



Kahuthu & another (Suing as Trustee of the Kenya Evangelical Lutheran Church) v Muthoni (Administratrix of the Estate of Naomi Muthoni Ngware) & another (Environment & Land Case 154 of 2014 & Civil Case 170 of 2007 (Consolidated)) [2023] KEELC 19979 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 154 OF 2014
& CIVIL CASE 170 OF 2007 (CONSOLIDATED)**

LC KOMINGOI, J

SEPTEMBER 21, 2023

BETWEEN

BISHOP ZACHARIA KAHUTHU, MATHEW M. DAMBALA (SUING AS TRUSTEE OF THE KENYA EVANGELICAL LUTHERAN CHURCH) PLAINTIFF

AND

NJERI WA MUTHONI (ADMINISTRATRIX OF THE ESTATE OF NAOMI MUTHONI NGWARE) 1ST DEFENDANT

NAIROBI CITY COUNTY 2ND DEFENDANT

JUDGMENT

1. This Judgement relates to two consolidated court cases. Namely, Nairobi ELC 170 of 2017 and ELC No. 154 of 2014 (formerly) Civil Suit No.287 of 2004 (OS). In a ruling delivered on 21st November, 2007, court directed that they be consolidated.
2. By an Originating Summons dated 24th March 2004 and Amended on 2nd October 2018 the Plaintiff seeks the following Orders:
 - a. That the Plaintiff/Applicant be declared to have become entitled by adverse possession of over twenty one (21) years to Dagoretti/Riruta/1035.
 - b. That in the alternative, this honourable court does declare that Dagoretti/Riruta /1035 was held in trust by the 1st Defendant/Respondent in favour of the Plaintiff/Applicant by virtue of being a bona fide purchaser for value and upon making this declaration order the Land to be transferred into the Plaintiff/Applicant’s name.



- c. That in default of the Defendant/Respondent to transfer the suit property to the Plaintiff/Applicant the Deputy Registrar of this Honourable Court do execute all the documents necessary to effect the transfer.
 - d. That vesting orders do issue the aforesaid land into the plaintiff free from all charges and encumbrances.
3. The OS is supported by Zachariah Kahuthu Wachira Supporting Affidavits sworn on 2nd October, 2019. Zachariah Kahuthu Wachira depones that he is a Bishop and trustee of Kenya Evangelical Lutheran Church. He stated that the church has been in actual possession of the disputed property since 1976 when they purchased it from Naomi Muthoni Phineas Ngware, the original owner for value consideration. It consequently undertook construction upon obtaining the requisite approvals from the then Nairobi City Council. Even though the entire purchase price was paid, the property was not registered in the church name. It is alleged requests to have the property transferred to church by the deceased or her estate never borne any fruit. In addition, the 1st Defendant proceeded to register the property in her name without their knowledge yet this suit was pending hearing and determination. This was notwithstanding the fact that the church had continuous and exclusive occupation since 1976 and that the deceased title was extinguished. He maintains that the property ought to be transferred to Plaintiff, since it is a bonafide purchaser for value as the deceased estate is holding it in trust for the Plaintiff.
4. The OS Application is opposed by Njeri wa Muthoni through a Replying Affidavit sworn on 13th November, 2019 which was filed on 14th November, 2019. She depones that she was previously known as Joy Njeri Sangale until 1997 when she changed her name. She asserts that she is the daughter of the late Naomi Muthoni Ngware together with her sister Lucy Wairimu Ngware who passed away in September, 2018. Her mother became the registered proprietor of L.r. Dagoretti/Riruta/1035 in 1st February, 1973. She explains that upon the death of their mother in 28th October, 1991, she applied for letter of administrator of her estate together with her sister on 21st February, 1992 whose certificate of grant was confirmed on 12th October, 1992. The suit property title was subsequently transferred to her in 2006 as a beneficiary of the estate pursuant to court order. The Plaintiffs attempt to have the grant revoked through an application filed on 3rd September, 2009 was dismissed with costs for being unmerited. She avers that in 1976, her late mother entered into an agreement for sale with the Plaintiff over 0.5 (½) acres portion of the suit property for a consideration of Ksh.40,000/=. According to her, only Ksh.10,000/= of the purchase price was paid. The deceased also donated 0.25 {¼} acres to the Plaintiff as a gift since she was a spiritual and religious person who always aided and supported its activities. The deceased had constructed wooden residential structures on 0.4 acres of the property which she leased to tenants while the remaining portion had trees. Between 1990s and 2005, the land rates were paid by the 1st Defendant.
5. She further stated that during the deceased's lifetime and upon her death when this suit was filed, the Plaintiff's activities were only restricted to ¼ acres. However, in 2005, they fenced off and commenced construction on 0.4 acres portion yet it was not part of the sale agreement and the donation. When it was asked to stop such activities, they offered to pay the 1st Defendant Ksh.30,000/=: being the purchase price, which she rejected because it was not equivalent to the current market rates. Subsequently, they proceeded to demolish the wooden structures on 0.4 acres and fenced it and undertook construction. This prompted the 1st Defendant to institute Civil Suit No.170 of 2007 because they refused to abide to her numerous requests that the construction be stopped. It is also stated that the 2nd Defendant revoked the said construction as it was obtained through misrepresentation of ownership of the suit property.



6. According to the 1st Defendant, the Plaintiff was mis-guided to expect that transfer would be effected yet it refused to pay the entire purchase price. The mere fact they obtained the original certificate without her knowledge does not confer ownership of the property upon them. She accuses the Plaintiff of wrongfully extending their activities beyond what was donated and sold. That it's claim for adverse possession cannot succeed since the owner permitted them to possess the portion. Further the sale agreement is still pending completion and they not proved existence of the alleged trust. Should the Plaintiff wish to retain the ½ acres, then it ought to pay the remaining balance at the prevailing market rate failure to which an order to vacate do issue against it. The court is urged to find that the Plaintiff has unlawfully possessed and trespassed on 0.4 acres and order it to vacate and pay compensation for the time occupied.
7. On 20th February,2007, Njeri wa Muthoni, the Plaintiff herein sued Bishop Zachariah Kahuthu and Mathew M.Dabala as trustees of Kenya Evangelical Lutheran Church and the City Council of Nairobi in a Plaint dated 20th February,2007 where she sought for the following prayers,
 - a. A permanent injunction restraining the 1st Defendant, their agents and or servants from proceedings with the ongoing construction in Dagoretti/Riruta/1035.
 - b. Nullification by the 2nd Defendant of the Architectural plan No. ED11 approved on 7th August,2006 and structural plan approved on the 11th October,2006 relating to Dagoretti/Riruta/1035.
 - c. An order for the immediate demolition of the structure in Dagoretti/Riruta/1035 at the 1st Defendants cost.
8. The Plaintiff claims that she is the registered owner of Dagoretti/Riruta/1035, (herein referred as “the disputed property”). She accuses the 1st Defendant of making misrepresentation to the 2nd Defendant that it was in the process of acquiring the property in order to get approvals of its architectural and structural plans. Even though she requested the 2nd Defendant to issue her with the said plans, the Plans were never handed out to the Plaintiff. As a result, the 1st Defendant was denied entry into the suit property despite numerous requests according to the Plaintiff. The Plaintiff admits that notice of intention to sue was never served upon the Defendants for the reason that this matter was urgent. She further discloses that Originating Summons seeking adverse possession of suit property was instituted against her by the 1st Defendant.
9. Through a Statement of Defence dated 10th April, 2007 filed on 10th April, 2007, the 2nd Defendant states that it approved the 1st Defendant structural and architectural plans because it never knew the property had any dispute. It avers that it will at the appropriate time seek this suit indemnity costs from the 1st Defendant who misrepresented the suit property. This is because it made its decision in good faith based on the information provided. It is the 2nd Defendants case that the Plaintiff never served it with demand and notice of intention to sue it.
10. The 2nd Defendant denies the Plaintiff's allegation in a Defence and Statement of Claim dated 30th April, 2007 filed on the same date. It is their case that in 1976, they purchased the disputed property from Naomi Muthoni Phinehas Ngwere (deceased) who was its registered owner. Upon obtaining possession in 1976, it applied for change of user of the property from residential to church in 1979 which was approved on 1980 therefor permitting it to construct church, school and office. It denies ever making any misrepresentation to the 2nd Defendant in order to get approvals. According to the 2nd Defendant, the Plaintiff registered the suit property in her name without their knowledge on 13th September,2006.



