



**Mc Tough v Hongo & another (Environment and Land Miscellaneous Application
58 of 2017) [2023] KEELC 21425 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 58 OF 2017
SO OKONG'O, J
NOVEMBER 9, 2023**

BETWEEN

WILLIAM ROMAN MC TOUGH PLAINTIFF

AND

LAWRENCE O. HONGO 1ST DEFENDANT

**LAWRENCE O. HONGO (BEING SUED AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE MICHAEL HONGO AYIEKO) 2ND DEFENDANT**

JUDGMENT

The pleadings

1. By an Originating Summons dated 11th November 2010 brought under Order XXXVI Rule 3D(1), (2) and (3) of the *Civil Procedure Rules*, Section 30 of the *Registered Land Act*, Chapter 300 Laws of Kenya, and Sections 3 and 3A of the *Civil Procedure Act*, the Plaintiff (hereinafter referred to only as “the Applicant”) who claimed to be the occupier and adverse possessor of Kisumu/Kogony/33(hereinafter referred to as “the suit property”) sought the determination of the following questions;
 1. Whether the Applicant purchased an identified portion of the suit property measuring approximately half of the original title from the Defendants (hereinafter referred to only as “the Respondents”) on 3rd March 1989 but the Respondents had failed to execute the transfer documents in favour of the Applicant.
 2. Whether the Applicant has an overriding interest under Section 30(a), (d) and (g) of the *Registered Land Act* (Cap. 300) Laws of Kenya of the identified portion of the suit property.
 3. Whether the 2nd Respondent is holding the title in respect of the suit property in trust for the Applicant
 4. Whether the Applicant is an adverse possessor of a portion of the suit property.



5. Whether the court ought to vest the suit property upon the Applicant.
 6. If (2,3,4 and 5) above are in the affirmative, whether the Kisumu District Land Registrar should be directed to cause the sub-division of the suit property and thereafter register the Applicant as the absolute proprietor of his identified portion of thereof.
 7. Whether the Applicant is entitled to the costs of the application.
2. The Application was based on grounds that the Applicant purchased an identified portion of the suit property measuring approximately half of the original title from one, Michael Hongo Ayieko (deceased) (hereinafter referred to only as “the deceased”) on 3rd March 1989 while he was still alive and upon the death of the deceased sometime in mid-nineties, the 1st Respondent obtained Grant of Letters of Administration in respect of the estate of the deceased and secretly transferred the suit property into his name. The Applicant averred that the 1st Respondent thereafter refused to transfer to the Applicant his portion of the suit property. The Applicant averred that he had occupied and owned the suit property since 3rd March 1989, a period of more than 20 years. The Applicant averred that he had occupied the suit property continuously without force, without secrecy, without permission, and without interruption for the said period of more than 20 years. The Applicant averred that the 1st Respondent was in the process of selling the Applicant’s portion of the suit property to a third party.
 3. In his affidavit in support of the application, the Applicant stated as follows: On or about 3rd March 1989, he purchased an identified portion of the suit property measuring approximately half of the original title from the deceased at a consideration of Kshs. 65,000/-. The deceased pointed out to him the said portion of the suit property which extended from the homestead of the deceased to the shores of Lake Victoria. It was a term of the agreement of sale between him and the deceased that he was to pay to the deceased a deposit of Kshs. 30,000/- which he did and the balance of Kshs. 35,000/- was to be deposited with Kohli Patel & Raichura Advocates to be released to the deceased upon transfer of the land into the name of the Applicant. Even though he deposited the said sum of Kshs. 35,000/- with the said advocates, the deceased did approach him on numerous occasions requesting advances which he gave him totaling Kshs. 30,000/-. The 1st Respondent collected these advances on behalf of the deceased on numerous occasions. At the request of the deceased, he employed the 1st Respondent at his restaurant known as Octopus Discotheque where the 1st Respondent worked for a number of years while also tending to his land.
 4. In 1991 while the suit property was still under adjudication, the Applicant asked the Provincial Land Adjudication Officer to consider registering among other parcels of land, the suit property in his name as he had purchased the same. He was advised to make a payment of Ksh. 1,400/- for the exercise to be undertaken which he did. The suit property was not registered in his name by the Provincial Land Adjudication Officer. The remaining parcels of land mentioned in his letter to the Provincial Land adjudication officer were however successfully registered in his name and titles issued. The said parcels of land were; Kisumu/Kogony 3018, Kisumu/Kogony 25, Kisumu/Kogony 26 and Kisumu/Kogony 27.
 5. The Applicant averred that the suit property was sharing a common boundary with his other parcel of land Kisumu/Kogony 3018 while the other land parcels Kisumu/Kogony/25, 26 and 27 were next to each other. He stated that he had plans to commence large-scale farming once he obtained all the titles for the said parcels of land. The Applicant stated that in 1994, the 1st Respondent who at the time was his employee informed him that the 1st Respondent’s sister, Annette Hongo was trying to dispose of the Applicant’s parcel of land to a third party at Kshs. 200,000/-. He stated that he went and stopped the transaction. He stated that the 1st Respondent’s sister apologised to him and agreed



