Ouko & another (Suing as the Personal Representatives and Administrators of the Estate of Jason Atinda Ouko (Deceased)) v Kageni (Sued as the Personal Representative and Administrator of the Estate of Samuel Muhika Kageni (Deceased) (Civil Appeal 382 of 2019) [2025] KECA 2126 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KECA 2126 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 382 OF 2019

M NGUGI, AO MUCHELULE & WK KORIR, JJA

DECEMBER 5, 2025

BETWEEN

ROSELYN DOLA OUKO ..... 1ST APPELLANT

AARON TAFARI OUKO ..... 2ND APPELLANT

SUING AS THE PERSONAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF JASON ATINDA OUKO (DECEASED)

AND

RAHAB WANGUI KAGENI (SUED AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF SAMUEL MUHIKA KAGENI (DECEASED) ..... RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court at Nairobi (S. Okong'o, J.) dated 27th June 2019 in ELC Civil Suit No. 38 of 2011 (O.S))

JUDGMENT

1. Through an agreement dated 11th January 1977, Jason Atinda Ouko ("Ouko/vendor") sold a portion of land measuring 5 acres from L.R. No. 3589/6 Karen ("suit property") to Samuel Muhika Kageni ("Kageni/purchaser"). Years after the two left this world, a dispute arose between their beneficiaries in respect of the agreement. Consequently, the respondent, Rahab Wangui Kageni (suing as the personal representative and administratix of the estate of Samuel Muhika Kageni) took out an Originating Summons dated 24th June 2011 and further amended on 7th August 2013 for a declaration that the appellants, Roselyn Dola Ouko and Aaron Tafari Ouko, being the personal representatives and administrators of the estate of Jason Atinda Ouko, held the land in trust for the estate of Samuel Muhika Kageni. In the alternative, the respondent sought an order of adverse possession against the

appellants over the said portion. The Summons having been opposed, proceeded to a full hearing, and on 27th June 2019, S. Okong'o, J. of the Environment and Land Court allowed the alternative prayer for adverse possession in respect of a portion of 2.5 acres out of L.R. No. 3589/6 Karen.

2. The appellants were dissatisfied with the judgment and through the Memorandum of Appeal dated 13th August 2019, filed the present appeal, raising six grounds of appeal as reproduced hereunder:

> " 1. The learned Judge erred in both fact and law in holding that the claim of adverse possession was proved by the plaintiff, contrary to the evidence adduced.
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> 2. The learned Judge erred in law in ignoring the case law regarding the doctrine of adverse possession already settled by the Court of Appeal, thus undermining the principle of stare decisis.
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> 3. The learned Judge erred in both fact and law when he ignored the express provisions of the agreement for sale between the parties.
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> 4. The learned Judge erred in both law and fact when he failed to make a finding on the central dispute as to whether the Respondent had paid the purchase price to the Appellant as provided for in the agreement for sale.
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> 5. The learned Judge erred in law in failing to appreciate that the agreement for sale was conditional agreement that can only be consummated upon the fulfilment of a future event.
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> 6. The learned Judge erred in law in failing to find that the plaintiff had no legal capacity to institute the suit on behalf of the Estate."

3. On her part, the respondent filed a notice of cross appeal dated 26th June 2020, raising the following grounds:

> " 1) The Learned Judge erred by making a finding that the Respondent's claim for adverse possession was limited to only 2.5 acres of the suit property while indeed and in fact the Respondent's claim as pleaded in the Further Amended Originating Summons filed in the Superior Court on 22nd February, 2013 was for 2.5 acres and any other additional portion that the Respondent occupies and if the Learned Judge had not made the error of assuming that the Respondent's claim was limited to 2.5 acres only, the Learned Judge, after taking consideration of the glaring evidence that was adduced before him at the trial by the respondent and her witnesses (PW1 and PW3) and the Appellants' own witness (DW1) to the effect that the Respondent had taken possession of 5 acres of the suit property in the year 1977, would have declared unequivocally that the Respondent was entitled to 5 acres which she had adversely occupied for over 34 years prior to the filing of the suit and would have entered Judgement in the Respondent's favour and awarded the Respondent 5 acres instead of the 2.5 acres that he awarded to her in his Judgement.
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> 2. The Learned Judge erred in law by awarding the Respondent only 2.5 acres of the suit property against her claim of "2.5 acres and any other additional portion that she occupies" while the preponderance of the evidence adduced

at the trial clearly pointed out to the fact that the Respondent had been in exclusive possession of 5 acres of the suit property openly and as of right and without interruption since the year 1977, that is to say, for a period of over 30 years prior to the filing of the Suit, in a manner that was adverse to the Defendants' interest in the suit property and was therefore entitled to an additional 2.5 acres of the suit property, instead of the portion of only 2.5 acres that the Learned Judge awarded her in his Judgement.

