



Mogaka v Ouko & another (Being sued as personal representatives and administrators of the Estate of the Estate of Jason Atinda Ouko) (Environmental and Land Originating Summons 282 of 2011) [2025] KEELC 1216 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1216 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 282 OF 2011
OA ANGOTE, J
MARCH 13, 2025

BETWEEN

THOMAS NYANGERI MOGAKA PLAINTIFF

AND

ARON TAFARI OUKO 1ST DEFENDANT

ROSELYN DOLA OUKO 2ND DEFENDANT

**BEING SUED AS PERSONAL REPRESENTATIVES AND ADMINISTRATORS
OF THE ESTATE OF THE ESTATE OF JASON ATINDA OUKO**

JUDGMENT

1. Vide an Originating Summons dated 13th June, 2011 brought pursuant to the provisions of Order 37 Rule 7 of the *Civil Procedure Act* and Sections 3, 3A and 63(e) of the Civil Procedure Rules, the Plaintiff seeks the following reliefs:
 - i. That this Honourable Court be pleased to decree that part of the sub-divided title as sub plot B being 5 acres of L.R No 3589/6 Karen has vested in the Plaintiff by virtue of Section 38 of the Limitations of Actions Act, Cap 22 by virtue of his open, continuous and un-interrupted occupation of that parcel of land for more than 13 years.
 - ii. That a vesting order for the parcel of 5 acres of L.R No 3589/6 Karen be issued in favour of the Plaintiff-Thomas Nyangeri Mogaka.
 - iii. A declaration be and is hereby issued that the Deputy Registrar do sign transfer documents in respect of 5 acres of L.R No 3589/6 Karen in favour of the Plaintiff.
 - iv. That the costs of this originating summons be borne by the Respondents.



2. The Originating Summons is supported by the Affidavit of the Plaintiff, Thomas Nyangeri Mogaka, of an even date. He deponed that sometime in 1987, with the consent of the deceased, Jason Atinda Ouko, he entered into the parcel of land delineated as sub-plot 'B' measuring 6 acres being part of L.R No 3589/6 (the suit property) whose title was registered in the name of Jason Atinda Otuko.
3. Upon his entry, he deponed, he constructed a temporary structure housing Mogstone Seed Company, his company involved in seed research; that he also embarked on land preparation by improving the drainage and access roads for the seed project and that he has lived on the aforesaid 5 acres land un-interrupted to date.
4. According to Plaintiff, sometime in 1991, boundary demarcation issues arose between himself and a neighbor, Charles Maranga; that he informed Mr. Jason Atinda Ouko, the registered proprietor, of the same vide a letter dated 4th January, 1991 and that Mr. Ouko responded on the same day confirming the measurements of his property.
5. The Plaintiff stated that to protect his interests over the property, he filed Civil Case No 1295 of 1991 where Jason Ouko (now deceased) admitted that he was in occupation of the suit property which he had intended to purchase from him and that before the matter could be finalized, Jason Atinda Ouko died.
6. He opined that since the death of Mr. Ouko, he has lived on the suit property un-interrupted for the last 15 years without right, without force and without answering to anybody.
7. In response to the Summons, Aaron Tafari Ouko, a co-Administrator of the estate of the deceased, Jason Atinda Ouko, swore a Replying Affidavit on 6th December, 2011. He deponed that the estate of the late Jason Atinda Ouko is, and has at all material times been the registered owner of the entire parcel of land known as L.R No 3589/6- I.R 23229; that the Plaintiff has indicated that he entered into the portion of the suit property he claims with the consent of the deceased and with the intent to purchase the same; that the Plaintiff has admitted that he entered the suit property on the basis of his purchaser's interest pursuant to an agreement of sale evinced by the letter dated 13th June, 2011, and that the Plaintiff has since 1992 registered a caveat on the title to the suit property.
8. According to the Defendants, in 1991, the Plaintiff sued the deceased and Mr. Charles Maranga claiming inter-alia, nullification of the sale between the two on the basis that it was overlapping with part of the portion under sale between him and the deceased and sought for an injunction restraining the deceased and Charles Maranga from trespassing onto his property and damages against the two aforesaid.
9. In response to that suit, it was deposed, the deceased indicated that he had agreed to sell the land to the Plaintiff who only paid Kshs 10,000 out of the agreed sum of Kshs 570,000; that the agreement had not been reduced into writing and he had not executed or registered any interest in the Plaintiff's favour and that in lieu of the foregoing, the Plaintiff was putting up structures on the suit property at his own risk.
10. Mr. Tafari, the 2nd Defendant, deponed that the Plaintiff, having obtained temporary injunctive orders on 14th March, 1991 relied on the same for years without any further action in the suit leading to its eventual dismissal for non-attendance in July, 2001; that his attempt to reinstate the suit was unsuccessful and that on 18th November, 2008, the Registrar of Titles wrote to the Plaintiff giving him notice to withdraw the caveat placed by him on the parcel of land.
11. He urged that it is apparent from the foregoing that the Plaintiff has not demonstrated factual possession having entered into the land in 1987 and instituted a suit against the registered owner