to refund the money she had received from the third party. He stated that the 1st Respondent's sister had used part of the money and only managed to refund Ksh. 179,000/- compelling the Applicant to add the third party an extra Kshs. 21,000/- to bring the total to Ksh. 200,000/- which was accepted by the third-party buyer.

6. The Applicant stated that to compensate him for the said sum of Ksh. 21,000/- the 1st Respondent, his mother, and elder brother Sombe Hongo agreed to extend the Applicant's portion of land inside the deceased homestead up to the 1st Respondent's mother's hut which the Applicant accepted. The Applicant stated that when the deceased was still alive, the Applicant had difficulty obtaining the portion of land that had been sold to him because there was a strange title number Kisumu/Kogony/3012 which existed only on paper but not on the ground that delayed him in completing the transaction.
7. The Applicant averred that the District Land surveyor visited the site, confirmed the size of his portion of land and promised to ensure that title Kisumu/Kogony/ 3012 was removed from the register and that the original boundary of Kisumu/Kogony/33 was restored. The Applicant averred that the deceased and he were patient and waited for the land office to rectify the register in order for the Applicant to obtain the services of a surveyor to commence the subdivision process of Kisumu/Kogony/ 33 so that the deceased could transfer to him his parcel of land.
8. The Applicant averred that the deceased passed away before transferring to him the portion of the suit property that he had purchased from him. The Applicant averred that he approached the 1st Respondent to assist him by undertaking the succession process in respect of the estate of the deceased after which he could subdivide the suit property and transfer the portion thereof that the Applicant had purchased to the Applicant. The Applicant stated that the 1st Respondent gave him several excuses one of which was that he was still in the process of obtaining the death certificate for the deceased. The Applicant averred that in 2000, the 1st Respondent left the Applicant's employment.
9. The Applicant averred that he never saw the 1st Respondent again and his efforts to reach him to complete the succession and transfer of the Applicant's portion of the suit property were not successful. The Applicant averred that on 26th July 2010, he received a phone call from a village elder Ahmed Ali Juma that a stranger was attempting to fence the Applicant's land and that the 1st Respondent was the one trying to dispose of it. The Applicant averred that he conducted a search and discovered that the 1st Respondent had secretly transferred the suit property into his name on 25th January 2000. The Applicant averred that the 1st Respondent's action was unlawful in that he secretly conducted succession in respect of the deceased's estate and transferred the whole of the suit property into his name without informing the Applicant.
10. The Applicant averred that the 1st Respondent could only be presumed to be holding the title in respect of the suit property in trust for the Applicant. The Applicant averred that he was a bona fide owner of the suit property having purchased the same for value. The Applicant averred further that he had been in continuous occupation of the suit property without force, without secrecy, without permission and without interruption for a period in excess of 20 years. The Applicant averred that he stood to suffer irreparable damage if the Originating Summons was not allowed. The Applicant averred that he purchased the suit property with the intention of developing a modern agricultural farm to take advantage of the irrigation water from the nearby Lake Victoria and should the 1st Respondent dispose of the same, the Applicant would not be in a position to achieve his dream.
11. The Applicant averred that he had been advised by his advocates on record that because he had been in constant occupation of the suit property without force, without secrecy, without permission, and without interruption for a period in excess of 20 years, his claim could only be sustained as an adverse