3. The Learned Judge erred by failing to make a finding that the Respondent had by herself and her late husband Samuel Muhika Kageni, whose Estate she is an Administratix thereof, paid the full purchase price of 5 acres to be excised from the suit property (L.R. No. 3589/6 Nairobi), and that the said payment coupled with the Respondent's continuous and uninterrupted possession thereof rendered Jason Atinda Ouko (Deceased), whose Estate the Appellants herein represent, a trustee of the respondent who held the title to the 5 acres in trust for her and on her behalf and therefore the Respondent herein was entitled to an order that the appellants do transfer to her a portion of 5 acres of the suit property."

4. During the hearing of the Summons, the respondent called three witnesses while the appellants called one witness. This being a first appeal and being mindful of our duty to reassess the evidence and arrive at our independent decision, we summarize the pleadings and the evidence of the witnesses in the succeeding paragraphs.

5. The respondent's Originating Summons was supported by her affidavit sworn on 29th June 2011. It was her averment that she was the widow and administratix of the estate of Kageni, who entered into an agreement for the purchase of 5 acres of land from Ouko on 11th January 1977. Her case was that through the agreement, her husband agreed to purchase a portion of 5 acres from the vendor's parcel of land known as L.R. No.3589/6. She deposed that upon making part payment of Kshs. 10,000, the vendor permitted her husband to take possession of the 5 acres, which he occupied with his family until 14th October 1978, when he passed away. She further averred that after the death of her husband, she remained in occupation of the suit property until the time she filed the summons, and that she has erected a house thereon. It was her averment that the vendor recognized her occupation and ownership of the property, but passed away on 2nd February 1996, before the suit property could be transferred to her as the administrator of the estate of her deceased husband.

6. At the trial, Andrew Gachu Mwangi (PW1) testified that he was a nephew of Rahab Wangui Kageni. He stated that his uncle, Kageni, bought a portion of L.R. No. 3589/6 measuring 5 acres. His family, likewise, bought a portion of Ouko's land. PW1 stated that the deceased paid the entire purchase price to Ouko before he died. He testified that other people also bought land from Ouko. It was his evidence that some of the purchasers subsequently registered caveats against the title of Ouko's property. PW1 further stated that the respondent lived on her portion within the suit property after being given possession by the vendor. In cross- examination, he stated that the respondent had a building on the suit property, and that she was in possession of the property with the permission of the vendor. In re-examination, he testified that the property is situated at the edge of a forest next to Kibera slums and had been subjected to vandalism over the years.

7. The respondent, who testified as PW2, adopted her witness statement dated 10th November 2015 as her evidence in chief. She testified that she was the widow of Kageni and the administrator of his estate. It was her case that by an agreement dated 11th January 1977, Ouko agreed to sell to her husband 5

acres of land to be excised from L.R. No. 3589/6 at a price of Kshs. 130,000. Her husband paid a deposit of Kshs. 10,000 upon execution of the agreement, while the balance was paid in instalments, with the last payment being made on 19th July 1996 through the vendor's advocate, Mr. Maucho. It was her evidence that at the time of the vendor's death, subdivision of the suit property had not been completed, and the land was yet to be transferred to her. She also testified that she continued occupying the parcel of land after the death of her husband with the blessings of the vendor.

8. PW2 further stated that upon taking occupation of the portion of land on 11th January 1977, they made improvements, and paid rent and service charges in the name of the vendor. She deposed that she had an interest in the appellants' property both as a purchaser and an adverse possessor. In cross-examination, she testified that apart from the agreement that her husband entered into with the vendor, she was not aware of any other agreement between the parties. She confirmed that the house she had put up on the property was vandalized. Her testimony was that although she never lived on the property, she carried out other activities therein.

9. Justus Ochenge Duncan (PW3) adopted his witness statement dated 8th December 2017 as his evidence in chief. His testimony was that he was employed by the respondent as a gardener and security guard at the suit property for about 18 years from February 1993. It was his evidence that at the time of his employment, the suit property had trees, an incomplete building, and a small house for a watchman. He further stated that on 17th June 2011, a group of people in 3 vehicles, while armed with clubs and pangas, and led by one Brian Yongo Otieno, invaded the suit property and informed him that they had come to fence it. He informed the respondent of the invasion and also reported the incident to the area chief. The property was taken over, and he was unable to access it thereafter.

10. The appellants opposed the Originating Summons through an affidavit sworn on 25th October 2011 by Aaron Tafari Ouko ("Aaron"). In the affidavit, Aaron averred that at all material times L.R. 3589/6 belonged to Ouko and that the portion claimed by the appellant had never been delineated and was non-existent. He deposed that the respondent occupied the suit property pursuant to a sale agreement, hence, a claim for adverse possession could not be sustained. Aaron also declared that the respondent had not been in actual possession of the suit property and that Ouko never lost possession of the suit property.

