Mai Mahiu Kijabe Longonot Co Ltd v Kariuki & 6 others (Environment & Land Case 36 of 2017) [2023] KEELC 740 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 740 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 36 OF 2017

FM NJOROGE, J

FEBRUARY 9, 2023

BETWEEN

MAI MAHIU KIJABE LONGONOT CO LTD ..... PLAINTIFF

AND

WINFRED MUTHONI KARIUKI ..... 1ST DEFENDANT

BENSON IRUNGU KARIUKI ..... 2ND DEFENDANT

GRACE WANGUI KARIUKI ..... 3RD DEFENDANT

JOSEPH KIMANI KABAIKU ..... 4TH DEFENDANT

SAMMY MWICIGI ..... 5TH DEFENDANT

HANNAH NJERI ..... 6TH DEFENDANT

GATERE KARIUKI ..... 7TH DEFENDANT

JUDGMENT

1. Nairobi HCCC No. 991 of 2006 (OS) was renamed Nairobi ELC 2005 of 2007. In that case the parties were as follows:

   Winfred Muthoni Kariuki (1st plaintiff)

   Benson Irungu Kariuki (2nd plaintiff)

   Mary Muthoni Kariuki (3rd plaintiff)

   Versus

   Maai Mahiu Kijabe Longonot Co. Ltd (defendant)

2. The orders sought in that case were as follows:

1. That the defendant, its directors, agents and servants be and are hereby enjoined and restrained from selling, charging, leasing, subdividing or in any other way dealing with and/or alienating howsoever land parcel known as all that piece of land situate in Naivasha Township containing by measurements 0.17217 of an acre or which said piece of land is delineated on the survey plan No. 32388 until the full determination of this suit.

2. That the land parcel known as all that piece of land situate in Naivasha Township containing by measurements 0.17217 of an acre or less known as LR No.1144/17/XXIV particularly delineated on the survey plan No. 32388 has been acquired by adverse possession by the plaintiffs and the right title, rights and interests of the defendants, are hereby extinguished.

3. That it be and is hereby ordered that the said land parcel Reference No. 1144/17/XXIV be registered in the name of the plaintiffs and the Registrar of Titles is (sic) hereby ordered to effect the changes and do register the plaintiffs in their capacity as personal representatives of the deceased as the owners of the LR No.1144/17/XXIV situate in Naivasha Township.

3. Nairobi HCCC no 45 of 2010 was later renamed ELC No. 600 of 2010. In that case the parties were as follows:

   Mai Mahiu Kijabe Longonot Company Limited

   Versus

   Winfred Muthoni Kariuki,

   Benson Irungu Kariuki,

   Grace Wangui Kariuki,

   Joseph Kimani Kabaiku,

   Sammy Mwicigi, Hanner Njeri and

   Gatere Kariuki.

4. The orders sought in that case by way of the plaint dated 25/1/2010 were as follows:

   a. Orders that defendants be evicted from LR No. 1144/17/XXIV.

   b. An order that the defendants be permanently restrained from entering or trespassing onto the said LR No. 1144/17/XXIV.

   c. General damages.

   d. Costs and interest at court rates.

   e. Any other relief this honourable court may deem fit to grant.

5. The matters were consolidated while still in Nairobi and later transferred to Nakuru where the consolidated suit was renamed Nakuru ELC No 36 Of 2017 (the present number.) It is clear that this is a case in which the natural persons are seeking to be declared owners of the suit land by way of adverse possession in one suit while the limited liability company that owns the land is seeking to have them evicted in its own suit and that now the two suits have been consolidated.

Pleadings

The OS in Nairobi ELC 2005 of 2007

6. In the originating summons dated 18/9/2006 the plaintiffs Winfred Muthoni Kariuki, Benson Irungu Kariuki, and Mary Muthoni Kariuki stated as follows: that each of them represents each of the houses of the late Kariuki Wathanga Chotara (deceased) and they hold the grant of letters of administration to the estate of the deceased; that the suit land (LR No. 1144/17/XXIV) appears among the distributed assets of the deceased; that the deceased and his family began living on the suit land and the adjacent parcels l.R. Nos 1144/15/XXIV and 1144/16/XXIV in the year 1982; that after his demise his family continued living on the suit premises; that Gazette Notice No 2232 of May 1982 notifying all and sundry of the Succession Cause regarding his estate was issued and no person has ever objected to it; that to their knowledge the deceased purchased the suit land from the defendant together with two adjacent plots before he settled on the properties; that the defendant on 24/7/2003 applied for the annulment of the grant the plaintiffs hold claiming fraud; that the suit land has been consolidated with the two other properties adjacent to it for the purpose of making it distributable and it is therefore not in its original state by virtue of a court order; that at the time of the purchase, the suit land was charged to the Kenya Commercial Bank; that the deceased continued to pay the bank the purchase price on behalf of the defendant until the total debt was redeemed; that the charge registered in favour of the bank was then discharged and the bank has never sought any payment from the plaintiffs thereafter; that though the plaintiffs have the executed the sale agreement and the discharge of charge, they are unable to trace the executed transfer; that the defendant has never claimed rent for the suit property for the last 23 years; that failure to collect rent is a sign that the deceased had completed all his contractual obligations and therefore the estate has acquired the suit land under the doctrine of adverse possession. Exhibited by the plaintiffs to their OS are the following documents:

    a. a gazette notice for Succession Cause No 196 Of 1988;

    b. grant of letters of administration intestate in Succession Cause No 196 Of 1988;

    c. certificate of confirmation of grant dated 7/8/1996 in Succession Cause No 196 Of 1988;

    d. rectified certificate of confirmation of grant dated 22/3/2006 in Succession Cause No 196 Of 1988;

    e. agreement for sale dated 2/4/1982;

    f. amended summons for the revocation of grant in Succession Cause No 196 Of 1988; dated 16/2/2004;

    g. surveyor's letter to court dated 31/3/2006;

    h. court order dated 1/9/2006 in Succession Cause No 196 Of 1988;

    i. discharge dated 30/8/2003 court ruling in Succession Cause No 196 Of 1988 dated 5/6/2001 and

    j. a proposed map.

