Kimotho v Mushomba (Being sued as the administrator of the Estate of Reuben Mushomba Njoroge alias Reuben Mushomba - Deceased) (Environment & Land Case E004 of 2023) [2025] KEELC 1085 (KLR) (11 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1085 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE E004 OF 2023

LN GACHERU, J

FEBRUARY 11, 2025

BETWEEN

NELSON MURUNGARU KIMOTHO ..... PLAINTIFF

AND

FLORENCE WAMBUI MUSHOMBA (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF REUBEN MUSHOMBA NJOROGE ALIAS REUBEN MUSHOMBA - DECEASED) ..... DEFENDANT

JUDGMENT

1. The Plaintiff herein filed an amended Plaint dated 3rd July 2024, and sought for Judgement against the Defendant for the following Orders:

    a. A declaration that the Plaintiff has become entitled to the portion of land measuring 4.5 Acres which is to be excised out of the property known as Maragua Ridge Settlement Scheme Plot No.53 measuring 4.5 Acres by virtue of adverse possession.

    b. A declaration that the portion of land measuring 4.5 Acres to be excised out of the property known as Maragua Ridge Settlement Scheme Plot No.53 registered in the name of Reuben Mushomba belongs to the Plaintiff by virtue of agreement dated 25th August 2007.

    c. An order that the defendant in her capacity as the administrator of the estate of Reuben Mushomba Njoroge alias Reuben Mushomba, do execute transfer of 4.5 Acres to be excised out of the property known as Maragua Ridge Settlement Scheme Plot No.53 in favour of the Plaintiff.

    d. In alternative to prayer (c) above, the Deputy Registrar of this Honourable Court do execute transfer of the parcel of land to the Plaintiff.

e. In lieu of (a), (b) and (c) above, the Defendant be ordered to refund the Plaintiff the entire purchase price of the suit land at the current market value, while taking to consideration the developments thereon.

f. Costs of this suit, interests and other relief that Court deems fit to grant.

2. The Plaintiff claimed to have purchased 4 ½ acres of land which portion was to be excised out of land parcel No. Maragua Ridge Settlement Scheme No. 53 measuring 4 ½ acres (the suit property) from one Esther Muthoni Mushomba (deceased), and mother to the Defendant herein. Further, at the time of purchase, the suit land was registered in the name of Reuben Mushomba (deceased), and husband to Esther (the Vendor)

3. It was further claimed that the said Esther was a beneficiary of the estate of Reuben Mushomba in her capacity as one of his wives. Further, that Florence Mushomba, the Defendant herein, is the administrator of the estate of the late Reuben Mushomba, and is aware about the purchase of the suit land by the Plaintiff.

4. The Plaintiff being the purchaser and Esther Mushomba as the Vendor entered into a sale agreement dated 25th August 2007, in which the purchaser was required to pay the entire purchase price of Kshs 630,000/= as each acre was sold at Kshs 140,000/-.

5. Further, on 25th August 2007, the Plaintiff paid a deposit of Kshs 300,000/= via a banker's cheque from Equity Bank of Kenya into a bank account held jointly by Esther Mushomba and Reuben Mushomba, and Esther acknowledged receipt of the cheque by signing the agreement.

6. The Plaintiff further claimed that the said agreement was witnessed by two witnesses, Grace Margaret Murungaru of ID NO 4608111 and Boniface Njoroge Mushomba of ID NO. 6424599 (son of Reuben and Esther).

7. After the execution of the said sale agreement, the Plaintiff immediately took vacant possession and has been in occupation of the said land and has undertaken developments thereon. However, Esther died before she could finalize her Petition for letters of administration or finalize transfer of the suit land to the Defendant.

8. On 4th May 2021, the Defendant filed a Petition for letters of administration without any reference to the Plaintiff as a creditor of the estate. Further, on 23rd November 2022, she was granted letters of administration. From the time of purchase, the Plaintiff's occupation of the suit land for the past 17 years has been open, continuous and uninterrupted.

9. Therefore, the Plaintiff seeks to be declared as the owner of the suit property by virtue of the agreement dated 25th August 2007, and by virtue of the doctrine of adverse possession.