- possessor and that the agreement of sale that he entered into with the deceased could only act as a demonstration and evidence of the date when he took actual possession of the suit property.
12. The Applicant averred that everyone in the village including the local area chief, the elders, and the 1st Respondent himself knew that the Applicant was the equitable owner of the suit property, and as such no prejudice would be occasioned to the 1st Respondent should the court grant the orders sought.
 13. The Applicant averred that the delay in seeking the consent of the land control board to subdivide the suit property and transfer his portion to his name could be explained away in that there was a technical problem of the existence of the strange title Kisumu/Kogony/3012 in the lands office register that encroached on his portion of the suit property according to the survey map of the area. The Applicant averred that there was also the death of the deceased seller, Michael Hongo Ayieko, and finally, his thwarted efforts to convince the 1st Respondent to conduct succession and transfer his portion of the suit property to him which the 1st Respondent unreasonably declined. The Applicant averred that were it not for the said legal technicalities, he had a strong cause of action for specific performance against the Respondents in Winam SRMCC NO.249 of 2010. The Applicant averred that in its ruling of 26th October 2010, the said court advised him to seek the remedy of adverse possession in the High Court.
 14. The Respondents opposed the Originating Summons through grounds of opposition dated 25th January 2011 and a replying affidavit sworn on 24th January 2011. In their grounds of opposition, the Respondents contended that the Applicant's claim was time-barred and untenable in law. The Respondents averred that the Applicant's suit was based on contracts that had become null and void and as such unenforceable. The Applicant contended that the equitable relief of trust could not be grounded upon an illegality. The Respondents averred that the Applicant having grounded his claim on the purchase of the suit property, the remedy of adverse possession was not available to him. The Respondents averred that the Applicant had never been in possession of the suit property and as such his adverse possession claim had no basis. The Respondents averred that the Applicant's remedy if any was for a refund of the purchase price.
 15. In his replying affidavit, Lawrence Okoth Hongo averred that he had since birth continuously lived on and later built his own homestead on the suit property. He stated that he was still in occupation of the suit property. He stated that he had never seen the plaintiff occupy, work on or even take possession of any portion of the suit property. He stated that he had always used the entire land. He stated that the boundary of the suit property did not extend to Lake Victoria. He stated that in between the lake and the suit property, there was a parcel of land known as Title No. 3012 which was owned by a third party. He stated that it was not possible that the Applicant could have purchased from the Respondents land extending to the lake.
 16. The 1st Respondent averred that the contract sued upon having been entered into in 1989, any claim grounded upon it was statute barred and untenable since time could not be extended to file a suit based on a contract. The 1st Respondent averred further that the Applicant failed to make an application for consent of the Land Control Board and no consent having been granted within the prescribed time or at all, the contract became illegal, null, and void. The 1st Respondent contended that it was a criminal offence to insist on the terms of the contract as the Applicant was purporting to do. The 1st Respondent averred further that the agreement that the Applicant had sued on, and the law limited the Applicant's remedy to a refund only and not specific performance. The 1st Respondent averred that it would be unjust to grant the orders sought because it would effectively deprive the 1st Respondent of his proprietorship of the suit property unfairly.



