



Nzuku & 438 others v Paul & another (Environmental and Land Originating Summons E002 of 2023) [2024] KEELC 4029 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 4029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**

**LG KIMANI, J
APRIL 30, 2024**

BETWEEN

PATRICIA MWATHA NZUKU & 438 OTHERS APPLICANT

AND

MUSEE PAUL 1ST DEFENDANT

KOLI MBATHI NZEKA 2ND DEFENDANT

JUDGMENT

1. This suit was instituted by way of Originating Summons dated 10th February 2023 seeking to determine the following questions:
 - a. Whether the plaintiffs are entitled by virtue of adverse possession to all that parcel of land known as Mutonguni/Kauwi/3490 which is registered in the name of Musee Paul the 1st Defendant herein.
 - b. Whether the plaintiffs should be registered as proprietors of all that parcel of land known as Mutonguni/Kauwi/3490 which is registered to Musee Paul, the 1st Defendant herein.
 - c. If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the County Lands Registrar Kitui to give effect to the said findings.
 - d. Whether the plaintiff should be paid the costs of this suit.
2. Two affidavits were sworn in support of the application by Hellen Mwikali Musili, the 339th plaintiff with attached authority from the other plaintiffs. She deposes that the 2nd defendant is the administrator of the estate of the late Mbathi Nzeka Kangwe (Deceased), who was the registered owner of the parcel of land from which Mutonguni/Kauwi/3490 was excised on or before 24-10-2001.



3. The plaintiffs are members of women and self-help groups within the Katutu location in Kitui County who came together in the early 1990s under the umbrella of a group known as Vaati wa Katutu Women Group, and she is a member of the Kasakini Women group which is a corporate member of the group.
4. The plaintiffs had pooled their resources and purchased a portion of the land measuring 0.65 Ha from Mbathi Nzeka Kangwe(Deceased) which they have been occupying, cultivating and working on. To complete the transaction, the deceased had excised the parcel they were occupying from his larger land, which came to be registered as Mutonguni/Kauwi/3490 but he passed on before he could transfer the suit land to the group. The 2nd Defendant promised to transfer the suit to the group but she has been reluctant to do so.
5. It was deposed that despite this reluctance to transfer the suit property to them, the beneficiaries of Mbathi Nzeka Kangwe(Deceased) have not interfered with their occupation and use of the suit land which they have occupied for the last 32 years which they have used to cultivate, plant and grow different types of crops and other activities without interruption.
6. Sometime in August 2021, the group received information that the 1st Defendant had through other persons, not officials of the group purported to unlawfully, illegally and unprocedurally acquire the land parcel and they reported the matter to the police for investigations and through their advocates he informed them that he had allegedly bought the land through the group's officials.
7. Upon exerting pressure on the 2nd defendant to file a succession case and transfer the suit land to the group, she enlisted the help of the police to intimidate them to accede to their demands and cede the suit land to the 1st defendant. Attempts to petition for a general meeting of the member groups to discuss the purported sale were foiled by the alleged fraudsters, national government ministry officers, the defendants, the police and national government administrators for the Kitui West sub-county.
8. It is deposed that to defeat their claim over the suit land, the 2nd defendant transferred the land to the 1st defendant when he already knew about their claim over the suit property.
9. The plaintiffs aver that they have been in occupation of the suit land since 1991 and the period within which the deceased could have claimed back the land lapsed in 2003, 32 years without interruption and are therefore entitled to it as adverse possessors. They state that as advised by their advocate, time starts running from the time completion was supposed to be done which in their case was in 1991 and pray for the order of adverse possession.

The 1st defendant's replying affidavit.

10. The 1st defendant deposed that the certificate of official search over the suit property shows that he is the sole registered owner which he legitimately bought from the officials of Vaati wa Katutu Muungano Women group.
11. He also deposed that the plaintiffs have no locus standi to institute the said suit by law as a registered group can only be sued through its officials and not in the individual members' names. He stated that there was a minuted resolution to sell the suit land and he paid the full price with the understanding that the 2nd defendant herein would transfer the land to him upon finalization of the succession proceedings.
12. He challenged the claim for adverse possession stating that the Applicant must prove that the disputed land is owned and registered in the name of the defendants to succeed in such a claim, that the possession must be adverse and that they have been in open and unpermitted occupation of the



disputed land for more than 12 years against the registered owner, where a certified extract of the Title Deed must be attached. He noted that he has only owned the land for less than a year.

