



Mwenje & 4 others (Suing as representatives of the Estate of David Mwenje - Deceased) v Njenga & 4 others (Environment and Land Case Civil Suit 243 of 2009 & Environment & Land Case 13 of 2022 (Consolidated)) [2024] KEELC 4768 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4768 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 243 OF 2009 &
ENVIRONMENT & LAND CASE 13 OF 2022 (CONSOLIDATED)

OA ANGOTE, J
JUNE 13, 2024

BETWEEN

MAUREEN WAITHERA MWENJE 1ST PLAINTIFF
ERIC KAMAU MWENJE 2ND PLAINTIFF
SUING AS REPRESENTATIVES OF THE ESTATE OF DAVID MWENJE -
DECEASED

AND

DAVID KINYANJUI NJENGA 1ST DEFENDANT
MONICA WANGUI NJENGA 2ND DEFENDANT
GRACE NJERI NJENGA 3RD DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 13 OF 2022

BETWEEN

DAVID KINYANJUI NJENGA 1ST PLAINTIFF
MONICA WANGUI NJENGA 2ND PLAINTIFF
GRACE NJERI NJENGA 3RD PLAINTIFF

AND

MAUREEN WAITHERA MWENJE 1ST DEFENDANT
ERIC KAMAU MWENJE 2ND DEFENDANT



**SUED ON THEIR OWN BEHALF AND AS REPRESENTATIVES OF THE
ESTATE OF DAVID MWENJE - DECEASED**

JUDGMENT

Background

1. This Judgement is with respect to two suits being ELC 243 of 2009 and ELC 13 of 2022 (formerly ELC 121 of 2011). On 19th September, 2023, the Court directed that the matters be heard simultaneously and the proceedings taken in file ELC 243 of 2009.

ELC 243 of 2009

2. Vide an Amended Originating Summons dated 24th June, 2009, the Plaintiffs seek the following reliefs;
 - i. A declaration that the Plaintiffs as personal representatives to the Estate of the Late David Mwenje and the Plaintiffs are entitled to be registered forthwith as owners of L.R No's 10060/8, 10060/9 and 10060/12 which the deceased, and after his death, the Plaintiffs have been in adverse possession since 30th June, 1993 to date for more than 12 years immediately preceding the presentation of this suit and, on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendants or its predecessors in the above title and that the Defendants title to L.R No's 10060/8, 10060/9 and 10060/12 has been extinguished in favour of the Plaintiffs under Section 37 and 38 of the Limitation of Actions Act, Laws of Kenya.
 - ii. An order for permanent injunction be issued restraining the Defendants, their employees, servants, agents, or any person claiming through them from evicting the Plaintiffs, their agents and/or servants from the parcel of land known as L.R No's 10060/ 8, 10060/9 and 10060/12(suit land) or from levying any distress for rent or interfering with the Plaintiffs' possession of the same or alienating, transferring, disposing and/or dealing with the suit land in any manner whatsoever.
 - iii. A declaration that the distress for rent levied on the 8th May, 2009 by Kang'eri Wanjohi t/a Kindest Auctioneers is unlawful, null and void and an order for general damages for illegal attachment of distress.
 - iv. An order for costs and interest thereon of this Application.
3. The Originating Summons is supported by the Affidavit of Maureen Mwenje dated 26th May, 2009 and a Supplementary Affidavit dated 26th June, 2009.
4. It is the Plaintiffs' case that vide an agreement dated 20th March, 1992, their father, the late David Mwenje, purchased the parcels of land known as L.R No's 10060/8, 10060/9 and 10060/12 (hereinafter the suit properties) from the Defendants' father and predecessor in title, Njenga Mathu at a consideration of Kshs 2, 780,000.
5. It was deposed by the Plaintiffs that upon execution of the Sale Agreement, their father took possession of the three suit properties as a monthly tenant at Kshs 2,500 per parcel hence a composite rent of Kshs 7, 500/ per month and that nonetheless, neither the deceased nor his Estate paid any rent.
6. According to the Plaintiffs, the said Njenga Mathu subsequently rescinded the agreement and filed HCC No 3195 of 1993; that before the suit could be heard, he filed a notice of discontinuance dated