7. Through the legal firm of Mwangi Chege & Co Advocates the defendant filed a replying affidavit sworn by its chairman of the board of directors, one Kennedy Njuguna Mbugua on 18/10/2006. The response of the defendant as contained therein is as follows: that Mary Muthoni Kariuki is not an administrator; that the land was unlawfully distributed to Mary Muthoni Kariuki, Elizabeth Wairimu

Kariuki and Grace Wangui Kariuki to be registered as owners in common in equal shares; that the defendant is the registered owner of the suit land; that the defendant sought by application to have the issued grant revoked; that the plaintiffs then claimed that they had acquired the suit land by way of adverse possession; that no explanation was however given by the plaintiffs as to why they had not sought it to be registered in the name of the administrators before inclusion among the deceased's assets; that another claim raised by the plaintiffs was that the deceased had purchased the suit land; that it is not true that the defendant sold the suit land to the deceased; that the sale agreement exhibited by the plaintiffs is not authentic since there is no evidence that the purchase price was paid; that in any event the sale agreement would be null and void by reason of limitation; that the deceased was merely a tenant on the suit premises, a fact said not to have been denied by the plaintiffs; that upon the deceased's demise the firm of Khamati Minishi & Co Advocates demanded the payment of rent and in default eviction to issue; that the plaintiffs refused to pay rent; that the plaintiffs have not occupied the premises uninterruptedly since 1982 as claimed; that in any event the doctrine of adverse possession could not apply as the deceased had entered into possession with the consent of the defendant; that it is not correct that the property has been amalgamated with any other properties or subdivided; that it is the defendant who applied for the issuance of the discharge of charge when the loan to KCB was fully repaid; that the discharge was indeed drawn by the defendant's advocate; and that the claim for adverse possession ought to be rejected. the following documents are exhibited in the replying affidavit:

a. Title to LR No.1144/17/XXIV;

b. Application for revocation of grant dated 16/2/2004 in succession cause 196 of 1988;

c. The 3rd plaintiff's replying affidavit dated 4/8/2004 to the motion for revocation;

d. The 1st plaintiff's replying affidavit dated 24/5/2003 to the motion for revocation;

e. A supplementary affidavit of Kennedy Njuguna Mbugua dated 22/10/2004;

f. Various correspondences;

g. Discharge dated 30/8/2003.

8. Closely aligned to the contents of the replying affidavit analyzed above are the contents of the plaint dated 25/1/2010 in ELC No. 600 of 2010 (as it was then known before consolidation.) The 1st and 2nd defendants in the OS and 5 new parties have been joined as defendants but the 3rd defendant is omitted. The plaint supplies the date of demise of Kariuki Wathanga Chotara as 9/1/1988 and that the administrators to his estate being the 1st – 3rd defendants in the plaint included the suit land among the deceased's assets and distributed it to three beneficiaries of the estate. After an application by the defendant the High Court excluded the suit property from among the assets of the deceased in the certificate of confirmation of grant; that the 1st, 2nd and 3rd defendants took control of the suit property, rented it out to and received rents from the rest of the defendants (4 in number) who have trespassed onto it; that the 1st, 2nd and 3rd defendants have failed to pay rent to the plaintiff despite demands hence the prayers for eviction and injunction in the plaint.

9. In a joint defence filed on 5/5/2010 the defendants denied the claim in the plaint and maintained that the suit land belongs to the deceased's estate; that he purchased it together with two other named parcels from the defendant pursuant to a sale agreement made on 2/4/1982 for the consideration of Kshs 1000,000/= and that the deceased was put into possession by the defendant and given the original title which is in the hands of the estate; that the plaintiff had paid for all 3 plots a withholding tax (10%) being Kshs 20,000/= on 25/8/1982 vide cheque and the relevant tax document had been executed by the parties; that the plaintiff and the deceased shared one advocate for the transaction who is now

deceased and his records do not show why the transfer of the suit land was not registered alongside the others; that the deceased was never a tenant to the plaintiff; that the defendant never disturbed the estate's occupation of the suit land until 2005; that no tax was payable unless all consideration was paid; that the deceased and his family had lived on the suit land before the defendant laid its claim in 2005; that the estate's tenants joined to the suit had been tenants for a very long time, and had been paying rent to the estate; that the plaintiff slept on its rights and is guilty of laches; that there is no landlord – tenancy relationship between the plaintiff and the estate; that as the transfer was not available, the OS for adverse possession was lodged by the estate.

Hearing

10. Both sides in the suit filed by plaint filed their respective lists of documents, bundles of documents, lists of witnesses and witness statements. Hearing of the consolidated suit took place between 3/6/2021 and 27/9/2022.

Evidence of the plaintiffs

11. PW1 – Mary Muthoni Kariuki gave sworn evidence and adopted her witness statement dated 5th October 2015 filed on 15th April 2016 as part of her evidence. She produced as P. Exh 1 the 15 documents listed in the "Defendant's List and Bundle of Documents in Nairobi HC 45/2010" dated 21st October 2011 and filed on 24th October 2011. She stated that she had learnt about existence of the plot in 1988 after her father had passed away. During Succession proceedings, the suit property LR No. 1144/17/XXIV was listed as belonging to the deceased. In the confirmed grant, the property was distributed to the first house which included Mary Muthoni Kariuki, Elizabeth Wairimu Kariuki and Grace Wangui Kariuki. Nobody has ever collected rent from the three persons after their father passed away and nobody had attempted to evict them. They are currently still in occupation of the suit property. They have tenants on the suit land who pay rent to PW1 as the daughter of the first house. PW1 believes that the property belongs to the plaintiffs. They have been living on it and paying rates since their father was alive.