The evidence and submissions

17. At the trial, the Applicant who gave evidence as PW1 reiterated the contents of his affidavit in support of the Originating Summons that I have analysed above. It is not necessary to repeat the same here. The Applicant stated that he took possession of the first portion of the suit property that he purchased from the deceased, in 1989. He stated that after taking possession, he planted maize on the property. He stated that he also fenced the same with euphorbia trees and constructed a small structure that was partly a shop and partly a dwelling for the caretaker. He stated that he purchased the second portion of the suit property from the deceased on 9th June 1992. He stated that the agreement for this second portion was between him and the deceased's 3 widows because the deceased had died by then. He stated that after paying the last installment of the purchase price to the said widows in 1994, he took possession of the second portion of the suit property and amalgamated it into the first portion. He stated that he planted trees on this second portion of the suit property.
18. The Applicant stated that in March 1994, the deceased widows asked him to give them Kshs. 21,000/- to refund to a purchaser to whom the 1st Respondent's sister had purported to sell the Applicant's portion of the suit property. The Applicant stated that he gave out this sum of Kshs. 21,000/- in exchange for an additional portion of the suit property. He stated that in addition to the said sum of Kshs. 21,000/- he paid Kshs.15000/- for the trees that were on the said portion. He stated that he took possession of this additional portion of the suit property immediately and planted more trees.
19. He stated that when he was purchasing land from the deceased, he was at the same time purchasing a portion of another parcel of land Title No. Kisumu/Kogony/2902 from one Michael Ayieko. He stated that he had a title for the first portion of the suit property that he purchased from the deceased and the portion of Title No. Kisumu/Kogony/2902 that he purchased from Michael Ayieko. He stated that the first portion of the suit property and the portion of Title No. Kisumu/Kogony/2902 that he purchased from Michael Ayieko were consolidated by the adjudication officer when he lodged a late objection and given a single Title No. Kisumu/Kogony/3018. He stated that he was issued with a title for Title No. Kisumu/Kogony/3018. He stated that although a portion of the suit property had been excised and combined with a portion of Kisumu/Kogony/2902 to give rise to Title No. Kisumu/Kogony/3018, the parcel number for the suit property did not change.
20. The Applicant stated that he did not get title for the other portions of Title No. 33 (the suit property) because the deceased passed away and the family of the deceased did not help him to obtain the title. He stated that the deceased's family promised to take out letters of administration in respect of the estate of the deceased so that he could have the said portions of the suit property registered in his name. The Applicant stated that he was informed that somebody had fenced his land and that the said person had acquired the same from the 1st Respondent. The Applicant stated that he went to the land office and conducted a search. He stated that he was surprised to find that the suit property had been registered in the 1st Respondent's name since 2000. He stated that he was shocked that 1st Respondent was registered as the owner of the suit property in January 2000 and yet Grant of Letters of Administration were obtained in 2010; that is 10 years later. He stated that the Grant of Letters of Administration was not in the name of the 1st Respondent although he claimed to be the administrator of the estate of the deceased.
21. He stated that he had fully paid for all the three portions of the suit property and sought the assistance of the court to get the same. He stated that the measurements of his portions of the suit property were as follows: The first portion was approximately 75metres x 50 metres, the second portion was 50 metres by 50 metres and the third portion was about 50 metres x 5 metres. He stated that the portions extended from near the homestead going down to the lake. He produced a survey report which he