between 1991-2001, enjoying possession on account of the court order, registered a caveat against the title in 1992 and was asked by the Registrar to remove the caveat in 2008.

12. Further, it was deponed, the Plaintiff has not demonstrated animus possidendi because he entered into the suit property with the intent to purchase the same, filed a suit against the registered owner and registered a caveat on the property and that the Plaintiff has no cause of action and the Summons should be dismissed.

Hearing and Evidence

13. The matter proceeded for hearing on 27th September, 2023. The Plaintiff, as PW1, adopted his witness statement dated 28th May, 2023 as his evidence in chief and produced the bundle of documents dated 25th May, 2023 as PEXHB1. [Except for photos at pages 31-34 and 172-185].
14. It was his oral evidence that he seeks to be declared the owner of the 5 acres of land that he is currently occupying by way of adverse possession and that he entered on the land in 1987 having bought 6 acres thereof vide a verbal agreement with Mr. Ouko who died on the 2nd February, 1996.
15. According to Mr. Mogaka, when he entered into the property, there were no neighbors and the nearest occupant was about 200 metres away; that the entire parcel of land was 87 acres and the seller was not in occupation; that he filed the earlier suit because the vendor sold the same parcel of land to other people despite him paying for the same and that one Mr. Maraga and a lady who were neighbors began claiming his portion of land.
16. PW1 stated that vide the letter of 4th January, 1991, Mr. Ouko wrote to him informing him that his land is 2.5 acres which position was erroneous; that him and Mr. Ouko's lawyer agreed that he cedes one acre to settle the dispute which he did and that he now occupies 5 acres which he lives on with his wife and four sons.
17. PW1 stated that of the Ouko family, he only knows two of the sons; that none of the Oukos children live on the land; that the court should give him the title to the suit property in respect to the 5 acres and that he has suffered and has a big family.
18. In cross-examination, PW1 stated that he purchased sub-plot B on the basis of a provisional subdivision scheme and that according to the letter by the City Council of Nairobi dated 5th January, 2006, there was no final approval of the scheme.
19. PW1 stated that the price for the 6 acres was Kshs 60,000 out of which he paid the deposit of Kshs 10,000/= in 1987 and Kshs 6,000/= in 1990; that he paid 10% of the purchase price and was waiting for his title; that in 1992, he registered a caveat against the title as a purchaser; that as at 22nd October, 2017 when Mr. Kagwe swore an Affidavit indicating that he had purchased sub-plots 19 and 20, Mr. Ouko was deceased and that the letter of 11th November, 1995 by Mr. Kagwe makes reference to one plot being plot 19.
20. In re-examination, PW1 stated that Rosemary occupies 3 acres of the larger land; that plots 19 and 20 measure 2.5 acres each; that he has been on the property for 36 years; that Mr. Kagwe was Mr. Ouko's Advocate; that Mr. Ouko has never sought to evict him and that a surveyor went to the land and confirmed the acreage of the parcel he is occupying.
21. It was his further evidence on re-examination that he is unaware of the letter of 12th June, 1992; that the entry of '2.5 acres' in the said letter is handwritten and not countersigned; that he has never occupied less than 5 acres since 1987; that the correspondence between the Advocates was in an attempt to get a solution and that he is claiming the land not as a purchaser, but by way of adverse possession.



