Case Number:	Civil Appeal 129 of 2006
Date Delivered:	09 Aug 2012
Case Class:	Civil
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Martha Karambu Koome, Hannah Magondi Okwengu
Citation:	Malcom Bell v DANIEL Toroitich Arap Moi& another [2012] eKLR
Advocates:	Raymond Kiprop Kipkemei for school Mr. A.B Shah & Kiplenge for Moi
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	HCCC 14 of 2004
Case Outcome:	Allowed
History County:	Nakuru
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

MALCOLM BELL.....
.....APPELLANT

AND

HON. DANIEL TOROITICH ARAP MOI

THE BOARD OF GOVERNORS, MOI HIGH SCHOOL, KABARAK.....RESPONDENTS

(An appeal from the judgment of the High Court of Kenya at Nakuru (Apondi, J) dated 31st October, 2005

in

HCCC NO. 14 OF 2004)

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JUDGMENT OF KOOME, J.A.:

1. Two cases being, **Nakuru HCCC NO 14 OF 2004** and **Nakuru CIVIL SUIT NO 303 OF 2004 [OS]**, were consolidated and resulted into a judgment dated 31st October, 2005, by Apondi J, the subject matter of this appeal. ***MALCOLM BELL*** (Malcom) filed Civil Suit No 14 of 2004 against ***HON DANIEL TOROITICH ARAP MOI*** (Moi) on 20th January, 2004. Moi was the second and the immediate retired President of the Republic of Kenya but was sued in his private capacity as the proprietor of a learning institution known as Moi High School Kabarak (the School).

2. Malcolm is the registered proprietor of LR NO 6207/02 (the suit land) which land is adjacent to the school. He inherited the land from his father the late Walter Bell (Walter) who passed away in 1997. Malcolm became the registered proprietor of the suit land pursuant to a Transfer and Assent that was registered on 19th May, 2000. According to Malcolm, in or around 1981, his father, then the proprietor of the suit land, was threatened to surrender 100 acres of the suit land to the school. Subsequently, in 1986, the school encroached into the suit land by fencing off approximately 110 acres.

3. At the time of the alleged encroachment, there were stores, cattle dips and other farming activities that were going on, on that portion of land which were being undertaken by Malcolm's father. However, the late Walter did not transfer the land to the school. The school also did not pay any compensation for the land. At the time, Moi was still in office as the President of the Republic of Kenya and, therefore, Malcolm contended his father could not claim the land or compensation. The suit land was guarded by uniformed police and was used by the school.

4. After the death of Walter and after Moi retired from office, Malcom instituted the first suit (plaint) in which he sought the following orders:

"(a) A perpetual injunction restraining the defendant by himself or servants or agents from entering, occupying, remaining in occupation, using or in any other manner, howsoever interfering with the plaintiffs, use, enjoyment, occupation, and ownership of the parcel of land known as LR No. 6207/02 or any part thereof;

(b) An order for eviction compelling the defendant or his servants or agents to move out of the portion of LR NO. 6207/02 that he occupies by himself or his servants or agents;

(c) General damages for trespass;

(d) Mesne profits from 19th May, 2000 to the date when the defendant moves out of the suit land;

(e) Costs of the suit;

(f) Interest on (c), (d) and (e) above at court rates; and

g) Any other or further relief as the court deems fit to grant."

5. On 26th February, 2004, Moi filed a defence and denied the claims by Malcolm and without prejudice to the defence, Moi averred as follows in paragraph 15 of the defence:

"Without prejudice to the foregoing, the defendant avers that:

i. Moi High School Kabarak is built on a portion of 1080 acres of land which was donated to it by the defendant from part of his own land. The 100 acres of land donated by the late Mr Ginger Bell, which is the subject and is located opposite the land donated by the defendant, is being and has always been exclusively farmed by the school continuously and uninterrupted (sic) since 1981.