11. Through the Counterclaim, it is acknowledged that Nairobi HCCC No.287 of 2004(OS) where they sued the Plaintiff claiming ownership of the disputed property by virtue of adverse possession of over 23 years is still pending heading and determination. Considering the Plaintiff title is already extinguished by its exclusive possession and occupation, the 2nd Defendant prays that the Plaintiff suits be dismissed with costs and judgement entered in its favour for the following orders.
 - a. The 1st Defendant be declared to have become entitled by adverse possession of over 30 years to Dagoretti/Riruta/1035.
 - b. A vesting order does issue the aforesaid land unto Defendant free from all charges and encumbrances.
 - c. Costs of the suit.
 - d. Any other or further relief that his honourable court may deem fit to grant to the Defendants.
12. In reply to the 1st Defendant's defence and counter, the Plaintiff reiterate her claim and further adds that the 1st Defendant undertook construction beyond the area its purportedly purchased.

Evidence of the Plaintiff.

13. PW1, Samuel Kimundo Kariuki, stated that he knew Naomi Muthoni Ngware since 1974. In 1968, church service was inaugurated on his house upon a request by the Pastor. When the membership grew, he requested Naomi to lease the church her bigger house which she agreed. The church was further moved to a nursery school upon its expansion. In 1976, Naomi offered to sell to the church a portion of her land which she had subdivided. The court was informed that construction of the church took place between 1978-1980. It was his evidence that the church was allowed to fence the plot upon payment of the entire purchase price. In addition, no dispute ever existed between the church and Naomi over the property prior to her death in 1991.
14. During cross examination he reiterated that it was Naomi who proposed that the church purchases a plot. Even though he stated that the church undertook construction after paying the entire purchase price, PW1 admitted that he did not witness the agreement. He did not know the agreed purchase price or how much was paid. According to his evidence, it is Naomi who suggested that the church ought to be constructed and its parcel fenced therein. She also donated $\frac{1}{4}$ of an acre of her property to the church
15. PW2, Jacob Anaeli Kimaro, stated that he worked as the Treasurer for Kenya Evangelical Lutheran Church from 1974 – 1984. He explained that he met Naomi when he came to Nairobi when they were searching for a place of worship. Naomi, who was then a church member offered to sell to $\frac{1}{2}$ acre and as well as gift the church $\frac{1}{4}$ acre. She also showed them the church boundaries. He produced receipts to confirm that Naomi was paid the entire purchase price. Even though he stated that the church was issued with the title deed, he did not know whether the title had been transferred to it. It was his evidence as at 1984 when he left Kenya, no dispute existed over the suit land between the church and Naomi.
16. His evidence during cross examination was that Naomi was paid more than Ksh.40,000/= . Even when she was paid in cash, she would be issued with receipts and the church membership was also notified accordingly. He however did not know why she never transferred the plot to the church despite yet it was shown the boundaries which is currently fenced with a barbered wire. He reiterated that the church bought $\frac{1}{2}$ acre at Ksh.40,000/= while $\frac{1}{4}$ acre was given for free. The court was also informed that construction of the church which is now a big building commenced in 1985-2006.



17. Even though he confirmed during re-examination that Naomi acknowledged receipts of payment of the purchase price, he did not have any documents to prove so. This was despite admitting that the church was constructed on $\frac{1}{2}$ and $\frac{1}{4}$ acres were acquired from Naomi.
18. PW3, Zacharia Kahuthu Wachira stated that he served as the Bishop of Evangelical Lutheran Church from 1991 to July, 2020. He also served as an evangelist in 1974 and while at Mombasa until 1987 when he became a pastor. In 1991, he was elevated as Bishop when he came back after conclusion of his studies. It was his evidence that in 1976, the church transferred its offices from Mombasa. It tasked its elders to look for a plot. Consequently, an agreement was signed with Naomi, one of its members for purchase of $\frac{1}{2}$ acre at Ksh.40,000/=. She also donated $\frac{1}{4}$ acre to the church. The court was informed that Ksh.10,000/= was paid on 1976 while the final balance was paid on 1978. To support his testimony, he produced a ledger/cashbook to prove Naomi was paid Ksh,24,000/= more even though he would not explain what was the purposes of the extra monies. He maintained that in 1976, the church obtained possession of the property and commenced construction on 1980. To date, the church has a bigger building comprising of a nursery school.
19. Despite affirming that Naomi never complained that she did not receive the entire purchase price or when the property was handed over to the church, he would not explain why she never effected transfer of the title to the church. He added that he only knew Naomi's children upon her death when they claimed possession of the property on allegation that the entire purchase price was never paid. He admitted that the church obtained change of user before undertaking any construction. According to him, the 1st Defendant registered the suit property title in her name yet she knew the title had already been handed over to the church. It was his testimony that the title of the suit property must therefore be registered in the plaintiff's name.
20. He stated that he was not present when $\frac{1}{2}$ acre was sold through a sale agreement dated 29/7/1976 or when $\frac{1}{4}$ acre was donated to the church, it was his evidence on cross examination that Naomi was paid Ksh.30,000/=. He however did not have any acknowledgment nor minutes to support this. He maintained that the church occupied the entire property. He further stated that when the 1st Defendant approached the church seeking to be paid the entire purchase, she was informed that Naomi had been paid. The court was told that the construction was later stopped by the court.
21. His evidence on re-examination was that since 1976 when the church has been in possession of the suit property. He stated that the 1st Defendant wanted the church to re-purchase the $\frac{1}{2}$ acre yet Naomi had been paid and had surrendered the original title to the church.
22. PW4, Samuel Karanu Waweru, an advocate of the high court of Kenya and Plaintiffs' legal officer confirmed that the Plaintiff bought $\frac{1}{2}$ acre from Naomi Muthoni Ngware at Ksh.40,000/=. She also donated $\frac{1}{4}$ acre. Upon payment of Ksh.40,000/=: the church obtained possession of the property to date. Its application for change of user and building plans was also granted by the then Nairobi City Council. After Naomi's demise on 28/10/1991, her two-daughters applied for letters of administration in 1992. PW4 stated that when they discovered the property had been transferred to 1st Defendant on 2007, they approached the 1st Defendant seeking she does execute the transfer documents in favour of the church. Instead, she insisted that the church ought to pay the consideration at the prevailing market price because it had not been paid. Attempts to amicably settle the matter never bore any fruits. This prompted the church to file a suit seeking cancellation of the 1st Defendants title on whose property it had occupied since 1991.
23. On cross examination, he maintained that Naomi donated $\frac{1}{4}$ acre to the church and also sold $\frac{1}{2}$ acre at Ksh.40,000/=. In spite of the fact that he testified that the entire purchase price was paid, he could



not substantiate whether Naomi received the said monies. It was PW4's evidence that even though Naomi surrendered the original title deed, she never stated whether she was not selling the entire land. He was also not sure if Naomi was informed about Application for change of user and approval of building plans. It was not until her demise that they discovered that the rates were never paid to the 2nd Defendant. The court was informed that the church approached the 1st Defendant to execute the transfer documents when it sought to construct additional buildings. In addition, this suit was filed when negotiations to settle the matter failed. PW4 confirmed that notwithstanding the fact that the church was in possession of the suit property since 1999, the 1st Defendant listed the suit property for confirmation of grant without notifying it.

24. On re-examination, he admitted that Naomi never demanded any payment from the church prior to her death in 1991 nor complained when construction commenced. Further, Naomi was paid the purchase price. He also confirmed that the church made an application for change of user and building approvals for the entire land.

Evidence of the Defendants

25. DW1, Njeri wa Muthoni alias Joy Njeri Sangale stated that Naomi Muthoni was her mother and owner of Dagoreti/Riruta/1035 which she obtained in 1/2/1973. She explained that the title was subsequently transferred to her upon when succession proceedings were concluded. She stated that as the administrator of her mother's estate, she legally acquired the title to the suit property. It was her testimony that her late mother donated $\frac{1}{4}$ acre to the church and also sold them $\frac{1}{2}$ acre at Ksh.40,000/= . However only Ksh.10,000/= of the purchase price was paid. When she approached the church in 1990 seeking to be shown documents demonstrating Ksh.30,000/= was paid, nothing was availed to her. As a result, she instituted the suit being ELC 170 of 2017. It was DW1's evidence that in 2005, the court barred the church from undertaking further construction when they extended beyond three quarter acres.
26. When she was cross-examined, she admitted that she was 15 years when her mother sold the property to the church in 1976. She also admitted that her mother worked closely with the church and also gave out the original title deed. It was her evidence that the plaintiff did not have any documents to prove her mother was paid Ksh.30,000/=. On the contrary, it occupied more land than what was donated and sold to it upon her demise.
27. Her evidence on re-examination was that the church trespassed on 0.4 acres without any colour of right.
28. At the close of the oral testimonies parties tendered final written submissions;

The Plaintiff's submissions

29. The Plaintiff in its submission dated 9th November, 2022 filed on 12th January, 2023 reiterates the claim and raises the following issues for determination;
- a. Whether the Plaintiff after entering into an agreement for sale over Dagoreti/Riruta/1035 paid the Defendant the balance of the purchase price being Ksh.30, 000/=?
 - b. Whether the Plaintiff having paid the full purchase price and having taken possession of Dagoreti/Riruta/1035 with the knowledge of the deceased and later the Defendant for over 28 years at the time of filing suit is entitled to title by way of adverse possession?
 - c. Who bears the costs of the suit?



30. The Plaintiffs' counsel states that the deceased sold ½ acre as evidenced in an agreement dated 29th July, 1976 and further donated ¼ of the suit property to the church. Proof of payment of the purchase price was demonstrated by ledgers produced in court. In addition, DW1 testified that her mother never complained nor demanded the balance of Ksh.30, 000/= from the Plaintiff. No justification has been provided why the deceased never demanded the balance yet the Plaintiff constructed a church, nursery school, water kiosk, toilets and tailoring school upon obtaining possession of the suit property. Similarly, the 1st Defendant never produced any evidence to show that the deceased was not aware during her lifetime that the Plaintiff made an application seeking change of user of the suit property. The deceased also never informed the Plaintiff to vacate the suit property nor demanded back the title she had issued to it.
31. According to counsel, the Defendant admitted existence of a valid sale agreement between the Plaintiff and the deceased over the property and also acknowledged that the Plaintiff was issued with the title deed and paid a portion of the purchase price. PW2 also produced documents during his testimony to show that Ksh.65,000/= was paid to the deceased.
32. Section 7 of the Limitation of Action, Section 13, 16 and 17 and 38(1) and (2) of the Land Registration Act and decisions of *Mtana Lewa v Kahindi Ngala Mwangandi*(2005)eKLR and *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* (2018) eKLR are cited to explain what the doctrine of adverse possession entails. It is submitted that possession and occupation of the suit property by the Plaintiff since 1976 to 24th March, 2004 when this suit was filed admitted by the both the Plaintiff and the 1st Defendant. DW1 affirmed that the occupation was never interrupted during the deceased lifetime. There is no documentation to prove the deceased asked the Plaintiff to vacate the property.
33. Taking into consideration the Plaintiff occupied and extensively developed the suit property for more than 12 years since execution of this agreement, it is entitled to the property through adverse possession for the reasons that the Defendants title was extinguished on 1990 as was held in *Mbira v Gachihi* (2002) IEALR 137 and *Titus Matuku Kasuve v Mwaani Investments Limited & 4 Others* 1KLR 184. *Public Trustee v Wanduru Ndegwa* (1984)eKLR as quoted in *Nahashon Gichohi Muiga v Edwin Onesmus Wanjau* (suing in her capacity as the Administrator of the Estate of *Kimingi Wairera*(deceased) and of *Mwangi Kimingi* (deceased) (2022)eKLR and *Bridges v Mees* (1957) 2 ALL ER 577 as cited in *Njiru & Others* (1974) EA 526 are put forward to argue that the purchaser possession over disputed property becomes adverse to the vendor when the last payment of the purchase price is made. The Plaintiff are therefore entitled to be registered as the proprietors of the suit property because they have occupied it by 12 years. The court is beseeched to award costs to the Plaintiff because it has proven its case on a balance of probabilities.

The 1st Defendants submissions

34. On 9th March, 2023, counsel for the 1st Defendant filed submissions dated 8th March, 2023 raising the following issues for determination.
 - a. Whether the Plaintiff has become entitled to ownership of Dagoretti/1035 by adverse possession?
 - b. Whether the 1st Defendant holds L.r. No. Dagoretti/1035 in trust for the Plaintiff?
35. It is argued that a person seeking to acquire title through adverse possession must prove non permissive possessive and consensual occupation of the land in question as was held in *Samuel Miki Waweru v Jane Richu* (2004) eKLR. Despite recognizing that the late *Naomi Muthoni Ngware* donated ¼ acre through an acknowledgement dated 29th July, 1979, it argued that the parcel became adverse to her. The



Plaintiffs are therefor only entitled to claim through adverse possession ½ sold to them if they paid the entire purchase price. Computation of time for their claim can only begin to run against the proprietor from the date the last payment was made as provided in Section 38 of the Limitation of Actions Act. In view of the fact that the Plaintiff never proved they paid balance of the purchase price, it argued that they are not entitled to claim adverse possession as was held in Njeri Kimani (suing in her capacity as the administratrix of the estate of Nasser Njoroge (deceased) v Edwin Onesmus Wanjau (suing as the administrator of the estate of Kimingi Wairera and Mwangi Kimingi (deceased) 2022 eKLR.

36. It is further submitted that the late Naomi Muthoni Ngware was only paid Ksh.10,000/= of the purchase price as shown in the acknowledgment dated 29th July,1976. None of the Plaintiff witnesses provided any written acknowledgment to show the balance of Ksh.30,000/= was ever paid the deceased. Therefor the Plaintiff has no legitimate legal claim over the ¼ acre. The Plaintiff is condemned for obtaining approvals for architectural and structural drawing from the 2nd Defendant yet there was an already existing dispute over the suit property. It is therefore unjust and unfair for the Church to stake a claim and disinherit the deceased surviving daughter on the basis of a trust as bonafide purchaser.

The 2nd Defendants submissions

37. The 2nd Defendants through submission dated 7th March, 2023 reiterated that it acted in good faith while discharging its mandate. The Plaintiff and the 1st Defendant must therefore be condemned to pay its costs for dragging it to court over their personal issues relating to ownership of the suit property. Considering it never frustrated any parties quite possession and enjoyment of the suit property, it claims against it must be dismissed with costs.
38. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:
- i. Whether the plaintiff having paid the full purchase price and having taken possession of Dagoretti/Riruta/1035 with the knowledge of the deceased and later the 1st defendant for over 28 years at the time of filing suit is entitled to title by way of adverse possession.
 - ii. Whether the 1st Defendant is the rightful owner of Dagoretti/Riruta/1035.
 - iii. Who should bear costs of the suit?
39. It is not in dispute that there was an agreement to purchase by the Plaintiff on half of an acre of Dagoretti/Riruta/1035 through a written agreement dated 29th July 1976 signed between the parties. It is also not in dispute that Naomi Muthoni donated a quarter of an acre of the said land to the plaintiff.
40. The plaintiff through its witnesses tendered oral and documentary evidence showing clearly that the balance of Kshs.30,000/= was paid.
- PW2 Jacob Anaeli Kimaro told the court that he would record the payments made to Naomi Muthoni on the ledger book. He produced the record as exhibit in this case.
41. DW1 (the 1st defendant) confirmed that the deceased did not make any demand for payment of the alleged Kshs.30,000/=. I agree with the plaintiff's submission that the reason why there was no demand for payment is because there was no balance as the full purchase price has been paid.
42. It is in evidence that the plaintiff took possession and put up structures on the land namely a church building, a nursery school, a water tank, toilets and a tailoring school.



Naomi Muthoni Ngware (the deceased) left her title for Dagoretti/Riruta/1035 with the Church pending finalization of the purchase and its transfer to the Church. The deceased in her lifetime never demanded for it nor required the plaintiff to vacate the land.

43. I find that the 1st Defendant, neither pleaded nor demonstrated that the deceased was not aware of the change of user into a Church, the application for construction nor the development of the land in all her life before her demise in 1991.

44. Exhibit P1 of the plaintiffs bundle states;

“I have recalled from the E.L.C. Kenya Synod the sum of shillings ten thousand only (Shs.10,000) which is part payment on the purchase by the K.L.C. T. Kenya Synod of one-half acre of plot 1035, Dagoretti Nairobi. It is agreed that the total payment shall be shillings forty thousand (40,000). Title to the property shall be left with the Kenya Synod pending finalization of the purchase and transfer of the property to the Kenya Synod. I also agree to give one-quarter of an acre of the same plot as a donation for the purpose of building a place of worship”.

The documents in the plaintiff's bundle show that Naomi Muthoni (the deceased) was paid about Kshs.65,000/= This is not disputed by the 1st defendant.

The Applicable Law.

45. The Doctrine of Adverse Possession is one of the ways of land acquisition in Kenya.

Section 7 of the Limitation of Actions Act provides that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 of the Limitation of Actions Act provides that;

“Right of action not to accrue or continue unless adverse possession

- (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 10 [Rev. 2007] Limitation of Actions CAP. 22 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.



Section 38(1) of the Limitation of Actions Act provides that;

- “(1) 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”.

46. Order 37 of the Civil Procedure Rules provides that;

“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased 104 Civil Procedure CAP. 21 [Subsidiary] person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction; (g) the determination of any question arising directly out of the administration of the estate or trust.

Analysis and Determination

47. In the case of *Mtana Lewa Vs. Kahindi Ngala Mwangandi* (2005)eKLR it was held that;

Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it motis or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years”.

48. Similarly in the case of *Peter Mbiru Michuki Vs. Samuel Mugo Michuki* (2014) eKLR where the Court of Appeal held as follows:

32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case



of Public Trustee – v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

49. It is not in dispute that the plaintiff has been in occupation of the suit property from 1976 upto 24th March 2004 when this suit was filed and to date.

During her life time Naomi Muthoni (the deceased) never objected or interrupted the plaintiff's occupation.

In the case of Mbira Vs. Gachuhi (2002) EALR 137 the court held that;

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

50. I find that the plaintiff has fulfilled and demonstrated the elements required for adverse possession having been in actual open, exclusive and hostile possession of the ½ acre which was acquired by way of sale and the ¼ acre donated by the deceased who had title to the suit property.

In the case of James Obande Wasui Vs. Jeremiah Ochwada Musumba (2002) eKLR the court held that, “as an occupiers right, adverse possession runs with the land irrespective of change of proprietorship”.

51. As per Section 28 of the Land Registration Act as the time the 1st Defendant obtained another title to the suit property, the suit property was subject to an overriding interest in the form of rights of adverse possession in favour of the plaintiff.

The plaintiff's rights of adverse possession were not terminated by reason of registration of the 1st defendant as the proprietor following the succession proceedings.

52. It should also be noted that the 1st defendant, in the initial succession proceedings had not included the suit property as one of the assets of the deceased available for distribution to the beneficiaries. The 1st defendant only listed it after the plaintiff refused to pay her again for the suit property at the current market value.

53. Under Section 27 of the Civil Procedure Act costs shall follow the event. In the circumstances of this case, I do order that each party bears own costs.

54. In conclusion I find that he plaintiff is entitled to be registered as the owner of the suit property by virtue of adverse possession as per the provisions of the Limitations Actions Act.

55. I find that the plaintiff has proved its case on a balance of probabilities. In essence the 1st Defendant's claim in ELC 170 of 2017 is dismissed with no orders as to costs.

56. Accordingly, I make the following orders:

a. That the plaintiff is declared the owner of Dagoretti/Riruta/1035 by virtue of having been in adverse possession thereof in excess of the prescribed period.



- b. That an order is hereby issued that the plaintiff be registered as the owner of Dagoretti/Riruta/1035.
- c. That each party bears own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF SEPTEMBER 2023.

L. KOMINGOI

JUDGE.