22. PW2 was the Plaintiff's wife. She adopted her witness statement dated the 26th May, 2023 as her evidence in chief. It was her evidence that they have been on the property for more than 30 years; that she knows the late Ouko and his sons having known them since they purchased the property in 1987 and that he initially sold them six acres but they have been occupying five acres.
23. PW2 stated that the two plots are now known as L.R 3589/37 and 38 and are currently registered in the names of the Defendants as Administrators of the Estate of Jason Atinda Ouko and that Mr. Ouko lived on a separate parcel of land while the 87 acres was occupied by persons who had purchased the same.
24. On cross-examination, she testified that they entered into the suit property by way of an agreement with the deceased to purchase the land; that they paid 10% and were to be issued with a title before paying the balance of the purchase price; that they took possession of the land with the permission of Mr. Ouko and that the 1987 agreement has never been cancelled.
25. She stated upon being re-examined that they claim the land as adverse possessors; that they surrendered one acre to the Oukos because Mr. Ouko had entered into an agreement with another purchaser and requested them to surrender the same on condition that they would get a title and that they were to get the title before paying the full purchase price.
26. PW3 was Justus Ochenge Duncan. He adopted his witness statement dated 23rd May, 2023 as his evidence in chief. It was his evidence that he works for Rahab Wangui Kageni, a neighbor to the Plaintiff who purchased a plot in the 87 acre parcel; that he has known the Plaintiff and his family for about 33 years and that the Plaintiff's parcel of land is approximately 5 acres which he has fenced and utilized.
27. According to Mr. Ochenge, the Kagenis, whom he works for, bought and paid for 5 acres but were only granted 2.5 acres in breach of the contract; that he is aware of the Standard Bank Account in which the late Ouko instructed the Kagenis to pay for the plot and that this is the same account in which Mr. Mogaka was instructed to pay his final instalment of the 10% deposit of Kshs 50,000 being Standard Chartered Bank- Account number 0100129734008, Moi Avenue Branch.
28. On the 24th June, 2011, he stated, the wife and sons of the late Jason Atinda Ouko brought goons into the 87 acres parcel of land and threatened to demolish all their homes and evict them calling them trespassers; that they were accompanied by Brian Yongo and Ahmed Nassir Advocate; that the Kagenis went to court and won the case and that Mr. Mogaka is still on the land to date.
29. It was his testimony on cross-examination that he has no evidence of any formal employment letter or application to show he works for Ms. Kageni and that he was not there when the Mogaka's paid for the land.
30. He stated during re-examination that he lives on the property belonging to Rahab Kageni; that the titles have changed and her (Rahab) land is now Block 149/1868; that Brian Yongo claimed the entire 87 acres and brought security to guard the property and that he managed to occupy Rahab's land but they went to court and he was evicted.
31. PW4 was Stephen Osembe, a lawyer, who adopted his witness statement dated 26th May, 2023 as his evidence in chief. It was his evidence that he has known the Plaintiff for approximately 30 years; that after his A-Levels, he was invited to Karen to till the suit land in 1990 and that they found the Mogaka's on the land as laborers' and knew his neighbors.
32. He stated that he is aware that Mr. Mogaka is growing many types of fruits on the land; that he remembers the Ouko family and knows that they lived on a different parcel of land; that the second