ii. The plaintiff is a vexatious litigant by nature and although there is no cause of action disclosed against the defendant, the plaintiff still sued the defendant and failed to serve summons to enter appearance to date. This despite being ordered by the court so to serve.

iii. The plaintiff is aware that in 1981, his late father one Ginger Bell who owned Lowling Farm opposite Kabarak farm, where Moi High School Kabarak is established, offered to donate and indeed donated 100 acres to the school because he supported the principle for which the school was founded.

iv. That the school, in appreciation, constructed a cattle dip, a borehole and since the borehole could not yield water, the school purchased water pipes and connected the plaintiff's father's farm with water from Kabarak High School. The school further connected electricity at the farm for a distance of about 7 km, which the plaintiff personally supervised. These developments were made at much higher expense than the value of the land.

v. The excision of and final fencing off of the 100 acres was done under close supervision of Mr Ginger Bell himself who unfortunately died in the middle of 1997.

vi. That the plaintiff has on several occasions personally visited Kabarak High School with a view to follow up the implementation of the projects which had not been completed by the time of his father's

death and undertook to personally and formally transfer the 100 acres to the school as soon as the administration of his deceased's estate had been completed.

vii. The plaintiff is aware that his late father had no dispute whatsoever with the school concerning the 100 acres nor did the plaintiff or any member of his family object to the donation of the 100 acres to the school.

viii. The plaintiff is aware that his late father and the institution to which he donated the land enjoyed a cordial mutually beneficial relationship and it was therefore impossible for any form of coercion, threats or intimidation to be visited upon the plaintiff's father, the plaintiff or any member of his family.

6. On 8th November, 2004, the Board of Governors of the school filed an originating summons against Malcolm seeking determination of the following questions:

1. Whether the plaintiff school is entitled under Section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya to be registered as absolute proprietor of 100 acres of LR NO. 6207/2"

2. Whether the defendant should excise out the said portion and transfer it to the plaintiff school and failure to which the Deputy Registrar of the High Court, Nakuru should execute the transfer documents to the plaintiff"

3. Whether this Honourable court should give directions as regards the hearing of this Originating Summons"

4. Whether the defendant should pay the costs of this suit"

5. Whether this Honourable court should grant the plaintiff school any other or further relief as the court may deem it fit and just"

7. The originating summons was based on the grounds that the school entered into, fenced, used and developed the suit land pursuant to a void transaction between the school and Walter in 1981; that by 1982, the school was in continuous and uninterrupted adverse possession, use and occupation of the suit land; that by 1995, when Walter was the title holder, the school had acquired the title to the said portion by adverse possession; and that the law of limitation had barred Walter from lodging any claim.

8. It is further contended by the school that between 1982 and 1997, when Walter died - a period of twelve years had elapsed as by law provided. All that period Walter never claimed rent or vacant possession of the suit land and Malcom could not legally inherit the suit land. This originating summons was filed in the cause of the proceedings and hearing of the suit filed earlier by Malcom.

9. On 16th November, 2004, the court made an order for the consolidation of the two suits in the following terms:

"… the court hereby consolidates this case with civil suit No. 303 of 2004 [OS]. However, the lead file will be HCCC No. 14 of 2004. The plaint will have to be changed to reflect the new parties. The originating summons by the 2nd defendant will be treated as a counterclaim, while the replying affidavit by the plaintiff will be treated as a reply to the counterclaim. The plaintiff is hereby granted 7 days within which to amend the plaint and file a replying affidavit."

Malcolm filed an amended plaint on 18th November, 2004, in which he contended that the claim by the school for adverse possession was a mere smokescreen to cover the sins of Moi, as the school and Moi were one and the same entity.

10. This being a first appeal, it is my duty to re-evaluate the evidence, assess it afresh and make my own conclusions but as I do so, I must remember that I neither saw nor heard the witnesses and give allowance for that. In ***SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO LTD & OTHERS [1968] EA 123*** at page 126, Sir Clement De Lestag VP set the guiding parameters:

"… 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the cases generally."

