M'Mukira & another v Magiri & another (Environment and Land Appeal E018 of 2024) [2024] KEELC 7450 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7450 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E018 OF 2024

CK NZILI, J

NOVEMBER 6, 2024

BETWEEN

JOSEPH KOOME M'MUKIRA ..... 1ST APPELLANT

INTERNATIONAL GOSPEL CENTRE (SUING AS THROUGH THE EXECUTIVE OFFICIALS, NAMELY CHAIRMAN, SECRETARY, TREASURER AND PASTOR) ..... 2ND APPELLANT

AND

CHARLES MAGIRI ..... 1ST RESPONDENT

ALICE NAITORE MAGIRI ..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. T.M Mwangi – SRM in CMC ELC No. 125 of 2016 delivered on 13.7.2023)

JUDGMENT

1. The appellants, who were the defendants at the trial court, had been sued by the respondents as the plaintiffs by an initial plaint dated 25.4.2016, for trespass and erection of structures in 2015 on the 1st respondent L.R No. Kirua/Naari – Maitei/472. The appellants filed a defence dated 25.7.2017, saying he bought the land in 1999. By an application dated 14.9.2017, one Justus Kuria Nkanata sought to be joined as an interested party to the suit pursuant to a sale agreement dated 7.9.2017 between him and the 1st respondent leading to a title deed issued to him on 21.4.2017, after the interested party was allowed to join the suit, he filed a list of witness statements.

2. By an application dated 11.7.2019, the firm of CP Mbaabu and Co. Advocates, who had rejoined the suit by a notice of appointment dated 11.7.2019, sought leave to amend the plaint. By an order dated 17.7.2019, leave was granted to the respondent to amend the plaint within 7 days. The appellant was equally ordered to file and serve an amended defence within 10 days of receipt of the amended plaint.

3. There is no evidence from the court record that the respondent filed and served an amended plaint before the expiry of the set period. What is clear is that the respondent instructed the firm of Vivian Aketch and Co. Advocates to come on record in place of CP Mbaabu and Advocates, by a notice of change of advocates dated 21.8.2019. In the draft amended plaint, the respondents had intended to include the 2nd appellant, International Gospel Centre (sued through its executive officials, namely; Chairperson, secretary, treasurer and pastor.

4. It is not clear if summons to enter appearance were extracted and served upon the intended 2nd defendant as proposed in paragraphs 2A, *5*, *7*, *8*, *9*, 11A, B, C and at the footnote of the said draft amended plaint, attached to the application dated 11.7.2019. What appears to have been filed is amended witness statements on 7.10.2019.

5. Perhaps assuming that the proposed draft defence had been filed, the appellants filed an amended joint statement of defence and counterclaim dated 19.9.2019, which was with leave amended further as per the further amended defence and counterclaim dated 5.8.2024, denying the contents of the respondent's plaint.

6. In answer to paragraphs *5* & 6 of the amended plaint, the appellants averred that on 3.2.1999, the respondent sold to the church some land to operate church activities as an affiliate of the Kenya Pentecostal Revelation Church, took vacant possession and built a church. It was averred that they have exclusively been undertaking all their church activities on the said land, with no activities by the respondents in terms of farming.

7. The 1st appellant averred that he never purchased the land on behalf of EAPC Kirachene as he had ceased being a member of the said church and joined the 2nd appellant church. The appellants averred that the purchase price was Kshs.60,000/= and not Kshs.300,000/=, which the 2nd appellant's official members fully contributed and paid to the respondents, though by way of instalments. The appellants averred that after clearing the purchase price, the respondents kept on promising them that they would transfer the land to the 2nd appellant church.

8. The appellants averred that the respondents had purported to sell the land to the interested party at a higher price, and the 1st appellant could now accept the refund of Kshs.60,000/= paid in 1999 – 2000 and more so, when the money belonged to the 2nd appellant and not the 1st appellant, since he only paid it on behalf of the church.

9. The appellant averred that EAPC church Kirachene and the 2nd appellant were two different entities and the said refund was never acknowledged or received by the 2nd appellant or any of its members.

10. By way of a counterclaim, the appellants, as the plaintiffs in the counterclaim, sued the respondents and Justus Kinyua, the interested party. It was averred that the respondents agreed to sell and received Kshs.60,000/= for ¼ an acre out of L.R No. Kiirua/Naari/Maitei/472, which by 8.4.2000, as acknowledged receipt by the respondents, took vacant possession and extensively fenced, installed water and electricity and built a church which they have been utilizing since then, while awaiting the formal transfer to the 2nd appellants' name all in vain. They, therefore, averred that they were entitled to the suitland by virtue of adverse possession.

11. The appellants averred that EAPC church Kirachene and International Gospel Centre were two different organizations, and neither of the appellants have ever received a refund of Kshs.60,000/= of the purchase price regarding the suit land. The 1st appellant averred that he ceased being a member of the EAPC Kirachene in 1996, when he joined and started the International Gospel Centre.

12. The appellants averred that if at all the purchase price was refunded by the respondents, it was to members of EAPC Kirachene who were not parties to the suit.

13. Again, the appellants averred that vide a sale agreement dated 13.2.2017; the 1st respondent purported to sell the same land to the interested party in breach of the existing sale agreement, in which they had neglected or failed to transfer the land despite constant requests to do so. Similarly, it was averred that reselling the same piece of land already bought and in possession of them was irregular and illegal.

14. The appellants counterclaimed for:

    i. Declaration that the land belonged to the International Gospel Centre and should be registered as such.

    ii. Declaration that the appellants have been in exclusive, continuous and uninterrupted occupation of the suit land for over 23 years and hence was entitled to the land by virtue of adverse possession.

15. The counterclaim was verified by an affidavit sworn by the 1st appellant as its pastor.

16. At the trial, Charles Magiri testified as PW 1. He adopted witness statements dated 25.4.2016, 13.8.2018, 19.8.2016, 13.8.2018 and 19.8.2019 as his evidence in chief. PW 1 told the trial court that in 2000, the 1st appellant proposed to his wife, the 2nd respondent, to buy his land measuring 0.10 ha, then registered under his name at Kshs.300,000/=, alleging the land was unclean and would cause death to his family; they gave her Kshs.60,000/= only, for his family to doubt the same for the land was in a prime area. He said that the amount was returned to the 1st appellant, but he rejected it leading to a demand letter dated 13.4.2016 to collect the money and vacate the land.

17. PW 1 said that the 1st appellant wrote a letter dated 18.4.2016, rejecting the proposal and instead reported the matter to Njuri Ncheke's panel of elders, who issued a summons to them dated 21.4.2016, for a meeting set for 27.4.2016. While still relying on a witness statement dated 13.8.2018, PW 1 indicated that he knew the 1st appellant as a pastor with the EAPC Kirachene branch. He changed the tune to say that he was the original registered owner of L.R No. Kiirua/Naari/Maitei/472.

18. Further, PW 1 said that he was approached by the EAPC executive and the 1st appellant as its pastor to sell to them a church plot, which they went ahead, bargained and agreed at Kshs.300,000/=. PW 1 said that on 3.2.1999, they orally agreed and he received Kshs.60,000/= and the church structure where they could conduct their prayer session until they raised the balance and cleared upon the transfer.

19. PW 1 told the trial court that they went ahead to the land control board, and the 1st appellant decided that the land be registered under his name instead of the church leading to a disagreement between the EAPC members and the land control board committee leading to a cancellation of the board meeting. The 1st appellant had changed the sale agreement and forged his signatures, the EAPC elder's signatures and inserted a new church ministry.

20. PW 1 said that the 1st appellant, who was then an EAPC pastor, stopped being an EAPC pastor and founded the 2nd appellant. PW 1 said that he sued the 1st appellant only after he refused to attend court and instead took him to the Njuri Ncheke panel of elders, who ordered him to pay Kshs.40,000/= for the expenses incurred.

21. Similarly, PW 1 said that members of the EAPC demanded a refund of the deposit after he breached the sale agreement, given that they disagreed with the 1st appellant and vacated the church plot. PW 1 told the court that he was left with no option but to sell the suit land to the interested party in order to refund the deposit to EAPC, who acknowledged receipt of the sum, and the interested party, obtained

a title deed. PW 1 said that he never sold any land to the 1st appellant in any other capacity, save as a pastor of the EAPC Kirachene branch, who was also the one who took over vacant possession.

22. Again, relying on a further witness statement dated 17.8.2019, PW 1 told the court that the appellants trespassed into his land in 2015 and not 2000, erected a semi-permanent church structure and started operating it as a church called EAPC Kirachene, hence denying him use of the land which he used to plant assorted food crops.

23. In this case, PW 1 changed the version of events and said that sometime in 2000, the 1st appellant had, as a trustee of EAPC, offered to buy the land said to have been unclean for Kshs.300,000/= but paid only Kshs.60,000/=.

24. PW1 went on to say that the matter was taken to Njuri Ncheke, elders twice, who ruled in his favour and that by an agreement dated 13.2.2017, he sold the land to the interested party for Kshs.700,000/= after receiving a deposit of Kshs.300,000/=, PW 1 said that he refunded members of EAPC Kshs.60,000/=. PW 1 said that later, the church disintegrated, and the 1st appellant coined the church as an International Gospel Church and established a house of worship on the land, which by then was occupied by the 1st appellant and his cronies or supporters. He sought an eviction order.

25. PW 1 relied on a copy of the title deed, summons dated 20.4.2016, letter dated 13.4.2016, acknowledgement letter, sale agreement dated 13.2.2017, correspondence letter dated 22.6.2016 and 27.9.2017 Njuri Ncheke handwritten proceedings dated 21.9.2017 bundle of letters dated 27.9.2017, bundle of letters dated 17.1.1995, 16.8.1995 and 24.11.1993, EAPC letter dated 7.5.2000 and a chiefs letter dated 9.7.2000 as P. Exh No's. 1-11 respectively.

26. In cross-examination, PW 1 told the court that he had known the 1st appellant for 32 years, both as a member of the EAPC and neighbour. He denied making the agreement dated 3.2.1999, with the 1st appellant on behalf of the 2nd appellant. PW 1 insisted that the only oral agreement he made to sell land was with the executive court and EAPC. He denied that the 1st appellant had left the EAPC in 1999. While admitting to appearing with the 1st appellant at the Njuri Ncheke panel of elders, PW 1 said that he declined to transfer the land after his children objected. He said that the initial land sale was with EAPC church and not the 2nd appellant church, currently occupying his land.

27. PW 1 said that he had been booking applications with the land control board severally to transfer the land, but he did not have such papers before the court, including the letter that the children and his wife wrote to the 1st appellant. Asked why it took so long to file the suit, PW 1 said that it was their pastor due to an internal dispute within the church and the handling of the dispute initially by the area chief and the Njuri Ncheke elders.

28. PW 1 said that since he refunded the deposit to EAPC church members, he was entitled to the land.

29. Alice Naitore Magiri testified as PW 2 that she relied on witness statements dated 19.8.2019 and 7.10.2019 as her evidence in chief. PW 2 told the court that in 2000, the 1st appellant proposed to purchase the suit land at Kshs.300,000/=, while telling her that the land was "unclean" and would cause death to her family. She said that she received Kshs.60,000/= from the 1st appellant, who erected a church on the land, but when she informed PW 1 and the children, they declined since the land was prime land.

30. PW 2 said that in 2016, a demand letter was written to the 1st appellant to vacate the land but declined. She insisted she made a report to the Njuri Ncheke elders in the second witness statement filed on 7.10.2019. PW 2 told the court that her husband was the owner of the land, and the 1st appellant

trespassed into the land in 2015 and built a semi-permanent structure, hence denying them its use and enjoyment. Further, PW 2 said that 1st appellant started operating a church known as EAPC Kirachene.

31. PW 2 said that when the 1st appellant approached her in 2000, he was doing so as a trustee of EAPC church and that it was the executives of the church who gave her husband Kshs.60,000/=PW 2 said that PW 1 booked a land control board meeting where the 1st appellant wanted the land registered under his name, but the members of the EAPC members refused, only for the matter to be referred to the Njuri Ncheke elders by the 1st appellant.

32. Additionally, PW 2 told the court that they refunded the money to EAPC officials, church disintegrated, leading the 1st appellant to start the 2nd appellant church on the same structures that used to belong to the EAPC Kirachene. She said that Njuri Ncheke elders ruled in favour of PW 1, and the 1st appellant was fined Kshs.40,000/=, which he never gave them. Similarly, PW 2 said that the appellants have declined to vacate the land. Asked about the sale agreement dated 3.2.1999, PW 2 admitted that her I.D. card number was on the documents. Further, she admitted that the appellant took vacant possession of the land in 1999.

33. According to PW 2, the 2nd appellant was illegally on the land since the church which bought the land was EAPC Kirachene. PW 2 said that she sold the suit land to a third party by an agreement dated 13.2.2017 produced as P. Exh No. (6) and refunded the EAPC their deposit. She denied that it was the 1st respondent who breached the initial agreements by declining to transfer the land; otherwise, it was the 1st appellant who, after going to the board on 3.5.2006, purported to have the land under his name instead of the EAPC Kirachene hence causing a delay as shown in DMF (1) dated 3.2.1999, PW 1 denied selling the land to the 2nd appellant.

34. Gervasio Kinyua testified as PW 3. His evidence was that the 1st appellant used to be a pastor of EAPC church Kirachene where he used to be the chairman between 1999-2000. PW 3 told the court that on 3.2.1999, the church raised Kshs.60,000/= to acquire the suit land for an agreed price of Kshs.3000,000/= being ¼ an acre from the 1st respondent. After paying the deposit, PW 3 stated that, the respondents allowed them to erect a church structure on the land as they raised the balance while awaiting the land to be transferred to them.

35. PW 3 said that the respondents booked a land control board meeting on 3.5.2000, but after attending it, the board declined to grant the consent since the 1st appellant wanted the land to be under his name instead of the church. PW 3 said that they unsuccessfully tried to resolve the dispute at the office of the chief, only for the dispute to be referred to the Njuri Ncheke panel of elders by the 1st appellant.

36. Moreso, PW 3 said that the relationship between the 1st appellant and EAPC broke down, the former was left on the church structure and found the 2nd appellant on the land. PW 3 said that given the forgoing EAPC resolved to return the land to the respondents after he refunded them the deposit by an agreement dated 17.2.2017. PW 3 denied signing any sale agreement with the respondents as per a copy before the court dated 3.2.1999, since he only knew of an oral agreement. He termed the signatures on the document as forged. PW 3 denied that to open a branch or acquire land, an authority for EAPC headquarters was required. He admitted that the land was under occupation by the appellants.

37. PW 3 similarly confirmed that he did not disclose to the appellants that he had received a refund from the respondents on behalf of the EAPC. PW 3 acknowledged signing a document while purchasing land from the respondents in 1999/2000, including DMF (1), (14) and P. Exh No. (5), whereas the committee refunded Kshs.60,000/= to the respondent PW 3 said that he could not recall whether PW 1 signed anywhere acknowledging receipt of the refund.

38. Similarly, PW 3 said that after purchasing the land, the church broke up, and he left the church. PW 3 denied teaming up with the respondents to file the suit against the appellants as to a copy of revenge for their differences. He said that there was no notice of change of name for the church issued from EAPC to the 2nd appellant church.

39. Julius Mate Mbogori testified as PW 4. As a chairman of the Njuri Ncheke panel of elders, Tigania, PW 4 told the court that following a report by the 1st appellant, summons were issued to PW 1 and PW 2, and after listening to the dispute, pastor Koome produced a sale agreement dated 3.2.1999 which the EAPC elders rejected since the land was bought by the church and not the 1st appellant in his personal capacity.

40. PW 4 said that the church members accused the 1st appellant of trying to defraud the church of their land at the land control board meeting. PW 4 produced the decision made by the panel as P. Exh No. 9 (a) & (b) in 2016, in which they recommended that the respondents refund the purchase price to EAPC church, which had bought the land and not the 2nd appellant.

41. Joseph Mwirigi Munene testified as PW 5. As the assistant chief Matiri Sublocation he told the court that on 9.7.2000, members of EAPC came to him reporting that after conducting a fund drive to purchase a church land, they attended a land control board meeting with pastor Koome, who dishonestly tried to transfer the land to his name instead of the church. PW 5 said that he wrote to the 1st appellant and the respondents as per a letter dated 9.7.2000 produced as P. Exh No. (7).

42. PW 5 said that a meeting took place on 13.7.2000 where the 1st appellant said that he wanted to set up the 2nd appellant church on the said land; otherwise, he did not recognize members of the EAPC. On the other hand, PW 5 said that the EAPC said that they did not recognize the 2nd appellant for they had the land following a funds drive. PW 5 said that after listening to the dispute, he made a finding that the respondents refunded Kshs.60,000/= to EAPC members. PW 5 confirmed that a church building had been erected on the suit land but could not recall the name, though he was a neighbour to the land.

43. The trial court observed that the witness appeared dishonest. He, however, confirmed that the appellants had been on the land for 20 years, refusing to vacate it. According to PW 5, PW 3 were signatories to DMF (12), showing the land as bought by the 2nd appellant.

44. Josephat Gitonga M'Biriti testified as PW 6. As the secretary of the EAPC in 1999/2000, he stated that on 3.5.2000, PW 1 took them to the land control board meeting as part of EAPC elders who were buying church land from him.

45. PW 6 said that the exercise was cancelled since the 1st appellant opted to have the land transferred to his name instead of EAPC who were the bonafide purchasers of the land. PW 6 told the court that the church wrote a letter dated 7.5.2000 (P. Exh No. 16), demanding that the respondents not transfer the land to the 1st appellant. PW 6 also confirmed that he attended the dispute at the chief's office as well as before the Njuri Ncheke elders, where a resolution was made for the 1st respondent to refund Kshs.60,000/= to the EAPC church as per acknowledgement receipt at the advocate's office produced as P. Exh No. (5).

46. PW 6 told the court that there was a church building on the land written IGC church. He also stated that differences occurred in 2000, leading the EAPC church to split. He admitted that the 1st appellant had equally contributed Kshs.60,000/= to purchase the land, though they received the refund on behalf of EAPC in 2017 and hence had no claim against the seller.

47. PW 6 said that the secretary of EAPC was a member who decided to purchase the land and not the executive committee of the church. PW 6 produced no minutes to that effect. PW 6 said that after attending the land control board meeting, they were unable to agree on who was to be registered as the owner; hence, the meeting was aborted. He termed DMF (12) bearing his name, I.D. number and signature as forgeries. PW 6 said that after EAPC Kirachene collapsed in 2000, what remained on the land was the 2nd appellant's church. He admitted that the 1st appellant was not involved in the refund.

48. Joseph Koome M'Mukira testified as DW 1. He relied on a witness statement dated 15.7.2016 as his evidence in chief. He told the court that in February 1999, the 1st respondent sold the suit land, which was registered under him, to the 2nd appellant with the consent of his wife; the 2nd respondent paid for it, took vacant possession and was allowed to commence occupation and construction of a church structure.

49. DW 1 said that the purchase price was agreed at Kshs.60,000/= to be paid in instalments, with the final payment done in 2000. DW 1 said that the 2nd appellant had conducted church services, weddings and other youth activities on the land since February 1999. He denied that the alleged trespass took place in 2015, or the alleged purchase price of Kshs.300,000/=; otherwise, the respondents were misleading the court after purporting to resell their land at a higher price to the interested party, during the pendency of the suit and their occupation.

50. Further, DW 1 said that he had exclusively occupied and developed the suit land since 1999, and therefore, the respondents could not have refunded Kshs.60,000/= to someone else or to another church outfit. DW 1 relied on a branch certificate to operate, a certificate of registration, a payment receipt, a certificate showing the change of name and a card as DMF 1 as D. Exh No's 1-8, respectively. DW1 told the court that he had been in possession of the suit land operating as the International Gospel Centre since 1999, and hence, his counterclaim dated 19.9.2019 should be allowed.

51. Further, D.W. 1 confirmed that he referred the matter to Njuri Ncheke's panel of elders as per P. Exh No. (2). DW 1 stated that between 1981 and April 1996, he was a general clerk in the church of local churches and then became a pastor for up to April 1996 for EAPC before leaving to form the 2nd appellant, a branch of the Kenya Pentecostal Revelation Church (KPRC) who had authorized him to open and operate the branch as per D. Exh No. (1) and DMF (2) – 4 dated 17.4.1996 and 31.10.2003. As to the agreement with the respondents, DW 1 said that it was signed both in blue and black ink, although it was typed at a cybercafé Meru town, in the absence of the respondent and the rest of the witnesses.

52. D.W. 1 denied that the suit related to three churches namely the appellant, Kenya Pentecostal Revelation Church and EAPC. He said that as per D. Exh No. (2) his contract with EAPC was to last for three years only unless the contract was renewed. Regarding a letter dated 7.5.2000, DW 1 said that he was not aware that the respondents had been notified by EAPC members such as PW 3, not to surrender the land to him or the 2nd appellant; otherwise, he was a member of the latter, as per D. Exh No. (2) and a certificate of registration dated 17.4.1996.

53. Similarly, DW 1 said that the 2nd appellant was an affiliate of KPRC that was registered on 31.10.2003, though it had been in operation from 1995 as per the job card due to expire on 17.4.1996. He denied that the Njuri Ncheke decision ordered him to pay Kshs.40,000/= costs to the respondents. As to the interested party, DW 1 said he neither knew him nor was he aware that the suit land was registered under the interested party name with effect from 2017.

54. Answering questions from the interested party, D.W. 1 told the court that the interested party was a cousin to his mother. DW 1 said that after buying the land occupying and developing it between 1999

and 2017, he equally placed a caution against the title register, which was lifted. D.W. 1 said that the land had a cement floor stone well reinforced with metal bars, metallic door and iron sheet wall. As to the title deed held by the interested party, D.W. 1 told the court that it was obtained during the pendency of the suit, while the interested party, who is a family member and the respondents, knew of his occupation and developments on the suit land. Further, he said that since 1999, there has never been a disruption of his occupation or church services by the respondents or any other persons.

55. Sarah Kararu testified as D.W. 2 she relied on a witness statement dated 25.7.2016 as her evidence in chief. As a member of the 2nd appellant, under the 1st appellant as the pastor DW 2 told the court that the church was an affiliate of KPRC of Kenya, which bought the suit land from the respondents for Kshs.60,000/= in 1999 and exclusively embarked on utilizing and developing a church therein. DW 2 said that the respondents continued promising to transfer the land to the church name until April 2016, when they attempted to refund the money to the 1st appellant, who declined to accept the refund. She denied that the purchase price was Kshs.300,000/=

56. In cross-examination, DW 2 denied being a party to a letter dated 7.5.2000, since it was no longer a member of the EAPC. DW 2 said that the Njuri Ncheke elders visited the land; they demanded that DW 1 slaughter a goat, and after he declined to do so, he was told that he was not a wise person before the elders.

57. D.W. 2 confirmed that she was present when the respondents made the sale agreement in 1999. D.W. 2 said that Josephat Gitonga and Gervasio Kinyua were no longer members of the 2nd appellant.

58. Justus Kinyua Nkanata, the interested party, testified as D.W. 3. He said that he appeared before the Njuri Ncheke together with the parties herein but could not remember the verdict. He could not remember the name of his church at Kirachene, where he attends church services. He did not produce any exhibits.

59. Arch Bishop Joseph Kobia M'Limbiti testified as DW 4. He relied on his witness statement dated 20.7.2016 as his evidence in chief. He told the court that he had been a Bishop of Kenya Pentecostal Revelation Church, which was started in 1986, whose branch was the 2nd appellant under the leadership of the 1s appellant, which started its operations on the suit land in 1999, after its members purchased the land at Kshs.60,000/= from the respondents. D.W. 4 said that the appellants developments and operations were under his authority and supervision as the Bishop of the mother church.

60. D.W. 4 said that he was aware that the respondents had all along been promising to transfer the land to the church, and since they had a good relationship, he had no doubts about them until there was a change of mind in April 2016, when PW 1 alleged that the value of the church land had gone higher and could sell it for more money. As to the refund, D.W. 4 told the court that the church members had contributed the money and not the 1st appellant; hence, he could not accept it.

61. In cross-examination, D.W. 4 confirmed that D. Exh No. (3) was a card showing that the 1st appellant was a pastor operating the 2nd appellant, a non-registered entity but operating under the cover of KPRC since April 1996, pending its formal registration by the registrar of societies. DW 4 said that before moving to KPRC which was registered, he used to be a member of EAPC. Regarding D. Exh No. (7) D.W. 4 said that he was not a party to it, though after it was brought to his office by DW 1, he stamped it.

62. DW 4 told the court that he had requested the respondents to transfer the land in the name of ICTG/KPRC since he had already notified the registrar of society that he had the 2nd appellant its affiliate church. Since the 2nd appellant was not in existence, DW 4 said that the sale was between the respondents and the Bishop of the church; otherwise, DW 1 kept him informed of the progress of

the 2nd respondent, DW 4 stated that the appellate church was erected on 3.2.2019 and has since been operating on the suit land.

63. From the court records of 15.12.2022 it appears D.W. 3 was recalled to testify. He relied on a witness statement dated 20.8.2019 as his evidence in chief and produced a copy of a title deed, sale agreement, plaint and search certificate as IP Exh No. (1) – (5) respectively.

64. DW 3 told the court that he bought the land from PW 1 but had yet to complete the payment, even though a title deed was issued to his name in 2017. DW 3 denied being a blood relative of DW 1, although they were village mates. DW 3 also denied the legality of the 2nd appellant to be able to purchase and own land from the respondents in 1999.

65. In addition, DW 3 confirmed that there was a Mabati structure on the suit land when he bought the land on 13.2.2017 and acquired a title deed on 21.4.2017, operated by the 1st appellant. D.W. 3 denied that they bought the land during the pendency of this suit. DW 3 said that he was given vacant possession of the land when he bought it but had yet to make entry into the land since the 1st appellant was occupying it. D.W. 3 said that before he bought the land, there was a temporary security (hut) structure on it; otherwise, he never fenced, occupied or utilized the land, for he was not ready for that.

66. DW 3 denied that a church signpost or fence belonged to the 2nd appellant when he bought the land. He also stated that her claim was for the respondents to remove the appellants so that he could take both possession and occupation of the land. He further said that he came to the suit to offer support to the respondents.

67. Following closure of the defence case the trial court allowed the respondents suit. The appellants have appealed against the judgment by a memorandum of appeal dated 13.3.2024, following leave issued on 6.3.2024 to file the appeal out of time.

68. The grounds are that the trial court erred in law and facts:

    i. For finding that the respondents were entitled to ownership of the land, yet there was a claim on adverse possession for over 23 years.

    ii. For failing to consider or disregarding the appellant's pleadings, evidence and case law.

    iii. For failing to find that the cause of action against the respondents was unfounded and unmerited.

    iv. For being biased in favour of the respondents, it was full of errors, had no reasons to support and was a travesty of justice.

69. This appeal was directed to be canvassed by way of written submissions. The appellants rely on written submissions dated 22.10.2024. It was submitted that the appellants had led evidence in support of the claim based on adverse possession, from permissive entry into the suit land in 1999, where they constructed a semi-permanent structure for worship purposes as per a sale agreement dated 3.2.1999 for Kshs.60,000/= which was paid in full. The appellants submitted that the evidence of possession of the land in an open, notorious, continuous and uninterrupted manner was not challenged by the respondents.

70. As to the purported disownment of the sale agreement and a refund of Kshs.60,000/= to EAPC, the appellants submitted that the evidence by PW 1 -6 was inconsistent, disjointed, illogical, contradictory and all pointing to a fact that the EAPC church was out to grab the church land, with the help of the respondents and the interested party, more so after forming a splinter group in 2000. Reliance was placed Public Trustee vs Wanduru (1984) KLR, Ogendo Afwanda vs Alice Awiti Orende & another

(2020) eKLR, Stanley Mwangi Gatunge vs Edwin Onesmus Wanjau (suing as the administrator of Kimingi Wariera & Mwangi Kimingi (deceased).

71. The respondents relied on written submissions dated 25.10.2024. It was submitted that for a claim based on adverse possession to succeed, a claimant must prove:

    i. On what date he came into possession?

    ii. The nature of the possession.

    iii. Knowledge of the possession by the other party.

    iv. Length of the possession.

    v. If the possession was open and undisturbed for the requisite 12 years.

72. Relying on Sections 7, 9-12 of the *Limitation of Actions Act*, Richard Wefwafwa Songoi vs ben Munyifwa Songoi (2020) eKLR and Samuel Kibamba vs Mary Mbaisi (2015) eKLR, the respondents submitted that it was not enough for the appellant to state that they had been in an open, continuous and uninterrupted manner without proof of the same and the intention to hold adverse as held in Mbui vs Maranya (2013) eKLR. The respondents submitted that going by the statement of defence and counterclaim dated 19.9.2019, the 2nd appellant wanted an unregistered legal entity, as KPRC, going by the evidence of D.W. 1 and 3, to be able to enter, purchase and own the suit land through the 1st appellant, given DMF No. (4) was made after 31.10.2003, the name of KPRC was not disclosed or existed in 1999, and DMF No. (4) had no evidentiary value.

73. Further, the respondents submitted that going by the evidence of PW 3, PW 6 and DW 1, PW 1 could not transfer the suit land to the EAPC for want of a land board consent. The respondents submitted that after EAPC broke up, DW 1 & 2 were only allowed to remain on the land as they solved their internal problems. Therefore, the respondents submitted that the remaining on the land was permissive and consensual. Reliance was placed on Mombasa Teachers Cooperative Savings and Credit Society Ltd vs Robert Muhambi Katana & others (2018) eKLR, Mbui vs Maranya (supra) Gachuma Gacheru vs Maina Kabuchwa (2016) eKLR, Maweu vs Kiu Ranching & Farming Cooperative Society (1985) eKLR and Mtana Lewa vs Kahindi Ngala Mwangangi (2015) eKLR.

74. As to the capacity to sue the respondents submitted under Sections 4, 5 & 6 of the *Societies Act* Cap 108, the 2nd appellant was an unlawful society; its membership or management by the 1st appellant was on non-existent entity formed to grab the land from the respondents, which should not be countenanced in law. The respondents submitted that the 1st appellant was committing a criminal offence by being in charge of an illegal entity under Section 5 of Cap 108.

75. The role of this court is to reevaluate and reassess the record of the trial court with an open mind and come up with independent findings as to facts and the law while giving credit to the court who saw and heard the parties testify. See Selle & another vs Associated Motorboat Company Limited (1968) EA 123. Having gone through the record, the issues calling for determination are whether the respondents had a validly amended plaint against the appellants if the respondents could sustain the suit after disposing of the land during its pendency to the interested party if the appellants could sue or be sued if the appellants proved their defence and amended counterclaim to be entitled to adverse possession if the appeal has merits and what is the order as to costs.

76. Having looked at the lower court record and the submissions by the parties, the issues calling for my determination are:

    i. Whether the respondents filed and served proper pleadings.

ii. Whether the 2nd appellant had the capacity to sue and be sued.

iii. Whether the interested party was properly joined to the suit and could benefit in the reliefs sought by the respondents against the appellants and vice versa.

iv. Whether the respondents and the interested parties had filed a bonafide defence to the counterclaim.

v. Whether the appellants were entitled to the reliefs sought in the counterclaim.

vi. Whether the appeal has merits.

vii. What is the order as to costs?

77. Times without number, courts have held that in an adversarial system, it is the parties who formulate their respective claims, counterclaims and or defences, through pleadings. Courts can only determine issues raised or those framed by the parties with no room for any other business. Similarly, courts cannot grant a relief not prayed for in the pleadings. See IEBC & others vs Stephen Mutinda Mule (2017) eKLR, Raila Omollo Odinga vs IEBC & others (2013) eKLR and Hamida vs NSSF (2023) KECA 1241 (KLR). Further, courts exist for the orderly administration of justice before it with rules on timelines and the taking specific steps as commanded, for obedience by the rules of pleadings and evidence.

78. The primary pleadings by the respondents remain the plaint dated 25.4.2016. I say so because, after the order directing that the amended plaint be filed and served within 7 days, there is no evidence that the respondents filed and served the draft proposed amended plaint by 11.9.2019, which was the stipulated period by the trial court.

79. Order 8 Rule 6 of the Civil Procedure Rules provide that when a party fails to file an amended plaint, upon grant of leave to do so, the order shall cease to have effect without prejudice to the power of the court to extend the period. Order 8 Rule 7 (2) Civil Procedure Rules provide that all amendments shall be shown by striking out in red ink all deleted work. In Cooperative Insurance of (K) Ltd vs Paem Agencies Co. Ltd (2014) eKLR, the court said failure to underline was a fundamental error going to the root of the suit. The court said that failure to comply with Order 8 Rule 7 (2) Civil Procedure was fatal. An amended plaint must be accompanied by a verifying affidavit duly signed by the respondents.

80. It is the respondents who wanted to bring on board the 2nd appellant, describing it as the International Gospel Centre sued through its executive officers, namely the Chairperson, secretary, treasurer and pastor in the draft amended plaint at paragraph 2A thereof. Evidence that the respondents filed the amended plaint, extracted and served summons to enter the appearance to the proposed 2nd defendant is missing in the lower court record.

81. In this appeal, the respondents have relied on Sections 4, 5 and 6 of Cap 108, to say that the 2nd appellant was an illegal entity which could not sustain or could not purchase, transact, own or enforce any legal rights in their favour.

82. If we are to go by the original plaint the appellant was sued for trespassing into the suit land with effect from 2015. By the proposed amended plaint, the respondents were the ones introducing the 2nd appellant. They did not describe it as an illegal entity. Through the proposed amended plaint, the respondents were trying to bring in the information contained in the further witness statements, filed after the initial plaint which formed the bulk of the testimony of PW 1-6.

83. A party cannot be allowed to travel outside its pleadings. By failing to file and serve the amended plaint, issues with regard to the EAPC church, the respondents had dealt with the issue of refund and the use of the suit land, fell between three church entities remained unpleaded by the respondents. Any evidence, therefore, based on unpleaded issues remained moot. Even if the appellant introduced the said issues in the amended defence filed to a non-existent amended plaint, the burden to plead was on the respondents for a plaint and a counterclaim are different.

84. The law is that witness statements are not pleadings. In Vishva Stones Supplies Co. Ltd vs RSR Stone (2000) Ltd Civil Appeal Application E308 of 2020 (2024) KECA (1978) KLR (26th July 2024) (Judgment), the court held that there is a big difference between a pleading and a witness statement, pleading being formal written statement outlining parties, respective claims, defences and response to each other, claim, while under Section (3) of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact is proved or disapproved. In essence, the court said that the primary purpose of a witness statement is to prove the litigant's claim, hence equating a witness statement with a pleading had no basis in law and that a witness statement could not supplement a pleading, nor could the function of the two be confused.

85. The court cited IEBC & others vs Stephen Mutinda Mule (2014) eKLR, that Article 159 (2) (t) of the *Constitution* cannot be used to cure the failure to plead special damages.

86. In this appeal, even if there is evidence that the appellants, in compliance with the trial court order, filed a further amended joint defence and counterclaim on 19.9.2019 that was further amended on 5.8.2022, a counterclaim is a stand-alone suit. There is no evidence that the respondent filed a reply to the further amended defence and counterclaim.

87. A suit falls or stands on its own regardless of the counterclaim. If the respondents had complied with the court order allowing them to amend the plaint, they would have brought on board the nexus between the appellants and the EAPC as was proposed in the application dated 11.7.2019 and the issue of the refund. Similarly, they would also have brought on board the interested party through pleadings who had, by 18.12.2017, applied to join the suit and filed a list of witness statements and documents dated 13.8.2018. The respondent had equally filed a list of documents dated 13.8.2018 and 19.9.2019 in relation to the EAPC sale agreement with the interested party and the issue of a refund.

88. Without filing a proper pleading, the respondents had no claim against the 2nd appellant. Any evidence led against the 2nd appellant remained unsupported by the pleadings. Any reliefs sought against the 2nd appellant by the respondent were also unsupported by the respondents pleadings. As to the reliefs sought in the further amended defence and counterclaim, there is no evidence that the respondents and the interested party filed any reply to the defence against the assertion by the 1st appellant on the capacity in which he entered into the suit land, developed a church and remained therein operating under the official of KPRC which was separate and distinct from him or the affiliate church.

89. Coming to the counterclaim, the respondents and the interested party, despite an order dated 17.7.2019, failed to file and serve any defence to the counter claimant; deny the contents therein as to entry into the land on 3.2.1999, payment of total purchase price by 8.4.2000, uninterrupted open, continuous and notorious occupation therein, illegal sale and transfer of the land to the interested party during the pendency of the suit, while the appellants were on the suit land which was in breach of the sale agreement and prejudicial to the respondents as pleaded in paragraph 24 of the counterclaim.

90. In the further statement dated 19.8.2019, the respondents were silent on the contents of the counterclaim. The 1st respondent continued describing himself as the registered owner of the suit land, yet the title deed had changed hand by 2017, to the interested party. He continued praying for an

eviction order based on trespass by the 1st appellant, yet he was no longer the owner of the land by an application dated 23.10.2020; the 1st respondent described himself as the legal owner of the land entitled to the temporary injunction, yet he had already transferred the land to the interested party.

91. By an application dated 5.8.2022, the appellants sought and were allowed to file a further amended defence and counterclaim to raise a claim of adverse possession. The claim for adverse possession was pleaded in paragraphs *18*, 22A, 22C and prayers No. (aa) & (bb), of the further amended defence and counterclaim dated 5.8.2022. A specific court order was made on 1.9.2022, allowing the respondents and the interested party to file a reply to the defence and defence to the counterclaim by 9.9.2022 and to re-open the respondents' case.

92. When the matter resumed for hearing on 13.10.2022, the respondents opted to proceed with the defence case, even when they had not complied with the court orders on pleadings. There is no evidence that the respondents and the interested party filed any reply to the defence and defence to the counterclaim, regarding the issue of adverse possession. A party who fails to plead to the dispute and raise any such defence or counterclaim would simply be inviting a court to enter the realm of speculation. A party who has failed to set the agenda for trial through pleadings cannot be heard to complain. See IEBC vs Stephen Mutinda Mule and others (supra) which cited with approval Sir Jack Jacob; "The Present Importance of Pleadings".

93. The failure to oppose the counterclaim and raise the issue of capacity to sue by the 1st and 2nd plaintiffs and the interested party to the counterclaim was fatal on the part of the respondent. It is through that defence that the respondents' witness statements, documents and the evidence tendered during the trial would have had a basis in law to prove their responses and defence to the counterclaim.

94. The respondents failed to plead to the claim for adverse possession and lack of capacity to sue or be sued by the appellants. The issue of dealing with the EAPC as the initial buyers of the land and the refund of the Kshs.60,000/= and the question of Kshs.300,000/=, as the initial purchase price was not pleaded by the respondents and defence to the counterclaim. The interested party equally did not challenge the pleadings by the appellants as not living on the suit land openly, notorious as of rights, uninterrupted and accrual of prescriptive or overriding rights over the land by 2011 such that by the time the suit land was sold and transferred to the interested party in 2017, the rights of the respondents to the land had become extinguished by operation of Section 38 of the *Limitation of Actions Act*.

95. Even though there was no reply to the defence and defence to the counterclaim, still the appellants had a duty to tender evidence in support of their defence and counterclaim based on adverse possession of the alleged trespass.

96. Trespass refers to unjustified entry into the private land of another and the commission of acts of destruction. See Section 3 (3) of the *Trespass Act*.

97. In this appeal, the respondents alleged that the illegal entry by the 1st appellant occurred in 2015. The demand letter dated 12.4.2016 referred to a transaction undertaken by the respondents with the 1st appellant in 2000 to buy ¼ an acre of the suit land.

98. The law of contract at the time did not require a written agreement so long as there was an acknowledgement or memorandum and taking up of vacant possession. There was so much evidence tendered that oral evidence was vitiated by illegality, fraud or undue influence. No record was availed from the Registrar of Societies, that the 1st appellant had no legal capacity to found a church or operate it. Similarly, there were no bonafide registered trustees or officials of EAPC called to tender evidence that in 1999 or 2000, the suit land was legally acquired by the 1st appellant in his capacity as a trustee or an authorized official of EAPC and not in his individual capacity.

99. Regarding the purported rejection of the land control application form to transfer the land to EAPC the easiest thing for the respondents was to tender the forms and minutes from the land control board meeting for 3.5.2000 that the suit land was being bought by EAPC church with the 1st appellant as their pastor and not any other person other than the letter dated 13.4.2016 there is no evidence tendered that by April 2000 the respondents had written to the 1st appellant denying that the sale purchase price was Kshs.300,000/= and not Kshs.60,000/=. The demand letter dated 13.4.2016 is silent on Kshs.3000,000/=.

100. Assuming that the purchase price was Kshs.300,000/= and not Kshs.60,000/=, there is no indication whether there was a timeline to clear the balance and, if so, whether, after the effluxion of time, the respondents put the 1st appellant on the EAPC on notice to complete the transaction or else terminated the sale agreement.

101. It is trite law that courts do not re-write contracts but enforce them unless vitiated by illegality, fraud or was procured through undue influence. See National Bank of Kenya vs Pipeplastick Samkolit (K) Ltd.In paragraph 8 of the initial statement of defence dated 25.7.2016, the 1st appellant was categorial that the purchase price was Kshs.60,000/= and not Khs.300,000/=. The 1st appellant was also categorial in paragraph 6 thereof, on the manner of entry and developments as with the full consent approval and authority of the respondents.

102. The 1st appellant pleaded that it denied the alleged refund in 2016, for the suit land had considerably appreciated in value and that the respondents were actuated by greed to dispose of the land for a higher price. In the application dated 14.9.2017, the interested party, in his affidavit sworn on 24.11.2017 in paragraph *7*, described the 1st appellant as a mere squatter on his land and a total stranger to him. He further averred in paragraphs 8, 9, 10 and 11 of the affidavits that any agreement between the appellants and the respondents was rendered obsolete by the operation of law and that the 1st appellant should only be entitled to a refund.

103. Looking at the sale agreement dated 13.2.2017 in clause No. (2) & (5), the 1st respondent committed to hand over vacant possession to the interested party at the execution of the sale agreement. Similarly, the 1st respondent indicated that the land was being sold free of all encumbrances and was being sold with no developments.

104. By 13.2.2017, the 1st respondent already knew that there was a suit against him, the 1st appellant who had even filed a statement of defence dated 25.7.2016, raising purchaser interest. Is it not true that the land was vacant or free of any encumbrances? The 1st respondent was trying to dispose of the land contrary to the doctrine of lis pendens. By the time the interested party became the registered title holder to the land on 15.3.2017, the 1st appellant had already been in occupation of the suit land for over 12 years. His occupation of the suit land was adverse to the rights of the valid owner. The 1st respondent had not driven him out of the land or asserted superior title before the 12 years expired in 2012, from the date of receiving the final instalment. The letter dated 18.4.2016 in response to that dated 13.4.2016 was clear and the date of taking up exclusive vacant possession, adverse developments on the land, non-eviction of the adverse possessor for the land effective entry to drive out the adverse possessor from the land or assertion of title by the respondents and or acceptance by the 1st appellant that the respondents were the actual owners of the land.

105. To prove adverse possession, a party must tender evidence of dispossession and discontinuance of possession by the valid owner with an intention to own the suit land. See Wambugu vs Njuguna (supra), Maweu vs Kiu Ranching (supra), Manason Ogendo Afwanda vs Alice Awiti Orende & others (supra) and Stephen Mwangi Gathigi vs Edwin Onesmus (supra).

106. In Songoi vs Songoi (2020) eKLR, the court was emphatic that for a party to be entitled to adverse possession it must prove the entry date, nature of the possession, knowledge by the other party and length of possession in an open and undisturbed manner.

107. In this appeal, the 1st appellant was allowed to the suit land by the respondents. There is no evidence that before 12 years expired, there was an effective entry to drive out the 1st appellant or notice to cease adverse acts on the land on account of termination of the permissive entry.

108. Documentary and photographic evidence tendered shows that the 1st appellant's developments were permanent in nature. There is no evidence to show that the respondents applied for and obtained an eviction order to drive out the 1st appellant from the suit land in 2000 if at all the land belonged to another church entity. Similarly, there is no evidence tendered by the respondent that EAPC lodged a claim as the actual owners or purchasers of the land in 2000, disowning the 1st appellant as an imposter to its land.

109. Even if the respondents refunded any money to EAPC after selling the land to the interested party, there is no evidence that before the sale and the refund, the 1st appellant was notified to vacate the land on account of a refund and was equally notified of the change of ownership.

110. D 3 in his pleadings did not plead or testify that before he bought and was transferred the suit land, he caused due diligence and insisted that the intruder be driven out as a condition precedent or, in the alternative, he immediately took over vacant possession and asserted ownership thereof. DW 3, in his evidence, told the trial court that he joined the suit so as to assist the respondents in driving out the appellants.

111. It is trite law that an interested party is neither a plaintiff nor a defendant and that an interested party cannot bring a new cause of action or new issues for trial apart from those of the primary parties to the suit. See Republic vs Francis Muruatetu vs Republic (2021) KESC 31 KLR.

112. The interested party only filed a witness statement, which he relied on as DW3. He filed no pleading seeking substantive relief against the appellants or defending the claim of adverse possession. Evidence not based on pleadings could not assist him. His evidence was of no assistance to the relief of eviction by the respondents who had already ceded ownership of the land to him in 2017.

113. Other than a title deed, the interested party did not produce any land control board consent, transfer forms, stamp duty payments and registration fees, showing that he regularly, procedurally and legally obtained the title deed. Above all, overriding rights by way of adverse possession bind the land but not the title. The developments by the appellants on the suit land were visible for all to see. Due diligence includes, visiting the land to ascertain who is in occupation. See Torino Enterprise Limited vs Attorney General (2023) KESC 79 (KLR) and Dina Management Limited vs County Government of Mombasa & others (2022) KESC 24 (KLR) The interested party, in my view, failed to plead and testify that his title deed was not subject to the adverse rights by the occupants of the land since 1999, which he was aware of since, in his evidence, he was categorical that he came on board to assist the respondents to drive out the appellants from the land.

114. The constant factor in this appeal is the 1st appellant; whether or not the 2nd appellant had the capacity to purchase, sue or assert title to the land is neither here nor there. The evidence by the respondents and their witnesses is that the fallout came out when the 1st appellant insisted that the land be registered under his name.

115. PW 1 & 2 were clear that the parties went for the land control board consent. So, the respondents knew that the 1st appellant intended to own the land as of right exclusively. In my considered view, the claim

for adverse possession based on both evidence tendered and admission by PW 1 – 6 shows that it was pleaded and proved to the required standards.

116. The upshot is that I find the sale, transfer and registration of the suit land to the name of the interested party on February 13, 2017 and April 21, 2017, was not only against the doctrine of lis pendens but was also subject to the accrued overriding rights of the 1st appellant. The appeal is allowed. The respondents' suit based on the plaint dated April 25, 2016 is dismissed. The counterclaim dated August 5, 2022 is allowed to the extent that the 1st appellant is entitled to L.R No. Kiirua/Naari/Maitei/472, by virtue of adverse possession. The interested party is ordered to transfer the same to the 1st appellant within 2 months from the date hereof in default the Deputy Registrar of the court to do so.

117. Costs of the appeal and in the lower court to the 1st appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6TH NOVEMBER, 2024

In presence of

C.A Kananu

Parties

Miss Onyango for Aketch for the respondent

HON. C K NZILI

JUDGE