- 26th July, 1996 and that he thereafter subsequently transferred the three suit parcels to the Defendants herein being his children at a consideration of Kshs 100,000 per parcel.
7. The Plaintiffs maintain that the transfer of the parcels to the Defendants was a bogus transaction whose sole aim was to defeat their fathers' claim to the land as against the then registered owner Njenga Mathu and that the titles that passed to the Defendants were subject to their father's right of occupation, whether as a tenant or as the Defendants allege, a trespasser, or as set out in Section 109 of the Transfer of Property Act(repealed).
 8. The Plaintiffs urge that they have a prima facie case by virtue of their continuous, open and uninterrupted occupation of the suit property since 1993 and they have acquired prescriptive rights thereto; that the Defendants have instructed Kindest Auctioneers who have already proclaimed their household goods and that they will suffer irreparable loss unless the Defendants are restrained from evicting them and from levying illegal distress of rent.
 9. In response to the summons, the 1st Defendant, on his own behalf and on behalf of his co-Defendants, swore a Replying Affidavit in which he deponed that Njenga Mathu was the owner of the suit parcels L.R No 10060/8, L.R No 10060/9 and L.R No 10060/12 which he agreed to sell to David Mwenje vide a Sale Agreement dated the 20th March, 1992 and that key among the terms of the agreement were that the purchaser would occupy the three buildings as a tenant for a monthly rent of Kshs 7, 500 pending completion of the purchase price.
 10. The 1st Defendant deposed that special condition no 13 provided that the sale could be rescinded for breach by the purchaser upon which the deposit would be forfeited; that clause 9 made time of essence; that the purchaser took possession as a tenant pending completion; that Mr. Mwenje paid monthly rent albeit irregularly and that the sale fell through due to Mr Mwenje's inability to pay the full purchase price within the contractual timelines and despite being granted an extension.
 11. The 1st Defendant deponed that by a Plaint dated 1st July, 1993 in HCCC 3195 of 1993, the vendor sought an order of eviction of the purchaser from the suit premises; that the hearing never took off for one reason or the other and the suit was eventually discontinued by a notice on 26th July, 1996; that by a letter dated 30th May, 1998, the purchaser was given a full account of the deposit and the balance was sent to his Advocates and that he was through the same letter asked to vacate the premises.
 12. It was deponed that the purchaser's Advocate returned the cheque by a letter dated 18th June, 1998 but the same was returned to him through a letter on the same day; that the aforesaid letter reiterated the notice to vacate; that the purchaser's Counsel returned the cheque as cancelled allegedly due to security reasons on 23rd June, 1998; that they became the owners of the property for value and legal consideration as evinced by the transfers and that after the transfer, they instructed their Counsel to give the purchaser notice to vacate.
 13. Mr Njenga stated that upon Mr Mwenje's failure to vacate, they filed proceedings seeking his eviction by a Plaint dated 16th May, 2000; that the hearing did not proceed on account of a myriad of reasons attributable to the Defendants; that the matter was last in court on 22nd November, 2007 but was taken out of the cause list and that David Mwenje died on 13th March, 2008.
 14. According to the 1st Defendant, after his death, the Plaintiffs petitioned the High Court to release money from his accounts to meet their needs including fees, rent and medical costs incurred by the deceased and that after they were granted the orders the file became dormant.
 15. It is Mr Njenga's contention that the Plaintiffs are mature and earning Kenyans who should acquire their own property rather than seek to reap where they have not sown; that he works for Dandora



Millers Ltd which is opposite the premises and he believes none of the Plaintiffs lived on the suit property before their father's death and that they have deliberately declined to get full representation only taking out a limited grant for purposes of filing the present suit.

16. He urged that nonetheless, the Plaintiffs have not been in adverse possession and did not get the property from a party in adverse possession; that time stopped running once a suit for eviction was filed; that failure to pay rent by the Plaintiffs did not make their possession adverse and that the Plaintiffs have no rights merely as children of the deceased and the limited grant is misconceived as it relates to the deceased's estate yet the suit is by them seeking to enforce their rights to the property.
17. In response to the Replying Affidavit, the 1st Plaintiff swore a Supplementary Affidavit on her own behalf and on behalf of the 2nd Plaintiff. She reiterated the contents of her Affidavit of 26th May, 2009 stating that the consideration for the suit property was far below the market value and it is clear that the same was to defeat their claim and that they have brought the suit as representatives of the Estate of the deceased.
18. She averred that the Defendants are contradicting themselves contending on one hand that they lived with their father while simultaneously asserting that they have never lived on the suit property; that the deceased was in adverse possession of the land since 1993 when he stopped paying rent and the filing of the suits which were withdrawn and/or abated did not interrupt the adverse possession.

ELC 13 of 2022 (formerly HCC 121 of 2011)

19. Vide a Plaint dated 28th March, 2011, the Plaintiffs (Defendants in ELC 243 of 2009) seek the following reliefs;
 - i. An order for vacant possession as per paragraph 7 above.
 - ii. An eviction order as per paragraph 7(a) above.
 - iii. An order for mesne profits or rent arrears and in default of payment execution to issue against the Defendants personally and the deceased's estate.
 - iv. A mandatory Injunction in terms of prayer 7(d) above
 - v. Costs and Interest.
20. It is the Plaintiffs' case that the 1st Plaintiff is the registered owner of L.R No 10060/9, the 2nd Plaintiff the owner of L.R 10060/12 whereas the 3rd Plaintiff is the registered owner of L.R 10060/8; that the Defendants have been living on the property with their deceased father who had taken possession thereof as a tenant of the then owner Njenga Mathu pending completion of a sale agreement and that the sale was rescinded and Njenga Mathu transferred the properties to the them vide transfers in August and October, 1998.
21. According to the Plaintiffs, upon their registration as owners of the suit property, they issued the deceased with a notice to vacate but the deceased and subsequently his children refused to vacate; that they took out a limited grant and sued them claiming the property by way of adverse possession; that the claim in ELC 243 of 2009 was struck out in 2010 and that HCCC 1110 of 2000 between the Plaintiffs and the deceased abated after his death.
22. They maintain that the Defendants and their father's estate are in rent arrears amounting to Kshs 1,110,000/= as at 1st February, 2011; that they have levied distress for rent but the rent arrears are unpaid and accruing and that the deceased and his family occupied the three properties wherein there are residential houses at the consolidated rent of Kshs 7, 500.



23. Vide its Defence, the Defendants denied the assertions as set out in the Plaint. They conceded to the existence of the sale agreement stating that the same was for the purchase of the suit properties at an agreed upon purchase price of Kshs 2, 780,000/=; that the deceased paid Kshs 1,300,000/= with the condition that the balance would be paid through his financiers and that Njenga Mathu abandoned the sale and withdrew the security and title documents from the deceased and instituted HCCC 3195 of 1993 which he unilaterally terminated.
24. According to the Defendants, Njenga Mathu thereafter transferred the properties in breach of the earlier sale agreement in favour of the deceased; that the transfer was fraudulent as it attracted no consideration having been sold at Kshs 100,000 per plot grossly below the original price of Kshs 2, 780,000; that the transfer was undertaken with the intent to defeat their rights; that the withdrawal of the suit was meant to facilitate the illegal transfer of the suit property and that the part payment was not accounted for or repaid.
25. The Defendants assert that their entire family has been in actual occupation of the properties since 1992 and that vacant possession of the suit property is not available to the Plaintiffs as they acquired the property subject to the Defendants' rights of occupation and subject to whether their title has become extinguished by virtue of the provisions of the Limitation of Actions Act.