- son was a toddler when he worked there and that he worked there for one year between March 1990 to March 1991.
33. PW5 was Steve Rodgers Kobedo, a land surveyor practicing under the name of Rokos Mapping Consultants. He adopted his witness statement dated 6th June, 2024 as his evidence in chief and produced the documents at page 65, being IR 111/18 and a survey report dated as PEXHB2.
 34. It was his evidence that Mr. Mogaka sought his services with regard to his residence situate in Mukinduri Lane, Karen; that they proceeded to the suit property on 14th April, 2024 where they viewed the site, took measurements and photographs and that they ascertained the measurement of the suit property which is approximately 5 acres.
 35. PW3 stated that they received from Mr. Mogaka a copy of his National Identity card; the map pertaining to the mother title, L.R No 3589/6; the map pertaining to the 1992 sub-division and the Kenya Gazette special issue of 20th April, 2022, Vol CXXIV-No 68. According to PW3, the salient features on the suit property are three houses, an office structure, sewerage system, gatehouse, mature trees, orchard and water harvesting dam and/or fish pond.
 36. He stated that based on the current land registration regime in Nairobi, the parcel of land L.R 3589/37 is registered as I.R 216182 and L.R 3589/38 is currently registered as I.R 216181; that the two portions each measure 2.5 acres on the ground and are occupied by the Plaintiff and his family and that the properties formerly known as L.R 3589/37 and 3589/38 are occupied by several homesteads and resonate with Block Number 149/1870 and 149/1871 as per the Gazette Notice of 20th April, 2022.
 37. During cross-examination, he stated that the title to the suit property is currently in the names of Rosalyn Ouko and Aaron Tafari Ouko; that he visited the land but did not notify the registered owners; that the suit land has an orchid and a house and that the orchid is on L.R 3589/37 while the house is on L.R 3589/38.
 38. DW1 was Aaron Tafari Ouko. He adopted his witness statements dated the 7th February, 2019 and 21st June, 2021 as his evidence in chief and adduced the bundle of documents dated 22nd June, 2023 as DEXHB1.
 39. It was his evidence that the Plaintiff sought to purchase land and approached his father; that they agreed to the sale and purchase of a portion of 2.5 acres but the Plaintiff requested for more land to carry out his experiments which his father allowed and that pursuant to their agreement, the Plaintiff was to purchase 2.5 acres and use the other 2.5 acres to carry out his experiments.
 40. According to DW1, the Plaintiff never completed payments for the 2.5 acres; that the agreements have never been terminated; that the Plaintiff sued his father in HCC 1295 of 1991 which suit was dismissed and that there is another suit by Rosemary being ELC 415 of 2018 which is pending in respect of a different portion of land.
 41. In cross-examination, he stated that their family has never lived on the portion of land being 87 acres where the suit land is comprised; that the Mogakas are occupying two portions of the land being L.R 3589/37 and 38 and that he does not know how long the agreements were to last and knows there are time limits in law and that none of the parties rescinded the contract.
 42. It was his further evidence on cross examination that the Mogakas have never ceased occupying the two portions of land being 5 acres; that when they came on board, they issued a circular asking all persons on the land to provide evidence of how they entered thereon and that he has never met Mr. Kagwe and never knew him to be his father's Advocate.



Submissions

43. The Plaintiff's counsel filed submissions on 30th September, 2024. Counsel submitted that the law with respect to adverse possession is to be found in Sections 7, 13 (1) and (2), 17 and 38 of the *Limitation of Actions Act* and that speaking to the same, the court in Gabriel Mbui Mukindia Maranya[1993]eKLR, noted that where a landowner has been out of possession and a stranger has been in possession for a statutory period sufficient to bear the owners right to re-enter or recover possession by action, the registered proprietor holds it in trust for the person whom by virtue of the statute, has acquired the title.
44. It was submitted that whilst the Plaintiff entered into the suit property in 1987 with permission on the basis of a sale agreement, the agreement thinned and disappeared and as from 1990; that from that time, the Plaintiff commenced hostile occupation and that despite attempts to have him evicted by the family of the late Jason Ouko, and attempts at encroachment from the neighbours, he has never been dislodged from the property. Reliance in this regard was placed on the cases of Titus Mutuku Kasuve Mwaani Investments Limited & 4 Others[2004]eKLR and Sisto Wambugu Kamau Njuguna[1983]eKLR.
45. Counsel submitted that similarly, HCCC No. 1295 of 1991 was meant to repulse attempted interruption by the deceased which was done through the injunctive orders granted in the matter; that the Plaintiff's claim is reinforced by the Affidavit of Advocate Kagwe who affirmed that the deceased was aware of the Plaintiff's right but declined to fulfil his part of the contract and that further, the meetings referenced in 1995 and 2001 affirmed the Plaintiff's exclusive occupation.
46. It was submitted that in any event, the agreement entered into between the Plaintiff and the deceased was inherently flawed from the onset as the deceased was selling to him property already promised to another purchaser and that the first contract not having been validly rescinded, the subsequent oral contract was invalid. Reliance in this respect was placed on the case of Abuga & 2 Others Abuga[2020]eKLR.
47. Counsel urged that the Defendants' testimony contradicts the evidence adduced by them; that as regards HCCC No. 1295 of 1991, the same abated in 1997 and there was no suit to be dismissed and that the inaction by the Defendants crystallized their adverse possession of the suit property.
48. The Defendants' counsel filed submissions on 7th November, 2024. Counsel submitted that the law and requirements for adverse possession were reiterated in the case of Mbira Gachuhi(2002) IEALR 137 and Richard Wefwafwa Songoi Ben Munyifwa Songoi[2020]eKLR wherein it was stated that a person must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use of land by him, or those under whom he claims for the statutorily prescribed period without interruption.
49. It was submitted that in the circumstances, the Plaintiff entered the suit property under a sale agreement and with the consent from the vendor upon payment of the deposit and retained possession on the basis of the aforesaid sale and as such, he has not met the element of non-consensual, and non-permissive possession of the property.
50. Reliance in this respect was placed on the cases of Gabriel Mbui Mukinda Maranya[1993]eKLR, Erick Chepkwony Aengwo Jonathan Rutto Kibiesang[2013]eKLR, Samuel Miki Waweru Jane Njeri Eichu C.A No 122 of 2001(UR), Wambugu Njuguna [1983] eKLR 172, Richard Wefwafwa Songoi (supra) and Muchanga Investments Ltd Safaris Unlimited (Africa) Ltd & 2 Ors[2009]eKLR.



51. It was submitted that where there is a contract between the parties, the same can only be repudiated or rescinded by either of the parties upon issuance of a notice; that the fact that the Plaintiff continued to stay on the property and unilaterally deemed himself an adverse possessor rather than a purchaser, does not amount to a rescission of the contract and that rescission is generally available as a remedy or defence for the non-defaulting party and is accompanied by restitution. Reliance in this respect was placed on the cases of Njamunyu Nyaga[1983]eKLR, and Samuel Miki Waweru(supra).
52. Counsel noted that further still, the evidence by the Plaintiff, to wit, the pleadings in HCC 1295 of 1991, caveat registered over the property, correspondence between the Plaintiff and the then vendor's advocates, list of purchasers and affidavit of Advocate Kagwe show that he has at all times deemed himself a purchaser.
53. In any event, it was urged, as expressed in Cheromei Muigai[2024]KEELC 5604(KLR), a Plaintiff can only claim adverse possession upon payment of the entirety of the purchase price which payment was in the circumstances, admittedly not fully paid; that between 1991 to the dismissal of the suit in 2001, the Plaintiff's stay on the suit property was on account of the interim orders issued in HCCC No. 1295 of 1991 and that the court in Andrew Kariuki Boko David Kinuthia Kimani[2019]eKLR acknowledged that the existence of injunctive orders denies the title owner a chance to assert his rights.

Analysis and Determination

54. Having considered the Originating Summons, the Affidavit in support thereof and in opposition thereto and submissions, the sole issue that arises for consideration is whether the Plaintiff is entitled to 5 acres of L.R 3589/6, I.R 23229 by way of adverse possession.
55. Vide the present Originating Summons, the Plaintiff seeks to be declared the owner of 5 acres of the portion of land previously known as plot "B" in L.R 3589/6 Karen by way of adverse possession.
56. According to the Plaintiff, in 1987, he entered into the suit property pursuant to a verbal agreement for sale between himself and the registered proprietor, the deceased, and that pursuant to the terms of the agreement, he was to pay a 10% deposit, take possession and would pay the balance of the purchase price after receiving the title.
57. He contends that upon payment of the agreed upon deposit, being Kshs 60,000, and his taking possession, there was no longer any contractual inclination by any of the parties and as such his possession became adverse.
58. The Plaintiff adduced into evidence copies of the title deed to the suit property, documents pertaining to the approved sub-division scheme of 3rd May, 1997; deposit of bank statements dated 25th August, 1987 for the sum of Kshs 10,000 and 14th August, 1990 for Kshs 50,000; Standard Chartered Bank account slip belonging to Jason Atinda Ouko; photos in respect of the suit property and various correspondence in relation to the suit property.
59. The Plaintiff also adduced into evidence the agreement between the deceased and Ms Rosemary Moraa, electricity statements and water bills dated the 5th June, 1989, 19th August, 1991 and 28th June, 1995; court orders dated 14th March, 1991, 30th June, 1993, 23rd December, 1994, Penal notice dated the 4th January, 1995, pleadings and proceedings in HCCC 1295 of 1991, letters of grant of administration dated 22nd May, 2006, approved sub-division of 26th June, 1992, map showing amendment of approved sub-division of 87.5 acres, the purchasers' list and the table of purchase prices.
60. Vide the supplementary bundle, the Plaintiff adduced the title deed and sub-divisions of L.R 3589/6 into plots including LR Nos. 1870 and 1871 each measuring 2.5 acres, Gazette Notice Vol CXX1V-



No 68 dated the 20th April, 2022; payments for official searches of Nairobi/Block 149/1870 and 1871, the new sub-division map, Affidavit dated 20th May, 2010, succession certificate dated 22nd May, 2016, court order dated 11th April, 2018 in respect of Succession cause 353, land rates payments statement and receipts, survey report dated 31st May, 2024, topographical map sheet, correspondence, certificate of computer print-out, and court order dated 26th April, 2024.

61. On their part, the Defendants, while conceding to there being a verbal agreement for sale between the Plaintiff and the deceased contend that the same was for 2.5 acres of land whereas he was permitted to use the other 2.5 acres for purposes of carrying out his research.
62. They contend that nonetheless, the Plaintiff has always stayed on the suit property by asserting purchaser's interest; that to this end, the Plaintiff instituted HCCC No. 1295 of 1991 in which he was granted temporary injunctive orders restraining interference with his occupation; that he stayed on the property on account of the court orders aforesaid until 2001 when the suit was dismissed and that ultimately, the Plaintiff's plea of adverse possession is untenable.
63. As aforesaid, the Plaintiff lays claim to the suit property by way of adverse possession. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act, provides as follows:

“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.”

64. Further provisions are made under Section 13 which provides as follows:

- “(1) 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 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”

65. And Section 17 of the Act which states:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”



66. Finally, Section 38(1) and (2) provides the mechanism of having an adverse possessor registered as the proprietor of the suit property. The section provides as follows:

- “(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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

67. The net effect of the foregoing section is to extinguish the title of the proprietor of the land in favour of a party who has been in open, hostile, and continuous possession thereof for a minimum period of 12 years.

68. Discussing the concept of adverse possession, the Court of Appeal in *Mtana Lewa Kahindi Ngala Mwangandi* [2015]eKLR stated thus:

“Adverse possession is essentially a situation where a person takes possession of land, 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 12 years.”

69. As regards the elements in a claim for adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR stated as follows:

“A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession;
- (b) what was the nature of his possession;
- (c) whether the fact of his possession was known to the other party;
- (d) for how long his possession has continued; and
- (e) that the possession was open and undisturbed for the requisite 12 years.”

70. In a claim for adverse possession, the burden of proof is upon the person setting up and seeking to prove title by adverse possession.

71. To begin with, it is trite that a plea of adverse possession can only be made with respect to clearly identified, defined or at least an identifiable portion of land. From the evidence adduced herein, it is apparent that plot “B” within L.R 3589/6 (mother title) claimed by the Plaintiff no longer exists on account of various sub-divisions that have taken place.

72. The evidence before this court shows that in 1992, the mother title was sub-divided into 29 sub-plots. As per the sub-division plan, the Plaintiff lays claim to plots 19 and 20 which were issued with title numbers L.R No 3589/37 and 38 in the names of the Defendants. Pursuant to Gazette Notice dated 20th April, 2022, the aforesaid plots are now referenced as Nairobi/Block 149/1870 and 1871. This is uncontroverted by the Defendants. The court finds that the property being claimed is identifiable.



73. The parcels in issue are currently registered in the names of the Defendants, being Administrators of the Estate of the deceased having been so registered in their names on the 28th February, 2020. The deceased was the original registered owner of the property.
74. It is not in disputed that the Plaintiff entered into the suit property in the year 1987. It is also conceded that he has been in physical possession thereof from 1987 to date. What is in issue is the nature of his entry and stay on the property and whether the same can be said to be hostile and as such adverse.
75. Starting with the manner of entry, the Plaintiff states that the same was permissive on account of a sale agreement entered into between himself and the deceased. The Defendants concede to this, save that they contend that out of the 5 acres, the Plaintiff took possession of 2.5 acres as a purchaser while the deceased granted him permission to use the other 2.5 acres for his experiments.
76. In response to the Defendants' claim, the Plaintiff's raised a counter argument being that if indeed the deceased only sold to him 2.5 acres, then his entry into the remaining 2.5 acres was hostile and that this is evinced by the facts that contrary to the permission alleged, he constructed permanent buildings on the property.
77. In yet another counter-argument, the Plaintiff contends that the verbal agreement entered into between himself and the deceased was in any event materially defective and as such, his initial entry into the property was adverse.
78. It is clear that the Plaintiff initially entered the suit property as a purchaser, believing in good faith that he had acquired 6 acres of land, which later, with the consent of the registered owner, reduced to 5 acres. There is no evidence to show that at any point during this entry, the Plaintiff operated under the assumption that he was trespassing or asserting rights adverse to those of the vendor. This being so, the Plaintiff cannot retroactively characterize his entry as hostile.
79. Having found that the Plaintiff's entry into the suit property was permissive, can a claim for adverse possession arise therefrom? Speaking to this, the Court of Appeal in the case of *Wilson Kazungu Katana & 101 Others . Salim Abdalla Bakshwein & another* [2015] e KLR, cited with approval its decision in the case of *Samuel Miki Waweru . Jane Njeri Richu*, Civil Appeal No. 122 of 2001(UR), where it held thus:
- “...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in (accordance with) provisions of an agreement of sale lease or otherwise....”
80. Nonetheless, even where the initial entry is with permission, subject to an agreement and/or contract, a claim for adverse possession can lie in the right circumstances. Discussing this, the Court of Appeal in *Peter Mbiri Michuki Samuel Mugo Michuki* [2014] eKLR, held that:
- “ 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.”

81. Similarly, the Court of Appeal in *Wilfred Kegonye Babu v Henry Mose Onuko* [2019] eKLR quoting from *Wambugu Njuguna* [1983]KLR 172 held that:
- “Where the claimant is a purchaser under a contract of sale of land...The possession can only therefore become adverse once the contract is repudiated. The court further stated that where the claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment. In *Catthy Alucia Jebor Kiplagat v Vincent Komen Krelnut* [2018 Eklr, the court held that Adverse possession can be claimed where the registered owner fails to complete land sale process to frustrate the buyer who is in possession and occupation of the suit land.”
82. The Plaintiff maintains that the agreement between himself and the deceased essentially collapsed after he paid the agreed upon deposit price and that after that, contractual obligations between them thinned out and his continual stay was adverse. Equally, he claims, the attempts by the deceased to sell off his portion of the property constituted a breach contract.
83. In *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] eKLR, the court emphasized that adverse possession is calculated from the date of payment of the purchase price to the full span of twelve years, provided the purchaser has taken possession. There is no evidence to show that any of the parties repudiated the contract. Indeed, according to the Plaintiff, he was only supposed to pay the balance of the purchase after the transfer of the title in his name. On the contrary, in 1991, the Plaintiff instituted legal proceedings against the deceased, seeking, among other remedies, specific performance of the sale agreement.
84. In 1992, the Plaintiff registered a caveat against the suit property claiming purchaser’s interest. By pursuing this course of action, the Plaintiff was unequivocally asserting his rights as a purchaser, reinforcing the existence of a contractual relationship, thereby negating any claim of hostility.
85. Additionally, through HCCC No. 1295 of 1991, the Plaintiff obtained injunctive orders that preserved his occupation of the land. This means that the Plaintiff’s continued presence on the land was safeguarded by the court, not by any assertion of hostile possession. This lasted until 2001 when the matter was dismissed. The institution of the suit also stopped time from running.
86. Although the Plaintiff argued that the Defendant in HCCC 1295 of 1991 having died in 1996, the suit abated in 1997, the record does not show that the court marked the suit as having abated. To the contrary, the record shows that the suit was dismissed in 2001. What this means is that time for purposes of adverse possession started running in 2001, after the dismissal of the suit for want of prosecution.
87. That being the case, and considering that this suit was filed in 2011, it follows that this suit was filed before 12 years had lapsed. The time between 2001 to 2011 constitutes 10 years. Indeed, even as at 2001, the Plaintiff was still admittedly attending purchasers’ meetings conducting himself as such, and not as an adverse possessor.
88. In this matter, the court acknowledges and is sympathetic to the Plaintiff’s circumstances. The Plaintiff has been in occupation of the suit land for a significant period and has made substantial developments



on it. It is evident that he has invested time, resources, and efforts in improving the suit property, likely with the expectation that the purchase arrangements will be successfully concluded.

89. The court nonetheless bears in mind that it is the law as applied to the facts, not sympathy and morality, that determines a case. The court appreciates the dictum in *Mwinyi Hamis Ali v Attorney General & Philemon Mwaisaka Wanaka: CA No 125 of 1997*, where it was held as follows:

“adverse possession does not apply where possession is by consent and in a court of law sympathy does not take a second stand as the court is governed by statutes.”

90. Adverse possession is a doctrine that requires strict adherence to legal principles. In the circumstances, the Plaintiff has failed to establish the essential elements thereof, particularly the requirement of hostile occupation against the rights of the registered owner. His plea must fail.

91. In the end, the court finds that the Originating Summons dated 13th June, 2011 is unmerited. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mose for Plaintiff

Ms. Lukoye for Defendants

Court assistant: Tracy

