



**Nyabande & another v Mumbo & another (Environment and Land Appeal E010 of 2023) [2024] KEELC 5158 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5158 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E010 OF 2023  
SO OKONG'O, J  
JULY 11, 2024**

**BETWEEN**

**GABRIEL OYIEKO NYABANDE ..... 1<sup>ST</sup> APPELLANT**

**ROSE ONYANGO OMONDI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CONSOLATA AOKO MUMBO ..... 1<sup>ST</sup> RESPONDENT**

**NICHOLAS OLELA MUMBO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. F.Rashid (SPM) delivered on 15th August 2023 in Winam SPMC ELC No. 10 of 2020)*

**JUDGMENT**

**Background**

1. All that parcel of land known as Kisumu/Wathorego/455 (hereinafter referred to as “the suit property”) was registered in the name of Charles Walugu Maguth, deceased (hereinafter referred to only as “the deceased”) on 29<sup>th</sup> November 1994 as the first registered owner according to the extract of the register (Green Card) that was produced in evidence in the lower court as part of the court file for Winam SRM Succession Cause No. 61 of 2018. The appellants were registered as the joint proprietors of the suit property on 13<sup>th</sup> June 2019 as beneficiaries of the estate of the deceased following a Grant of Letters of Administration in respect of the estate of the deceased that was issued to the 1<sup>st</sup> appellant on 2<sup>nd</sup> August 2018 in the said Winam SRM Succession Cause No. 61 of 2018 (hereinafter referred to as “the Succession Cause”). The said Grant of Letters of Administration was confirmed on 11<sup>th</sup> April 2019. The respondents sought the revocation of the said Grant of Letters of Administration but the application was dismissed on 13<sup>th</sup> March 2020.



2. On 18<sup>th</sup> September 2020, the appellants filed a suit against the respondents at the Senior Principal Magistrate’s Court at Winam namely, Winam SPMELC No. 10 of 2020 (hereinafter referred to as “the lower court”). In the lower court, the appellants sought an order for the eviction of the respondents from the suit property claiming that they were trespassers thereon. The respondents filed a defence and a counter-claim against the appellants on 15<sup>th</sup> December 2020. The respondents’ defence and counter-claim was amended on 20<sup>th</sup> July 2022. In their defence and counter-claim, the respondents denied the appellants’ claim in its entirety. The respondents averred that the 1<sup>st</sup> respondent purchased the suit property from Charles Walugu Maguth, deceased (the deceased) through an agreement of sale dated 5<sup>th</sup> December 1984 and that the deceased died before transferring the property to the 1<sup>st</sup> respondent although the 1<sup>st</sup> respondent had taken possession immediately after purchase. The respondents averred that the 2<sup>nd</sup> appellant ratified the said agreement through another agreement of sale between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> appellant dated 6<sup>th</sup> July 2018. The respondents averred that the 1<sup>st</sup> respondent paid full consideration under the two agreements of sale.
3. The respondents averred that the appellants acted fraudulently by obtaining the full purchase price from the 1<sup>st</sup> respondent and promising to transfer the suit property to the 1<sup>st</sup> respondent and then turning around after obtaining a Grant of Letters of Administration in respect of the estate of the deceased to transfer the suit property to themselves. The respondents sought among other reliefs; an order for specific performance of the agreements for sale of the suit property between the appellants and the 1<sup>st</sup> respondent dated 13<sup>th</sup> May 1984 and 6<sup>th</sup> July 2018 aforesaid, an order compelling the appellants to transfer the suit property to the 1<sup>st</sup> respondent, in the alternative, a declaration that the respondents had acquired the suit property by adverse possession, and further in the alternative, an order compelling the appellants to refund of Kshs. 5,600/- which the 1<sup>st</sup> respondent paid to the deceased and the sum of Kshs. 40,000/- paid by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> appellant together with interest from the date of payment.
4. At the trial, the appellants called two witnesses in proof of their case while the respondents called three witnesses in their defence and in proof of their counter-claim. After considering the evidence adduced by the parties, the lower court delivered a judgment on 15<sup>th</sup> August 2023 in which it dismissed the appellants’ suit and entered judgment for the respondents for specific performance of the agreements of sale referred to earlier. The lower court ordered the appellants to transfer the suit property to the 1<sup>st</sup> respondent in default of which the executive officer of the court was authorised to execute all necessary documents on behalf of the appellants to facilitate the transfer of the suit property to the 1<sup>st</sup> respondent. The respondents were also awarded the costs of the suit and the counter-claim. In the judgment, the lower court framed four (4) issues for determination namely; whether the respondents’ claim for specific performance was time barred, whether the respondents’ claim met the threshold for adverse possession, whether the respondents were trespassers on the suit property and should be evicted, and who should pay the costs of the suit. On the first issue, the lower court found that the respondents’ specific performance claim was based on the agreement of sale dated 5<sup>th</sup> December 1984 between the 1<sup>st</sup> respondent and the deceased and the agreement of sale dated 6<sup>th</sup> July 2018 between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> appellant. The lower court held that the agreement of sale dated 5<sup>th</sup> December 1984 between the 1<sup>st</sup> respondent and the deceased was superseded by the subsequent agreement of sale dated 6<sup>th</sup> July 2018. The lower court held further that time started running for the purposes of Limitation of Actions on 6<sup>th</sup> July 2018 which was the date of the second agreement of sale and as such the respondents’ specific performance claim was not time barred.
5. On whether the respondents had made a case for adverse possession, the lower court held that since the respondents had taken possession of the suit property pursuant to the agreements of sale dated 5<sup>th</sup>



