



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 79 OF 2014

IN THE MATTER OF A PORTION MEASURING 81.48 HA (218 ACRES THEREABOUT) OF LAND REFERENCE NO. 7590/6

BETWEEN

JOSEPH MUOKI KAKENYI.....1ST PLAINTIFF

MATHEW MWEU KAKENYI.....2ND PLAINTIFF

ANNOUNCEATAH MARITIA KITETA.....3RD PLAINTIFF

(Suing on their own behalf and as administrators of the estate of Peter Mwikya Kakenyi (deceased))

VERSUS

DR. DAVID HOPCRAFT.....1ST DEFENDANT

GAME RANCHING LIMITED.....2ND DEFENDANT

JUDGMENT

1. This suit was instituted by way of Originating Summons dated 17th July 2014, under the provisions of **Order 37 Rules 1 and 7 of the Civil Procedure Rules and Sections 38 of the Limitation of Actions Act**. In the Originating Summons, the Plaintiffs sought for the following orders:

a. A declaration that the Plaintiff is entitled by adverse possession to all that portion of land measuring 81.48 Ha (218 acres thereabout) being a portion of all that piece of land known as L.R. 7590/6.

b. This Honourable Court be pleased to issue a vesting order directed to the Defendants herein to immediately transfer the suit premises into the Plaintiff's names and in default, the Deputy Registrar of this Court be ordered to sign the transfer forms and all other necessary documents in favour of the Plaintiff.

c. The costs of these proceedings be borne by the Defendants.

2. The Originating Summons is supported by an Affidavit sworn by the 1st Plaintiff, Joseph Muoki Kakenyi, who deponed that he and the other two Plaintiffs are the administrators of the estate of the late Peter Mwikya Kakenyi (deceased). The 1st Plaintiff deponed that in 1976, the deceased entered in a contract with the Defendants to purchase a portion of land measuring about 81.48 Ha (218 acres thereabout) out of the 2nd Defendant's land known as L.R. No. 7590/6 along Mombasa Road (the suit property) for the sum of Kshs. 300,000, which he duly paid.

3. It was the deposition of the 1st Plaintiff that the purchase price for the suit property was made on 7th April 1988, 5th June 1985 and 12th August 1985; that the Defendants obtained consent to subdivide and sell the suit property to the deceased from the Masaku Donyo/ Sabuk Land Control Board via a letter dated 10th August 1981 and that the deceased and the Defendants proceeded to fence out the suit property and the deceased took possession of that land from 1976 until 2011 when he died.

4. The 1st Plaintiff deponed that the deceased's family has continued in occupation and possession of the suit property to date, without

interference or interruption from the Defendants; that since the demise of the deceased, his family has unsuccessfully pursued the Defendants through written and oral correspondence for the transfer of the suit property to the Estate and that the suit property is listed in High Court Succession Cause No. 1657 of 2011 as one of the assets of the deceased's Estate.

5. The 1st Plaintiff filed a Supplementary Affidavit in support of the Originating Summons on 4th November 2016 in which he deponed that the 1st Defendant was at all material times a director and main shareholder of the 2nd Defendant; that the deceased made all the payments to the 1st Defendant, who receipted and acknowledged the payments and that the 1st Defendant admitted via email correspondence that the deceased had purchased the suit property in 1976 and had been in occupation of the land since then, but that the deceased had not paid the full purchase price, which was not true.

6. The Plaintiff argued that the Plaintiffs, as administrators of the estate of the deceased, can lawfully assert adverse possession on behalf of the deceased's Estate and that the Plaintiffs have properly moved this court via the Originating Summons.

7. The Defendants filed Grounds of Opposition to the Originating Summons dated 18th September 2014. They opposed the Summons on the ground that there was no evidence of the alleged agreement; that the copies of the receipts of the purported payments were illegible; that there was no adverse possession of the property by the deceased because he was in occupation of the suit property under a license and permission of the Defendants and that the issues raised by the Plaintiffs are not suited for an Originating Summons.

8. The Defendants also filed a Defence and Counterclaim dated 19th November 2014 where they denied the Plaintiffs' claim. The Defendants averred that a claim for adverse possession of land cannot be raised posthumously by the Estate of the deceased and that the claim is embarrassing because the Plaintiffs' assert adverse possession on one hand and on the other hand they assert that the deceased entered into a Sale Agreement.

9. In the counter claim, the 2nd Defendant asserted that it is the registered proprietor of Land Reference No. 7590/6; that at their own cost, they had paid all rates and land rents due to the relevant Government authorities; that they erected and maintained the fencing around the land, conducted night patrols, maintained security, put out fires on the land and that they are the ones who built and maintained a road on the perimeter of the property and surveyed and placed beacons on the property.

10. The Defendants reiterated that the deceased occupied a portion of the property with the express or implied permission of the 2nd Defendant; that the deceased's Estate and the Plaintiffs herein have not acquired adverse or prescriptive rights over the suit property and that although in 1976 the 2nd Defendant and the deceased entered into a sale agreement, the deceased breached the said agreement. The Defendants averred in their counter claim that the deceased only performed part of the agreement and was only entitled to the part of the property he had paid for.

11. The Defendants further asserted that the deceased did not pay for the subdivision, fencing or surveying of the suit property, nor did he assert ownership adverse to the 2nd Defendant's title. The 2nd Defendant consequently sought for the ejection of the Plaintiffs from the suit property, rescission of the sale agreement, costs of the suit and interest thereon.

12. The Plaintiffs responded vide a Reply to Defence and Defence to Counterclaim. They denied the averments made by the Defendants and stated that at all material times, LR. No. 7590/6 was registered in the 1st Defendant's name, Dr. David Hopcraft, who is the main shareholder and director of the 2nd Defendant, and who transacted with the deceased over the suit property.

13. The Plaintiffs averred that the fencing of the suit property was jointly undertaken by the deceased and the Defendants; that the deceased reinforced the fencing by planting cactus plants and other plants; that the deceased extended his ranching activities from the adjacent LR No. 7885 which he owns to the suit property and that the 2nd Defendant's counterclaim was bad in law and ought to be struck out.

The Plaintiffs' case

14. The 1st Plaintiff, PW1, informed the court that he and the other Plaintiffs are the administrators of the deceased's Estate and that the deceased paid Kshs. 300,000 to the Defendants for a portion of land measuring about 81.48 Ha (218 acres thereabout) out of the Defendant's land known as L.R. No. 7590/6, (the suit property) with the last payment being on 7th April 1988, following which the Defendants never demanded payment for the purchase price.

15. PW1 informed the court that the deceased used the land openly for grazing, harvested sand from the river for his purposes, and cut firewood for use and for sale. According to PW1, although the Defendants sought consent for subdivision of the land, which consent was granted by the land control board, the transfer of the suit property was not effected in favour of the deceased allegedly because rates for the entire land had not been paid.

16. PW1 stated that following the deceased's demise, the administrators of his Estate could not distribute the land amongst his beneficiaries because the land had not been transferred to the deceased; that in 2017, when third parties invaded the land and claimed it was theirs, the Defendants did not assist them in evicting the invaders and that in the email correspondences, the 1st Defendant stated that although he agreed to sale 218 acres to the deceased at the price of Kshs 2500 per acre, the deceased only paid for 30 acres, which was not true.

17. PW1 informed the court that the deceased acquired the land for purposes of improving and expanding his ranching activities which he was then undertaking on his land known as LR No. 7585 which is adjacent to the suit property and that upon purchase of the suit property, the deceased and the 1st Defendant jointly marked out the suit premises by erecting a fence separating it from the portion of LR No. 7590/6 which remained under the occupation of the Defendants.

18. It was the evidence of PW1 that this is a claim for adverse possession, as the deceased was in possession of the land for forty-four (44) years. PW1 disputed the averment that the Defendants had been taking care of the land.

19. In cross-examination, PW1 stated that the suit was based on the agreement for sale between the Defendant and the deceased; that he did not have a copy of the said agreement and that although LR No. 7590/6 has a title, the portion of LR 7590/6 that the Plaintiffs are claiming does not have a title. It was the evidence of PW1 that he did not have the approved sub-division plan but had the approval from the land control board for subdivision of LR No. 7590/6 dated 10th October 1981.