11. Aaron Tafari Ouko (DW1) was the only witness called by the appellants. He adopted the averments made in his replying affidavit and also relied on his witness statement dated 30th May 2016 as his evidence in chief. He testified that he was a co- administrator of the estate of Ouko, the other administrator being Roselyn Dola Ouko. His evidence was that Ouko was the registered proprietor of the entire parcel of land known as L.R No. 3589/6 registered under I.R No. 23229, measuring approximately 87.5 acres. He stated that the property had never been subdivided and that Plot No. 3589/35 claimed by the respondent had never been delineated and was non-existent. Although DW1 acknowledged that Ouko and Kageni had indeed entered into a sale agreement for 5 acres to be excised from L.R No. 3589/6 on 11th January 1977, he averred that the agreement was pegged on the successful subdivision of the whole parcel of land, which was delayed by caveats and encumbrances placed on the title by some of the purchasers. According to the witness, this resulted in Ouko being unable to comply with the conditions for approval of the subdivision imposed by the defunct City Council of Nairobi. DW1 relied on clause 9 of the agreement as allowing the vendor to rescind the agreement and refund the purchase price if he was unable to complete the subdivision.

12. Turning to the question as to whether the terms of the agreement were fulfilled by the purchaser, DW1 refuted the claim that the purchase price was fully paid, testifying that Kageni only paid a deposit of Kshs 10,000. Aaron testified that although the respondent lived on the suit property with the consent of the vendor, the vendor rescinded the agreement after failing to complete the subdivision.

He also denied the claim that the respondent stayed on the suit property, asserting that she had not been in possession for over 12 years. His evidence was that the respondent only erected an incomplete structure on the suit property, and that after her husband's death, she relocated to the United States, and that due to the pathetic and uninhabitable state of the property, the administrators of the estate of Ouko decided to fence it in compliance with their duty as administrators. He decried the respondent's attempt to pay the purchase price 19 years after the signing of the sale agreement, terming it as ill-motivated. In cross-examination, he agreed that the parcel number 3589/35 was obtained from a proposed subdivision plan which was never approved. He insisted that they had been paying rates for the whole parcel of land. He further testified that he did not know why the subdivision plan in the respondent's bundle of documents, which had land reference numbers and plot sizes, was never approved. While asserting that Ouko had retained the services of Kagwe & Company Advocates, he acknowledged that Advocate Maucho was also known to Ouko.

13. At the hearing of the appeal, learned counsel, Mr. Sagana, appeared for the appellants, while Ms. Ndinda held brief for Mr. Mbaabu for the respondent. Counsel for the parties relied on the written submissions already filed, accompanied by oral highlights in plenary.

14. In urging the appeal, Mr. Sagana relied on the written submissions dated 16th September 2020. Counsel commenced by submitting that the trial Judge erred in finding that the claim for adverse possession was proved. According to counsel, once the learned Judge correctly found that a claim for specific performance did not lie because the conditions of the agreement were not met, it was erroneous for him to find that the respondent adversely possessed 2.5 acres. Counsel submitted that this is because the respondent did not assert that the contract was repudiated and neither did the learned Judge make a finding that the agreement had been terminated, and as per the holding in Sisto Wambugu vs. Kamau Njuguna [1983] KECA 69 (KLR) and Samuel Miki Waweru vs. Jane Njeri Richu [2007] KECA 465 (KLR), a purchaser of land in possession under a contract of sale cannot claim adverse possession unless the contract of sale has first been repudiated between the parties or voided by the law.

15. Still insisting that the learned Judge erred in holding that the respondent had proved the claim for adverse possession, counsel submitted that the respondent failed to substantiate the payment of the total purchase price of Kshs. 130,000, and the time when adverse possession commenced could not, therefore, be determined. In support of the argument, Public Trustee vs. Wanduru Ndegwa [1984] KECA 72 (KLR) was cited for the holding that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years.

16. The appellants' counsel wrapped up on this issue by arguing that the learned Judge overlooked case law on adverse possession, thereby violating the principle of stare decisis. Dodhia vs. National & Grindlays Bank Ltd & Another [1970] 1 EA 195 and Rai & 3 Others vs. Rai & 4 Others [2013] KESC 20 (KLR) were cited to buttress the necessity to adhere to the principle of stare decisis.

17. Turning to the contention that the learned Judge ignored the express provisions of the sale agreement, counsel submitted that the terms of the agreement were never fulfilled. Specifically referring to clauses 2 and 3 of the agreement, which provided that the completion of the sale and purchase was subject to submission by the vendor to the purchaser of a sub-divisional deed plan of the plot and the payment of the balance of Kshs. 120,000, counsel submitted that there was no proof that the conditions were met. According to counsel, there was no evidence adduced before the trial court to prove that: the vendor obtained a sub-divisional deed plan; the vendor issued notice to the purchaser that he had such a deed plan; the vendor supplied the purchaser with a deed plan; the purchaser paid the balance of the purchase price in exchange with a transfer of the property; that there was a duly signed transfer by the vendor; and that the property became unencumbered. Counsel argued that the parties to the sale agreement had intended it to be a conditional one, to be consummated upon the future event

of subdivision of the property and transfer of a clean title to the purchaser. Counsel submitted that the parties had provided a remedy in the agreement for the refund of the purchase price should the transaction fail. Magnate Ventures Ltd vs. David Odwori Namuhisa [2020] KECA 457 (KLR) was cited to stress the importance of respecting the intention of the parties to a contract. According to counsel, the trial Judge failed to interpret the sale agreement as per the clear intention of the parties, especially regarding its conditional nature, payment, and the conditions for transfer. Further, that the intention of the parties could only be discerned from the agreement.

18. Additionally, learned counsel Mr. Sagana urged that the documents relied upon by the trial Judge to find that the purchase price was fully paid were not produced as exhibits but were only marked for identification.

19. On the question as to whether the respondent could, without joining the other administrators, institute the suit on behalf of the estate of Kageni, counsel submitted that she could not. In this regard, counsel faulted the learned Judge's finding that the respondent could independently institute the suit without the consent of her co-administrators. On this, counsel argued firstly that, despite the respondent bringing the suit as an administrator, the learned Judge made an order of adverse possession in favour of the respondent in person, yet she was not a party to the suit. Secondly, counsel contended that the action by the respondent of filing the suit without involving the other co-administrators was contrary to the law. Thirdly, counsel faulted the learned Judge for finding that the issue was raised in submissions, arguing that the issue was raised during cross-examination. Reliance was placed on the decision of Obaga J. in Michael Chole Lugalia (suing as Administrator of the estate of Ezekiel Majani Lugalia vs. Jonathan Ligure Ayodi [2016] eKLR for the proposition that the capacity to agitate any suit on behalf of the estate of a deceased person jointly inheres in the administrators at all times. According to counsel, the learned Judge erred by holding that this was an issue of non-joinder while in fact the same was an issue of legal capacity which rendered the suit incompetent and incurably defective in law.

20. Mr. Sagana finally submitted that the suit, which was filed in 2011, was time-barred by virtue of section 38 of the *Limitation of Actions Act*. He argued that since the last payment occurred on 19th July 1996, actions for specific performance or adverse possession ought to have been initiated within 12 years and the suit did not, therefore, comply with the provision. We were therefore urged to set aside the judgment of the ELC and declare the respondent a trespasser.

21. In opposition to the appeal, learned counsel, Ms. Ndinda, relied on the submissions dated 23rd August 2021. Counsel commenced by addressing the question as to whether the learned Judge was correct in finding that the respondent had proved her claim for adverse possession, and submitted that the respondent had indeed proved her claim on a balance of probabilities. According to counsel, the purchaser and, upon his demise, the respondent, had been in open, actual, and uninterrupted occupation of five acres of L.R. No. 3589/6 for a period of 33 years before the filing of the suit in 2011. Reliance was placed on Public Trustee vs. Wanduru Ndegwa (supra) for the proposition that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years after the purchaser takes possession of the property, since the purchaser dispossesses the vendor upon taking possession. Pointing to clause 3 of the agreement which provided that the completion of the sale and purchase was to be within forty days and upon the production of a sub-divisional deed plan for the plot by the vendor, counsel submitted that the agreement, which was signed on 11th January 1977, was rendered null and void on 28th February 1977 after the vendor was unable to complete the sale due to failure to produce a sub-divisional deed plan. According to counsel, the purchaser had therefore been in adverse possession for over thirty-four years before the suit was filed. Counsel adverted to the testimony of PW3 that there were trees, an incomplete building, and a small house for a watchman on the property to assert that occupation was indeed proved by the

respondent. The decision in Peter Mbiri Michuki vs. Samuel Michuki [2014] KECA 342 (KLR) was cited in support of the proposition that possession of land or any property, for that matter, need not be actual and physical; possession can also be constructive, and it was not compulsory that the respondent was in actual physical occupation of the property.

22. Turning to the question as to whether the purchase price was fully paid, Ms. Ndinda submitted that the full purchase price of Kshs. 130,000 was paid. It was her position that the payment of the purchase price was proved by the production of the payment cheques as exhibits. According to counsel, even if adverse possession was to run from 19th July 1996 when the last payment was made, the twelve-year statutory period would have lapsed on 19th July 2008, and the respondent's claim for adverse possession, having been lodged in 2011, was valid in the circumstances.

23. Still supporting the finding of the learned Judge on the issue of adverse possession, Ms. Ndinda submitted that the respondent had, in the Further Amended Originating Summons, invoked the concept of constructive trust, and this went to support the claim for adverse possession. She referred to Maina & 87 Others vs. Kagiri [2014] KECA 880 (KLR) to argue that the appellants were in possession of the suit property as constructive trustees because the full purchase price was paid, meaning a trust was created in favour of the purchaser.

24. As regards the appellants' assertion that the learned Judge ignored case law on adverse possession, counsel submitted that the learned Judge fully considered the case law on adverse possession and rightly applied it to the facts of the case. We were therefore urged to find that the learned Judge was correct in his determination of the issue of adverse possession.

25. Responding to the appellants' submission that the respondent's suit was bad in law because she instituted it without the consent of her co-administrators, Ms. Ndinda argued that the trial court was correct in finding that the respondent had the legal capacity to institute the suit on behalf of the estate of Kageni. In support of her argument, counsel relied on Order 1 Rule 9 of the Civil Procedure Rules, 2010; Zeinab Khalifa Khator & 4 Others vs. Abdulrazak Khalifa Salim & Another [2017] KECA 81 (KLR); and William Kiprono Towett & 1597 Others vs. Farmland Aviation Ltd, Marco Dunn & Toby Dunn [2016] KECA 301 (KLR) for the proposition that under the law of succession, it is not mandatory to join all administrators in a case, and that a misjoinder or non-joinder of parties should not defeat a suit, especially when the orders sought will bind the estate.

26. Finally, in support of the respondent's cross appeal, Ms. Ndinda argued that the learned Judge erred by holding that the respondent's claim for adverse possession was limited to 2.5 acres since the pleadings and evidence adduced demonstrated that the respondent was in possession of 5 acres. She submitted that since the full purchase price was paid, the learned Judge ought to have found that the appellants had created a constructive trust in favour of the respondent for the entire 5 acres, not just 2.5 acres. Relying on Maina & 87 Others vs. Kagiri (supra), counsel argued that the trial Judge erred by failing to appreciate that the respondent was in occupation having paid the full price and a constructive trust had been created in her favour. Counsel therefore urged us to dismiss the appeal and allow the cross appeal.

27. This being a first appeal, our duty as donated by rule 31(1)(a) of the Court of Appeal Rules, 2022 was explained in Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

28. We have considered the record as well as submissions and authorities cited by counsel. The issues we isolate for our resolution are: whether the respondent's suit was defective; whether the respondent proved her case; and who should bear the costs of this appeal.

29. The first issue regarding the respondent's capacity to sue is a point of law which can determine the appeal in limine. The appellants contend that the learned Judge erred on two fronts: first, by finding that the issue concerning the respondent's capacity to sue was raised at the submission stage; and second, by finding that the respondent could file the suit without involving the other administrators of the estate of Kageni.

30. Order 31 rules 1 and 2 of the Civil Procedure Rules speaks to suits by administrators as follows:

> " 1. Representation of beneficiaries in suits concerning property vested in trustees [Order 31, rule 1]
>
> In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.
>
> 2. Joinder of trustees, executors and administrators [Order 31, rule 2]
>
> Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:
>
> Provided that the executors who have not proved their testator's will, and trustees, executors, and administrators outside Kenya, need not be made parties."

31. On the other hand, Order 1 Rule 9 of the Civil Procedure Rules state that:

> " No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

32. We have painstakingly gone through the entire record, and we note that the issue of the respondent's capacity was not raised in the pleadings and only arose during the cross-examination of the respondent. Even in the appellants' list of issues dated 29th May 2016, appearing at pages 227 and 228 of the record of appeal, this issue was not raised. In Ann Wairimu Wanjohi vs. James Wambiru Mukabi [2021] KECA 476 (KLR), the Court, when confronted with issues not raised in pleadings, held that:

> " We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties. In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly

addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings."

33. We associate ourselves with the cited decision and therefore find no error in the learned Judge's appreciation of the import of Order 1 Rule 9 and Order 31 rules 1 & 2 of the Civil Procedure Rules and his conclusion on the question as to whether the respondent's clam was defective. We agree that the issue was raised late in the day and could not be the basis for striking out the respondent's suit.

34. Similarly, we agree with the learned Judge that there is no express provision of the law barring a single administrator from filing a suit where an estate has more than one administrator. What the law requires is that where a person is suing the estate of a deceased person, the trustees, executors, or administrators "shall all be made parties to a suit against one or more of them." As regards a suit commenced against a third party by the estate, the law, in our view, is as was expressed in Zeinab Khalifa Khator & 4 Others vs. Abdulrazak Khalifa Salim & Another (supra) thus:

> "Moreover, we have not come across any provisions in the Law of succession and also the Probate and Administration Rules of Cap 160 laws of Kenya that prohibit joint administrators from seeking different orders from court. Indeed in our view what would be prohibited is one administrator dealing with the assets of the estate singularly where there is joint administration."

35. The respondent in her pleading was clear that she was in court on behalf of the estate of her deceased husband. The fruits of her litigation will go to the estate of the deceased and not to herself.

We therefore do not find any merit in the appellants' challenge to the propriety of the respondent's suit.

36. On the question as to whether the respondent proved her case, we flagged out an issue which we find necessary to comment on even though none of the parties raised it. We commence by reaffirming the principle in Ann Wairimu Wanjohi vs. James Wambiru Mukabi (supra) that "pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties." The positions of the parties in a case before a court of law are ringfenced by the pleadings filed in court. Parties cannot operate outside their pleadings. Thus, in David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others [2014] KECA 155 (KLR), the Court stressed that:

> "It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.
>
> The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or

defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

37. Upon perusal of the impugned judgment, it is apparent that the learned Judge addressed the issue of specific performance, which was never pleaded by the respondent in her Originating Summons as amended or addressed through her submissions. Although counsel for the appellants made submissions as if the respondent had sought an order for specific performance, it is clear that the respondent never sought such an order. Indeed, through the Further Amended Originating Summons dated 7th August 2013 and filed on 8th August 2013, the respondent was in the main seeking an order:

> " That this Honourable Court declares that Jason Ouko Atinda and Roselyn Dola Ouko, now the Administrators of the Estate of the Late Jason Ouko Atinda...have been holding the said portion of 5 acres that is comprised in Land Reference No. 3589/6 Karen in trust for Samuel Muhika Kageni and upon his death now hold the same in trust for the estate of the late Samuel Muhika Kageni."

38. In the alternative, the respondent sought an order:

> " That this Honourable Court be please to decree that part of the sub-divided title as subplot L.R. No. 3589/35 Karen measuring 2.5 acres and any other additional portion that the Plaintiff occupies has vested in the Plaintiff by virtue of Section 38 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya and by virtue of her open, continuous and uninterrupted occupation of that parcel of land for more than 15 years."

39. We cannot speculate on why the learned Judge determined an issue (claim for specific performance) that was not placed before him and ignored an issue (declaration of constructive trust) raised by the respondent. Even though the appellants' counsel addressed the issue of specific performance in the submissions filed before the learned Judge, counsel for the respondent never addressed the issue. The exception expounded in Odd Jobs vs. Mubia [1970] EA 476 that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision, was, therefore, not applicable in the circumstances of the case. We will once more stress the centrality of pleadings in resolution of court cases by referring to the holding of the Court in Independent Electoral and Boundaries [2014] KECA 890 (KLR) that:

> " As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the Appeal succeeds on that score."

40. Nevertheless, since the issue was never raised in the appeal or cross appeal, we will leave the matter at that and proceed to consider the determination by the learned Judge on the issue of adverse possession.

41. It was not disputed that by an agreement dated 11th January 1977, Kageni and Ouko entered into a contract for the sale of a portion of 5 acres to be carved from L.R. No. 3589/6 Karen. In accordance with the terms of the agreement, the purchaser, Kageni, immediately took possession of the parcel of land after paying a deposit of Kshs. 10,000. However, the parties to the agreement died before they

could see through the final payments and transfer of the 5-acre piece of land. To appreciate the rules of interpretation of contracts such as the one before us, we refer to the decision of the Supreme Court of the United Kingdom in RTS Flexible Systems Limited (Respondents) vs. Molkerei Alois Müller Gmbh & Company KG [2010] UKSC 14 & 38, where it was held that:

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

42. Additionally, the British Columbia Court of Appeal in Langley Lo- Cost Builders Ltd. vs. 474835 Ltd., 2000 BCCA 365 had the following to say on the interpretation of contracts:

> " [20] ...In A.G. Guest, ed., Chitty on Contracts, 27th ed. (London: Sweet and Maxwell, 1994), it is noted at 152 that in normal commercial transactions, where the intention to be contractually bound is at issue, the onus of proving that such an intention did not exist "is on the party who asserts that no legal effect is intended, and the onus is a heavy one": Edwards v. Skyways Ltd., [1964] 1 W.L.R. 349. Those, however, were cases where the form of the documentation was clearly contractual. The circumstances in the instant case were far more informal.
>
> [21] Most authorities suggest that the Court is not confined to the four corners of the alleged agreement, but may look at all the circumstances. In Osorio vs. Cardona (supra) McLachlin J. considered evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties. The investigation is to determine whether a reasonable observer would think that Terry Johnson on behalf of Langley, in signing the faxed document in these circumstances, intended to be contractually bound when he signed and delivered the faxed documents."

43. Our attention was drawn to clauses 3 & 9 of the agreement which provided as follows:

> " 3.
>
> (a) The Vendor shall within seven (7) days notify the Purchaser of his receipt of the sub-divisional Deed Plan for the plot.
>
> (b) subject to sub-clause (a) of this Clause the completion of the sale and purchase shall take place at Nairobi aforesaid within Forty (40) days of the notification aforesaid by the production to the Purchaser of a sub-divisional Deed Plan for the plot. The balance of the purchase money shall then be paid in exchange

for a transfer of the plot (free from any encumbrances) to the Purchaser (or as he shall direct).

9. If for any reason the Vendor is unable to complete the sale then this transaction shall be regarded as null and void and the Vendor shall refund to the Purchaser all the moneys paid hereunder."

44. Counsel for the appellants argued that the contract was repudiated as the vendor failed to meet his end of the bargain by securing the subdivision deed plans. However, it is essential to point out that if clauses 3 and 9 were to be construed in their strict sense, then the contract, having been signed on 11th January 1977, would have been repudiated by 28th February 1977. However, as at 14th October 1978, when the purchaser died, the vendor had not expressed his intention to repudiate the contract by refunding what had been paid towards the purchase price. Even as at 2nd February 1996, when the vendor died, the contract still stood. Considering the provisions of clauses 3, 8, and 9 of the agreement and the actions of the parties to that agreement prior to their deaths, we do not think they intended at any point to renounce the agreement. Their intention was clearly to see to it that the deal went through notwithstanding the challenges. Despite the difficulties in adhering to the completion clause, the parties seemed to have accommodated each other. We therefore find that the sale agreement survived the parties and bound their estates.

