



**Ndwiga (Suing as Representative of Hesbon Ndwiga) v Kiande (Environment & Land Case 65 of 2017) [2023] KEELC 22553 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22553 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 65 OF 2017  
A KANIARU, J  
DECEMBER 14, 2023**

**BETWEEN**

**NALEAH NJURA NDWIGA ..... PLAINTIFF**

**SUING AS REPRESENTATIVE OF HESBON NDWIGA**

**AND**

**NJERU KIANDE ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff - Naleah Njura Ndwiga - suing as a representative of the estate of Hesbon Ndwiga filed this suit on 02.10.2012 by way of Plaint against the Defendant – Njeru Kiande. The said plaintiff went through numerous amendments and with leave granted on 25.02.2020, she filed a final plaintiff styled “Further Further Amended Plaintiff” dated 10.12.2020. That final plaintiff was filed on 14.12.2020.
2. The plaintiff has sought orders that the court do order transfer of 3 acres from LR Parcel No. Ngandori/Kirigi/832 from the Defendant to herself and the same be registered in the name of Naleah Njura Ndwiga after subdivision and registration; that the court extends time within which parties may apply to the Land Control Board for consent to transfer the suit land to the plaintiff; the defendant to be declared to be holding the 3 acres of the suit land in trust for the late Hesbon Ndwiga and his family and the said trust be dissolved; that the court declares that the plaintiff’s husband estate has acquired 3 acres out of the suit land by way of adverse possession and all the rights thereto and the said land be transferred to the plaintiff; a declaration that the plaintiff be registered as the legal owner of the suit land in place of the defendant; orders to the defendant to sign all necessary documents transferring the suit land to the plaintiff failure to which the Deputy Registrar be mandated to do so; issuance of mandatory restriction orders restraining the defendant from harassing her or transferring, sub-dividing, trespassing into the 3 acres of land unless for purposes of segmenting the 3 acres for the plaintiff; the Registrar to be ordered to remove/lift restrictions and or prohibitions lodged against the suit land.



3. The plaintiff's claim is that on or about 1964 through a written agreement, the Defendant received the sum of Kenya Shillings One Thousand Two Hundred on the promise that he would heave out, sell and transfer three acres from his half share of Land Parcel No. Ngandori/Kirigi/832 to the Plaintiff's husband. That the Defendant subdivided the suit land and gave vacant possession of the agreed portion to the deceased and his family but failed to transfer the title to the deceased. That they both attended the Land Control Board in 1975 but thereafter the defendant failed to facilitate the transfer or proceed with the agreed sale any further. That the plaintiff and her family have built a stone house and have occupied the suit land for over 50 years where they've buried other members of the family as well as the deceased. That the plaintiff has brought this suit as the administrator of the Estate of the deceased.
4. The defendant opposed the suit by way of a Further Amended Defence and Counterclaim dated 10.05.2021 and filed on 12.05.2021. He denied that there was any agreement to transfer the suit land herein or that he received any money in exchange for the said transfer. He also denied attending any Land Control Board in 1975 or even subdividing his land and said that any possession that was given to the plaintiff's husband and his family was that of licencees to be determined on demand; that the same was determined upon the deceased's death therefore the plaintiff and her family are trespassers on the Defendants land. He also contended that there was no valid contract for sale of land as the same became time barred in 1970 under the *Limitation of Actions Act*. That the plaintiff's suit is misconceived and barred by limitation there having been no surviving cause of action as at the time she acquired a grant to her husband's estate on 27.04.2010. That the deceased did not obtain the mandatory Land Control Board consent to the alleged contract of sale which is a controlled transaction and that the whole action to recover land became time barred after 12 years in 1976. The Defendant in his Counter claim prays for the dismissal of the Plaintiff's suit and for eviction orders against the Plaintiff from the subject land.
5. The suit was set down for hearing. PW1 was Naleah Njura Ndwiga the plaintiff in the suit. She adopted her witness statement and bundle of documents as evidence. She stated that she lives on the suit land with her family and that the deceased husband is the one who bought the land in 1964 from the defendant who was the seller. That both the defendant and the deceased signed an agreement and the same was witnessed to although all the witnesses died. That the land was subdivided so that they would get their 3 acres and there were other people who witnessed the subdivision; there were minutes of the subdivision. That they started living on the land immediately and built a house in 1965 which house is still there. They have extensively developed the land and after the subdivision was done, they got the mutation form which shows the land was sub divided into three with one portion being given to the deceased. That the land was not transferred to the deceased neither were boundaries fixed on the land.
6. On cross examination, she said that she was not there when the agreement was written but the husband showed it to her. That her husband died on 12.10.2003 and he would demand that the land be transferred to him but the defendant would threaten him with violence. That the reason why they did not file a case earlier was because the lands office kept on promising to settle their matter. That her husband and the defendant were not on good terms and that they would plant trees sometimes and the defendant would uproot them. That the defendant has never given them notice to vacate the land and that she has a permanent house on the land. They have also never physically fought over the land. She further testified that the land was originally registered in the names of the defendant and a Samuel Kanyoti and that they owned it in half share. That the deceased bought his land from the defendant not from Kanyoti.
7. PW2 was Sospeter Njagi Andrew Mbungu the brother in law to the plaintiff. He adopted his written statement as evidence. He testified that he knows the defendant since they were children. He said he lives in his land in Mutunduri together with his family. The plaintiffs husband was his late brother. That the deceased husband to the plaintiff bought the 3 acres of land from the defendant and that the



- witnesses who accompanied the parties to the lands office to transfer the land to the deceased told him about the sale. He testified that he could not tell whether the land was transferred to his brother.
8. On cross examination he testified that the witnesses who had told him about the sale were all deceased. That the plaintiff lives on the land with her children whereas the defendant lives on a different part of that same land. That the land was big and the defendant sold a portion to his brother and that the defendant lives on the portion he didn't sell. He testified that he had seen documents relating to that land. He also testified that he could not recall the number of the land but on re-examination and upon being shown the mutation form, he said that it stated the land was said to be Ngandori/Kirigi/832 which was subdivided into three portions. That the family of his late brother lives on one portion, another purchaser lives on another while the defendant lives on the third portion. That the other purchaser was called Samuel Kanyoti who is deceased.
  9. DW1 was Njeru Kiande the defendant. He adopted his witness statements and bundle of documents as evidence in his case. He testified that the suit land belongs to him and another person called Samuel Kanyoti who is not a party to the suit. That the plaintiff is from his clan and that she lives on his land. That she was given a place to build on the land by his father and was told that she would leave if she bought her land but now she has refused to leave. He denies having sold the land to either the plaintiff or her husband and admits that he knew the deceased. He further testified that the plaintiff's husband had put a caution on the land but he was told to remove it. That the plaintiff's husband never sued him. He denies having gone to the Land Control Board concerning the suit land and alleges that the plaintiff's sister was a member of the Land Control Board at Runyenjes and that she was trying to push things in order to ensure that the plaintiff got his land but she was not successful. He asked the court to get him back his land from the defendant.
  10. On cross examination, he testified that the signature on the sale agreement was not his and that he did not enter into a sale agreement with the deceased. That he lives on the suit land together with the plaintiff and that her husband was alive when she started living there. He testified further that his father gave the plaintiff the land to build a house after they were chased away from where they were living. That his father was called Kiande Kabuthi and that the green card does not show that the father was the owner of the land. He testified that there was no way the land ever belonged to his father and that he was about 20 years old when the plaintiff started living on the land. He admitted that the plaintiff's late husband placed a caution on the suit land as a purchaser of the land and that they went to the lands office together and the deceased lifted the caution. He testified further that the plaintiff lives on a big portion of land but he has not measured it; that his land parcel No. 832 is 10 acres where he lives with his family together with Samuel Kanyoti's family and that of the plaintiff. That the land has never been subdivided; a land Registrar who was the plaintiff's brother drew the map of the land and inserted numbers and details fraudulently which happened while the plaintiff's husband was dead; he never reported the matter to the police. He denied that there was any agreement between him and the plaintiff for her to continue occupying his land after her husband's death.
  11. On re-examination he testified that he was given the land when he was 18 years old and that at that time he didn't know much about land. That Samuel Kanyoti purchased his land from his father and that he was to get half the land and the defendant another half. That the plaintiff lives on a bigger portion of land than himself.