13. The 1st defendant also contended that the plaintiffs have not provided the group's past or current registration certificate nor the group's membership register to prove that they belong to the group. He dismissed the attached list of members authorizing the plaintiffs to act for them as fictional as there are no identification documents attached. It is impractical for more than 430 persons to occupy, farm or carry out any meaningful activities on a piece of land that is 1.5 acres as alleged by the applicants.
14. The 1st defendant also stated that as a private individual, he has no influence on state officers and the police and denied working in cahoots with them to frustrate the plaintiffs and states that the claim is frivolous, vexatious, an abuse of the court process and prays that the same be dismissed with costs.

The 2nd Defendant's replying affidavit

15. The 2nd defendant filed a reply to the originating summons vide affidavit sworn on 13th March 2023, where she deposed that she is the wife and the administrator of the estate of Mbathi Nzeka Kang'we who was the owner of the land in question in this suit.
16. She acknowledged that the suit land was bought by Vaati wa Katutu Muungano Women Women Group in the early 1990s and her husband excised the said portion of land sometime in 2000 to transfer it to the group but he died before the transfer could be finalized.
17. She explained the delay in beginning succession proceedings to her husband's estate and that there was no urgency until the officials of the group requested her to transfer the land to the 1st defendant who had bought it in 2021. She stated that the land has mostly been lying idle but its ownership has never been in dispute and the group decided to sell the land since most of the members had since passed on.
18. She disputes the claim for adverse possession since the plaintiffs' occupation was with permission and has never been in contention. She also disputes the list of plaintiffs stating that many of them are not members of the group and most people were not born at the time of purchase or were too young. She therefore states that the plaintiffs' claim should be dismissed with costs.
19. Nancy Mukala also swore a replying affidavit, stating that she is the secretary of the Vaati wa Katutu women's group and that the ownership of the land has never been in dispute since they bought the land from the 2nd defendant's husband. She deposed that in 2020, the group agreed to sell the land to the 1st defendant since members were mostly elderly in age and a resolution was made.
20. She deposes that the disgruntled people who hold that there was no sale are not members of the group. The said people reported them to the police and they were arrested and detained at Ndolo's police station after which DCI investigated the matter and found that they had followed due process and they were released. She also questioned the authenticity of the plaintiffs' signatures, claiming that most of the members were not aware of this suit.

The Plaintiff's supplementary affidavit

21. The 339th plaintiff swore a supplementary affidavit in response to the defendants' affidavits under the leave of the court and deposed that there has never been any minuted resolution to sell the suit land and that the alleged sale was without their authorization.
22. She also deposed that as advised by their advocate where there is a confirmed sale, there can be a claim for adverse possession if the seller does not transfer the land to the buyer as long as the buyer has taken



possession, occupied and used the land and that time starts running from the time completion was supposed to occur.

23. On the matter of exhibiting a certified extract of the title deed, they state that exhibiting a certificate of search is sufficient.
24. It was also deposed that all the plaintiffs who have executed the authority to act exist and if any of them are deceased, they died after executing the authority. On the matter of the group certificate, she stated that they had never been shown the said certificate and it was one of the reasons for agitating for a general meeting. They also state that they admitted make members even though the group was christened a women's group.