The Defendant's Response

10. The suit is opposed by the Defendant through her Statement of Defence date d 7th August 2023, wherein she claimed that the sale agreement dated 25th August 2007, between the Plaintiff and her mother was illegal and void ab initio as it amounted to intermeddling with the estate of late father.

11. Further, she averred that her mother, Esther Mushomba, lacked legal authority or power to transfer the suit property on account of lack of Letters of Administration appointing her as the administrator of her late father's estate.

12. It was averred that her family has at all times been in possession of the suit property, and have been actively maintaining and carrying out various thereon.

Plaintiff's Response To Defendant's Statement Of Defence

13. The Plaintiff filed a reply to the Defendant's Statement of Defence in which he reiterated that the agreement of 25th August 2007, was executed by a representative of the estate of the late Reuben Mushomba with the Defendant's consent, and as such, it was a valid contract.

14. The matter proceeded for hearing via viva voce evidence. The Plaintiff called one witness, Susan Kananu Kibaara, who testified on behalf of the Plaintiff, her father-in law, vide the Power of Attorney dated 13th January 2023.

15. PW1, Susan Kananu Kibara, testified that the Defendant was selling the suit land, and the Plaintiff, Nelson Murungaru Kimotho agreed to buy the said land. She further testified that the Defendant is the administrator of the estate of Reuben Mushomba.

16. She adopted her Witness Statement as her evidence in chief, and also produced her list of documents as exhibits, which were marked PEXHIBTS1-7. Further, it was her evidence that the suit land was bought in 2007, at Ksh 140,000/= per acre, and the Plaintiff paid a total of Ksh. 340,000/=, and took possession of the said land. Thereafter, he started to cultivate the said land after paying all the money to Esther. She claimed that Nelson, the Plaintiff herein lives in USA, and thus the Power of Attorney.

17. Upon being cross examined by Mr. Rienye for the Defendant, she confirmed that the said land was bought in 2007, by Nelson, the Plaintiff herein and she was present when the suit land was bought.

18. However, she confirmed from the sale agreement her name had not been indicated, and she was not present when said sale agreement was drawn. She also confirmed that she was the daughter–in-law of Nelson, the Plaintiff herein, though she had no evidence to show that she was a daughter-in law to the Plaintiff.

19. It was her further testimony that Nelson paid the full purchase price, but she was not present, but Nelson paid that money using a cheque. However, she did not have copies of the said cheque, and she did not have evidence that money moved from Nelson's account to that of the Defendant. Further, she confirmed that she did not have evidence to show that the Defendant has lived on the suit land for 17 years.

20. The witness further stated that the suit land initially belonged to Reuben Mushomba, and Florence was the wife, and it was not for Esther. However, when Reuben died, the land was given to Esther, but she had no evidence to show that the land was under the control of Esther after the death of Reuben.

21. On re-exam, she affirmed that she was not present when the cheque was given to Esther, and that Esther sold the land because she wanted to move elsewhere.

Defendant's Case

22. DW1 Florence Wambui Mushomba, adopted her Witness statement as her evidence in chief, she also relied on her filed documents, and produced her list of documents as exhibits.

23. Upon being cross examined by Ms. Gachango for the Plaintiff, she stated that she lives in Germany, and that she is not utilizing the land in question. However, she travels twice per year to Kenya. She confirmed that Esther Muthoni Mushomba was her mother, and she is the administrator of the estate

of Reuben Mushomba, and she was issued with letters of Administration, but her mother had initiated the succession process, but died before conclusion.

24. The defendant denied that her mother had sold 4 acres to the Plaintiff, as she was not shown the said sale agreement of 2007. She further stated that she had not seen the Plaintiff's documents, and she was only told about this case by her advocate, and did not know about the sale agreement. She confirmed that Reuben Mushomba was her deceased brother, and she was not aware that her said brother witnessed the execution of the said agreement. Further, she did not know that the Plaintiff has been utilizing the land. She also claimed that her family is the one that has been utilizing the land.

25. In re-exam, she testified that she was last in Kenya in 2024, visited the suit land and noted that there was maize and beans planted thereon, and they were planted upon her instructions, and thus they belong to her.

26. The hearing was concluded on 22nd July 2024, and the parties were given 21 days each to file their respective written submissions.

Plaintiff's Submission

27. The Plaintiff filed written submissions dated 7th August 2024 through the Wangui Gachango & Co Advocates, and raised five issues for resolution by the Court as follows: -

    a. Whether Susan Kananu Kibaara was a competent witness to testify on behalf of the plaintiff

    b. Whether Plaintiff has become entitled to 4 ½ acres to be excised out of the property known as Maragua Ridge Settlement Scheme Plot No. 53 by virtue of adverse possession.

    c. Has the Plaintiff, therefore, established a claim under adverse possession?

    d. Whether the property known as 4 ½ acres to be excised from land parcel No. Maragua Ridge Settlement Scheme Plot No.53 registered in the name of Reuben Mushomba Njoroge belongs to the Plaintiff by virtue of agreement dated 25th August, 2007.

    e. Who should bear the costs of the suit?

28. On whether Susan Kananu Kibaara was a competent witness to testify on behalf of the Plaintiff, the Plaintiff relied on Order 9 Rule 1 of the Civil Procedure Rules and the case Gathenya Ngumi v Eric Kotut & 4 others [2022] to buttress the submission that Susan Kananu Kibaara was a competent witness having been given the authority to testify on behalf of the Plaintiff who was outside of the Country via a general power of attorney No. IR/A 75996/1 (FORM LRA 5) that was duly registered.

29. Whether Plaintiff has become entitled to 4 ½ acres to be excised out of the property known as Maragua Ridge Settlement Scheme Plot No. 53 by virtue of adverse possession, the Plaintiff argued that adverse possession is one of the ways of land acquisition in Kenya. She cited Sections 7,13,17 and 38, of the *Limitation of Actions Act*, to show that the title of the proprietor is extinguished in favor of adverse possessor, at the expiry of 12 years.

30. To prove clear possession, he produced photos of the maize he had allegedly planted on the suit land. Further that his occupation was without the consent of the Defendant who is the administrator of the estate of the deceased, and who is the registered owner of the suit land. Further, the 12 years have lapsed since August 2007, when the Plaintiff assumed possession of the suit land. Reliance was sought in the holding of the Court in the case of Karuntimi Raiji vs M'makinya M'Itunga

31. It was also submitted that the mother to the Defendant, Esther Mushomba, being an administrator could dispose of the property of the deceased registered proprietor, as such the sale agreement dated 25th August 2007 was valid.

32. That during the hearing and in her witness statement the Defendant acknowledged that her late mother, Esther Mushomba, sold the land to the Plaintiff, and that she had applied for confirmation of grant but died before it was finalized.

33. Reliance was placed on the case in Re Estate Of Charles Gungu Gwiyanga (deceased) (Succession Cause No.44 of 2021) [2022] KEHC 10300(KLR) (22 July 2022) (Ruling).

34. Further, that the agreement was in writing, executed and was witnessed by competent witnesses. A deposit of Kshs.300,000/= was made via a banker's cheque at the time of execution of the agreement. The agreement was signed on issuance of the cheque and there has never been a claim of the cheque bouncing, meaning the payment went through. The balance was cleared on 31st January 2008, as was in the sale agreement. This was in line with the provisions of Section 3 (3) of the *Law of Contract Act*.

35. On who should bear the costs of this suit, relying on Section 27 of the *Civil Procedure Act* it was submitted that costs should follow the event and should be awarded to the Plaintiff.

Defendant's Submissions

36. The Defendant filed her written submissions dated 16th August 2024, through Gikenye Mugo & Rienye Advocates, and identified three issues for determination:

i. What is the probative value of the Plaintiff's evidence?

37. The Plaintiff's sole witness was his Attorney and though she had authority via the General power of attorney, that does not override the rules of evidence under the *Evidence Act*.

38. It was submitted that Section 70 of the *Evidence Act* mandates that a signature must be proved to be in the signatory's handwriting. The witness for the Plaintiff admitted that she was not there when the sale agreement was signed and could not verify the Plaintiff's signature, and as such, the sale agreement holds no probative value.

39. Secondly, only a copy of the sale agreement was produced, with no explanation for the absence of the original sale agreement.

ii. Was there a valid contract for the sale of land?

40. The Defendant relied on Section 82 (b) (ii) of the *Law of Succession Act*, which provides that the sale of immovable property before the confirmation of the grant is expressly prohibited. For this submission, reliance was placed in the case Ratemo & 3 Others vs Rioba & Another [2023] KEELC 20711 [KLR] and Macfoy vs United Africa Co. Ltd [1961] 3 ALL ER 1169.

41. The Defendant also submitted that the Plaintiff failed to prove that any payment was made for the land. Although PW1 claimed that payment was made by cheque, no cheque or other proof was produced and therefore, without consideration, no valid contract exists. Further, there was no valid contract of sale capable of conferring any beneficial interest upon the Plaintiff in the claimed land.

42. It was also submitted that the Plaintiff's case is contradictory as he relied on both a sale agreement and adverse possession. Further, his evidence, consisting of photographs and a Surveyor's report, did not substantiate his claim. Further, the Plaintiff's witness had no personal knowledge of the land and

nothing on the land ties the Plaintiff to the suit land. No proof was provided that he personally planted the crops growing on the claimed land or that he has ever set foot on the land given that he currently resides in the USA.

43. It was further submitted that any claim for adverse possession is premised on occupation or possession. If the Plaintiff was never in actual occupation of the suit land, then the statutory period of adverse possession could not begin to run. Guidance was placed on the holding of the Court in Mbira v Gachuhi (2002) 1EALR 137 cited in Stephen Mwangi Gatunge V Edwin Onesmus Wanja [2002] eKLR.

44. This court has carefully considered the available evidence, and the rival written submissions and cited authorities and finds that the issues for determination are;

    i. Whether the Plaintiff is entitled to the suit land pursuant to the doctrine of adverse possession.

    ii. Whether the Plaintiff is entitled to a refund of the purchase price rendered in respect of the suit property.

    iii. Who shall bear the costs of the suit.

i. Whether the Plaintiff is entitled to the suit land pursuant to the doctrine of adverse possession.

45. The Plaintiff's prayers Nos (a) and (b) as per the Plaint crave a declaration that he is entitled to a portion of land measuring approximately 4.5 Acres out of the suit property on the basis of Adverse Possession.

46. The procedure for laying a claim to a parcel of land on the basis of adverse possession is set out in the law in Sections 9, 13, 17, 37 and 38 of the *Limitation of Actions Act* as read together with Order 37 Rule 7 of the Civil Procedure Rules.

47. The instant suit was originated by the Plaintiff through a Plaint dated 3rd July 2024, which is not the normal procedure for claims based on the doctrine of Adverse Possession. The Plaintiff's suit is not anchored on the provisions of 37 and 38 of the *Limitation of Actions Act* and Order 37 Rule 7 of the Civil Procedure Rules. The issue for consideration by the Court is whether the Plaintiff's failure to adhere to the established procedure applicable to claims based on Adverse Possession is fatal to his suit.

48. Although the issue was not raised by the Defendant, the Court is faced with a procedural question regarding the Plaintiff's prayers for a declaration that he is entitled to the suit property by virtue of Adverse Possession, which calls for resolution. See the holding of the Court in the case of Kuria Kiarie, Njuguna Kuria & Kimani Kuria v Sammy Magera [2018] KECA 467 (KLR).

49. In the case of Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR, the Court reasoned as follows

> "Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by Originating Summons. It has also been held that the procedure of Originating Summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala vs Okumu [1997] LLR 609 (CAK), which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly,

in Bayete Co. Ltd vs Kosgey [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted."

50. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him. See the decision in Mtana Lewa vs Kahindi Ngala Mwagandi (supra).

51. In the instant suit, the question is whether, the issue of adverse possession can be considered by the Court, recognizing that the Plaintiff having omitted to follow the established procedure, the Court is cognizant of the Overriding Objective set out under Section 3A of the *Civil Procedure Act* as well as the imperative to render justice without undue regard for procedural technicalities as provided for under Article 159(2) (d) of *the Constitution* of Kenya. See also the holding of the Court in the case of Obado vs Oyugi & 2 others (Civil Application 7 of 2014) [2014] KESC 25 (KLR) (23 April 2014) (Ruling).

52. Accordingly, it is the holding and finding of the Court that the Plaintiff's failure to ground the instant suit under Sections 37 and 38 of the *Limitation of Actions Act* is not a fatal omission warranting dismissal of the said suit.

53. The Plaintiff's claim is based on principles of adverse possession as was established in the case Joyce Wairimu Muira vs Ndegwa Gitu (2013)eKLR. From the evidence adduced in the Court, it is evident that the Vendor of the suit property had not taken out Letters of Administration in respect of the estate of her husband in order to be in a position to lawfully dispose the said land to the Plaintiff. Further, the Plaintiff was represented by an Advocate in the said transaction of disposing the suit property, therefore, there is a reasonable presumption that he was aware of the applicable laws related to the capacity of the Vendor to dispose the suit land.

54. Upon carefully consideration of the totality of the evidence adduced by the parties herein especially the Plaintiff, the Court is persuaded that although the Plaintiff has demonstrated that he has been continuously growing crops on 4 ½ acres of the suit land as shown in the photographic evidence, his entry therein was premised on an unlawful contract owing to the Vendor's incapacity.

55. Further, it is the finding and holding of the Court that time did not begin to run for purposes of Adverse Possession. Furthermore, the Court cannot enforce an unlawful contract, and therefore, Plaintiff's claim that he is entitled to the suit land on the basis of Adverse Possession is found unmerited and is hereby dismissed.

ii. Whether the Plaintiff is entitled to a refund of the Purchase price rendered in respect of the suit property.

56. The Plaintiff's suit contains an alternative prayer for refund of the purchase price delivered to the Vendor of the suit property namely, the Defendant's late mother. The Court has considered the totality of the evidence adduced by the parties and is satisfied that the Plaintiff did make a transfer of the sum of Kshs.300,000/- to a joint account held by the registered owner of the suit property and his wife namely Esther.

57. The Plaintiff claimed that as the purchaser, he was required to pay the entire purchase price of Kshs.630,000/- as each acre was sold at Kshs.140,000/- and he rendered full payment. However, he did not adduce evidence to demonstrate that he paid the remainder of Kshs.330,000/- out of the entire purchase price of Kshs.630,000/-.

58. Therefore, this Court is satisfied that the Plaintiff is entitled to a refund of the amount paid to the Vendor of the suit land who lacked the requisite legal capacity to dispose the said land. Accordingly,

the Court finds and holds that the Plaintiff is entitled to refund of the paid amount of the purchase price. Consequently, the court directs the Defendant to refund the amount of Ksh.300,000/- paid by the Plaintiff as purchase price, with interest at courts rate from the date of payment by the Plaintiff, until payment in full.

59. On the issue of costs, the Court relies on the provisions of Section 27 of the *Civil Procedure Act*, which provides that costs are awarded at the discretion of the court. Due to the unenforceable nature of the contract for the disposal of the suit property, the Court directs each party to bear its own costs.

60. Having found and held as above, this court concludes that the Plaintiff has failed to prove his case on the required standard of balance of probabilities. Consequently, this court proceeds to dismiss the Plaintiff's suit in terms of Prayers (a), (b), (c), (d) of the Amended Plaint dated 3rd July, 2024. However, the court allows Prayer No. (e) for refund of the part paid purchase price of Kshs.300,000/= at court's rate while taking into account developments therein, from the date of payment by the Plaintiff until payment in full.

    Further each party to bear its own costs.

    It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY, 2025

L. GACHERU

JUDGE

11/2/2025

Delivered online in the presence ofDIVISION -

Joel Njonjo – Court Assistant

M/s Macharia holding brief for Ms Wangui Gachago for the Plaintiff

Mr. Rienye for the Defendant