December 1984 and 6<sup>th</sup> July 2018, an adverse possession claim was not established by the respondents. On the issue whether the respondents were trespassers on the suit property, the lower court made a finding that the appellants were the registered proprietors of the suit property and that they had been issued with a title deed for the property. The lower court stated that the registration of a person as an owner of land could be impeached on the grounds that the same was obtained fraudulently or through misrepresentation or illegally, unprocedurally or through a corrupt scheme. The lower court held that the conduct of the 2<sup>nd</sup> appellant of recognising the agreement of sale dated 5<sup>th</sup> December 1984 through a subsequent agreement of sale dated 6<sup>th</sup> July 2018 and failing to honour the same was malicious. The lower court took issue with the 2<sup>nd</sup> appellant's act of participating in two Succession Causes one with the 1<sup>st</sup> appellant (Succession Cause No. 61 of 2018) pursuant to which they were issued with a Grant of Letters of Administration which they used to acquire the suit property and the other alone (Succession Cause No. 117 of 2018). The lower court held that the appellants' title to the suit property was not "clean". The lower court held that since the respondents entered the suit property through the agreements of sale the 1<sup>st</sup> respondent entered into with the deceased and the 2<sup>nd</sup> appellant, they were not trespassers on the suit property. It was on the basis of the said findings that the lower court dismissed the appellants' suit and allowed the respondents' counter-claim.

### **The appeal**

6. The appellants were dissatisfied with the said judgment of the lower court and filed this appeal on 17<sup>th</sup> August 2023. In their memorandum of appeal dated 16<sup>th</sup> August 2023, the appellants challenged the decision of the lower court on the following grounds;
  1. That the lower court erred in dismissing the appellants' suit in its entirety;
  2. That the lower court erred in law in compelling the appellants to transfer the suit property to the 1<sup>st</sup> respondent in fulfilment of the terms of the agreements of sale dated 5<sup>th</sup> December 1984 and 6<sup>th</sup> July 2018;
  3. That the lower court erred in awarding the respondents the costs of the counter-claim without considering the evidence on record, and
  4. That the lower court failed to consider and analyse the evidence on record in its entirety.
7. The appellants prayed that the appeal be allowed and the judgment of the lower court delivered on 15<sup>th</sup> August 2023 be set aside. The appellants also prayed for the costs of the appeal.
8. The respondents sought leave to file a supplementary record of appeal which was granted. They used the opportunity to file some documents for which no leave was granted. They filed a Notice of Cross Appeal dated 20<sup>th</sup> November 2023 and a Notice of Grounds Affirming the decision of the lower court also dated 20<sup>th</sup> November 2023. Order 42 Rule 32 of the Civil Procedure Rules on the power of the appellate court on appeal provides as follows:

“ 32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”



9. I am of the view that an appellate court has been given power to deal with all the issues arising on an appeal including any issue that a respondent may have against a decision the subject of appeal. This may explain why the [Civil Procedure Act](#) and the Rules made thereunder did not provide for a procedure for the filing of a cross-appeal and notice of grounds affirming a decision. I am of the view however that it is good practice for orderly hearing of an appeal for a respondent served with a memorandum of appeal who wishes to challenge part of the decision appealed against by an appellant, and who has not yet filed an appeal of his own to file a cross-appeal against the same decision setting out the grounds on which the cross-appeal is based. The [Civil Procedure Act](#) and the Rules have not provided expressly for the timelines within which such cross-appeal should be filed. I am of the view that such cross-appeal should be filed after service of a memorandum of appeal under Order 42 Rule 12 of the [Civil Procedure Rules](#) and before the giving of directions by the court under Order 42 Rule 13 (1) of the [Civil Procedure Rules](#).
10. I however find the filing of grounds affirming the decision rather unnecessary. I am of the view that a respondent who feels that the decision of the court appealed against is correct and proper for other or further reasons rather than those relied on by the trial court is at liberty to put forward such argument at the hearing of the appeal. It is not necessary to file a notice of grounds affirming a decision since such grounds must arise from the evidence that was before the trial court and cannot take the appellant by surprise.
11. Having said that, what are the respondents' grounds of cross-appeal? The respondents have contended that the lower court erred in fact and law by holding that the respondents had not established their adverse possession claim which they raised as an alternative relief because they had entered the suit property with the permission of the appellants. The respondents have contended further that the lower court erred in failing to address the issue of a refund of the purchase price which the respondents raised as a further alternative prayer. The respondents urged the court to allow the cross-appeal, set aside the judgment of the lower court or vary the same in part whatever the outcome of the main appeal and the same be substituted with a judgment in favour of the respondents in terms of alternative prayer (c) and (d) of the respondents' counter-claim in the lower court.
12. In their notice of grounds affirming decision of the lower court, the respondents contended that the said decision should be affirmed upon grounds other than those relied on by the lower court. The respondents averred that the agreement of sale dated 18<sup>th</sup> July 2018 was not time barred and that the same was made for the purposes of enforcing the agreement of 5<sup>th</sup> December 1984. The respondents averred further that each of the two agreements should be considered in isolation as each had different terms and conditions. The respondents averred further that the 2<sup>nd</sup> appellant acted unconscionably and in connivance with the 1<sup>st</sup> appellant in a scheme that was aimed at denying the 1<sup>st</sup> respondent her entitlement to the suit property.

### **The submissions**

13. The appeal was argued by way of written submissions. The appellants filed submissions dated 13<sup>th</sup> December 2023 while the respondents filed submissions and supplementary submissions dated 18<sup>th</sup> December 2023 and 3<sup>rd</sup> January 2024 respectively. The respondents' supplementary submissions were filed without leave. The appellants submitted that they were the beneficiaries of the estate of Charles Walugu Maguth, deceased (the deceased) pursuant to the Grant of Letters of Administration that was issued to them in Succession Cause No. 61 of 2018 on 2<sup>nd</sup> August 2018 and confirmed on 12<sup>th</sup> April 2019. The appellants submitted that the agreements of sale dated 5<sup>th</sup> December 1984 and 6<sup>th</sup> July 2018 were not genuine or valid and as such could not support the alleged sale of the suit property to



the 1<sup>st</sup> respondent. The appellants submitted that the agreement dated 5<sup>th</sup> December 1984 was not enforceable. The appellants submitted that the claim based on the said agreement was time barred. The appellants submitted that the agreement dated 6<sup>th</sup> July 2018 was entered into with the 2<sup>nd</sup> appellant while the 2<sup>nd</sup> appellant had no capacity to enter into such agreement as she had not obtained a grant of letters of administration in respect of the estate of the deceased. The appellants termed the agreement null and void. The appellants submitted that their appeal should be allowed and that the respondents' cross-appeal was an afterthought and a waste of judicial time. The appellants averred that the cross appeal was an admission on the part of the respondents that the lower court erred.

14. The respondents framed four issues for determination by the court. The first issue was whether the lower court erred in making an order for specific performance against the appellants. The respondents submitted that the agreement of sale dated 5<sup>th</sup> December 1984 was valid in law and complied with Section 3(3) of the *Law of Contract Act*. The respondents submitted that it was not disputed that the 1<sup>st</sup> respondent complied with the terms of this agreement by paying the full purchase price and was put into possession by the deceased. The respondents submitted that the 1<sup>st</sup> respondent cultivated the suit property until 2018 when she sought to have the agreement completed so that she could sell a portion of the property. The respondents submitted that it was at that point that the appellants came into the picture leading to the second agreement with the 2<sup>nd</sup> appellant dated 6<sup>th</sup> July 2018 in which the 2<sup>nd</sup> appellant undertook to do succession and have the property transferred to the 1<sup>st</sup> respondent. The respondents submitted that the agreement of sale with the 2<sup>nd</sup> appellant dated 6<sup>th</sup> July 2018 was valid and could be enforced through specific performance. The respondents submitted that the lower court was correct in ordering specific performance of the said agreement.
15. The second issue framed by the respondents was whether the 1<sup>st</sup> respondent had acquired the suit property by adverse possession and if so, whether the Appellants' suit was time barred. The respondents submitted that a change of ownership of land does not stop time from running for the purposes of adverse possession. The respondents submitted that the 1<sup>st</sup> respondent took possession of the suit property immediately after the execution of the agreement of 5<sup>th</sup> December 1984 and payment of the full purchase price. The respondents submitted that the 1<sup>st</sup> respondent had occupied the suit property for a total of 36 years by 2020 when she filed a counter-claim seeking to be registered as the owner of the suit property by adverse possession. The respondents submitted that the lower court erred in its finding that the 1<sup>st</sup> respondent's occupation of the suit property was permissive rather than adverse. The respondents submitted that upon taking possession of the suit property, the 1<sup>st</sup> respondent subsequently assigned a portion thereof to the 2<sup>nd</sup> respondent who was her son and opted to sell the remaining portion to a third party.
16. The respondents submitted that the issue of limitation of action goes to the jurisdiction of the court and as such it could be raised at any stage of the proceedings. The respondent submitted that having regard to the 1<sup>st</sup> respondent's occupation of the suit property in 1984, the appellants' suit in the lower court was time barred. The respondents submitted that the reliefs that were sought by the appellants in the lower court could not be granted in the circumstances.
17. On the issue of refund of the purchase price, the respondents submitted that the respondents had prayed for a refund of the purchase price as an alternative prayer. The respondents submitted that the lower court did not address this issue. The respondents invited the court to consider the issue in the event that the appeal by the appellants was allowed.
18. On the issue of costs, the respondents submitted that costs follow the event and that costs are at the discretion of the court. The respondents submitted that the appellants' suit having been dismissed and the respondents' counter-claim allowed, the lower court exercised its discretion correctly in awarding



the costs of the suit to the respondents. The respondents urged the court to dismiss the appellants' appeal and allow the respondents' cross-appeal.

19. In their supplementary submissions, the respondents submitted that the suit property did not form part of the deceased's estate and as such they could not have intermeddled with it. The respondents submitted that the deceased had sold the suit property to the 1<sup>st</sup> respondent in 1984 and as such the property was not free property of the deceased at the time of his death. The respondents submitted that in any event, the issue of intermeddling with the suit property was not raised in the pleadings before the lower court neither did it form a ground of appeal. The respondents submitted that raising the issue in the submissions violated the provisions of Order 42 Rule 4 of the [Civil Procedure Rules](#).

### **Analysis and determination**

20. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the appellants, the respondents' cross-appeal and notice of grounds affirming the decision of the lower court, and the submissions by the advocates for the parties. As correctly submitted by the respondents, this being a first appeal, the court must consider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the lower court. The court has to bear in mind however that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, [Kenya Ports Authority v. Kuston \(Kenya\) Limited](#) [2009] 2 E.A 212 where the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

21. The appellate court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, [Peter v. Sunday Post Ltd. \[1958\] E.A 424](#) and [Makube v. Nyamuro](#)[1983] KLR 403.
22. I will consider the appellants' appeal after which I will go to the cross-appeal by the respondents. In summary, the appellants have contended that the lower court erred in ordering specific performance of the agreements of sale dated 5<sup>th</sup> December 1984 and 6<sup>th</sup> July 2018. In the Supreme Court of Uganda case of [Manzoor v. Baram](#) [2003] 2 E.A 580 that was cited in the case of [Thrift Homes Limited v. Kays Investment Limited](#) [2015]eKLR, the court stated as follows on specific performance:

“Specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done, that which ought to be done”. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through



inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance.”

23. In *Amina Abdulkadir Hawa v. Rabinder Nath Anand & Another* [2012] eKLR, the court cited Chitty on Contracts, 28<sup>th</sup> Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles...specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party...severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”

24. In *Gurdev Singh Birdi and Marinder Singh Ghatora v. Abubakar Madhubuti CA No.165 of 1996* the court stated that:

“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

25. The agreement dated 5<sup>th</sup> December 1984 was made between Charles Walugu Maguth, deceased and the 1<sup>st</sup> Respondent while the agreement dated 6<sup>th</sup> July 2018 was made between the 2<sup>nd</sup> appellant and the 1<sup>st</sup> respondent. As correctly found by the lower court, a claim for specific performance based on the agreement dated 5<sup>th</sup> December 1984 was time-barred and as such was unsustainable. The respondents argued which argument was accepted by the lower court that the said agreement of 5<sup>th</sup> December 1984 was revived by the agreement of 6<sup>th</sup> July 2018. I find no merit in this argument. As I have mentioned, the agreement dated 5<sup>th</sup> December 1984 was made between Charles Walugu Maguth, deceased and the 1<sup>st</sup> respondent while the agreement dated 6<sup>th</sup> July 2018 was made between the 2<sup>nd</sup> appellant and the 1<sup>st</sup> respondent. The 2<sup>nd</sup> appellant was not an administrator of the estate of the deceased as at 6<sup>th</sup> July 2018 when she entered into the said agreement with the 1<sup>st</sup> respondent and has never been an administrator of the estate of the deceased. The 2<sup>nd</sup> appellant was also not registered as the owner of the suit property. The 2<sup>nd</sup> appellant could not therefore purport to revive an agreement between the deceased and the 1<sup>st</sup> respondent. The fact that she was the only heir of the estate of the deceased did not give her that power.
26. Whether the agreement dated 6<sup>th</sup> July 2018 made between the 2<sup>nd</sup> appellant and the 1<sup>st</sup> respondent is taken to have revived the earlier agreement dated 5<sup>th</sup> December 1984 between Charles Walugu Maguth,



deceased and the 1<sup>st</sup> Respondent or the same is considered alone, the agreement could not be enforced. I have already held that the agreement dated 6<sup>th</sup> July 2018 could not revive the agreement dated 5<sup>th</sup> December 1984. Considered alone, this agreement dated 6<sup>th</sup> July 2018 even if it was validly entered into between the 2<sup>nd</sup> appellant and the 1<sup>st</sup> respondent could still not be enforced. At the time the order for specific performance was made, the suit property according to the evidence that was before the lower court was registered in the names of the appellants as joint owners and the two were issued with a title deed on 13<sup>th</sup> June 2019. The property was first transferred to the 1<sup>st</sup> appellant by transmission as the administrator of the estate of the deceased before it was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> appellants as joint proprietors.

27. The suit property could not be transferred to the 1<sup>st</sup> respondent as at 15<sup>th</sup> August 2023 pursuant to the agreement dated 6<sup>th</sup> July 2018 between the 2<sup>nd</sup> appellant and the 1<sup>st</sup> respondent. The 1<sup>st</sup> appellant was not a party to the agreement dated 6<sup>th</sup> July 2018. The 1<sup>st</sup> appellant could not be compelled to transfer to the 1<sup>st</sup> respondent the suit property in fulfilment of the terms of an agreement to which he was not a party. The 2<sup>nd</sup> appellant could not also transfer a property registered jointly in her name with the 1<sup>st</sup> appellant. In any event, the agreement dated 6<sup>th</sup> July 2018 provided that the 2<sup>nd</sup> appellant was to obtain a grant of letters of administration in respect of the estate of the deceased and thereafter transfer the suit property to the 1<sup>st</sup> respondent. At the time the order for specific performance was made by the court, there was evidence before the court showing that the grant of letters of administration in respect of the estate of the deceased had been issued to the 1<sup>st</sup> appellant on 29<sup>th</sup> July 2018 even before the counter-claim for specific performance was filed. This means that the 2<sup>nd</sup> appellant could not perform the agreement dated 6<sup>th</sup> July 2018 which the lower court found to have superseded the agreement dated 5<sup>th</sup> December 1984. As I mentioned earlier, the respondents' application seeking to revoke the said grant in favour of the 1<sup>st</sup> appellant was dismissed by the court on 13<sup>th</sup> March 2020.
28. For the foregoing reasons, it is my finding that the lower court erred in making an order for specific performance of the agreements dated 5<sup>th</sup> December 1984 and 6<sup>th</sup> July 2018. With these findings, I would set aside the lower court judgment. While still on this issue, I wondered while writing this judgment how the 1<sup>st</sup> respondent could have entered into an agreement for the sale of the suit property with the deceased on 5<sup>th</sup> December 1984 while the property was registered in the name of the deceased on 29<sup>th</sup> November 1994!
29. With regard to the respondents' cross-appeal, the respondents took issue with the lower court's finding that their adverse possession claim was not established. I have noted that the agreement dated 5<sup>th</sup> December 1984 had no completion date. The agreement was open-ended. According to the terms of the agreement, the 1<sup>st</sup> respondent had performed her part of the agreement and was given possession awaiting performance by the deceased of his part of the agreement. I agree with the lower court that the 1<sup>st</sup> respondent took possession of the suit property with the permission of the deceased. The 1<sup>st</sup> respondent had a duty to establish that the permission that was given to her to enter the suit property was withdrawn and that her possession of the property became adverse to the interest of the deceased in the property. The respondents did not address the lower court and this court as to when the 1<sup>st</sup> respondent's occupation became adverse to the interest of the estate of the deceased on the suit property. The 1<sup>st</sup> respondent did not tell the lower court whether or not the consent of the Land Control Board was obtained in respect of the transaction. In my view, the agreement dated 6<sup>th</sup> July 2018 between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> appellant was an indication that the 1<sup>st</sup> respondent treated the agreement dated 5<sup>th</sup> December 1984 as still alive and wanted it enforced. According to the 1<sup>st</sup> respondent, she believed that the 2<sup>nd</sup> appellant was going to take out grant of letters of administration and have the suit property transferred to her until she received a demand letter dated 22<sup>nd</sup> June 2019



asking her and the 2<sup>nd</sup> respondent to vacate the suit property. It was no wonder that she sought specific performance of the said agreements of sale. The 1<sup>st</sup> respondent could not claim the suit property as a purchaser and by adverse possession at the same time. I cannot fault the lower court for its finding that the respondents had entered and occupied the suit property with the permission of the deceased and the respondents.

30. Even if it is assumed that the lower court erred in its finding that the respondents entered the suit property with the permission of the deceased and the 2<sup>nd</sup> appellant and that the 1<sup>st</sup> respondent could claim the suit property as a purchaser and also by adverse possession, did the 1<sup>st</sup> respondent prove her adverse possession claim? In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

“ 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?”

19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person’s favour. See *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* (supra).

31. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necprecario (no force, no secrecy, no evasion) ...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

32. In *Githu v. Ndeete* [1984] KLR 776 it was held that:

“Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”



33. The 1<sup>st</sup> respondent gave evidence that she entered the suit property in 1984 after purchasing the same from the deceased, Charles Walagu Maguth. The 1<sup>st</sup> respondent testified further that she cultivated various crops on the suit property until 2016 when she allowed the 2<sup>nd</sup> respondent who was her son to settle on the property. The 1<sup>st</sup> respondent called witnesses who corroborated her evidence of cultivation of the suit property and occupation of the land by the 2<sup>nd</sup> respondent in 2016. The 1<sup>st</sup> respondent told the court that she also sold a portion of the suit property to a third party in 2018. The appellants denied the 1<sup>st</sup> respondent's claim that she took possession of the suit property in 1984 and that she had been cultivating the same. According to the appellants, the respondents entered the suit property in 2016 when the 2<sup>nd</sup> respondent forcefully put up temporary structures on the property. At the trial, evidence was placed before the court of the 2<sup>nd</sup> respondent's home on the suit property. Apart from the oral evidence that was rebutted, there was no evidence of the 1<sup>st</sup> respondent's use or occupation of the suit property.
34. From the evidence tendered by the 1<sup>st</sup> respondent, at the time she lodged her counter-claim for adverse possession in 2020, she was not in possession of the suit property. The person in occupation of the suit property was the 2<sup>nd</sup> respondent who entered the suit property in 2016. I am of the view that even if the 1<sup>st</sup> respondent was using the suit property prior to 2016 which was not established in my view, the 1<sup>st</sup> respondent could not maintain an action for adverse possession of the suit property in 2020 having surrendered possession of the suit property to the 2<sup>nd</sup> respondent in 2016. The 1<sup>st</sup> respondent contended that the fact that she was sued by the appellants meant that she was in possession of the suit property. Paragraphs 6, 7 and 8 of the plaint filed in the lower court are clear as to who was in possession of the suit property according to the appellants. The appellants averred that it was the 2<sup>nd</sup> respondent who was in possession of the suit property and that the 1<sup>st</sup> respondent was sued because she claimed to have purchased the suit property from the deceased. It is therefore my finding that the 1<sup>st</sup> respondent's adverse possession claim was not proved.
35. The respondents had also contended that the appellants' suit was time-barred and that although the issue was not raised in their defence and counter-claim, it touched on the jurisdiction of the court and as such could be raised even on appeal. In *Phoenix of E. A. Assurance Company Limited v. S.M. Thiga T/A Newspaper Service* [2019] eKLR, the Court of Appeal stated as follows:
- “In common English parlance, Jurisdiction denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”
36. Order 2 Rule 4 of the *Civil Procedure Rules* provides as follows:
- “4.
- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;



- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
  - (c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”
- (emphasis added)

37. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled “The present importance of pleadings” published in 1960 Current Legal problems, at P.174 where the author stated as follows:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

38. Earlier in this judgment, I had set out the pleadings by the parties before the lower court. The defendant did not plead that the appellants’ suit was time-barred. The issue was also not raised at the trial or in the submissions by the parties before the lower court. The lower court did not therefore express any opinion on the same. I do not agree with the respondents that limitation of action is a jurisdictional issue and as such can be raised at any time. The provisions of the *Civil Procedure Rules* that I have reproduced above provides that if a defendant wishes to rely on limitation of action as a defence, the same must be expressly pleaded. I have perused the authority that was cited by the respondents on this issue. The authority is distinguishable as it dealt strictly with the issue of jurisdiction of the court which is not the case here. The matter did not concern limitation of actions. It is therefore my finding that the point was wrongly taken in cross-appeal as it is an issue that was not pleaded and was not determined by the lower court.



39. The other issue raised by the respondents in their cross-appeal concerned their prayer for a refund of the purchase price paid to the deceased and the 2<sup>nd</sup> appellant together with interest. Prayer for a refund was an alternative prayer. The lower court having granted the main relief which was specific performance, the court could not at the same time give an order for a refund of the purchase price. The lower court was not even obliged to consider the issue. The lower court cannot therefore be faulted for its failure to determine the issue whether or not the 1<sup>st</sup> respondent was entitled to a refund of the purchase price.
40. Now that I have held that the 1<sup>st</sup> respondent was not entitled to an order for specific performance and that the 1<sup>st</sup> respondent did not establish her adverse possession claim, can I order a refund of the purchase price? From the evidence on record, the 1<sup>st</sup> respondent claimed to have paid the deceased, Charles Walugu Maguth a sum of Kshs. 5600/- on 5<sup>th</sup> December 1984 as the purchase price. The claim for a refund could only be brought against the 1<sup>st</sup> appellant in his capacity as the administrator of the estate of the deceased. The claim could not be brought against him in his personal capacity. The 1<sup>st</sup> appellant did not institute the lower court suit as an administrator of the estate of the deceased. The appellants brought the suit in their personal capacities as the registered proprietors of the suit property. The said sum of Kshs. 5600/- is not recoverable from the appellants but from the estate of the deceased against which the counterclaim was not brought. As for the sum of Kshs. 40,000/- said to have been paid to the 2<sup>nd</sup> appellant, I am satisfied from the evidence on record that the 2<sup>nd</sup> appellant received Kshs. 35,000/- from the 1<sup>st</sup> Respondent. It would amount to unjust enrichment if the 2<sup>nd</sup> appellant retained the said amount. The 1<sup>st</sup> respondent is entitled to the same.

### **Conclusion**

31. For the foregoing reasons, I find merit in the appellants' appeal. The respondents' cross-appeal on the other hand has no merit save as stated above. I allow the appeal on the following terms;
1. The judgment of the lower court delivered on 15<sup>th</sup> August 2023 is set aside and substituted with a judgment in favour of the appellants against the respondents in terms of prayers (a) and (b) of the plaint filed in the lower court dated 17<sup>th</sup> September 2020.
  2. The respondents or any of them in possession of all that parcel of land known as Kisumu/Wathorego/455 shall vacate the property and hand over the same to the appellants on or before 31<sup>st</sup> December 2024 in default of which the appellants shall be at liberty to move the court for warrants for their forceful eviction from the property.
  3. The 2<sup>nd</sup> appellant shall pay to the 1<sup>st</sup> respondent a sum of Kshs. 35,000/- together with interest at court rates from the date of this judgment until payment in full being the refund of the monies paid by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> appellant under the agreement dated 6<sup>th</sup> July 2018.
  4. Each party shall bear its costs of the lower court suit and of this appeal.

**DELIVERED AND DATED AT KISUMU ON THIS 11<sup>TH</sup> DAY OF JULY 2024**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The 1<sup>st</sup> Appellant in person

Mr. Odhiambo D. for the Respondents

Ms. J. Omondi-Court Assistant

