



REPUBLIC OF KENYA



**Gichuhi & 4 others v Kimani & 4 others (Environment & Land Case
163 of 2013) [2023] KEELC 21036 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21036 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 163 OF 2013
A OMBWAYO, J
OCTOBER 26, 2023**

BETWEEN

**WILLIAM KIUNA GICHUHI 1ST PLAINTIFF
RACHEAL MUMBI NGETHE 2ND PLAINTIFF
MARTHA NJERI MWANGI 3RD PLAINTIFF
STEPHEN WERU MACHARIA 4TH PLAINTIFF
JULIA WANGARI NG'ANG'A 5TH PLAINTIFF**

AND

**TABITHA WANJIRU KABUI KIMANI 1ST DEFENDANT
MARY MUTHONI (SUED AS THE ADMINISTRATORS OF THE ESTATE OF
THE LATE SIMON WAKABA MURIGI) 2ND DEFENDANT
TERESIAH WANJIKU NGIGI 3RD DEFENDANT
MARGARET NJERI NJUGUNA 4TH DEFENDANT
EUNICE NJOKI MBURU 5TH DEFENDANT**

JUDGMENT

1. The Plaintiff commenced this suit vide Amended Originating Summons dated 17th January, 2023 against the Defendants for a claim of adverse possession over Dundori /Miroreni Block 2/1024 for determination as follows:
 1. Whether the Plaintiffs are entitled under Section 38 of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya to be registered as the absolute proprietor of the parcel of measuring



approximately a quarter of an acre under the Plaintiff's occupation and which land is part of Title No. DUNDORI/MIRORENI BLOCK 2/1024.

2. Whether the Defendants should excise the portion of land occupied by the Plaintiffs and transfer it to the Plaintiff.
 3. Whether in default of the Defendants transfer of the land to the Plaintiff by signing all the requisite forms, documents and conveyance documents the Deputy Registrar of the Honourable Court should execute all such documents as may be necessary for the registration of the Plaintiffs as the proprietors of the land.
 4. Whether this Honourable Court should give directions on the of the summons.
 5. Whether the Plaintiff should be granted any other relief by this Honourable Court.
 6. Whether the Defendants should pay the costs of this suit.
2. The 1st Defendant in response filed his Replying Affidavit dated 27th July, 2007.

Plaintiffs' Case

3. Julia Wangare Ng'anga testified as PW1 where her statement dated 10/2/2022 and filed on 14/3/2022 was adopted as her evidence in chief. She testified that she entered the land in 1995 through an agent. She added that she has lived and farmed on the land for 27 years and that no one has ever evicted her. On cross examination, she confirmed that she is claiming Title No. Dundori/Miroreni Block 2/1024. which belonged to Simon Wakaba Murigi. She stated that the same was sold to her in 1995 through David Nguhiu Kibugi and she paid 35,000/=. She confirmed that she did not have the agency agreement.
4. She further confirmed that she entered as purchaser with the owner's agent's permission. She added that the agent of the owner had promised to give them the title but he did not. She admitted that she did not know the acreage of the land but that her son was entitled to a quarter. She stated that her son moved to Kirinyaga and allowed them to live on the land as he prepared the title documents. Further, that the five plaintiffs were given permission to use the land after purchase.
5. She confirmed that Title No. Dundori/Miroreni Block 2/1024 was big parcel of land which she has built a house. She stated that her paper indicates that her plot is in Title No. Dundori/Miroreni Block 2/1024.
6. She admitted that she did not produce the map and that one David Nguhiu Kibugi came in 2003 to subdivide the land into 1/8th and put beacons. She confirmed that she placed a restriction as she was given 50 by 100 instead of a quarter. She confirmed that she is the owner of the land as she bought the same.
7. On re-examination, she stated that there is no agreement between herself and that no one including Wakaba has ever challenged the restriction.
8. William Kirua Gichuki testified as PW2. His statement dated 10/2/2022 was adopted as his evidence in chief. He produced a sketch at page 8 and a letter at page 28 dated 14/3/2003 (PEX 8). He testified that his property is in Title No. Dundori/Miroreni Block 2/1024 measuring a quarter of an acre. He testified that he has been in possession since 1994. He further testified that his property and that of his wife are in the same unit. It was his testimony that the registered owner is Wakaba Simon but that they have never met as they used an agent one David Nguhiu Kibugi.



