



**Kenga & 12 others v Mohamed (Civil Appeal E052 of 2022)
[2025] KECA 2219 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2219 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E052 OF 2022
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
DECEMBER 19, 2025**

BETWEEN

**JACKSON KENGA 1ST APPELLANT
BARAKA KOYO 2ND APPELLANT
THOMAS MAITHA 3RD APPELLANT
EDWARD RANDU MARKO 4TH APPELLANT
EMMANUEL MOSES 5TH APPELLANT
PRISILA SHIDA CHIVALI 6TH APPELLANT
DHAHABU MASHA 7TH APPELLANT
NIXON MRAMBA 8TH APPELLANT
JUMWA CHARO 9TH APPELLANT
KACHE NYANIJE 10TH APPELLANT
JOAN KIBIBI 11TH APPELLANT
JANET DHAHABU 12TH APPELLANT
NYANIE HINZANO 13TH APPELLANT**

AND

MWANAISHA HABIB MOHAMED RESPONDENT

*(An Appeal from the Judgment and Decree of the Environment & Land Court at Malindi,
(M. A. Odeny, J.) delivered on 16th November 2022 in E.L.C. CASE No. 41 of 2018)*



JUDGMENT

1. By a Plaint dated 16th February 2018, the Respondent, Mwanaisha Habib Mohamed, filed a suit against the Appellants seeking the following reliefs:
 - a. A declaration that the Respondent is the absolute and indefeasible proprietor of parcel of land reference No.434 Malindi Title No. LT.21 Folio 668 File 3536 (the disputed property) situated in Malindi.
 - b. A declaration that the Appellants jointly and severally have illegally, unlawfully, wrongfully and without any colour of right encroached and trespassed into the disputed property.
 - c. An order of mandatory injunction be issued compelling and or requiring the Appellants, their agents, servants, relatives and any person under their instructions to immediately demolish and or pull down and remove the illegal structures constructed and or erected on the disputed property on which the Appellants and or their agents have erected and built and thereafter remove the debris, failing which, the Respondent and or her agents, contractors and or servants be authorized to demolish and remove the illegal structures and the costs incurred thereby be paid by the Appellants within a specific time to be specified by this Court.
 - d. A permanent injunction to issue restraining the Appellants, their agents, servants, relatives and or any person under instructions from the Appellants from further constructing, farming, interfering, encroaching, trespassing and or in any way dealing with the disputed property.
 - e. General damages for trespass and unlawful encroachment onto disputed property as from April 2016 until vacant possession is rendered.
 - f. The officer commanding station, Malindi Police Station, to provide security to the Respondent in enforcing the court orders.
 - g. Costs of this suit and interest thereon.
2. It was the Respondent's case that she was the registered owner of the disputed property, which she purchased from one Justus Njuki Nyaga through an indenture dated 15th December 2014 and registered on 19th January 2016. She stated that, between 2016 and 2017, the Appellants unlawfully trespassed on the disputed property, constructed temporary structures and began cultivating it, thereby depriving her of the right to utilize and develop her land; and that her attempts to occupy and develop the land were met with hostility and threats from the Appellants. As a result, she wrote to the National Land Commission (Commission) on 7th April 2016 seeking intervention. In a response dated 6th June 2017, the Commission confirmed that the disputed property belongs to her; that she had voluntarily offered 2 acres to the Appellant squatters who were to vacate the remaining 22 acres with immediate effect. The County Surveyor was to provide a survey report while the Deputy County Commissioner was to ensure that the Respondent was able to enjoy quiet possession; and that all illegal developments, transfers, or sales of any part of the disputed property by the Appellants should stop forthwith.
3. PW1 further testified that she met with the squatters on three occasions, during which they failed to produce any proof of ownership. She reiterated her willingness to let them keep 2 acres of the land and produced documentary evidence confirming her ownership; that on 13th March 2016, a meeting was held between the Appellants, the Member of County Assembly, the Chief, the Deputy



County Commissioner and herself, where it was expressly confirmed and admitted that there was indeed wrongful and illegal invasion, trespass and encroachment by the Appellants onto her parcel of land. The Respondent produced several documentary exhibits in support of her case. She also tendered a Certificate Title/Indenture over the disputed property as evidence that she is the registered owner having purchased it from Justus Njuki Nyaga. She also presented a Certificate of Official Search dated 6th April 2016, which confirmed that the disputed property was duly registered in her name.

She further produced a letter dated 7th April 2016, which she wrote to the Commission as well as the Commission's response.

4. Additionally, she produced minutes of a meeting held on 5th October 2017, evidencing her having engaged with the squatters on several occasions in an effort to resolve the dispute amicably, and even offering part of the land to them. Finally, she tendered photographs depicting the structures and cultivation activities that had been undertaken by the Appellants on the disputed property, demonstrating the extent of the trespass and encroachment. She urged the court to allow her claim.
5. During cross-examination, PW1 stated that the vendor, Mr. Nyaga, showed her the land before purchase and at that time, there were no squatters or houses on it. She asserted that the structures currently existing were constructed after she acquired the land, with a permanent structure being built about three years later without her consent.
6. On their part, the Appellants denied the claim. It was their case that the Respondent had no claim over the land. Through Jackson Kazungu Kenga, DW1, they claimed to be in lawful occupation of the disputed property having resided thereon since time immemorial without any notice of a dispute in title. He stated that the Respondent was not a bona fide purchaser for value without notice and that, had she carried out due diligence, she could have noticed that the Appellants were already in occupation of the disputed property. They contended that the land was part of a government settlement scheme, and that they were recognized as squatters awaiting allocation by the Commission and the County Government of Kilifi; that they had been in occupation of the land for years and had all along been in physical control of the disputed property, by building permanent houses and planting permanent crops, a clear demonstration that they have the animus possidendi to occupy the disputed property; and that the Respondent was not in actual possession and, as a consequence, was not entitled to the disputed property.
7. In evaluating the evidence, the trial Judge found that the Respondent's title was properly registered and that, under section 24(a) of the [Land Registration Act](#), such registration vests on the registered owner absolute ownership together with all rights and privileges appurtenant to that land. Further, section 26(1) of the same Act provides that a Certificate of title issued by the Registrar is prima facie evidence that the person named is the absolute and indefeasible owner, and that such title may only be challenged on grounds of fraud, misrepresentation, or if it was acquired illegally, unprocedurally, or through a corrupt scheme. The court observed that the Appellants had not pleaded or proved any shortcoming in her title. They merely alleged irregularity, but produced no evidence to support their claims.
8. Importantly, the court pointed out that the Appellants had not filed a counterclaim for adverse possession, nor had they provided any credible evidence to show that they met the legal threshold required for such a claim. The trial Judge emphasized that it is not enough for someone to occupy another person's land and later claim ownership through adverse possession. Such a claim must be specifically pleaded, it must be acknowledged that the title exists in another's name, and occupation supported by proof of open, continuous and uninterrupted possession for the statutory period; and that the Appellants had alluded to none of this.



9. The court also took into account the letters from the Commission which confirmed that the Respondent was the rightful owner of the disputed property; that the Commission further appreciated that the Appellants, referred to as squatters, were offered two acres as a gesture of goodwill, which demonstrated that the Respondent was at all times acting in good faith by seeking an amicable solution before resorting to litigation. The Appellants, however, failed to take advantage of that offer and continued their unlawful occupation.
10. In its analysis, the court reasoned that the Respondent had effectively discharged her burden of proof under the law by producing the title documents, correspondence from the Commission, and evidence of trespass. The Appellants, on the other hand, had failed to demonstrate any legal or equitable right over the disputed property. The Judge therefore found that their continued occupation of the land constituted unlawful trespass and an infringement of the Respondent's proprietary rights. It was pointed out that trespass is actionable per se, meaning that a claimant does not have to prove actual damage to succeed in such a claim. Based on the extent of the encroachment and the period during which the Respondent was deprived of the use of her land, the court found it appropriate to award general damages of Kshs. 300,000 for trespass.
11. In conclusion, the court held that the Respondent had proved her case on a balance of probabilities and issued a declaration that she is the absolute and indefeasible owner of the land in question. The Appellants were found to have illegally and unlawfully encroached upon the land and were ordered to vacate within 45 days, failing which an eviction order would issue. They were also ordered to demolish and remove all the illegal structures they had erected, and were restrained permanently from any further interference, construction, or occupation.
12. Aggrieved, the Appellants filed an appeal to this Court on the grounds that: the learned Judge was in error in failing to find that the Respondent's claim for recovery of the disputed property as against the Appellants was time barred by virtue of the provisions of Section 7 of the Limitations of Actions Act; in failing to appreciate that the Appellants' evidence raised the defence of limitation as enshrined in Section 7 of the Limitations of Actions Act; in failing to find that the Respondent's title to the disputed property had long been extinguished by operation of law and, in particular, the provisions of Section 17 of the Limitations of Actions Act; and in failing to appreciate that the Appellants' claim of adverse possession of the disputed property could be raised as a defence to the Respondent's claim for recovery of possession of the disputed property without the need of pleading a counterclaim and, as a result, arrived at a wrong decision.
13. Both parties filed written submissions which they relied upon. When the appeal came up for hearing on a virtual platform, learned counsel Mr. Shujaa appeared for the Appellants while learned counsel Mr. Komora appeared for the Respondent.
14. In their submissions, the Appellants argued that the learned Judge failed to reach a finding that the Respondent's suit for recovery of the disputed land was time-barred. They contended that they entered onto the land as early as the year 2000, long before the Respondent acquired her title in January 2016; and that the Respondent's own evidence, supported by an indenture dated 15th December 2014 and a registration certificate dated 19th January 2016, confirmed that she only became the registered owner at that time; further that, by then, the Appellants were already in open, continuous, exclusive, and uninterrupted possession of the land for over 16 years.
15. The Appellants further submitted that the Respondent's predecessor in title, Justus Njuki Nyaga, had been dispossessed of the property and had not taken any legal steps to recover it within the statutory 12-year period. As such, it was submitted, under the *Limitation of Actions Act*, that the right to recover the land and, consequently, the predecessor's title was extinguished by operation of law before the land



was transferred to the Respondent which, they argued, did not reset the statutory limitation period. Citing this Court's decision in the case of *Mwangi Githu vs Livingstone Ndeete* (Civil Appeal No. 24 of 1979), they emphasize that a mere change in ownership does not interrupt adverse possession, and that any new registered owner takes the land subject to overriding interests of persons already in adverse possession.

16. The Appellants also argued that their occupation was permanent, open, and hostile to the rights of the true owner; that they had built houses, planted trees, and developed the property without interference from either the previous owner or the Respondent; and that the Respondent's later complaints to the Commission and her offer to give them two acres of land did not amount to a legal assertion of ownership sufficient to stop time from running under the statute of limitation.
17. The Appellants faulted the trial Judge for holding that they could not rely on adverse possession because they had not filed a counterclaim. They submitted that this finding was legally incorrect since a party in possession can rely on adverse possession as a defence to a claim for recovery of land. This Court's cases of *Chevron (K) Ltd vs Harrison Charo Wa Shutu* [2016] KECA 248 (KLR), and *Gulam Mariam Noordin vs Julius Charo Karisa* [2015] eKLR, were cited for the proposition that a defence of limitation or adverse possession may be raised through a statement of defence, and that a counterclaim is only necessary where one seeks to be registered as owner by adverse possession.
18. They asserted that, in their defence and oral evidence, they consistently stated that they had lived on the land since 2000, constructed permanent homes, and made various developments. This, they argue, clearly raised the issue of adverse possession even without a counterclaim. They maintained that, by 2018 when the Respondent filed suit, the right of action to recover the property had long lapsed, the title of her predecessor had been extinguished, and that the Respondent could not lawfully revive or enforce a right that no longer existed. They asserted that their occupation had matured into ownership by adverse possession. In view of the foregoing, we were urged to set aside the decision of the trial court.
19. The Respondent opposed the appeal. She submitted that she is the registered proprietor of the disputed property, a position supported by Sections 24(a) and 26(1) of the *Land Registration Act*, which vest absolute ownership in a registered proprietor and provide that a Certificate of title is prima facie evidence of such ownership. She argued that her title was never challenged on the legally recognized grounds of fraud, misrepresentation, illegality, or procedural irregularity and that, since the Appellants did not present any evidence meeting those statutory exceptions, the trial court was right in finding that her title was indefeasible.
20. In response to the Appellants' argument that the claim was time-barred or that they had acquired the land through adverse possession, the Respondent submitted that these defences were not properly before the trial court; and that the Appellants did not file a counterclaim for adverse possession, and neither did they plead or prove the statutory ingredients required for that doctrine. Merely occupying land, she contends, does not confer ownership.
21. It was further submitted that the Appellants admitted that they did not possess any ownership documents and were only squatters who claimed to have lived on the land "since time immemorial." It was argued that the alleged long-term occupation could not displace her registered title in the absence of clear evidence of adverse possession. The case of *Haro Yonda Juaje vs Sadaka Dzenzo Mbauro & Kenya Commercial Bank* [2014] eKLR was relied on to support the proposition that one cannot succeed in a claim for adverse possession without first acknowledging the registered proprietor's ownership; that a party who claims that the title was fraudulently acquired cannot simultaneously claim ownership under adverse possession in that, the two positions are legally inconsistent; that, further, the Appellants' reliance on Section 7 of the *Limitation of Actions Act* is misplaced, as limitation



does not extinguish a valid registered title unless the strict requirements for adverse possession are met; that the Appellants neither demonstrated open, continuous, and exclusive possession for the statutory period nor showed that the true owner ever abandoned her rights or was prevented from asserting them. In conclusion, the Respondent submitted that the trial judge was right in finding that the Appellants were trespassers.

22. Being a first appeal, this Court is guided by the well-established principle in *Selle vs Associated Motor Boat Co.* [1968] EA 123 that an appeal to the Court of Appeal from a trial in the High Court is by way of a retrial. The Court must therefore reconsider the entire evidence, re-evaluate it independently and draw its own conclusions while bearing in mind that it neither saw nor heard the witnesses. The appellate court will not ordinarily interfere with factual findings unless the trial judge failed to consider material evidence, misapprehended the facts, or applied the wrong legal principles.
23. This standard was also affirmed in *Abdul Hameed Saif vs Ali Mohamed Sholan* [1955] 22 EACA 270 where the appellate court emphasized that it may depart from the trial judge's findings where such findings are inconsistent with the overall weight of the evidence.
24. Having considered the record of appeal and the submissions, the following issues arise for determination:
 - i. Whether the respondent's suit was time-barred under Section 7 of the *Limitation of Actions Act*.
 - ii. Whether adverse possession may be validly raised as a defence without a formal counterclaim.
 - iii. Whether the appellants had acquired ownership by adverse possession, and if the learned Judge erred in rejecting that defence.
25. Beginning with the issue as to whether the Respondent's suit was time- barred under Section 7 of the *Limitation of Actions Act*, the Appellants argued that they entered the disputed property in the year 2000 and that, by the time the Respondent filed her suit in 2018, more than twelve years had lapsed, thereby rendering the claim statute-barred; and that Section 7 of the *Limitation of Actions Act* bars any action to recover land after the expiration of twelve years from the date the right of action accrued. In addressing this issue, we have considered the Record and find that the issue of limitation of time was neither pleaded in the Appellants' defence nor raised as a preliminary objection or issue during the hearing before the Environment and Land Court. Clearly, at no time was any attempt made to invite the trial court to determine whether the suit was time- barred.
26. This Court in the case of *South Nyanza Sugar Company Limited v. Rankai* (Civil Appeal No. 172 of 2019) [2025] KECA 427 (KLR) held that:

“The statute of limitations, like the doctrine of exhaustion, is an affirmative defence. It must be raised in the first responsive pleading by a party or shortly thereafter, or only later in the trial with the leave of the trial court. It is not preserved as a defence if it is not raised during trial and cannot be raised for the first time on appeal. Its jurisdictional bite is lost when a party fails to raise and pursue it at trial; it is considered forfeited or waived. ... An adversary cannot be expected to respond to the factual claims at the appellate level where an appellant is permitted to mount the statute of limitations for the first time on appeal.”
27. We agree and adopt the rationale advanced by the above authority to find that, in this appeal, the issue of limitation of time having not been raised before the trial court, it cannot be raised or determined by this Court for the first time on appeal. On this basis, we decline the invitation to entertain a matter that was neither pleaded nor canvassed at the trial stage.



28. As to whether adverse possession can be raised without a counterclaim, the decision of this Court in the case of *Gulam Mariam Noordin vs Julius Charo Karisa* [2015] eKLR settles the matter. It affirmed that a plea of adverse possession can properly be raised in a defence without necessarily being the subject of a counterclaim or an originating summons. The Court held:

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counterclaim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v. Okumu* (1997) LLR 609 (CAK), which, like this appeal, involved a claim for adverse possession raised in defence to an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v. Kosgey* (1998) LLR 813, where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.

The Court has, in *Teresa Wachika Gachira v. Joseph Mwangi*, CA No. 325 of 2003, expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi, nec clam, nec precario* — that is, without force, secrecy, or permission.”

29. Equally, in the case of *Chepkwony vs Malenya* (Civil Appeal No. 90 of 2018) [2021] KECA 47 (KLR), the Court reiterated that a claim of adverse possession may be competently raised through a defence and need not necessarily be instituted by way of an originating summons. The Court observed:

“It is evident from the record that the respondent’s assertion of entitlement to the suit property was not founded on an originating summons but on a defence and rebuttal in the appellant’s reply to defence. ... In light of the above exposition, it is our view that the current jurisprudential position on this issue is that a party claiming adverse possession founded on a defence is entitled to relief where such claim is well founded on evidence. It is in this same vein that we hold that the respondent’s claim for adverse possession was well founded in law. The learned Judge therefore fell in no error when he sustained that claim as presented in a defence and rebutted through a reply to defence as opposed to presentation by way of originating summons.”

30. The law is now settled that a party may validly raise adverse possession as a defence to an action for recovery or eviction, provided that the plea is specifically pleaded and supported by credible evidence.

31. But having said that, in the present appeal, the Appellants’ statement of defence contained only general claims of long occupation without expressly invoking the doctrine of adverse possession or setting out its essential elements.

32. In the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR, this Court defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it, and the person having title omits or neglects to take action against such person in assertion of his title for a certain period — in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites



being that possession of the adverse possessor is neither by force nor stealth nor under the license of the owner. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner.”

33. Similarly, in the case of *Mbira vs Gachuhi* [2002] 1 E.A.L.R. 137, it was held that:
- “...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”
34. It is therefore trite that to establish such a claim of adverse possession, a claimant must demonstrate the following elements: the date of entry — when possession of the land commenced; the nature of possession — whether it was exclusive, open, and adverse; knowledge by the true owner that such possession was being exercised; duration of possession; that it continued for at least twelve 12. uninterrupted years; open and undisturbed occupation -that the possession was without secrecy, permission, or interruption (*nec vi, nec clam, nec precario*— meaning without force, without secrecy, and without permission). See also *Kioko & Another vs Mulinge & Another* [2025] KECA 274 (KLR); *M’Mikua vs Muchiri & another* [2024] KECA 1882 (KLR); *Titus Mutuku Kasuve vs Mwaani Investments Ltd & 4 Others* [2004] eKLR; *Titus Kigoro Munyi vs. Peter Mburu Kimani*, Civil Appeal No. 28 of 2014; and *Wambugu vs Njuguna* [1983] KLR 172, and *Karuntimi Raiji vs M’Makinya* [2013] eKLR).
35. The Appellants claimed that they entered the disputed property around the year 2000 and had since built houses and planted trees. However, they failed to produce credible evidence indicating the precise date of entry, the extent of occupation, whether such occupation was known to the owner and whether it was maintained openly and continuously for twelve years. Their pleadings and testimony were vague and unsupported by documentary or corroborative evidence.
36. Conversely, the Respondent’s title was only registered in 2016 following a lawful transfer from one Justus Njuki Nyaga. No proof was adduced to show that either the Respondent or her predecessor were effectively dispossessed twelve years prior to the filing of the suit in 2018.
37. Even if we were to assume that the Appellants entered the disputed property earlier than 2016, the evidence did not demonstrate precisely when they took up occupation, or that their occupation was continuous and uninterrupted as required by law. On the other hand, the Respondent produced correspondence showing that she lodged several complaints with the Commission between April 2016 and June 2017, protesting against the Appellants’ encroachment and seeking intervention from the authorities. In its letter dated 6th June 2017, the Commission confirmed that the disputed property belonged to the Respondent, and it directed the Appellant squatters to vacate the remaining 22 acres, and to cease all developments and transactions on the land forthwith.
38. Such formal complaints and official intervention constituted a definite assertion of ownership and interruption of the Appellants’ possession. The Respondent’s actions through the Commission can be said to have effectively disrupted any continuity of possession by the Appellants. In effect, their occupation cannot, in law, be deemed to have remained uninterrupted for twelve years.
39. As a consequence, and from the foregoing, it is clear that the Appellants’ alleged occupation of the disputed property did not meet the legal threshold for adverse possession as required by Sections 7, 13, 17, and 38 of the *Limitation of Actions Act*. But the Respondent has proved that her lawfully acquired and duly registered title, remains absolute and indefeasible under Sections 24 and 26 of the



Land Registration Act, particularly as no fraud or illegality were proved. As was the trial Judge, we too, are satisfied that the Appellants were pure trespassers on the disputed property and we have no reason to interfere with that finding.

40. In sum, the appeal is without merit and is hereby dismissed with costs to the Respondent. We uphold the Judgment and Decree of the ELC at Malindi (M.A. Odeny, J.) delivered on 16th November 2022.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

