Fernandes v Allen; Fernandes (Interested Party) (Enviromental and Land Originating Summons 267 of 2014) [2024] KEELC 1396 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1396 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 267 OF 2014

AA OMOLLO, J

MARCH 14, 2024

BETWEEN

DIPTI FERNANDES ..... PLAINTIFF

AND

SANDRA BERNADETTE ALLEN ..... DEFENDANT

AND

JOSE DHANIA FERNANDES ..... INTERESTED PARTY

JUDGMENT

1. The Plaintiffs filed an Originating Summons dated 4th March 2014 seeking for the following orders;

    a. A declaration that the said Apartment Number 7, Block B, Land Reference Number 1870/ IV/198 be deemed to belong to the Applicant under the doctrine of adverse possession in fact and in law.

    b. That the Applicant be registered as owner of Apartment Number 7, Block B, Land Reference Number 1870/IV/198 (herein after referred to as "the Apartment.)"

    c. That the Respondent, her servants, agents or whosoever be permanently restrained from trespassing on the Apartment on Land Reference Number 1870/IV/198 in breach of the Applicant's rights as owner in adverse possession.

    d. That the Respondent, her servants, agents or whosoever be permanently restrained from interfering with the Applicant's quiet possession of the Apartment on Land Reference Number 1870/IV/198.

e. That the Land Registrar, Nairobi be and is hereby directed to register as sole owner Apartment number 7, Block B, Royal Residency, Land Reference Number 1870/IV/189 in the Applicant's sole name.

f. Costs of this suit

g. Such other relief or further remedy and orders as this Honourable Court may deem fit to grant within the circumstances of this suit.

2. The OS was supported by an affidavit and supplementary affidavit both sworn by Dipti Fernandes on 4th March 2014 and 2nd December 2022 respectively. The Plaintiff stated that together with her ex-husband they purchased Apartment Number 7, Block B, Royal Residency an Apartment Complex on Land Reference Number 1870/IV/198 on Rhapta Road, Westlands herein after referred to as "the property".

3. The Plaintiff averred that in the year 2001 together with the ex-husband Mr. Jose Dhania Fernandes, moved into the property and since then she has been in continuous occupation of the same even after Mr. Jose moved out of the property in 2008 after facing matrimonial differences. She further explained that at the time of purchase, for convenience, they had instructed the developer's Advocate to draw out an agreement for sale and sub lease over the property in the Respondent's name whom Mr. Jose had introduced as a family friend and who he said was handling the management of his foreign accounts in the United Kingdom where she was based.

4. She contended that the Respondent handling their account in the United Kingdom, directly remitted their funds as the purchase price funds to the Developer's Advocates. That in June 2003, the Plaintiff, Mr. Jose and Respondent had agreed to register the property in joint names but the same did not materialize as differences arose.

5. She added that the Respondent at all times had been aware of her occupation of the property and rightly understood that she is the rightful owner. That she had been paying the outgoings such as Land Rent and Rates and all utility bills and had also served as Director in the management company known as Royal Residency Management Limited. The Applicant stated that the Respondent and the Interested Party acquired the property from its developers Huts and Homes Limited for a sum of UK Sterling Pounds 51,800 in 2001 which at the then prevailing exchange rate of Kshs.113.80 to the Pound translated to Kshs.5,850,000.00

6. She added that the Interested Party was employed in the Tourism and Hospitality industry while she worked with United States International University as well as offering consultancy services. That they ran joint accounts in and out of jurisdiction; Bank of Baroda, Pondicherry India; Barclays Bank, United Kingdom; Standard Chartered Bank Limited, Kenya; First National Finance Bank Limited, Kenya and Commercial Bank of Africa Kenya Limited, Kenya.

7. It is her averment that one of the relatives who held their funds was her uncle Jyotindra Amin whom they directed to make the repayment direct to the Respondent. Further, that the Interested Party also wrote to the Bank of Baroda, Pondicherry India requesting for uplifting of the fixed deposits held in their joint account and transfer the same to the Respondent. It is her averment that upon the consolidation of the funds, the Interested Party instructed the Respondent to wire the funds directly to the Developers' advocates M. A. Khan Advocates for the purchase of the suit property.

8. Lastly, the Applicant pleaded that she settled the utility bills of the property, paid for its improvements and attended to the repairs of any breakage. She also stated that she was not served with the Notice

to vacate and denied that the same was received by the Interested Party on her behalf. She urged the Court to grant her reliefs contained in the originating summons.