9. On cross examination he confirmed that he entered the land as a purchaser and that David Nguhiu Kibugi was the agent. He further confirmed that his wife filed Nkr HCCC 106 of 2007 on 24/5/2007.
10. The witness was shown PEX8 and stated that in 1999 Wakaba subdivided the land into smaller plots. As at 2003, they were claiming the land as purchasers. He confirmed that he is claiming the land as a purchaser as he entered the land through the agent's permission.
11. He stated that Title No. Dundori/Miroreni Block 2/1024 was as a result of subdivision of Title No. Dundori/Miroreni Block 2/1009 which they bought. He confirmed that Samuel Wakaba was registered on 30/12/1996. The witness admitted that he did not have any document to show he was occupying Title No. Dundori/Miroreni Block 2/1024 which is 2 ½ acres. He further admitted that he did not know the size of 1009 and that he was not shown any land but shown a portion of parcel number 1009. He also admitted that they have no documents that indicate that Title No. Dundori/Miroreni Block 2/1024 arose from Title No. Dundori/Miroreni Block 2/1009.
12. The witness was shown PEX 4 and PEX 5 where he admitted that he had never seen the letter and that it does not mention Block 2/1024. He added that according to the said documents, Title No. Dundori/Miroreni Block 2/1024 does not feature anywhere. He confirmed that they have fenced and have put up a semi-permanent structure.
13. He admitted that he never stayed there but that he has only been doing farming with a single structure. He stated that his neighbour informed him that the structure was being vandalized. He admitted that he could be occupying any portion of the parcel land.
14. On re-examination he stated that they never signed any agreement as they have been dealing with an agent. He added that it was David Nguhiu Kibugi who sold them the land. He stated that he had never seen Simon Wakaba.
15. Stephen Weru Macharia testified as PW3. He produced his statement dated 10/2/2022 which was adopted as his evidence in chief. He testified that he demands one quarter of an acre plot which is part of Title No. Dundori/Miroreni Block 2/1024. He testified that he entered the land in 1994 as the 1st occupant within a group of five and that Mr. Kibugi gave them the land.
16. He further testified that the land was sold by Nguhiu Kibugi as an agent of Wakaba. He added that he developed the land and no one has ever interfered with them. He testified that they brought the matter to court as they were yet to receive titles. He also testified that Wakaba through his agent David Nguhiu Kibugi had promised to give them titles.
17. On cross examination, he admitted to have brought the case in court in NKR HCC No.105 of 2007 on 24/5/2007. He confirmed that he bought the land through Nguluhi Kabugi and added that he had never met Mr. Wakaba in connection with the said case. He further confirmed that Mr Kibugi showed them the original title deed and that they trusted Kibugi since he had the original documents of 1024. He admitted that he did not have receipts and that he has been waiting for the title deed. He also admitted that he did not have anything to show that he was occupying Title No. Dundori/Miroreni Block 2/1024.
18. He was shown PEX 2 where he confirmed that the green card for Title No. Dundori/Miroreni Block 2/1024 was opened on 30/12/1996 and added that he never dealt with Title No. Dundori/Miroreni Block 2/1009. He stated that Title No. Dundori/Miroreni Block 2/1024 was initially Title No. Dundori/Miroreni Block 2/2/46. He added that he has lived in the said land for the last 25 years.



19. Rachel Mumbi Ngette testified as PW4. She produced her statement dated 10/2/2022 which the court adopted as her evidence in chief. She testified that she has stayed in the land for 29 years and that she needs a title as the title is in the name of Simon Wakaba.
20. On cross examination, she confirmed that her land is Ndundori/Miroreni/Block/1024 and that they have been in occupation since 1994. She added that David Kibugi showed her the land which she then purchased in 1994. She had a sale agreement, receipts but not the title deed. She admitted that she did not have any evidence that Kibugi was Wakaba's agent. She confirmed that she has lived on the land without any problem and that she knew nothing about any subdivision.
21. She confirmed that she did not know Tabitha Kimani as well as the 2nd, 3rd, 4th Defendants. She stated that Kibugi sold her the land in 2003 and she has had quiet occupation of the land. She further stated that she had engaged the agent to give her the title but he did not. She admitted that PEX 4 did not mention the land and added that in 2003 they were claiming the land as purchasers. She also confirmed that her claim is based on adverse possession.
22. On re-examination, she stated that the Defendants are sued as administrators of the Estate of Wakaba. She added that she had never shifted from the land. She also stated that her land was never reduced and confirmed that the title is in the name of Simon Wakaba.
23. Margaret Njeri Mwangi testified as PW5. She produced her statement on page 48 which was adopted as her evidence in chief. She testified that in 1994 she bought the suit land which was ¼ of an acre through an agent, Mr Kibugi. She further testified that she took possession and that she has been occupying the same for 27 years. It was her testimony that the registered owner of the property is Simon Wakaba Murigi. On cross examination she confirmed that she never bought land directly from Mr Wakaba as she used agents. She further confirmed that Mr. David Kibugi was Wakaba's agent who showed her the land. She also confirmed that she bought land No. Block 2/1024 but admitted that she did not have any receipts.
24. She confirmed that the green card shows that the plot was registered on 30/12/1996 and added that she never had any documents in 1994. She admitted that she never saw the title and stated that she is claiming ¼ of an acre. She confirmed that Block 2/1024 measured 2 ½ acres divided in 4 quarter acres. She confirmed that she has not put up house since she did not have the title.
25. The witness was shown PEX 8 and she confirmed that problems started in 2003 when Mr Kibugi wanted to resurvey the land. She confirmed that the resurvey was done on the paper but not on the ground. She stated that they then registered a restriction on 11/3/2003 and added that she did not know the person who removed the restriction and why. She lodged the complaint on behalf of the 5 plaintiffs' but that the same was never resolved and that was when they came to court. She added that she had filed a separate suit which was consolidated with others.
26. On re-examination, she stated that the title is in the name of Simon Wakaba and added that she had never met him. She stated that she had wanted to get a title deed when they met David Nguhiu Kibugi but that they did not know whether he had the documents. This marked the close of the Plaintiff's case.

Defendant's Case

27. Elijah Kuria Wakaba testified as DW1. He produced his written statement dated 10/4/2023 which was adopted as his evidence in chief. He testified that Samuel Wakaba Murigi (deceased) was his father and that Tabitha and Mary are his sisters. It was his testimony that the land in dispute is in Ndimu area Nakuru measuring 45 acres. He testified that he land is in their possession and that no one including the Plaintiffs stays on the land. He testified that his father never sold the land. He further testified that he



- did not know about Title No. Dundori/Miroreni Block 2/ 2/46 and that Title No. Dundori/Miroreni Block 2/1024 was a subdivision from a parent title of 24 acres. He testified that his father inherited the land from his grandfather John Murigi Wakaba. He testified that his father tried to sell the land 1024 but they did not have the money to buy it all. The 2nd, 3rd 4th defendants have never claimed land. He testified that his father died in 2015 and that he had surveyed the land but he was not sure when.
28. He testified that he saw his father survey the land through a surveyor known as Muthoni. It was his testimony that he subdivided the land in 50 X100 as he wanted to sell the land and that the subdivision was not completed and a restriction was placed on the by Julia Wangui Ng'ang'a. He further testified that there is no connection between the Plaintiffs and their land.
 29. On cross examination he admitted that he did not know the Plaintiffs and that his father never sued them. He further admitted that in 2003 his father saw restriction in his land but he never took any action to remove it as there was an ongoing court case. He confirmed that the letter dated 18/8/2003 was written to Mr. Simon Wakaba by Kahiga Waitidi. He added that 2/46 was not entirely sold but sold only 2 ¼ acres. He does not know where the land is. He stated that he did not know who is in occupation of the 2/4 of an acre and added that any person on the land is there by mistake. He confirmed that the Plaintiffs are not on the land and that the 3rd, 4th and 5th Defendants would get their land upon payment. He admitted that he did not have any survey plans.
 30. On re-examination, he stated that no surveyor was called to show the plots. He stated that the 24 acres show that the land was being sold to the 2nd, 3rd and 4th Defendants and not the Plaintiffs'.
 31. Mary Muthoni Wakaba testified as DW2. She produced her statement dated 10/2/2023 which was adopted as her evidence in chief. She testified that she knows the land in dispute as it belongs to them. It was her testimony that she never saw the Plaintiffs utilising the land. She testified that the 3rd, 4th and 5th Defendants are entitled to 2 ½ acres and added that there was no relationship between the Plaintiffs and 3rd, 4th and 5th Defendants. She testified that the title was issued on 30/12/1996 and that the case was filed on the year 2001. She further testified that in 1994 the title had not been issued and that 12 years had not lapsed when the case was filed. She testified that the land is four and one quarter acres and not one quarter of an acre. She also testified that the Plaintiffs' have never occupied the land.
 32. On cross examination, she confirmed that she is the administratrix of the estate of Simon Wakaba and that she does not know the Plaintiffs. She confirmed that the land is near Kenya Cereals and Produce Board about five km. She stated that their land is 1024 and that their father never sold the land to the Plaintiffs. She added that they did not know Kibugi as he was an imposter. She further stated that the 3rd 4th and 5th Defendants had wanted to buy all land and they paid 240,000/= but they could not pay the whole amount.
 33. She stated that in 1996 the land was subdivided with quarters and that later in 2003 he subdivided into plots. He subdivided 2 ¼ acres for 3rd, 4th and 5th Defendant and that they were authorised to take the land. She testified that the land has not been utilized. On re-examination, she stated that her evidence was for the consolidated cases. She stated that she did not know the parcel number where the Plaintiffs' stay. She added that she has not filed any case against them. That marked the close of the Defendant's case.
 34. On 14th July, 2023 this court conducted a site visit to the land in dispute where both parties were present and testified. The court noted that there were very old mature trees, Maize plantations, wooden Gate, old Semi permanent structures constructed in 1996, underground tank, store done on the land occupied by Julia Wangare Ng'ang'a. She had connected electricity on the land It also confirmed



the land as DUNDORI/MIRORENI/BLOCK 2/1024 The plaintiffs each showed the court their respective parcels on the ground which were in their possession.

Plaintiffs Submissions

35. Mr Kibet learned Counsel for the plaintiffs submits that the suit property is registered in the names of Simon Wakaba Murigi (deceased). That the registered owner Simon Wakaba Murigi (deceased) never transacted or dealt with the plaintiffs at all, over the respective plots. That the plaintiffs bought their respective portions from David Nguhiu Kibugi in or about 1994. That the plaintiffs immediately thereafter took possession of their respective plots. The plaintiffs are to date in possession and occupation of their respective portions of the suit property. That David Nguhiu Kibugi was not the agent of the registered owner Simon Wakaba Murigi (deceased). That the plaintiffs occupy distinctive and defined portions of plots measuring one quarter acres forming part of Dundori Imiroreni Block 2 11024.
36. That the deceased Simon Wakaba Murigi despite being registered owner of the suit property and not having instructed David Kibugi to sell the suit property took no action against the plaintiffs or David Kibugi over their dealings on the suit property.
37. The plaintiffs contend that from the site visit by the court, it was clear that the plaintiffs are in occupation of their respective portions with well-designed access road serving the occupants and also connected with electricity supply passing through the said service road.
38. According to counsel, the service road in the suit property is well designed such that it is serving the plaintiffs and other occupants owning plots opposite each other. The service road is in the middle of the property and it was clear it has been of use for a long period of time. The plaintiffs argue that it clear from the evidence adduced that the plaintiff's occupation of their respective plots has been open, without the consent or permission of the registered owner. Further despite the open occupation by the plaintiffs, the registered owner took no action to assert his rights over the property.
39. The registered owner categorically denounced David Nguhiu Kibugi as his agent as seen from letter dated 5th September 2003 by P.M Njuguna & co advocates which says as follows:-

“our client never appointed an agent in the name of David Nguhui Kibugi as alleged in your letter under reply”
40. The registered owner and the two witnesses in court for registered owner distanced themselves from the purported agency relationship with Mr. David Nguhiu Kibugi completely, and as such the entry by the plaintiffs into the suit property cannot therefore be said to have been with the consent and knowledge of the registered owner. The plaintiffs argue that permission or consent of a stranger with no link with the registered owner cannot amount to consent or acquiescence by the registered owner.
41. According to the plaintiffs, their evidence demonstrates that they have been in open, continuous and uninterrupted occupation. Despite the registered owner learning of a caution placed by the 5th plaintiff, he chose to ignore and kept away. To date the registered owner has done nothing to assert his claim of the land in which is the registered proprietor. Even after having been sued by the plaintiffs, the registered owner has not counterclaimed or sought to affirm his ownership.
42. The plaintiffs occupation is notorious and without any secrecy. The notoriety is evidenced by existence of road serving the plaintiffs together with electricity in the middle of the property.



43. The defendant in giving evidence suggested that they have been using the land themselves, but upon the site visit it was clear that the assertion was not supported by setup of the suit property, which is well demarcated into quarters with even other 3rd parties occupying other portions within the suit property.
44. The plaintiffs submit that they have established that they have had open," continuous uninterrupted possession of their respective portions forming part of land parcel Dundori Mimioreni Block 2 /1024 for a period beyond 12 years. That the defendant in evidence and affidavits suggested that the registered owner re-entered the property sometimes in 2003 for resurvey. However, this fact was refuted, and confirmed by the site visit the property is subdivided into 1/4 plots and not 50ft by 100ft. The registered owner herein has never instituted any legal proceedings as a way of asserting his right of the suit plots.
45. The plaintiff relies on Githu V Ndeete (1984) KLR 776 where the court of appeal held firmly as follows:-

“Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by adverse possessor. Assertion of right occurs when the owner takes legal proceedings or make an effective entry into the land...in my view giving notice to quit is cannot be an effective assertion of right for purpose of stopping time from running under *Limitation of Actions Act*”
46. The plaintiff referred to the case of Gatimu Kinguru v Muya Gathangi as an example of an adverse possessor obtaining tittle to an identifiable portion of an owner’s land.
47. The plaintiffs further submit that what is important in adverse possession is that to constitute dispossession, acts must have been done inconsistent with the enjoyment of soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface of land; but cultivation of the surface without fencing off has been held sufficient to prove possession. The plaintiffs herein have all fenced off the portions they are claiming in addition to actively cultivating for a period beyond 12 years.
48. According to the plaintiffs, the date when the title deed was issued according to the Green card for Dundori/Miroreni Block 2/1024(NDIMU) was on 30th December 1996 and it's not in dispute that the mother title namely Dundori/Miroreni Block 2/46 was registered in the name of the 1st defendant before the same property was then subdivided to Dundori/Mororeni Block 2/1024.
49. The plaintiff contends that at the time of subdivision and creation of the title above the plaintiffs were already in occupation and possession of the surface of land, the possession was taken in the year 1994 and therefore time starts running in 1994 before subdivision.

1st Defendant’s Submissions

50. Gatu Magana learned counsel for the first defendant argues that the parties are bound by their Pleadings. The Plaintiffs' claim herein as pleaded, is purely on adverse possession. That it is trite Law that parties are bound by their pleadings. So too, the Court is enjoined to only determine and/or grant such reliefs as is pleaded, and claimed, before it. Therefore, in law, the Plaintiffs cannot be heard to claim for relief based on any other causes of action, such as contractual purchase, which the Plaintiffs herein have extensively attempted to prove, but did not plead.



51. Counsel relies on the case of Independent Electoral and Boundaries Commission & another -v- Stephen Mutinda Mule & 3 others (2014) eKLR, the Judges of Appeal quoted with approval the words Of Sir Jack Jacob, in his article "The Present Importance of Pleadings" thus:-

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality. Each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. The court itself is as bound b) the pleadings of the parties as they are themselves.

52. The 1st defendant submits that it is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. The court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial, by their pleadings and neither party can complain if the agenda is strictly adhered to. The proper legal position (is) that parties are bound by their pleadings, which in turn limits the issues upon which a trial court may pronounce.

53. The 1st defendant relies on the dictum of Judge Pius Aderemi JSC, in *Adetoun Oledaji (Nig) Limited Vs Nigeria Breweries PLC*, S.C 91 of 2002, holding that;

"...it is now a very trite principle of law that parties are bound by their pleadings and that and evidence led by and of the parties, which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings, goes to no issue and must be disregarded".

54. The 1st defendant contends that in Law, the Plaintiffs are bound by their pleadings herein. As such, the plaintiffs' claim on contractual purchase, which is not anchored on any pleadings, cannot be entertained/ determined by this Honorable Court. As for the evidence adduced by the Plaintiffs on contractual purchase, they urge this Honorable Court to disregard it, as it does not support the Plaintiffs' pleading of adverse possession.

55. The defendants submit that this suit is expressly brought under Section 38(1) of the *Limitation of Actions Act*, and the old Order XXXVI rule 3D of the old Civil Procedure Rules. These twin provisions stipulate, in mandatory terms, the mode of moving the Court in a claim for adverse possession. Any different nature of claim, for instance a claim premised on contractual interest or purchase of land, cannot be brought by way of Originating Summons, but rather by way of a regular suit commenced by Plaintiff.

56. In the present case, no other claim save for that of adverse possession would be available for consideration or determination herein. This was the holding by Hon. A.G. Ringera J (as he then was), in the case of *James Obande Wasui -vs Jeremiah Ochwada Musumba* (2002) eKLR, where the court expressed itself thus (last paragraph);

“the plaintiff's claim that he may have an overriding interest over the Respondent's land under the provisions of the Registered *land Act* cannot be a matter for adjudication in this Originating Summons as the only relief sought and indeed the only relief which could be sought in an Originating Summons of this nature was the registration of the applicant as proprietor of the suit land by virtue of adverse possession. ”



57. The 1st defendant further submits that the Plaintiffs cannot purport to pursue a claim premised on contractual purchase of land in this Originating Summons.
58. On privity of Contract the 1st defendant submits that the Claim for enforcement of contract herein, would also fail for want of privity of contract. He contends that the doctrine of privity of Contract is a long-established part of the Law of Contract, which ensures that, parties that actually negotiated a contract who are privy to it are the only ones entitled to enforce its terms.
59. The defendants argue that as per the privity of Contracts doctrine, a Contract cannot confer rights or impose obligations on any person other than the parties to the Contract. Accordingly, a contract cannot be enforced either by or against a third party. The Plaintiffs' case herein is that, David Nguhu Kibugi, advertised sale of some parcels of land measuring 1/4 acre each, from the parcel of land known as Dundori/Miroreni Block 2/1024. To which they purchased the said parcels of land from David Nguhu Kibugi and duly paid him the purchase price. The said David Nguhu Kibugi is a stranger, who was never the registered owner of the Suit land herein, and who is not even a party in this Suit.
60. That in law, the said, David Nguhu Kibugi, had no legal capacity to sell that which he did not legally own.
61. He had no good title to the land which he could pass on to the Plaintiffs. That the purported contract between David Nguhu Kibugi and the plaintiffs' herein cannot in law, bind either the Deceased, or his Estate, or his legal representatives the 1st Defendant herein. It could also not confer title to the plaintiffs.
62. The 1st defendant argues that there is in fact no possession of the Suit land by the Plaintiffs as one of the ingredients, an Applicant(s) must prove in a claim for adverse possession, is possession. This, must be actual, meaning there must be sufficient degree of physical occupation for the requisite period. In this case, she submits that the Plaintiffs' allegation of being in possession of portions of land Title No. Dundori/Miroreni Block 2/1024, is false and non-existent.
63. The Suit land Title No. Dundori/ Miroreni Block 2/1024, measuring approximately 4.5 acres, was a sub division of land Tide No. Dundori/ Miroreni Block 2/46, measuring approximately 24 acres that the proprietor, Simon Wakaba Murigi, had inherited from his late father John Murigi Wakaba.
64. In Adverse possession claims, it is now trite that applicants bear the burden of specifically identifying the land, they are in possession of.
65. According to the 1st defendant, the Plaintiffs herein merely pleaded that they are in possession of a quarter an acre each, of the land known as Title No. Dundori/ Miroreni Block 2/1024. The Plaintiffs failed to specifically identify the portions of land they allege to be in possession of, as they did not adduce any survey or documentary evidence that could prove this.
66. This flaw could not even be remedied with the site visit that was conducted by the Court and the parties herein, as it was still not clear which specific portions the plaintiffs were allegedly in possession of and if indeed they were in possession of portions within land Title No. Dundori/ Miroreni Block 2/1024.
67. This was because of the Plaintiffs' failure to adduce survey report or documentary evidence to prove that the alleged Plaintiffs' land was within Dundori/ Miroreni Block 2/1024.
68. The 1st defendant argues that the crops found by the Court on the land during the site visit, could not be proved by the Plaintiffs it belonged to them. Indeed, in January, this year (2023) when the 1st Defendants visited the suit land, the crops were not on the land. Clearly the Plaintiffs' planted the crops, as the hearing herein was proceeding, in a ploy to hoodwink this Honorable Court that they have been in possession of the Suit land.



69. Ultimately, she submits that the Plaintiffs have failed to prove that they are in possession of land Title No. Dundori/ Miroreni Block 2/1024. Hence the claim for adverse possession cannot stand herein.
70. The 1st defendant further submits that even if the plaintiffs were in possession the same has not been continuous and uninterrupted for at least 12 years. First, the Plaintiffs claim to have purchased portions of the Suit land in 1994, and thereafter took possession of the land. However, the legal title to the Suit land was created and registered in 1996. It is now well settled, that time in adverse possession claims start running from the date of creation of title. In this case, 1996, and therefore by the time the Plaintiffs instituted this claim in 2007, twelve years had not lapsed.
71. The 1st defendant relies on the decision by Angote J in *Kahindi Ngaia Mwangandi -vs- Mtana Lewa* (2014) e KLR, where he correctly stated that;
- “Indeed the principle that pervades statutes of limitation is that limitation extinguishes the remedy, but not the right. This means that the legal right to own property is not defeated, but only the right to lay a claim over the property is extinguished.”
72. She submits that even if the Plaintiffs had ever been in possession of the Suit land, the same would have stood extinguished when the late Simon Wakaba Murigi, the registered owner of the Suit land re-entered his land in 2003 and asserted his title.
73. The 1st defendant submits that the claim for Adverse Possession does not lie if the claimant entered and remained on land through a purchase agreement or with permission and authority of the owner. The Plaintiffs maintain that they entered on the Suit land in 1994 as purchasers, with the express invitation, permission and authority of David Nguhu Kibugi, the alleged agent of the proprietor, Simon Wakaba Murigi (deceased). The Plaintiffs' further supported this assertion with Par. 4, a letter by the Plaintiffs' Advocate purportedly addressing David Nguhiu Kibugi's principal, Simon Wakaba.
74. Learned counsel submits that permissive occupation is inconsistent with adverse possession. Occupation of land by an intruder who pleads adverse possession must be non-permissive use i.e. without permission from the registered owner of the land occupied. However, in this case, the Plaintiffs admit that their purported possession of the suit was contractual at its inception, they took possession of the land as purchasers and not as trespassers or through other unlawful means.
75. Ultimately, learned counsel submits that the plaintiffs have totally failed to prove any or the necessary ingredients for a claim in Adverse possession; as such the entire suit should be dismissed, with costs to the 1st defendant.

Analysis and Determination

76. I have considered the pleadings and the evidence on record and rival submissions and I am of the view that the following issues need to be determined:
- a. Whether the Plaintiffs' entered into a sale agreement with the 1st Defendant.
 - b. Whether occupation and possession by the Plaintiffs over Dundori/Miroreni/Block 2/46 constituted adverse possession.
 - c. Who should bear the costs of the suit.
77. On the first issue for determination, it is not in dispute that the 1st Defendant is the registered proprietor of the suit property. The Plaintiffs led evidence to show that they had entered into an agreement for the sale of the suit property with David Nguhiu Kibugi as the agent of the 1st defendant. PW1 to PW5 all



testified that they bought the suit land through the 1st Defendant's agent one David Nguhiu Kibugi. They testified that they never knew Simon Wakaba Murigi (deceased) but that he had authorized David Nguhiu Kibugi to subdivide and sell the suit land on his behalf. The 1st Defendant filed a Replying Affidavit in response to the Plaintiffs Originating Summons where he denied having entered into any agreement with the Plaintiffs or authorized any agent to sell the suit land on his behalf. During cross examination, DW1 testified that they David Nguhiu Kibugi was not their father's agent but an imposter.

78. This court has looked at the letter dated 15th March, 2002 allegedly authorizing David Nguhiu Kibugi to subdivide and sell on behalf of the 1st Defendant.
79. This court is of the view that the same does not amount to a valid letter of authorization as the 1st Defendant never appended his signature. He is not the author of the letter and therefore this court finds that the said letter was done without the knowledge of the 1st Defendant. In addition, the Plaintiffs did not produce any sale agreement as evidence of sale of the suit property. In view of the foregoing, this court is satisfied that there was no sale agreement entered into between the Plaintiffs and 1st Defendant for purchase of the suit property.
80. I do agree with the 1st defendant's argument that there was no privity of contract between the 1st defendant and the plaintiffs due to the fact that David Nguhiu Kibugi was not the agent of the 1st defendant as there was no contract of agency.
81. The Plaintiffs' case herein is that, David Nguhu Kibugi, advertised sale of some parcels of land measuring 1/4 acre each, from the parcel of land known as Dundori/Miroreni Block 2/1024 which they purchased from David Nguhu Kibugi and duly paid him the purchase price.
82. I do find that the said David Nguhu Kibugi is a stranger to the 1st defendant. I do agree with the 1st defendant that David Nguhu Kibugi, had no legal capacity to sell that which he did not legally own.
83. He had no good title to the land which he could pass on to the Plaintiffs. That the purported contract between David Nguhu Kibugi and the plaintiffs' herein cannot in law, bind either the Deceased, or his Estate, or his legal representatives the 1st Defendant herein. It could also not confer title to the plaintiffs.
84. Going to the second issue for determination, the law on adverse possession is provided for under the [Limitation of Actions Act](#). Section 7 of the Act which provides:

“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

- “(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”.

85. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 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, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

86. The law on adverse possession is hinged on five basic maximums thus:-

A. Open and notorious use of the Property.

For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

This court finds that the plaintiffs met this conditions because they were in possession and when the court visited the site found evidence of fencing, opening or closing gates, an entry to the property, crops, buildings, that a Mr Simon Wakaba Murigi or the administratrix of the estate was expected to know about.

B. Continuous use of the Property –

The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. In this case the plaintiffs were in possession from 1994 to-date and have never been dispossessed by the 1st defendant and the allegations that the 1st defendant entered the land in 2003 and caused subdivision were not verified. In any event the 1st defendant denied that David Kibugi was his agent and therefore cannot now claim that the entry by David Kibugi in the suit land was repossession by the 1st defendant.

C. Exclusive use of the Property



The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a granary on the owner's property, and the owner then uses the granary, the adverse party cannot claim exclusive use. In this case Simon Wakaba Kibugi did not ever enter the suit land to use the same. The plaintiffs were in exclusive use of the land.

D. Actual Possession of the Property

The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The plaintiffs are in actual possession of the property.

E. Non Permissive Possession.

The owner of the property should not have given his permission for the possession of the property. There is no evidence that the 1st defendant gave permission to the plaintiffs to utilize the land.

87. It is not in dispute that the Plaintiffs took possession of the suit property sometimes in 1994 and started cultivation and planting of trees. It was their testimony that they took possession with the proprietor's permission through David Nguhiu Kibugi and claimed that they were not trespassers. PW5 on the other hand during cross examination confirmed that problems begun in 2003 when Mr. Kibugi came to the suit property to conduct subdivision of the property without their knowledge. DW2 confirmed that in 1996 the land was subdivided in quarters and that later in 2003 subdivided into plots. This court visited the land in dispute and found no evidence that Simon Wakaba Murigi ever dispossessed the plaintiffs from the suitland.

88. In the case of Sisto Wambugu -vs- Kamu Njuguna (1983) eKLR and Samuel Miki Waweru -vs- Jane Njeri Richu (2007) eKLR. The court of Appeal in the latter case expressed themselves as follows:-

“It is trite Law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in Jandu -vs- Kilpa (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) IKAR 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 adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from the date of the termination of the contract.”

89. The distinct facts of this case are that the plaintiffs were given permission by Mr David Nguhiu Kibugi to take possession after paying him some money allegedly on behalf of Simon Wakaba Murigi. The permission was not given by Simon Wakaba Murigi and therefore it cannot be said that the plaintiffs were in possession with the permission of Simon Wakaba Murigi. The true state of facts are that the plaintiffs were trespasser having been given permission by Mr David Nguhiu Kibugi who wasnot the owner of the land.



90. In the Court of Appeal case of Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184, it restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

91. In the instant case, it is clear from the facts and evidence adduced that there was no interruption that took place by Simon Wakaba Murigi before the 12 years lapsed. The Plaintiffs testified that they took possession of the suit property in the year 1994. PW4 during cross examination confirmed that re subdivision took place in the year 2003. However, when the court went on the ground there was no evidence of subdivision as the plaintiffs are still in possession as it were in 1994. It is therefore clear that the possession by the Plaintiffs on the suit property was never interrupted and thus this court is of the view that they have been in adverse possession of the suit land.

92. Having then carefully considered the available evidence, this court finds that the Plaintiffs have proved their case to the required standard of balance of probabilities. In the upshot of the above is that Plaintiffs Amended Originating Summons dated 17th January, 2023 is allowed thus:-

1. The Plaintiffs are each are entitled under Section 38 of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya to be registered as the absolute proprietors of the parcel of measuring approximately a quarter of an acre under the Plaintiffs' occupation and which land is part of Title No. Dundori/Miroreni Block 2/1024.
2. The Defendants should excise the portions of land occupied by each of the Plaintiffs and transfer to the Plaintiffs by signing all the requisite forms, documents and conveyance documents, in default, the Deputy Registrar of the Honourable Court should execute all such documents as may be necessary for the registration of the Plaintiff as the proprietor of the land.
3. The Defendants pay the costs of this suit.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF OCTOBER 2023.

A.O. OMBWAYO

JUDGE

