Case Number:	Civil Appeal 121 of 2006
Date Delivered:	30 Sep 2016
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, George Benedict Maina Kariuki, Philomena Mbete Mwilu
Citation:	Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	H.C.C.C. NO. 2658 OF 1998 (O.S)
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI & MWILU, JJ.A.)

CIVIL APPEAL NO.121 OF 2006

BETWEEN

BENSON MUKUWA WACHIRA.....APPELLANT

AND

THE ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES.....RESPONDENT

(Appeal from Judgment and/or Decree of the High Court of Kenya at Nairobi (Ojwang, J) delivered on 10th March 2006

in

H.C.C.C. NO. 2658 OF 1998 (O.S))

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JUDGMENT OF THE COURT

BACKGROUND

1. Benson Mukuwa Wachira, the appellant herein, was aggrieved by the judgment of the High Court (Ojwang J, as he then was) delivered on 10th March 2006 in H.C.C.C. No.2658 of 1998 (OS) in favour of the respondent herein. In the suit in the High Court, the appellant was the respondent while **The Assumption Sisters of Nairobi Registered Trustees**, the respondent herein, was the applicant. The latter had brought the suit seeking orders to the effect that the appellant held land Title No. L.R. 209/9010 ("the suit land") as trustee for the respondent because, according to the respondent, the appellant's Title had been extinguished by the respondent's adverse possession of more than 12 years and further that the appellant should be registered as the sole proprietor of an estate in fee simple of the suit land. A further order was sought by the respondent to restrain the alienation of the suit land by the appellant pending the determination of the suit.

2. This being a first appeal, our mandate is as set out in Article 164 (1) of the Kenya Constitution 2010, Section 3 of the Appellant Jurisdiction Act (No.9 Laws of Kenya), Section 78 of the Civil Procedure Act and rule 29(1) of this Court's Rules. We are enjoined under the law to re-appraise the facts and to draw our own inferences and conclusions. The predecessor of this court correctly stated in **Selle and Another versus Associated Motor Boat Company Limited & Others** [1968] EA 123 (at page 126 para G-1 by Sir Clement De Lestang V.P) over legal duty in first appeals thus –

"An appeal to this Court from a trial by the High 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally."

3. In her affidavit sworn on 27th November 1998 filed in the said suit, Sister Martin Wanjiru (who is hereinafter referred to as **"Sister Martin"**) averred that she has since 1955 been a Sister with Assumption Sisters of Nairobi which she founded.

She was also a director of the Kibarage Good News Centre run by the Assumption Sisters which is located on both the suit land (No. LR 209/9010, Nbi) and Plot No.LR 209/9006, which are contiguous. In the said affidavit, Sister Martin further averred that the Assumption Sisters have been in open and continuous possession of the suit land for over 18 years since 1980. She averred that in 1980, Cardinal Maurice Otunga asked her to establish a mission to serve the poor in the City of Nairobi following which she visited the Chief of Kibarage, one I. K. Kamau, who agreed that she could start a feeding and child health programme on the suit land. Thus, she proceeded to take possession and control of the suit land and to fence it. She also put up gates before embarking on construction of permanent structures to cater for the feeding programme while the rest of the land was used for outdoor activities including as a playground and a place for prayer. As the centre grew, Sister Martin avers that she built a First Aid Centre to give medical services to the children of the villagers who numbered over 30,000. The medical centre grew into a dispensary and in 1985 Sister Martin built classrooms and dormitories and extended the facilities thus enlarging the centre which has a two-storey primary school, a two-storey girls' secondary school, isolation room, dining hall, kitchen, administration block and library at a cost in the tune of shs.32.5 million obtained from donors. It was Sister Martin's averment that since 1980, she has been in exclusive possession of the suit land and at no time has she ever abandoned its possession.

4. A copy of Grant No. I.R. 66151 in respect of the suit land attached to the affidavit of Sister Martin in support of the Originating Summons in H.C.C. Suit No.2658 of 1998 (OS) shows that the Government of Kenya granted to the appellant the suit land (No. L.R. 209/9010, Nairobi, measuring 0.9485 of a hectare) for 99 years from 1st July 1977 subject to payment of annual rent of Shs.1,000/= (revisable). The Grant was registered on 26th May 1995. On 4th December 1996, the appellant charged the suit land to Kenya Commercial Bank to secure a loan of Shs.400,000/= and on 29th September 1997 the appellant had a further charge registered in favour of Kenya Commercial Bank to secure a further sum of Ksh.600,000/=.

5. The appellant filed a replying affidavit sworn by him on 22nd February 2000 to the suit (No.2658 of 1998) in which he averred that the respondent's occupation of the suit land was illegal. He contended that although the letter of allotment to him from the Government of Kenya was for 2.7182 acres, and not 2.7 hectares as averred by Sister Martin, subsequent survey reduced the acreage to 0.9485 hectares as indicated in the Grant No. I. R. 66151. It was the appellant's averment that in or about February 1995 a firm of advocates (Kagwe & Co.) on behalf of the respondent wrote to him stating that the respondent was in possession and was desirous of purchasing the suit land at a consideration ostensibly to be agreed on. The appellant averred that upon receipt of the letter, he visited the suit land and ascertained its invasion by the respondent whereupon he hired a firm of advocates (Ndungu Njoroge & Kwach) to act for him. The latter demanded on the appellant's behalf compensation for trespass and averred that the respondent was in illegal occupation and denied that such occupation amounted to adverse possession. The evidence before the High Court also shows that the appellant all along knew that there were trespassers on the suit land whom he thought to be slum dwellers. He did not take any action to evict

them.

DECISION APPEALED FROM

6. In the impugned judgment dated and delivered on 10th March 2006, the High Court (Ojwang, J as he then was), found that the appellant's title to the suit land (which was described in the judgment as "Area A") was deemed extinguished through the respondent's adverse possession and that the respondent had become entitled to the same by dint of adverse possession and ordered that the respondent be registered as proprietor of an estate in fee simple of the land described as "Area A" in L.R. 209/9010 comprising 0.4284 hectares or thereabouts in place of the appellant. The court ordered the appellant to transfer the said land within 60 days from the date of the judgment failing which the Deputy Registrar of the High Court would execute all the documents necessary for such transfer to be effected. In addition, the High Court issued an injunctive order restraining the appellant from alienating, utilizing, charging or developing or in any way interfering with said land.

MEMORANDUM OF APPEAL

7. In his memorandum of appeal to this court, the appellant proffered seven (7) grounds of appeal in which he contended that the learned Judge misdirected himself in his analysis of the evidence and in his decision on adverse possession; that he failed to appreciate that adverse possession could not crystallize before the year 1995 which is the year when the suit land was registered; that there can be no adverse possession to a letter of allotment; that as the respondent had acknowledged the appellant's title, the question of adverse possession could not arise; that the necessary legal ingredients for adverse possession to accrue were absent; that there was no evidence that the appellant was in possession of the suit land from 1980; that although Sister Martin "could have been in possession, the respondent, The Assumption sisters of Nairobi, Registered Trustees" were not; that the learned trial Judge erred in applying common law principles of land ownership to the exclusion of settled law and statute law, the Constitution and court precedents. The appellant seeks from this court orders for setting aside of the High Court judgment and for an order for the respondent to vacate the suit land and pay costs.

HEARING OF THE APPEAL AND SUBMISSIONS OF COUNSEL

8. When the appeal came up for hearing, learned counsel **Mr. B. N. Ngugi** appeared for the appellant while learned counsel **Mrs. W. Wambugu** appeared for the respondent.

9. Mr. Ngugi abandoned ground 6 of the grounds of appeal and argued the rest of the grounds. The thrust of his arguments was that for adverse possession to crystallize, the respondent had to be in possession adversely to the title of the appellant for a continuous and uninterrupted period of 12 years; that as the respondent acknowledged the appellant's title in February 1995 the issue of adverse possession did not arise as the suit was filed in 1998; that the suit land was unsurveyed and registration under the RTA was on 16th June 1995; that accordingly, adverse possession could not arise before 16th June 1995; that the respondent had not dispossessed the appellant of the suit land; that the possession of the land by the respondent was not continuous; that the learned trial judge erred in having regard to common law principles before applying statute law and local court precedents.

10. Learned counsel **Mrs. Wambugu** opposed the appeal and maintained that time started to run in 1980 and adverse possession crystallised in 1992 when the appellant's title was extinguished before the respondent instituted in 1998 H.C.C. Suit No.2658 of 1998 (OS); that the respondent occupied the suit land openly, continuously and adversely to the title of the appellant and developed it extensively; that the suit land was surveyed in 1981 and was registered on 16th June 1995; that after the Letter of Allotment

dated 20th July 1977, the subsequent survey of the suit land in 1981 delineated the suit land; that the appellant acknowledged that the respondent was on the appellant's land; that the correspondence exchanged by the parties' advocates did not form a basis of computation of time in as much as such correspondence neither interrupted the running of time nor constituted an assertion of title by the appellant.

ANALYSIS AND DETERMINATION

11. We have carefully perused the record of appeal and the submissions of both counsel and have given due consideration to the evidence and the law. The issues that emerge for determination in this first appeal are

(a) whether in law adverse possession could arise before the appellant got registered on 16.6.1995 as the proprietor of the suit land;

(b) whether the respondent was in adverse possession

(c) if the answer to (b) is in the affirmative, when time in adverse possession started to run and whether the twelve year period elapsed before the institution of the suit in the High Court;

(d) whether in law there was acknowledgment of the appellant's title to the suit land by the respondent which could, *ipso facto*, stop time from running.

(e) whether the suit land was surveyed or unsurveyed and the effect of survey or lack of it on the application of the doctrine of adverse possession;

(f) the effect on the running of time of the advocates' letters on behalf of the respondent proposing purchase of the suit land.

12. To answer issue (b) first, namely, whether the respondent was in adverse possession, the following factors require to be interrogated –

· the fact that the appellant had no title and only held a letter of allotment to the suit land until the appellant was registered as proprietor of the suit land on 16th June 1995 under the RTA, now repealed;

· the fact that respondent is said to have "acknowledged" the appellant's title to the suit land through the correspondence exchanged between the advocates for the appellant and the advocates for the respondent and;

· the contention that the appellant had never been in possession; and if so whether the appellant was in law capable of being dispossessed of the suit land by the respondent;

13. The suit No.2658 of 1998 filed by the respondent in the High Court was founded on the provisions of the **Limitation of Actions Act**, Cap 22 of the Laws of Kenya. Section 38 (1) of the **Limitation of Actions Act** stipulates that –

"S.38. where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

14. The statutes referred to in Section 37 of the Limitation of Actions Act are **The Government Land Act**, Cap 280, now repeated; **The Registration of Titles Act**, Cap 281, now repealed; and **The Registered Land Act,** Cap 300, now repealed.

The Judicature Act, Chapter 9 of the Laws of Kenya, provides in Section 3(1) that –

The Jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –

" (a) the Constitution

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

15. The English common law applied to the case in the High Court as it does to this court by dint of section 3(1) (c) of **The Judicature Act**. When the instant litigation was commenced in 1998, the Registration of Titles Act had not been repealed by the **Land Registration Act**. Under the common law, one of the methods of acquiring land was by prescription under the doctrine of adverse possession which is still the law of Kenya by dint of section 7(d) of **The Land Registration Act**, Chapter 280 of the Laws of Kenya. **Black's Law Dictionary**, Ninth Edition, defines "prescription" as follows –

"Prescription, n. (15c) 3. The effect of the lapse of time in creating and destroying rights. 4. The extinction of a title or right by failure to claim or exercise it over a long period – Also termed negative prescription; extinctive prescription. 5. The acquisition of title to a thing (esp.an intangible thing such as the use of real property) by open and continuous possession over a statutory period. _ also termed positive prescription; acquisitive prescription. Cf.

ADVERSE POSSESSION. See (for senses 3-5) PERIOD OF PRESCRIPTION. [Cases: Adverse Possession....

16. A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an interrupted period of not less than 12 years. An order for adverse possession made in favour of a trespasser is enforceable against the person registered as proprietor whose title is extinguished by adverse possession. The High Court in **Amos Weru Murigu v. Marata**

Wangari Kambi and Another (H.C.C.C. No. 33 of 2002 (O.S) (at Kakamega) correctly held that –

"adverse possession can only arise where land is registered in the name of the person against whom the claim for adverse possession is made for the simple reason that land must be occupied by a trespassing claimant adversely to the title of the owner (proprietor) against whom the claim is made under Section 38 of the Limitation of Actions Act."

17. In the instant appeal, the appellant was the registered proprietor when the suit No.2658 of 1998 was instituted in the High Court and consequently an order for adverse possession in favour of a trespassing claimant could be made and enforced against the registered owner or proprietor of the suit land if the trespassing claimant successfully proved his claim for adverse possession. But can time in adverse possession run or start to run against an owner of land who is not registered as proprietor of the suit land but otherwise holds a letter of allotment" It is not difficult to discern that if the suit land is not registered, then compliance with Section 38 (1) may be problematic not least because, a litigant may be unable to show the court that he has become entitled to be registered in respect of land whose title is not yet in place and more importantly, because as at the date of institution of the suit for adverse possession there must be in existence a title which the court can declare to be extinguished by adverse possession under Section 38(1) (supra). Unless such suit land is registered at the time of institution of the suit under any of the statutes referred to in Section 37 of The Limitation of Actions Act, a claim for the title by a trespassing claimant would be misplaced and, a court order would be incapable of being effected.

18. But can time run where the owner of land only holds a letter of allotment to the land (which is not yet registered in his (owner's) name)) but is otherwise registered under any of the statutes referred to in section 37 of the Limitation of Actions Act" If the land is registered in favour of the Government of a County Government, the doctrine of adverse possession would not apply to it and the claim would fail. In the instant appeal, at the time when the suit was filed, the land claimed by dint of adverse possession had been registered under the Registration of

Titles Act in the name of the respondent as proprietor, and clearly a court order in favour of a trespassing claimant under Section 38(1) of the Limitation of Actions Act could be effected. As to whether time in adverse possession could run against the respondent owner before the suit land got registered in his name, when he had only a letter of allotment, is a matter the learned trial judge grappled with. He posed the following question –

"is it the case that a squatter can only claim adverse possession in relation to a registered title"'"

19. The learned trial judge delivered himself as following –

"I have considered whether the word registered, as used in S.38 of the Limitation of Actions Act (Cap 22) is to be taken literally. Registration of title to land, as I have already noted herein, is the culmination of governmental processes which ascribe ownership of a parcel of land to a particular individual

– and those processes may entail allotment, surveying and the registration. The term "registration" is not recurrent in the common law literature, but it is in use in Kenyan statute law, in a country in which, I would take judicial notice, there also exist unofficial, customary tenures. If the term "registration" were not used in Kenyan law relating to adverse possession, then it is conceivable, I believe, that one could claim adverse possession in relation to obsolescent traditional tenures, and this would entail complications of public policy and of law enforcement. This perception leads me to conclude that the term "owner of land", as it would appropriately

apply in Kenyan law, would refer to a person who either already bears a final paper title, or a process document secured by law and leading to the issuance of the final paper title. I would adopt this wider interpretation of the statute law, as I believe it will accommodate certain adverse possession situations of merit.

20. The focus of the trial judge was spot on. But more significant in this case is the fact that the suit land (which initially had no registered title but was subsequently registered before the suit for adverse possession was instituted in the High Court by the respondent) was defined, delineated and surveyed by government as early as 1981. It was contended that in his letter dated 7th March 1981, the Commissioner of Lands required the appellant to pay survey fees for the suit land whose title reference No.LR 209/9010, Nairobi, was allocated as early as 7th March 1981, vide the Commissioner of Lands letter dated 7th March 1981 exhibited by the appellant as exhibit "BMW 3" in the High Court suit. The effect of the allocation and allotment by the Government was to divest the latter of its legal interest in the suit land and to constitute the appellant the new owner thereof. Following survey and allocation of the title number, a grant for the suit land was registered on 26th May 1995 by which time the respondent had been on the suit land for a period exceeding 14 years (from 1981). Clearly, when the respondent moved into possession of the suit land in 1980, the land belonged to the Kenya government and the issue of adverse possession could not arise. But after the government allocated the land to the appellant in 1981, and thus divested itself of interest in it, the appellant became the new owner and hence the doctrine of adverse possession became applicable.

21. As Equity looks on that as done which ought to be done, it is legally plausible to assert that where, as here, a trespassing claimant (the respondent) was in continuous and uninterrupted possession and control of land belonging to a person (the appellant) who, as here, had an allotment letter to such land which was surveyed and delineated and had a title number and was registered under the RTA, such trespassing claimant, for all intents and purposes, must be deemed to have been in adverse possession to the title of the owner notwithstanding that such title was in the form of allotment letter in the beginning and notwithstanding that formal title is issued either after the 12 year period of adverse possession or after time in adverse possession had started to run. The requirement of section 38 of the Limitation of Actions Act is for the land claimed to be registered under any of the statutes referred to in section 37 of the Act. It is not for the owner of the land to have a formal title deed. As long as the land claimed is registered under a statute and is owned by the person against whom a claim for adverse possession claim is made, that is sufficient. Section 38 of the Act is concerned with enforceability and effect of court orders and it seems clear that providing that at the time of the institution of the suit the land claimed is registered in the respondent's name, as required under Section 38 (supra) under any of the statutes referred to in section 37 (supra), it matters not that the owner did not have a formal title to it when the time in adverse possession commenced or started to run if the land claimed is delineated and defined and ownership vested in the person against whom the claim for adverse possession is made. In this case, not only was survey carried out by the time adverse possession commenced, but the title number to the suit land was also allocated and known. That is the number that was subsequently reflected in the grant. It was correctly stated in the case of **Amos Weru Murigu v. Murata Wangari Kambi & Another** (supra) that –

"where a person is a beneficial owner or is a beneficiary entitled to, but is not registered as a proprietor of land registered under any of the statutes cited in S.37 of the Limitation of Actions Act, the doctrine of adverse possession cannot be invoked against him or her. A beneficial owner may not be in a position to effectively assert his or her title to the land and time cannot run against such beneficial owner."

A beneficial owner would include an heir who would not have legal title before transfer is effected in his

or her name and consequently cannot assert her right to the land.

22. In the instant appeal, the appellant was not a beneficial owner. He was the true owner and he had capacity not only to assert his right of ownership but also eject trespassers. He was aware that the suit land was occupied by trespassers whom he thought to be slum dwellers. The evidence shows that as long ago as 1980, he knew there were trespassers on the suit land. In our view, it did not matter that he did not know their identity, or whether they were slum dwellers or otherwise. Trespassers are trespassers. That is why the common law principle holds true that where one trespasser removes another trespasser who is in adverse possession to the title of the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own (see **Amos Weru Murigu v. Murata Wangari Kambi & Another** (supra)). It is important to point out that in adverse possession, it is the knowledge by the owner of the land that there is a trespasser on his land that counts. There does not have to be a meeting of the minds, that is to say, that the owner knows of the trespasser and the trespasser knows of the owner. As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in adverse possession will run. But knowledge that the owner knows of the trespasser on the land must be strictly proved. It is not enough for the trespasser to speculate that the owner must have known that he was on the land without showing clearly that the owner knew or could not in the circumstances of the case be ignorant about it. If there is evidence that the trespasser occupied and carried activities and/or developments on the land claimed which the world could see and it is shown, for instance, that the owner lives near the land claimed or visits the area where it is located, the owner cannot be allowed in law to feign ignorance that he does not know of the trespass.

23. Does it make any difference to the respondent's claim to adverse possession that Sister Martin had permission of the chief to move into and use the suit land although the land did not belong to the Chief" First, adverse possession does not apply to government land. In this case, the land was privately owned from 1981. There is no evidence on record that the chief was acting on instructions of the appellant to whom the land belonged or as his agent. Rather, the chief had no authority to deal with the suit land and for all intents and purposes he would himself have been a trespasser if he had stepped on the land. In law, the fact that a trespasser thinks he is on land of the true owner with the latter's permission when in fact he is on the land of another person whose permission she does not have does not undermine the application of the doctrine of adverse possession. As long as one is on the land with the knowledge of the owner and without the latter's permission that constitutes in itself trespass and may give rise to adverse possession.

24. It was contended on behalf of the appellant that the respondent acknowledged the appellant's title to the suit land because the latter intimated willingness to buy the land when the identity of the appellant *qua* owner was fully explained and disclosed. But a careful perusal of the correspondence exchanged between the parties shows that while the appellant did not grant permission to the respondent to be or to continue to remain on the suit land, the respondent maintained trespass and refused to move out even when the appellant through his advocates' demand letters required the respondent to vacate. The appellant did not assert his title by ejecting the respondent. He merely demanded through his advocates that the respondent vacates. The High Court correctly stated in **Amos Weru Murigu v. Marata Wangari Kambi & Another** (supra)–

"....as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption,

the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time form running."

25. A trespasser who promises to leave the land on which he is trespassing but does not leave cannot be said to acknowledge the title of the owner, nor can a trespasser who tells the owner that he would like to buy the property but does not buy it. And such promise to buy the land or to vacate which does not materialize does not in adverse possession interrupt time or stop time from running.

26. We have dealt with the issue of assertion of title by the owner of land and have shown what, in terms of assertion of title, interrupts time from running in adverse possession. We now focus on acknowledgment by the trespasser of the owner's title. It is not enough for the trespasser to merely say or acknowledge that the owner is the proprietor of the land which the trespasser is occupying. The word "acknowledgment" is defined by **Black's Law Dictionary**, Ninth Edition, to mean -

1. "A recognition of something as being factual;

2. an acceptance of responsibility

3. the act of making it known that one has received something;

4. a formal declaration made in the presence of an authorized officer such as a notary public, by someone who signs a document and confirms that the signature is authentic."

27. In law, for a trespasser to be said to have acknowledged the title of the owner of the land, the trespasser must be shown to have accepted by conduct or by declaration before the period of twelve year of adverse possession has run out that he, the trespasser, accepts he is on the land with the owner's permission, consent, or acquiescence and is not on the land adversely to the title of the owner. An acknowledgment that falls short of this or does not amount to acceptance by the trespasser that he is on the land with the consent, tacit or otherwise, of the owner will not do, nor will it be acknowledgement if the period of adverse possession has run its course and adverse possession has crystallized and the title of the owner has been extinguished. It is precisely because adverse possession does not arise where a person is on another's land with the latter's consent or permission that a trespasser's acknowledgment of the owner's title must clearly show that the trespasser has accepted that he is on the land with the knowledge and permission of the title holder.

28. In this appeal, acknowledgment of title by the respondent is said to have been contained in correspondence exchanged between the advocates for the parties. The first letter was addressed directly to the appellant by the respondent's advocates, Messrs Kagwe & Co. It was exhibited by the appellant as exhibit No.BMW6 in his replying affidavit to the originating summons in the High Court. The letter stated –

"Mr. B. M. Wachira,

P. O. Box 40201

NAIROBI

Dear Sir,

RE: L. R. NO. 209/9010 KIBAGARE

we act for Archdiocese of Nairobi Kenya Registered Trustees. We are aware, our Client has been operating a home for the destitutes under the name – Kibaragué Good News Centre and has been in occupation of your above mentioned piece of land which was allotted to you on 20th July 1977.

Our clients are desirous of purchasing the said piece of land from you.

We would be grateful if you would quote your selling price for our Client's consideration.

Yours faithfully,

Kagwe & Co.,"

29. The letter received a quick response in a terse two line letter by the appellant's advocates, Messrs Ndungu Njoroge & Kwach, which stated as follows –

22nd ***June, 1995***

Messrs Kagwe & Company

Advocates

P. O. Box 47445

NAIROBI

Dears Sirs

RE: B. M. WACHIRA L. R. NO.209/9010, KIBAGARE, NAIROBI

Your clients are in illegal occupation of our client's plot. May we please have your proposals as to how it is proposed to compensate our client for this illegal occupation"

30. First, the respondent's letter did not amount to an acknowledgement of the appellant's title in as much as the respondent was not seeking permission to occupy or to continue to occupy the suit land. Although the respondent accepted that the appellant was the owner of the suit land, the respondent clearly did not seek the appellant's permission to be on or to continue in possession of the suit land. On the contrary, she stated that she had been on the land but not with the permission or consent of the appellant. The respondent went further to state that she could buy the suit land ostensibly because she was interested in acquiring title to it without legal battle. With alacrity, the appellant stated that the respondent was trespassing.

In law, there was not in the circumstances, acknowledgement of title by the respondent. We so find.

31. At any rate, by the time the letters on which the claim for acknowledgment was pegged were

exchanged, the respondent had been on the suit land for close to 15 years (from 1980) and clearly adverse possession had already crystallised and extinguished the title of the appellant to the suit land after 12 years so that even if there was a valid acknowledgment in law, which there was not, it would have been immaterial because, the title of the appellant having been extinguished there was not, notionally, a title which could be acknowledged and the respondent could sue, as she did, under Section 38 of the Limitation of Actions Act the acknowledgment notwithstanding. We so find.

32. In 1996 the appellant charged the suit land to the Kenya Commercial Bank to secure a loan of Shs.400,000/= and 1997. He took a further loan of Shs.600,000/= and a further charge for that sum was registered against the title to the suit land. What were the legal implications of this on the respondent's claim for adverse possession" The point of law was addressed by the High Court siting in Kericho in the case of **Kipkoech Arap Langat & Another versus Kipngeno Arap Laboso** [H.C.C.C. No.124 of 2004 (0.S.)] Kericho in which the court correctly held –

"Where a proprietor charges or mortgages land occupied by a trespasser adversely to the title of the proprietor, regardless of whether the trespasser is aware of such transaction, the act of charging or mortgaging the land does not interrupt time from running in adverse possession. Time for adverse possession continues to run. Such adverse possession is an overriding interest acquired or in the process of being acquired by virtue of Section 38 of the Limitations of Actions Act. It must be noted that where the proprietor transfers land, the act of transfer does not interrupt the running of time in adverse possession. In both cases of transfer and mortgage of land on which a trespasser is in adverse possession, the running of time in adverse possession is not interrupted. As adverse possession is an overriding interest (acquired or in the process of being acquired) under Section 30 (f) of the Registered Land Act, Cap 300, the mortgagee or transferee takes subject to such overriding interest."

DECISION

33. We have found that the respondent occupied the suit land adversely to the title of the appellant for more than 15 years and that the appellant's title to the suit land was extinguished in 1993 or thereabouts. The suit whose judgment has given rise to this appeal was instituted after 12 years of adverse possession had run its course. We have also found that adverse possession and running of time did not depend on the issuance to the appellant of a title deed of the suit land and that providing the suit land was registered under the Registration of Titles Act (now repealed) and the appellant (and not the Government or County Government) was its owner, the claim for adverse possession held good. This answers issues (a), (b) and (c).

34. We have also found that the letters exchanged between the respondent and the advocates for the appellant did not in law constitute an acknowledgment by the respondent of the appellant's title to the suit land, and running of time was not stopped. In addition, it is our finding that adverse possession related to the land which was surveyed and delineated in the survey map. This answers issues (d) and (e). As regards issue (f), it is answered in issue (d).

35. In the result, the appeal fails. It is dismissed for want of merit. The costs of

the appeal shall be borne by the appellant.

Dated and delivered at Nairobi this *30th day of September 2016*.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR