REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 308 OF 2011(O.S)

RAHAB WANGUI KAGENI

(Suing as the administrator of the estate of

SAMUEL MUHIKA KAGENI).....PLAINTIFF

VERSUS

ROSELYN DOLA OUKO

AARON TAFARI OUKO (Sued as the administrators of the

estate of JASON ATINDA OUKO).....DEFENDANTS

JUDGMENT

The plaintiff instituted this suit by way of an Originating Summons dated 24th June, 2011 which was amended on 29th June, 2011 and further amended on 8th August, 2013 seeking the following orders:

a) That the court declares that the plaintiff who is the administratrix of the estate of the late Samuel Muhika Kageni is a successor in title to the deceased, having paid the full purchase price for a portion measuring approximately 5 acres and comprised in L.R No. 3589/6 Karen as identified in the agreement for sale made on 11th January, 1977 and is the beneficial owner thereof.

b) That the court declares that Jason Ouko Atinda(sic) and Roselyn Dola Ouko, the administrators of the estate of the late Jason Ouko Atinda(sic) the defendants herein or any other person who is identified as the administrator of the said estate have been holding the said portion of 5 acres comprised in L.R No. 3589/6 Karen in trust for the estate of the late Samuel Muhika Kageni.

c) That the court declares that in any event, the estate of the late Jason Atinda Ouko relinquished their right over a portion of 5 acres of L.R No.3589/6 upon execution of the agreement of sale dated 11th January, 1977 which was followed by consensual possession of the said property by the plaintiff and her late husband and payment of the full purchase price on 19th July, 1996.

d) That the court does order the administrators of the estate of the late Jason Atinda Ouko, the defendants herein, or any other person identified as the administrator of the said estate, to relinquish the said trust and transfer the ownership of a portion of 5 acres of L.R No. 3589/6(including L.R. No.3589/35 Karen which the plaintiff presently occupies) to the plaintiff, as the personal representative and administrator of the estate of Samuel Muhika Kageni.

e) That a declaration be issued for the deputy registrar to sign transfer documents in respect of 5 acres of L.R No. 3589/6 (including L.R No. 3589/35 Karen which the plaintiff presently occupies) in favour of the plaintiff as the personal representative and administrator of the estate of Samuel Muhika Kageni.

In the alternative,

1. That the court be pleased to decree that part of the subdivided title, sub-plot L.R No. 3589/35 Karen measuring 2.5 acres and any other additional portion that the plaintiff occupies is vested upon the plaintiff by virtue of section 38 of the Limitation of Actions Act and by virtue of her open, continuous and uninterrupted occupation of that parcel of land for more than 15 years.

2. That a vesting order in respect of the said parcel of land measuring 2.5 acres of L.R No. 3589/35 and any other additional portion that the plaintiff is entitled to be issued in the favour of the plaintiff, Rahab Wangui Kageni.

3. That a declaration be issued that the deputy registrar does sign transfer documents in respect of 2.5 acres of L.R No. 3589/35 Karen and any other portion that the plaintiff is entitled to in the favour of the plaintiff.

4. That costs of the Originating Summons be borne by the respondents.

The plaintiff's Originating Summons was supported by the plaintiff's affidavit sworn on 29th June, 2011. In the affidavit, the plaintiff stated that she was the widow and administrator of the estate of Samuel Mahika Kageni (hereinafter referred to as "the deceased"). She stated that on 11th January, 1977, the deceased entered into an agreement for sale with Jason Atinda Ouko, deceased (hereinafter referred to only as "Ouko") under which the deceased agreed to purchase from Ouko a portion of land known as L.R No.3589/35 measuring 5 acres (hereinafter referred to as "the suit property"). The plaintiff averred that upon making part payment of the purchase price to Ouko, the deceased was given vacant possession of the suit property and that he remained in occupation until his death on 14th October, 1978. The plaintiff averred that after the death of the deceased, she remained in occupation of the suit property and that she was in occupation of the property as at the time of filing this suit. The plaintiff averred that after she took control of the property, Ouko recognised her occupation and ownership of the property. The plaintiff averred that the deceased died before the suit property was transferred to him although he had taken possession and control of the same. The plaintiff stated that she paid the balance of the purchase price and that Ouko died on 2nd February, 1996 before transferring the suit property to the deceased. The plaintiff averred that she had lived on the suit property after the death of Ouko for uninterrupted period of over 15 years without any legal right over the property and without force. The plaintiff averred that she had constructed a house on the suit property and had also planted several trees. She stated that she had connected water and electricity to the suit property and that she was paying rates to the City Council of Nairobi for the property. The plaintiff averred that she was claiming a portion of L.R No. 3589/6 measuring 2 (sic) acres which after subdivision was given L.R No. 3589/35. The plaintiff annexed a number of documents to her affidavit in support of the Originating Summons.

The defendants opposed the Originating Summons through a replying affidavit sworn by the 2nd defendant on 25th October 2011. The 2nd defendant stated that the estate of Ouko was at all material times the registered owner of the entire parcel of land known as L.R No. 3589/6, I.R 23229 measuring 87.5 acres which had never been subdivided. He stated that the portion of the said parcel of land claimed by the plaintiff as Plot No. 3589/35(the suit property) was not delineated and as such undefined and non-existent. He averred that the plaintiff and the deceased occupied the suit property pursuant to an agreement for sale and as such a claim for adverse possession could not be sustained.

The 2nd defendant contended that the plaintiff had not been in actual possession of the suit property and that what she had put up on the property was an incomplete structure which was standing on a portion of land measuring 2.5 acres. He contended that Ouko never lost possession of the suit property and denied that the plaintiff had been in open and uninterrupted occupation of the property for more than 12 years.

At the trial, the plaintiff gave evidence and called two witnesses. The plaintiffs' first witness was Andrew Gachu Mwangi (PW1). PW1 told the court that the plaintiff was her aunt. He stated that the plaintiff and the deceased bought a portion of L.R 3589/6 measuring 5 acres (the suit property). PW1 averred that his family also bought a similar portion of land from Ouko. He stated that the deceased paid the entire purchase price to Ouko before he died. He contended that there were other parties who were interested in portions of L.R 3589/6 but had not completed paying the purchase price.

PW1 stated that some of the purchasers of portions of L.R 3589/6 registered caveats against the title of the property. He stated that the plaintiff was in her 70s and was sick. He contended that the plaintiff was given possession of the suit property by Ouko and that she had been in occupation thereof since 1970s. PW1 stated that he was brought up on L.R 3589/6 where they had a home. He stated that the defendants were known to him. He averred that there was a dispute over the administration of the estate of Ouko which was the subject of High Court Succession Cause No. 353 of 1997. He averred that an administrator of the estate of Ouko was to be appointed after the determination of the said succession cause. He stated that the plaintiff was amongst the many purchasers of land who were seeking titles from the estate of Ouko. He stated that the plaintiff and the deceased having paid the purchase price in full were entitled to be issued with a title in respect of the suit property.

In cross-examination, PW1 stated that the plaintiff was his aunt. He stated that he did not interact with the deceased since the deceased passed away when he (PW1) was still young. He averred that the plaintiff and Ouko entered into a sale agreement for the purchase of L.R 3589/35 after which the plaintiff and her husband were given possession upon payment of the entire purchase price. He stated that the plaintiff had a building on the suit property and that she was in possession of the property with the permission of Ouko. In re-examination, PW1 stated that the plaintiff had a permanent structure on the suit property. He stated that the property is situated at the edge of a forest next to Kibera slums and had been subjected to vandalism over the years. He stated that he was not sure whether the building was still on the suit property as he was last on the property in 1980s.

The plaintiff (PW2) gave evidence after PW1. She testified that she was a widow of the late Samuel Muhika Kageni (deceased) in respect of whose estate she was an administrator. She adopted her statement dated 10th November, 2015 as part of her evidence in chief and produced the documents attached thereto as plaintiff's exhibit 1, save for documents at pages 29, 31 and 34 which were marked as MFI 2(a), (b) and (c). The plaintiff stated that she had put up a house on the suit property and had also planted trees thereon. She stated that she was staying in Mombasa where she was undergoing treatment. In her statement, the plaintiff stated that by an agreement dated 11th January, 1977, Ouko agreed to sell to the deceased land measuring 5 acres which was to be excised from L.R No. 3589/6 at a price of Kshs 130,000/-. She stated that a deposit of Kshs 10,000/- was paid on the execution of the said agreement and the balance was paid by instalments the last of which was made on 19th July, 1990 through Ouko's advocate. The plaintiff stated that at the time of his death in 1996, Ouko had not completed the sub- division process and had not transferred to her the suit property which she had occupied since 11th January, 1977. The plaintiff stated that after taking possession of the suit property on 11th January, 1977, she cleared bushes, planted trees, erected a house thereon and started subsistence farming. She stated that she had been paying bills for water connected to the property and land rates. She stated that she was interested in the suit property both as a purchaser and an adverse possessor.

In cross examination, the plaintiff stated that she did not require the consent of her co-administrators to file this suit. She stated that apart

from the agreement that the deceased entered into with Ouko she was not aware of any other agreement between the parties. She contended that the purchase price for the suit property was Kshs. 130,000/- and that Kshs. 10,000/- was paid upon the execution of the agreement. She stated that she made further payments through Maucho advocate who was acting for Ouko.

The plaintiff stated further that the structure which they had put up on the suit property was a house with a roof and that the same was vandalized and left without a roof. The plaintiff stated that she never lived on the said house but carried out other activities in the compound. She stated that the building that she put up on the suit property was approved. In her further evidence in cross-examination, the plaintiff stated that she took possession of the suit property in the 1980s and started construction of the house on the property thereafter. The plaintiff stated that she was not present when the deceased and Ouko entered into the agreement for sale dated 11th January, 1977. She stated that she knew the firm of Kagwe & Company advocate and that Mr. Kagwe had sworn an affidavit which was included in her bundle of documents and for which she made some payment to him.

In re-examination, the plaintiff referred to minutes of a meeting that was held on 25th November, 1995 at the office of Kagwe & Company Advocates and stated that she attended the said meeting. She maintained that she paid the entire purchase price for the suit property to Ouko. She stated further that the building on the suit property was put up in the 1970s/1980s and was never completed owing to lack of funds.

The plaintiff's last witness was Justus Ochenge Duncan (PW3). PW3 adopted his statement filed in court on 8th December, 2017 as part of his evidence in chief. He stated that he was employed by the plaintiff as a gardener and security guard since February, 1993 to look after her property at Mukinduri lane, Karen. He stated that he was working in the plaintiff's premises shown in the photographs at pages 39-44 of the plaintiff's bundle of documents and pages 5 and 6 of the defendants' bundle of documents. He stated that when he was employed, the suit property had trees, an incomplete building and a small house for a watchman. He stated that the suit property bordered Kibera slums and as such the premises were prone to vandalism. He stated that he used to stay on the suit property while on duty but while off duty he used to live in the neighbourhood.

PW3 stated that on 17th June, 2011, a group of people in 3 Nissan vehicles armed with clubs and pangas led by one, Brian Yongo Otieno invaded the suit property and informed him that they had come to fence it. PW3 stated that he informed the plaintiff of the said incident and also reported the same to the area chief. He stated that on 18th June, 2017, he could not access the suit property as the same had been taken over by Neptune Security Guards. He stated that from a distance, he could see people fencing off the property and others clearing the compound. He stated that on 19th June, 2017, he saw a convoy of vehicles entering the suit property and was henceforth unable to access the premises.

PW3 stated that he worked for the plaintiff for 18 years within which period there was no dispute over the suit property. He stated that it was until 2011 that a dispute arose over the ownership of the suit property.

In cross examination, PW3 stated that the suit property measured between 2.5 to 5 acres. He stated that the property had a kei-apple fence and that he used to weed trees along the fence. He reiterated that between 1993 and 2011 when he was employed by the plaintiff to look after the suit property, no dispute arose over the ownership of the property. PW3 stated that the structure on the suit property was incomplete and as such the plaintiff did not live on the same. In re-examination, PW3 stated that the invasion of the suit property took place on 17th June, 2011 and that he reported the matter to the area chief and to the plaintiff. He stated that on 18th June 2011, he was roughed up and his camera was confiscated.

Aaron Tafari Ouko (DW1) testified as the sole defence witness. He adopted his replying affidavit sworn on 25th October, 2011 and his statement dated 30th May, 2016 as his evidence in chief and produced documents attached to the defendants' list of documents dated 29th May 2016 as defence exhibit 1. In his witness statement, DW1 stated that that he was a co-administrator of the estate of Jason Atinda Ouko (deceased)(Ouko) together with Roselyn Dola Ouko. He stated 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 (hereinafter referred to as "the whole plot"). DW1 contended that the whole plot measured approximately 87.5 acres. He contended that the property had never been subdivided and that Plot No. 3589/35(the suit property) which the plaintiff was claiming was un-delineated, undefined and non-existent. He contended that Ouko had always been in possession of the whole plot and that he had allowed permissive occupation of some portion thereof. He stated that after his death, his children remained in possession as beneficiaries and administrators of his estate.

DW1 admitted that on 11th January, 1977, Ouko entered into an agreement with Samuel Muhika Kageni (deceased), for the sale of land measuring 5 acres, which was to be excised from the whole plot. He stated that the completion of the said agreement for sale was pegged on the successful subdivision of the whole plot which was delayed by caveats and encumbrances placed on the title by some of the purchasers. He contended that this led to Ouko's inability to comply with infrastructural pre-conditions that had been imposed by the defunct City Council of Nairobi before approval of the subdivision could be given.

DW1 stated that clause 9 of the sale agreement allowed Ouko to rescind the agreement and refund the purchase price in the event that he was unable to complete. He stated that the deceased only made payment of a deposit of Kshs 10,000/- towards the purchase price. He stated that there was no evidence of payment of the balance of the purchase price. He stated that with the permission of Ouko, the deceased went ahead to construct an incomplete structure on the suit property. DW1 stated that Ouko rescinded the agreement for sale due to the deceased's failure to fulfil his obligations under the agreement for sale.

DW1 stated that the plaintiff never resided on the suit property. He contended that neither the plaintiff nor the deceased were in possession of the property. He stated that the deceased died in the late 1980s after which the plaintiff relocated to the United States of America. He denied that the plaintiff had been in possession of the suit property for more than 12 years and contended that the plaintiff had never been in actual physical possession of the property. DW1 stated that due to the pathetic and inhabitable state of the property, the administrators of the estate of Ouko decided to fence it in compliance with their duty under the law of succession in order to safeguard it.

DW1 contended that the plaintiff's attempt to pay the purchase price 19 years after the agreement for sale was ill motivated and was an

endeavor on her part to unfairly and illegally benefit from a rescinded agreement. He stated that the plaintiff had also based the value of the suit property on the amount that was agreed upon 39 years ago between the deceased and Ouko whereas the value of the property had increased significantly.

In cross-examination, DW1 confirmed that he was aware of the agreement of sale dated 11th January 1977 between Ouko and Samuel Muhika Kageni (the deceased). He stated that the notice at page 38 of the plaintiff's bundle of documents was addressed to all persons who were occupying the whole plot. He averred that reference number 35 was obtained from a proposed subdivision plan which was never approved. DW1 stated further that the deceased was given possession of the suit property in accordance with the agreement for sale. He denied that the plaintiff was in possession of the suit property until 17th June, 2011 and averred that the photographs attached to his affidavit showing the structure built by the plaintiff on the suit property were taken in October 2011.

When he was referred to clause 8 of the agreement for sale, DW1 stated that he had no evidence that Ouko had issued the plaintiff with a default notice. He denied that the plaintiff had been paying rates for the suit property and contended that the rates receipts produced by the plaintiff were in the name of Ouko. He stated that they had been paying rates for the whole plot. He stated further that he did not know why the subdivision plan in the plaintiff's bundle of documents which had land reference numbers and plot sizes was never approved. DW1 denied that Ouko had an account with Standard Chartered Bank. He stated that Ouko had retained the services of Kagwe & Company Advocates and that Maucho advocate was also known to Ouko. He stated that he was not aware of the meetings which took place at the office of Kagwe & Company Advocates and the correspondence that was exchanged between the said firm and the plaintiff until after the death of Ouko as he was not involved with issues concerning the suit property in his father's lifetime. Asked about the dogs and guards which could be seen in the photographs in their bundle of documents, DW1 stated that there were complaints by neighbours that thieves were hiding in the suit property which necessitated clearance of the place, fencing it off and posting guards thereon.

In re-examination, DW1 stated that the subdivision of the whole plot was a material requirement under the agreement for sale between the parties and that this was never done. He stated further that there was no agreement for sale of the proposed plot number 22 or 35 to the deceased and further, that there was no agreement under which the plaintiff was to purchase land measuring 2.5 acres.

Submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff in her submissions dated 22nd November, 2018 contended that she had proved on a balance of probabilities that she was entitled to a portion of L.R No. 3589/6 (whole plot) measuring 5 acres (the suit property) through adverse possession. The plaintiff referred to clause 4 of the agreement for sale between the deceased and Ouko and contended that she was granted possession of the suit property was on 11th January, 1977. The plaintiff referred to clause 2(b), 3 and 9 of the agreement for sale and contended that upon breach by Ouko of the terms of the said agreement, her occupation of the suit property ceased to be permissive and became adverse.

The plaintiff submitted that from the replying affidavit of DW1 which the defendants had relied on as part of their evidence and DW1's testimony, the defendants had admitted among others; the existence of the agreement for sale dated 11th January, 1977; the fact that the whole plot was not subdivided; the fact that the agreement for sale was rescinded by Ouko; and the fact that the plaintiff had constructed an incomplete structure on the suit property.

The plaintiff submitted that under clauses 3 and 9 of the agreement for sale, the deceased's occupation of the suit property ceased to be permissive on 19th January, 1977 when Ouko failed to notify the deceased that a sub-division deed plan had been issued to him. The plaintiff submitted that even after Ouko had breached the agreement for sale, the deceased continued to be in open, continuous and uninterrupted occupation of the suit property without any interference by Ouko. The plaintiff submitted in the alternative that even if the agreement for sale did not become null and void following the said breach by Ouko, the agreement became unenforceable after 6 years under the Limitation of Actions Act. The plaintiff submitted further that even if it was taken that the further payment made by the plaintiff on 19th July, 1996 extended the life of the agreement for sale, her adverse possession crystalised on 19th July, 2008 after a lapse of 12 years from that date of the last payment. In support of this submission, the plaintiff relied on the case of Public Trustee *v* Wanduru Ndegwa[1984]eKLR. The plaintiff also relied on the case of Wambugu *v* Njuguna(1982-88)1KLR 217 in support of her submission that when a purchaser of land is in possession, adverse possession starts from the end of the validity of the contract or from the date of termination of the contract.

The plaintiff submitted that there was ample evidence of her actual possession of the suit property. The plaintiff submitted that photographs exhibited by the defendants showed a large permanent building, well tendered trees and well tendered cypress fence around the suit property. The plaintiff contended that the defendants did not deny the plaintiff's entry onto the suit property on 11th January, 1977 and that what was left for the court to determine was when the said possession became adverse.

The plaintiff argued further that possession coupled with payment of the purchase price created a constructive trust and converted Ouko into a trustee of the suit property for and on behalf of the plaintiff. For this submission, the plaintiff relied on the cases of Macharia Mwangi & 87 others *v* Davidson Mwangi Gakiri [2014]eKLR, Mwangi & another *v* Mwangi [1986] KLR 328 , Mutsonga *v* Nyati [1984]KLR425 and Kanyi *v* Muthiora [1984]712. The plaintiff submitted that cheques dated 30th May, 1994 and 19th July, 1996 drawn in favour of Ouko and S. Mauncho & Company Advocates respectively were not contested and further that there was no evidence placed before the court that the said cheques were dishonoured.

In their submissions in reply dated 10th April, 2019 the defendants contended that the plaintiff lacked capacity to institute this suit alone. The defendants contended that since three (3) administrators including the plaintiff were appointed by the court to administer the estate of Samuel Muhika Kageni ("the dceased"), this suit should have been brought in the names of all the three (3) administrators and that in the absence of the other administrators of the deceased, the plaintiff's suit is incompetent and unsustainable. In support of this submission, the defendants relied on the cases of Micheal Chole Lugalia (suing as administrator of the estate of Majani Lugalia) *v* Jonathan Ligure Ayodi(2016)eKLR, and Republic *v* Nairobi City Council, Misc. Civil Appl. No. 103 "B" of 2013 where the court stated that without capacity, a suit is incompetent and cannot be sustained.

With regard to the agreement for sale which the plaintiff had sought to enforce, the defendants submitted that the agreement for sale sought to be enforced by the plaintiff was different from the agreement that was entered into between the deceased and Ouko. The defendants submitted that the plot numbers, the terms and mode of payment, the acreage of the land sold and the completion period were all different. The defendants contended that, whereas the agreement for sale dated 11th January, 1977 described the subject plot as No. 12, in her witness statement, the plaintiff described the plot whose possession she took as No. 22. The defendants submitted that the plaintiff's claim was in the circumstances based on a non-existent agreement for sale of land which agreement was unenforceable under the provisions of section 3(3) of the Law of Contract Act. In support of this submission, the defendants relied on the case of Silverbird Kenya Ltd *v* Junction Ltd & 3 others [2013] eKLR. The defendants urged the court to dismiss the plaintiff's suit for non-compliance with section 3(3) of the Law of Contract Act.

The defendants submitted further that the deceased died testate. The defendants submitted that the Certificate of Confirmation of Grant that was produced by the plaintiff in evidence had no schedule of assets of the deceased. The defendants submitted that this coupled with the omission by the plaintiff to produce before the court a copy of the deceased's will and to join the other administrators of the estate of the deceased to this suit could only lead to an inference that the suit property did not form part of the deceased's estate.

The defendants referred to clause 2 of the agreement for sale and submitted that all payments towards the purchase price for the suit property were to be made to the vendor and not to a third party including the parties' advocates. The defendants submitted that the plaintiff did not offer any explanation as to why she paid the balance of the purchase price yet there was no completion as envisaged by clause 3 of the agreement. The defendants submitted further that there was no explanation for the alleged payment of Kshs 140,000/- when the purchase price was Kshs 130,000/- and further, that no evidence was provided to show that the alleged payments made between 14th April, 1994 and 19th July, 1996 were actually made.

The defendants referred to the South African case of Neethling *v* Klopper 1967(4) SA 459(A) cited in Kovacs Investments 724 (pty) Ltd *v* Fredrick Carter Marais (323/2008) [2009] in support of their submission that clauses relating to the manner and time within which payment of the purchase price should be made constitute material provisions in an agreement which cannot be varied or amended orally. The defendants referred to clauses 3, 4, 5 and 9 of the agreement for sale and urged the court to give effect to the intention of the parties who foresaw that performance by Ouko could be frustrated and made provision for a refund of the purchase price under clause 9 of the agreement.

With regard to the claim for specific performance, the defendants submitted that under section 4(1)(a) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, an action founded on contract may not be brought after 6 years from the date of the accrual of the cause of action. The defendants argued further that specific performance was not possible without compliance with the terms of clause 3 of the agreement for sale relating to the subdivision of the whole plot. The defendants submitted further that the agreement for sale provided a specific remedy for termination under clause 9. In support of their submission, the defendants relied on the cases of The Power Co. Ltd. *v* Gore District Council [1997]1NZLR 537(CA) cited in Planet Kids Ltd. *v* Auckland Council [2012] NZCA 562, Turney *v* Zhilka[1959]SCR 578, National Bank *v* Pipeplastic Samkolit(K)Ltd & another[2001]eKLR, Kenya Shell Ltd *v* Elizabeth Wangui Njenga(2004)eKLR and General Assurance Society Ltd vs. Chandmull Jain & another 1966 AIR 1644 . The defendants urged the court to decline an invitation to rewrite the contract for the parties.

In their further submission, the defendants submitted that the contract between the parties was subject to a suspensive condition under clause 3 of the agreement, which was never met. The defendants submitted that when a contract is subject to a suspensive condition, it only comes to effect if the condition is met. The defendants cited the cases of Kukal Properties Development Ltd *v* Taffazal H. Maloo & 3 others [1993]eKLR and submitted that the fulfilment of a suspensive condition is a pre-requisite for a contract to come into effect and that in this case, no remedy could be invoked for a breach of contract that never existed.

With regard to the plaintiff's claim for adverse possession, the defendants submitted that the plaintiff did not prove that she was in possession of the suit property and that she had constructed thereon a building. The defendants submitted that there was no evidence that the plaintiff had occupied the suit property since 1980s as she had claimed. The defendants argued that the plaintiff never lived on the suit property and that PW3 could not prove that he lived or worked on the suit property.

In their further submission, the defendants relied on the cases of Samuel Miki Waweru *v* Jane Njeri Richu CA No. 122 of 2001 and Sisto Wambugu *v* Kamau Njuguna (1982-88)1KLR 217 cited in Alice Iminza Muhavi *v* Daniel Kiptab[2010]eKLR in which the court held that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise and that in case of possession pursuant to an agreement for sale or lease, such claim can only arise after the agreement has been repudiated in which case time for the purposes of adverse possession starts to run from the date of termination of the contract.

Determination:

I have considered the pleadings and the evidence tendered by the parties. I have also considered the submissions of counsels. The plaintiff has sought specific performance of the agreement for sale dated 11th January, 1977 and in the alternative, an order that she has acquired title to a portion of the suit property by adverse possession. Before, I consider the merit of the plaintiff's claim, I wish to deal with a preliminary issue that was raised by the defendants in their submissions. The defendants had contended that the plaintiff's suit is incompetent on account of the fact that the plaintiff did not join in the suit her co-administrators. I am of the view that the plaintiff's objection to the suit on account of non-joinder of the other administrators of the estate of the deceased has no merit for several reasons. First this issue was raised by the defendants at the submission stage. In their response to the Originating Summons, the defendants did not take issue with the competency of the suit. Suits are determined on pleadings. A party cannot be allowed at the submission stage to argue an issue that was not raised in his pleadings. I believe that if the defendants had taken issue with the competency of the suit in their replying affidavit, the plaintiff could have had an opportunity to explain why she did not join the other administrators of the estate of the deceased as parties to the suit. Secondly, Order 32 rule 2 of the Civil Procedure Rules cited in the authorities relied on by the defendants in support of their objection to the suit provides that, "*Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them (emphasis added).*" This in my understanding means that only in a suit brought against one or more of the administrators where there are more than one, is it mandatory to join all the administrators. I have not come across any provision of the Civil Procedure Rules which

provides that a suit brought on behalf of an estate against a third party must be brought in the names of all the administrators where there are more than one. In the case of Zeinab Khalifa Khator & 4 others *v* Abdulrazak Khalifa Salim & another [2017] eKLR, the Court of Appeal stated that:

> *"…..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."*

Finally, Order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. The court is enjoined under that order to deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. For the foregoing reasons, the objection raised by the defendants regarding the competency of the suit herein based on non-joinder of the other administrators of the estate of the deceased to the suit as plaintiffs is overruled.

On the merit of the claim, I will first deal with the claim for specific performance. The law is settled that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. In Gurdev Singh Birdi and Marinder Singh Ghatora *v* Abubakar Madhubuti CA No.165 of 1996 it was held that:

> *"…It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."*

In the case of Amina Abdulkadir Hawa *v* Rabinder Nath Anand & Another [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

> *"Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles……..specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party…..severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."*

In the Supreme Court of Uganda's case of Manzoor *v* Baram [2003] 2 E.A 580 that was cited in the case of Thrift Homes Limited *v* Kays Investment Limited [2015] eKLR, the court stated as follows on specific performance:

> *"Specific performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course."*

From the material before the court, I am of the view that this is not an appropriate case to order specific performance. As rightly submitted by the defendants, the sale of the suit property to the deceased was dependent upon Ouko subdividing the whole plot. The whole plot has to date not been subdivided. It would not be possible to convey the suit property to the plaintiff as it has not been formally delineated and given a reference number. I have also noted from a copy of the title for the whole plot that was produced in court that there are several caveats and court orders registered against the title of the property some of which were in place before the deceased entered into a contract with Ouko. These may pose some challenge to the defendants if they were to be ordered to perform the agreement for sale between Ouko and the deceased. The other reason why the court would not order specific performance is that the parties provided a remedy in the agreement for sale in the event that Ouko was unable to complete the same. As correctly submitted by the defendants, this court cannot rewrite the agreement which the parties entered into. I am also of the view that due to the lapse of time and the variation in land prices over time, it would not be appropriate to order specific performance in this case.

With regard to the adverse possession claim, again, the law is settled. In the case of Salim *v* Boyd and Another (1971) E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In the case of 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, nec plecario (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."*

In the case of Titus Mutuku Kasuve *v* Mawani Investment Ltd & Others, Civil Appeal [2004] 1 KLR 184 the court stated as follows:

> *"……in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition."*

It was not disputed that L.R No. 3589/6("the whole plot") is registered in the name of the estate of Jason Atinda Ouko ("Ouko"). It was also not disputed that on 11th January, 1977, Ouko entered into an agreement for sale with Samuel Muhika Kageni("deceased") in respect of a portion of land measuring 5 acres which was to be excised from L.R No. 3589/6 ("the whole plot"). 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"). It was also common ground that the sale transaction was never completed because Ouko did not subdivide the whole plot. The suit property was therefore not transferred to the deceased or his estate.

The plaintiff led evidence that after the deceased was given possession of the suit property by Ouko in 1977, he remained in possession until the time of his death. The plaintiff contended that after the death of the deceased, the plaintiff continued in possession until 2011 when the defendants sought to evict her from the property. The defendants disputed the plaintiff's claim that she was in possession of the suit property from 1977 to 2011. The parties were however in agreement that the deceased after taking possession of the suit property erected an unfinished structure thereon. The photographs produced by both parties in evidence showed that the said structure was still in place as at the time of the filing of this suit.

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, a part 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. I believe the evidence of PW3 that he had been employed by the plaintiff to look after the property and that he worked for the plaintiff on the suit property until 2011 when the defendants forcefully entered the suit property leading to the filing of this suit. PW3's account of the events that took place on the suit property on 17th and 18th June, 2011 when the defendants made forceful entry into the suit property was not challenged in any material respect. I am of the view that the fact that the building that the deceased and the plaintiff had constructed on the suit property was incomplete and that the two did not live on the property did not mean that they were not in possession. In my view, the plaintiff placed before the court sufficient proof that she was in possession of the suit property for more than 12 years prior to the filing of this suit. In Halsbury's Laws of England, 3rd Edition, volume 24 page 252 that was cited in Githu *v* Ndeete [1984] KLR 776, the court stated that:

> *"To constitute dispossession, acts must be done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it(q). Fencing off is best evidence of possession of the surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession."*

Possession of the suit property was granted by Ouko to the deceased pursuant to clause 4 of the agreement for sale. It was common ground that the initial entry and possession of the suit property by the deceased was permissive. In the case of Mwinyi Hamis Ali *v* Attorney General & another, Civil Appeal No. 125 of 1997, it was held that adverse possession does not apply where possession is by consent. In Wambugu *v* Njuguna, [1983] KLR 172 it was held that:

> *"Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined".*

From the evidence on record, the deceased and the plaintiff entered the suit property pursuant to a sale agreement on 11th January 1977 as a purchaser. The deceased and the plaintiff's entry in 1977 was with permission of Ouko. In the case of Public Trustee *v* Wanduru, (1984) KLR 314 it was held that a purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run and that time is reckoned from the date of payment of the purchase price. From the evidence adduced by the plaintiff, the last installment of the purchase was paid on 19th July, 1996. From that time up to the date of filing of this suit, the plaintiff had been in occupation of the suit property for 15 years. If the plaintiff did not make any further payment towards the purchase price after the initial deposit of Kshs. 10,000/= that was paid by the deceased on 11th January, 1977 as claimed by the defendants, the plaintiff would have been in occupation of the suit property for 34 years as at the time this suit was brought in 2011.

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 claim 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 a portion only of a large parcel of land provided possession for the statutory period is established. See, Githu *v* Ndeete (supra).

In conclusion, I hereby enter judgment for the plaintiff against the defendants on the following terms:

1) I hereby declare that the plaintiff has acquired by way of adverse possession title to a portion measuring 2.5 acres of all that parcel of land known as L.R No. 3589/6.

2) The defendants shall sub-divide and excise from L.R No. 3589/6 the said portion of land measuring 2.5 acres on which the plaintiff's uncompleted building stands and shall execute a transfer in respect thereof in favour of the plaintiff once the caveats and other encumbrances existing on the title of the property are discharged.

3) The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 27th day of June, 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Mbabu for the Plaintiff

Mr. Anyega and Mr. Biriq for the Defendants

Mr. Waweru-Court Assistant