12. Upon cross-examination by Mr. Chege, PW1 stated that she is the eldest in the family being a member of the first house; that her mother's name is Dorcas Waithera and her father's name is Kariuki Chotara; she was born in 1967. As the eldest daughter, she knows much about my family. She became aware of the properties when her father passed away in 1988. When she grew up, she found tenants in the suit property. Her father had four wives including her mother. She had never lived on the suit property. Her attention was drawn to paragraph 2 of her witness statement where she had stated that her late father had lived on a plot adjoining the suit property. She stated that her father lived on the suit property which was a town plot. They also had a farm house. She is familiar with her father's succession cause. She used to accompany one of the administrators to go to their advocates' office. PW1 is one of those who gave instructions in the matter. She was not aware that the suit property was not included in the initial petition in the Succession cause. Neither was she aware of whether it was only included in the Certification of Confirmation of Grant. The plaintiffs have the original title for the suit property. It is with their advocates. She admitted that Entry No. 4 in that title is a transfer to Maai Mahiu Kijabe Longonot Company Limited, the defendant and that since entry No. 4, there has been no other transfer in the original title; that Maai-Mahiu Kijabe Longonot Company Ltd has never come to evict them. Their father was never a tenant on the property because he was the one that used to collect the rent as owner. Before instructing Kirundi & Co. Advocates, they had instructed Betty Muraya & Co. Advocates. PW1 was aware that previously, Maai-Mahiu Kijabe Longonot Co. Ltd was represented by Khamati, Minishi & Co. Advocates and that that law firm wrote to Betty Muraya & Co. in 1999 asking her to remit the rent and that she did not comply. She was aware that Betty Muraya & Co.

wrote to Khamati on 17th May 1999 stating that the land belonged to the deceased; PW1 did not have the original of the sale agreement and she admitted that she was not present when the agreement was made; she did not know if her father bought suit property from Maai-Mahiu Kijabe Longonot Co. Ltd yet at paragraph 11 of her witness statement, she had referred to the agreement for sale. She was 15 years old as at the date of the sale agreement and she did not know much about it. She is aware that in the ruling the Hon. Justice Rawal gave she ordered removal of the suit property from the certificate of confirmation of grant. She does not however know if there was any appeal against the ruling. She stated that the plaintiffs have been collecting rent because the suit property belongs to them.

13. Upon re-examination by Ms. Matu PW1 stated that her father lived on the suit property and that prior to the letter dated 25th February 1999 from Khamati Minishi & Co, the plaintiffs had had not received any letter from Maai-Mahiu Kijabe Longonot Co. Ltd; that they got the agreement for sale from their step mother's advocate.

14. PW2 – Joseph Kimani Kibaiku gave sworn evidence and adopted his written witness statement dated 5th October 2015 and filed on 15th April 2016 as part of his evidence in chief. His evidence is that he is a tenant of the late Kariuki Chotara in Mai Mahiu Building in Naivasha, having entered the building in 1983; that he was looking for business premises and came across the property. From 1983, he used to pay rent to Kariuki Chotara who passed away in 1988; he never paid rent to Maai-Mahiu Kijabe Longonot Co. Ltd and nobody other than Chotara has ever demanded rent from PW2. Nobody has demanded that he vacates the building. He currently pays rent to the family of the late Chotara.

15. Upon cross-examination by Mr. Chege he stated that when he was looking for business premises, he met Chotara's agents known Nacom Agencies and they reached an agreement. He used to pay rent to Chotara though Nacom Agencies. He is not aware if Chotara was a tenant. After Chotara's death in 1988 they started paying to Betty Muraya & Co. Advocates who were lawyers for the family. He does not know if the property was owned by Maai-Mahiu Kijabe Longonot Co. Ltd. He did not ask Nacom to show him the title for the suit property. He does not know who the registered owner of the property is. Currently, he remits his rent to Mary Muthoni Kariuki and he does not know if Betty Muraya & Co. were collecting rent on behalf of Maai-Mahiu Kijabe Longonot Co. Ltd. He admitted that at paragraph 8 of his witness statement, he stated that in 2008 some people who told him that they owned the building and asked him to remit his rent to them but he refused to remit it to them since they did not have by proof of ownership; however, he does not have any proof that the persons he pays rent to own the property.

16. Upon re-examination by Ms. Matu he stated that he was remitting the rent to Nacom Agencies on behalf of Mr. Chotara and that he had stated at paragraph 6 of his statement that he had been advised by Grace Wangui Kariuki to remit rent to Betty Muraya & Co and that as at the time of the hearing he was still paying rent. At that juncture the Plaintiffs closed their case.

Evidence for the defendants

17. DW1, Patrick Ndungu Kuria gave sworn evidence and adopted his witness statement filed on 26/7/2017 as part of his evidence-in-chief. His evidence is that he is a director and secretary to the Board of the defendant, Maai Mahiu Kijabe Longonot Ltd; that LR 1144/17/XXIV is the suit plot which is registered in the name of the Defendant company and that the defendants admitted so by producing the original title before the court. He stated that paragraph 3 of agreement dated 2/4/1982 speaks of Kshs. 100,000/=; that LR 1144/17/24 is mentioned in the agreement (paragraph 1) as one of those plots to be sold; that Kshs. 150,000/= is said to have been paid; that he was not aware of any money so paid. He stated that the properties No. 1144/15 and 1144/16 are in the name Kariuki Chotara but the suit property is not and that the plaintiffs have given no reason for that omission.

When shown special conditions as page 2 of agreement he said that it stated that purchase price was to be paid after Registration. LR No 1117/17/24 was never registered in the name of Kariuki Chotara. And from the plaintiff's own documents therefore, the balance was therefore not paid. He was referred to paragraph 8 of the special conditions whereupon he stated that the 90 days granted in that special condition are over yet the plaintiffs have confirmed title is still not transferred. When shown the defence in ELC 600/14 Civil Suit 45/10 he stated that Kariuki never bought the suit land as claimed, hence the claim the plaintiffs are pursuing at present; that Kariuki passed on 9/1/1998; that the heirs brought a succession case; that Mary, Elizabeth and Grace Kariuki got the property under the Confirmed Grant in Nairobi Succession cause No. 196 of 1988; and the defendant then went before the court, (Rawal J.) and successfully applied for the suit property to be removed from among Kariuki's properties as it did not belong to his estate. When shown page 43 of his bundle he stated that the court agreed that the suit property was not Kariuki's as at the time of his death and it was therefore expunged from among the deceased's assets. Thereafter the plaintiffs immediately filed HCCC No. 991/2006 (Originating Summons) (later renamed NBI ELC 2005/07) claiming the property by way of adverse possession. He stated that from the construction of the originating summons the plaintiffs brought the originating summons on behalf of Kariuki Chotara's Estate, stating at first that he bought the land while he had not. That the case was filed by children of the deceased on behalf of the Estate, yet one can't stay on their father's land and acquire title thereby; he stated that Mary Kariuki is the third wife as per paragraph 2 of the originating summons; that she never gave evidence in the present suit and so was not cross-examined; that she had spoken of a sale agreement in paragraph 15 and had admitted to not being able to trace any transfer; that her evidence is mere speculation that as the others were transferred so should the suit land. PW1 in this case is a daughter in the family; that none of the Plaintiffs in this case gave evidence; that at page 7 the deponent in the proceedings states that she is the eldest in the family and soon thereafter admitted that she has never lived on the suit property. That she had stated that her father lived in a plot adjoining the suit property; that PW1's evidence in paragraph 2 of her statement stated that the family lived elsewhere. DW 1 stated that the family therefore never acquired the suit land.; that Kariuki was the company's tenant, paying rent to the company; that the company instructed Khamati and Minishi Advocates that the late Kariuki's family should remit rent for the suit property; that the children of Kariuki engaged Betty Muraya, Advocate; that the letters of 25/2/1999, 17/5/1999, 6/6/1999, 10/4/1999 in the plaintiff's bundles dated 27/10/2011 should be rather marked as the defendant's documents. (The said letters were at that point produced as DExh.9(a), (b), (c) and (d) respectively). DW1 further stated that the plaintiffs had admitted that their Lawyer was Betty Muraya. That the defendant then filed HCCC 45/10 seeking eviction and the plaintiff's claim ought to be dismissed with costs, and that they should surrender the original title and be evicted from the suit property.

18. DW1, upon cross-examination by Ms. Matu, stated that he is a director of the Defendant; that Kariuki was a tenant. He had been a tenant for long until his demise; the building on the property had a number of businesses; he was a tenant of the entire building; that he did not have any evidence that Kariuki was paying rent; that the 4th – 7th Defendants in the suit were paying rent to the 1st – 3rd Defendants; that Kariuki had liberty to sublet. That Kariuki died in 1988. That the defendant was aware between 1988 –1996 that Kariuki was deceased when shown PExh.9(d) DW1 stated that it seeks a statement for 14 years (of rent) and that Rawal J's ruling dated 12/11/2009 preserved the status quo were made in that Kariuki's children collected the rent from the suit land. However, he stated that the defendant has been paying land rent for the property; Kariuki only bought the adjacent properties.

19. Upon re-examination by Mr. Chege DW1 stated that the 3 plots were previously under one title and it is not a surprise the plaintiffs have the original title. He stated that no one could have prevented Kariuki

from renting out those premises and he actually rented them out; that he used to pay rent to him. At that point the defendant's case was marked as closed.

Submissions

20. At the end of the hearing, the parties were ordered to file submissions which they did on 11/11/2022 (plaintiffs) and 15/11/2022 (defendant). I have considered the submissions of the parties in this judgment.

Determination

Issues for determination

21. Throughout the rest of this judgment I will refer to the estate of the deceased and their tenants as "the plaintiffs" and the limited liability company they have sued in the Originating Summons as "the defendant." The issues arising for determination in the present suit are as follows:

    a. Whether there was a valid sale agreement between the deceased and the defendant, and if so, whether the parties performed their respective parts of the contract;

    b. Whether the estate of the deceased is entitled to be declared owner of the suit land by virtue of adverse possession and w whether the notification of charge by the Commissioner of Income Tax impacts in any manner on the parties' respective claims in this suit;

    c. Whether the plaintiffs ought to be evicted from the suit land and injuncted from interfering with it;

    d. Whether an order of general damages can issue and against whom;

    e. Who ought to meet the costs of this consolidated suit.

The issues are Addressed as Herein Under.

22. The following issues are uncontroverted: that the title to the suit land is in the name of the defendant; that the original title is held by the estate of the deceased; that the deceased and his family had occupied the suit land for a long period of time; that the defendant stayed for a period of 10 years after the deceased's death before it claimed rent from the estate which was also 17 long years since the agreement was made between it and the deceased. The explanation for that delay is contained in the defendant's supplementary affidavit filed in the succession cause on 22/10/2004. It is stated in that affidavit that when Kariuki Wathanga Chotara died his survivors were approached for the rents whereupon they claimed that there was no legal representation for the deceased's estate; consequently, the defendant was not able to ask for rent from any person who could be identified as an administrator; that however when the defendant realized that the grant of letters of representation had been issued it demanded the rents from the occupants who claimed beneficial interest. Copies of correspondences are attached to establish that claim.

23. The letter dated 6/6/1998 is addressed by Khamati to Mrs. Winnie Muthoni Kariuki demanding that she vacates the suit property in default of which legal action would be taken.

24. A letter dated 10/4/99 from Khamati to Betty which seeks from Grace Kariuki, on whose behalf Betty Muraya & Co was purportedly collecting rents, a statement of rent accounts for the previous 14 years in default of which the defendant would resort to court action for compulsion. There is a letter dated 25/2/1999 from Khamati Minishi & Co Advocates to Betty Muraya & Co Advocates reiterating the same demands word for word.

25. The next letter exhibited is dated 17/5/99 from Betty Muraya & Co advocates to Khamati in response to the letter dated 10/4/1999. By it the heirs of Kariuki stated through their advocated that they do not know the defendant; that they cannot comprehend its claim; that the property is registered in the name of Kariuki her father and she has inherited it; that the defendant's claim ought to be directed to the administrators of Kariuki's estate.

