allowed the respondents' claim. The court determined, first, that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the registered owners of the suit property and that they held the land in trust for the other 16 members of Kaptien Farm. To the question whether part of the suit property was leased or sold to Apollos, the trial court found that what was entered into between the members of Kaptien Farm and Apollos was a lease in exchange for repayment of the loan to AFC.
14. Regarding the appellant's claim, the court found that the doctrine of estoppel applied: the appellant could not change her position and assert that she owned the property in her own right through adverse possession while she had previously claimed that Apollos had granted her the property.
15. Dissatisfied with the decision, the appellant filed the present appeal in which she raises eighteen grounds of appeal in her memorandum of appeal. I will endeavour to summarise these rather prolix grounds which are also somewhat repetitive. The first five grounds relate to the appellant's contention that the lease to Apollos was null and void for want of Land Control Board consent. The appellant contends that having found that the 120 acres of the suit land was leased as opposed to having been sold to Apollos, the trial judge erred in law when he failed to consider whether or not the consent of the relevant Land Control Board was sought and obtained; that the court erred in failing to find that the lease of the suit property was null and void for lack of Land Control Board consent; and upon the lease becoming null and void, his occupation of the suit property became adverse and time began to run against the registered owners.
16. The appellant contends that the trial judge erred in law when he failed to find and hold that upon expiry of 12 years, from the time when the lease became null and void, the registered owners held the land in trust for the appellant's father in law. It is the appellant's argument, accordingly, that the trial court erred when it held that the appellant was a trespasser in the suit property which she had occupied since 1973 or thereabouts.
17. In the sixth ground of appeal, the appellant impugns the decision of the trial court on the basis that it erred in law and fact when it held that the suit by the respondents was filed against her in her personal capacity as no determination could be made against her personally without simultaneously making a determination on the interest of the estate of Apollos. Grounds seven, eight and nine impugn the trial court's findings with respect to the surrender of the title to the land of which the suit property comprised a part to the government for purposes of obtaining a sub-division scheme and the findings in respect thereof.
18. The appellant argues in her seventh ground that the trial judge erred in law and fact when he failed to find and hold that as at 13<sup>th</sup> May 1998 when the respondents surrendered the land to the government in exchange for a sub-division scheme, they were holding the land in trust for the appellant's father in law, who had already acquired prescriptive rights over the suit property. Further, that in holding



- that adverse possession cannot run against the government, the trial judge failed to appreciate that the surrender of the land was only in exchange for a sub-division scheme and the appellant's father in law had already acquired prescriptive right over the suit property at the time of the surrender.
19. While conceding that parties are bound by their pleadings, the appellant argues in her ninth ground of appeal that the trial court erred in failing to appreciate that from her defence on record, her father in law had already obtained prescriptive rights over the suit property by the time the land was surrendered to the government in exchange for the subdivision scheme.
  20. The appellant argues in her tenth ground that to the extent that the estate of Apollos was not enjoined to the suit, the respondents' suit should fail as the suit property was held in trust for his estate and her occupation was by his permission and that of his estate.
  21. The appellant impugns the finding that her arguments in the suit were *res judicata*. She contends that in so finding, the trial court failed to appreciate that neither she nor the respondents were parties to Kitale HCCC No. 35 of 1997. Further, that the trial court failed to appreciate that to the extent that there was no counterclaim in Kitale HCCC No.35 of 1997 to which the registered owners were also not parties, the court could not conclusively determine the rights of the appellant's father in law vis-a-vis the registered owners.
  22. The trial court's decision is further impugned for the holding that the decision in Kitale HCCC No.35 of 1997 extinguished the rights of Apollos over the suit property, and for holding that the appellant is estopped from claiming entitlement to the suit property in her own right.
  23. The appellant's final grounds of appeal relate to the award of mesne profits. The appellant contends that the award of KShs.8 million as mesne profits was erroneous as it was never specifically pleaded, and the computation of the mesne profits was faulty. Finally, the findings of the court are faulted as being against the weight of evidence.
  24. In her submissions dated 10<sup>th</sup> February, 2022 highlighted by her learned counsel, Mr. Kiarie, the appellant submits that upon the trial court finding that a lease was entered into, he failed to consider that the consent of the Land Control Board to the lease was not sought, which is contrary to section 6(1) of the *Land Control Act*. Support for this submission is sought in the case of *Samuel Miki Waweru v Jane Njeri Richu* Civil Appeal No. 122 of 2021. As a consequence of the lack of consent from the Land Control Board, the transaction between the respondents and Apollos became null and void after the expiry of three month. Accordingly, the occupation of the suit property by Apollos became adverse to the registered owners from 13<sup>th</sup> November 1973. Upon expiry of twelve years from that date, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' title to the 120 acres portion of LR No. 1800/3 was extinguished, and they continued to hold it in trust for Apollos. The respondents, therefore, had no cause of action against the appellant.
  25. The appellant submits further that in Kitale HCCC No. 35 of 1997, the issue of acquiring prescriptive title by adverse possession was not raised. She submits that prescriptive title had only been acquired against the two registered owners in either 1986, 1988 or 1990. The trial judge in Kitale HCCC No. 35 of 1997 was therefore right in holding that the issue of the prescriptive title in favour of the appellant's father in law was not in issue in the suit. She submits further that after the court dismissed the suit, it made no orders directing Apollos to vacate the land, the reason, according to the appellant, being that there was no counter claim and the registered owners were not party to the suit.
  26. The appellant submits further that the trial court erroneously made an award of mesne profits of KShs. 8 million to the respondents. She submits that mesne profits are in the nature of special damages that need to be specifically pleaded and proved.



27. The interested party, Apollos Kennedy Mwangi, joined in his capacity as one of the administrators of the estate of Apollos and represented before this Court by learned counsel, Mr. Nderitu, supported the appeal. In submissions dated 26<sup>th</sup> September, 2022, he rehashes the appellant's argument regarding the failure to obtain Land Control Board consent is reiterated.
28. The interested party argues that as consent was not obtained when the respondents leased the land to Apollos, the transaction did not satisfy the requirements of section 6 of the Land Control Act in relation to agricultural land, and the transaction was null and void. Similar arguments as those advanced by the appellant are made in relation to the claim that the respondents held the land in trust for Apollos as Apollos had obtained prescriptive rights over it from the outset as the lack of Land Control Board consent rendered the lease null and void.
29. Finally, the interested party submits that the doctrine of estoppel or res judicata did not apply in the circumstances of this case. This, it is submitted, is because one suit proceeded on the basis that the issue in contention was a licence while the other related to a lease.
30. The 1<sup>st</sup> respondent was represented by Ms. Tum in the appeal. In her submissions, she contended that the appellant did not have capacity to sue on behalf of the estate of Apollos. She further contended that the issue of Land Control Board consent had not been raised before the trial court, though it was pointed out to her by the Court that indeed it had. It was her submission further that the issue of adverse possession was never pleaded in the defence at the trial court. Her submission was that the appeal had no merit and ought to be dismissed. Though Ms. Tum indicated that she had filed written submissions, they were not before this Court.
31. The 3<sup>rd</sup> respondent, represented by Mr. Bosek, filed submissions in opposition to the appeal dated 14<sup>th</sup> February, 2022. He submits that the trial court's decision was based on the evidence before him, including the proceedings in High Court Civil Case No. 35 of 1997. He further submits that a court of competent jurisdiction had made a determination on the issue of ownership of the suit property and the appellant could not therefore claim ownership. The 3<sup>rd</sup> respondent further submits that the appellant was introduced into the suit land by Apollos, her father in law, who had entered into a lease agreement with members of the farm. The trial court had dismissed the appellant's claim that Apollos had purchased the suit property.
32. The 3<sup>rd</sup> respondent further submits that the appellant's claim for adverse possession could not stand as she had pleaded that the land had been surrendered to the government and did not therefore belong to the respondents. It is his submission that the respondents surrendered the title on 13<sup>th</sup> May 1998 for the purpose of obtaining sub-divisions in favour of its members.
33. It is the 3<sup>rd</sup> respondent's submission further that the appellant was a licensee of Apollos until his demise on 24<sup>th</sup> September, 2001. By the time the respondents filed their suit in 2009, the appellant had not stayed on the property for more than 12 years, support for this submission being sought in the case of Wairimu Mburu v Chege Thaiya [2019] eKLR.
34. The 3<sup>rd</sup> respondent further submits that the trial court should not be faulted for finding that the appellant was a trespasser in the suit property and that mesne profit was due and payable to the respondents. He asserts that mesne profit was pleaded and proved by a valuation report prepared by Mwamba Valuers Limited.
35. Having considered the record of the trial court, its judgment, the appellant's grounds of appeal and the submissions of the parties, I believe that the appellant and the interested party raise four main issues for determination by this Court. The first is whether the estate of Apollos had acquired prescriptive rights



over the suit property as there was no Land Control Board consent in respect of the lease between him and the respondents, and the lease was therefore null and void. Secondly, whether the trial court erred in finding that the appellant was barred by the doctrine of estoppel and res judicata from making a claim in adverse possession of the suit property in her own right. A third issue, collateral to the main issues is whether the trial court erred in its decision with respect to the surrender of the suit property to the government in exchange for a sub-division scheme. The final issue is whether the award of mesne profit against the appellant was justified

36. This is a first appeal. Accordingly, this Court is under a duty to re-evaluate the evidence before the trial court and reach its own conclusions-see *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 in which the Court stated:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

37. I have set out above the uncontested facts relating to the suit property, and the points of departure. The appellant and the interested party do not, in this appeal, contest the fact that the respondents were the registered proprietors of Kaptien Farm, L. R. No. 1800/3.

38. Unlike the contention in Kitale HCCC No. 35 of 1997 in which Apollos contended that he had either purchased the suit property or was a shareholder of Kaptien Farm entitled to 132.5 acres, the argument before us seems to be: yes, the respondents are the registered owners of the suit property; yes, they had leased the property to Apollos; they had not, however, obtained Land Control Board consent, the lease was therefore null and void; and the estate of Apollos had obtained title by prescription. By extension, the appellant had also obtained prescriptive rights over the property and was not a trespasser.

39. I will deal first with the question of the validity of the lease to Apollos, the linchpin of the prescription argument advanced by the appellant and the interested party. They rely on section 6 of the [Land Control Act](#), which provides that any transaction involving agricultural land, including the sale, transfer, lease, mortgage, division or any other disposal of agricultural land is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction.

40. This Court has recently considered a similar argument advanced in reliance on section 6 in [Aliaza v Saul](#) (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment). In holding that a vendor who had received the full purchase price and given possession to the purchaser but had not applied for Land Control Board consent to the transaction could not be permitted to rely on the section to escape his obligations I observed:

“ 31. I recognise that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in *Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & Another* and *Kiplagat Kotut v Rose Jebor Kipngok* best capture the spirit of the *Land Control Act* when interpreted through the prism of the *Constitution* of Kenya 2010, particularly section 7 of the



Transitional and Consequential Provisions contained in the Sixth Schedule of the Constitution....

32. As was recognized by this Court in the *Macharia Mwangi Maina* case, the *Land Control Act* is an old legislation, enacted in 1967. The public policy considerations underpinning the Act were well articulated in the *Ole Tukai* decision where this Court observed as follows:

“What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the *Land Control Act* in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.”

41. In his concurring judgment in the *Aliaza* decision, Kiage JA observed as follows:

“46. It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.

47. It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat the appellant’s rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring



him to meet his just obligations and denying him the benefits of default and deceit.”

42. In the present appeal, the appellant and the interested party raise the argument regarding lack of Land Control Board consent in support of a claim by Apollos’ estate, an argument that he did not raise in his claim before the High Court in Kitale. More importantly, Apollos who, from the evidence before the trial court and the High Court in Kitale HCCC No. 35 of 1997 appears to have been in a stronger economic position and, possibly, more knowledgeable than the respondents had as much duty as the respondents to apply for or initiate the process of applying for Land Control Board consent for the lease transaction between him and the respondents.
43. It would be unconscionable if the Court were to hold now, fifty years later, that because there was no consent from the Land Control Board in respect of the said lease, freely acknowledged by all the parties to this appeal, the lease was null and void, and that time started running in 1973 in favour of Apollos, and that his estate and daughter in law can benefit from the failure to obtain the consent. The argument with respect to prescription advanced in favour of the estate by the interested party is unsustainable.
44. With regard to the adverse possession claim by the appellant, it is undisputed that she entered into the suit property after the lease between Apollos and the respondents. She and her spouse, a son of Apollos, were licensees of Apollos. They had entered upon the suit property with his permission. He, in turn, had gone into the suit property as a lessee of the respondents.
45. As observed earlier, in his claim in HCCC 35 of 1997, Apollos had claimed to be entitled to the suit property as a shareholder in Kaptien Farm or a purchaser of the suit property from the respondents. The trial court in that matter (Nambuye J as she then was), found no merit in his claim, and dismissed the suit. In doing so, the court observed that there was nothing before it to counter the defence allegation that the acreage given to Apollos was for leasing to ‘enable the plaintiff assist’ the members of Kaptien Farm pay off the AFC loan. The court further noted that while there was mention of ‘long usage’, prescription had not been pleaded. The decision of Nambuye J was not challenged on appeal, and so it remains a binding decision in so far as the claim of Apollos goes.
46. That being the case, could the appellant maintain a claim of adverse possession in her own right? Section 7 of the *Limitations of Actions Act* Cap 22 provides that:
- 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 first accrued to some person through whom he claims, to that person.
47. The respondents’ claim was filed in 2009, seven years after the decision of the High Court in HCCC No. 35 of 1997 in which it dismissed Apollos’ claim to the suit property. The appellant has conceded throughout the proceedings that she entered into the land with the permission of Apollos. Her occupation to the suit property, as the trial court found, would have been adverse to that of the true owner only from the determination of the suit against Apollos, that is from 2002.
48. The appellant did not file a counterclaim in adverse possession to the respondents’ suit, her explanation being that such a claim is not permissible as a claim of adverse possession cannot be raised in a counterclaim-a position that is not correct-see the decision of this Court in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR. Nonetheless, as the trial court found, the appellant was on the suit



property as a licensee of Appollos. In holding that she could not sustain a claim of adverse possession, the trial court observed as follows:

“ Even if she has been on the suit land since 1973 or 1974 as she claims, she has been on the suit land as a licensee of Appollos who was himself on the land on lease basis with permission of members of Kaptien Farm. Apollo remained the controlling person in as far as the suit land was concerned. This is why he had to file a suit in 1996 against some individuals from Kaptien Farm. Appollos died on 24.9.2001. The defendant therefore remained a licensee of Appollos until his death. If the defendant has to raise a claim of adverse possession in her own right, then that can begin from the time Appollos died on 24.9.2001. Time will then start running in her favour after 24.9.2001. The question which arises then is whether the defendant has acquired the suit land by way of adverse possession. The law requires that she ought to have been in continuous, peaceful and uninterrupted possession for a period of 12 years. In the year 2004, the plaintiffs filed a suit against her seeking her eviction. This suit was however dismissed on a technicality. About five years later the plaintiffs brought the present suit against her. Even if we were to assume that the 2004 case was not there, the defendant would have been on the suit land for a period of about 8 years which is short of the statutory period required for one to acquire land by way of adverse possession.”

49. I agree with the reasoning of the trial court above. As was held by Gicheru JA (as he then was) in *Kweyu v Omutut* [1990] KLR 709 at page 716:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period of 12 years, it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality).

Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

50. Kneller J. in *Kimani Ruchine v Swift, Rutherford & Co. Ltd* (1980) KLR 10 cited with approval by this Court in *Francis Gicharu Kariri v Peter Njoroge Mairu* Civil Appeal No. 293 of 2002 (Nairobi) held that a person laying a claim in adverse possession has 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.”

51. Appollos had been on the suit property as a lessee of the respondents. Upon dismissal of his suit in which the court upheld the respondents’ position that Appollos was on the suit property as a lessee and had no rights as a purchaser, his right to occupy the land ended. This decision, properly, also ended the right of any person claiming under him. He died prior to the determination of the suit, but the appellant continued in occupation of the land even after his demise. To claim a right in adverse possession in her own right, the appellant would have needed to show possession in the circumstances set out in *Kimani Ruchine v Swift, Rutherford & Co. Ltd* (*supra*) for a period of twelve years. This she was not able to show, and the trial court was correct in its finding that she had no right to be on the land and was a trespasser.
52. The appellant impugns the finding of the trial court that her claim that she was entitled to the suit land was res judicata and she was estopped from raising the defence that she did. In making this finding, the trial court observed at paragraph 18 of its judgment that:
  - “ 18. Related to the above issue is the issue of estoppel and res judicata as regards to Kitale HCCC No. 35 OF 1997. The defendant is contending that Appollos bought the suit land i.e. 132.5 acres. This is the same argument which was raised by Appollos. The exhibits produced by the defendant were also produced by Appollos in Kitale Civil Case No. 35 of 1997. The court made a determination on the same documents. The defendant was a witness in Kitale HCCC No. 35 of 1997. She was supporting Appollos case that Appollos bought the suit land. She even stated that it was upon Appollos to decide on what land he was to give her out of the suit land. I find that in the wider sense of the doctrine of res judicata, her arguments in this case are res judicata. The issues were raised by Appollos in Kitale HCCC No. 35 of 1997. The same were decided on by a court of competent jurisdiction. It does not matter that the defendant was not a party to the suit. The subject matter of the suit is the same as was in the previous suit. The arguments the defendant is raising could have been raised in the former suit. If Appollos argument was that he was buying the suit land for his son Chege Mwangi the husband of the defendant, I see no reason why she was not made a party to the former suit. What the defendant is raising in this present suit could have been made a ground or grounds in support of the former suit.”
53. In her defence before the trial court, the appellant stated that she was a daughter in law of Appollos, who owned Gutongoria farm, comprising 1800 acres, adjacent to Kaptien Farm. The respondents had approached Appollos in 1973 to assist them repay a loan they owed AFC. She further stated that they had agreed to sell 120 acres to Appollos, who sent his son, Chege, and the appellant to live in a farm house on the suit property after Stanley Musbei, one of the members of Kaptien Farm, moved out. She and her husband had cultivated the land and given the proceeds to Appollos to repay the loan owed by the members of Kaptien Farm to AFC. The loan had been repaid in 1979, and she had been cultivating the suit property from her entry thereon to date.
54. She maintained that Appollos bought the suit property and did not lease the 120 acres as alleged by the respondents. When she was prevented from cultivating the land in 1996 by some members of Kaptien Farm, Appollos went to court and an injunction was granted which enabled her to carry on farming.



- It was her case that she cannot be evicted from the suit land as it belongs to her, and she cannot pay mesne profits on a property which is hers.
55. In support of her contention that the suit property had been sold to Apollos, she relied on a document, produced as exhibit 1 in Kitale HCCC 35 of 1997 as evidence of sale, and before the trial court as exhibit 6 for the same purpose, yet the document had been held not to be evidence of sale as far back as 2002.
56. When one considers the appellant's evidence and legal arguments in the two suits involving the suit property, one is struck by the inconsistency and shifting positions that the appellant takes. These inconsistencies, I am constrained to observe, cast serious doubt on the veracity and integrity of her positions.
57. In her evidence before the Court in Kitale HCCC No. 35 of 1997, while she supported her father in law's position that he bought, rather than leased, the suit property from the respondents, she also claimed that she and her husband had bought the property. She also testified that it was up to Apollos to decide what portion of the suit land to give her. She claimed before the ELC that the property was hers, and that she was entitled to it by way of adverse possession. It was her defence that the suit property did not belong to the respondents as it was government land, having been surrendered to the government in 1998.
58. Then, in her submissions and in this appeal, she conceded that the title to Kaptien Farm, LR. 1800/3, had been surrendered for purposes only of obtaining a sub-division scheme to enable the members subdivide the land among its members. Considered against the totality of the evidence before the trial court, one is hard pressed to find a basis for faulting the conclusion of the trial court that the appellant's defence before it was res judicata, and that she was estopped from raising the arguments she had in her defence as she ought to have raised them in HCCC No. 35 of 1997.
59. The final substantive issue relates to the appellant's contention that the trial court erred in making an award of mesne profits of Kshs. 8,000,000 against her. Her contention is that mesne profits, which are in the nature of special damages, were neither pleaded nor proved. This argument, however, is not borne out by the pleadings and the evidence on record.
60. At paragraph 11 of the plaint, the respondents averred that the appellant had benefitted financially in utilising the suit property, and they prayed for mesne profits from the date of judgment in HCCC No. 35 of 1997. Regarding the evidence, the respondents called Boniface Kapiri Wafula Musa (PW5) who produced a valuation report prepared by Mwamba Valuers which indicated that in 2013, the rental amount per acre was between Kshs 3,000-8,000. The appellant's own evidence was that she had leased part of the suit property at an annual rent of Kshs 8,000.
61. It is not in dispute that where a person is wrongfully deprived of property by another, he or she is entitled to mesne profits for loss suffered as a result of the property being wrongfully held by another, for the period that the property was so held- see *Attorney General v Halal Meat Products Limited* [2016] eKLR. The trial court had found that the appellant had no right to the suit property, and was a trespasser. In making the award for mesne profits, the trial court stated as follows:
- “ 27. The other issue for determination is whether the plaintiffs are entitled to mesne profits. Mesne Profits are awarded to a successful litigant against a defendant who has been unjustifiably benefiting from a property which is found to belong to the claimant. I have found that the defendant became a trespasser to the suit land as from the date the court decreed that Appollos who had allowed her to be on the suit land had no claim to the 132.5 acres. The defendant has



been on the suit land since then. She has been growing maize on about 122 acres of the suit land which is all arable as per the evidence of PW5 Bonface Kapiri Wafula Musa a Professional valuer who valued the land. He found out that about 10 acres were reserved for the homestead. The valuer valued the property in 2013. He produced his report as exhibit 3. This witness testified that he has been around the area since the year 2000 and he therefore knows about the rental income if one were to lease out. An acre would fetch between 3000/= to 8000/= in 2014. He therefore found that the profits accrued from the suit land between 2003 and 2013 will be 8,000, 000/=. The Mesne Profits are being considered in the year 2015. This is a period of about 2 years from the date of valuation. During cross examination, the defendant confirmed that she had leased out 5 acres to someone at Kshs. 8,000/= per acre. This confirms the findings of the valuer when he put the income per acre at 8,000/= as at 2013. The defendant has been utilizing the suit land since the 1970s. The plaintiffs are only claiming mesne profits from 2003 to 2013. I do not find any ground to fault the valuer's assessment... I therefore award the plaintiffs mesne profits of Kshs.8,000,000/= (Eight Million).”

62. Taking into account the pleadings and evidence before the trial court, I find no basis whatsoever to interfere with the trial court's findings with respect to the mesne profits.
63. In the result, and having considered all the issues distilled from the memorandum of appeal and the submissions of the parties, I find the present appeal to be without merit. I would therefore dismiss it with costs to the respondents.

#### **Judgment of Kiage, JA**

64. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, JA and I am in full agreement with her reasoning, the conclusion she reaches, and the order she proposes.
65. As Tuiyott, JA is in agreement, the appeal is dismissed with costs to the respondents.

#### **Judgment of Tuiyott, J.A**

66. I have had the benefit of reading in draft the Judgment of Mumbi Ngugi, JA, with which I am in full agreement and I have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**



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

*Signed*

**DEPUTY REGISTRAR**

