



**Thuo Commercial Agencies Limited v Nakuru Workers Housing Co-operative Society Limited  
(Environment & Land Case 558 of 2013) [2024] KEELC 1329 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1329 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 558 OF 2013  
A OMBWAYO, J  
MARCH 14, 2024**

**BETWEEN**  
**THUO COMMERCIAL AGENCIES LIMITED ..... PLAINTIFF**  
**AND**  
**NAKURU WORKERS HOUSING CO-OPERATIVE SOCIETY  
LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit vide an amended Plaint dated 4<sup>th</sup> February, 2022 against the Defendant seeking the following orders:
  - a. A declaration that the Defendant breached the sale agreement.
  - b. A declaration that the Defendant is not entitled to an order of specific performance.
  - c. An order of eviction against the Defendant and its members to vacate the suit property and give vacant possession to the Plaintiff.
  - d. Mesne profits from the date the Defendant took possession to the time vacant possession is given back to the Plaintiff and an order of inquiry into the mesne profits due to the Plaintiff.
  - e. Costs of this suit and interests thereon.
  - f. A permanent injunction restraining the Defendant whether by itself or its agents, servants, members, associates or otherwise howsoever from remaining on or continuing in occupation of the suit property.
  - g. The OCS Nakuru Police Station to ensure compliance with the orders of this court.
  - h. Any other relief as this honorable court may deem fit to grant.



2. The Defendant filed its Further Amended Defence and Further Amended Counter claim dated 8<sup>th</sup> February, 2022. It sought for the following orders in its counter claim:
  - a. Declaration An order of specific performance directing the Plaintiff (now Defendant) to transfer the suit 63 Acres (now known as Land Reference Number 6282/21) already excised from the parcel of land known as Land Reference Number 6282/1 in favour of the Defendant.
  - b. In The Alternative a declaration that the Defendant (now the Plaintiff) is the owner of the 63 acres of all that parcel of land known as Land Reference Number 6282/1 under the doctrine of adverse possession.
  - c. The Plaintiff (now the Defendant) be ordered to execute all the requisite documents towards transfer of the 63 acres occupied by the Defendant (now Plaintiff) out of all that parcel of land known as Land Reference Number 6282/1.
  - d. Costs of the Counterclaim
  - e. Orders of permanent injunction restraining the Defendant whether by themselves, their servants and or agents from in whatsoever manner interfering with the Plaintiff's quiet enjoyment of the occupied 63 acres (the suit land) out of all that parcel of land known as Land Reference Number 6282/1.
  - f. Interest on (b) at court rates
  - g. Any other relief this Honorable Court deems fit and just to grant.

### **Plaintiffs' Case**

3. Maina Ndua testified as PW1 director of Thuo Commercial Agencies Ltd. His statement dated 8<sup>th</sup> February 2022, bundle of documents dated 9<sup>th</sup> October 2013 filed on 13<sup>th</sup> October 2013 (PEX 1-25) and a supplementary list of documents dated 4<sup>th</sup> February 2022 filed on 8<sup>th</sup> February 2022 was adopted as his evidence in chief. He testified that David Thuo was his late father who was a director of the Plaintiffs company. He testified that the Defendant has not occupied the entire acres as they claim but only a portion measuring 15 or 20 acres.
4. It was his testimony that the Defendant and his deceased father had entered into a written agreement for the purchase 63 acres but the same was not honored. He testified that Kenya Airports Authority had lodged a caveat against the title as per PEX28. That the Defendant had not completed payment for the land as agreed.
5. Upon cross examination, PW1 confirmed that his ID No. was 21518563 and that he became a director of the company when his father started ailing.
6. He further confirmed to have visited the subject land severally and admitted that the Defendant occupies about 15-20 acres. He further admitted that he had not taken any measurement. He stated that some of the people had put a permanent structure on the land and fenced.
7. He admitted that there was a church on the land but no borehole. He confirmed that out of the 100 acres, his father had wanted to sell 37 acres to Catholic Dioceses but the sale was not completed due to the caveat by KAA. He further confirmed that there is an ongoing case at Nakuru ELC with KAA.
8. PW1 was referred to paragraph 10 of his witness statement where he confirmed that the caveat by KAA was one of the factors that frustrated the transaction. He added that the sale was entered into in 1990 and that the caveat was lodged in 2015. He confirmed that a survey was done and the portion of 63



acres delineated. He stated that the Defendants did not fully pay for the land resulting to the non-completion of the sale agreement. He added that the company had not received any money from the Defendant

9. PW1 was also referred to page 59 of the Defendant's bundle where he affirmed that the letter dated 2<sup>nd</sup> May 1990 was from the Plaintiff acknowledging a cheque for Kshs500,000/=. He stated that the full purchase price was Kshs 2,646,000/= as per the agreement and that there was a clause that spelt the mode of payment.
10. He further stated that the said letter had suggested other payments other than the Kshs500,000/= paid. He added that SL Muhia advocate was the advocate for both parties.
11. PW1 was further referred to page 77 of the Defendants' bundle a letter dated 11<sup>th</sup> July 1990 where he stated that the advocate was confirming that he had instructions to pay Kshs600,000/= upon compliance with the terms of the agreement as per letter of 9<sup>th</sup> May 1990 at page 60.
12. PW1 was referred to letter a dated 31<sup>st</sup> May 1990 at page 76 defendants bundle where he confirmed that the completion never occurred. He stated that the surveyor had released the deed plan for 63 acres to the wrong party which brought about many issues.
13. The witness was further referred to a letter dated 30<sup>th</sup> August 1996 from the 1<sup>st</sup> Defendant's bundle at page 66 where he affirmed that his father wrote to commissioner of lands to give fund approval for subdivision. He added that as per letter of 28<sup>th</sup> August 1996 by commissioner of Lands page 65- the conditional approval for subdivision was issued. He stated that a balance of Kshs1.7 million was not paid.
14. On re-examination, he stated that they have an ongoing case with KAA respecting the suit land. He further stated that his father vide a letter dated 2<sup>nd</sup> May 1990 was categorical that there was to be no possession until the full purchase price was paid. He added that when the deed plan was collected from the surveyor they reported to the police.
15. PW1 was recalled for further cross examination where he referred to PEX 29 and stated that the case ELC 340 does not have Nakuru Workers. He added that Page 73 of the Defendant's trial bundle is the affidavit while the Deed plan No. 273124 is in respect to L.R No.6282/421 which is 63 acres.
16. He stated that the deed plan is at page 55 and that the affidavit refers to the Plaintiff's deed plans. He further stated that the other deed plan is No.273125 at page 81 which is 37 acres in respect of L.R 6282/22. 6282/1. He stated that the deed plans were genuine and in respect of LR.6281/1. He further stated that 6282/1 was consolidated with another property which is 200. He also stated that he was aware of the claim by Kenya Airport Authority which is claiming 3000 acres. He further stated that LR No. 4731/1 and L.R No. 6282/1 are separate and that workers are not claiming 4731/1. He confirmed that advocate Muhia never released any funds to the company and added that he was the advocate for both workers. He stated that he had delinked his association with Muga but not in writing.
17. Upon re-examination, he stated that Property number 6282/1 existed and that he has the title as produced in court. He added that there is a caveat by KAA on L.R No. 6282/1 in 100 acres.
18. In conclusion he stated that the case filed by KAA was 152/2016 in respect of 4731/1 and that the case is 340 of 2016 which revolves around L.R No. 6282/1.

This marked the close of the Plaintiff's case.



## Defendant's Case

19. John Mwangi testified as DW1. He produced his written statement which was adopted as his evidence in chief. He testified that he lives at 6282/21 parcel number 201 and that he is a member and shareholder of Nakuru Workers Housing Co-operative Society. He testified that he has the authority as shown in page 134 (PEX 1).
20. He testified that they have the sale agreement at page 32- 54 for the sale of 63 acres which was to be excised from LR No.6282/1. He further testified that the purchase price was 2,646,000 and that the advocate for the vendor was H. Muya advocate. He testified that they paid the entire purchase price which money was to be paid through HSM Muya advocate. He produced the agreement as DEX2. He further produced a payment receipt dated 8/6/1990 being a deposit of 700,000 (DEX3) which the Plaintiff acknowledged.
21. He testified that there was a correction on the balance which lawyer corrected (DEX5). He testified that the Plaintiff never responded to the letter dated 2<sup>nd</sup> May 1990. He further testified that Deed plan number 273124 referred to L.R No.6282/21 while 273125 referred to 6282/22. He testified that he has a certificate copy of the deed plan number 273124 (DEX 7). He added that the land is 63 acres which he had proposed subdivision of LR 6282/1 into the portion of 25.5 Ha and 14.97Ha (DEX8).
22. He further testified that he has a deed plan for surrender of 6282/22 (DEX 9) and a letter dated 28<sup>th</sup> August 1996 in respect of the consent (DEX10) which the Plaintiff responded to (DEX 11).
23. He further testified that their advocate requested for the documents so that they could pay (DEX12) but the same were not given. He added that Page 91 is the Kenya Gazette for acquisition while Page 92 is the notice (DEX 13). DW1 testified that the land was registered in the name of Waka Ltd. Pages 94-131 shows external development of social amenities such as church and a county borehole which has been in operation for the last 9 years which photos were produced as (DEX 14).
24. DW1 testified that they have the proposed regulations of subdivision of 424 portions of LR No.6282/21 where pages 30-31 refer to proposed regulations DEX 15 9(a) and 15(b). He testified that they came to learn that the Plaintiff had not collected the 600,000/= nor was it collected from Muhia by the Plaintiff's agencies. Instead, he stated that the money left their hands to Muhia and they are yet to be refunded any money.
25. He further testified that they occupied the land in 1992 and that they have no interest in the 37 acres. He added that the entire 63 acres is occupied and that they are in occupation of 6282/21 while the airport occupies 6282/22.
26. He stated that page 133 is a caveat on KAA Land Number 23166,6282/22. He further stated that there was no land relevant to the case in the caveat entered 6282/22 is 37 acres (DEX 16). He testified that Wahome Weruhia a surveyor had informed the court that if paid 600,000 he would sign the documents. He urged the court to dismiss the instant suit and that their defence and counter claim be upheld. He also sought for specific performance as 14 lives had been lost due to non-performance and pendency of this case.
27. On cross examination, DW1 confirmed that he was a member of the Defendant with a share certificate. He admitted that he did not have the share certificate in court. He stated that he had a letter from the Society confirming his membership as the secretary of the group. He added that he joined the Defendant in 13<sup>th</sup> November 1989. He confirmed that he did not sign the agreement as an individual. He further confirmed that he bought the land from the Plaintiff and not David Thuo.



28. He stated that page 54 shows only one signature and that the signature for both the purchaser and the vendor is not visible. He added that Ba on DEX 3 did not mean balance as they had paid the entire purchase price. He stated that the money was received from the Defendant.
29. He further stated that they were not allowed to subdivide the land. He also stated that on 6<sup>th</sup> December 1990 he had not taken possession but that they took possession in March 1992. He stated that the Plaintiff did not allow them to take possession but that they took possession as per the agreement. That lawyer of both parties advised them to proceed and subdivide. He stated that he occupies plot number 201.
30. DW1 was referred to PEX27 where he confirmed that the same was a caveat on 6282/1 dated 11<sup>th</sup> August 2015. He added that there was a caveat placed on KAA. That the Plaintiff's title has not been cancelled and that the deed plan was for surrender.
31. Upon reexamination, he stated that his share certificate was in the office. He further stated that he took the company in 1989. He stated that page 59 was signed by David Thuo and confirmed that he had not witnessed the paying of money. He added that they occupied the land after paying the purchase price and that David had not collected the last instalment from the advocate.
32. Silvester Mwangi Muhia testified as DW2. His statement at pages 47-48 was adopted as his evidence in chief. He testified that he is an advocate at S.L Muhia & Company Advocates. He testified that he had prepared the sale agreement and that the Director of the Plaintiff company came with the Defendant. He testified that he did the agreement and that he was acting for both parties.
33. He further testified that he paid Ksh.1,100,000 to HHM which monies was to be paid to the Plaintiff. He added that at page 59 he was asking for Ksh700,000 but stated that the remaining balance was 600,000 instead.
34. He testified that DEX 3 showed that he was given the balance and that the completion date was 8/6/1990 thus the final payment. He testified that the Plaintiff did not bring all necessary documents and did not respond to his letter on page 76. He stated that the survey was done late. He further stated that he is ready to comply with the agreement once the documents are brought.
35. On cross examination, DW2 stated that one of the director's had refused to sign the agreement. He stated that the directors were Thuo and his wife and that his wife did not sign the agreement. He further stated that Thuo was paid Kshs3000 for the agreement and Five hundred thousand for the suit property
36. DW2 referred to Page 59 A – where he confirmed that he had a balance of Kshs 600,000. He added that there was no agreement to enter and that people had paid their money but the seller was ran away with the money and did not want to surrender the land to the Defendant. He stated that the sale agreement did not allow subdivision before payment of the full purchase price. He added that the balance has never been paid.
37. Upon reexamination, he stated that many left to the Defendants for Thuo to be paid but he declined. He stated that he was not the block for failure as Mr. Thuo never complained against Githua.
38. Gibson Wahome Werugia testified as DW3. His statement dated 18<sup>th</sup> October 2021 and documents filed on 19/9/2023 was adopted as his evidence in chief. He testified that he is a surveyor and that he had done a survey for the Defendant in Lanet Area near the airport. He testified that the land was L.R number 6282/1 with an acreage of 100 acres equivalent to 40.47 Ha. He further testified that the Defendant was present and that one portion measuring 37 acres was for the KAA having been compulsorily acquired. He added that he was dealing with Mr David Thuo.



39. DW3 was shown (DEX 8) where he stated that the same was a PDP he had prepared after being instructed by Mr David Thuo. He stated that the same shows an area of 14.97Ha and 25.51Ha. He also testified that page 55 was a deed plan produced as (DEX7) which represented LR No.6282/21. He further stated that the other Deed Plan that existed was for LR 6282/22 DEX9. He testified that the surrender meant that the land was to be surrendered to the government. That page 92 being the Kenya Gazette Notice (DEX13)
40. It was his testimony that the parcel of land was to be acquired for Nakuru Civilian Airport and that the holder of the title was to register the deed plan at the land's office. He testified that the deed title was never surrendered and that the letter dated 15<sup>th</sup> February 1990 was approved for deed (DEX 17). He produced documents as follows: DEX10 being the final agreement by Commission of lands, DEX 11, Mr Thuo acceptance. Page 73, an affidavit by Maina Ndua, Page. 70 his letter dated 3<sup>rd</sup> May 2019 DEX 18, Page 71 their letter dated 31<sup>st</sup> May 2019 by Director of Surveys DEX1 and page 70 his letter to SLM Muhia DEX 20.
41. He stated that S.L.M Muhia was the lawyer for Thuo where he charged Ksh.11,000. He testified that he had released the documents to Makokha DEX 21.
42. DW3 was shown DEX 15(a) and 159(b) where he stated that it was a section for the plan for approval and that 14 was for subdivision into 424 portions.
43. Upon cross examination, he confirmed that he did not have a license and certificate with him. He confirmed that his ID was commissioned by the Plaintiff. He added that there was no letter of appointment. He further confirmed that the land was 100 acres and he was to excise 37 acres for the airport. He admitted that he did not have the original deed Plans as the same had disappeared with Mr Makokha.
44. He stated that at page 55, the deed plan was dated 9/11/2018 issued on 20<sup>th</sup> November 2018 and that the caveat referred to 6282/1. He added that on 11<sup>th</sup> August 2015 there was a caveat on the entire 100 acres and that the Deed Plan was issued on 9<sup>th</sup> November 2018, 3 years after the caveat.
45. He stated that the deed plan has not been registered in the title as a caveat was placed due to acquisition. He further stated that the caveat was to protect government's interest. He further stated that for the caveat to be recorded, it was necessary that the 2 deed plans ought to be shown especially the one for the surrender to the Government of Kenya for KAA.
46. He stated that he was not aware of the outcome of the compulsory Acquisition but confirmed that the government acquired the portions. He further confirmed that there was no deed plan for the airport and that he was to remove the 37 acres for the airport.
47. He stated that on the ground the 37 acres were acquired and his fees was paid by the Defendants.
48. On reexamination, he stated that he was a licensed surveyor and that his documents were at home. He added that when he did the subdivision, the caveat was not there. That marked the close of the Defence case.

### **Submissions**

49. The Plaintiff filed its submissions dated 30<sup>th</sup> November, 2023 on 4<sup>th</sup> December, 2023. It submitted that there was no valid sale agreement between the parties. It submitted that the agreement had only been signed by one director on behalf of the Plaintiff. It stated that there was breach of the sale agreement by the Defendant for failure to pay the balance of Kshs.416,000. The Plaintiff further



- submitted that resulted in breach of the agreement by the Defendant was the subdivision of the suit property.
50. It submitted that the effect of the breach of the sale agreement by the Defendant resulted in it being discharged from the contract. The Plaintiff relied on the case of *Hitenkumar Amritlal v City Council of Nairobi* [1992] eKLR and submitted that the Defendant's claim of specific performance cannot issue since the Defendant breached the contract. The Plaintiff urged the court to grant it the orders as sought in its amended plaint.
  51. It relied on the case of *Nonny Gathoni Njenga & another v Catherine Masitsa & another* [2014] eKLR and submitted that the photographs taken at pages 93 to 131 of the Defendant's bundle are inadmissible. The Plaintiff argued that the court had not done a site visit to the suit property. It also argued that the photos ought to have been produced by the person who took them so as to verify their authenticity.
  52. It further submitted that the Defendant's claim of adverse possession lacks merit as it had purported to have taken possession of the suit property vide the sale agreement. The Plaintiff cited the case of *Sospeter Wanyoike v Waithaka Kahiri* [1979] eKLR. In conclusion, the Plaintiff urged the court to allow its claim and dismiss the Defendant's counterclaim with costs.
  53. The Defendant filed its submissions dated 23<sup>rd</sup> November, 2023 on the same day where it gave a background summary of the case. It argued that the Plaintiff did not place any material before the court to prove that the Managing Director's signature was insufficient or that the sale agreement was defective.
  54. It submitted that there was no justification for any caveat by Kenya Airports on the subdivision of the suit property that had been purchased by the Defendant. The Defendant argued that there was evidence of several letters it wrote to the Plaintiff to collect the balance of the purchase price which the Plaintiff never responded to. It further submitted that whereas it performed its part of the bargain on the agreement, the Plaintiff in breach of the same failed to deliver the completion documents, execute the transfer forms and collect the balance of the purchase price from the Defendant.
  55. It was the Defendant's submission that this court finds that the above actions by the Plaintiff was frustration and breach of the contract by the Plaintiff. It submitted that the said actions caused it to proceed with realization of its objective which was to buy the land, occupy, subdivide and allocate to their members. The Defendant relied on Section 107 of the *Evidence Act* and submitted that the Plaintiff failed to discharge its burden of proof to the required standard.
  56. It further relied on Section 120 of the said Act and argued that the Plaintiff never took any action against the Defendant until 2003 a period in excess of 22 years. The Defendant cited the Court of Appeal case of *Katiwa Kanguli v Bamburi Cement Limited* [2015] eKLR and submitted that by the Plaintiff's actions, it would be unconscionable to permit the Plaintiff to renege from the representation vide the instant suit after inordinate delay.
  57. The Defendant relied on the case of *Akuisi Farmers Company Limited v Robert Ndiritu Gitonga* (2019) eKLR and Section 34 and 35 of the Company Act. It submitted that failure to affix the company seal on the signed agreement by the Managing Director does not render the contract invalid. In conclusion, the Defendant relied on Section 4(1) of the *Limitation of Actions Act* and submitted that the Plaintiff's suit is time barred as it was brought in excess of 23 years.



## Analysis and Determination

58. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:
- a. Whether there was breach of the sale agreement dated 6<sup>th</sup> March, 1990.
  - b. Whether the suit is time barred
  - c. Whether the Defendant is entitled to an order of specific performance directing the Plaintiff to transfer the suit property in its favour.
  - d. Whether the defendants are in adverse possession of the property.
  - e. Who should bear the costs of this suit?
59. It is not in dispute that both parties entered into a sale agreement on 6<sup>th</sup> March, 1990 for sale of the suit property. The timelines for payment and completion of sale transaction were expressly set under paragraph 1 on the special conditions in the sale agreement. The purchase price was Kshs.2,646,000 and the Defendant paid Kshs. 1,100,000 upon execution of the agreement and a further Kshs. 500,000 and Kshs.30,000 as evidenced from the receipts produced.
60. The Plaintiff wrote a letter dated 2<sup>nd</sup> May, 1990 (DEX4) confirming that the remaining balance was Kshs.700,000. However, the Defendant produced a letter dated 9<sup>th</sup> May, 1990 from the advocate addressed to the Plaintiff clarifying that the remaining balance was Kshs.600,000. The said letter was never responded to by the Plaintiff. DW1 testified that the balance of Kshs.600,000 was to be paid once the transfer of ownership was done.
61. According to the Defendant's Amended Defence and Counterclaim, under paragraph 8 he averred that the purchase price has been paid in excess of  $\frac{3}{4}$ . This confirms that there was still some balance remaining on the purchase price.
62. I have perused the sale agreement and it is clear that the completion date was 8<sup>th</sup> June, 1990. Despite there being a disparity on the remaining balance, it is not in dispute that in line with paragraph 1 (c) of the sale agreement, the balance of Kshs.600,000 was to be paid on 8<sup>th</sup> June, 1990 which the Defendant failed to do so.
63. DW1 testified that their advocate had requested for the completion documents so that they could pay the balance of the purchase price (DEX12) but the same were not released. It is noteworthy that the sale agreement did not provide that the balance of the purchase price was to be paid upon a party meeting certain condition. The agreement clearly stipulated that time was of the essence thus the completion date was on 8<sup>th</sup> June, 1990. DW2 further testified that the balance of the purchase price had never been completed but that he was ready to comply with the agreement once he was issued with the completion documents.
64. In the Court of Appeal case of National Bank of Kenya Ltd v Pipeplastic Sunkolit (K) Ltd & another [2003] 2 E.A 503 held as follows:
- “ a court of law cannot rewrite a contract between the parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
65. Further the case of Mwitia & another v Lydia Mburugu (Suing as the Legal Representative of the Estate of the Late Daniel Mathiu Mbiti) & another (Environment and Land Appeal E022 of 2021) [2022]



Justice Nzili in allowing the appeal cited the case of William Kazungu Karisa v Cosmas Angore Cnzera [2006] eKLR, where it was held as follows:

“...the basic rule of law of contract is that parties must perform their respective obligations in accordance with terms and conditions of the contract executed by them and an agreement could only be amended or varied by the consent of the parties.”

66. It is not in dispute that Clause 1 of the sale agreement was specific on the timelines and mode of payment of the purchase price. This court is of the view that timelines on the payment of the purchase price had already been agreed upon at the signing of the agreement. DW1 could therefore not claim that it was ready and willing to pay the balance of Kshs. 600,000 upon the Plaintiff meeting certain conditions. This clearly meant that the Defendant did not fulfil its part of the contract obligation to wit payment of the balance of the purchase price on the completion date.

67. In the case of Sisto Wambugu v Kamau Njuguna [1983] eKLR the court held that:

“...contracts for sale of land gives the vendor the right to rescind the sale if the purchaser does not pay on the appointed day after giving a reasonable notice to the defaulting party making time of essence.”

68. In the instant case, the Defendant having failed to pay the balance within the stipulated completion date, the Plaintiff had the right to rescind the sale agreement. From the foregoing, I find that the Defendant breached the terms of the contract.

69. On the second issue, that is whether the plaintiff's suit is time barred, I do find that the defendant was given permission to enter the property vide a sale agreement and time started running when the permission was withdrawn and this appears to be envisaged in the letter dated 23<sup>rd</sup> April 2010 by Collins Ochieng on behalf of Nakuru Workers Housing Co-Operative society addressed to the plaintiff where the plaintiff is said to have announced at the chiefs baraza that the defendants were occupying the land illegally. The tone of the letter is evidence that the dispute was still live and that the society recognized that the plaintiff was the seller of the disputed parcel of land measuring 63 acres on which 420 members were settled. The society was looking forward to resolving the dispute. This letter was an acknowledgment that the dispute was live and not stale and therefore by this date the cause of action had not accrued. and therefore the limitation time had not started running on that date. The relevant section is 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya that provide as follows:-

“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.”

70. In the case of Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] e KLR, it was held as follows;

“Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaintiff) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1<sup>st</sup> Defendants, but only if he did so within twelve years after the Sale Agreement.”



71. The purpose of the Law of Limitation was stated in the case of *Mehta v Shah* [1965] E.A 321, as follows;
- “The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”
72. In *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, the Court of Appeal held as follows;
- “...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
73. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought.
74. In the case of *Iga v Makerere University* [1972] EA, the Court had this to say on the Law of Limitation;
- “A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”
75. Essentially therefore, the Plaintiffs’ suit having been filed on 10<sup>th</sup> October 2013 and on the 23<sup>rd</sup> of October 2010 the limitation period had not started running the suit was not filed out of time.
76. Going to the third issue for determination that is whether the defendant is entitled to the order of specific performance, the Defendant is seeking for an order of specific performance directing the Plaintiff to transfer the suit property to it. In the ELC Appeal case of *Gilbert Kimani Nyumu v Gideon Kipkoeh Kiptisia* [2019] eKLR J. M.A Odeny in dismissing the appeal relied on the case of *In Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* [2006] eKLR, where the court stated that:-
- “Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles”
- “The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”
77. Having already established that terms of the said contract had not been fulfilled, then specific performance would not be ordered. The term of the contract in contention is the payment of the balance of the purchase price as well as the subdivision on the suit property. It is not in dispute that the



Defendant took possession of the suit property and did subdivision before completion of the purchase price. Both DW1 and DW2 testimonies confirmed the same. DW2 upon cross examination admitted that the sale agreement did not allow subdivision before payment of the full purchase price.

78. DW2 confirmed that subdivision was done at a later stage. In addition, DW3 testified that he surveyed the suit land upon instructions from the Plaintiff. However, upon cross examination, he admitted that he did not have a license certificate. This court finds that the said subdivisions on the suit property were therefore unlawfully done. This was contrary to the sale agreement since the balance of the purchase price had not been completed.
79. This court finds that the Defendant is not entitled to an order of specific performance since it breached the terms of the contract being payment of the balance of the purchase price as well as the illegal subdivision to its members.
80. On the issue as to whether the doctrine of adverse possession applies, it is not in dispute that the sale agreement under paragraph 4 expressly provided as follows:

“The Purchaser may take possession on signing of the agreement to the extent only that it may hold its meetings on the land but they cannot subdivide the land to their members until the purchase price is paid in full.”

81. The import of the above is that the defendants were given permission to occupy the land only for meetings pending their payment of the balance of the purchase price but they went ahead to subdivide the land and constructed buildings in breach of the permission and therefore it cannot be said that they were in adverse possession because the owner did permit them to take possession.
82. Claims under adverse possession are set out in several provisions of the *Limitation of Actions Act*. Section 7 places a bar on actions to recover land after 12 years from the date on which the right accrued. Section 13 provides adverse possession as the exception to this limitation:

- “(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Finally, Section 38 of the Act provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of



those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

83. The principle of adverse possession was more elaborately set out in the case of *Wambugu v Njuguna* [1983] KLR 172, where the Court held that:

“In order to acquire by the Statute of Limitations, title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

84. This right to be adverse to land does not automatically accrue, unless the person in who’s this right has accrued takes action. Section 38 of the *Limitation of Actions Act* gives authority to the claimant to apply to Court for orders of adverse possession.

85. The Court in *Malindi App No. 56 of 2014:- Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR held:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

86. Further, in the case of *Mbira v Gachuhi* [2002] 1 EALR 137: the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

87. Therefore, to determine whether the Plaintiff’s rights accrued, the Court will seek to answer the following; -

- i. How did the Plaintiff take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of her possession and occupation?
- iv. How long has the Plaintiff been in possession?



88. In *Public Trustee v Wanduru Ndegwa* [1984] Eklr the Court of Appeal as per the holding of Kneller J.A arrived at the position that a vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays the deposit for it. The vendor retains a lien on it for the balance of the purchase price which disappears when it is paid and the purchaser becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession. The limitation period will begin to run from the date of payment in full or last instalment. In the case before me the defendants did not pay the whole purchase price the and therefore the limitation period did not run. The upshot this of the above is that the defendants do not satisfy the principle of adverse possession though she has been in possession of the land for a period of 23 years before the filing of the suit but it has been in breach of the agreement of sale by non-payment of full purchase price. The principle of adverse Possession does not apply because the defendant had not made the last payment. The Defendant's counterclaim therefore fails and is dismissed with costs. On the other hand the plaintiff has proved on the balance of probabilities that the defendant is in breach of the terms of the agreement consequently judgment is entered for the plaintiff in the following terms that:-

89.

- a. A declaration that the Defendant breached the sale agreement.
- b. An order of eviction against the Defendant and its members to vacate the suit property and give vacant possession to the Plaintiff within the next 90 days.
- c. Costs of the suit to the plaintiff.

It is so ordered.

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**A. O .OMBWAYO**

**JUDGE**