20. PW1 conceded that the registered owner of the land is the 2nd Defendant and not the 1st Defendant; that the 1st Defendant is a shareholder in the 2nd Defendant and was receiving money on its behalf and that it is the 2nd Defendant that issued receipts for Kshs200,000 while the 1st Defendant received Kshs. 100,000. According to PW1, it is the 1st Defendant who issued receipts on behalf of the 2nd Defendant.

21. PW1 stated that the deceased did not pay anything for nine 9 years, that is from 1976 to 1985; that the Defendants failed to transfer the land to the deceased because the deceased had failed to pay rates and that the deceased and his family had been on the property for many years. According to PW1, it is the deceased and his family that have been in charge of security of the land and that it is their employees who put out the fires in 2010.

The Defendants' case

22. The 1st Defendant, DW1, testified that he was retired and owned a ranch; that he is the Managing Director of the 2nd Defendant and that LR No. 7590/6 is registered in the name of the 2nd Defendant. According to DW1, he set up the 2nd Defendant to manage wildlife.

23. It was the evidence of DW1 that he was wrongly joined in this suit because L.R.No.7590/6, in which the suit property is located, is registered in the name of the 2nd Defendant and adverse possession can only be claimed against a registered owner; that no allegations of fraud have been made against him and that he has no discernible interest in the suit property. It was the evidence of PW1 that as a director of the 2nd Defendant, any actions he took were on behalf of the 2nd Defendant and he cannot be held liable for such actions or omissions.

24. DW1 stated that the 2nd Defendant and the deceased entered into an agreement for the sale of the suit property for Kshs. 2500 per acre with interest, and not Kshs. 300,000 as alleged by the Plaintiffs; that the deceased failed to pay the full purchase price, and only paid Kshs. 300,000 and that the copy of the agreement for sale was destroyed in a fire in his home.

25. It was the evidence of DW1 that the 2nd Defendant continues to exercise rights, powers and obligations of ownership in respect of the suit property and that it pays all rates and land rents due to the Government and the local authorities. It also continues to maintain the property at its own cost. DW 1 testified that the deceased did not pay for the subdivision, fencing or surveying of the property.

26. According to the 1st Defendant, the sale agreement that he entered into with the deceased and the part payment that the deceased made is evidence of a licence which was granted by the 2nd Defendant to the deceased, and not adverse possession and that therefore the occupation and use of the suit land was consensual by way of the said license.

27. It was the evidence of the 1st Defendant that the occupation of the suit property by the deceased was not hostile, uninterrupted or exclusive; that the title was not transferred to the deceased because the agreement for sale was not completed and that the deceased did not intend to assert adverse possession and did not do so in his lifetime.

28. It was the evidence of DW1 that the deceased made the last payment for the land in 1988, and had been in occupation of the land for 21 years and that if the deceased had intended to claim the land by way of adverse possession, he would not have made the payment. DW1 stated that the 1988 payment was not the final installment and that is the reason that made him not to transfer the land to the deceased.

29. DW1 contended that the suit property cannot constitute part of the deceased's property within the meaning of Section 3 of the Law of Succession Act; that the Plaintiffs thus do not have the legal standing to assert title that did not exist as at the time of the deceased's death and that as the land was not subdivided, the land claimed is part of a large parcel held by the 2nd Defendant.

30. DW1 testified that he is the one who constructed a chain link fence between his land and the land he had sold to the deceased; that he allowed the deceased to move into the land in 1976 because he wanted to create a good relationship with the deceased and that between 1976 and 2011, the deceased lived peaceably on the land and treated the 1st Defendant as a friend.

31. In cross-examination, DW1 admitted to issuing the 1985 receipt for Kshs. 100,000. He stated that the deceased took possession of the land in 1976 and that he made the second payment on 12th August 1985 and the third payment on 7th April 1988.

32. PW1 admitted that the piece of land he was selling to the deceased was identifiable according to the sketch map for subdivision and that the deceased occupied this land from 1976. He denied that the deceased planted the cactus boundary, although the said boundary exists. DW1 stated that he requested the deceased to make full payment but did not make a formal demand.

33. In re-examination, DW1 stated that the sale agreement was signed by himself and the deceased and that each one of them kept a copy and that the rates for the land were paid in 1977 and he continued paying the rates for the entire parcel of land. According to PW1, the amount due in 1988 for rates was Kshs. 2,637,000.

The Plaintiff's Submissions

34. The Plaintiffs' advocate submitted that the Plaintiffs have satisfied the requirements of adverse possession as set out in Mbira vs Gachuhi (2002) IEALR 137 in which the court held as follows:

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

35. The Plaintiff's advocate also relied on the case of Francis Gicharu Kariri vs Peter Njoroge Mairu (2005) eKLR which cited with approval the decision in Kimani Ruchire vs Swift Rutherford & Co. Ltd. [1980] KLR as follows:

"The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (No force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration."

36. The Plaintiffs' counsel argued that this suit is properly before this court by way of Originating Summons pursuant to **Order 37 Rule 7** of the **Civil Procedure Rules**, which provides that a claim for adverse possession under **Section 38** of the **Limitation of Actions Act** should be by Originating Summons. Counsel asserted that a claim for adverse possession can be made by a deceased person posthumously. Counsel relied on the case of Joseph Kamau Gichuki (suing as the administrator of the Estate of Gichuki Chege (deceased) vs James Gatheru Mukora & Another (2019) eKLR where the court allowed a claim for adverse possession posthumously as follows:

"I am satisfied that the plaintiff has established on a balance of probabilities that the deceased took possession of the suit property in 1974 and remained in possession until his death in 1994. I am also satisfied that the developments on the suit property were carried out by the deceased. The plaintiff's claim over the suit property was not based on the agreements for sale between the deceased and Kariuki. The claim was based on adverse possession. In the circumstances, it is irrelevant whether the agreements for sale between the deceased and Kariuki were valid or not. The only relevant issues for the court's consideration are, whether the deceased took possession of the suit property, whether his possession was open, continuous and uninterrupted for the statutory period of 12 years and whether his possession was adverse to the interest of the registered owner of the property."

37. It was submitted by counsel that courts have held that administrators can be sued for adverse possession against the estates they administer. Counsel quoted the case of Phyllis Wanjiru Kamau vs Wilson Gichuhi Gachagwe & 2 others (2019) eKLR which referred to **Section 16** of the **Limitation of Actions Act** which provides that for provisions of the Act relating to actions for recovery of land, an administrator of an estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration. They also relied on the Court of Appeal decision in Peter Mbiri Michuki vs Samuel Mugo Michuki Civil Appeal No. 43 of 2013.

38. The Plaintiffs' counsel contended that the sale of the suit property lapsed 6 months after the last payment in 1988 by operation of the Land Control Act as there was no evidence that consent of the relevant Land Control Board was obtained for the sale of the land, following payment of the purchase price in 1988. They quoted the case of Samuel Miki Waweru vs Jane Njeri Richu CA Civil Appeal No. 122 of 2001 (2007)eKLR, where the court of appeal held as follows:

"It is not in contention in this case that the Land Control Act applied to the alleged lease or sale of the portion of land claimed by the respondent or that the consent of the Land Control Board was neither applied for within the stipulated period nor granted. It follows therefore, and Mr. Gitonga concedes, that, the alleged sale or lease became void for all purposes as provided by Section 6 (1) of the Land Control Act with the consequences stipulated in Section 22 of the Land Control Act. Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of possession by the respondent thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner."

39. Counsel submitted that the deceased in this case remained in open, uninterrupted and exclusive occupation of the suit property, hostile to the interests of the registered owner. It was submitted that there is no evidence of a resolution by the 2nd Defendant giving the deceased permission to be on the suit land after the lapse of the sale.

40. It was submitted that the 1st Defendant is rightly enjoined in the suit because at all material times, he was the one who dealt with the deceased in respect to the sale of the suit land in 1976, prior to registration of the 2nd Defendant as proprietor of LR. 7590/6 in 1977. Counsel submitted that after the deceased's demise, the 1st Defendant also dealt with the family of the deceased, without any indication that he was acting on behalf of the 2nd Defendant.

41. It was submitted by the Plaintiffs' counsel that although the suit is anchored on the doctrine of adverse possession, the nature of the 1976 agreement has a bearing on the Plaintiffs' claim because it explains how and when the deceased took possession of the suit land. It was submitted that the Defendants acquiesced to the deceased's possession of the land for the entire period of over 23 years. Counsel relied on the case of Maweu vs Kiu Ranching and Farming Cooperative Society (1985) eKLR and Kweyu vs Omuto C.A Civil Appeal No. 8 of 1990 cited with approval in Wilson Njoroge Kamau vs Nganga Muceru Kamau [2020] eKLR as follows:

"In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such

inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts.”

42. It was submitted that the deceased’s occupation, which occurred pursuant to a sale of land, became adverse and time began to run after payment of the purchase price as the sale was not completed and fell through by operation of the law. They relied on the case of Wanyoike vs Kahiri 1979 KLR 239 and Stato Wambugu vs Kamau Njuguna [1983] eKLR where the Court of Appeal held that:

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant’s possession is deemed to have become 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.”

43. Counsel also relied on the case of Public Trustee vs Wanduru (1984) KLR 314 at 319 cited with approval in Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR, Madan JA 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. It was submitted by counsel that 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.

The Defendants’ Submissions

44. The Defendants’ advocate submitted that the suit property is not part of the deceased’s free property under the Law of Succession Act and that the occupational rights of the deceased do not vest in the administrators because such rights terminate upon the death of the deceased. According to counsel, the Plaintiffs cannot assert or gain a better title than that of the deceased in his lifetime.

45. It was submitted by the Defendant’s counsel that the deceased entered and used the property with the 2nd Defendant’s permission under an agreement of sale; that the agreement infers a licence; that the deceased never asserted adverse possession nor did he undertake any adverse act on the land and that the joint fencing and peaceful occupation by the deceased also points to permission and licence that was granted to him, and not adverse possession.

46. It was submitted that neither the Plaintiffs nor the deceased lived on the land and that the deceased’s occupation was limited to livestock and ranching activities. It was submitted that the 2nd Defendant maintained constructive possession of the suit property and that the land the Plaintiffs are claiming is part of a larger area which has never been sub-divided.

47. According to the Defendants’ counsel, in adverse possession, time would start running from the date of the termination or repudiation of a contract, where a purchaser of land is in possession of such land with the permission of the vendor; that neither party repudiated the agreement and that the 2nd Defendant continued to charge interest for the amount that remained unpaid. Counsel relied on the case of Sisto Wambugu vs Kamau Njuguna where the Court of Appeal held that time does not become of the essence in a contract for sale of land unless it was provided for or if either party gave notice to the party at fault, making time of the essence.

48. Counsel for the Defendants argued that possession is not enough to establish adverse possession and that a licensee must prove that his possession was adverse to that of the licensor. Counsel relied on the case of Jandu vs Kirpal & another (1975)EA 223, Wallis Cayton Bay Holiday Camp Ltd vs Sell-Mex and BP Ltd, Hyde vs Pearce (1982) WLR 560 and Haro Yonda vs Sadaka Dzengo Mbaruro & another (2014)eKLR.

49. It was submitted that the Originating Summons is defective because a certified extract of the title to the land in question was not annexed to the Supporting Affidavit; that the suit property has not been sub-divided and has no title and that the Supporting Affidavit is also not dated, thus offending the **Oaths and Statutory Declarations Act**. Counsel argued that where the suit land is not registered, then compliance with **Section 38(1)** of the **Limitation of Actions Act** may be problematic.

50. Counsel relied on the case of Peter Githongora Migwi vs Kamau Munene Wakaba & 2 others (2021)eKLR and Kweyu vs Omuto(1990) KLR 709, where the Court of Appeal held that an Originating Summons that did not have a certified copy of the extract of title was defective.

Analysis and Determination

51. The issues for determination in this suit are as follows:

- a. *Whether the Originating Summons filed is competent.*
- b. *Whether the Plaintiffs have locus to make a claim for adverse possession.*
- c. *Whether the Plaintiffs have established a case for adverse possession.*

Whether the Originating Summons is competent

52. The Originating Summons was filed pursuant to **Order 37 Rule 7** of the **Civil Procedure Rules**, as read together with **Section 38** of the **Limitation of Actions Act**. **Order 37 Rule 7** of the Civil Procedure provides as follows:

- (1) ***An application under section 38 of the Limitation of Actions Act shall be made by originating summons.***

(2) *The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.*

(3) *The court shall direct on whom and in what manner the summons shall be served.*

53. The Defendants have opposed the suit on the grounds that it ought to have been initiated by way of a Plaint rather than by Originating Summons.

54. The issue of how a litigant can recover land on the premise that he is entitled to it by way of adverse possession was settled by the Court of Appeal in *Gulam Miriam Noordin vs Julius Charo Karisa [2015] eKLR*. In the said case, the court stated that where a party applies to be registered as the proprietor of land by adverse possession, **Order 37 Rule 7** requires such a claim to be brought by Originating Summons. The Court of Appeal in the *Gulam Miriam* case (*supra*) further held that a party may also claim for adverse possession in a counterclaim. To the extent that the Plaintiff's claim is for adverse possession, they were entitled to file an Originating Summons.

55. The Defendants have also claimed that the suit is defective for failure by the Plaintiffs to annex a certified copy of extract of title to the land in question, in accordance with **Order 37 Rule 7 (2)** of the **Civil Procedure Rules**. According to the Defendants, the suit property was never subdivided and that the said land does not have a title document. That is what the Court of Appeal stated in *Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR*.

'If the suit land is not registered, then compliance with Section 38 (1) may be problematic not least because, a litigant may be unable to show the court that he has become entitled to be registered in respect of land whose title is not yet in place and more importantly, because as at the date of institution of the suit for adverse possession there must be in existence a title which the court can declare to be extinguished by adverse possession under Section 38(1).'

56. It is therefore true that **section 38 (1) of the Limitation of Actions Act** is only applicable to land that has a title document, or land that has been registered, or both. However, where land has been registered, and an applicant files a claim for a portion of such land claiming adverse possession, such a claim will be valid notwithstanding the fact that the portion of land being claimed by the adverse possessor does not have a title or has not been registered. What is critical is the registration of the larger parcel of land, and the portion of land being claimed is being definite and identifiable.

57. In this suit, the suit property that the Plaintiff's father purchased from the Defendants is 218 acres, and is part of L.R. No. 7590/6, which is registered in favour of the 2nd Defendant. The acreage and identification of the suit property, which is a portion of L.R. No. 7590/6, is not disputed. Indeed, the 1st Defendant admitted in his evidence that *"on or about 1976, the 2nd Defendant entered into an agreement with the late Brigadier Peter Mwikya Kakenyi for the sale of part of Land Reference number 7590/6 measuring 81.48 Ha (approximately 214 acres).*

58. The suit property herein is therefore definite and identifiable, and is a portion of L. R. No.759016 which has a title. The suit land was fenced in 1976 pursuant to an agreement between the deceased and the 1st Defendant. In addition, the Plaintiff produced in evidence a sketch map showing the proposed subdivision of Land Reference number 7590/6 which shows the location of the suit property.

59. It is not disputed that the 2nd Defendant is the registered proprietor Land Reference number 7590/6, and that it sold a portion thereof to the deceased. The Plaintiffs produced in evidence a copy of the title for Land Reference number 7590/6, together with the sketch plan of the land that was sold to the deceased. The Defendants did not deny the authenticity of the copy of the title that was exhibited by the Plaintiffs. This court thus finds that the requirement to annex the extract of title to the disputed land has been met.

Whether the Plaintiffs have locus to make a claim for adverse possession.

60. The Defendants have asserted that the Plaintiffs, as administrators of the Estate of the deceased, cannot get a better title than that of the deceased in his lifetime. It was submitted by the Defendants that the suit property is not part of the deceased's free property under the Law of Succession Act, and that the occupational rights of the deceased do not vest in the administrators because such rights terminated upon the death of the deceased.

61. In *Karuntimi Raiji vs M'makinya M 'itunga [2013] eKLR*, the Court of Appeal held that a claim of adverse possession, which is a claim founded on limitations of action as set out in **Section 30 (f)** of the **Registered Lands Act**, can survive the death of any person. The Appellate Court considered the provisions of **Section 2(1)** of the **Law Reform Act** as follows:

"Section 2 (1) of the Law Reform Act stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of, his estate. The proviso to the sub-section indicates the causes of action that do not survive namely defamation or seduction or inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery..."

62. A claim for adverse possession is not one of the exception under **section 2 (1)** of the **Law Reform Act** where the personal representatives of the deceased person cannot sue on behalf of the Estate of the deceased. A claim for adverse possession is one of those claims that survives the deceased person. The Plaintiffs therefore have the requisite *locus standi* to institute this suit for adverse possession on behalf of the deceased.

Whether the Plaintiffs have established a case for adverse possession.

63. In *Mtana Lewa vs Kahindi Nala Mwagandi [2015] eKLR* the Court of Appeal summed up what adverse possession entails adverse

possession entails:

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

64. Similarly, the term ‘adverse possession’ was defined in **Gabriel Mbui vs Mukindia Maranya [1993] eKLR** as follows:

“It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”

65. **Francis Gicharu Kariri vs Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)** approved the decision of the High Court in the case of **Kimani Ruchire vs Swift Rutherfords & Co. Ltd., (1980) KLR 10** at page 16 letter B, where Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.”

66. Where the person occupying land does so with the consent of the owner, the Court of Appeal in **Ndiema Samburi Soti vs Elvis Kimtai Chepkese (2010) eKLR**, held that such a person cannot be said to be in adverse possession as in reality, he has not dispossessed the owner and the possession is not illegal. Such possession only becomes adverse when such a licence determines, as was held in **Wambugu vs Njuguna, (1983) KLR 172**:

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

67. In an instance where a purchaser occupies land subject to a sale agreement and with the consent of the vendor, the courts in **Sisto Wambugu vs Kamau Njuguna [1982-88] 1 KLR 217**; and **Samuel Miki Waweru vs Jane Njeri Richu, Civil Appeal No. 122 of 2001** held that time does not start running for purposes of Adverse Possession, until the agreement is terminated.

68. In the case of **Samuel Miki Waweru vs Jane Njeri Richu (2007) eKLR**, the Court of Appeal was of the view 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. The court went further to hold that possession does not become adverse before the end of the period for which permission to occupy has been given. The court in the **Samuel Miki** (*supra*) case distinguished the **Sisto Wambugu** case (*supra*) as follows:

“It is important to bear in mind that in Sisto Wambugu the court was dealing with the nature of a purchaser’s possession under a general contract of sale land and not under a controlled transaction within the ambit of the Land Control Act...Thus the agreement of sale in this case was terminated for all purposes by the operation of the law and the continuation of possession by the respondent thereafter could not be referable to the agreement of sale or permission of the original owner. It was an independent adverse to the title of the original owner...In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessee pending completion and the transaction thereafter becomes void under section 6 (1) of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

69. However, in **Public Trustee vs Wanduru (1984) KLR 314** cited with approval in **Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR**, Madan JA 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.

70. In this matter, the undisputed facts are that the late Peter Mwikya Kakenyi entered into a contract with the Defendants in 1976 for the purchase of a portion of land measuring about 81.48 Ha (218 acres thereabout) out of the Defendant’s land known as L.R. No. 7590/6 along Mombasa Road (the suit property).

71. While the Defendants initially denied the existence of this contract in the Grounds of Opposition to the Originating Summons, they later on admitted to it in their Defence and Counterclaim. The only contestation raised by the Defendants was on the purchase price. While the Plaintiffs’ position is that the purchase price was Kshs. 300,000, the position by the Defendants was that the purchase was Kshs. 2,500 per acre.

72. All the parties are agreeable that the deceased paid Kshs. 300,000 for the suit land in three instalments, the last instalment of Kshs. 100, 000 having been made in the year 1988, with the first instalment and second installments having been made in the year 1985. It also not contested that the deceased took possession of the portion that he purchased from the Defendants in 1976.

73. The agreement between the deceased and the 2nd Defendant was never produced in evidence. The Defendants asserted that the sum of Kshs. 300,000 paid by the deceased was not the full sum of the agreed purchase price, and that that was the reason that made the 2nd Defendant not to transfer the land to the deceased. The Plaintiffs denied this assertion and contended that the contract was unwritten and that the sum of Kshs. 300,000 was the full purchase price.
74. The evidence produced in this court shows that the deceased paid Kshs 300,000 in installments of Kshs. 100,000 on 7th April, 1988, 12th August, 1985 and 5th June, 1985 respectively. The deceased took possession of a portion of LR No. 7590/6 in 1976 that he had purchased and used the land for ranching purposes. The deceased's family has continued being in possession of the land.
75. While the relationship between the deceased and the Defendants, and the consequential occupation of the suit property by the deceased, was initiated by way of a sale agreement, the Plaintiffs' claim is based on adverse possession and not the validity of the contract.
76. Although the deceased bought a portion of LR No. 7590/6 in 1976, and took possession of the land in the same year, the 2nd Defendant was registered as the owner of the said land on 17th March, 1977. The 2nd Defendant obtained the consent of the Masaku Donyo Sabuk Land Control Board to sub divide LR No. 7590/6 into two portions measuring 1019.51 Ha and 88.52 Ha on 10th August, 1981. It is the portion measuring 88.52 Ha that the Defendants had sold to the deceased in 1976.
77. The fact that the Defendants had to obtain the consent of the Land Control Board to sub divide the land in 1981 shows that the suit land was governed by the **Land Control Act**, which, under **section 6 (1)** requires the consent of the board before any sub-division and transfer can be effected. The consent to transfer the land must be obtained within six months from the date of the agreement.
78. Considering that the parties herein entered into an agreement in 1976, and the 2nd Defendant was registered as the owner of LR. No. 7590/6 on 17th March, 1977, the parties were obligated to get the consent of the board to sub divide and transfer the portion of land that the deceased had bought by 17th September, 1977, which was six months after the issuance of the title to the 2nd Defendant.
79. The evidence before me shows that the Defendants have never obtained the consent of the Land Control Board to transfer the land since they sold the suit property to the deceased in 1976. The deceased has always remained in possession of the portion of land he bought from the 2nd Defendant despite the absence of the consent of the Board to transfer the suit property to him.
80. That being the case, the agreement of sale in this case, whether oral or written, was terminated for all purposes by the operation of the law and the continuation of possession of a portion of LR No. 7590/6 measuring 80.52 Ha by the deceased, and after his demise the Plaintiffs, could not be referable to the agreement of sale or permission of the original owner. The possession of the suit property by the deceased and thereafter his family became adverse to the title of the 2nd Defendant, from the date the sale agreement was terminated.
81. In any event, if the Defendants' case is that the deceased was on the land by virtue of the 1976 agreement, and with the Defendants' permission, and that the deceased has never paid the full purchase price, then the deceased possession of the suit property became adverse to the Defendants' title twelve (12) years from the date when the deceased made the last instalment, which was in 1988, and declined to pay the full purchase price.
82. This conclusion is informed by the 1st Defendant's email, and in particular the email of 10th November, 2012 in which the 1st Defendant informed the 1st Plaintiff that the payment of Kshs. 100,000 by the deceased in 1988 "only added some 7 to 8 acres to his total." From 1988, it was obvious, at least from the Defendants' point of view, that the deceased had breached the agreement and was therefore not on the suit property with their consent, or under any form of agreement.
83. In conclusion, it is the finding of this court that the possession of the suit property by the deceased and the Plaintiffs became adverse from the time the transaction became void, which was in September, 1977, when the two parties failed to obtain the consent of the Land Control Board to sub divide and transfer the suit property to the deceased.
84. That being so, the Plaintiffs' claim for adverse possession in respect of 82.48 Ha of LR No. 7590/6 is meritorious, and the same is allowed as follows:
- a. **A declaration be and is hereby issued that the Plaintiffs, on behalf of the late Peter Mwikya Kakenyi, are entitled by adverse possession to all that portion of land measuring 81.48 Ha (218 acres thereabout) being a portion of all that piece of land known as LR. 7590/6.**
 - b. **A vesting order be and is hereby issued directed to the Defendants herein to immediately transfer land measuring 81.48 Ha (218 acres thereabouts) being a portion of all that piece of land known as LR. 7590/6, upon a survey been done and a deed plan issued at the Plaintiffs' expense, into the Plaintiffs' names and in default, the Deputy Registrar of this Court is hereby directed to sign the transfer forms and all other necessary documents in respect to the said land, in favour of the Plaintiff.**
 - c. **The Defendants' counter claim is dismissed with costs.**
 - d. **The Defendants to pay the costs of the suit and the counter-claim jointly and severally.**

Dated, signed and delivered in Machakos virtually this 18th day of February, 2022.

O. A. Angote

Judge

In the presence of:

No appearance for the Plaintiffs

Mr. Mapesa for Ms Kilonzo for the Defendants

Court Assistant: Okumu