26. From the correspondence which is not denied there is clear proof that as at 1998/1999 the defendant was already claiming ownership and seeking possession and control of the suit land which claim Kariuki's heirs resisted, thus leading to the defendant's application dated 16/2/2004 for revocation of grant in their succession cause.

27. The defendant has not demonstrated that the deceased used to pay any rent to it. There is no explanation as to why the deceased and later on his administrators were allowed to collect rent from the tenants on the premises without remitting any rent to the defendant for such a long period if indeed they were tenants who had merely sublet the premises to business people.

28. On the basis of the revealed facts, it must be the case that consideration was fully paid for the two plots that were transferred to the deceased. The plaintiff's case lacks some crucial evidence as to payment of the purchase price for the suit property which is quite glaring gap in the face of the fact that the other plots which are subject matter of the same agreement as the suit land which are said to have been sold were actually transferred to the deceased without a hitch soon after the agreement.

29. Nonetheless, this lack of crucial evidence fades in comparison to the gravity of the defendants' lack of evidence to demonstrate that the deceased was a tenant which should be an easy exercise; the burden of proof lay on the defendant to establish that the deceased was merely a tenant on the suit premises. The plaintiff never produced any rent receipts or invoices or lease agreement between it and the deceased.

30. The sale agreement dated 2/4/1982 included the suit land among the properties to be sold was not challenged by the defendant and was indeed admitted in evidence. Having admitted that sale agreement in evidence it was crucial for the defendant to therefore substantiate its claims that the deceased was a mere tenant by demonstrating that at one time after the sale agreement was executed the parties thereto met and agreed to have it reduced into a lease. This the defendant did not do and so I am inclined to disbelieve its evidence claiming that there was any lease between it and the deceased.

31. Consequently, the heirs of the deceased inherited an interest arising out of the sale agreement and all its attendant permutations, including the right to claim adverse possession against the defendant.

32. Since this is a claim for adverse possession; there is no evidence showing that the plaintiffs ever paid or did not pay consideration. This court must therefore examine the terms of the agreement in order to determine the actual time when it became void for the purpose of determining whether the plaintiff's claim for adverse possession is merited.

33. The sale agreement dated 2/4/1982 provided that the purchaser shall pay the balance of the purchase price to Ms J.K. Gatuguta & Co advocates on or before 30/6/1982. By the agreement the purchase price so deposited would be released to the vendor after the registration and transfer of the property to the purchaser. The vendor was also to pay withholding tax and obtain the relevant Form W70, obtain the relevant clearance certificates. Any outgoings were to be apportioned as at the actual date of payment of the balance of the purchase price. If any of the special conditions were not fulfilled within 90 days after the date of completion the sale would be void and any monies paid would be refunded. As seen from the record there is no evidence of completion of payment in full of the consideration, apportionment of the outgoings or refund. This court is dealing with a situation in which only the deceased and the directors then of the defendant knew the truth.

34. Besides the explanations of the defendant as to delay in claiming rent are facts of which the parties have been of understandably loud silence owing to their gravity and implication to their respective cases; this court notes two entries of interest in the title to the suit land. One is entry No. 5 dated 20/9/1975 being a memorandum of registration of charge of Kshs 50,000/= in favour of Kenya Commercial Bank. The other is entry no 6 being a notification of charge dated 11/11/1983 by the Commissioner of income tax for Kshs 1,500,000/=. These dates of the two entries should be juxtaposed against the date of the sale agreement which is 2/4/1982 to arrive at the conclusion that about one year and three months after the sale agreement was executed, the Commissioner Of Income Tax (as his office was known then) injuncted the transfer of the property by registration of a charge to secure unpaid tax from the defendant; it is probable that the existence of both the Kenya Commercial Bank charge and the Commissioner's charge were the real reason for the stalling of the progress of the transaction and consequent non-registration of any transfer over the suit property. However, that does not still explain why the plaintiffs have presented before court no executed transfer to establish that all consideration had been paid in full by the deceased as at his demise as the execution there. Those are the two entries that this court has to keep in mind while determining the present dispute and to which it will revert later on in the present judgment.

35. So what are the factors governing a claim for adverse possession when it arises from an aborted sale transaction? Before I delve into these, I must address two salient entries in the title document to the suit property which may or may not affect the outcome of this case later on. Back to the factors that govern adverse possession claimed after an aborted sale. The court in the case of *Walter Kipchirchir Koech v Tapnyobii w/o Melil & another* [2021] eKLR held as follows:

> " 59. In the present case, the Applicant took possession of the suit lands in the years 1975 and 1979 respectively as a purchaser, pending compliance with the requisite statutory formalities. The 1st Respondent allowed him to stay there by accident or design and allowed matters to drift on without taking steps to evict the Applicant from the land after the contract failed on account of non-completion with legal requirements. In the process, she lost her rights to the land when the agreement of sale between the parties became void and she was subsequently disposed of the land in a manner that was hostile to her enjoyment when the Applicant went ahead to take possession and develop it as earlier on stated for a period spanning more than 40 years.
>
> 60. In conclusion, I find that Applicant has, on balance of probabilities proven possession and continuous use of the suit land for more than 12 years, contrary to the Respondents' use and has made up a case for being granted the orders sought. The amended Originating Summons of 12th April 2019 is allowed with costs as prayed."

36. The court in the case of *Francis Mwaniki Ngumba v John Mwariri Wamai & 4 others* [2019] eKLR held as follows:

> 17. In the case of *Wanyoike v Kahiri* [1979] KLR at page 239 Justice Todd (as he then was), held that in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase. In the case at hand the Plaintiff led evidence that the last installment was paid in Nov 1990 and by the time of filing suit in December 2002, the full span of 12 years had run its term. There is no evidence that the Defendants have taken steps to stop time from running. The Plaintiff led evidence that the family was aware of his occupation

of the land. The 1st Defendant [from] whom he bought the suit land is a party. He produced minutes of a meeting held on 25/4/1990 where some of the Defendants were present. In those minutes which remain unchallenged by the Defendants, the land claimed by the Plaintiff was revisited and the boundaries re-identified and shown to the Plaintiff. The Defendants defense is that they were not consulted and if they were the 1st Defendant did not have capacity to sell and in the alternative there was no Land Control board consent. Adverse Possession is merely a legalized trespass on the land. It mattered not that land control board consent was not obtained nor the entry is illegal. The fact on the ground is that the Plaintiff has occupied the land in his right as a purchaser and his possession became adverse to that of the registered [owner]. By the time the Defendants became registered owners of the land the Plaintiff had been in occupation from 1987, thus Adverse Possession had accrued and vested in the Plaintiff.

18. The Plaintiff led evidence that he has been in exclusive control of the suit land and demonstrated her animus possidendi in developing the suit land through planting tea, trees food crops and building a house on the suit land as though it was as of right. That he has done this since 1987 to date openly and without interruption by anyone, least of all, the Defendants and their family is not under challenge.

19. Chanan Singh J, in *Jandu v Kirpal* [1975] EA 225, at p 237 and Simpson, J (as he then was), in *Wainaina v Murai and others* [1976] KLR 227 at p 231 were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case unchallenged evidence has been led that the Defendant's father and as admitted by them had knowledge of the open and exclusive possession of the suit land by the Plaintiff.

20. The totality of the evidence above is that the Plaintiff's case succeeds.

37. The Court in the case of *Bedan Maina Njoroge v Patrick Ngaruiya & another* [2021] eKLR Hon. Justice Kenei held as follows:

33. The *Limitation of Actions Act* does not expressly define adverse possession. Nevertheless, case law is awash with what adverse possession entails and generally it is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years. See Court of Appeal decision in *Mtana Lewa v Kahindi Ngala Mwangandi* (2005) eKLR. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was "nec vi, nec clam, nec precario," that is, peaceful, open and continuous. The possession should not have been through force, no in secrecy and without the authority or permission of the owner. These doctrines are internationally accepted and were specifically reiterated by the South Africa Supreme Court in the case of *Z F Stoffberg NO & others v City of Cape Town* (1325/2017) [2019] ZASCA 70.

34. It is also trite and rightly so as submitted by the both parties that a claim for adverse possession can be founded on sale agreements for land. In such instances, the period for adverse possession starts to run after payment of the last installment of the purchase price. See the case of Wanyoike *supra*.

38. In the present case, there is no firm evidence of the date the last installment was paid to the vendor under the sale agreement dated 2/4/1988. All that is known is that by the date of the execution of the agreement some Kshs 150,000/- out of the total consideration amounting to Kshs 1,000,000/- had been paid. The recourse is to take the last date known under the agreement as the date by which the last instalment ought to have been paid in default of which the agreement would be rendered void.

39. The sale agreement states that the sale should be completed within 90 days of the date of execution, that is latest by 30/6/1988. As there is no evidence of payment in respect of the suit land, the agreement became void as per condition No 8 therein on that last date.

40. With no evidence that there was any renewal of that agreement thereafter, the deceased became a trespasser on the suit land from that date and time should have begun running for the purposes of adverse possession. Evidently by the date of the filing of the Nairobi HCCC No 45 of 2010 (later renamed Nairobi ELC No. 600 of 2010) on 1/2/2010, the deceased and his administrators had remained on the land for a cumulative 28 years.

41. It matters not that the defendant went to the succession court and sought to nullify the grant. That action cannot, subject to this court's findings below, be deemed to have stopped time from running for purposes of adverse possession. What could have stopped time from running, and which could have averted a claim of adverse possession, was, and again this is subject to this court's findings below, a suit for orders of eviction before 12 years had lapsed from 30/6/1988 and the defendant never filed any such suit.

42. In this court's view, the defendant knew of the deceased's taking of possession and allowed the deceased to remain on the suit land even after he had become a trespasser. The defendant does not plead any of the things that could vitiate the plaintiff's claim for adverse possession: entry or occupation by force, secrecy or discontinuation of possession. The conclusion that this court arrives at is that the plaintiffs have proved the universally recognized ingredients of adverse possession over the suit land but it can not declare them owners for reasons stated here in below.

43. This court must address the issue of the only remaining charge which is that registered by the Commissioner of Income Tax, now known as Commissioner of Domestic Taxes, on 11/11/1983. Entry No 6 on the title to the suit property reads as follows:

> " Notification of charge by the Commissioner of Income Tax for Kshs 1,500,000/="

44. Though the plaintiffs and the defendants appear to have known that there was a charge on the property, the Commissioner of Income Tax was not joined as a party to the present suit and so the tax Issues regarding entry No 6 on the title to the suit land have not been tried. The eventual outcome of that tax dispute cannot be prognosticated for now. I am unable to firmly establish by clear evidence herein whether the tax default was by the defendant or any other person.

45. The former provisions of Section 103 of the *Income Tax Act* provided as follows:

> " 103. Security on property for unpaid tax
>
> (1) ...
>
> (2) If a person on whom a notice has been served under this section fails to make payment of the whole of the amount of the tax specified in the notice within thirty days of the date of the service of the notice, the Commissioner may by notice in writing direct the Registrar of Lands that the land or building, to the extent of the interest of the person therein, be the subject of security for tax of a specified amount, and the Registrar shall, without fee, register the direction as if it were an instrument of mortgage over or charge on, as the case may be, the land or buildings and thereupon that registration shall, subject to any prior

mortgage or charge, operate while it subsists in all respects as a legal mortgage over or charge on the land or building to secure the amount of the tax."

46. The above provisions were repealed in 2015 vide Act No. 29 of 2015, 2nd Sch. Section 103 of the *Income Tax Act* was deleted by Section 110 of the *Tax Procedures Act*, 2015. The relevant, existing provisions in the latter Act are now in its Section 40, and are set out hereunder as follows:

" 40. Security on property for unpaid tax

(1) Where a taxpayer, being the owner of property in Kenya, fails to pay a tax by the due date, the Commissioner may notify the Registrar in writing that the property, to the extent of the taxpayer's interest in the property, shall be the subject of a security for the unpaid tax specified in the notification:

Provided that the Commissioner shall, within seven days from the date of the notification to the Registrar, by notice in writing inform the taxpayer and any other person who may have an interest in the property about the notification.

(2) Where the Registrar has been notified by the Commissioner under subsection (1), the Registrar shall, without levying or charging a fee, register the Commissioner's notification as if it were an instrument of restraint on the disposal, mortgage on, or charge, as the case may be, the property specified in the notification.

(3) A registration under subsection (2) shall, subject to any prior restraint on disposal, mortgage or charge, operate as a legal restraint on the disposal, mortgage, or charge on, the property to secure the amount of the unpaid tax, and any prior restraint shall supersede the Commissioner's notification.

(4) The Commissioner shall, upon the payment of the whole of the amount of unpaid tax secured under this section, direct the Registrar in writing to cancel the notification made under subsection (2), and the Registrar shall, without levying or charging a fee, record the cancellation of the notification and the notification shall cease to apply.

(5) Where the taxpayer fails to pay the tax liability described in the notification under subsection (1) within two months after receipt of the notification, the Commissioner or authorised officer may, at the cost of the taxpayer, dispose of the property that is the subject of the restraint on disposal, mortgage or charge, by public auction or private treaty, or as provided for under the relevant Act for the recovery of the tax:

Provided that where a plan has been agreed between the taxpayer and the Commissioner, the liability shall be settled within the agreed payment plan before the notification by the Commissioner is lifted.

(6) Subject to section 34, where the property is subj ect. to a prior restraint, that prior restraint shall have priority if the property is disposed of under subsection (5).

(7) For the purpose of this section—

"property" means land or building, aircraft, ship, motor vehicle, or any other property which the Commissioner may deem sufficient to serve as security for unpaid taxes;

"Registrar" includes—

(a) the Land Registrar defined in section 3 of this Act;

(b) the Registrar of Ships appointed under section 14 of the *Kenya Maritime Authority Act*, 2006 (No. 5 of 2006);

(c) the Director-General of the Kenya Civil Aviation Authority appointed under sect on 19 of the *Civil Aviation Act*, 2013 (No. 21 of 2013);

(d) the Director-General of the National Transport and Safety Authority appointed under section 15 of the *National Transport and Safety Authority Act*, 2012 (No. 33 of 2012); or

(e) any other person who the Commissioner is satisfied has authority to hold property sufficient to serve as security for unpaid taxes;

"relevant Act" includes the *Kenya Maritime Authority Act*, 2006 (No. 5 of 2006), *Merchant Shipping Act*, 2009 (No. 4 of 2009), *Civil Aviation Act*, 2013 (No. 21 of 2013), *Land Registration Act*, 2012 (No. 6 of 2012), *Land Act* 2012 (No. 3 of 2012), *National Transport and Safety Act*, 2012 (No. 33 of 2012), or any other Act that provides for the registration of property. [Act No. 22 of 2022, s. 39.]"

47. It cannot be known if the tax referred to by that entry was owed by the transferor or the transferee or some other person though it should be presumed it is more likely that it was the transferor's obligation, but that should not be the focus of investigation by this court in this decision. In any event if it was the deceased who owed the tax it would be still payable from his estate as the provisions of Section 97 of the *Income Tax Act* states as follows:

" 97. Deceased persons

Where a person dies, then to the extent to which—

(a) tax charged in an assessment made upon him has not been paid; or

(b) his executors are charged to tax in an assessment made under section 48 of this Act,

the amount of tax unpaid or charged, as the case may be, in the assessment as finally determined shall be a debt due and payable out of his estate."

48. The amount of tax owed now cannot be determined from the contents of the present suit either. What matters is that the land was not, even as at 11/11/1983, transferable without the consent of the Commissioner of Income Tax under Sections 86 and 87 of the *Land Act* and in any event it was not transferred to the deceased at all. In *Masek Ole Tinkoi & 3 others v Kenya Grain Growers Limited & 2 others* [2018] eKLR, Ohungo J considered such property to be currently used or enjoyed by the government of the Republic of Kenya as security for tax liabilities owing from the 1st defendant in that case, and that such categorization brought the land under the category of "land otherwise enjoyed by the Government" under Section 41 (a) (i) of *Limitation of Actions Act*. That section provides as follows:

"41. This Act does not –

(a) enable a person to acquire any title to, or any easement over-

(i) Government land or land otherwise enjoyed by the Government;

(ii) ....."

49. I agree with Ohungo J and I add that even at present, that is the proper approach that should be given to such land that is under a charge by the government to secure taxes payable by the owner.

50. It is expressly stated that a registration under Subsection 40 (2) of the *Tax Procedures Act* shall, subject to any prior mortgage or a charge, operate as a legal mortgage over, or charge on, the land or building of the taxpayer to secure the amount of the unpaid tax and the provisions of the *Land Act* relating to the rights of the mortgagee shall apply.

51. The notification of charge can only be lifted once the tax owing has been paid. As the encumbrance still remains registered, it is clear that the tax remains unpaid and the parties' rights under the land sale agreement dated 2/4/1988 remain suspended till the Commissioner's charge is discharged. In the foregoing circumstances, I consider that time could not be deemed to run in favour of the deceased against the defendant from the time that the charge registered under entry No. 6 signifying government's interest in the suit land was registered and for as long as that charge remained undischarged.

52. The effect of an order of this court to the effect that the suit land be registered in the name of the plaintiffs by virtue of prescription would be to override the chargee's rights in the registered charge securing tax owed and thus indirectly assist the targeted debtor to avoid tax obligations which this court is not inclined to do. This court also finds that after the date 11/11/1983 the defendant lost the right to sell and transfer the suit land to the deceased as long as the charge was registered over the land.

53. As I have found that the contractual rights of the parties under the agreement dated 2/4/1988 were suspended by the registration of the Commissioner's charge dated 11/11/1983, this court is not able to declare that the plaintiffs have right to be declared owners of the suit land by virtue of adverse possession.

54. It is clear that the presence of the charge by the Commissioner altered the fortunes of the plaintiffs who can not now claim adverse possession the suit. What about the rights of the defendant?

55. The chargee may have certain rights under the existing law but a charge is never construed as a transfer of land. The equity of redemption is jealously guarded by the law at all times. Section 80 of the *Land Act* states as follows:

> " 80. Charge of land to take effect as security only
>
> 1. Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the chargor to the chargee but the chargee shall have, subject to the provisions of this Part, all the powers and remedies in case of default by the chargor and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption."
>
> 2. ...."

56. The provisions set out immediately herein above signify that the charged land is not transferred to the chargee by the charge instrument. In addition, the provisions of Section 13 of the *Limitation of Actions Act* provides as follows:

> "(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
>
> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
>
> (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12 (3), the land in reversion is taken to be adverse possession of the land."

57. The plaintiffs were therefore not persons in whose favour time could run for the purposes of adverse possession and thus the defendant's title remained valid, indefeasible throughout the subsistence of the notification of charge by the Commissioner of Income Tax. The defendant's right to the land as chargor continued to rank higher than that of any other third party including the deceased and all his heirs.

58. The foregoing analysis leads to the conclusion that the plaintiffs have remained trespassers on the suit land all along since the agreement between the deceased and the defendant became void. Trespass occurs from day to day and the defendant can not in any event be deemed to be time barred as each day renews the cause of action in trespass. In the case of *Gatatha Farmers Co. Ltd v Otieno Okiro & 2 others* [2018] eKLR the court held as follows:

> " The fact that the defendant is still in occupation of the land means that it is a continuous cause of action. Trespass has been defined as "any unjustifiable intrusion by one person upon

land in the possession of another" (See *Clerk & Lindsell on Trots*, 18th Edition paragraph 18 -01).

Trespass is distinct from recovery of land. The continued occupation by the defendant without the permission of the plaintiff is noted. No capacity in the form of employment under the plaintiff or its predecessor is claimed by the defendant. The defendant was not a tenant. His father was. If his claim is under his father's estate it is not possible for it to be elevated to any higher ground than his father's rights to occupation in his lifetime which was to end upon his death. If the arrangement with the deceased's employer was that the deceased would have use and occupation of the land only for his lifetime, I do not see how the defendant can claim not to be in trespass. If trespass is the cause of action here, and it certainly is, it is possible that that claim may not be time barred at all.

The court in the case of Msa. Civil Suit No. 84 of 2005 *Janendra Raichaind Shah v Mistry Walji Naran Murji* [2014] eKLR stated as follows at paragraph 58:-

> "Nevertheless in fairness to the plaintiffs their argument that their cause of action arose on each day that the defendant was in wrongful occupation may be valid. On this, the court draws an analogy from continuing trespass".

Clerk and Lindsell on Torts 17th Edition at paragraph 17.02 states:-

> "Every continuance of a trespass is fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues.
>
> The defendant was in continuous wrongful possession from 1st January, 1990 (a day after the lease determined) upto after 24th November, 2004 when the plaintiffs sold the premises to Vantage yet in respect of the plaintiffs their cause of action first arose in June, 1985 when they became owners of the property. So from June 1985 to 24th November, 2004 a new cause of action arose each day the defendant continued to be in wrongful possession. However for purposes of the Limitation of Actions Act, any cause of action that arose three years before the date of filing of the suit would be statute barred. The suit was filed on 12th May, 2005 and so any cause of action that arose prior to 12th May, 2002 is time barred."

Going by the reasoning in the case of Janedra (*supra*) the plaintiff's case herein having been filed on 3/6/2011, can only be in respect of any cause of action occurring after 3/6/2008, that is 3 years earlier, I therefore find that the plaintiff's claim is not time barred."

59. Consequently, the defendant in the instant case retained its locus to bring an action for eviction of any other person trespassing on the suit land and that is what it did by way of its plaint dated 25/1/2010. I find that in the circumstances of this case the defendant's claim for eviction and injunctive orders against the plaintiff's must succeed.

60. As to whether an order of general damages can me made against the plaintiffs as prayed by the defendant, it is certain that an agreement had envisaged that the land would be transferred to the deceased if the transaction went through but it failed. The defendant slept over its rights for decades and surprisingly awoke from its deep slumber a few years ago to lodge the present claim, but it must be credited for waking up at all after that long. Besides its evidence never focused on the quantum of general damages for trespass as would have been required to warrant an award under that head. As if taking cue from the evidence the submissions also were not enlightening on that aspect of the claim. They merely ask that the plaintiffs do pay damages equivalent to the rents they have collected over the

years. Such rents never formed the substance of the claim in the plaint. No evidence in the form of expert analysis of the quantum of rents received by the plaintiffs over the years was adduced.

61. However inadequate the defendant's evidence may be the law remains that once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages as stated in various cases including *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR. Thus I am inclined to award the defendant nominal damages in the sum of Kenya Shillings One Million (Kshs 1000,000/=) only against the plaintiffs to extenuate its losses over the years of occupation by the plaintiffs.

62. The upshot of the foregoing is that the Originating Summons dated 18/9/2006 is hereby struck out and the defendant's claim in the plaint dated 25/1/2010 succeeds as the defendant has established it on a balance of probabilities.

63. In conclusion and for the avoidance of doubt I issue the following final orders:

    a. The Originating Summons dated 18/9/2006 is hereby dismissed;

    b. The defendant's claim in the plaint dated 25/1/2010 is hereby granted;

    c. The plaintiffs shall remove themselves and all their movable assets from LR No. 1144/17/XXIV within 30 days of this judgment and in default they shall be forcibly evicted therefrom;

    d. An order of permanent injunction is hereby issued permanently restraining the plaintiffs from entering or trespassing onto LR No. 1144/17/XXIV;

    e. The plaintiffs shall jointly and severally pay to the defendant Kenya Shillings One Million (Kshs 1000,000/=) only being general damages for trespass;

    f. The plaintiffs shall jointly and severally pay to the defendant the taxed costs of the present proceedings.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 9TH DAY OF FEBRUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU