



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELCA NO. 306 OF 2017

AGNES WAMBUI MUHIA.....PLAINTIFF

VERSUS

AGNES WANGUI MUHIA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on the 20/3/17 seeking orders *interalia* for a permanent injunction restraining the Defendant from interfering with the Plaintiff's LOC15/MUGEKA/623 (suit land), in particular, lodging objections to the subdivision and transfer of the suit land with Kiharu Land Control Board and or any other body dealing with landed property. The Plaintiff avers that she is the registered owner of the suit land and that the Defendant should be restrained from making a claim on the suit land, which claim is time-barred. The Plaintiff averred that she acquired the suit land from Miiti Njara Imwe (also referred to as Njara Imwe in the judgment). That if the Defendant had any claim, she should have directed it to Njara Imwe during his lifetime.

2. In denying the Plaintiff's claim, the Defendant filed a statement of defence alongside a counterclaim. The Defendant admits that the Plaintiff is the registered owner of the suit land but claims that the said registration was done fraudulently in disregard of her claim of 1 acre which was acquired through purchase by her husband the late Wilson Muhia of 2 acres from Njara Imwe on 17/2/75. Out of the said agreement the said seller only excised 1 acre to the Defendant's husband in 1984. This parcel is known as LOC 15/MUGEKA/622 for which a title was issued in the name of the Defendants husband. Njara Imwe promised to excise the second one acre to make two acres bought from LOC 15/MUGEKA/623.

3. The Defendant has pleaded and particularized fraud in para 14 of the counterclaim. She sought orders *interalia*;

a. A declaration that the Defendant is entitled to one acre out of the LOC15/MUGEKA/623.

b. An order against the Plaintiff directing her to transfer 1 acre from title No. LOC 15/MUGEKA/623 to the Defendant and in default thereof the Deputy Registrar to execute the transfer documents.

c. In the alternative and without prejudice to prayer a) and b) above a declaration that the Defendant is entitled to one acre from LOC15/MUGEKA/623 by virtue of adverse possession.

d. An order for injunction restraining the Plaintiff by herself, her agents and or servants from selling, transferring, letting out, subdividing, trespassing or interfering with the Defendant's quiet possession of her portion out of LOC15/MUGEKA/623.

e. Costs of the suit.

4. The Defendant averred that her husband Wilson Muhia died in 1996. Before his death, he and his family including the Defendant had taken possession of the 2 acres of the land bought from Njara Imwe and continued to live peacefully with the assurance from Njara Imwe that he would effect the transfer of one acre to the Defendant. That they constructed a house on LOC 15/MUGEKA/622 and commenced farming on the one acre portion on LOC 15/MUGEKA/623.

5. The Defendant averred that the Plaintiff colluded with her children to transfer the title LOC 15/MUGEKA/623 to herself during the lifetime of Njara Imwe. She contends that the said transfer was done without her knowledge and in disregard to her right to one acre pursuant to the agreement of sale between her late husband and the said Njara Imwe on the 17/2/75. It is her contention that the Plaintiff misled the said Njara Imwe to transfer the whole of LOC 15/MUGEKA/623 to her while knowing or ought to have known of her one acre entitlement in the title. She termed the said transfer to the Plaintiff as fraudulent. She particularized fraud under para 14 of her counterclaim.

6. In the alternative the Defendant pleaded that she has lived on the one-acre portion of LOC15/MUGEKA/623 with her family since 1996 peacefully uninterrupted with the full knowledge and without the permission of the Plaintiff.

7. In her reply to defense and counterclaim the Plaintiff denied the Defendant's counterclaim and contended that the claim on fraud was baseless since the discovery of the same was made in 2017. He urged the Court to strike out the counterclaim and enter judgment in favour of the Plaintiff.

Plaintiff's evidence

8. The Plaintiff testified at the trial of the case and adopted her witness statement filed on the 17/3/2017. She stated that she is the registered owner of the suit land. That she acquired the land from Njara Imwe, now deceased. That the Defendant has lodged a false claim over her land and raised objections to her subdivision and transfer of a portion to her children. She termed the Defendant's claim obnoxious as she failed to lodge the said claim with Njara Imwe while alive. She described the Defendant as a busy body and termed her claim statute-barred.

9. At the hearing, the Plaintiff informed the Court that she sued the Defendant for interfering with her land. She stated that she inherited the land from her father in law, Njara Imwe. She informed the Court that the Defendant has no claim nor entitlement to the land. She stated that she was not aware of any sale between the Defendant's husband and her father in law. That the Defendant does not live on the suit land.

10. On cross examination, the Plaintiff informed the Court that she is the daughter in law of Njara Imwe from whom she inherited the suit land from. She stated that her father in law had two children, a son and a daughter. That the daughter is married and was alive at the time she inherited the suit land. She stated that she is aware that her father in law sold LOC15/MUGEKA/622 to the Defendant's husband although she could not recall the year. She informed the Court that she blocked the access to the Defendant's land which was through the suit land in March 2017.

11. PW2- Charles Maina Muhia informed the Court that the Plaintiff is his mother. He stated that his grandfather Njara Imwe sold 1 acre of land to the Defendant's husband in 1984. He described the plot as LOC15/MUGEKA/622. He stated that the Plaintiff and her family live on LOC15/MUGEKA/623 while the Defendant lives on LOC15/MUGEKA/622. That the Plaintiff is the registered owner of LOC15/MUGEKA/623 while the Defendant owns LOC15/MUGEKA/622. That the Defendant has never cultivated any portion of LOC15/MUGEKA/623. That his grandfather died in 2007 and he is aware that neither the Defendant nor her husband demanded the alleged portion of one acre out of LOC15/MUGEKA/623 from any of his grandfather. That the Defendant's husband died in 1996. He confirmed to the Court that the Plaintiff blocked the access to the Defendant's land and the Defendant now accesses her land from elsewhere. He also told the Court that he was not present when his grandfather and the Defendant's husband entered into the agreement of sale in 1984.

The evidence of the Defendant.

12. The Defendant testified and relied on her witness statement dated the 19/4/17. She stated that she is aware that her husband, the late Wilson Muhia and Njara Imwe entered into an agreement in 1975 to buy 2 acres of land from Njara Imwe at the price of Kshs 3000/-. Her husband paid the full purchase price. That it was not until 1984 that Njara Imwe and her late husband went to Kahuro Land Board and managed to transfer title No LOC 15/MUGEKA/622 measuring one acre to her husband. Both parties agreed that the remaining one acre would be excised from LOC 15/MUGEKA/623 at a later stage.

13. That in March 2017 on learning that the Plaintiff had applied for consent to subdivide the suit land, she attended the Land control Board meeting and objected to the said subdivision on account of her claim of acre. That she also learnt that the Plaintiff had effected the registration of the suit land into her name without giving her a portion of one acre that she was entitled to pursuant to the agreement of sale of 1975. She produced copies of agreement dated the 17/2/75 and 21/6/75 in kikuyu and their translations in English, green cards for title numbers LOC15/MUGEKA/622 and LOC15/MUGEKA/623 and official land searches for LOC15/MUGEKA/622 and LOC15/MUGEKA/623 respectively.

14. The Defendant informed the Court that her husband was a cousin to Njara Imwe. That she started occupying a portion of one acre of LOC15/MUGEKA/623 in 1996. She used the land for grazing goats and as access to LOC15/MUGEKA/622. That Njara Imwe died in 2007 and was aware of my occupation and utilization of one acre of 623.

15. On cross examination she informed the Court that it is her husband that entered into agreement of sale for 2 acres with Njara Imwe. She confirmed that the agreement was signed by her husband in 1975. She stated that she has not produced any letters of grant of administration in the estate of her husband. That the agreement of sale dated the 2/7/75 does not mention the land reference number of the land being sold but it does indicate the size of the land as 2 acres. She explained that she did not witness the agreement for sale. She told the Court that Njara Imwe showed her the portion of one acre out of LOC15/MUGEKA/623 that she took possession and fenced in 1996 and the fence is still there on the ground. That her house is constructed on LOC15/MUGEKA/622. That she learnt from the area chief in March 2017 that the Plaintiff was in the process of seeking land control board consent to subdivide the suit land and transfer to her children. She informed the Court that she is related to the Plaintiff.

16. DW2- Tute Kambo informed the Court that he is the brother in law to the Defendant. That Wilson Muhia, deceased, was his brother. That he knows from his own knowledge that his brother bought 2 acres of land from Njara Imwe. He was present and witnessed the agreement of sale and payments between his brother and Njara Imwe in 1975. The purchase price was Kshs 3000/- which amount was paid in full in two installments; Kshs 2300/- on 17/2/75 and Kshs 700/- on 21/6/75. That in 1984 his brother and Njara Imwe attended the land control board at Kahuro to transfer a portion of one acre to his brother. The parties agreed that the balance of one acre would be excised from LOC15/MUGEKA/623 at a later date. He informed the Court that the Defendant has been utilizing the one acre portion in 6 LOC15/MUGEKA/623 and lives on LOC15/MUGEKA/622.

17. DW3 – Maina F Maruri stated that he knew the Defendant's husband as well as Njara Imwe. He reiterated the evidence as given by DW2 and informed the Court that he was present and witnessed the agreement and the payments between the Defendant's husband and Njara Imwe. That the Defendant has been utilizing the one acre in LOC15/MUGEKA/623 and lives on LOC15/MUGEKA/622, which she holds a title. He however informed the Court that he did not know where the suit land is situated. Despite claiming that he witnessed the agreement of sale, he conceded on cross examination that his name is not indicated in the agreement as being present.

18. At the close of the hearing the Parties with the leave of the Court carried out a scene visit on the 4/9/2018 in the presence of the Deputy Registrar of this Court. The report dated 7/9/18 and duly filed on 17/9/18 is on record.

19. The parties filed written submissions which I have read and considered.

20. The Plaintiff submitted that the Defendant's claim is baseless. That the Defendant ought to have filed an originating summons to agitate her claim of adverse possession and not through a counterclaim. That because the claim in adverse possession has been brought through a counterclaim, the same should fail for want of procedure. That the scene visit revealed that the boundary between LOC15/MUGEKA/622 and LOC15/MUGEKA/623 is fenced by Mikinduri trees and therefore the one acre being claimed by the Defendant is not part of LOC15/MUGEKA/623. She submitted that the Defendant has not been in continuous uninterrupted occupation of the one acre in LOC15/MUGEKA/623 and that there is no demarcation/delineation (not defined) of the one acre from the main LOC15/MUGEKA/623 on the ground and that the Defendant misled the Court in her evidence when she stated that she was tethering sheep, cows and goats on the claimed portion of the suit land.

21. The Plaintiff submitted that the Defendant's claim on alleged fraud on the part of the Plaintiff is being raised about 12 years after the Plaintiff became registered owner of the suit land. That a claim based on fraud should be raised within 3 years and this one being raised 12 years later is time barred. She faulted the Defendant for not claiming the suit land during the lifetime of Njara Imwe who died in 2007. Her husband too never raised any claim when he was alive against the said Njara Imwe. She stated that the Defendant is uncertain of her cause of action in the manner in which she has filed a claim for fraud as well as adverse possession in one counterclaim. That the counterclaim should have been directed at Njara Imwe and not the Plaintiff. Further that no land control board consent was obtained thereto and, in that regard, the contract remains unenforceable. That there was no privity of contract between the Plaintiff and the Defendant.

22. As to whether the Defendant has a valid claim of one acre on LOC15/MUGEKA/623, the Defendant submitted that the agreement of sale dated the 17/2/75 meets the set requirements of section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya which provides that a suit cannot be commenced unless the contract under which the suit is based is in writing, signed by the parties and their signatures attested by a witness who was present when the agreement was signed. The Plaintiff has not denied the existence of the agreement of sale. The said agreement was confirmed by DW2 and DW3 who informed the Court that they were present when the agreement was signed.

23. As to whether the Defendant's occupation of LOC15/MUGEKA/623 confers on her a right to title by way of adverse possession, the Defendant submitted that she has been in open, uninterrupted occupation of LOC15/MUGEKA/623 since 1996 with the knowledge of the Plaintiff who never stopped or opposed her occupation and farming until 2017. That the possession of one acre in LOC15/MUGEKA/623 by the Defendant has been continuous, exclusive actual and uninterrupted. The Defendant informed the Court at the hearing that she had been cultivating the one acre portion and used it as an access to LOC15/MUGEKA/622 through the erected gate at LOC15/MUGEKA/623. That the site report prepared by the Deputy Registrar of this Court supports the evidence of the Defendant that the gate to access LOC15/MUGEKA/622 was on LOC15/MUGEKA/623 which was used by both the Plaintiff and the Defendant until 2017 when the Plaintiff blocked the same. In conclusion the Defendant submitted that she has been on the disputed portion of one acre of LOC15/MUGEKA/623 in excess of 12 years and therefore is entitled to ownership by way of adverse possession.

24. As to whether the Defendant has the capacity to enforce the agreement entered into between her husband and Njara Imwe, the Defendant submitted that the Defendant is seeking the remedy of adverse possession on account that she herself has been in continuous, uninterrupted and open possession and occupation of the suit land with the knowledge of the Plaintiff for the full effect of the statutory period required.

25. Is the counterclaim against the Plaintiff time barred? The Defendant submitted that her counterclaim is premised on two aspects; one that the suit property was held by Njara Imwe in trust for Wilson Muhia through whom the Defendant is basing her counterclaim for one acre of LOC15/MUGEKA/623 and secondly, the Defendant claims the suit land through adverse possession on account of her occupation of the 1 acre portion of the suit land for over 12 years.

26. Having considered the pleadings, the evidence adduced at the hearing and the written submissions, the key issues for determination are;

- a. Whether the Defendant has the locus standi to file the counterclaim putting reliance on the contract.
- b. Whether the agreement for sale entered into on the 17/2/75 is time barred?
- c. Whether the Defendant has proved fraud on the part of the Plaintiff's title.
- d. Whether the Defendant is entitled to specific performance?
- e. Whether the Defendant has established title by way of adverse possession.
- f. Who meets the cost of this suit?

27. It is not in dispute that the Plaintiff is a relative of the Defendant. Njara Imwe was the father in law of the Defendant while the Plaintiff's husband Wilson Muhia was a cousin to the said Njara Imwe. This evidence was corroborated by the Defendant and PW2 at the hearing of the case.

28. The Court has looked at the background of the suit land and according to the green card on record, it would appear that Miiti Njara Imwe owned LOC15/MUGEKA/485 which land was subdivided into two titles namely LOC15/MUGEKA/622 and LOC15/MUGEKA/623. The green card for LOC15/MUGEKA/485 was not presented for the Court to appreciate when the said Njara Imwe became registered as owner of LOC15/MUGEKA/485. The Court does not find it necessary because there is no issue in respect to the original parcel of land. The green

cards for the two parcels of land were opened on the 31/5/84 and the said titles registered in the name of MIITI NJARA IMWE (Njara Imwe).

29. On 17/2/75 Njara Imwe and Wilson Muhia entered into an agreement for sale wherein Njara Imwe sold 2 acres of land to Wilson Muhia at Kshs 3000/- and the 1st payment of Kshs 2300/- was made and accepted on the 17/2/75. The balance of Kshs 700/- was paid to Njara Imwe on 21/6/75. This evidence was corroborated by DW1 and DW2 who testified that they were present and witnessed the transaction. In her evidence in chief the Plaintiff confirmed to the Court that her father in law sold 6 LOC15/MUGEKA/622 to the Defendant's husband although she could not recall the year.

30. In her evidence in chief the Defendant stated that after paying the full purchase price, it was not until 1984 that her husband and Njara Imwe went to Kahuro Land Control Board to obtain consent for the transfer of one acre to Wilson Muhia. According to the green card for LOC15/MUGEKA/622, the title was registered in the name of Miiti Njara Imwe on the 31/5/84. The same title became registered in the name of Wilson Muhia Kambo, the Defendant's husband on 13/6/84. It is the Defendant's evidence that she and her husband were given possession of the one acre in 1984 upon which they occupied and constructed a house for their family where they live upto date. She further stated that the parties, Njara Imwe and Wilson Muhia agreed to effect the transfer of the balance of one acre at a later stage. At this point Njara Imwe remained with LOC15/MUGEKA/623 from which the one acre would come from. This evidence of sale of LOC15/MUGEKA/622 to the Defendant's husband was corroborated by the Plaintiff as stated in para 29 above. The agreement for the sale of 2 acres and the attendant transactions was also supported and corroborated by DW2 who testified that he was present and witnessed the agreement. Although DW3 testified that he was present and witnessed the agreement, the Court does not find his evidence credible on two grounds; on cross examination, he conceded that he does not know the suit land and secondly that his name is not included in the list of persons stated to be present at the signing of the agreement.

31. The Plaintiff has challenged the agreement on the ground that it did not contain the land reference number. It is on record that the Defendant's husband and the Plaintiff's father in law had entered into an agreement to sell land to each other. The Plaintiff admitted to the extent of acknowledging the sale of LOC15/MUGEKA/622 to the Defendant's husband. This parcel is not being disputed. The agreement indicates that the size of the land being sold was 2 acres. Parcel Number LOC15/MUGEKA/622 measures only 0.405 ha which is one acre. It is therefore short of one acre for which the Plaintiff's husband paid Kshs 3000/- in full. DW2 informed the Court that he was present and witnessed the agreement and according to him the land that was being sold was 2 acres out of the land owned by Njara Imwe. At that time Njara Imwe subdivided the land in 1984 and transferred one acre to the Defendant's husband, the original land had not been subdivided and given new plot numbers by then. Taken in context, the land that was being sold by the parties to each other had to be the land that Njara Imwe owned, that is to say the land LR NO LOC 15/MUGEKA 485, out of which LR NO LOC 15/MUGEKA 622 and LR NO LOC 15/MUGEKA 623 resulted from. The Defendant and DW2 have stated that the parties to the agreement agreed that the one acre would be transferred at a later date. The Court holds and finds that even though the agreement did not indicate the Land Reference number, the parties transacted in the knowledge that, the land being sold referred to a portion of 2 acres of land then owned by Njara Imwe and which the remainder from the subdivision of LOC15/MUGEKA/485 was LOC15/MUGEKA/623, having excised LOC15/MUGEKA/622 and transferred to the Defendant's husband.

32. Having given the above background to the case, the 1st issue for determination is whether the Defendant had the requisite locus standing to file the counterclaim based on the contract of sale. The Plaintiff filed suit against the Defendant on the basis that the Defendant has unlawfully interfered with the proprietorship of the suit land by objecting to her application for subdivision and transfer with Kiharu Land Control Board. She sought a perpetual injunction barring the Defendant from such interference. In a swift rejoinder the Defendant filed a statement of defence and counterclaim seeking interalia declaratory orders that she is entitled to one acre of the suit land based on an agreement of sale dated the 17/2/1975 between Wilson Muhia, her deceased husband and Njara Imwe, deceased, the previous owner of the suit land. In the alternative and without prejudice to the above prayers she sought a declaration that she is entitled to one acre from the suit land by way of adverse possession. In her defence to counterclaim, the Plaintiff raised issues with the counterclaim such as statutory time bar, privity of contract and promised to raise a preliminary objection which was never raised. The issue locus standi of the Defendant to file a counterclaim has been raised by the Plaintiff. It is clear that the claim of the Defendant is premised on the contract of sale between her later husband and the late Njara Imwe. She led evidence that she was not a party to the agreement nor a witness. There is no evidence of letters of representation presented to the Court by the Defendant. The Defendant in her submissions states that a party that enters into an agreement with another is bound by the terms of that agreement together with his successors in title and assigns and that she has stepped into the shoes of her husband in so filing her claim. That she is therefore directly entitled to take the net intestate estate of the deceased. Further that she is seeking adverse possession of one acre of the suit land on her own behalf based on her possession and occupation.

33. It is trite law that in order to undertake legal proceedings on behalf of the estate of a deceased person the person must be clothed with legal capacity to do so. In the case of **Trouistik International Union and Ingrid Vs Jane Mbeyu & Another Civil Appeal No. 145 of 1990 [1993] eKLR**, the Court of Appeal made the following observations in respect of a person's legal capacity to undertake legal proceedings on behalf of a deceased person;

“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all inclusive answer.”

34. In the case of **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR (Migori Civil Appeal No. 119 Of 2015)** observed as follows:

“Under Section 2 of the Law Reform Act and Section 4 of the Fatal Accidents Act, the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. In that case such a person ought to first obtain an appropriate grant so as to have the necessary locus standi. (See the Court of Appeal cases of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another (1982-88)1 KAR and Trouistik International & Another vs. Jane Mbeyu & Another, Civil Appeal No. 145 of 1990**). The grant may be a full grant or a limited grant.”

35. According to **Black's Law Dictionary (9th Edition)**, a legal representative may refer to either a lawful representative or personal representative. A personal representative is described as;

“A person who manages the legal affairs of another because of incapacity or death, such as the executor of an estate. Technically, an executor is a personal representative named in a will, while an administrator is a personal representative not named in a will.”

36. Section 3 of the Law of Succession Act (Cap 160) as follows;

“Personal representative means the executor or administrator of a deceased person”

Further an executor is defined in the same section to mean the person to whom the execution of the last will of the deceased person is confided whereas an administrator is defined as a person to whom a grant of letters of administration has been granted.

37. In the case of **Emilio Mputhia Mutiria v Basilio Gitonga Kirimi Sebastian & 4 others [2017] eKLR** the Court stated as follows;

“By law and by precedent as has been eruditely elaborated by the case of **Trouistik Union International & Another (Appellants) and Mrs Jane Mbeyu & Another (Respondents)** (op.cit) for a litigant to file a suit concerning the property of a deceased person, letters of administration must be obtained. In this case, the Plaintiff has not done so. It, therefore, means that this suit is improperly before this Court. This finding confirms that the Defendants' Preliminary Objection has raised a pure point of law.”

38. The preceding paragraphs help to highlight the importance of taking out letters of grant of administration in order to enable a litigant have standing to file suit. Given that her claim for one acre in 623 is tied to her husband's right of purchase on account of the agreement of 1975, the Defendant has not taken out a grant of representation to the estate of her husband and she therefore lacks the capacity to lay a claim under him in respect to the one acre of land from the suit land. The Court consequently finds and holds that the Applicant has no legal capacity to commence or prosecute legal proceedings before this Court. The counterclaim is therefore fatally incompetent.

39. In respect to the issue of time bar, the Plaintiff has submitted that the claim of one acre being based on contract did lapse after 6 years in accordance with Section 4 of the Limitation Actions Act. The general legal framework on Court enforcement of contracts is contained in Section 4 of the Limitation of Actions Act which provides for a limitation period of six years. However, in respect to the recovery of land, the limitation period is stipulated under Section 7 of the Act at twelve years. It is therefore clear that under section 4 of the Limitation of Actions Act, the contract is time barred. However, under section 7 of the Limitation of Actions Act, the Court will examine the matter under issue No. 4.

40. The Plaintiff has argued rather vigorously that fraud though pleaded is statute barred because a claim based on fraud must be filed within 3 years in the case of land from the time the Plaintiff started occupying the land. The Defendant in response stated that the discovery of fraud that the Plaintiff had become the registered owner was only in March 2017. She led evidence that the area chief informed her that the Plaintiff had become registered as owner of the land and was in the process of undertaking subdivision of the land. It is then that she objected to the transaction at the Land Control Board. She contends that the suit was filed in 2017 and therefore 3 years has not elapsed. I have examined the green card presented to Court and it is clear that the Defendant filed a caution on the on 6/3/17. In as much as the area chief was not called to testify, this evidence is consistent with the time the Plaintiff blocked the access road and the time the caution was lodged. The Court takes this evidence to be credible and holds that the claim for fraud is not time barred.

41. The Defendant under para 14 pleaded and particularised fraud against the Plaintiff. However, at the hearing she did not lead any evidence to prove fraud. It is trite law that fraud must not only be pleaded but proved as well. The burden of prove lay with the Defendant. The Court is satisfied that the burden of proof was not discharged. The Court will answer this issue in the negative.

42. Is the Defendant entitled to specific performance? Specific performance is an order of the Court for the due performance of the obligations in a contract. The remedy of specific performance is an equitable remedy and will be ordered where common law remedies are inadequate, as a matter of the Courts discretion and if the Court is satisfied that it will be observed in line with the maxim that equity does not act in vain. The Court is satisfied that the Defendant has no legal capacity to make this claim. This claim therefore fails.

43. Has the Defendant established title by way of adverse possession? The Defendant led evidence that she took possession of the one acre of land in 1996, grazed her goats and used the disputed portion as access to her plot No 622. That the access was closed by the Plaintiff in March 2017. She informed the Court that she has fenced the suit land and the fence is visible on the ground. The Plaintiff denied that the Defendant has been in occupation of the suit land for a period of over 12 years.

44. The Plaintiff did not respond to the alternative claim of adverse possession other than to contend that the claim should have been filed by way of originating summons.

45. According to the site report on record there was no fence between the disputed portion of one acre and the suit land 623. The only fence on the ground is the one between plot 622 and 623 made of Makinduri trees. The Defendant appeared uncertain of the size of the land she occupied during the hearing. She informed the Court that she occupied around ¼ acre on the upper side of 623. That this is the land she used for grazing goat's cultivation and as access to her plot 622.

46. In the case of **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove in the following terms;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land

openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

47. A claim in adverse possession must be proved by the claimant. It is clear from the evidence that the Defendant had no full control of the disputed suit land. The access gate/path was used by both the Plaintiff and the Defendant. According to the evidence of the Defendant she is uncertain how much land she was in occupation and when.

48. In the case of **Teresa Wachuka Gachira v Joseph Mwangi Gachira, Civil Appeal No.325 of 2003** the Court, on appeal found that the appellants did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

49. Section 13 of Limitation of Actions Act provides that a right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run. The Court is satisfied that the Defendant has neither showed proof of exclusive, continuous and uninterrupted possession of the land for twelve years or the animus possidendi to occupy the land. There is no evidence to demonstrate that possession is present and adequate in continuity, in publicity and in extent to show that her possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. There is no evidence of discontinuance of possession of the suit land by the Defendant. Even if the access road is taken to be possession, the same was not exclusive because it was used by both the Defendant and the Plaintiff.

50. In the end the Defendants claim fails and the counterclaim is dismissed with costs.

51. Sections 24,25 and 26 of the Land Registration Act protects the proprietorship of land by a registered owner. The Defendant has claimed that the Plaintiff acquired the suit land in unclear circumstances. It is their submissions that Njara Imwe died in 2007 and yet the Plaintiff alleges to have become registered as owner of the suit land in 2008. I have examined the green card and there is a curious entry dated the 12/11/2008 in which it is indicated that the said Njara Imwe registered a change of name on the title and the said title was transferred to the Plaintiff on even date. The Defendant failed to present evidence to challenge the title of the Plaintiff. The Defendant also alleged that the Plaintiff obtained title through fraud by not tendering any consideration for the suit land. The Plaintiff informed the Court that she inherited the land from Njara Imwe who was her father in law. The Defendant did not adduce any evidence in support of this claim as well.

52. The Court is satisfied that the Plaintiff in the absence of any evidence to the contrary, is the registered owner of the suit land and her claim succeeds.

53. Final orders;

a. A perpetual injunction restraining the Defendant from interfering with the Plaintiff land parcel No LOC15/MUGEKA/623 and in particular from lodging any objection on subdivision and transfer with Kiharu Land Control Board and any other body dealing with landed property.

b. Parties being related, each party to meet their costs of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH JANUARY DAY OF 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

T M Njoroge for the Plaintiff.

Mboha HB for Muchoki for the Defendant.

Irene and Njeri, Court Assist