- claimed captured the extent of his land (See PExh16). He stated that the report was prepared pursuant to a court order that was issued in Winam RMCC No. 259 of 2010. He stated that the 1st Respondent and he were present when the surveyor visited the site. The Applicant produced several documents in evidence as exhibits.
22. On cross-examination, he stated as follows in part, he had put up a structure on the portion of the suit property that he purchased but the same was destroyed by floods from the lake. He stated that when the structure came down, he gave the 1st Respondent the iron sheets to use and had not put up another structure. He stated further that he planted about 5000 eucalyptus trees and sisal on one of his portions of land. He stated that he also planted maize on another portion. He stated that 5000 trees were not there as some were destroyed by cows when they were still seedlings. He stated that there were some other eucalyptus trees growing. He stated that his structure came down in 1992 or thereabouts and he had a caretaker by the name Morris who lived there but he died. He stated that he had been using the land but not continuously. He confirmed that the dimensions of the portions of the suit properties he was purchasing were not indicated the agreements of sale that he had relied on. He confirmed further that he did not buy the whole of the suit property but only portions thereof. He stated that the portion of the suit property he was claiming was approximately 1 acre. He stated that the 1st Respondent's homestead was on the suit property but not on the portion that he was claiming.
 23. The Applicant's second witness was Ahmed Ali Juma (PW2). PW2 stated that he was a community policing officer in Usoma. He adopted his witness statement as his evidence chief. PW2 stated that he had known the Applicant from 1989 when he started coming to Usoma to check on the suit property. He stated that he also knew the 1st Respondent. He stated that the Applicant bought land from the deceased, built an iron sheet temporary house thereon which later collapsed. He stated that the Applicant also planted trees.
 24. On cross examination, PW2 stated that the Applicant planted trees on the land that he purchased in 1990 and the trees were still in existence. He confirmed that by the time the Applicant planted trees on the land he had not fully paid the purchase price. He stated that the Applicant also erected an iron sheet house in 1990 which later collapsed. He stated that the Applicant had not done any further development on the land. He stated that nobody was cultivating the land even when the deceased was alive. He stated that members of the deceased's family were tilling the lower part of the suit property where they were growing tomatoes and vegetables. He stated that he could not tell the size of the portion of land the deceased's widows sold to the Applicant. He stated that he was not involved in the transaction neither was he present.
 25. The Applicant's final witness was Josephat Tanui (PW3). He stated that he was a Land Surveyor in Elgeyo Marakwet. He stated that he worked in Kisumu between 2005 and 2013 before he was transferred to Elgeyo Marakwet. He stated that in 2010 on the orders made in Winam Civil Suit 249 of 2010, he went to the site of the suit property on 29th September 2010 to verify the works that were being undertaken on the suit property. He stated that his findings were that parcels Nos. Kisumu/Kogony/ 33, 3012, and part of 3144 were fenced as a single parcel. He stated that his other finding was that on the fenced parcels of land, there were existing structures. He stated that he had attached a map of the area to his report dated 29th September 2010 which he produced as an exhibit.
 26. After the close of the Applicant's case, the 1st Respondent gave evidence as PW1. He stated that he worked for the Applicant. The 1st Respondent adopted his witness statement dated 7th June 2012 as his evidence in chief and produced the documents attached to his supplementary list of documents dated 26th February 2013 as exhibits. He stated that the suit property was registered in his name. He stated that the land was previously registered in the name of the deceased. He stated that he got the



- suit property from his deceased father and had occupied the land for over 30 years. He stated that he was brought up on the suit property and that he was 50 years. He stated that the plaintiff had never occupied the suit property at any time.
27. On cross-examination, the 1st Respondent denied that the deceased sold the suit property to the Applicant. He admitted that he worked for the Applicant as a waiter in one of his hotels; Hotel Octopus. The 1st Respondent denied signing an agreement for sale of the suit property to anyone. The 1st Respondent admitted however that he signed the agreements between the Applicant and the deceased's widows made in 1992. The 1st Respondent stated that he obtained a title deed for the suit property on 25th January 2000. He stated that he had not reported the Applicant to the Police for fraud in relation to the agreements. He stated that he could not tell when he obtained the Grant of Letters of Administration in respect of the estate of the deceased. He stated that he did not know that he obtained a title deed for the suit property before obtaining a Grant of Letters of Administration in respect of the estate of the deceased.
28. The 1st Respondent stated that he did not receive any payment from the Applicant in relation to the suit property. He admitted however that his mother and stepmothers received some payment from the Applicant. He stated that he did not know for what purposes the money was being paid to the ladies. He stated that the Applicant acted fraudulently when he took a portion of the suit property.

The Applicant's submissions

29. The Applicant filed his submissions on 3rd July 2023. Applicant submitted that all the agreements of sale that he entered into with the deceased and his widows were valid and enforceable.
30. The Applicant submitted that he produced evidence that was corroborated by the 1st Respondent that the sale did occur and that no counterclaim was filed to establish a cause of action against the Applicant. The Applicant submitted that the court should find and declare that enforceable contracts subsist between the Applicant and the 1st Respondent as the Administrator of the estate of the deceased. The Applicant urged the court to grant the reliefs sought "in the plaint". The Applicant cited the cases of *Johnson Muinde Ngunza & Another v. Michael Gitau Kiarie & 12 Others* [2017]eKLR and *Trust Bank Limited v. Paramount Universal Bank Limited & 2 Others* [2009]eKLR in support of his submissions.

The Respondent's submissions

31. The Respondents filed their submissions on 3rd July 2023. The Respondents submitted that the burden was upon the Applicant to prove his adverse possession claim. The Respondents cited Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya, and the case of *Gichinga Kibutha v. Caroline Nduku* [2018]eKLR in support of this submission. The Respondents submitted that a person claiming land by adverse possession must satisfy the following: (1) prove that the possession claimed was adequate; (2) the possession had been continuous and uninterrupted, and (3) the occupation must have been open, exclusive, without secrecy, and with no force.
32. The Applicant submitted that so as to claim land by adverse possession, one has to satisfy all of the above conditions. The Applicant submitted that it was not sufficient to show that some acts had been committed. In support of these Submissions, the Applicant cited *Maweu v. Liu Ranching and Farming Cooperative Society* [1985] KLR 430 and *Samuel Miki Waweru v. Jane Njeru Richu*, Civil Appeal No.122 of 2001. The Respondents submitted that there was no evidence that the Applicant ever took possession of the suit property. The Respondents submitted that the Applicant never successfully removed or ousted the Respondents from possession of the suit property. The Respondents submitted that the Applicant had not satisfied the requirements of Section 38 of the



Limitation of Actions Act, Chapter 22 Laws of Kenya and Order 37 Rule 7 of the *Civil Procedure Rules*. The Respondents submitted that the Applicant had also failed to prove and satisfy ingredients of adverse possession. The Respondents urged the court to dismiss this suit with costs to the Respondents.

Analysis and determination

33. I have considered the pleadings, the evidence tendered and the submissions filed by the advocates for the parties. In *Hemed Kassim Hemed v. Fatuma Sheikh Abdalla* [2014] eKLR, Kasango J. stated as follows:

“3. Before embarking on that duty I wish to deal with Ground of Appeal No. 3 presented by the Appellant. On that ground Appellant faulted the Learned Magistrate for failing to make a finding that Plot Mombasa/Block XXXIV/60 (the suit property) the property in question, in this dispute, was family land. I have gone through the pleadings in this matter and I could not find any allegation that the said suit property is family land. To therefore fault the Magistrate for not considering that which was not in issue at the trial Court is in error on the part of the Appellant.

4. The Court of Appeal in the case *Independent Electoral And Boundaries Commission & Another –v- Stephen Mutinda Mule & 3 Others* [2014]eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-

... the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd –v- Nyasulu* [1998]MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled “The present Importance of Pleadings.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-

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

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for



an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.’

The Appellants also cited the Ugandan case of *Libyan Arab Uganda Bank For Foreign Trade And Development & Anor v. Adam Vassiliadis* [1986]UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in *Jones v. National Coal Board* [1957]2 QB 55 That-

‘In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.’”

Referring also to a decision of the Nigerian Supreme Court our Court of Appeal stated-

“*Adetoun Oladeji (nig) Ltd v. Nigeria Breweries PLC.S.C.* 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’”

34. I have cited this case to underscore the importance of pleadings. The Applicant’s case as pleaded was an adverse possession claim. However, at the trial, it was difficult to determine from the evidence that was being tendered by the Applicant whether he was out to prove a suit for specific performance or one for adverse possession. In his submissions, the Applicant abandoned his adverse possession claim altogether and urged the court to declare that enforceable sale contracts subsist between the Applicant and the Respondents. No submission was made on the pleaded claim of adverse possession. I found this turn of events ironic because in paragraphs 37 and 38 of his affidavit in support of the Originating Summons, the Applicant stated that he had been advised by his advocates which advice he believed to be true that a suit for specific performance could not succeed and that his only hope was in claiming the suit property by adverse possession. The Applicant pointed out that a specific performance claim would face hurdles such as limitation of actions and failure on his part to obtain the consent of the land control board for the agreements of sale of portions of the suit property that he entered into with the deceased and his widows.
35. This court cannot determine issues that have not been pleaded. The suit before the court being an adverse possession claim, the only issues that arise for determination in my view are; whether the Applicant has established the elements of adverse possession in relation to the portions of the suit property that he is claiming, whether the Applicant is entitled to the reliefs sought in his Originating Summons and who should bear the costs of the suit. The Respondents cited several cases on adverse possession some of which I will refer to. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
- a. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.



- b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 - g. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
 - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 - i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 - j. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
36. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

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

37. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not



whether or not the claimant has proved that he has been in possession for the requisite number of years.”

38. In *Gitbu v Ndeete* [1984] KLR 776 it was held that:

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

39. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystallized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person’s favour. See *Titus Mutuku Kasuve v. Mwaani Investments Limited & 4 Others (supra)*.
20. We cannot help but note that the evidence tendered in support of the respondents’ case was by five respondents. These respondents only gave evidence in relation to the dates they each entered into possession of the suit property. There was no evidence to show that such possession was without the consent of the former registered owner. The photographs of the structures erected on the suit property could equally not establish the absence of consent from the previous registered owner. In addition, we, unlike the learned Judge, find that no further evidence was given with respect to when the other respondents took possession. Without such evidence there was nothing to support the respondents’ contention that they had been in adverse possession of the suit property prior to the appellant’s title.
21. Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In *Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakshwein & Another* [2015] eKLR this Court observed: -

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Gitbu v. Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

In the same case, the court stated as follows:



18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/ occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu v. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in *Wambugu v. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?"
40. It is on the foregoing principles that the Applicant's claim falls for consideration. According to the Applicant, he bought 3 portions of the suit property. He bought the first portion from the deceased on or about 3rd March 1989. It is common ground that the Applicant purchased only a portion of the suit property on 3rd March 1989 and not the whole property. The agreement between the Applicant and the deceased dated 3rd March 1989 (P.EXH.1) does not indicate the measurement of the portion of the suit property that the Applicant purchased under the agreement. The Applicant averred that he purchased the second portion of the suit property from the deceased's widows on 9th June 1992. The agreements made with these widows were produced in evidence as P.EXH. 5(a), 5(b) and 5(c). These agreements do not indicate the measurement of the portion of the suit property that was purchased by the Applicant. The Applicant averred that he purchased the third portion of the suit property on 7th March 1994 when he paid a sum of Kshs. 21,000/- on behalf of the 1st Respondent's sister being the balance of a refund that the sister was to make to one, Mrs. Rattes(Emmanuel Rufus). The agreement dated 7th March 1994 (P.EXH.9) for the purchase of this third portion did not also indicate the measurement of the portion of the suit property that was purchased by the Applicant. In his Originating Summons, the Applicant sought among others a determination "Whether the Plaintiff purchased an identified portion of parcel Kisumu/Kogony/33 measuring "approximately half of the original portion" from the Defendant on 3-3-1989..." and "Whether the Plaintiff is an adverse possessor of a portion of land parcel number Kisumu/ Kogony/33." The law is that a person can claim a part of land by adverse possession. The portion must however be capable of being identified and measured. As I mentioned earlier, all the agreements that the Applicant entered into with the deceased and his widows did not indicate the measurements of the portions of the suit property that the Applicant purchased. In the Originating Summons, the Applicant claims a portion of the suit property measuring "approximately half of the original portion" purchased from the Defendant on 3-3-1989. The Applicant has not told the court the original measurement of the suit property. It is therefore not clear as to what half portion of that would be. From the evidence before the court, the suit property measures 0.7 hectares. I believe that it is a portion of this 0.7 hectares that the Applicant is claiming. The court is not sure what portion of this 0.7 hectares would constitute "half of the original portion". The court has also noted that in his prayers in the Originating Summons, the Applicant has only referred to an identified portion of Kisumu/Kogony/33 purchased from the deceased on 3-3-1989. At the trial, the Applicant told the court that through objection proceedings, he managed to have the portion of the suit property that was sold to him by the deceased on 3rd March 1989 registered in his name as part of Kisumu/ Kogony/3018. The Applicant did not tell the court the measurement of the portion of the original parcel Kisumu/Kogony/33 that he managed to excise and add to the portion of Kisumu/Kogony/2902 to form Kisumu/Kogony/3018 which measures 0.9 hectares. I also wonder why the Applicant is still claiming a portion of Kisumu/Kogony/33 purchased from the deceased on 3-3-1989 while he already has a title for the same. My conclusion from the foregoing is that the portions of the suit property being claimed by the Applicant cannot be identified both by their location and measurement. It is not clear how the Applicant arrived at some of the measurements that he mentioned in his evidence. The



surveyor's report dated 29th September 2010 that was produced in evidence by the Applicant was of no assistance to the Applicant in this regard.

41. In addition, I am not persuaded from the evidence on record that the Applicant occupied whatever portions of the suit property he is claiming continuously for a period of 12 years prior to the filing of this suit. The Applicant told the court that he took possession of the 3 portions of the suit property immediately after purchasing the same and planted trees, sisal, and maize thereon. The Applicant stated that he also put up some structures thereon. There was no evidence placed before the court showing these activities on the portions of the suit property claimed by the Applicant in this suit. The Applicant had the portion of the suit property that he purchased from the deceased on 3rd March 1989 in respect of which he has a title. Then there are two portions that he purchased from the deceased's widows. The Applicant did not tell the court whether the trees, maize, and sisal were planted on the first, second, or third portions of the suit property or on all of them. The court was also told by the Applicant that the trees were damaged and that even the structure that the Applicant had put up collapsed. I am not satisfied that the Applicant was in occupation of the portions of the suit property that he is claiming continuously for an uninterrupted period of 12 years prior to the filing of this suit. It was common ground that the Applicant never had actual occupation of the suit property at any time.
42. Due to the foregoing, it is my finding that the Applicant has failed to prove his adverse possession claim. The Applicant is in the circumstances not entitled to the reliefs sought in the Originating Summons.
43. On the issue of costs, costs follow the event unless the court for good reason orders otherwise. The Applicant has failed to prove his case against the Respondents. I can see no reason why the court should deny the Respondents the costs of the suit.

Conclusion

44. I find no merit in the Originating Summons dated 11th November 2010 for the reasons given above. The Originating Summons is dismissed with costs to the Respondents.

DELIVERED AND DATED AT KISUMU ON THIS 9TH DAY OF NOVEMBER 2023

S. OKONG'O

JUDGE

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

Mr. Muma for the Plaintiff/Applicant

Ms. Anyango h/b for Mr. Yogo for the Defendants/Respondents

