



**Raibu v Mungania (Environment & Land Case 270 of 2017)
[2022] KEELC 12605 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 270 OF 2017
CK NZILI, J
SEPTEMBER 28, 2022**

BETWEEN

AJERICA NJIRU RAIBU PLAINTIFF

AND

EVANGELINE NKIROTE MUNGANIA DEFENDANT

JUDGMENT

A. Pleadings

1. By an originating summons dated September 18, 2017, the plaintiff claiming entitlement of ½ acre out of Parcel No 491 Nyayo Sirimon settlement scheme registered under the defendant's name, based on long, uninterrupted, open and exclusive occupation with effect from 2002.
2. The defendant filed a replying affidavit sworn on January 23, 2017. She stated that in 2003 she was given Kshs 30,000/= by the plaintiff in exchange of which she leased ½ acre of her land *vide* an agreement dated April 18, 2002 which she was to refund and get back her land.
3. The defendant averred out of illiteracy, the agreement indicated she was selling the land which was not the case. Nevertheless, she averred that she allowed the plaintiff to occupy her land so long as no permanent buildings would be erected.
4. The defendant averred she managed to refund Kshs 5000/= on April 2, 2003 which the plaintiff acknowledged receipt of and therefore the plaintiff was being insincere more so since the land in the scheme could not be sold except being transferred to family members as a gift.
5. The defendant averred she eventually raised the balance but the plaintiff has been avoiding her and has declined to accept the refund despite numerous summons by both her advocate and the area manager.
6. Therefore, the defendant averred that the plaintiff was a tenant at will on her land occupying it with her consent on temporary basis hence did not warrant the orders sought.



B. Pre-trial conference

7. Following directions to maintain the status quo made on October 31, 2017, the plaintiff filed her list of witnesses dated September 18, 2017, list of witnesses dated September 18, 2017, list of documents, issues for determination dated January 30, 2018 and case summary, while the defendant filed a list of defendant's witnesses dated January 23, 2018, list of documents and issues for determination dated May 22, 2018 respectively.

C. Evidence

8. PW 1 adopted her witness statement dated September 18, 2017 and the supporting affidavits to the originating summons as her evidence in chief and produced the sale agreement as P Exh No (1), official search certificate as P Exh (2) and she stated that she had been on the suit land since 2002 and has built several new houses on top of the three structures she found on the land.
9. PW 1 further testified that initially the defendant allowed her on the land as a purchaser of the land measuring half an acre. She denied that the money was to be refunded to her in return of the land. Further, PW 1 denied any refund was made to at the defendant's advocates offices as alleged or signing an acknowledgment receipt before Ms Ogoti advocate for such a refund.
10. PW 1 denied knowledge of one Jeremia Kirimi Mwititi though she admitted one of her neighbours was called John Kaimenyi. Likewise, the plaintiff admitted that she was the one collecting income from the rental houses on the suit land.
11. Witness summons were taken out for the remaining witnesses. However, none were availed by the time the plaintiff closed her case on February 20, 2020. Similarly, the defendant failed to attend the defence hearing by the time counsel on record prayed to close the case on February 3, 2022.

D. Written Submissions

12. Through written submissions dated February 18, 2022 the plaintiff takes the view that she has been on the suit land for over 14 years, uninterruptedly, peacefully living and utilizing the land after clearing the full purchase price. She submitted a dispute arose in 2017 when she demanded for the transfer of the suit land. She submitted she has never been a licensee on the suit land going by the extensive developments she has made therein.
13. In her view, the two issues for determination are whether she held a sale agreement and secondly if she has proved adverse possession.
14. On the first issue, the plaintiff submitted she duly executed a valid sale agreement on April 18, 2002 and took vacant possession. However, efforts to seek and obtain the land control board consent have been resisted by the defendant.
15. The plaintiff submitted the vitiation of the sale agreement for lack of a land control board consent does not matter in a claim for adverse possession going by the holding in *Public Trustee v Wandura Ndegwa* (1984) eKLR.
16. As to adverse possession, the plaintiff submitted that her oral testimony stands uncontroverted given she has been in actual possession, use or occupation of the suitland and has therefore satisfied the ingredients thereof as defined in *Black Laws Dictionary* 9th Edition, *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR and *Felicity Mutete Mutula vs James Ndambuki* (2020) eKLR.



17. On her part, the defendant submitted that she is the registered owner of the suitland as her own home which she acquired as a squatter in Nyayo Settlement Scheme, and which she leased to the plaintiff after she lend her money. Unfortunately, the defendant submitted that the agreement was written as if she was selling and or transferring her land which was out of her illiteracy and old age.
18. The defendant submitted she has been willing to refund the sum advanced but in vain more so since by the scheme rules do not permit such sale and transfer.
19. In her view, given the replying affidavits exhibits attached and her witnesses statements the plaintiff has been unable to prove the ingredients of adverse possession. Reliance was placed on *Peter Okoth v Ambrose Ochido Andajo & another* (2021) eKLR, *Mbira v Gachuhi* (2002) 1 EALR 131, *Jandu v Kirplal & another* (1975) EA, 222, *Karuntimi Raiji v M'Makinya M'Itunga* (2013) eKLR, *Mwinyi Hamisi Ali v AG & Philemona Mwaisaka, Benjamin Kamau Murima & others v Gladys Njeri* Civil Appeal No 2013 of 1996.
20. The defendant therefore submitted the occupation by the plaintiff has been with permission of the defendant hence the reason she accepted the refund of Kshs 5,000/= as a clear evidence that the sale agreement was rescinded.
21. Further the defendant submitted if at all the plaintiff was a bonafide purchaser of the land she would not have allowed one Jeremiah Kirimi Mbui to build his structures so close to her structures.
22. Lastly the defendant submitted the plaintiff is driven by greed, wants to steal the defendants land and has failed to prove adverse possession.

D. Determination

23. The court has carefully gone through the pleadings, documents presented and testimony tendered. The issues calling for determination are:
 - i. If the defendant leased or sold the suit land to the plaintiff.
 - ii. If there was any rescission of the sale agreement and termination of any licence to occupy the land.
 - iii. What is the order as to costs?
24. It is trite law that parties are bound by their pleadings and issues flow from pleadings.
25. In his suit, the plaintiff pleaded that she came into the suit land by virtue of a sale agreement dated April 18, 2002 which she produced as P Exh No 1. In the said agreement the subject matter is described as ½ an acre of Plot No 491 Nyayo Settlement Scheme. The consideration being Kshs 30,000/= of which a deposit of Kshs 7,000/= was paid at the signing of the agreement. Clause 2 stipulates the manner of paying the balance of Kshs 23,000/= specifically Kshs 10,000/= was to be paid upon transfer by January 1, 2003. Clause 3 stipulated the cost of the transfer was upon the vendor. The parties inserted a default clause that any breach thereof was to attract a damage to the innocent party of Kshs 60,000/=. The sale agreement was duly executed and witnessed by two witnesses before an advocate.
26. The defendant disputed ever intending to sell and or transfer any land to the plaintiff. On the contrary she pleaded that the agreement was meant as a lease of her land after being advanced Kshs 30,000 by the plaintiff hence there can be no adverse possession since she revoked the licence to occupy refunded a portion of the amount but the plaintiff has failed to receive the balance and or hand over vacant possession.



27. The defendant pleaded that the agreement was erroneous or made through a mistake due to her illiteracy and old age.
28. Section (3) (3) of the [Law of Contract Act](#) and Section 38 of the [Land Act](#) 2012 are the laws governing land agreements in Kenya. The requirements are that the contract must be in writing signed by all the parties and the signatures be attested by a witness who is present at the time the contract is made. Prior to 2003 the law provided for only an acknowledgment note by either the seller or his representative and putting into possession of the purchaser.
29. A contract of sale of land can only be vitiated on account of a mistake, duress, misrepresentation, undue influence, illegality and lack of capacity to enter into it. See [Stanley Kamere & 26 others vs NHC & 2 others](#) (2015) eKLR.
30. In [Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd](#) (2017) eKLR the court held for a contract to be present there has to be acceptance of the offer in an unconditional, unequivocal, in absolute terms and for a consideration.
31. Similarly, it has been held that parties have the freedom to contract and one of the reasons they reduce it into writing is to put an end to disputes and that courts do not rewrite contracts. See [NBK v Pipelastik Samkolit \(K\) Ltd & antoher](#) (2001) eKLR.
32. In this suit, the defendant takes the view she was illiterate at the time she signed the sale agreement and or old. She does not deny attending to her lawyers' offices to sign the agreement.
33. The defendant does not deny putting the plaintiff into possession of the suit land. She does not deny receiving Kshs 30,000/=. She does not dispute that there were witnesses to the sale agreement and that one of the terms of the agreement was to transfer the suit land at her cost on January 1, 2003 upon receiving the whole amount. The defendant does not state when she discovered the anomaly on the sale agreement, notified the plaintiff and or raised a complaint with her advocates who prepared, witnessed both the sale agreement and the acknowledgment receipts dated April 18, 2002.
34. The plaintiff has denied the allegations that the acknowledgment receipt amounted to a rescission of the sale agreement. Looking at the acknowledgment receipts they do not state their purpose at all. On the contrary they mention the sale agreement dated on April 18, 2002. If anything, the easiest thing would have been to disclose on its heading that it was revoking, reviewing or revising the sale agreement dated April 18, 2002.
35. The defendant pleaded that the plaintiff was to occupy the suitland and handover the same over to her after the refund was made. In P exh No 1 there is no clause talking about the date of the alleged refund or handover of vacant possession.
36. On the contrary, what is indicated is the completion dated of January 1, 2003 when the defendant was to transfer the suitland after receiving the full purchase price. The plaintiff has pleaded and testified that the defendant reneged to transfer the land on being requested to attend the land control board in 2017. Between 2002 and 2017 there is no evidence that the defendant ever asserted ownership of the suit land and formally gave notice to terminate any alleged license and requiring the plaintiff to vacate the suit premises.
37. In absence of any prove to the contrary my finding is that there was a binding sale agreement between the parties in line with the [Law of Contract Act](#) in place before 2003 and parole evidence cannot be used to contradict a sale agreement which is in clear and in an unambiguous terms. Similarly, I find no evidence that there existed a license to lease the land. It falls under rule id certum est anod certum redid potest – that is certain and can be made certain.



38. For a party to establish adverse possession, he must prove entry into the land without a license or consent from the registered owner openly, notoriously, uninterruptedly and for a statutory period of 12 years.
39. In *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR the Court of Appeal held the burden is on the person claiming to be entitled to the land by adverse possession to prove not only the period of 12 years but also that his possession was without the owner's permission, that the owner was dispossessed or discontinued of his possession of the land and that the adverse possessor has done acts on the land inconsistent with the owners enjoyment of the soil for the purpose he intended to use it.
40. A suit can only be maintained under sections 7 & 38 of the *Limitations of Actions Act* against a registered owner. There is no dispute the defendant is the registered owner of the suitland with effect from 2016, going by P Exh 2 and the acknowledgment of the said fact by the defendant in her replying affidavit and annexure marked ENM "1". See *Sophie Wanjiku v Jane Mwihaki Kimani* Nairobi ELC NO 490 of 2010.
41. The plaintiff admitted that the entry into the suit premises was out of a sale agreement and the intention was to possess the land whereas the defendant thinks otherwise that she was only a licensee, for an indefinite period since it was until a refund of Kshs 30,000/= was made.
42. Exh 1 indicates that the completion period was January 1, 2003. So after January 1, 2003 and in absence of a notice to vacate or rescission of the sale agreement and or a refund of the whole purchase price, the plaintiff was and continued to occupy the premises with the animus possidendi – the intention of possessing and excluding or dispossessing the true owner. See *Hosea vs Njiru & others* (1974) EA 526. P Exh No (2) indicates that the defendant became the registered owner of the suit land on August 4, 2016.
43. In *Jandu v Kirpal* (supra), the court held the rule on permissive possession is that possession does not become adverse before the end of the period which the possessor is permitted to occupy the land.
44. The evidence before this court is that the defendant never expressly repudiated or rescinded the sale agreement at any time until he became the registered owner of the suit land on August 4, 2016. Prior to that, there is no extract attached to show who was the registered owner through the plaintiff was allowed entry as a purchaser pending completion of the transaction. The defendant has admitted she was the allottee of the suit land as squatter by Nyayo Settlement Scheme. This is clearly indicated in the P Exh (1). All what she was waiting for is the issuance of a title deed.
45. Adverse possession is about the land but not the title deed. Time therefore in my view started running from January 1, 2003 after the completion date determined the permissive possession. Thereafter the plaintiff occupied the suit land not as a purchaser but contrary to the rights of the registered owner. There is no evidence that the occupation was suspended or interrupted by the defendant on account of an alleged licence or through termination of the sale agreement or through repossession of the land or by an effective entry into the land. The defendant failed to attend court and give evidence in support of her defence.
46. In *Edward Mariga through Mobisa Mariga vs Nathaniel David Shutter* (1979) eKLR and *CMC Aviation Ltd vs Cruisair Ltd (No.1)* (1987) KLR 103, the court held where a party fails to testify the pleading thereof remains a mere statement of facts which has not been substantiated. Similarly, the fashion of evidence given by the party present stand uncontroverted or unchallenged. The defendant has not called the witnesses to the sale agreement and the lawyer who prepared the sale agreement to substantiate her allegations that the said agreement related to a lease and not the sale of the suit



land. Written submissions however forceful cannot replace evidence as held in *Daniel T. Arap Moi vs Mwangi Stephen Murithi & another* (2014) eKLR.

47. In view of the foregoing, I find the plaintiff has proved her case to the required standards. I proceed to allow the originating summons in terms of prayers no (1) (2) (3) with costs.
1. An order that Ajerica Njiru Raibu has become entitled by adverse possession to ½ acre out of land Parcel No 491 Nyayo Sirimon Settlement Scheme which land is registered in the name of the defendant.
 2. An order that the plaintiff be registered over ½ acre out of the said land which the plaintiff and her family have occupied for over 12 years.
 3. An order that the defendant's right over ½ acre out of the suit land has become extinguished by virtue of the fact that the plaintiff and her family has occupied it continuously, uninterrupted, openly and notoriously for over 12 years.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 28TH DAY OF SEPTEMBER, 2022

In presence of:

C/A: Kananu

Mukaburu for Karanja for Karanja for plaintiff

Miss Kimotho for defendant

HON. C.K. NZILI

ELC JUDGE