45. The next question is whether the respondent discharged the responsibilities of her deceased husband as laid down in the contract. According to the respondent, she paid the balance of the purchase price in full as follows: Kshs. 60,000 on 14th April 1994; Kshs. 10,000 on 30th May 1994; and Kshs. 60,000 on 19th July 1996. She testified that the last payment made in 1996 was made through an advocate called Mr. Maucho. Additionally, she stated that she had attended meetings chaired by Mr. Kagwe of Kagwe & Co. Advocates and had also been invited by the appellants for a meeting to verify her status as a purchaser. An affidavit sworn by Mr. Kagwe for the vendor was produced by consent, confirming that the respondent was listed by the vendor as a purchaser of plot 22 in the proposed subdivision. It was also confirmed that the respondent attended a purchasers' meeting held on 25th November 1995. It is imperative to note that in this meeting, the vendor, who was still alive then, was present.

46. The appellants' contention was that the final payment of the purchase price was not made to the vendor himself. They also claimed that the alleged further payments were not proved. This argument is not convincing because under item number 7 of the minutes of the meeting held on 25th November 1995, those with balances of their payments were to clear them, and "those who had paid through their advocates were to furnish Mr Kagwe with the list of the said firms." From the foregoing, it becomes apparent that Mr. Kagwe, having been instructed by the vendor, was in charge of facilitating the collection of the balances of the purchase prices from the purchasers. Additionally, it is also apparent that as of 25th November 1995, the vendor and the estate of the purchaser were keen on seeing through the contract of 1977. The fact that the respondent produced copies of cheques written in favour of Mr. Kagwe for clearing the balance leads us to conclude that the purchase price was indeed paid in full.

47. From the foregoing set of evidence, even if the banking slips were not produced as exhibits, the balance of probability tilts in favour of the respondent that the copies of the cheques proved payment. If the appellants disputed payment of the balances, they would have adduced evidence to support their case that the cheques did not reflect on the accounts of either the vendor or his advocates. This could not have been an uphill task, considering that the 2nd appellant himself acknowledged that his father, the vendor, retained the services of Kagwe and Co. Advocates. Although the failure to process the subdivisions was attributable to the caveats on the title, these caveats were known to the parties, as can

be seen in the minutes of 25th November 1995. Yet, despite their existence, the parties were still open to seeing the contracts performed to completion.

48. Turning to the question as to whether the respondent proved her claim for adverse possession, we commence by observing that time started running from 19th July 1996, when the respondent paid the last instalment. By the time the suit was filed, over twelve years had lapsed. The learned Judge cannot therefore be faulted for concluding that:

> " From the evidence adduced by the plaintiff, the last installment of the purchase price was paid on 19th July, 1996. From that time up to the date of filing this suit, the plaintiff has been in occupation of the suit property for 15 years."

49. In a situation where a claim for adverse position is premised on the existence of a purchase agreement, time only starts running once the contract is repudiated. Thus, in Sisto Wambugu vs. Kamau Njuguna [1983] KECA 69 (KLR), it was held that:

> " There have been several cases, of which the Livingstone Ndeete case is one, in which the claimant of land puts his case in the alternative, that is to say by pleading the agreement under which he is entered, and then asking for an order based on subsequent adverse possession. For instance in Hosea vs. Njiru & Others [1974] EA 526, Simpson J, following Bridges vs. Mees [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it."

50. At this point, we need to state that we did not understand the argument by counsel for the appellants that the respondent's claim was statute-barred by operation of section 38 of the *Limitation of Actions Act*. The cited provision is the foundation upon which claims for adverse possession are laid, and it does not provide any time within which such a claim should be instituted. We thus find no merit in the appellants' argument that the respondent's claim was statute-barred.

51. Apart from proving that she had been in occupation of the property in question for over twelve years, the respondent had to meet other requirements. In Samuel Kihamba vs. Mary Mbaisi [2015] KECA 853 (KLR), it was held that a person claiming land through adverse possession:

> " ... must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land. See Eliva Nyongesa Lusenaka & Anor v Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (UR). These prerequisites are required of any claimant, irrespective of whether the claimant and the respondent are related or whether the claim relates to family/ancestral land."

52. From the evidence on record, it is clear that the occupation of the suit property by the respondent from the time she paid the last installment in 1996 was open, without force, without secrecy, and without license or permission of the appellants. It was clear to all and sundry that her intention was to have the land as hers. The appellants claimed that the respondent was not in physical occupation of the land, but, as submitted by the respondent, the evidence of PW3 sufficiently established that she had

put up structures on the land and planted trees. The respondent was in control of the activities on the land through her employee, PW3. This satisfied the holding in Peter Mbiri Michuki vs. Samuel Mugo Gichuki (supra) that possession of land or any property, for that matter, need not be actual and physical but can also be constructive. By the time the respondent was making the last payment in 1996, they had been in possession since 1977 and continued doing so until the time the suit was filed.

53. Upon review of the evidence adduced in its entirety, we reach the same conclusion as the learned Judge that the respondent proved her claim for adverse possession. The question as to whether the respondent was in possession of 2.5 acres or 5 acres will be answered once we address the respondent's cross appeal.

54. In simple terms, the respondent's cross appeal is that although she had claimed adverse possession in respect of "2.5 acres and any other additional portion that" she occupied, and despite adducing evidence that she was occupying 5 acres, the learned Judge erred in awarding her 2.5 acres instead of 5 acres. In support of the cross appeal, counsel for the respondent submitted that the learned Judge, having found that the purchase price had been fully paid, ought to have found that the appellants had created a constructive trust in favour of the respondent for the five acres purchased.

55. Although the cross appeal is dated 26th June 2020, and is therefore presumed to have been filed before the appellants' submissions dated 16th September 2020, the appellants did not comment on the cross appeal in the written submissions. Nevertheless, at the hearing of the appeal, learned counsel, Mr. Sagana, mentioned that the purchaser only occupied 2.5 acres when he took possession in 1977.

56. Upon perusal of the judgment of the trial court, we note that in finding for the respondent on the claim for adverse possession, the learned Judge was emphatic that:

> " It was also common ground that Ouko gave the deceased possession of the said portion of land measuring 5 acres which as at the time of the agreement was delineated in a sketch plan for the purposes of identification and given No. 12 ("the suit property"). ...
>
> I am satisfied from the evidence on record that Ouko gave the deceased possession of the suit property, the deceased took possession and commenced development thereon. From the evidence before the court, apart from the incomplete building on the suit property that was put up by the deceased, the deceased also planted trees on the suit property, which can also be seen in the photographs produced in evidence by the parties. No evidence was placed before the court showing that after the deceased was given possession of the suit property, he abandoned the property, handed it back to Ouko, or was dispossessed of it. I am satisfied from the evidence on record that the plaintiff remained in possession of the suit property after the death of the deceased."

57. Strangely though, the learned Judge then went ahead to hold that:

> "From my analysis of the evidence on record as a whole, I am satisfied that the plaintiff has proved on a balance of probabilities her adverse possession against the defendants. The plaintiff's adverse possession claim was limited only to land measuring 2.5 acres. This is the land in respect of which the plaintiff has had actual possession out of the 5 acres that was sold to the deceased. From the evidence on record, this is the area where her unfinished structure stands. The defendants had contended that the parcel of land being claimed by the plaintiff was uncertain. I do not share the same view. The agreement for sale dated 11th January 1977, is very clear as to the parcel of land that was sold to the deceased. As I have mentioned earlier, it was not in dispute that the deceased was given possession of the land that was sold to him. In my view, there is no way Ouko could have given the deceased land

whose location and boundaries were uncertain. It was common ground that the whole land had not been subdivided and that the land purchased by the deceased had no title. This, however, cannot defeat the plaintiffs claim. An adverse possession claim can be maintained in respect (to) a portion only of a large parcel of land provided possession for the statutory period is established. See Githu vs. Ndeete (supra)."

58. The learned Judge made the determination on the occupied acreage notwithstanding that the evidence on record, including that of DW1, clearly confirmed that upon the signing of the agreement and the payment of the deposit of Kshs. 10,000, the respondent took possession of 5 acres which had been allocated parcel number 3589/35 in the proposed subdivision plan. A perusal of the record does not disclose any evidence that the area occupied by the respondent was ever reduced to any lesser size. Although there was no explanation offered as to why there was reference to 2.5 acres in the Further Amended Originating Summons, it was clear that the respondent was seeking adverse possession in regard to "2.5 acres and any other additional portion that" she occupied. Disregarding the inelegance of the respondent's pleadings, her request was clear that she was claiming adverse possession over the entire parcel she was occupying. It was therefore erroneous for the learned Judge to conclude that the respondent's claim was limited to 2.5 acres despite her claim for "any other additional portion" and the overwhelming evidence that she was occupying 5 acres. In the circumstances, there is merit in the respondent's cross appeal, and we therefore allow it.

59. Flowing from our discussion in this judgment, it follows that the appellants' appeal is without merit and is dismissed. On the other hand, we find merit in the respondent's cross appeal, and we allow it. The costs are awarded to the respondent.

60. For avoidance of doubt, we determine the appeal as follows;

    a. The appellants' appeal is dismissed;

    b. The respondent's cross appeal is allowed so that the trial Court's judgment to the effect that the respondent was in adverse possession of a portion of 2.5 acres out of L.R. No. 3589/6 is set aside and substituted by an order that the respondent is in adverse possession of 5 acres out of L.R. No. 3589/6;

    c. The appellants shall excise 5 acres from L.R. No. 3589/6 and transfer it to the respondent within 60 days of the date of this Judgment and in default thereof, the Registrar of the Environment and Land Court to execute all the necessary documents so as to effectuate the transfer of the said 5 acres to the respondent; and

    d. The costs are awarded to the respondent.

61. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2025

MUMBI NGUGI

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR