



Kairu v Kang’ethe (Being sued as the legal representative of the Estate of Kabura Muigai) (Environment and Land Case Civil Suit E008 of 2022) [2023] KEELC 17758 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17758 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE CIVIL SUIT E008 OF 2022
LN GACHERU, J
MAY 25, 2023

BETWEEN

NGOTHO KAIRU PLAINTIFF

AND

MARGARET WANJIRU KANG’ETHE (BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KABURA MUIGAI) DEFENDANT

(Being sue as the Legal Representative of the estate of KABURA MUIGAI...1ST DEFENDANT KENNETH MURUMBA NJOROGE..... 2ND DEFENDANT)

JUDGMENT

1. The Plaintiff filed the instant suit against the Defendants by a Plaint dated 28th March 2022, and he sought for judgement against the Defendants herein jointly and severally for the following orders.
 - a. A declaration that the Plaintiff has become entitled to the property known as Loc.8/Ngaru-nguyoini/281 by virtue of adverse possession.
 - b. A declaration that the property known as Loc.8/Ngaru-nguyoini/281 registered in the name of Kaburu Muigai belongs to the Plaintiff by virtue of agreement dated 1st April, 2005.
 - c. An order that the 1st Defendant in her capacity as the administrator of the Estate of Kabura Muigai, do execute transfer of title No. Loc.8/Ngaru-nguyoini/281 in favour of the Plaintiff.
 - d. In Alternative to prayer (c) above, the Deputy Registrar of this Honourable Court do execute transfer of the parcel to the Plaintiff



- e. In lieu of (a), (b), (c) and (d) above, the 1st and 2nd Defendants be ordered to refund the entire purchase price of the suit land at the current market value, while taking into considerations the developments thereon.
 - f. The 1st and 2nd Defendants be ordered to pay damages for breach of contract
 - g. Costs of this suit, interests and other reliefs that the Court deems fit to grant.
2. It is the Plaintiff's case, that he bought land from Julius Macharia Mwangi who was a beneficiary of the Estate of Kabura Muigai the registered proprietor. It was his case that he paid the consideration in full, which proceeds were used to pay for the purchase of Kajiado/ Kaputiei-north/20188, facts which he alleged are within the Defendants knowledge. He averred that the said Julius Macharia Mwangi, was a bona fide beneficiary of the Estate of Kabura Muigai by dint of Succession Cause No. 777 of 2014.
 3. Further, he averred that he took immediate possession, use and occupation of the suit property after the purchase, but the vendor died before transfer could be effected. It was the Plaintiff's claim that he has been in peaceful possession and occupation of the suit property for a period of 15 years with the knowledge of the Defendants. He averred that the Defendants are acting in cahoots to take the land from him.
 4. The 1st Defendant Entered Appearance and filed her Statement of Defence on the 26th April 2022, admitting that she was in the process of causing the land to be transmitted to her, before she could transfer to the Plaintiff his entitlement. It was her averments that she is not opposed to the Plaintiff getting his share of the suit property.
 5. The 2nd Defendant Entered Appearance and filed his Statement of Defence on the 7th June 2022, denying the contents of the Plaintiff. He averred that Julius Macharia Mwangi was never an administrator as alleged by the Plaintiff and that if any contract was executed, which he denies, then Julius Macharia Mwangi did not have the legal capacity. He added that he is not administrator and he cannot therefore be sued.
 6. The Plaintiff filed a Reply to the Defences reiterating the contents of his Plaintiff.
 7. The matter proceeded by way of viva voce.
 8. PW1, the Plaintiff adopted his witness statement dated 28th March 2022, and relied on the documents contained in the List of Documents filed alongside the Plaintiff as evidence in chief. He regurgitated the contents of his Plaintiff in his witness statement and asked this Court to grant him his claim. There was no cross-examination marking the close of the Plaintiff's case.
 9. DW1, the 1st Defendant adopted her witness statement dated 25th April 2022, as his testimony and relied on the documents contained in the List of Documents filed alongside her Defence as evidence in chief.
 10. On cross-examination, she confirmed that Julius Macharia Mwangi, sold land to the Plaintiff, although the land belonged to Kabura Muigai. The 2nd Defendant's testimony was not taken for non-attendance.

Parties filed their rival written submissions.

11. The Plaintiff filed his written submissions through the Law Firm of Wangui Gachango & Associates Advocates, and submitted on five issues.
12. The Plaintiff submitted that the 2nd Defendant's Notice of Preliminary Objection lacks the tenets of what constitutes a Preliminary Objection as was elaborated in Mukisa Biscuit Manufacturing Co. Ltd



VS West End Distributors Ltd [1969] EA 696 where the Court held that a PO must raise pure points of law.

13. It was the Plaintiff's submissions that the 2nd Defendant's Defence should not be considered as there was no evidence to counter the Plaintiff's testimony. He relied on a litany of cases in support of his claim.
14. On whether he is entitled to the suit property, he submitted that he has become adverse to the land within the provisions of Sections 7, 13, 16, 17 & 38 of the Limitation of Actions Act. He invited this Court to the holding in James Mwangi vs Mukunye Enterprises Ltd. Nairobi as quoted in the case of Karuntimi Raiji VS M'makinya M'itunga {2013} Eklr, where the Court relied on the case of where the Court found that for a claim of adverse possession to pass, one must show clear possession, lack of consent and uninterrupted occupation for more than 12 years.
15. It was the Plaintiff's further submissions that he has established a claim for adverse possession against the Defendants and has satisfied the principles enumerated in Joyce Wairimu Murira VS Ndegwa Gitu {2013} eKLR, as set out in the submissions. He also submitted that the suit property belongs to him and the said JuliusMacharia Mwangi being an administrator, had the powers to deal with the suit property. He relied on the case of In Re Estate of Charles Gungu Gwiyanga (Deceased) (Succession Cause No. 44 of 2021) {2022} where the Court highlighted the powers of Personal Representatives. That the contract for sale was a valid one within the provisions of Section 3(3) of the Law of Contract Act. In the end, he urged this Court to grant the prayers sought.
16. The 1st Defendant filed her submissions through the Law Firm of Githaiga Kimani & Co. Advocates supporting the Plaintiff's claim for adverse possession.
17. It is her submissions that the Plaintiff has been in occupation of the suit property for 18 years having gained access to the land through a sale. She admitted that the Plaintiff purchased the suit land from Julius Macharia Mwangi at a consideration of Kshs. 80,000/= and has remained in occupation to date. It was her further submissions that she is not in breach of the contract as she was ready to cause the land to be transferred to the Plaintiff.

The 2nd Defendant never filed any submissions.

18. This Court has not perused any copy of title deed for LOC.8/NGARU-NGUYOINI/281, to determine in whose name the land was registered in. However, from the evidence of all the parties to the suit, the land belonged to Kabura Muigai. It is also not clear for this Court whether a Grant for the Estate of Kabura Muigai was issued to Julius Macharia Mwangi. It is evident from the pleadings attached to the Plaint that a Succession Cause was filed being Murang'a HC Succ. No. 777 of 2014 Estate of Kabura Muigai. What can be deduced from pleadings of the Succession Cause is that firstly, there was a dispute over the suit property between the parties herein. Secondly, that the Grant of Letters of Administration was issued to the 1st Defendant over the Estate of Kabura Muigai, and which Succession Cause was petitioned by Julius Macharia Mwangi, who was the administrator thereof. It is thus correct to conclude that Julius Macharia Mwangi was an administrator of the Estate of Kabura Muigai.
19. It is the Plaintiff's case that he acquired the property through a purchase and as per the Certificate of Translation, the Plaintiff bought the suit land from Julius Macharia Mwangi on 1st April, 2005, for a consideration of Kshs. 80,000/=. He paid a sum of Kshs. 5,000/= at the execution of the agreement and as per an Affidavit sworn by Joseph Ndegwa Kamau. Further he paid Kshs.65,000/= to him on behalf of Julius Mwangi Macharia. This corroborates the Plaintiff's case that the consideration was used to



purchase land for and on behalf of Julius Mwangi Macharia. As to whether the entire consideration was paid or not is not clear to this Court.

20. The 2nd Defendant filed a Notice of Preliminary Objection and even though the same was not duly canvassed, this Court has the duty to determine it. The Preliminary Objection raised Three Grounds

1. That all the prayers sought cannot be legally granted as they offend provisions of Sections 4 and 38 of the Limitation of Actions Act and Section 37 rule 7 of the Civil Procedure Rules 2010 Laws of Kenya
2. That the entire pleadings violate Sections 45 and 82 laws of Succession
3. That this Court lacks jurisdiction to hear this suit

21. It is therefore relevant for this Court to first determine the merits of the Preliminary Objection.

22. A Preliminary Objection was described in the case of Mukisa Biscuits Manufacturing Co. Ltd...Vs... West End Distributors Ltd (1969) EA 696 to mean: -

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that: -

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

23. The Supreme Court in the case of Independent Electoral and Boundaries Commission vs Jane Cheperenger & 2 Others [2015] e KLR expanded the above principle and further gave the rationale for raising a preliminary objection. It delivered itself thus:

1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose off the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.
2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. ...
3.

24. The Supreme Court in the aforementioned case went on to state that;



The true preliminary objection served two purposes of merit:

1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and
 2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
24. The above being the description of Preliminary Objection, it is evident that a Preliminary Objection, must raise a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or where the Court is called upon to exercise judicial discretion.
25. In determining a Preliminary Objection, the Court will take into account that a Preliminary Objection must stem from the pleadings and that it raises pure point of law. See the case of *Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the Court held that:-
- A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
26. In the instant case, the Preliminary Objection is premised on the grounds that the suit as filed offends some sections of the Law, thus taking away the jurisdiction of this Court to determine the suit. The instant claim though emanating from a contractual agreement is a claim for adverse possession. There is no requirement that a claim for adverse possession must be filed within a specified period. However, it is trite that such a claim must be brought after the expiry of 12 years, the period when claim shall have crystalized.
27. Section 45 of the *Law of Succession Act* makes provisions for intermeddling. The said Section provides:
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
28. The foregoing section criminalizes any form of action on the free property of a deceased person without a Grant being issued. Section 82 of the *Law of Succession Act* enumerates the functions of Personal Representatives who have power to handle the Estate of a deceased person.
29. The High Court has the jurisdiction to determine succession causes and to a larger extent determine issues of intermeddling of a deceased’s property. Presently, it is not out rightly clear whether there was a grant or not. This Court will have to investigate facts before it can establish whether indeed there was



an administrator or not. It follows therefore that this ground cannot pass the test of what constitutes a Preliminary Objection.

30. Jurisdiction of a Court flows from *the Constitution* or a Statute. The Jurisdiction of this Court flows from Article 162 (2)(d) of *the Constitution* with its powers set out under Section 13(2) of the *Environment and Land Court Act*. Section 13(2) sets out the powers of this Court as:

- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.

31. This case is centered on the prescriptive rights attached to land. The Plaintiff claims ownership of the suit land by dint of adverse possession which is an interest attached to land and one that is an enforceable interest over land. It is trite law that jurisdiction is everything without which a Court should down its tools from the onset. Adverse possession being a claim for use and occupation of land, the Environment and Land Court is clothed with the jurisdiction. The High Court does not have the jurisdiction to hear and determine such issues.

32. Categorically, the Constitution under Article 162(2) envisages the establishment of Courts of equal status with the High Court, which shall be of equal status with the High Court. It provides:

“Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to –

- (a) ...
- (b) the environment and the use and occupation of, and title to, land.”

33. The jurisdiction of the High Court is set out under Article 165 of *the Constitution*. Article 165(5) is emphatic on what area that the High Court has no jurisdiction. It states as follows:

“The High Court shall not have jurisdiction in respect of matters-

- (a) ...
- (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”

To this end, this Court finds and holds that it has the requisite jurisdiction to determine this suit.

34. The 2nd Defendant further contended that the suit offends the provisions of Section 37 Rule 7 of the Civil Procedure Rules. This Court takes note that the 2nd Defendant made reference to Section 37 of the Civil Procedure Rules. Undoubtedly, such section does not exist. It is safe to conclude that the 2nd Defendant erroneously indicated Section in place of Order. This is for the reason that Order 37 of



the Civil Procedure Rules has significance impact on matters of adverse possession. Rule 7 of the said Order 37 makes provisions that:

- (1) An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The Court shall direct on whom and in what manner the summons shall be served

35. The section provides for the manner in which a claim for adverse possession is to be brought. While it requires that it should be by way of Originating Summons, the Plaintiff opted to institute the instant claim by way of Plaint. Rules of procedure cannot be flaunted, but the provisions of Article 159(2)(d) of the Constitution gives this Court the discretion to allow suit, but this discretion cannot be exercised if it results in a miscarriage of justice. The Court in the case of Mary Nduta Mutungi & 5 others VS Wambui Njenga & 2 others [2017] Eklr, correctly stated the application of Article 159(2)(d) in a similar case. The Court held:

36. Thus a claim to land by adverse possession by a procedure other than the prescribed procedure does not go to the jurisdiction of the Court to entertain the claim. It is merely a procedural irregularity which the Court in its discretion and in the interest of justice can waive under Article 159(2)(d) of *the Constitution* which provides that in exercising judicial authority, the Court shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. It is the law that originating summons is not the appropriate procedure for determining contentions disputes. That must be one of the reasons why the rules give power to the High Court to convert proceedings brought by originating summons into proceedings brought by a plaint even where such proceedings would not have been brought by way of a plaint. It follows that where there is a breach of prescribed procedure, the main consideration is not the form but the nature of the proceedings and whether the procedure adopted will result in a just, efficacious and expeditious resolution of the dispute.

37. Further, the Court in *Chevron (K) Ltd vs Harrison Charo Wa Shutu* [2016] Eklr, noted that a claim for adverse possession can be brought by way of a Plaint. The Court held:

The Courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See *Mariba v Mariba* Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See *Wabala v Okumu* (1997)LLR609CAK). In *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;

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



38. Having been sufficiently guided this Court proceeds to find that the suit is not defective for want of compliance with Order 37 Rule 7(1) of the Civil Procedure Rules.
39. On the issue of failure to attach a copy of an extract of title deed, this Court notes that save for testimonies confirming the land belonged to Kabura Mungai, there is no evidence in the form of title deed or certificate of Official search. The importance of attaching a title deed extract was well expounded in *Wilson Kazungu Katana & 101 Others VS. Salim Abdalla Bakshwein & Another* [2015] eKLR where the Court observed: -
- “The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu vs. Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.” [Emphasis added]
40. This was echoed by the Court in the case of *Samuel Kipngeno Koech VS Agnes Wambui Gitonga* [2016] eKLR, when it held:
- “It follows that for a claim of adverse possession to be entertained in this country, the applicant must specifically identify the exact title of land that is the subject of the claim.
- The extract of the title also has another significant importance. It does show the history of the proprietorship of the land in issue. This history is important in computing time, for there are some entities against whom one cannot claim adverse possession. So long as these entities remain the registered owners of the title being claimed, time cannot start running in favour of the occupant of the land in question. These entities are set out in Section 41 of the *Limitation of Actions Act*, CAP 22, Laws of Kenya”
41. This requirement was crystalized by the mandatory provisions of Order 37 Rule 7(2) of the Civil Procedure Rules. This helps the Court to know the exact location, acreage and details of the land. Presently, this Court appreciates from the Sale Agreement that the vendor was to sell his property, “Loc.8/Ngaru-Nguyoine/281 measuring approximately 0.4 acres” Sadly, this Court is not well guided as to the exact acreage of the land. But it is noteworthy from the testimony of the 1st Defendant that the Plaintiff is in occupation of the suit land exclusively.
42. Even though no title deed extract was attached, it is evident from the testimonies of both parties that the land can be adequately identified. The 1st Defendant who is alleged to have taken over the administration of the Estate of Kabura Muigai, after the demise of Julius Macharia Mwangi submitted that the land measured 0.4 acres. This corroborates the contents of the Sale Agreement that the parcel of land measured 0.4 acres. It is thus just to conclude that the entire parcel of land is 0.4 acres and is the parcel of land in contention. To this end, this Court finds and holds that failure to attach a copy of a title deed extract does not render the suit fatally defective. The upshot of the foregoing findings is that the 2nd Defendant’s Notice of Preliminary Objection dated 25th March, 2022 lacks merits and is hereby dismissed.
43. This Court will now proceed to establish whether the Plaintiff has made out a case for adverse possession.



44. It is trite law that registration of land in the name of a proprietor confers him/her indefeasible title to the property. The rights of a registered owner are however subject to overriding interests declared by section 28 of the *Land Registration Act* as not requiring noting in the register.
45. Section 28 of the *Land Registration Act* provides that:
- “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- (a)
 - (b)
 - (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
46. The Plaintiff wishes to defeat title on the basis of prescriptive rights as allowed above. It is the Plaintiff’s case that he has been in continuous, uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with him.
47. The Law on adverse possession is set out under the *Limitation of Actions Act* and Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Section 13 of the said Act provides adverse possession as the exception to this limitation:
- (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”
48. Finally, Section 38 of the Act provides that:
- “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.”



49. The principle of adverse possession was more elaborately set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations 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 having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

It further held that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

50. This right is adverse to land and does not automatically accrue unless the person in who's this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. The Court in *Malindi App No. 56 of 2014 Mtana Lewa VS Kahindi Ngala Mwangandi* [2015] eKLR, held:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

51. Further, in the case *Mbira VS Gachuhi* (2002) 1 EALR 137:the Court stated as follows;

“... 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 statutorily prescribed period without interruption...”

52. In order to determine whether the Plaintiff's rights accrued, the Court will seek to answer the following

- i. How did the Plaintiff take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of his possession and occupation?
- iv. How long has the Plaintiff been in possession?

53. For a claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. It is clear from the above analysis that a claim based on a sale agreement cannot issue, since the vendor's consent and permission is obtained before one can gain ingress into the land. The Plaintiff's claim emanates from a purported sale Agreement which this Court has read and concludes the entry was permissive.



54. However, every rule has an exception and the Court in Nairobi App No. 73 of 1982 Public Trustee VS Wanduru Ndegwa [1984] eKLR, found that in cases of sale agreement limitation of action begun running from the date of final payment. In the case Hosea v Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.
55. The 1st Defendant conceded that the Plaintiff is entitled to the claim and even alluded to her readiness to transfer the land to the Plaintiff. The 2nd Defendant on the other hand opposed the existence of the sale agreement and maintained the Plaintiff is not entitled to the land. The onus to prove that indeed a sale agreement was executed between the Plaintiff and the late Julius Macharia Mwangi lies squarely with the Plaintiff.
56. The Plaintiff produced a Sale Agreement which indicates that he bought parcel No. Loc.8/Ngaru-Nguyoini/ 281 vide a Sale Agreement executed on the 1st April, 2005. The Sale Agreement meets the tenets of a valid Sale Agreement and there being no evidence to discredit its authenticity, this Court finds it to be a valid document capable of conferring rights therein. The Plaintiff contended that he occupied the suit land immediately after purchase and has remained therein to date.
57. The 1st Defendant admitted in evidence that the Plaintiff acquired land through purchase thus corroborating the Plaintiff's testimony. As per the sale Agreement, the vendor received a consideration of Kshs. 5,000/= at the execution of the sale agreement. There is attached an Affidavit sworn by Joseph Ndegwa Kamau, which shows that the Plaintiff paid him Kshs. 65,000/= on behalf of Julius Macharia Mwangi, for purchase of a different parcel being Kajiado/Kaputie-North/20188. This corroborates the Plaintiff's claim that he paid the consideration to Julius Macharia Mwangi who used the proceeds to purchase another suit property. The deponent was not called to testify, but there was Affidavit that was produced in Court and was not objected to. It is not clear whether the entire sum was ever paid, but this Court notes from the bundles of receipts, Affidavit and Sale Agreements that money was paid and most transactions occurred in 2005. It is safe for this Court to conclude that time started running from 2005.
58. Having found that there was a sale agreement and time for adverse possession started to run in 2005, the next issue for determination is whether the Plaintiff's possession was continuous and uninterrupted since 2005, and whether there was anything that stopped time from running.
59. The Plaintiff maintained that he took possession and occupation of the suit property immediately after purchase in 2005. That he has been in occupation of the suit property with the full knowledge of the Defendants. The 1st Defendant conceded in his submissions that the Plaintiff has been in occupation of the suit property for 18 years. There is no evidence that his occupation was ever interfered with. This Court has perused some succession proceedings but finds that there was nothing that stopped time from running. What can stop time from running is the filing of a suit to assert rights. In Malindi CoA Civil Appel No. 29 of 2016 Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR the Court held
- “in order to stop time, which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.
60. This Court is guided by the decision in of the Court of Appeal in Peter Kamau Njau VS Emmanuel Charo Tinga (supra) where the Court found that for time in adverse possession to stop running, the owner of the suit land had to take active steps towards recovery of the land and/ or to assert his rights as the owner. Herein, there is no evidence that any party entered into the suit land to assert rights over



the said suit land. In that case, therefore this Court has established that there is nothing that stopped time from running within the 12 years of the Plaintiff's occupation and possession.

61. The Plaintiff must demonstrate that he was in occupation of the suit property *nec vi, nec clam, nec precario* for a period of over 12 years. This technically means that the Plaintiff must demonstrate he has been in without force, without secrecy and without persuasion. It flows from the testimony and pleadings that the Plaintiff's occupation has been with the knowledge of the Defendants and there was no evidence that he has been forcibly living on the suit land. It follows therefore that the Plaintiff's occupation meets the principle above.
62. Having found that the Plaintiff entered into the suit land in 2005 it is adequate, for purposes of computing time, to conclude that the Plaintiff as at the time of filing the suit had been in occupation of the suit property for a period of 17 years. To this end, this Court finds and holds that the Plaintiff has met the threshold for the grant of orders of adverse possession and is therefore entitled to Loc.8/Ngaru-nguyoini/281 to the exclusion of the Defendants herein

i. Who should bear costs of the suit?

63. It is trite that costs shall follow the events, and that the successful party be awarded costs. It is no doubt that the Plaintiff is the successful party. However, this Court takes note of the 1st Defendant's conduct and proceeds to direct that each party to bear their own costs.
64. Having found that the Plaintiff has proved his case on the required standard of balance of probabilities, the Court finds as follows: -
 - a. That the Plaintiff has proved his claim for adverse possession to the required standard.
 - b. That the Plaintiff is entitled to Loc.8/Ngaru-nguyoini/281 by virtue of adverse possession
 - c. An order that the 1st Defendant in her capacity as the administrator of the Estate of Kabura Muigai, do execute transfer of title No. Loc.8/Ngaru/Nguyoini/281 in favour of the plaintiff.
 - d. In Alternative to prayer (c) above, the Deputy Registrar of this Honorable Court do Execute transfer of the parcel to the Plaintiff,
 - e. That Land Registrar Murang'a be and is hereby directed to transfer title for Loc.8/Ngaru-nguyoini/281 from the name of the late Kabura Muigai to the name of the Plaintiff herein Ngotho Kairu.
 - f. Each party to bear its own costs.

It is s ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS D 25TH DAY OF MAY 2023.

L. GACHERU

JUDGE

25/5/2023

Delivered online in the presence of:

M/S Wangui Gachango for the Plaintiff

M/S Macharia for the 1st DefendantN/A for 2nd Defendant

Joel Njonjo Court Assistant



L. GACHERU

JUDGE

25/5/2023