Hearing and Evidence

26. The matter proceeded for hearing on 6th November, 2023. PW1 was Maureen Mwenye, the 1st Plaintiff herein and the Administrator of the Estate of the late David Mwenje. She relied on the Affidavit in support of the Originating Summons and the Supplementary Affidavit sworn on 24th June, 2009.
27. She also adopted her witness statement in ELC 121 of 2011 dated 2nd June, 2011 as her evidence in chief. She produced the Affidavits and annexures in ELC 249 of 2009 as PEXHB1 and the documents in ELC 121 of 2011 as PEXHB2.
28. It was the evidence of PW1 vide the statement that in 1992, the Defendants' father and predecessor in title, Njenga Mathu, being the registered owner of the suit properties, agreed to sell to their deceased father vide a written agreement and that the sale agreement between the deceased David Mwenje and the Defendants' predecessor in title was on condition that the Plaintiffs' predecessor in title would surrender titles to the bank of the late David Mwenje to secure a loan to finance the transaction.
29. PW1 stated that Mr Njenga, in breach of the contract failed to furnish the security documents leading to Mr Mwenje's inability to pay the balance of the purchase price and that the deceased had advanced to Njenga Mathu Kshs 1, 300,000 and was at all times ready and willing to pay the balance but Njenga Mathu unilaterally terminated the agreement.
30. According to PW1, the deceased, Njenga Mathu, thereafter transferred the property to the Plaintiffs; that the aforesaid transfer was illegal having attracted no consideration whatsoever; that their entire family has been resident on the suit property since 1992 and the claim against them is time barred; that the Defendants have no legal capacity to claim any rent/ and or mesne profits and that after the unlawful distress for rent, they filed Nairobi RMCC 662 of 2011 which is now the subject of an appeal and the claim for rent is res judicata.
31. In cross-examination, PW1 stated that her father did not finish paying for the suit property because the security documents were not provided; that he did not sue for breach of contract; that their father died a year before they filed the O.S, that is in 2009; that the sale had been rescinded and rent was not payable; that their entry was not adverse and only became so after the agreement was rescinded and that HCCC No 3195 of 1993 was filed against David Mwenje.



32. It was her further evidence on cross that time stopped running during the pendency of the suit; that the property was sold in 1995, and the new owners gave a notice dated 30th October, 1999; that HCC 1110 of 2000 was filed by David Kinyanjui but they were not made parties and that they were sued in HCC 121 of 2011.
33. During re-examination, she reiterated that their father initially entered the property with permission; that a suit was filed against their father seeking to evict him from the property; that the suit was filed on 1st July, 1993 and sought a declaration that the Sale Agreement had been rescinded; that by this time, the Sale Agreement was not alive having been rescinded and that after the rescission, no rent was paid.
34. She stated that the aforesaid suit was withdrawn and the second suit abated; that the present suit has been filed after 18 years; that they have no tenancy agreement apart from the Sale Agreement and that they have never paid rent.
35. DW1 was David Kinyanjui Njenga. He adopted his Replying Affidavit sworn on 5th June, 2009 as his evidence in chief. He produced the documents annexed thereto as DEXHB1 and the documents in ELC 121 of 2011 as DEXHB2.
36. It was his evidence that the premises is opposite Dandora Millers Company Ltd; that the two Plaintiffs have never lived there; that he was paid a deposit which he refunded through the deceased's Advocate and that he cancelled the cheque and returned the money.
37. It was his evidence that David Mwenje, deceased, had agreed to buy the suit premises from their father Njenga Mathu vide an agreement dated the 20th March, 1992; that he was given possession pending completion of the sale as a tenant paying a monthly consolidated rent of Kshs 7,500 and that the sale was rescinded due to Mr Mwenje's inability to pay the purchase price within the contractual timelines despite time being of essence in the contract.
38. It was his evidence that their father sold to them the suit properties and the transfers were registered in August and October, 1998; that they gave David Mwenje notice to quit which he failed to and they thereafter sued him; that the Plaintiffs have refused to remove themselves from the premises and have equally not paid rent of Kshs 1, 110, 000 and that they have levied distress for rent but the goods taken away may not realize sufficient funds even for the auctioneer's charges.
39. It was his further evidence on cross-examination that they distressed for rent and filed a suit for eviction and rent being HCCC 1110 of 2000; that ELC 121 of 2011 is similarly seeking rent; that they never entered into any agreement with David Mwenje who became a tenant as soon as they purchased the property and that they have been unable to access the premises since 1992 because the Plaintiffs are there.

Submissions

40. The Plaintiffs' counsel filed submissions on 22nd February, 2024. Counsel rehashed the facts of their case and the evidence as adduced during trial. He submitted that after the abatement of HCCC 1110 of 2000, the Defendants should have sought an extension to substitute the deceased and having failed to do so, they are barred from filing a fresh suit seeking the same cause of action.
41. Counsel submitted that the doctrine of adverse possession is one of the ways through which land can be acquired in Kenya; that the doctrine has statutory backing in Sections 7, 13, 16, 17 and 38 of the Limitations of Actions Act.



42. Counsel submitted that as affirmed by the Court of Appeal in Samuel Kihamba vs Mary Mbaisi, KSM CA No 27 of 2013, in a plea of adverse possession, a Plaintiff has to prove that they have used the land which they claim as of right, nevcı, nec clam, nec plecario (no force, no secrecy, no evasion) for a continuous period of 12 years and, additionally, they must have animus possendi, the intention to have the land.
43. Counsel maintained that the Plaintiffs have established the pre-requisites aforesaid having openly lived on the property for over 18 years as at the time of filing of the suit without the permission of the owner after the rescission of the Sale Agreement and that in Wambugu vs Njuguna (1983)KLR 172 the Court held that where a claimant is in exclusive possession of the land with leave and license of the Appellant pursuant to a valid license, the possession becomes adverse when the license is determined. Reliance was also placed on the case of Public Trustee vs Wanduru Ndegwa [1984] eKLR.
44. Counsel urged that as affirmed by the Courts in Kasuve vs Mwaani Investments Limited & 4 Others [2004] eKLR and Githu vs Ndeete, and Kipkoech Arap Langat & Anor vs Kipngeno Arap Laboso, Kericho HCCC No 124 of 2004, a mere change of ownership does not affect a claim for adverse possession and that further, as expressed in Section 16 of the Limitations of Actions Act, the death of the late Njenga Mathu did not extinguish the Plaintiffs' claim.
45. Reliance on the aforesaid was placed on the cases of Joseph Kamau Gichuki(suing as the Administrator of the Estate of Gichuki Chege (deceased) vs James Gatheru Mukora & Anor [2019]eKLR and Karuntimi Raiji vs M'Makinya M'Itunga[2013]eKLR.
46. The Defendants filed submissions on 19th January, 2023. Counsel submitted that prescriptive rights are legislated under Sections 37 and 38 of the Limitations of Actions Act and that where one takes possession pursuant to a sale agreement pending completion as a monthly tenant, possession cannot have been adverse. Reliance in this regard was placed on the case of Wambugu vs Njuguna (1983) KLR 172.
47. It was submitted that the Court of Appeal in Wilson Kazungu Katana (supra) affirmed that time stops running once a suit is filed for possession/eviction. Counsel also cited the cases of Githu vs Ndeete(1984) KLR 776 and Kiritu vs Kabura cited in Njuguna Ndatho vs Masai Itumo & 2 Ors, CA 231 of 1999.
48. Counsel submitted that from 1993 to 1996, no time was running courtesy of the vendor's suit; that time started running upon the suits discontinuation in 1996 but the vendor sold the land to the Defendants who asserted ownership in their own rights followed by a suit for distress for rent; that the Court in Peter Mbiri Muchuiki vs Samuel Mugo Michuki [2014]eKLR affirmed that a notice to vacate even without a suit is sufficient to trigger running of time and that the evidence shows that the Plaintiffs' occupation was resisted through-out.

Analysis and Determination

49. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
 - vi. Whether the Plaintiffs are entitled to L.R 10060/8, 10060/9 and 10060/12 by way of Adverse Possession? and if not,
 - vii. Whether eviction orders should issue against the Plaintiffs?
50. The Plaintiffs lay claim to the suit property by way of adverse possession. It is their case that their deceased father entered into the suit property sometime in 1992 as a purchaser for valuable



consideration pursuant to a Sale Agreement dated 20th March, 1992 between himself and one Njenga Mathu, deceased.

51. It is their case that in March, 1993, Njenga Mathu rescinded the agreement and filed a suit for eviction, which suit he withdrew on 26th July, 1996; that he thereafter transferred the suit properties to his children; that the transfer was intended to defeat their claim as against him and that their father and subsequently his estate have been in continuous possession of the suit premises since 30th June, 1993 and have by law acquired ownership thereof by virtue of the *Limitation of Actions Act*.
52. The Plaintiffs adduced into evidence the Letters of Administration of the Estate of David Mwenje, the Sale Agreement dated 20th March, 1992; Transfers dated 8th October, 1998 and 24th August, 1998 in respect of L.R 10060/8,10060/9 and 10060/12; the Plaint in ELC No 3195 of 1993; Memorandum of Appeal in Civil Appeal 104 of 2011; the pleadings in RMCC No 662 of 2011; the Ruling in Civil Appeal 192 of 2011 and the Plaint and Defence in HCCC 1110 of 2000.
53. They further adduced into evidence correspondence dated 22nd March, 1993 communicating rescission of the contract; notice of discontinuance of suit dated 26th July, 1996; Transfers in respect of the suit properties dated 8th October, 1998, 24th August, 1998 and a notification of sale.
54. On their part, the Defendants state that their deceased father was the original owner of the suit properties which he agreed to sell to David Mwenje; that as per the terms of the agreement, David Mwenje was to pay monthly rent until completion of the purchase price; that he failed to complete and the sale was rescinded and that their father filed a suit seeking to evict Mr Mwenje which he later on discontinued.
55. The Defendants states that sometime in August and October, 1998, their father transferred the suit properties to them and they are the current registered owners; that upon their registration, they issued the deceased David Mwanja with an eviction notice but he, and subsequently the Plaintiffs refused to vacate; that they sued him but the suit abated upon his death and that they instructed auctioneers to distress for rent in May, 2009.
56. The Defendants adduced into evidence correspondence between counsel for Mr Mwenje and Mr Njenga; correspondence requesting the deceased to vacate; pleadings in HCCC 3195 of 1993; certificates of title for the suit properties and the pleadings in HCCC 1110 of 2000.
57. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act, provides 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.”
58. Further provisions are made under Section 13 which provides;

“(1) A right of action to recover land does not accrue unless the land is in the 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 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), the land in reversion is taken to be adverse possession of the land.”

59. And Section 17 of the Act which states as follows:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

60. The ultimate Section under which the Plaintiffs have moved the court is Section 38(1) and (2) which states as follows:

- (1) 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

61. The net effect of the foregoing sections is to extinguish the title of the proprietor of the land in favour of a party who has been in possession thereof for a minimum continuous peaceful period of 12 years.

62. Discussing the concept of adverse possession, the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR stated thus:

“Adverse possession is essentially a situation where a person takes possession of land, 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 12 years.”

63. In discussing the essential elements in a claim for adverse possession, the Court of Appeal in *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR held as follows:

“A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession;
- (b) what was the nature of his possession;
- (c) whether the fact of his possession was known to the other party;
- (d) for how long his possession has continued; and
- (e) that the possession was open and undisturbed for the requisite 12 years.”



64. In a claim for adverse possession, the burden of proof is upon the person setting up and seeking to prove title by adverse possession. The required element of proof is the usual standard of proof in civil cases, namely, on a balance of probabilities. This was enunciated by the Court in the case of Gabriel Mbui (Supra) thus;

“The plea of adverse possession is always based on facts and they must be asserted, pleaded and proved. The person claiming adverse possession must show on what date he took occupation of the premises, the nature of his possession, whether his possession is known to the true owner, how long the possession when on, whether his possession was open and undisturbed. Unless these questions are asserted and proved a plea of adverse possession must fail.”

65. The Plaintiffs have instituted this suit on behalf of the Estate of their deceased’s father. It is undisputed that their father entered into the suit property in the year 1992 pursuant to a sale agreement. This means that the entry was a permissive one and no claim for adverse possession can lie therein.

66. However, where a contract of sale has been repudiated or rescinded by parties, as herein, or there has been failure to comply with the terms therein, the purchaser’s continual possession becomes adverse to the vendor and a claim for adverse possession can be sustained.

67. This position was affirmed by the Court of Appeal in Christopher Kioi & Another vs Winnie Mukolwe & 4 Others [2018]eKLR which stated thus;

“In Wambugu v. Njuguna (supra), this Court held that a purchaser of land under a contract of sale who is in possession of land with the permission of the vendor can only lay claim to the land after the period of validity of the contract, unless and until the contract has been repudiated, in which case adverse possession starts from the date of termination of the contract.”

68. In this case, time started running for purposes of adverse possession on 22nd March,1993 upon rescission of the contract by the seller.

69. As to the nature of occupation, the Plaintiffs contends that they have been in open, peaceful, continuous and exclusive occupation, a fact which has been objected to by the Defendants. The evidence shows that after the rescission of the sale on 22nd March, 1993, Njenga Mathu filed HCCC 3195 of 1993 against David Mwangi seeking to have the contract declared validly rescinded and have him evicted from the suit property.

70. It trite that the asserting of rights over land by the registered proprietor stops time from running in adverse possession claims. This was appreciated by the Court in Mercy Muthoni Githinji (Suing as the legal representatives of Andrew Githinji Nduati- Deceased v Cecilia Wanja Waweru (Suing as the legal representatives of Zaverio Waweru Mwitari- Deceased [2022]eKLR.

71. Expounding on what constitutes assertions of rights, the Court of Appeal in Civil Appeal No. 121 of 2006; - Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR affirmed the sentiments of the Court in Amos Weru Murigu vs Marata Wangari Kambi & Another which held as follows:

“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt



the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”

72. In the circumstances, time stopped running at the institution of the suit on 1st July, 1993 and started running afresh in 1996 upon discontinuance of the suit.
73. On various dates between August and October, 1998, Njenga Mathu transferred the property to the Plaintiffs. The Plaintiffs contend that this transfer was unlawful and was meant to defeat their claim. Nonetheless, nothing much falls on this contention. The law is clear that change of ownership does not affect prescriptive rights which go with the land. This means time continued running as from 1996 aforesaid despite the transfer of the suit property to the Defendants.
74. Upon the transfer of the suit property to them, the Defendants issued to the late David Mwenje with a notice to vacate the suit properties and thereafter filed HCCC 1110 of 2000 on 16th May, 2000, seeking an order for vacant possession and mesne profits. Between 1996 when the first suit was discontinued and 2000 when the fresh suit was filed, 12 years had not lapsed.
75. The filing of the fresh suit in 2000 stopped time from running again. HCCC No. 1110 of 2000 remained active up until sometime in 2009 whereafter it admittedly abated, being one year after the death of David Mwenje. In view of the foregoing narration, the Court finds and holds that at the time of filing the suit by the Plaintiffs in 2009, the Plaintiffs had not been in occupation of the suit property peacefully for a continuous period of 12 years.
76. The two suits in the year 1993 and 2000 stopped time from running and interrupted the Plaintiffs’ “peaceful and open” possession of the suit property. It matters not that the two suits were discontinued and abated respectively. Once the suits were filed, time stopped running until when they were terminated. The Plaintiffs cannot therefore claim the land as of right “Nec vi, nec clam, nec precario.” Ultimately, the Plaintiffs’ claim for adverse possession fails.
77. On the question of levying for distress of rent, it is noted that the Defendants admit having distressed for rent. However, the Plaintiffs admit to having litigated this issue before the Magistrates Court where they sought to have the distress for rent declared illegal. The Court found in its favour stating that the levy for distress and subsequent attachment was illegal. This position was affirmed by the High Court sitting on Appeal in Civil Appeal 192 of 2011. Consequently, this issue is res judicata.
78. Vide their Plea in ELC 121 of 2011 (now ELC No. 13 of 2022), the Defendants seek inter-alia to have the Plaintiffs evicted from the suit property and grant them vacant possession thereof. They also seek for an order for mesne profits or rent arrears. In the Plea, the Plaintiffs admit that there was a suit seeking the same orders, being HCCC No. 1110 of 2000 which abated in the year 2009 upon the demise of the then Defendant.
79. I have perused the Plea in HCCC No. 1110 of 2000 in which the Plaintiffs herein sued the late David Mwenje, currently represented by the Defendants in ELC No. 121 of 2011 (now ELC No. 13 of 2022). Just like in the current suit, the Plaintiffs in HCCC No. 1110 of 2000 had claimed for the eviction of the Defendant’s father.
80. The Plaintiffs seek to impugn the Defendant’s suit. They assert that after the abatement of HCCC 1110 of 2000, the Defendants should have sought an extension to substitute the deceased and having failed to do so, they are barred from filing a fresh suit founded on the same cause of action.



81. To begin with, it is not disputed that HCCC 1110 of 2000 abated upon the death of David K Mwenje. The law with respect to abatement of suits as against Defendants is found in Order 24 Rule 4 of the Civil Procedure Rules which provides that:

- “ 1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

82. Rule 7 of the said rule further provides that:

“(1)Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

83. In the case of *Laban Masinjila & 2 Others vs Joshua Andala Masinjila & 2 Others* [2021] eKLR, the Court persuasively stated thus;

“The effect of abatement of a suit is that it brings proceedings against the deceased party to a close in the same way that a judgment would. The finality is such that in terms of Order 24 Rule 7 (1) of the Civil Procedure Rules, no fresh suit can be brought on the same cause of action.”

84. As regards what constitutes a cause of action, the Court of Appeal in the case of *William Muinde Kilundo vs Peter K. Wambua & 3 Others* [2018] eKLR relied on the exposition by Pearson J in *Drummond Jackson vs Britain Medical Association* [1970] 2 WLR 688 at page 616 thus;

“A cause of action is an act on the part of the Defendant, which gives the plaintiff his cause of complaint.” Further Lord Diplock in *Letang vs Cooper* [1964] 2 All ER 929 at 934 rendered the following definition:-“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

85. Just like in the present case, HCCC No. 1110 of 2000 was instituted by the Defendants as against David S Mwenje seeking inter-alia an order for possession of the suit property as well as mesne profits from the date of the transfers to the date of giving possession. Their claim in this regard was founded on the fact of David Mwenje’s occupation of the suit property which they deemed unlawful.

86. Vide ELC No. 121 of 2011 (now ELC No. 13 of 2022), the Defendants equally seeks to have possession of the suit property against Mr. Mwenje’s legal representatives, the Plaintiffs herein, as well as mesne profits. As with their claim in HCCC No. 1110 of 2000, the same is founded on the fact of unlawful possession of the suit property by David Mwenje and subsequently his estate.

87. It is apparent from the foregoing that the Defendants have brought a fresh suit based on the same cause of action as existed in HCCC 1110 of 2000.



88. The provisions of Order 24 Rule 7 of the Civil Procedure Rules provides that where a suit abates or is dismissed under the Order, no fresh suit shall be brought on the same cause of action. What the Plaintiffs should have done was to apply for the revival of the abated suit, and for extension of time to substitute the deceased Defendant. Having not done, it is the finding of the court that ELC No. 121 of 2011 (now ELC No. 13 of 2022) is incompetent, and is for dismissal.
89. Indeed, the issue of the validity of the sale agreement between the parties herein, and the party who breached the said agreement, and the validity of the subsequent transfer of the suit properties, has never been addressed by any court of law.
90. Until that issue is canvassed, and the seller having put the buyer in possession of the suit property on the basis of the sale agreement, the Defendants in ELC No. 121 of 2011, who are Plaintiffs in the Originating Summons, shall continue being in possession of the suit property.
91. For those reasons, this court makes the following orders:
- i. The Plaintiffs' