



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola, & Ouko, SCJJ)

SC. PETITION NO. E035 OF 2025

-BETWEEN-

KAKUZI PLC..... APPELLANT

-AND-

MAKUYU CLUB (suing through **JOEL WANYOIKE,**
IRUNGU NDIRANGU & S.K. KIRUBI
as Trustees of the Club) **RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the Court of Appeal at Nairobi (**Gatembu, Lesiit & Ngenye-Macharia, JJ. A**) delivered in Civil Appeal No. 78 of 2020 on 8th November 2024)*

Representation:

Dr. Fred Ojiambo, SC & Mr. Wycliffe Oyoo for the Appellant
(Kaplan and Stratton Advocates)

David Mukii Mereka for the Respondent
(Mereka & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of Appeal dated 30th July 2025 and filed on 1st August 2025, is before this Court upon certification by the Court of Appeal (*Karanja, Nyamweya*

& *Odunga, JJ. A*) in Civil Appeal (Application) No. 78 of 2020 in its ruling delivered on 4th July 2025, as one involving a matter of general public importance under Article 163(4)(b) of the Constitution. The appellant is challenging the entire Judgment and Orders of the Court of Appeal (*Gatembu, Lesiit & Ngenye, JJ.A.*) in Civil Appeal No. 78 of 2020 delivered on 8th November, 2024.

[2] In essence, the appellate court affirmed the decision of the trial court which held that the respondent had acquired title by adverse possession to approximately seventy (70) acres, or thereabouts, forming part of the appellant's parcel of land known as L.R. No. 11674 (I.R. 20386/2) (hereinafter, the “*suit property*”), having been in adverse possession thereof for a continuous period exceeding twelve (12) years in accordance with Section 38 of the Limitation of Actions Act.

B. FACTUAL BACKGROUND

[3] The cause of action relates to a portion of land measuring approximately 70 acres, carved out of the suit property, which comprises of over 12,000 acres. The respondent asserts that this portion of land was donated to it by white settlers in 1934 for use as a golf course, long before the appellant was established. According to the respondent, it had exclusive, open, quiet, and non-permissive possession of the subject land since 1934 without any interference from the appellant. It developed the same by landscaping it, construction of a golf course complete with greens and tee boxes, the erection of a clubhouse, and the sinking of a 300-metre borehole, among other developments.

[4] The appellant, being the registered proprietor of the suit property since 1967, maintains that by way of Grant No I.R. 21211 issued under the Registration of Titles Act, an entity known as Sisal Limited was granted the suit property for a term of 941 years and 2 months from 1st June 1966. The said property was transferred to Kakuzi Fibrelands Limited, and the transfer was registered on 8th December 1967.

On 29th July 1971, a Certificate of Change of Name of Kakuzi Fibrelands Limited to Kakuzi Limited was registered.

[5] Having been in occupation and utilization of the said portion of land for more than 68 years, the respondent claims that the appellant's rights over the said portion of the suit property was extinguished by operation of the law, and it was therefore just for it to be registered as the absolute proprietor of the said portion of land through adverse possession.

C. LITIGATION HISTORY

i. Proceedings at the Environment and Land Court (ELC)

[6] It is this contention that precipitated the respondent to institute ***ELC Case No. 115 of 2017*** against the appellant, seeking the determination of the following questions:

- a) Whether the appellant's title in a portion of land, seventy (70) acres or thereabouts out of their land L.R. No. 11674 I.R. 20386/2 has been extinguished by the respondent's adverse possession thereof for a period of more than twelve (12) years in terms of Section 38 of the Limitation of Actions Act.*
- b) Whether the respondent has acquired title to the said land by its adverse possession thereof for a period of more than twelve (12) years from 1934 to date.*
- c) Whether the respondent ought to be registered as the absolute owner of the said land.*
- d) Whether the Registrar of Titles, Nairobi, should now be ordered to register the said land in the name of the respondent as absolute proprietor.*

e) *Whether the appellant should not be condemned with the costs of this suit.*

f) *In all the circumstances of the case, which other orders are expedient to make.*

[7] The respondent's case was that Makuyu Club was established in 1934 by white settlers, who developed the suit property into a golf course by landscaping the land, constructing tee boxes, and erecting ancillary structures, including a makeshift bar, pit latrine, and a borehole. The respondent maintained that since that time, its members had exercised open, continuous, and exclusive possession of the portion of the suit property delineated as the golf course, treating it as their own, without force, secrecy, or interruption. Further, that such occupation extinguished the appellant's title by operation of law and that the appellant held the title to the suit land in trust for the respondent.

[8] In opposing the claim, the appellant stated that the respondent had never exercised exclusive possession of the said portion of the suit property; that the respondent's use of the portion of land was always with its consent and that of its predecessors, who assisted in maintaining the course by providing equipment, paying staff wages, and financial assistance towards maintenance of the facility and these services were progressively withdrawn between 1996 and 1999. Further, the appellant contended that, it had consistently used the portion of the suit property used by the respondent as a golf course, for its own agricultural and forestry activities, including grazing livestock, harvesting hay, and transporting products across the property; that it had continuously taken steps to affirm its proprietary rights; and that in May 2001, there was an agreement to formalize the respondent's use of the portion of the suit property by way of a lease agreement, but the respondent instead, filed a case before the negotiations were complete. Finally, that its title had not been extinguished; and that the respondent lacked the legal

capacity to claim ownership of the said portion of the suit property or that its occupation was adverse.

[9] In its judgment of 18th October 2019, the ELC, (*Angote, J.*), held that the respondent's occupation of the suit property had exceeded the statutory period of twelve years. The Court found that the appellant did not dispute that the respondent's members had continuously and exclusively used the suit property as a golf course since 1934. It further held that, even after the appellant acquired the suit property in 1967, there was no evidence that the appellant had ever taken possession of, or exercised proprietary control over the portion of the land comprising the golf course. On whether the respondent's use of the suit property had been without the permission of the appellant, the court found that, by the time Sisal Limited was registered as proprietor of the suit property in 1966, the respondent's members had already been in possession since 1934, and using the 70-acre portion as a golf course. The Court further noted that, although the appellant provided certain forms of support to the respondent, including equipment and financial assistance, such support was characterized as donations rather than assertions of ownership or control. In the circumstances, the Court was satisfied that the respondent's occupation of the 70 acres was open, continuous, exclusive, and without the appellant's permission for a period exceeding twelve years. Subsequently, the Court held that the appellant's title to that portion had been extinguished by the respondent's adverse possession thereof, for a period of more than twelve (12) years in terms of Section 38 of the Limitation of Actions Act, and allowed the respondent's originating summons with costs.

ii. Proceedings at the Court of Appeal

[10] Aggrieved, the appellant filed **Civil Appeal No. 78 of 2020**, premised on nine (9) grounds as set out in the Memorandum of Appeal that the learned Judge erred in fact and in law by:

- i. *Failing to appreciate that the respondent had not acquired any rights pursuant to Sections 7 and 13 of the Limitation of Actions Act.*
- ii. *Finding that the appellant's title to a portion of land measuring approximately seventy (70) acres or thereabouts of their land, L.R. No. 11674 I.R. 20386/2, had been extinguished by the respondent's adverse possession thereof for a period of more than twelve (12) years in terms of Section 38 of the Limitation of Actions Act.*
- iii. *Finding that the respondent had acquired title to the said land by its adverse possession thereof for a period of more than twelve (12) years from 1934 to date.*
- iv. *Directing that the respondent be registered as the absolute owner of the 70 acres, being a portion of L.R No. 11674 I.R. 20386/2.*
- v. *Failing to consider evidence given by the appellant's witness that the appellant had at all material times taken steps to assert its title over the suit property and the occupation of the suit property by the respondent was with the knowledge and consent of the appellant, thereby arriving at an erroneous and/or wrong decision that the use of the suit property has been continuous, exclusive and without the permission of the appellant for a period of twelve (12) years.*
- vi. *Ignoring and failing to decide the case on the facts and evidence presented and adduced before him and in arriving at the decision based on assumptions that were not supported by evidence.*
- vii. *Failing to appreciate and hold that the respondent had not proved their case on a balance of probabilities as required by law.*

- viii. *Failing to consider and determine substantial and material issues and questions of law and fact that he was called upon by the parties to consider and determine.*
- ix. *Failing to consider the appellant's written submissions on the law and evidence and thereby arriving at an erroneous and/or wrong decision.*

[11] In its judgment of 8th November 2024, the Court of Appeal (*Gatembu, Lesiit and Ngenye, JJ. A*), identified two issues for determination, namely:

- i. *Whether the trial court erred in its finding that the respondent had satisfied the statutory threshold for a claim of adverse possession over the suit property; and*
- ii. *Whether the trial court erred by failing to find that the appellant asserted its right over the suit property.*

[12] On the *first issue*, the court found that the respondent had been in open, peaceful, and exclusive possession of the 72 acre portion of the suit property since 1934, when the land was donated to it by white settlers and developed into a golf course; that by the time the appellant acquired and registered the suit property in 1967, the respondent was already in occupation and continued to use the land uninterrupted; and that even assuming that time began to run in 1967, when the appellant acquired the land, the respondent remained in continuous and exclusive possession until 2002, a period of approximately 35 years, when the appellant filed a suit. Accordingly, the court was satisfied that the respondent had met the statutory requirements for adverse possession.

[13] On the *second issue*, the court held that an assertion of title must be accompanied by unequivocal acts capable of interrupting the adverse possessor's

occupation, such as physical re-entry, dispossession, or formal acknowledgement of title by the occupier, and that mere notices or correspondence do not suffice. In the court's view, the appellant neither took physical possession of the said portion of land, nor did it demand rent, or otherwise regularize the respondent's occupation, and therefore, the appellant's conduct fell short of this threshold, because it failed to take any effective steps to interrupt the respondent's possession or assert its ownership in law. Accordingly, the Court of Appeal dismissed the appeal with costs, thereby upholding the judgment of the trial court.

iii. *Proceedings at the Supreme Court*

[14] Dissatisfied, the appellant has now moved this Court, following certification by the Court of Appeal that the appeal involves a matter of general public importance. The appellant challenges the decision of the Court of Appeal on the grounds that, the learned Judges of appeal erred in law and fact by holding that:

- i. *The land tenure systems practiced in Kenya recognize informal arrangements of consent to till or use land with or without consideration.*
- ii. *The Honourable Judges erred in law by departing from the settled law on adverse possession by finding that a claim to land based on adverse possession runs against the title and not the current registered owner of the land.*
- iii. *The application and effect of the judgment is that a vast number of land owners may be deprived of their land.*

[15] They seek the following reliefs:

- a) *The petition be allowed.*

- b) *The Judgment and Order of the Court of Appeal delivered on 8th November 2024 be set aside in its entirety.*
- c) *The Judgment of the Environment and Land Court at Thika made on 18th October 2019 be set aside in its entirety.*
- d) *The Petitioner's prayers in Thika ELC No. 115 of 2017 be allowed.*
- e) *The costs of this Petition, the costs of the appeal before the Court of Appeal and of the suit before the superior court be paid by the respondent.*

[16] In response, the respondent has filed a replying affidavit sworn on 15th August 2025 by *Joel Wanyoike*, one of its Trustee directors, wherein they oppose the appeal and reiterate their arguments in the superior courts below. In a rejoinder, the appellant filed an affidavit sworn on 22nd August 2025 by *Dennis Gitaka*, its legal officer, reiterating their position.

D. PARTIES' SUBMISSIONS

i. Appellant's Case

[17] The appellant's submissions in support of the appeal are dated 22nd September 2025 and filed on 23rd September 2025, while the rejoinder submissions are dated 27th October 2025 and filed on the same date, the appellant submits under the following headings:

[18] On the issue *whether a claim by way of adverse possession can be sustained where initial occupation of land is by consent or donation by an owner without any transfer and particularly where there is a subsequent change of ownership*, the appellant submits that the respondent, at all material times being in possession of the suit property as a donee, is not a party in whose favour time could run for

purposes of a claim on adverse possession. It maintains that it is in the public interest that this Court recognizes that elements of adverse possession expressly exclude permissive utilization of land.

[19] On *whether the consent or affirmation of the existence of the donee by the subsequent owner and in the absence of an adverse incident can give rise to the running of time for a claim of adverse possession*, the appellant submits that, central to the determination of a question on adverse possession, is the occurrence of an adverse incident. The appellant contends that where no adverse incident is pleaded by the respondent, time could not run for purposes of a claim in adverse possession. In any event, the respondent utilized the 72 acres of the suit property with the express consent and knowledge of the appellant and the appellant's predecessors in title.

[20] The appellant further submits that permissive occupation cannot amount to adverse possession. It cites the case of ***Kihamba Vs Mbaisi*** [2015] KECA 853 (KLR), where the court held that strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy and without license or permission of the land owner, with the intention to have the land. Further reliance is placed on ***Sisto Wambugu Vs Kamau Njuguna*** [1983] KECA 69 (KLR), where the Court of Appeal laid down the guiding principles as regards adverse possession, *inter alia*, that the occupation can only be either with permission or adverse; and that the two concepts cannot co-exist. In that regard, the appellant argues that the Court of Appeal did not point out the adverse incident or the manner in which the respondent's occupation was inconsistent with the appellant's title to the suit property, to justify time running for purposes of a claim on adverse possession. Instead, the Court of Appeal speculated on the occurrence of an adverse incident and when time began to run.

[21] On possession, the appellant contends that mere possession by the respondent, regardless of duration, could not trigger the running of time, absent an adverse incident. It submits that the appellate court erred in finding that the appellant failed to assert its rights, as such assertion would only be necessary where entry onto the land was by a trespasser. Furthermore, the respondent's repeated acknowledgment of the appellant as the registered proprietor of the property, defeats any claim of adverse possession, as time could not run in the respondent's favour. In support of this position, the appellant relies on ***M'Riria & 5 others Vs Muthomi*** [2025] KECA 951 (KLR), where the Court of Appeal held that a claimant must demonstrate steps taken to assert rights adverse to or inconsistent with the title of the valid owner.

[22] Regarding *the impact of the Court of Appeal judgment on land tenure systems in Kenya*, the appellant submits that the issue of what amounts to adverse possession where the claimant came onto the suit property by way of donation, and a subsequent change in ownership of such property occurs, is an issue that is yet to be decided, within the settled principles of adverse possession. While appreciating this Honourable Court's decision in ***Bell Vs Moi & another*** [2013] KESC 23 (KLR), the appellant seeks to distinguish that decision by noting that the issues presented in this appeal, though arising from a claim of adverse possession, transcend the dispute between the parties, and urges this Court to develop the law in these circumstances. Indeed, the appellant submits that the appeal raises matters of general public importance, and that the respondent, having failed to seek a review of the ruling on certification, is estopped from contending otherwise. The appellant therefore urges that the appeal be allowed as prayed.

ii. Respondent's Case

[23] The respondent's submissions opposing the appeal are dated 10th October 2025 and filed on 13th October 2025. The respondent submits under the following headings:

[24] On *whether a claim by way of adverse possession can be sustained where initial occupation of land is by consent or donation by an owner without transfer, particularly where there is a subsequent change of ownership*, the respondent submits that, the subsequent change in ownership, including the registration of the appellant as proprietor, did not alter the fact that the respondent's occupation was without their permission, given that the new owner failed to grant any license for the continued occupation. It is submitted that the absence of such permission from the appellant meant that from the date of their registration as proprietors, the respondent's continued possession was without consent and therefore adverse to their title. To buttress this argument, the cases of ***Celina Muthoni Kithinji Vs Safiya Binti Swaleh & 8 others*** [2018] KEELC 4002 (KLR) and ***Mbira Vs Gachuhi*** (2002) 1 EALR 137 are cited to the effect 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.

[25] The respondent asserts that the appellant is approbating and reprobating where, on one hand, it admits that the initial entry to the suit property was by donation by previous owners, while on the other hand, it claims that there existed an informal arrangement or consent between the parties. Therefore, to the respondent, the appellant is estopped from claiming that the possession of the portion of the suit property by the respondent was due to a consent between them. It is asserted that the donation was made by the previous owners of the suit

property and was not renewed by the subsequent owners upon the transfer of ownership. Consequently, the respondent's occupation, which was initially permissive, ceased to be so from that point and became adverse.

[26] On *whether the consent or affirmation of existence of the donee by a subsequent owner and the absence of an adverse incident can give rise to the running of time for a claim of adverse possession*, the respondent submits that, under Section 13(2) of the Limitation of Actions Act, time ceases to run only where the owner takes effective steps to assert title to the property. It is further contended that mere recognition or passive acknowledgement by the owner does not interrupt the running of time unless accompanied by clear evidence that the occupier has acknowledged and submitted to the owner's authority. Citing ***Lewa Vs Mwagandi*** [2015] KECA 532 (KLR), the respondent submits that they had been enjoying continuous uninterrupted possession of the suit property since 1967, and it was not until 1999 when the appellant purported to introduce a license agreement, which led to the institution of this suit. Further, that by building structures on the suit premises, without obtaining permission from the appellant, the respondent treated the suit premises as if it were exclusively its own, and in a manner that was in clear conflict with the appellant's rights. To them, the appellate court did not speculate on the occurrence of any "adverse incident"; rather, it relied on uncontroverted evidence on the record, where the court considered the historical background of the case and found that time began to run in 1967.

[27] On whether upon registration of the title, the appellant undertook any steps to assert its title, the Limitation of Actions Act contemplates that an owner who sleeps on its rights beyond 12 years loses the ability to recover ownership of the property. As such, the claim of adverse possession can and does succeed in circumstances where initial occupation was by donation, but subsequent

occupation became adverse upon change of ownership. Indeed, the respondent submits that the adverse incident arose at the latest when the appellant became the registered proprietor of the suit property; that its continued possession was not by the appellant's consent, and no licence or permission was granted by it, yet the respondent's possession was open, continuous, and inconsistent with the appellant's ownership rights. Therefore, time began to run for purposes of adverse possession. To buttress this argument, the case of ***Kimani Ruchine Vs Swift, Rutherford & Co. Ltd*** [1980] KLR is cited.

[28] Lastly, on *the impact of the Court of Appeal judgment on land tenure systems*, the respondent submits that customary land tenure systems are irrelevant to the present dispute, as they entered into possession of the property through donation from the former owners, and have since maintained uninterrupted occupation without the consent of the current registered proprietor. The respondent argues that the matter does not involve subsistence occupation, communal use, or temporary arrangements typical of customary tenure, rendering the appellant's reliance on ancestral land tenure both factually and legally misplaced. Further, that this argument is being raised for the first time on appeal, contrary to the settled principle that appellate courts do not entertain new issues absent exceptional circumstances. In conclusion, the respondent maintains that the law on adverse possession is settled, that the case merely requires application of established principles to its specific facts, and that the claim that the matter is one of general public importance is unfounded. Accordingly, the respondent urges dismissal of the appeal and affirmation of the appellate court's judgment.

D. ISSUES FOR DETERMINATION

[29] While the present appeal invokes our appellate jurisdiction under Article 163(4)(b) of the Constitution, we note that the Court of Appeal did not specifically delineate the precise issue of general public importance to be determined by this Court, a practice we continue to discourage. In ***Stanbic Bank Kenya Limited Vs Santowels Limited*** [2024] KESC 31 (KLR), we emphasized that the Court of Appeal must, as a matter of good practice, specifically formulate or delineate the issue or issues it considers to be of general public importance. In its ruling, the Court of Appeal certified the present matter as one involving issues of general public importance, in the following terms:

“14. Given the foregoing, while the principles of law that apply in determining adverse possession are settled and their application will be determined by the facts of each particular case, we are persuaded that a novel question has been raised by Kakuzi as regards the elements of adverse possession where initial occupation of land is by consent or donation by an owner without any transfer, and particularly where there is a subsequent change of ownership.

15. The Court also noted in various parts of the judgment that the said land, had been donated to Makuyu Club by Sisal Ltd. Our understanding of the question posed by Kakuzi of what is the adverse incident in such circumstances, is the nature of possession that is adverse to the interests of a subsequent owner of such a property, within the settled principles on adverse possession. In our view this is a substantial issue of law that requires to be determined by the Supreme Court that not only arises from the facts of the appeal; but one which is likely to affect a

substantial number of members of the public and in particular buyers of land that is in possession or occupation by third parties; and which will also clarify the application of the principles on adverse possession.”

[30] Having considered the above expressions by the appellate court, the issues arising for our determination as matters of general public importance are:

- a) Whether a claim by way of adverse possession can be sustained where initial occupation of land is by consent or donation by an owner without any transfer and particularly where there is a subsequent change of ownership; and***
- b) Whether the consent or affirmation of the existence of the donee by the subsequent owner and in the absence of an adverse incident, can give rise to the running of time for a claim of adverse possession.***

[31] We hasten to add that, in our determination, we remain cautious of our lack of jurisdiction to revisit factual findings of either the High Court or Court of Appeal in line with our edict in ***Mitu-Bell Welfare Society Vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** [2021] KESC 34 (KLR).

E. ANALYSIS

- i. Whether an action for adverse possession can be sustained where the claimant's occupation and use of the suit property was triggered by a donation or consent by the initial owner without any transfer and particularly where there is a subsequent change of ownership.***

[32] The acquisition of land under the doctrine of adverse possession is recognized in all the civil and common law jurisdictions. This concept of adverse possession

has been the subject of many discourses and decisions in our courts. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:

“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.”

See also sections 9, 13, 17, 37 and 38 of the Limitation of Actions Act (LAA) which make further provisions on the mechanics of the doctrine.

[33] In ***Bell Vs Moi & another*** [2013] KESC 23 (KLR, this Court stated that:

“What constituted adverse possession had been answered time and again by the superior courts. The Limitation of Actions Act at sections 7, 13, 17 and 38 provided the procedure that an applicant should undertake to ascertain a claim for adverse possession. Adverse possession was also an issue that was normally proven through interrogation of evidence in a particular case...”

[34] These statutory provisions, in their breadth and clarity, leave no room for conjecture. For one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. For adverse possession to arise, there must be an apparent dispossession of the landowner, accompanied by *animus possidendi*, that is, the intention on the part of the claimant to possess the land to the exclusion of all others, including the true owner.

[35] In the case of **Wambugu Vs Njuguna** [1983] KLR 172, the Court held that, in order to acquire by the statute of limitation, title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it, or by his possession of it being discontinued. The occupation can only be either with permission or dispossession; the two concepts cannot co-exist. It is therefore settled that, for one to stake a claim on a parcel of land on the basis of adverse possession, one must show that they entered the parcel of land as a trespasser as opposed to by consent of the owner, because occupation of land by consent or license does not accrue any right of adverse possession on the applicant. This was also the position in the case of **Samuel Miki Waweru Vs Jane Njeri Richu** [2007] KECA 465 (KLR) where the court had this to say:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.”

[36] On the other hand, where one claims that their initial occupation of land, was through a donation by the original owner, it is the Court’s considered view that the donee acquires permission to enter upon and remain on the said land, for donation inherently imports the concept of permissible entry and possession. The act of donation, being voluntary and deliberate, vests in the donee a recognized entitlement to occupy or utilize the property in accordance with the terms of the grant. In consequence, the donee’s occupation flows from the donor’s consent, thereby constituting a permissible and cognizable entry upon the land, and one can therefore, not sustain a claim for adverse possession.

[37] Further, it is the Court’s view that such donation ought to have been transferred and registered in favour of the donee, absent which, the donation is

incomplete, and while it may still allow one to occupy the land, it does not in itself confer ownership of the land. In the absence of a legally enforceable interest binding the successor in title, therefore, upon a subsequent change of ownership, the donation lapses, and time begins to run for purposes of adverse possession. This was the position by the Court of Appeal in **Malcom Bell Vs Daniel Toroitich Arap Moi & another** [2012] KECA 99 (KLR), wherein, in denying a claim for adverse possession on a claim of donation of land, the Court held that:

39. The above evidence does not at all lead to the conclusion that the suit land was given as a gift or donation. In any event, the late Walter did not transfer the suit premises nor did he make a provision for it in his Will.

40. In my view, if the school construed the suit premises as a gift, it was an incomplete gift. According to the text by Halsbury Laws of England Vol 18 paragraphs 755 on page 396:

“The Court will not complete an incomplete gift. Where a gift rests merely in promise (written or verbal) or unfulfilled intention, it is incomplete and imperfect and the court will not compel the intending donor, or those claiming under him, to complete and perfect it

An incomplete gift can be revoked any time there is a locus penitential so long as the gift is incomplete. No question of conscience enters into the matter for there is no consideration. ...”

[38] Having so found, a claim for adverse possession must fail where it is shown that the claimant's possession was with the permission of the owner or that the claimant acknowledged the owner's title. It follows that a claim for adverse possession cannot be sustained where the claimant entered into possession by

virtue of the owner's consent or a donation, and such permission remained in force. In such circumstances, time does not begin to run for purposes of adverse possession until the permission is terminated or otherwise comes to an end. Likewise, where, before the expiry of the prescribed limitation period, the owner takes effective steps to assert his or her title, the running of time is interrupted.

[39] What about where there is a subsequent change of ownership? As stated elsewhere in this judgment, the possession of a claimant in an adverse possession claim, must be continuous and without any interruptions. As stated in the case of ***Francis Gacharu Kariri Vs Peter Njoroge Mairu*** [2005] KECA 67 (KLR) it must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration. In our view, where there is subsequent change of ownership, the initial consent or donation where there was no transfer lapses automatically, and time starts running against the new owner of the land. This is because the occupier's possession is without the true owner's permission. As to the date from which the period of limitation or prescription begins to run against the owner of land, courts have held that it runs from the date when the owner was entitled to immediate possession, and the squatter occupied the land under some colour of right. In the case of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and, therefore, entitled to take action against any intruder to the land (**See: *Alibhai Vs Alibhai*** [1938] EACA 15 ; ***Gathure Vs Beverly*** [1965] EA 514)

[40] We have said enough on the first issue to satisfy ourselves that the claim for adverse possession can be sustained upon a subsequent change of ownership, because any continued stay on the property is inconsistent with the subsequent owner's enjoyment. The converse again will be that, if the subsequent owner

asserts their rights of ownership upon change of ownership, time for purposes of adverse possession would not start running on the part of the applicant.

- ii. *Whether the consent or affirmation of the existence of the donee by the subsequent owner and in the absence of an adverse incident, can give rise to the running of time for a claim of adverse possession.*

[41] It is possible to enter the land with the consent of the owner. Consent may be oral or written. It may also arise by way of a license, whether implied or written, or through a valid tenancy agreement. However, if the owner at some point terminates the consent, and the claimant does not leave but continues to occupy the land, and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession.

[42] In *Joseph Gachumi Kiritu Vs Lawrence Munyambu Kabura* [1996] Eklr it was held as follows:

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him....He must therefore make a peaceable and effective entry, or sue for recovery of land.”

Adverse possession can indeed also accrue from a failed sale. The purchaser's initial entry is by consent arising out of the contract of sale, so possession is not adverse while that consent or the contractual relationship subsists. However, once the sale fails or the permission comes to an end, continued possession may become

adverse. (See **Okul & another Vs Ondieki & 3 others** (Civil Appeal E041 of 2021) [2026] KECA 882 (KLR)) The real question is identifying the point at which the consent ceased.

[43] Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see **Cheshire's Modern Law of Real Property, 11th edition at p 894**. On what can be considered 'adverse incident', we agree with the Court of Appeal in this matter that it must be accompanied by unequivocal acts capable of interrupting the adverse possessor's occupation, such as physical re-entry, dispossession, or formal acknowledgment of title by the occupier, and that mere notices or correspondence do not suffice.

[44] To our minds therefore, absent any adverse incident on the part of a subsequent owner, and where the subsequent owner consents or affirms the existence of the donee on the land, time starts to run for purposes of adverse possession. We further agree with the Court of Appeal in **Mtana Lewa Vs Kahindi Ngala Mwangandi** [2015] KECA 532 (KLR) that adverse possession essentially arises where a person takes possession of land and asserts rights over it, while the person holding title to the land omits or neglects to take action to assert his or her title within the prescribed limitation period, which, in Kenya, is twelve (12) years.

iii. What relief is available to the parties?

[45] From the foregoing, the respondent was able to show that it was in occupation of the portion of the parcel of land from 1934 onwards, including with the knowledge of the appellant. However, as we have stated hereinabove, the claim for adverse possession can be sustained upon a subsequent change of ownership, because any continued stay on the property, is inconsistent with the subsequent

owner's enjoyment. Upon a careful analysis of the evidence and the applicable law, the Court finds that time began to run in favour of the respondent in 1967, when the appellant acquired the suit property. The respondent, thereafter, remained in continuous, uninterrupted, and exclusive possession of the land until 2002, when, after a period of approximately thirty-five (35) years, it instituted proceedings seeking to acquire title by way of adverse possession. Having further found that a subsequent owner is required to assert ownership through clear and unequivocal acts capable of interrupting the adverse possessor's occupation, we are satisfied that the appellant failed to do so within the prescribed limitation period. The appellant remained indolent and only sought to assert its interest in May 2002, when, by its own account, it attempted to enter into a lease agreement with the respondent. That intervention came after the expiry of the statutory period by more than twelve (12) years and was therefore incapable of reviving the appellant's title. Accordingly, we find no reason to disturb the judgment of the Court of Appeal.

F. COSTS

[46] On the issue of costs, this Court in the case of ***Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others***, (SC Petition 4 of 2012) [2014] KESC 31 (KLR) set out the guiding principles governing the exercise of judicial discretion in the award of costs. The Court affirmed that, as a general rule, costs follow the event and are not intended to punish the unsuccessful party, but rather to compensate the successful party for the expense and inconvenience occasioned in prosecuting or defending the proceedings. Taking into consideration all the circumstances of this appeal, we find that the appellant shall bear the costs.

G. ORDERS

[47] Consequently, upon our conclusion above, we order that:

- i. *The Petition of Appeal dated 30th July 2025 is hereby dismissed.*
- ii. *The Judgment of the Court of Appeal dated 8th November 2024 is hereby affirmed.*
- iii. *The Appellant shall bear the costs of the Appeal.*
- iv. *We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the appellants.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of October 2026.

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF
THE SUPREME COURT

.....
S.C. WANJALA **NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

.....
I. LENAOLA **W. OUKO**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