11. Malcolm gave evidence in support of his claim which principally sought a perpetual injunction and an eviction order against Moi and the school from a portion of LR No 6207/02 which is occupied by the school. The whole parcel of land LR No 6207/12 belonged to Malcolm's father, Walter who died testate in July 1997. Pursuant to the Will left by Walter, the suit land comprising approximately 1,028 acres was wholly transferred to Malcolm. That transfer by assent was registered on 19th May, 2000.

12. In 2003, immediately Moi retired from office, Malcolm issued a demand letter to him requiring him to vacate from the suit premises. This demand was obviously resisted by Moi though his advocates and thus Malcolm filed this suit. According to his evidence, his late father was coerced to surrender one hundred acres to the school failure to which dire consequences such as losing the entire parcel of land would ensue. Immediately thereafter, Moi caused the land to be fenced off and the school started carrying out farming activities.

13. Malcolm's evidence was that his father could not take legal action while Moi was still in office. He also denied that there was any formal agreement in respect of the suit land, either for sale or by way of barter trade or as a gift to Moi or to the school. He further testified that no consent of the Land Control Board was obtained (this being agricultural land). Malcolm also asserted in the alternative, that even if Moi had undertaken to exchange the land on certain conditions such as provision of electricity; sinking of borehole or construction of a cattle dip, as claimed, none of these were supplied as the entire parcel of land was served by power from a generator until Malcolm obtained power supply from Kenya Power & Lighting in 2004.

14. On the part of the defence, several witnesses gave evidence. Principally three witnesses – **Mrs June Dykes** who used to cohabit with Walter as a common law wife for fourteen years before he died; **Joylon Cowley Mills** and **Hugh Peter Barclay** both white farmers and close friends of the late Walter. The thrust of their testimony was to discount the evidence of Malcolm that Walter could possibly have been coerced into surrendering the suit land to the school.

15. They testified that Walter was happy to surrender the land and in exchange, he was to get electricity supply, a borehole and a cattle dip. However, efforts by the school to dig a borehole were unsuccessful and the Ministry of Water abandoned the search for water. Before Walter died, these witnesses confirmed that he intended to transfer the 100 acres to the school if electricity was supplied to

his farm. According to them, the late Walter intended to transfer the portion of land to the school in a barter trade arrangement.

16. Further evidence for the defence was given by **Raymond Kiprop Kipkemei,** an advocate of the High Court who represented the school partly in this matter and in other civil suits. He adduced evidence that the school was sued in other suits including Nakuru HCCC NOs 741 of 1993 and 226 of 1994, where judgments were entered against the school despite its association with Moi, who was the President at the time. The school also has its own registered properties such as motor vehicles and parcels of land and conducted its matters independent of Moi.

17. Mr Kipkemei also attended a meeting which was also attended by Malcolm with his advocates and it was chaired by Moi to seek an amicable out of court solution to this dispute. The matter was referred for valuation and each party obtained their own valuations but the negotiations did not go far. **Sammy Kiptanui** was working as the school's commercial manager from 1997. He supervised the construction of a cattle dip on the suit land and paid a sum of KShs.70,000/- to a contractor. He also supervised the installation of electricity on the suit land.

18. The school took possession of the suit land and was carrying on commercial activities such as growing maize, fodder and rearing pigs. **Henry Kiptony Kiplagat** the principal of the school gave the history of the school which was registered in 1979 as a *"harambee"* school. Due to its expansion, the school changed its status from a *harambee* to a private school. The school stands on 1,180 acres of land out of which Moi donated 1,080 acres while the late Walter donated 100 acres. The school is currently owned by a Charitable Trust and Moi is the Chairman.

According to the principal, the school has been in occupation of the suit land from 1981 when they fenced it for their own exclusive use. The school's occupation has never been disturbed until Malcolm purported to issue a notice of eviction.