9. In opposition to the claim, the Respondent filed a replying affidavit on 18th October 2022 while the Interested Party filed a replying affidavit sworn on 21st October 2022. The Respondent deposed that she had known the Interested Party since the year 1970 and came to know the Applicant through him by virtue of them being man and wife upon their marriage in the year 1994. She added that the Interested Party being well known to her family, she entrusted him to secure a good property for her as an investment in Kenya. The process involved carrying out all processes such as due diligence, dealing with lawyers, and all other matter incidental to and related to the acquisition of the property on her behalf.

10. That it was an idea that they could jointly purchase the property but the idea never materialized due to lack of finances on the part of the Interested Party. She deposed to paying for the purchase of the property from her own finances and without the support of the Applicant or the Interested party.

11. The Respondent denied managing the Applicant's and ex husband's account stating that bank accounts cannot be managed by third parties but the actual account holders. She added that she loaned the Interested Party monies that has never been repaid and that the couple never contributed to the purchase of the suit property. She averred that she allowed them to occupy the property and the Interested Party carried all duties in relation to the property vide a formally executed power of attorney. She stated that she was issued with the receipt for the purchase price and a lease for the property was drawn in her name in the year 2007.

12. The Respondent contended that the Plaintiff moved into the property with her permission by virtue of being the wife to the Interested Party and on the agreement that they would eventually get a tenant for the property. She added that she was not worried about the Interested Party and his wife continued and long stay since she had allowed them to stay there out of her own free will and volition. Consequently, after she learnt of the couple's divorce she asserted her ownership of the property and issued a notice to the Interested Party and the Applicant to vacate. She asserted that since the lease to the property was registered in her name in the year 2009, the computation of time should start in 2009. She added that in 2014, this court issued a status quo order to be maintained in terms of occupation.

13. The Respondent contended that a claim for adverse possession cannot be maintained over an apartment existing as a sublease and is only applicable to land as defined in law which definition does not include an apartment owned under the *Sectional Properties Act* (now repealed). That in fact, the revisionary interest for the entire development therein was transferred to the management Company, Royal Residency Management limited from the registered developer, Huts and Homes Limited vide a transfer registered on 27th August 2009.

14. The Interested Party confirmed that he was married to the Plaintiff and that the Respondent was a family friend who had resided in Kenya before relocating to the United Kingdom. He affirmed that the Respondent was interested in purchasing the suit property and owing to the family history, friendship and trust gained over the years she donated a power of Attorney to him for purposes of purchase of the property. The suit property was transferred to her name in the year 2009.

15. He contended that at the time of purchasing the property, the Respondent allowed the Applicant and himself to occupy the house. He denied and that they had bought the same as their family home. According to him, any communication that he did to the vendor of the property or the lawyers was on the strength of the power of Attorney donated by the Respondent and that it was the Respondent who made all the payments for the purchase price.

16. The Interested party deposed further that after their marriage fall-out and having moved out of the property, the Applicant wrote an email to the Respondent in the year 2008 claiming the property. That the Respondent clarified the issue and gave a termination notice of three months for vacant surrender and proceeded to file a suit for eviction against the Applicant vide ELC NO.313 OF 2014 which suit was consolidated with the current suit. He contended that initially, the property was to be registered in the names of the three parties, (the Plaintiff, Respondent and himself) but the Respondent changed her mind as the Applicant and himself did not have money to purchase.

Oral evidence.

17. The Parties gave viva voce evidence `beginning on 13th April 2023 with the Plaintiff's testimony. She adopted the contents of her supporting and supplementary affidavits sworn on 4.3.2014 and 6.12.2022 respectively as her evidence in chief. She stated that she is asking the court to declare her as the owner of the property because she acquired it with her ex-husband.

18. On cross examination the Plaintiff confirmed that she has purchased a property before and was conversant with the process of purchasing of a property. She asserted that they took a loan from the Respondent for the purchase but conceded not annexing any document to prove payment she made for the purchase price of the suit property. That there is no communication to show that the property was purchased jointly with the Respondent. She was referred to annextures DF2 written in 1992 and 2nd December 1993; 4th July 1994 and 1999 which were communications done before the property was acquired.

19. The witness was also referred to her annexture DF3 (a letter forwarding a cheque for 12003 pounds) which does not state that the monies were for the purchase of the property. That the deposits were personal. She confirmed that DF4 (a cheque for 51800 pounds) was issued by the Respondent to the Advocate M.A Khan then acting for Royal Residence. She acknowledged that the email after the cheque confirmed the Respondent gave the I. Party a power of attorney. She admitted that DF5 indicates the Respondent as the buyer and Danny (I. Party) signing as caretaker/POA. She further conceded that the Respondent did not operate any account on her behalf or on behalf of her ex-husband.

20. Under further cross-exam, the Applicant agreed that there is no communication instructing the Respondent to pay any amount from her account and that the property was not included in the list of their matrimonial properties. She also admits the suit property was not included in the cause for division of the matrimonial property. She affirmed that she moved into the suit premises with her ex-husband in December 2001. That the suit property was formally registered into the Respondent's name on 28.08.2009 and the lease was signed by the Interested Party on behalf of the Respondent with the Power of Attorney number given. She filed this case the same year the Respondent brought a suit to evict her.

21. In cross-exam by Mrs Karanu learned counsel for the Interested Party, PW referred to paragraph 3 of her affidavit in support of the summons where she had deposed to purchasing the suit property jointly with her husband. That the account she referred to in her affidavit was held in WOOLICH Bank although she had not produced any supporting documents. According to her, the POA appeared after the divorce proceedings were filed. She also referred the court to an email annexed to her supplementary affidavit and dated 3.12.2001. That the sale agreement was signed on 18th December, 2001. She asserted that she objected to the agreement being signed in the name of the Respondent although she had no evidence to corroborate her objection.

22. The Plaintiff again says she did not object because the Interested Party told her it was in her best interests. She added that never vacated the house as demanded in the letter marked as DF5 in the I. Party's affidavit. She also denied receiving the vacation notice marked as SBA-9. That all along, the Respondent knew they were living in the suit house.

23. In re-exam, the Plaintiff stated that they got into the suit property in December 2001 where she still stays todate. It is her evidence that they held joint accounts with the I. Party in India and the UK such as in Bank of Baroda, Pondicherry in India. That in 1992, they met J. Amin (her maternal uncle) when they visited Pondicherry and they agreed to get a suitable house in UK where they would live. That page 18 of the supplementary affidavit confirms the cheque used for the purchase of the suit house originated from WOOLICH bank. That the lease was to be in their three names so that the I. Party does not disclose his income to Kenya Revenue Authority. This marked the close of the Plaintiff's case.

24. DW1 adopted her affidavit sworn on 18th October 2022 as evidence in chief. She also produced documents annexed to the said affidavit as exhibits in her defence. She averred that she gave the Applicant permission to stay in the property after purchase until they got an alternative residence.

25. On cross examination by Mr. Orina, learned counsel for the Applicant, the Respondent reiterated that the email dated 17.11.2001 addressed to her refers to a fixed deposit account and purchase price. That the Interested party approached her for investment in Kenya on a property but he later pulled out and she ended up purchasing the land by herself. She asserted that she always communicated with the I. Party and not the Applicant. She was referred to DF 2 and recognized it is in the hand writing of the Interested Party and in response to part two (2) of the said document, she insisted that she did not know of any account held by the Interested Party in the UK or any account by the Applicant. She also denied being given a P.O.A. to operate such an account.

26. The Respondent admitted that the Applicant and Danny moved into the suit property soon after purchase. She said she was sure of sending an email for permission to occupy although she did not produce a copy thereof. She confirmed that the lease for the property was registered on 27.8.2009 as entry number 26 while entry number 25 was made on 26th October 2004. She also admitted that since purchasing the property she had not returned to Kenya and has not settled any utility bill because it was an agreement that instead of paying rent, the Applicant and Interested Party would pay utility bills and keep the house in good order.

27. The Respondent asserted that as far as she was concerned, her advocates letter to the Applicant and the I. Party (SBA-8) was served on both of them. That the letter was sent to both of them because she believed they were living together. She denied that the I. Party was using her as a stooge and asserted that she paid for the purchase price alone.

28. In further cross-exam by Mrs Karanu for the I. Party, the Respondent said Mr. Danny was a long-time family friend who was treated like a son by her parents. She denied giving Danny any loan to purchase the suit property and stated that she had given him a POA to transact the purchase of the property on her behalf. After purchasing the apartment, she gave Danny and the Applicant permission to occupy the suit house. Later she gave them notice to vacate, the I. Party left but the Applicant has stayed on.

29. In re-exam, the witness said there was no link between DF2 and the suit property as it was made in 1992 but the house was purchased in 2001. She stated she was unaware of any legal requirement that she must visit the country where she invests. She denied manufacturing letters authored by her advocates. That the Applicant and the I. Party were to pay for the utility bills because they were not paying rent for the house. This is also marked the end of the Respondent's case.

30. The Interested Party also testified by adopting the contents of his Replying Affidavit as testimony and produced the documents annexed as his evidence. He stated that he had been given POA by the Respondent to purchase property and moved in the said property with the Applicant as husband and wife with the permission of the Respondent. The witness added that he did not make any contribution for the purchase of the suit property and did not have any claim to it affirming that it wholly belonged to the Respondent.

31. On cross examination the witness was shown DF10, a letter dated 9.6.2003 asking for the agreement to be amended to include the names of the three parties and in answer stated that he was hoping there would be a change in his financial status however that did not materialize. In answer to the document DF14, he said the invoices were addressed to him because it was their agreement that he pays the utilities. Further, that documents at pages 99-104 of the supplementary affidavit were addressed to him and the Applicant because they had agreed to improve the property and he paid for the costs.

32. In response to the letter DF7 issued by M. A. Khan, the Interested Party denied that the Applicant was a director of the management company as the officials of the management company were rotating. He denied conniving with the Respondent to deprive the Applicant her interest in the suit property. In re-examination, the witness in further responses to the letters from M.A. Khan said that being in the management company did not grant any ownership rights in the suit property to the Applicant.

Submissions.

33. The Applicant, Respondent and Interested Party filed their submissions dated 1st November 2023, 22nd November 2023 and 23rd November 2023.

34. The Applicant submitted that the Respondent's argument that she became legal proprietor and owner on registration on the 27th August, 2009 but a perusal of the Grant Number IR 88894 for the mother parcel Land Reference Number 1870/1V/198 on which the apartments were built and sub-leases granted indicate that the land was alienated for a term of 99 years with effect from 1st May, 2002 in favour of Huts & Homes Limited, the developer and by this date the Applicant had already moved into possession and occupation of the suit property in December, 2001.

35. She relied in the case of Kairu vs Gacheru (1988) KLR 297 at Page 302 paragraphs 15 to 40 and to page 302, where the Court of Appeal suggested that adverse possessory rights could in fact lie as against the previous owner of title, before the Respondent in the instant case being Huts & Homes Limited. That the Applicant's adverse possessory rights in fact run as against the previous owners prior to the Respondent's registration in August 2009 and the said registration did not therefore confer an indefeasible and absolute right of ownership, as the same was subject to the Applicant's possession by virtue of the provisions of Section 7 as read with Sections 37 (a) & 38 of the *Limitation of Actions Act*.

36. The Applicant stated that land as defined in the Registration of Titles Act is "...land and benefits that arise out of land or things embedded or rooted in the earth, or attached to what is embedded for the permanent beneficial enjoyment of that to which it is so attached, or permanently fastened to anything so embedded rooted or attached, or any estate or interest therein, together with all paths, passages, ways, waters, watercourse, liberties, privileges, easements, plantations and gardens thereon or thereunder lying or being, unless specifically excepted. That in reliance with the decision in Githu V Ndeete (1984) KLR 776 where the Court of Appeal held at Page 776 that a title by adverse possession can be acquired under the *Limitation of Actions Act* (or a part of a parcel of land to which the owner holds title to submit that the Applicant had adverse possessory rights over the property.

37. The Applicant stated that entry into the property in December 2001 was affirmed by both the Respondent and the Interested Party under cross-examination and she filed the instant suit on the 10th March, 2014 which is a period of roughly thirteen years two months from the date of entry. She added that the narrative by the Respondent and the Interested Party that her entry was permissive is not established by evidence.

38. She added that the Power of Attorney that both the Respondent and the Interested Party overly relied on to build the impression that the Interested Party had been acting on behalf of the Respondent was in fact perfected and registered in September 2005 which was well over 4 years from the suit property's acquisition and occupation in December 2001 and the lease was being perfected in October 2008.

39. The Applicant submitted that her possession of the suit property was open and undisturbed to the extent that she even became a director of the property's management company by virtue of her ownership of the suit property which fact was alluded to by the Vendor's lawyers in the letters dated 15th January 2004 and 9th August 2004. That further to evidence that she was the user of the property, settled utility bills and sketched up the design of the kitchen of the property and pursued further improvements on the same. The Applicant contended that the notices issued by the Respondent were received by the Interested party who had no claim on the property rather than the Applicant who has asserted her right of ownership of the same.

40. She submitted that as held in Githu V Ndeete (Supra) at Page 780 Paragraphs 1 to 10, that time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his right or when his right is admitted by adverse possession thus assertion occurs when the owner takes legal proceedings or makes an effective entry into the land and giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitations of Actions Act.

41. For the Respondent, it is submitted that the Applicant has failed to comply with the provisions of order 7 (2) of the Civil Procedure Rules, 2010 which requires that summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed hence this suit should be dismissed. She also submitted that claims for adverse possession are only applicable to and relate to land and in the current suit, the claim is directed towards ownership of an apartment unit which is within a sectional plan of a building. She explained that ownership of an apartment is two folds; a sectional title ownership through the registration of a sublease on the mother title registered and owned either by the developer or the management company; and secondly, through a share in the management company which share represents a single unit within the development.

42. She added that since the issue revolves around the ownership of a single share which share represents a single apartment in the said apartment block, then the dispute before court is not one for adverse possession, but one that involves ownership of shares representing the apartment in the corporation forming the management company. Since the management company is a separate and distinct legal entity where shares are in play cannot fall within a claim of adverse possession. She put it that this court lacks jurisdiction to determine the issue of ownership of shares which make up the apartments herewith as held in the management company.

43. In reliance to the case of Ravji Karsan Sanghani v Pamur Investment Limited [2021] eKLR and Ramco Investments Limited v Uni-Drive-In Theatre Limited [2014] eKLR the Respondent submitted that she gave permission to the Interested party to occupy the said premises and consequent to the permission, he moved in with his wife, the Applicant. Her evidence is confirmed by the Interested Party thus the Applicant never dispossessed the Respondent of her apartment as she lived on the premises with the express authority of the Respondent.

44. She also submitted that the Applicant having moved into the property and stayed in it as the wife of the Interested Party she could not be said to have had "exclusive" possession of the apartment and neither was her possession hostile or adverse to that of the Respondent. In support of this argument, she cited the case of Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184.

45. The Respondent added that it is not in dispute that the Interested Party held a power of Attorney donated by her and being a holder of a power of attorney grants the donee all the rights and powers of the donor. Thus, by the act of the Interested party and his wife occupying the apartment in question, it was in law as if the donor was in actual occupation. Further, that a claim for adverse possession cannot be argued together with a claim for ownership on account of an outright purchase. Hence, a claim for purchase of a suit property is not one that can be urged through an originating summons as is the case herein.

46. She continued in submitting that the continued stay of the Applicant in the suit property to this day is anchored on the orders of the court issued vide a ruling delivered on 31st March 2017 upon hearing both the Applicants Notice of Motion Application seeking orders of injunction against her. She urged the Court to dismiss the originating summons with costs.

47. The Interested Party submitted that the applicant does not qualify for ownership of the suit property by reason of adverse possession because the applicant does not meet the ingredients of adverse possession as set out in the law and well put in the case of Wambugu versus Niuguna (1983) KLR 173 and re- cited in the case of Muchambi Ndwiga and Ano. Versus Octavian Mwaniki Kariuki (2021) eKLR.

48. The Interested Party relied in the case of Gabriel Mbui versus Mukindia Maranya (1993) Eklr where the court made certain additional observations on the manner of occupation while discussing the conditions to be met before one can claim ownership by way of adverse possession to submit that the Applicant and Interested party entered into the premises with the consent of the Respondent. In that case, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;

    1) He must make physical entry and be in actual possession or occupancy of the land for the statutory period. 2) The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. 3) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied. 4) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi.

49. He submitted further that the Applicant ought to establish continuous, uninterrupted and unbroken possession for the statutory period but their occupation was interrupted by the Respondent when she gave them a three months' notice to vacate the property on 20th October, 2008 as evidenced by email correspondence between the parties dated 15th October,2008. Further, the Respondent issued a second demand notice to the Applicant to vacate the property on 10th January,2009 and a third demand notice was issued some time in 2013. Lastly, that at the time of filing of this suit, the property was registered in the name of the Respondent and she has not, at any point, been dispossessed of the same by the Applicant.

Analysis and Determination:

50. After reviewing of the pleadings; the evidence tendered and the written submissions rendered, the issues I frame for determination are twofold;

    a. whether the Plaintiff has proved that she entitled to the suit apartment ` by virtue of adverse possession.

    b. whether the Plaintiff is entitled to a share in the suit property as a purchaser

    c. what orders to make and who pays the costs of the suit

51. The claim for adverse possession is grounded in law under the provisions of section 7 of the *Limitation of Actions Act* and Order 37 rule 7 of the Civil Procedure Rules. Section 7 provides that;

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

52. Article 260 of *the Constitution* of Kenya 2010 defines land to includes....(e) the air space above the surface while Section 3 of The Registered *Land Act* defines land to includes land covered with water, all things growing on land and buildings and other things permanently affixed to land.

53. An interpretation of the given definition of land thus shows that a development on the land which include units of apartments fall under the definition of land as intended in the concept of adverse possession. Therefore, the suit herein falls under this court's jurisdiction as established under Article 162 (2)b of *the Constitution* and Section 13 of the *Environment and Land Court Act*.

54. It is trite that parties are bound by their pleadings (see the Supreme Court of Kenya in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR). In her pleadings the Applicant brought forth a claim for adverse possession over the property on the grounds that she has been in possession/ occupation of the same since the year 2001. In the same line she stated that she and the ex-husband had purchased the property through the Respondent using funds drawn from oversees accounts allegedly maintained on their behalf.

55. The burden of proof under the provisions of section 107 to 109 of the *Evidence Act* Cap 80 is at the doorstep of the Applicant/Plaintiff. In order to succeed in her claim of adverse possession she must satisfy the criteria stated in the case of Gabriel Mbui vs Mukindia Maranya supra and Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430. In the latter case, the Court held;

> " Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent, and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".

56. In the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR, the court of Appeal cited with approval the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001(Unreported), where the Court of Appeal delivered the following dictum:

> " ...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.

57. The starting point is to analyze the mode of Applicant's entry to the suit property for purposes of determining when time began to run against the Respondent. There is no dispute the three parties knew each other with the family friendship between the Respondent and the I. Party being in place before he married the Applicant. The Applicant was aware that the sale agreement dated 18th October 2001 was drawn in the name of the Respondent but still they got to enter into the suit premises. From her evidence, they got into the suit property on the basis that they bought it. She said that she inquired why the agreement was in the Respondent's name but was told by the I. Party that it was in her interests. She added that there was even an arrangement to have the lease in their joint names (Applicant, Respondent and Interested Party) to protect the I. Party from taxes due to Kenya Revenue Authority.

58. Thus, the Applicant's evidence was that their entry into the suit premises was on account of purchase. The burden now to be discharged was a demonstration to the Court when she discovered that her ownership rights as purchaser was nolonger the case and that her occupation turned hostile to that of the Respondent. The hostile occupation cannot be inferred as the Applicant must prove dispossessing the Respondent from the intention she wanted to use the house for. On the face of the documents produced between the period of December 2001 to August 2009, one reads that the conveyance transaction was still active before culminating in the registration of the lease in the Respondent's name.

59. For instance, the letter from M. A. Khan advocate dated 12.6. 2003 (annexed as DF6 in the Supplementary affidavit) requested for submission of the original sale agreement to enable the advocate revise it to read the three names as suggested. There is also produce a copy of the draft lease drawn in the names of the parties herein although it was never executed. The I. Party stated that the intention was to purchase a share in the suit property although it did not materialize because they (Applicant and I. Party) did not get the anticipated funds. The Applicant does not contradict this piece of evidence and if this was the intention of the parties by this time, how does their occupation become hostile to that of the Respondent?

60. The other limb that the Applicant had to prove was whether from the time the hostile occupation began, twelve (12) years had lapsed. Some of the copies of trails of the emails annexed in the supporting affidavit show that the Applicant's husband was acting on behalf of the Respondent. For instance, the email dated 21st November 2001 had remarks handwritten to Mr. Khan where the I. Party was explaining the difficulty the Respondent was having in securing a banker's draft for payment of the purchase price. The email dated 3rd December, 2001 from Sandra (Respondent) appointed the I. Party as her attorney. The email dated 1st Sept 2002 from the I. Party to the Respondent talking about converting some Can$ into Sterling pounds and credit her account; the email of 29th Sept 2004 by the I. Party stating that the developer did not have the letter confirming his having a Power of Attorney.

61. All these times of the exchanges of the emails, the Applicant and the I. Party's marriage was intact. Although the Applicant stated that she only became aware of the existence of the power of attorney during the divorce proceedings, the evidence on records show otherwise. She was aware the number of the power of attorney was recorded when the I. party signed the agreement and transfer documents in favour of the Respondent. In any event, absence of her knowledge does not invalidate the date when the power of attorney was issued going by the dates on the emails. By virtue of their marriage and the I. Party acting on behalf of the Respondent, how does time run against an authorized agent? I find that no sufficient evidence was led to show that her interest were exclusive to those of the I. Party before the divorce proceedings. Consequently, the claim for adverse possession had not matured.

62. As stated in the introduction of this determination, the Applicant's pleading and evidence seems to suggest that she wants the property not by virtue of adverse possession rather that they bought it. Yet,

a claim for ownership by purchase cannot be brought in the same suit with adverse possession because the latter assumes you recognize the title of the registered owner. In the case of Catherine Koriko & 3 Others v Evaline Rosa (2020)eKLR, the Court of Appeal held;

> " A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants' application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No 105 of 2010. I cannot be blind to this attempt and I decline to condone the same."

63. Further, in the case of Njue v Matiabe & 3 others (Environment & Land Case E050 & E010 of 2021 (Consolidated)) [2023] KEELC 17361 (KLR) (11 May 2023) (Judgment), Justice Oguttu Mboya discussed;

> " 100. My understanding of the Doctrine of adverse possession is that the claimant (the person contending to be in adverse possession) must first and foremost concede to, acknowledge and admit the title of the owner of the property which is in question. Indeed, the doctrine of adverse possession is hinged on the provisions of Section 7, 13, 17, 37 and 38 of the Limitations of Actions Act, Chapter 22 Laws of Kenya.
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> 101. However, in this respect, the Defendants themselves are contending that same are the lawful owners of the suit property save for the fraud, illegality and misrepresentation applied by the Plaintiff, culminating into the issuance of the certificate of title in his name.
>
> 102. In my humble view, the moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession."

64. Consequently, for insisting that the funds used to purchase the suit premises were from accounts operated on their behalf by the Respondent disentitles the Applicant from the relief of adverse possession.

65. Despite my observations in paragraphs 62-64 above, I take the liberty to consider whether the Plaintiff laid a valid claim of ownership by purchase. This is in line with the position taken in the case of Odd Jobs vs Sunday (1970) EA 476, it was held that "A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide."

66. The Applicant asserted that the suit property was purchased using funds from their foreign joint account that was operated by the Respondent. The Respondent denied the existence of such an account thus shifting the burden of proof to the Applicant. In a bid to demonstrate the existence of the joint account and or an account operated for Mr Danny by the Respondent, the Applicant produce several emails. For instance, the emails at pages 33 to 35 between the Respondent and the I. Party in 1995 and 1996 referring to payment of some funds. She also produced a copy of fixed deposit receipt

operated at Bank of Baroda dated 24.04.1997 in their joint names (Applicant and I. Party) at pages 50-54 and with Standard Chartered Bank at pages 56-58 of the supplementary affidavit.

67. But of more importance, the Applicant at pages 59 to 61 produced a statement of account from Woolich Building Society London held by the I. Party and dated 31st March 1992. There are many other banks transactions produced (pages 64-67 of supplementary affidavit) which indeed confirm that the I. Party held bank accounts in the United Kingdom. She has also produced documents to prove that they operated a joint bank accounts with the I. Party both locally and in the United Kingdom. The Applicant however did not produce any letter of authority issued to the Respondent to operate any of these accounts on their behalf or on behalf of the I. Party. The closest that looked like an authority was a letter dated 4th July 1994 (page 77 of sup. Affidavit)

68. The said letter read in part; "Sandra be assured that you have my full mandate to act or make a decision to safeguard both Dipti's and my interest in any financial transaction that we have requested on our behalf. After my death, I request you to assist Dipti with the same guidance which you have shown me over the years"

69. This letter does not make mention of any bank account operated although at paragraph three it referred to instructions to make some payments of 1000 UK pounds to J.S. Amin as of May 1994 until further instructions from either the Applicant or the I. Party. The correspondence at pages 78 to 87 1996-1999 were also specific for the purposes for which the monies were to be released/transferred to/by the Respondent. There is no mention that the Respondent withdrew them from an account held by the Applicant jointly or otherwise but the documents show a course of dealings undertaken by the Respondent on their behalf. The issue of purchase of the suit property had also not arisen and it is not mentioned in any of the correspondences produced by the Applicant

70. At pages 88 and 89 of the supplementary affidavit, the Applicant has produced a copy of instructions issued by the I. Party to the Bank of Baroda, Pondicherry Branch, India dated 23rd November, 2001. The Bank responded on 20th December 2001 thus;

> "We refer to your letter dated 1.12.2001 and our letters dated 1.12.2001 and 7.12.2001. As requested by you, we have closed the above fixed deposit and enclose a draft no. 097085 dt 18.12.2001 for 12,003 pounds favouring Ms Sandra Fernandes. Please acknowledge receipt. Yours faithfully, senior br Manager"

71. The I. Party while forwarding the bankers draft to the Respondent (at page 90) thanked her for helping him with the loan. Probably it is this kind of transactions that the Applicant wants the court to draw an inference that monies used to pay for the suit house was not from the Respondent's funds. Furthermore, the funds in this draft was only 12003 pounds which is way below the cost of the suit property and no there is no additional evidence that indicated the balance if at all was paid by the Applicant or the I. Party. The Applicant went further to produce letters drawn by I. Party instructing the developer's advocate to change the agreement to read the three names of the parties herein which was not executed hence it remains a draft. On this bundle, the Applicant also produced summaries of improvements they undertook on the house which improvements the I. Party did not deny but he added that he is the one who paid for them.

72. Although the Applicant has gone to great length to lay a basis to show that the Respondent did several transactions on behalf of the I. Party even before the purchase of the suit property. The recent of such dealings was the banker's draft done in December 2001 and a few days' after payment of the Purchase price and the I. Party was thanking the Respondent for helping with the loan. Despite the proximity in these two transactions, and the I. Party having denied any stake in the suit premises, this court is

prohibited by law to assign any stakes to him or to infer that the loan referred to in the note at page 90 was monies used to purchase the suit premises. There is nothing to create any form of trust (resultant or constructive) as between the Applicant and the Respondent.

73. Further, the correspondences and the transactions were pretty much between the I. Party and the Respondent. The Correspondences and dealings between the two started even before the I. Party got married to the Applicant so that one cannot safely conclude that the Respondent connived with the ex-husband to defraud her of the suit property. Other than the Respondent, the documents presented by the Applicant also show some financial dealings between the I. Party and JYO Amin and the Respondent. Each time, the letters would give details of the specific instructions.

74. In so far as the purchase of the suit premises are concerned, the only agreement executed is between the Respondent and the Developer. The receipt for payment for the purchase price was issued in the name of the Respondent by the M.A. Khan advocate who acted for the vendor in the transaction. The title documents are registered in the name of the Respondent. It is this court's opinion and I so hold that where there is an agreement in writing, the Courts cannot rewrite a contract based on conduct of a party. Onguto J in the case of Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR cited the very relevant words of Steyn LJ in G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyds Rep 25 thus:

> "...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See Brogden –v- Metropolitan Railway [1877] 2 AC 666; New Zealand Shipping Co Ltd v A M Satterthwaite & Co. Ltd. [1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; Gibson v. Manchester City Council [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See British Bank for Foreign Trade Ltd. v. Novinex [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See Trollope & Colls Ltd. v. Atomic Power Constructions Ltd. [1963] 1 WLR 333."

75. The case law cited above takes the proposition inter alia that the transaction once performed on both sides will often make it unrealistic to argue that there was no intention to enter into such legal

relations. No wonder, the law imposes a heavy burden on the Applicant that to cancel the rights of the Respondent as a registered owner, she ought to have satisfied the provisions of section 26 (1) of the *Land Registration Act* No 3 of 2012 (previously section 143 of the Registered *Land Act* cap 300 repealed). Section 26(1) provides that;

> "(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party"

76. Order 2 of the Civil Procedure Rules also requires that particulars of fraud must be pleaded in a suit where fraud is alleged. In this case, there were no allegations of fraud or illegality pleaded against the Respondent and none has been proved. It is my holding that carrying out improvements on and or paying utility bills towards the house did not confer any ownership rights to the Applicant. Consequently, having found that the claim under the doctrine of adverse possession was not proved, I find no basis to deny the Respondent her rights over the suit property. There is also no sufficient evidence of fraud/connivance adduced to vitiate the Respondent's title being apartment no 7 on L.R No. 1870/IV/198. The reliefs sought by the Applicant are unavailable to her and the result is that her suit is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024

A. OMOLLO

JUDGE