The hearing of the suit

25. The suit proceeded on 25/7/2023 and PW 1 Hellen Mwikali Musili the 339th plaintiff relied on her affidavit in support of the originating summons and her supplementary affidavit as evidence as well as the documents annexed thereto. She stated that she was previously the vice chair of the Katutu Women group from the year 1990 when they started coming together until the year 2021 when she became the chairlady.
26. PW 1 stated that the group has had male members but they are not leaders. She denied ever having a meeting to sell the land and stated that the officials of the group did not sell the land. That the person who sold the land's name was Nancy Mwendu Mukala who was a secretary of the group and that the other signatories to the said agreement were ordinary members and not group officials.
27. She stated that the members had sought for the group documents from the secretary Nancy Mwendu but she declined to give them and efforts to petition for a group meeting were futile. She also stated that she was not present at the meeting that was held on 30/7/2021 on bundle no.4 of the defendant's list and stated that the meeting probably did not take place, they just wrote the names of people.
28. PW 1's statement is that they entered the suit land in 1991 where they used to plant maize and beans and sold the produce in the market. She also stated that the family of Mbatha Nzeka (Deceased) never chased them from the land and it was only in 2021 when police officers were sent to chase them when the purported sale was going on. It is only upon procuring a certificate of official search that they learnt that the land was registered to the 1st Defendant.
29. On cross-examination, she denied ever being given receipts for registration fees as a member of the Katutu Women's group. Regarding the group's documents, she stated that the Chairlady, Secretary and treasurer were the ones who kept them in their custody.
30. Upon being asked whether she produced minutes of the meeting where she was declared the chair lady of the group in 2021, she responded that they did not file the minutes. She denied being present at the meeting on 26/8/2021 she stated that the secretary had made up names in that particular meeting and that it never occurred. She also acknowledges that the former chair lady is not one of the plaintiffs.
31. The defence case began with DW 1 Koli Mbatha Nzeka who also adopted her replying affidavit as her evidence and stated that she was the wife of Mbatha Nzeka(deceased). She confirmed that her husband sold the land to Vaati wa Katutu Muungano Women Group and that they were allowed to use the land, which they cultivated.
32. The witness testified that the group sold the land to the 1st Defendant, Musee Paul and the committee members informed her of the need to transfer the land to his name. She however could not recall all the group members who informed her of this save for the group secretary Nancy Mwendu.



33. Upon cross-examination, DW 1 stated that she is also part of the Katutu Women's group in the Molomuni group (Murrum group) and that she attended meetings of the group, including the one where the land was sold, where 26 members signed the agreement. She stated that she was also known as Jedida Mbathi. Before her husband died, the land had not been given the current title number yet. She however denied ever filing a succession case or bringing a case in court to transfer the land to the 1st defendant. She also stated that she did not visit the Land Control Board to acquire their consent to subdivide the land to the 1st Defendant.
34. The witness acknowledged that PW 1 the 339th plaintiff is the chairlady of the group and listed some committee members who signed the agreement for sale. On re-examination she denied ever going to the Lands office to transfer the land to the 1st defendant but that the 1st defendant told him to give him the title deed.
35. DW 2 Nancy Mukala gave her statement that she has been a member of the Katutu Muungano Women group since 1992 and that she is the secretary of the group, who has the responsibility of keeping group documents.
36. She stated that she was called by the chair lady and vice-chair lady and instructed to circulate a letter to all the churches to inform them of a meeting, where the 1st one was held on 30/7/2021 but due to the COVID-19 restrictions, only 2 representatives from each sub-group could attend. The chair lady said that she was too old to continue with tilling the land and that they aimed to get donors to build a brick-making factory on the suit land. However, the donor was short of funds and since they had waited for long, the chairlady suggested that they sell the land and share the proceeds and the date of the meeting the groups were in agreement.
37. On 26/8/2021, they met and the sub-groups agreed to sell the land at Ksh.700,000 per acre which was sold to the 1st defendant and the group members were made aware. Some of the members had a dispute with the sale and the matter was referred to the DCC Kitui West sub-county and then later to the DCIO office. Investigations revealed that there was no fraud and the cautions that had been placed on the title were removed.
38. On cross-examination, DW 2 stated that the chairlady is the one who calls for group meetings. She denied being removed from office, and that she had only gone to undertake studies at Nairobi University. She was not present at the hearing of the caution that was lodged on the title nor at the time of signing the transfer documents. The witness denied that PW 1 was ever a chairlady of the group and also denied being the one who sold the land on her own but stated that it was sold as a group.
39. DW 3 Musee Paul, the 1st defendant also testified, relying on his replying affidavit which was adopted as evidence. He got information from his father that the group Vaati Wa Katutu Women group had resolved to sell their land, which meeting his mother was present. He asked for the contact of the committee members he could communicate with and was given the contact of Regina the treasurer and Nancy Mukala the secretary. He sought for a search for the land and minutes of the members present when the resolution was passed.
40. After a week, he gathered the money for the purchase and went to a lawyer to draw the agreement for sale, have it signed and stamped and took the same to the Co-operative Bank, where minutes of the meeting where the land was sold to him were required. He transferred the Kshs.1.3 million purchase price balance to be paid on transfer of the land.
41. He was informed of a dispute by the area chief and a meeting that was called by the area chief, assistant chief, ACC and group members which he attended with his advocate. The dispute was that the officials



put the money in their accounts. The DCI investigated the matter and it was found that he acquired the land procedurally, referring to document 7 of his list.

42. On cross-examination, DW 3 stated that the group had been on the land for several years and that he knew the previous proprietor Mbathi(Deceased). He however stated that he was unaware of the succession case through which he got the land and that he was only given documents to sign. He was also not summoned to the Land Control Board but he paid stamp duty.
43. He also stated that he did not carry out a search at the Ministry of Culture to confirm the true officials of the group. The purchase price was transferred to an account at the co-operative bank under the name Vaati wa Katutu but it was not exhibited as evidence. He has been working on the land since then and fenced it.

The Plaintiffs' Written Submissions

44. Counsel for the Plaintiffs submitted that claims for adverse possession are brought against the registered owners of the land in question and that it is not disputed that the suit land was registered to Mbathi Nzeka Kangwe (Deceased) and the 2nd defendant has been sued in her capacity as the administrator of the estate of the deceased though she deliberately hid the grant from the court. They submitted a screenshot of the succession cause number E479 of 2021 where the 2nd defendant was the petitioner.
45. Submitting that the law allows for claims of adverse possession against the estate of a deceased person, they relied on the authorities in the cases of Phylis Wanjiru Kamau vs Wilson Gichuhi Gachagwe & 2 others (2019) eKLR and Regina Wanjiru Mbogo & another vs Lucy Wairimu Gichuhi & 2 others (2019) eKLR.
46. On the requirement that the adverse possessor must have occupied the land open and peacefully for more than 12 years without interruption, they submit that it is not in dispute that the plaintiffs bought the suit land from the deceased in 1991, where occupation need not be by dwelling.
47. Their submission is that where there is an agreement for sale, there can be a claim for adverse possession if the agreement is terminated, repudiated, rescinded or invalidated at the time starting from when the purchase price was paid in full. This is due to the agreement being null and void because the same was not in writing nor was it signed by at least 2 witnesses and for lacking the consent of the Land Control Board relying on the decision of Justice Munyao Sila in the case of Kiplagat vs Rose Jebor Kipngok(2014)eKLR.
48. They also submit that the entry by the plaintiffs in 1991 cannot have been said to be through a valid agreement and that the statutory period for adverse possession would have lapsed in June 2004. They relied on the holding of the court in Regina Wanjiru Mwago & another vs Lucy Wairimu Gichuhi & 2 others (2019) eKLR citing with approval the case Public Trustee vs Wanduru(1984) KLR, the holding of the court of appeal in the case of Titus Munyi vs Peter Mburu Kimani(2015)eKLR and Mageta Enterprises Limited vs Tilak Company Limited(2020)eKLR.
49. Noting that the title deed for the larger parcel of land where the suit property was hived off was issued on 24-10-2001, they submit that if we were to calculate the adverse possession period the same would lapse in 2013.
50. The plaintiffs questioned the fact that the 2nd defendant did not go through the succession process and did not produce a certificate of confirmation of grant distributing property to him and the lack of consent from the Land Control Board. Their position is that the defendants clandestinely transferred the property to defeat the plaintiffs' agitation for a title deed in their favour



51. It is their submission that by the time of the purported sale to the 1st defendant, the estate had already lost title to the plaintiffs and the 2nd defendant could not pass good title to him. They cited the case of Peter Okoth vs Ambrose Ochido & Benedict Odhiambo Oketch(2021)eKLR where it was held that a claim of adverse possession runs against the title and not necessarily the current holder of the title as well as the court of appeal case Peter Gicuki Wanjohi vs Julius Mumbi Muturi(2021)eKLR.
52. They also mention that at the time of the alleged sale, the plaintiffs had no capacity to sell the land to the 1st defendant as it was held in the case of Maweu vs Liu Ranching & Farming Cooperative Society Ltd(1985)KLR 430 and the case of Manason Ogendo Afwanda vs Alice Awiti Orende & another(2020)eKLR.

Defendants' written submissions

53. Counsel for the defendants submitted that the elements of adverse possession have not been established in this case since the possession has not been adverse. This is because it was agreed that the plaintiffs were on the suit land with the consent of the 2nd defendant after they purchased it from her late husband.
54. On the matter of there being no sale agreement between the plaintiffs and the 2nd defendant's husband, it was submitted that the parties were acting in good faith and their intention to enter into a contractual agreement for the sale was very clear. Since the land was unadjudicated at the time, there was nothing to write in the contract but there was likely a mutual understanding that once this was done, the sale would be formalized as this was common practice then.
55. The defendants refer to the plaintiffs as licensees as it was held in the case of Sisto Wambugu vs Kamau Njuguna (1983)eKLR who cannot succeed in a claim for adverse possession.
56. They also raised the issue of the lack of land control board consent in the transaction with the 1st defendant, stating that it is an offence to remain on such land under Section 22(b) if the [Land Control Act](#) and that a party cannot benefit from their own offence, relying on the holding in the case of Gabriel Mbui vs. Mukindia Maranya(1993)eKLR.
57. Their submission is that time does not run until the possession becomes adverse and that a claim for adverse possession can only succeed against a registered owner. Quoting section 39 of the law of limitations act, they submit that the plaintiffs are estopped by the promise to transfer land to them from claiming adverse possession as their equitable share was recognized all through.
58. It is also submitted that the plaintiffs ought to have applied to be joined in the succession proceedings as interested parties or commenced proceedings in other ways than a claim for adverse possession.

Analysis and Determination

59. The Court has considered the pleadings herein, the evidence adduced in court and the submissions by Counsel for the parties and considers the following to be the issues for determination.
 1. Whether the 2nd defendant is an administrator of the estate of the deceased and if a claim for adverse possession is instituted against the estate of a deceased person.
 2. Whether the plaintiffs have been in adverse possession of the suit land for more than twelve years.
 3. Whether the plaintiffs' claim is sustainable having obtained possession of the suit land through purchase and consent of the seller.



1. Whether the 2nd defendant is an administrator of the estate of the deceased and if a claim for adverse possession is instituted against the estate of a deceased person.

60. The plaintiff's Counsel raised the issue of whether the 2nd defendant is an administrator of the estate of the deceased Koli Mbatha Nzeka in submissions. It is noted that the title to the Originating Summons does not specifically state that the 2nd defendant, Koli Mbatha Nzeka has been sued in her capacity as the administrator of the estate of Mbatha Nzeka (Deceased). However, the body of the said Originating Summons identifies her as the Administrator of the said estate and the fact that she is sued in that capacity. The Plaintiffs have indicated that they were unable to exhibit the grant of letters of administration because they claim that she has deliberately hidden the documents from the Court.

61. In the case of *Trouistik Union International and Ingrid Ursula Heinz V Jane Mbuyu & Another* [1993] eKLR.

“The Court of Appeal made the following observations in respect of a person's legal capacity to undertake legal proceedings on behalf of a deceased person; “To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the *Law of Succession Act*. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer.”

62. The 2nd defendant in her replying affidavit sworn on 13th March 2023 admitted that she was the wife and administrator of the estate of the deceased Mbatha Nzeka Kangwe. The capacity of the 2nd defendant as an administrator of the estate of the deceased is alleged by the Plaintiffs and is admitted by the defendant and the same is thus not contested. As provided under Order 15 Rule 1 of the Civil Procedure Rules issues for determination arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

63. The Plaintiff's Counsel submitted on the question of whether a claim for adverse possession can be maintained against the estate of a deceased person. It is noted that the suit land was previously registered in the name of the deceased. This question as to whether a claim for adverse possession can be made against the estate of a deceased person was aptly captured by the Court of Appeal sitting at Nyeri in the case of *Karuntimi Raiji v. M'Makinya M'itunga* (2013) eKLR where the Court of Appeal observed:-

“...Another issue raised by the appellant is that a claim for adverse possession does not survive a deceased person. Section 30 (f) of the Registered Lands Act and Section 2 of the *Law Reform Act* provide an answer to the issue. Section 30 provides that:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;”

Section 30 (f) preserves rights being acquired by virtue of limitation of actions.....”

64. The court further finds that the issue was not contested by the defendants and in the court's view is not an issue arising for determination by the court but for the avoidance of doubt and based on the above authorities, a claim for adverse possession can be made against the estate of a deceased person.



- Whether the plaintiffs have been in adverse possession of the suit land for more than twelve years.
65. Section 7 of the [Limitation of Actions Act](#) CAP 22 Laws of Kenya provides that;
- “An action may not be brought by any person to recover the 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.”
66. Section 37 provides for the application of the [Limitation of Actions Act](#) to registered land and states that;
- “This Act applies to land registered under the Government Lands Act (Repealed), the Registration of Titles Act (Repealed), the Land Titles Act (Repealed) or the Registered [Land Act](#) (Repealed), in the same manner and to the same extent as it applies to land not so registered, except that—
1. where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act.”
67. Section 38(1) of the [Limitation of Actions Act](#) CAP 22 provides that:
- “Registration of title to land or easement acquired under Act 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.”
68. The procedure for making such an application is set out by Order 37 Rule 7 of the Civil Procedure Rules (2010) which provides that:
- “An application under section 38 of the [Limitation of Actions Act](#) shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”
69. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in the assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”



70. The Plaintiffs claim that by way of an oral mutual agreement with the deceased, they purchased the suit land in 1991 and were put in possession occupying, cultivating and working on the land for more than 12 years since then. They state that their occupation was with the knowledge of the deceased seller and the 2nd defendant as administrator of his estate. Further, none of the beneficiaries of the deceased's estate stopped or interfered with the occupation and use of the land. While testifying in court, the Plaintiff's only witness Hellen Mwikali Musili testified that when the group took possession of the suit land in 1991 they used to cultivate maize and beans and sell the same in the market. They also built a toilet but at the moment the toilet has sunk and is no longer there. She further testified that in 2001 the deceased carved out from a larger piece of land the suit parcel of land to transfer the same to the group but he passed on before he could do so. She stated that the deceased allowed the plaintiffs to use the land. She confirmed that the group purchased the land intending to get a donor and build a polytechnic but when this did not materialize they started cultivation.
71. Concerning the purchase and possession of the suit land by the plaintiffs, the 1st defendant Musee Paul confirmed in his replying affidavit and in evidence in court that indeed the group which the plaintiffs claim to belong to Vaati Wa Katutu Muungano Women Group, purchased the suit land in 1991 and were given possession of the same by the deceased. He testified that he was born and schooled within the locality where the land is located and the land was being used by the group around 1991 and even in 1996.
72. The 2nd defendant also gave evidence and confirmed that the suit land was purchased by the group Vaati Wa Katutu Muungano Women group in the early 1990s. The land was purchased through an oral agreement as the parties dealt with each other in good faith and thus there was no hurry in transferring the land. After the purchase of the land the group was authorized to take possession and use the land as they wished but the land was lying idle since then. She stated that the issue of ownership of the land was never in dispute as the land belonged to the group.
73. From the foregoing, it is clear that all the parties to this suit agree that the group Vaati Wa Katutu Muungano Women group purchased the suit land from the deceased Mbathi Nzeka Kang'we in the early 1990s and the group was given possession of the said land. The occupation of the group was under the contract of sale with the permission of the vendor and the same was not at any time challenged by the deceased seller, the administrator of his estate or any of his beneficiaries. It is also the finding of the court that the sale of the land even though it was oral was never rescinded, repudiated or cancelled by any of the parties.
74. As stated elsewhere there is no evidence adduced by the plaintiffs that they demanded that the transfer of the suit land be made to them and the same was declined until the sale to the 1st defendant was commenced. In the court's view, if such a demand had been made, it would have been concluded that time had started running for purposes of adverse possession. In the case of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR Chesoni Ag JA stated concerning the rescission of a contract of sale of land.

“Contracts for the sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day. The law is that this right can only be exercised where time is of the essence, or if it is not after the party who is not at fault has given reasonable notice to the defaulting party making time of the essence. The position is explained by the following passage: Halsbury's Laws of England (ibid) para 485:

“In cases where time is not originally of the essence of the contract, or where stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable



time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken.”

75. Having admitted that the agreement for the sale of the suit land to the group was oral, no evidence was adduced of the terms and conditions of the sale to determine the sale price, the time within which the sale was to be concluded and/or the completion date of the transaction. It is further noted that the deceased vendor Mbathi Nzeka Kangwe was first registered as proprietor of the land on 24th October 2001, ten years after the sale and taking possession of the land by the group. It is not clear if this was a first registration and whether the provisions of the Land Control Act applied to the suit land prior to the registration in 2001.
76. The plaintiffs have not shown evidence that the contract for the sale of land that was confirmed by both parties was ever broken. In this case, and according to the defendants, the group agreed to sell the land to the 1st defendant after competitive bidding. The sale is evidenced by the sale agreement dated 10th September 2021 between the Group as the seller and Musee Paul and the sale price was Kshs. 1,300,000/=. The agreement recognizes that the transfer of the land to the purchaser was to be effected through a succession cause and that the sale was with the blessings of the family of the deceased registered owner. This transaction of sale though challenged by the Plaintiffs in the court's view, serves as a recognition by the 2nd defendant of the ownership of the land by the group Vaati Wa Katutu Muungano Women's group. She recognized the group's right to sell the land and was willing to transfer the land to the person identified by the group.
77. The defendants argue in their submissions that the occupation and possession of the suit land by the plaintiffs was not adverse for the reason that the said possession was obtained through purchase and with permission from the deceased which permission continued throughout his life. They submitted that the said permission negated the very essence of adverse possession.
78. On the other hand, Counsel for the Plaintiffs argued that where there is an agreement for sale, there can be a claim for adverse possession if the agreement is terminated, repudiated rescinded or invalid and the time starts running from the date when the purchase price was paid in full. The Plaintiffs further argue that they could not enforce the agreement for sale since the oral agreement was void from the onset as it violated the express requirement of Section 3 (3) of the Law of Contracts Act. The Counsel for the Plaintiffs further argued that since the parties did not obtain Land Control Board Consent within six months, the sale was null and void.
79. In Dr Ojienda's, Principles of Conveyancing Hand Book, Law Africa Vol II page 97 the learned author has stated that:
- “Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission the occupation can only be either with permission or adverse, the two concepts cannot co-exist.”
80. In the case of Jandu vs. Kirpal [1975] E. A 225 Chanan Singh J. stated that:
- “The rule on ‘permissive possession’ is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land”.



81. In the Court of Appeal case of *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Backshwen & another* [2015] eKLR, in which the court cited with approval its decision in the case of *Samuel Miki Waweru vs. Jane Njeri Richu*, Civil Appeal No. 122 of 2001(UR), where it had stated that;

“...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 lease or otherwise. Further, as the High Court correctly held in *Jandu vs. Kirpal* [1975]EA225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

82. Further, in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR the court stated as follows confirming that for possession of land to be found to be adverse the same must be non-permissive;

“(3) The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with leave of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called "adverse". Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner's will accompanied the occupier's possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as "hostile" possession, to emphasize that "hostility" is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without



permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (Cobb v Lane [1952] 1 All E R 1199; Denning, MR, in Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd [1974] 3 All ER 575 at p 580; Chanan Singh, J, Jandu v Kirpal and another (1975) EA 225 at pp 233, 234, 237; Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi, 1[1976] Kenya L R 253, at pp 257, 258).”

83. In the present case, the court agrees with counsel for the defendants that the plaintiffs came into possession of the suit land by permission of the deceased and they have not shown that the permission was ever withdrawn. Indeed, the 2nd defendant as administrator of the estate of the deceased seller Mbathi Nzeka Kangwe (Deceased) confirmed that the issue of ownership of the land was never in dispute as the land belonged to the group. She further stated that she had not seen the need to file a succession cause into her husband's estate until the officials of the group requested her to transfer the land to the 1st defendant which she did.
84. The defendants exhibited a certificate issued to the group Vaati Wa Katutu Muungano Women Group by the Ministry of Labour and Social Protection showing that the group was registered on 9th January 1992. They also exhibited the sale agreement dated 10th September 2021 between the group as the seller and Musee Paul the 1st defendant as the purchaser. On the part of the group, the persons who signed the sale agreement were Temea Mutia, Nancy Mwendu Mukala, Agnes Kanyaa Kvasu, Felistus Mukai Ndeme and Syonzau Itungu Mwanja.
85. The plaintiffs did not avail to the court any official communication or a search from the Ministry of Labour and Social Protection to show that the persons who signed the agreement on behalf of the group were not officials of the said group. The plaintiffs claim that the persons involved in the sale of the land to the 1st defendant were not the officials of the group. It is noted that according to the Plaintiff's only witness PW1 Hellen Mwikali Musili, the chairlady of the group was Jedida Muli and according to the defendants she is the one who convened the meetings of 30th July 2021, 26th August, 2021 and 2nd September 2021 that are said to have resolved to sell the land while Nancy Mwendu Mukala was the group secretary. Further, according to PW1 some of the signatories to the sale agreement Temea Mutia, Agnes Kanyaa Kvasu, and Felistus Mukai Ndeme were members of the group's executive committee.
86. Further, the letter from B. M. Musyoki & Co. Advocates dated 23rd November 2021 states that the sale of the land to the 1st defendant was by some of the officials of the group but that the said sale was without a resolution and approval of the rightful owner. During examination-in-chief, the 2nd defendant confirmed that the group committee members approached her and told her that the 1st defendant had purchased the suit land and consequently she gave him the land parcel number and that when she transferred the land she did not think there was anything wrong. Upon cross-examination, she however denied filing the succession cause or having attended the court during any succession proceedings. She also denied having attended the land control board for purposes of transfer of the land.
87. In the court's view, the evidence of the 2nd defendant showed that she recognized that the land belonged to the group Vaati Wa Katutu Muungano Women Group and that the group had resolved to sell the land and whatever action she took to facilitate the transfer of the land to the 1st defendant was done based on that recognition. In the court's view, the plaintiffs have not shown that the transfer of the suit land to the 1st defendant by the 2nd defendant was on her own account or was evidence of termination,



repudiation, rescission or invalidation of the agreement between the group and the deceased or his estate.

88. The plaintiffs exhibited a certificate of search dated 25th November 2022 showing the 1st defendant was registered proprietor of the suit land Mutonguni/Kauwi/3490 on 25th August 2022 and a title deed issued. Even though no documents of transfer were exhibited to the court, the 2nd defendant confirmed that she commenced the process of succession cause when she was approached by officials of the group to transfer the land to the 1st defendant to whom the group is said to have agreed to sell the land.
89. The elements of adverse possession that a plaintiff has to prove have been stated in many cases. In the case of *Kimani Ruchine & Another vs. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows on page 16;

“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec plecario (no force, no secrecy, no evasion)..... The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

90. The court of appeal in the case of *Karuntimi Raiji v M'makinya M 'itunga* [Supra] held as follows:

“There are two issues relevant to the claim of adverse possession in this matter. First is the date from which the 12 years should be calculated; second, did the respondent have a peaceful, uninterrupted occupation based on a claim of right and without consent of the appellant” The answer to the first question is provided by the case of *Francis Gitonga Macharia – v Muiruri Waithaka Civil Appeal No. 110 of 1997* where this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. In this case, the appellant was registered as proprietor of the suit property on 22nd March 1973; we find that the claim for adverse possession against the appellant starts to run from this date and not 1954. For the avoidance of doubt, we reiterate that the claim for the overriding interest of the respondent in relation to the suit property started to run from 1954 and this overriding interest was in existence and protected under Section 30 of the RLA as of 22nd March, 1973 when the appellant became the registered proprietor of the suit property.”

91. It is the court's view that the plaintiffs have not proved their case on a balance of probabilities that they are entitled by virtue of adverse possession to all that parcel of land known as Mutonguni/Kauwi/3490 which is registered in the name of Musee Paul the 1st Defendant herein. The plaintiffs have further not proved that they are entitled to be registered as proprietors of the suit parcel of land. Indeed, the plaintiff's claim appeared to be more of a challenge to the authority to sell the land and the capacity of the persons who sold the suit land on behalf of Vaati wa Katutu Muuungano Women Group as opposed to a claim for adverse possession.
92. For the foregoing reasons the suit herein is found to have no merit and the same is hereby dismissed with costs to be paid to the defendants.

DELIVERED, DATED AND SIGNED AT KITUI THIS 30TH DAY OF APRIL, 2024.

HON. L. G. KIMANI, JUDGE

ENVIRONMENT AND LAND COURT - KITUI

Judgement read in open court in the presence of-



Musyoki: Court Assistant

B. M. Musyoki for the Applicants

Musya for the defendants