## Submissions

12. The suit was canvassed by way of written submissions. The plaintiff filed her submissions on 11.09.2023. She gave brief facts of the case and identified four issues for determination. The first was whether the defendant holds title to 3 acres out of land parcel Ngandori/Kirigi/832 in trust for



the plaintiff's husband. On this, she submitted that her case is that her husband and the Defendant had entered into a sale agreement for the sale of a 3 acre portion out of the suit land and the plaintiff's husband advanced the sum of Kshs. 1200 in consideration for the sale, which the defendant acknowledged upon execution of the agreement. As a result of this, there is a resulting trust that subsists in favour of the plaintiff. She cited the case of *Twalib Hatayan & Anor vs Said Saggat Ahmed Al-Heidy & 5 others (2015) eklr*. She further submitted that the Defendant's action of signing the land control board forms produced in evidence and attending the land control board shows that the defendant intended to transfer the said portion of land to the Plaintiff's husband. That the Defendant's action of subdividing the suit land into 3 portions, being his portion, the portion of the plaintiff's husband and the portion of Samuel Kanyoti shows the defendant's intention to be bound by the sale agreement. That the defendant's dispute about the validity of the sale agreement and denial of entering into the said agreement were mere denials. Further, it was submitted that the burden of proof of the alleged forgery of the defendant's signature on the sale agreement and the allegations of fraud lay on the Defendant which ought to have been pleaded in the defence and counterclaim. This burden was not discharged and therefore the allegation of fraud should fail. She cited the case of *Kinyanjui Kamau vs George Kamau Njoroge (2015) eklr*.

13. She identified another issue for determination as whether the plaintiff's estate has acquired 3 acres out of the suit land herein by way of adverse possession. It was her submission that she and her family have been in open, exclusive, uninterrupted and adverse possession of the 3 acres of the suit land. That it is not in dispute that the defendant is the registered owner of the suit land as evidenced by the green card; that she and her husband took occupation of the suit land upon purchase of the same in April 1964. That they have been living on it since then which translates to a period in excess of 50 years. That the defendant was aware of the occupation of the subject land by her family but took no steps to evict them; that the said occupation was not by licence and that the defendant gave no evidence of such licence. That her husband constructed a permanent house on the said land where they lived with no interference by the defendant; that she buried her husband and other family members thereon with no interference; and that the occupation of the suit land by the plaintiff was thus adverse to the defendant. That also 39 years had lapsed from the time the plaintiff's husband took occupation of the suit land in 1964 and by the time he died in 2003, a period in excess of 12 years had lapsed. She cited the cases of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi (2020) eklr* & *Chevron (K) Ltd v Harrison Charo Wa Shutu (2016) eklr* to support this position.
14. Further it was submitted that the plaintiff's suit is not time barred as the same is an action based on trust and that Section 20 of the *Limitation of actions act* provides no limitation period which applies to an action under trust. That on the plaintiff's action under contract and for recovery of land being time barred, an order was issued on 8/10/2012 vide Embu CM Misc Application No. 49 of 2012 (*Naleah Njura Ndwiga v Njeru Kiande*) where the plaintiff was granted leave to file suit against the Respondent out of time. That the defendant did not challenge the said leave to file suit out of time and therefore the case is properly before court. It was submitted further that the restrictions entered against the subject land ought to be lifted to enable transfer of the subject land to the plaintiff.
15. The defendant filed his submissions on 4.4.2022. He too gave a background of the case and identified about five issues for determination by the court. The first was whether the plaintiff's husband estate had acquired the suit land by way of adverse possession. On this he submitted that the plaintiff was living on the suit land based on permission granted by the Defendant and that the Plaintiff had not satisfied the requirements of a claim for adverse possession. That the plaintiff did not prove that there was a trust that was created or existed in her favour.



That the purported sale agreement had also been defeated by time as the same was said to have been executed in the year 1964 and if it were to be enforceable, any action thereto expired in the year 1970. The suit herein was filed in 2017, many years later after the expiry of the provided period for contract claims.

16. He further submitted that the law regarding consent from the Land Control Board was not complied with as the same ought to be obtained within 6 months of the making of an Agreement for a controlled transaction. He asks the court to allow the counterclaim as being the registered proprietor he holds an indefeasible title to the land and to take it away from him would be an injustice. He also prays for costs of the suit. He cited the cases of Ramadhan Wanzala Omoro v County Government of Kakamega (2020) eKlr citing the case of Samuel Miki Waweru v Jane Njeru Richu Civil Appeal No. 122 of 2001, Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakswain & Anor (2015) Eklr, Gichuki v Gichuki Civil Appeal No. 21 of 1981.

### **Analysis and Determination**

17. I have considered the pleadings, evidence, and rival submissions by both learned counsel on record. As initially filed, the suit herein was primarily based on breach of contract. The plaintiff was alleging that her late husband had purchased three acres from the defendant and had fully paid the purchase price but the defendant had reneged on the contract and refused to transfer the land to the husband. But as the suit progressed, amendments were made and the suit additionally became one based on trust and adverse possession. It is common ground that the plaintiff is in possession of the land she is claiming. It is fairly clear that she and her late husband went into possession in early 1960s. There is however a difference in opinion as to how the plaintiff got into possession. According to the plaintiff, the defendant sold land to her late husband who paid the full purchase price and was allowed to go in to possession. But according to the defendant, it is his own late father who allowed the plaintiff's late husband to go into possession. The understanding was that the plaintiff's late husband would move out of the land after acquiring his own land.
18. Between these two different positions, the court has to make a choice as to which one to accept. And I choose to accept the plaintiff's position and here is why: The defendant's oral evidence in court shows him saying that the plaintiff is on the land courtesy of permission given by the defendant's own father. The impression created is that the defendant himself played no role in the entry, occupation and/or possession of the land by the plaintiff. But the defendant's evidence in his written statement tells a different story. And the story goes thus "That around 1964, I entered into an agreement with the plaintiff's husband relating to the subject matter of transactions which were never completed and are now barred by law. That during the time I allowed the plaintiff's husband to live on my parcel of land" (please see paragraphs 4 and 5 of the defendant's written statement dated 11/7/2018). From this, it is clear that the defendant is engaging in double-speak or, if you like, talking from both sides of his mouth. Such talk usually comes from people who do not have honesty as one of their strong points. Compare this with the plaintiff's oral and written evidence which is clear that the whole thing started from sale followed by possession and/or occupation.
19. The defendant also expressed his position concerning the sale agreement provided as evidence by the plaintiff. He disowned the signature attributed to him in the said agreement. According to him, his true signature is the one appearing in his documents filed in this case. True, the signature in the agreement prima facie appears different from the signature in his documents relating to this case. But I am minded to consider that the signature in the defendant's pleadings or even his witness statement were made when the defendant had already formed his intention to oppose this suit. In a scenario like that, it is possible to sign differently in order to make the point that the signature in the agreement is fake. While



my observation here may look speculative, it pays to bear in mind that the signature in the agreement and the defendants signatures in his documents relating to this suit were made over 50 years apart. Besides, it seems to me clear that the defendant is capable of having more than one signature. And indeed he has.

20. I think I need to explain: In the court file itself there is a memo of appearance in person filed by the defendant on 29/7/2013. The memo is dated 14/11/2012. That memo is clearly signed by the defendant himself and the signature is totally different from the signatures in the defendants pleadings or in his witness statement, which signatures he wanted the court to accept as his only signature. The signature in that memo is not disowned by the defendant and it therefore remains very much his signature. My considered opinion is that even on the issue of signatures, the defendant was being less than honest. The court record itself shows he has more than one signature.
21. My take, in light of all this, is that the defendants and the plaintiffs late husband entered into a land sale agreement. The agreement is the one made available to this court. It is apparent that the defendant later had a change of mind but that change came when the plaintiff and her husband had already gone into possession and occupation of the land. The defendant however did not take any action to remove the plaintiff and her husband from the land. His allegation that they were on the land as a licencees sounds hollow in my view. Their manner of using the land and the fact that they even put up a permanent house on it all indicate actions consistent with ownership, not licence. I further bear in mind that the plaintiff deceased family members are buried on the land and the defendant did not oppose the burial.
22. My position on these issues is further cemented or fortified by the fact that the plaintiff seems to be occupying or possessing the larger part – 3 acres – of the land earmarked for the defendant, with the defendant occupying only two acres. It seems to make less sense to me to see that the person being called the licensee possesses the larger portion of the land than the person shown as the registered owner. The fact that the defendant changed his mind concerning the land sale transaction would seem to suggest that the land was very important to him. Why then would he allow a mere licensee to occupy the larger portion? To me, the defendants averments are difficult to believe. The plaintiffs version of events comes across as more credible. The plaintiff is obviously on the larger portion because that was the portion that her late husband was purchasing, and was equally the portion that she and her late husband were allowed to possess or occupy.
23. I think I now need to turn my attention to some of the things stated in the submissions. The issue of the suit being caught up by *Limitation of Actions Act* (Cap 22) was raised by the defendant. According to the defendant, the cause of action arose in “1964 when the alleged purchase price was completed. The period of claiming by adverse possession as provided by Section 7 of the *Limitation of Actions act*, CAP 22 Laws of Kenya therefore lapsed the year (sic) 1976” The defendant further submitted: “The plaintiff’s claim was therefore extinguished upon the expiry of the period twelve years from the date the cause of action arose thus she has no legal right to benefit from the defendants parcel.”
24. On the same issue of Limitation of actions, the plaintiff submitted that “the plaintiffs suit is not time barred as the same is an action based on trust”. The plaintiff continued: “We rely on Section 20 of the Limitation of Actions which provides that no Limitation period applies to an action under trust”. The plaintiff also sought to make the point that she had sought leave of court to file suit out of time in EMBU CM Miscellaneous Application NO. 49 of 2012 [Nalea Njura Ndwigwa v Njeru Kandie].
25. This is the court’s position: If this suit had remained as initially filed, an argument raised in favour of Limitation period would have been strong. I say this because as initially brought, the suit was based on a breach of contract. The Limitation period for suits based on contract is six (6) years and it is obvious that this suit was filed way beyond or outside this period. It wouldn’t even matter to this court that the



plaintiff had gone to court to have the time within which to file the suit extended. The law is simply that extension of time does not apply to a suit based on contract. This is the position that emerges from the reading of the cases of *Mary Osundwa Vs Nzoia Sugar Co Ltd* [2002] eKLR and *Onditi Odhiambo Vs Gateway Insurance Co. Ltd: Civil Appeal No. 37 of 2013* [2014] eKLR.

26. But as things stand now, an argument relating to limitation period as raised by the defendant is weak or even hollow. The suit herein underwent various amendments which ultimately saw the legal concepts of adverse possession and trust introduced. As pointed out by the plaintiff, limitation period does not generally apply to suits based on trust. I think it would also be legally sound to say that it does not apply where adverse possession is found to apply. And this would be so because where adverse possession is found to be demonstrated, it is clear that the registered owner is treated by law to be holding the land in trust for the adverse possessor until the adverse possessor goes to court seeking to become the registered owner. The immediate trust that arises in favour of the adverse possessor after 12 years ensure that limitation period does not run.
27. Still on the issue of Limitation, the defendant submitted that the alleged cause of action arose in 1964 as that is the time the purchase price is said to have been paid. According to the defendant, the period for claiming under adverse possession is provided for under Section 7 of *Limitation of Actions Act* (Cap 22). The period is 12 years and that period lapsed in 1976. This appears to me to be a flawed submission. Section 7 of the *Limitation of Actions Act* (Cap 22) states 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.”

28. The above provision is not meant to apply to an adverse possessor claiming land from a registered owner. Rather, it applies to a registered owner of land who neglects or fails to assert his right of ownership concerning land in occupation or possession of another person – normally an adverse possessor - who is actually claiming or intending to claim ownership. The registered owner is supposed to assert his rights of ownership within a 12 year period. Outside that period, Section 7 bars such registered owner from asserting his rights. It is therefore wrong for the defendant to seek to construe Section 7 of the *Limitation of Actions Act* (Cap 22) against a claiming adverse possessor like the plaintiff. The plaintiff has never become the registered owner of the land.
29. Then there is the issue of trust. This issue was raised by the plaintiff and is meant to be treated as yet another way in which the plaintiff owns the land. As first raised in the pleadings, it was not clear the kind of trust the plaintiff had in mind but in the plaintiff's submissions, it is clear that the plaintiff is claiming to own the land through a resulting trust. Blacks Law Dictionary, Ninth Edition at page 1653 defines resulting trust thus:

“A remedy imposed by equity when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property.”

I venture to add that this definition is also captured well in the plaintiff's submissions. In this definition, it is clear that the concept of transfer is central in a resulting trust. Another concept central to this concept is reversion of the property back to the transferor. In other words, the transferred property reverts or springs back to the transferor.

30. In the case at hand, it is important to ask ourselves whether there is any transfer of property that had taken place. The answer to this is no. Since the parties never engaged in any transfer this important



concept in a resulting trust is lacking. In my view, a resulting trust in this case can only arise in favour of the defendant, not the plaintiff, and this is how it can arise: If the defendant had agreed to transfer the property to the plaintiff, and had actually done so on the basis of only small or insufficient payment or even no payment at all, on the understanding that the plaintiff would pay after transfer, if the same plaintiff then completely refuses later to pay the purchase price after transfer, then a court of equity would be right to invoke a resulting trust in favour of the defendant because it would be clear that the property was never meant to be completely or fully owned by the plaintiff without payment of the full purchase price. In such a scenario, the property would revert or spring back to the transferor, in this case the defendant. A resulting trust would arise in favour of the defendant owing to the plaintiff's refusal to pay the purchase.

31. But this is not the scenario obtaining here. The property never changed hands. The plaintiff paid the purchase price but the property was never transferred. In my considered view, a constructive trust would be more suitable in this matter. In an ideal situation, once parties enter into a proper sale agreement and the consideration is paid or given, the land is supposed to be transferred to the buyer. In some instances however – and this seems to be the case here – some sellers refuse to transfer the land to the buyer. In a scenario like that, what legal protection does such buyer have? In appropriate cases, the law treats the seller as having created a constructive trust in favour of the purchaser. This is a trust imposed by the law of equity when a seller enters into an agreement with a purchaser and is paid the purchase price but then refuses to transfer the land. Equity does not allow a wrong to be suffered without a remedy.
32. The court of appeal invoked this kind of trust in *Macharia Mwangi Maina & 87 others Vs Davidson Mwangi Kagiri* [2014] eKLR. In that case, the respondent had entered into various sale agreements with quite a number of purchasers for 240 different plots. The respondent however refused to surrender the title despite the purchasers having paid the full purchase prices. The court found for the purchasers and invoked a constructive trust in their favour.
33. In my view, this is the same scenario obtaining in this case. But I am constrained to observe that the case was not urged before me on the basis of a constructive trust. If it had, I would have invoked the legal maxim: *Nemo commodum capere potest de injuria sua propria* (meaning: no one can derive benefit from his own wrong). I would then have invoked a constructive trust in favour of the plaintiff because the defendant received the purchase price but wrongfully refused to do what required doing in order for the plaintiff to become the registered owner of the property. But I now leave it at that as the trust urged before me is inappropriate in the circumstances of this case.
34. Let me now come to adverse possession. I have already said something about it but it is now time to focus more fully on it. The plaintiff submitted, inter alia, that she has had open, exclusive and uninterrupted possession of the three acres of land she is claiming from land parcel No. Ngandori/Kirigi/832. This has been so far over 12 years and it was equally so even before her husband died in the year 2003.
35. According to the plaintiff, she and her husband took possession and occupation of the land in April 1964 and she and her family have been living on it since then. The defendant has been aware of this but has never taken steps to evict them. For persuasion and/or guidance, the cases of *Richard Wefwewa Songoi Vs Ben Munyifwo Songoi* [2020] eKLR and *Chevron (K) Ltd Vs Harrison Charo was Shutu* [2016] eKLR were cited and quoted.
36. The defendant on his part submitted that the plaintiff's husband was on the land through permissive arrangements with him. Adverse possession was said not to be possible where the claiming adverse possessor is on the land with the permission of the registered land owner. The defendant's other



argument is that the plaintiff didn't attach an extract of title to his suit as is required under order 37 Rule 7 of the Civil Procedure Rules, 2010. To drive his points home the defendant cited the cases of Ramadhan Wanzala Omoro Vs County Government of Kakamega [2020] eKLR and Wilson Kazungu Katana & 101 others Vs Salim Abdala Bakswein & Another [2015] eKLR.

37. What exactly is adverse possession in our local jurisprudence was defined in the case of Mtana Lewa Vs Kahindi Ngala Mwangandi [2015] eKLR as follows:

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

38. In the book “Law of Limitation and Adverse possession, Volume II, 5<sup>th</sup> Edition, at pages 1366 and 1367, the writer, KJ Rumtomji, makes the following instructive observation about adverse possession:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (colour of title is that which is title by appearance, but not in reality)

Adverse possession is made out by the co-existence of two distinct ingredients. The first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it can not be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely”

The writer further made the following pertinent remarks:

“To make possession adverse, there must be entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously.”

39. In this matter, the plaintiff's deceased husband is said to have entered into an agreement to purchase the land. That happened way back on 26/4/1964. Following that agreement, and upon payment of the full purchase price, the plaintiff and her late husband entered into possession of the land that same year. They never left the land. The defendant would wish the court to believe that possession took place with his permission. Of course it must have happened that way in the beginning but the defendant fails to appreciate that the plaintiff were entering and possessing land they could call their own, having paid the full purchase price. The defendant was supposed to ensure that the requisite legal process to ensure transfer of land to the plaintiff's late husband was initiated. He didn't do so. He seems to have gone silent over the whole issue. After the agreement was entered into and the whole purchase price paid, the next step would have been to go to Land Control Board to obtain consent. That was supposed to have been done within six months. As the owner of the land, the defendant was the one who could effectively initiate the process. He didn't but he now wants to benefit from that omission by saying that the consent was not obtained as required by the law. This would be unconscionable in the eye of



equity. If the court were to agree with the defendants position, it would be allowing him to benefit from his own wrong.

40. To this court, the broad character of adverse possession as stated elsewhere in this judgement exists in the circumstances prevailing. My view is that six months after entering into sale agreement the occupation and possession of the land by the plaintiff and her late husband became adverse. As the defendant was not willing to transfer the land to the plaintiff's husband, he should have initiated the process of removing them from it. He didn't take any action and has never taken any. The permission or licence under which the plaintiff possessed or occupied the land ended when the six month period within which consent of Land Control Board was supposed to be obtained expired. From that point onwards possession became adverse. It is clear that the plaintiff and her late husband continued using the land as their own. They even put up a permanent house there. The plaintiff's late husband and other family members are buried there. All this happened without the defendant raising a finger.
41. To me, the plaintiff has demonstrated on a balance of probabilities that she is an adverse possessor. She didn't however prove sufficiently that she is entitled to ownership in any of the other ways pleaded in her final amended plaint.
42. The defendant on his part lodged a counter-claim in which he wanted the plaintiff's case dismissed with costs and that the same plaintiff and her family be evicted from the land. Also asked for are costs of the counter-claim or any other relief. The merits of the counter-claim were not demonstrated. My appreciation of this entire matter persuades me that an equitable estoppel would apply against the defendant concerning the counter-claim. For equitable estoppel to lie, these four elements must be shown to exist:
  - a. A promise which is clear and unambiguous in its terms.
  - b. Reliance by the party to whom the promise is made.
  - c. The reliance must be both reasonable and foreseeable.
  - d. The party benefiting from the estoppel must be injured by the reliance.
43. In this matter, the promise to the plaintiff and/or her late husband is discernible from the sale agreement and from the fact of being put in possession of the land, all with a view to ultimately becoming registered owners. The plaintiff relied on that undertaking and developed the land. She even made it the dwelling and living place of her family. It was reasonable and foreseeable that the defendant would be honest enough honour his side of the bargain. Nothing seems to have prepared the plaintiff for the strange turn of events. The defendant simply changed his mind. Finally, it would be injurious to the plaintiff to suffer eviction knowing well that she and her husband played their part well in the whole transaction. The plaintiff and her family live on the land. They have developed it. Deceased members of her family including her husband are buried there. And she has a permanent house on the land. Eviction would obviously cause her great injury or loss. All this explains why it would be improper to allow the defendant's counter-claim. It clearly shows that equitable estoppel can apply. I therefore hereby dismiss the counter-claim with costs to the plaintiff.
44. Ultimately, the plaintiff's suit is allowed on the basis of her claim as an adverse possessor. The court therefore finds that the plaintiff has acquired three (3) acres out of land parcel No. Ngandori/Kirigi/832 which she occupies and uses. She is declared to be an adverse possessor of that portion. The court orders that the plaintiff be registered as owner of that portion in place of the defendant whose title has become extinguished. Costs of the plaintiff's suit are awarded to the plaintiff.



**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023.**

In the presence of M/s Chepkorir for defendant and M/s Mukami (absent) for plaintiff.

Court assistant: Leadys

Interpretation: English/Kiswahili

**A.K. KANIARU**

**JUDGE**

**14/12/2023**