19. The learned trial judge disbelieved Malcolm's evidence, and made a finding that the school is a different entity from Moi. He also made a finding that the school was able to prove the claim of adverse possession of the disputed land for a period of over twenty [20] years. He therefore, ordered Malcolm to transfer the suit land within thirty [30] days and in default, the Deputy Registrar of the court would do so. This is the judgment that gave rise to this appeal in which Malcolm has raised twenty eight [28] grounds of appeal.

20. During the hearing, Mr Mutie, learned counsel for the appellant, who appeared with Mr Kahiga, reduced the grounds of appeal to six and argued them as follows:

1. Adverse possession:

It was submitted on behalf of the appellant that where possession of land was with the consent of the registered owner, such possession cannot be adverse at the same time. In this case, the school was in possession of the suit land with the consent of Walter until his death and time started running immediately the demand of vacant possession was made. This submission found support in the case of ***WAMBUGU VS NJUGUNA, (1983) KLR 172 at holding 4***, where this Court held:

"Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with

permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist."

21. Further in the case of ***SAMUEL MIKI WAWERU VS JANE NJERI RICHU, CA NO 122 OF 2001***, (unreported) this Court said:

"It is trite law that 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 provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in JANDU VS KILIPAL [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of SISTO WAMBUGU VS KAMAU NJUGUNA, 1982 – 88 1 KLR 217 relied on by Mr Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of a licence or possession of such land only after the period of validity of the contract unless and until the contract of sale has first been repudiated as required by the parties in which case, adverse possession starts from the date of the termination of the contract."

2. Donation/Gift of Suit Premises:

22. Mr Muite referred to a letter dated 27th January, 2003 written by Mr Kipkemei, the advocate for the school. The letter stated that the suit land was given to the school by Walter as a gift. A gift is given with the consent of the giver yet the defence by Moi is that the suit land was donated. A donation is a gift and in appreciation of the gift the respondents claim that they constructed a cattle dip, sank a borehole and connected the appellant's farm with electricity. According to Mr. Muite, the evidence by the three defence witnesses, who were apparently very close to the late Walter, confirmed that no bore hole was dug, and the electricity was not supplied although those were conditions precedent to the transfer of the suit land. The late Walter did not, therefore, transfer the suit land.

3. Contract of sale:

23. The issue of contract of sale can be deduced from the evidence of June Dykes and the other two white farmers. However, the respondents were supposed to connect the appellant's farm with electricity and the late Walter was to transfer the land as long as the school honoured their part of the deal. The school did not provide a borehole nor did they supply electricity until after the demise of Walter when it was connected in 1999. Mr. Muite submitted that the evidence before the High Court revealed that there was an intention to donate the land and possession was with consent of the registered owner and if this was the position, a gift or donation vests upon a transfer being effected. For a transfer to take effect, the land needed to be subdivided after obtaining the relevant consent of the Land Control Board. According to Mr Muite, it was not the duty of the court to complete an incomplete gift by ordering a subdivision and transfer of the land.

4. The Effect of Section 14 of the Constitution:

24. Mr Muite further submitted that under ***Section 14 (2) of the old Constitution***, Moi was protected from any legal proceedings while in office. The Constitution provided:

"2. No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he

is exercising the functions of the Office of President.

3. Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the Office of the President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceeding, as are mentioned in sub section (1) or (2) may be brought against that person."

Due to the above provisions of the law the appellant could not have instituted this suit until Moi retired from office in December 2002.

5. Capacity of the 2nd Respondent to institute the suit:

25. The issue of whether the school was a legal entity that was capable of acquiring land by adverse possession was not resolved by the evidence on record. The evidence by the respondents was that the school was started as a public aided school *''Harambee''*. Later on it changed the name and changed its status to a private school which is owned by a Trust. This status is in stark contrast with the provisions of the Education Act that provides that the Minister for Education appoints members of Board of Governors who are gazetted.

26. In the case of a gazetted board, it is given power under the law to sue or be sued. Mr Muite urged us to make a determination of this issue which was not resolved by the High Court. Further, the evidence shows the school is a private entity that purportedly belongs to a proprietor, known as "Charitable Trust" but there was no evidence to show whether the Trust was registered under the ***Land (Perpetual Succession Act) Cap 286***. According to Mr Muite, the school failed to discharge the burden of proof that it had capacity to sue and to own property.

6. Re-evaluation of the evidence:

27. This being the 1st appellate court, counsel for the appellant reminded the Court about the duty to re-evaluate the evidence before the trial court and arrive at its own independent determination on the facts and the law and decide whether to allow the appeal or not.

28. The appeal was opposed. Mr A. B. Shah, learned counsel, teamed up with Mr Kiplenge for both Moi and the school. Mr Shah observed that Malcolm's claim as pleaded in the plaint was a claim against a tort of trespass to land. Malcolm also alleged that the suit land was taken by the school through threats and intimidation. On the other hand, the defence evidence was clear there was no force applied but the late Walter exchanged the land through a barter system. It was clear, therefore, in his submission that the learned judge properly disregarded Malcolm's evidence that the suit land was taken away by force.

29. As regards the capacity of the school to sue and be sued, he submitted that the suit was brought under the name of "Board of Governors" as provided for under ***Section 13 of the Education Act***. Mr Shah further argued that there was no evidence that the school was owned by a "charitable irrevocable trust". He conceded that a land transaction such as the one in issue required land control board's consent. The transaction over the suit land thus became void for all intents and purposes after the consent was not obtained within the stipulated period. Consequently, even if the school did not keep its part of the bargain, adverse possession occurred.

30. Mr Kiplenge, learned counsel assisting Mr Shah, took the arguments further by submitting that

there was no legal nexus between Moi and the school. Malcolm, Moi and the school held a meeting to discuss an amicable solution but the discussions never went beyond each party providing a valuation report. There was no evidence that Moi was trading in the name of the school and this is demonstrated by the demand notices that were issued against the school and not to Moi. According to Mr Kiplenge, Moi was brought in as a legal guise in order to surmount the provisions of the Limitations of Actions as the school had been in occupation of the suit land for more than twenty three [23] years by the time the demand letter was issued.

31. On the challenge to the school's legal capacity to sue, Mr Kiplenge faulted this on the grounds that it was not addressed as a preliminary point of law before the trial court. Finally, Mr Kiplenge submitted that there was an oral agreement within the provisions of ***Section 6 (1) of the Land Control Act*** and he urged us to dismiss the appeal.

32. I have anxiously considered the evidence, the case law cited on both sides of the argument, the judgment of the trial court and the submissions of counsel. The first issue to consider and determine is whether the school acquired title to the suit land by way of adverse possession as found by the trial court. The claim by the school in the originating summons was based on the provisions of ***Section 38 (1) of the Limitations of Actions Act,*** which provides thus:

"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."

32. The school had the evidential burden of proving that it was in exclusive possession of the suit land for a continuous period of twelve [12] years without any interruption. Another auxiliary point to determine was the nature of possession. Was the school in possession of the suit land with permission of the registered owner or had the school with the help or influence of Moi used force to grab the suit land"

In the case of ***WAMBUGU VS NJUGUNA [1983] KLR 172***, this 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.

33. The evidence on record in support of the respondents' case on adverse possession was fully adopted and relied on by the learned trial judge, who made the following remarks:

"On the other hand, the Court was impressed by the evidence of the defence witnesses who were consistent, logical and truthful. The DW 1 – Ms June Dykes, the DW 2 – Joylon Mills and DW – Hugh Peter Barclay are senior and respectable citizens of this country, there is no evidence that they had any grudge against the plaintiff. There was also no evidence that they were likely to benefit in any way should the plaintiff lose the case. What was apparent was that all three of them were very close to the late Bell who had been described as a courageous man.

The evidence on record clearly shows that the plaintiff has failed to prove his case on a balance of probabilities. On the other hand, I hereby find that the 2nd defendant has proved its adverse possession claim since it has been in possession of the disputed land for over 20 years. That is far in excess of the 12 years required by the law. That possession has been open, continuous and uninterrupted.

Besides the above, even assuming for argument's sake that the 2nd defendant had entered the land by consent as argued by Mr Kahiga – that could only have been for 6 months to cover the statutory period to obtain a land board consent. That consent cannot be for 20 years. This court concurs with the reasoning in the Court of Appeal Case No. 49 of 1996 (unreported)."

34. The evidence from these three witnesses was that the late Walter surrendered or donated the suit land subject to certain conditions; that is, digging of a borehole to supply his farm with water, supply of electricity and construction of a cattle dip. The evidence on record was that once the school honoured their part of the bargain, the late Walter would transfer the title of the suit land to the school. It is common ground that the school did not honour their part of the bargain and this explains why the late Walter did not transfer the suit land or make a provision for it in his Will; whether the transfer was by way of barter trade or of donation.

35. I am of the respectful view that the learned trial judge overlooked or otherwise misdirected himself on the issue of how the school came into possession of the suit land. This is because adversity presupposes that possession was open, continuous and hostile to the rights of the registered owner for a period of twelve [12] years. The evidence that the trial judge agreed with and relied on is contrary to the laid down principles of adverse possession. If the school was given a licence to occupy the suit land, subject to certain conditions, the licence came to an end when Malcolm, who was the successor in title of the registered owner, made a demand for return of the suit land, that is when adversity started and, therefore, that situation did not last twelve years. The demand letter was made in 2003.

36. Another point of some legal significance is the fact that the learned trial judge seems to have rejected Malcolm's evidence that the school took possession of the suit property through intimidation and threats. This line of evidence which portrayed some adversity on the part of the school in the occupation of the suit land was also denied by the respondents' own witnesses who insisted that the property was exchanged through oral or barter agreement and there was no force, coercion or intimidation by either the school or Moi.

37. This now leads me to the issue of whether the late Walter had given the suit land to Moi as a gift to the school. The evidence by the three key defence witnesses was that Moi intended to put up an agricultural college, but the land was being occupied and used by the secondary school. Moi did not testify, however, none of the other witnesses who apparently were closely associated with the school gave any evidence to support the claim that the suit property was a gift or donation from the late Walter. The three witnesses said there were conditions which were not partly fulfilled by Moi and the school by the time the late Walter died.

38. It is also necessary to re- evaluate the evidence of other defence witnesses especially Mr. Kipkemei. He studied at the school for "A" Levels in 1986 and went on to qualify as an advocate of the High Court and acted as an advocate for the school when Malcolm issued a demand for the suit land. He also participated in the meeting that unsuccessfully tried to resolve the dispute. Sammy Kiptum used to work as a commercial manager of the school and in 1997, he supervised the construction of the cattle dip and paid a contractor KShs.70,000/-. It is important to highlight a portion of his evidence on page 492 of the record:

"I visited the plaintiff more than four times. The first time I visited him was end of 1998 or early 1999. On that visit, I wanted to establish whether he was happy with the construction of the cattle dip. He told me he was satisfied. During that visit, he raised the issue of borehole. He complained that the workers who went to dig the borehole ever did a good job. He also complained that the school took too long to construct the cattle dip and supply electricity. I was made to know by the principal that the father

of plaintiff had donated 100 acres in exchange for a replacement of a cattle dip; borehole and supply of electricity."

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. A copy of the Will was part of the evidence, it gives very elaborate details of how his estate was to be distributed, and if indeed he had an obligation to the school where he was supposed to transfer a large portion of his land, I see no reason why he did not provide for it.

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. …"*

I think there is nothing more to say on this issue of gift which was also tied with the issue of contract of sale. The evidence is clear that the three conditions that were agreed upon were not fulfilled by the school and that is perhaps why the late Walter did not sign the transfer or make provision for the transfer in his Will.

41. The other issue for consideration is the capacity of the school to sue or even to own property. Evidence was adduced and I have no reason to doubt that the school was started as a *harambee* secondary school but subsequently, changed to a private school. What is not clear is the legal status of the school after it transitioned and ceased to be a public school. How does a public entity become a private entity" Was there a privatization process" The evidence by Kiprono Kiplagat [DW 8], the principal of the school was that the school was first registered in 1979 by the Ministry for Education which issued a certificate in 1992. It was a certificate of change of particulars which changed the name of the school to Moi High School (Kabarak) and classified it as a private school.

42. Mr Kiplagat's evidence was that Moi donated 1080 acres of land. However, the school is owned by a "Charitable Trust". This witness was categorical that although Moi is the Chairman of the school, he has nothing to do with its ownership as the school is non-profit making and carries on its own business. With respect, this evidence does not clarify the legal status of the school. The following questions are not answered: when the school ceased to be a public school and became a private institution; whether the Minister for Education in charge of appointing members of the Board of Governors as per the provisions of the ***Education Act***; whether the Board of Governors are appointed pursuant to the Charitable Trust or by the Chairman of the school; and whether the Charitable Trust is registered under the ***Land (Perpetual Succession) Act cap 286***.

43. All these questions continue to linger in my mind and in the end lead me to conclude that the legal identity of the school is not known. What is, however, very clear, is that Moi played a very significant role in the school, from graciously donating 1,080 acres of his land for the school, to changing the name to "Moi", to being the Chairman and having been the influence that led it to occupy 100 acres of the suit land belonging to Walter. Although Mr Kiplagat denied that Moi had anything to do with the ownership of the school, the evidence portrays him as the person who dealt with the late Walter and was supposed to ensure the conditions that were agreed upon were fulfilled by him or the school.

44. In my view, since the legal status of the school could not be established from the evidence, Malcolm was justified in filing the suit against Moi. Regarding Malcolm's claim, he was able to prove that he was the registered owner of all that parcel of land known as LR No. 6207/02. He was entitled to possession of his own property; the school failed to prove the claim of adverse possession, therefore the learned trial judge should have dismissed the school's claim. The evidence adduced on behalf of the school portrayed a respectable institution that could not use force or hostility to acquire or to occupy another person's land. The evidence was that it was permitted to use the land as a gift. That was not adverse possession but a license which was terminated or a gift which was never completed.

45. The appellant sought orders for *mesne* profits in the appeal, but there was no satisfactory evidence to support both the claim for *mesne* profits or the claim for general damages.

For the above reasons, I would allow the appeal and set aside the orders of Apondi, J made on 31st October, 2005. I would substitute therefor judgment for the appellant in terms of prayer **No (a)** of the appellant's amended plaint, that is to say:

"(a) A perpetual injunction restraining the respondents by himself or servants or agents from entering, occupying, remaining in occupation, using or in any other manner, howsoever interfering with the appellant's use enjoyment, occupation, and ownership of the parcel of land known as LR No. 6207/02 or any part thereof."

I would also dismiss the originating summons filed by the respondents. Since the respondents are carrying out farming activities, they are given six [6] months to move out of the suit premises and hand over vacant possession to the appellant in default of which, they will be evicted without further recourse to court. The appellant shall have the costs of this appeal and the suit in the superior court to be paid by the respondents jointly and severally.

This judgment was written pursuant to the provisions of ***Rule 32 (2) of the Court of Appeal Rules, 2010***.

Dated and delivered at Nakuru this 9th day of August, 2012.

M. K. KOOME

JUDGE OF APPEAL

JUDGMENT OF OKWENGU, JA.

I have had the opportunity to read in draft the judgment of ***Koome, J.A.*** and I do agree with it in its entirety. I have nothing useful to add.

Dated and delivered at Nakuru this 9th day of August, 2012.

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR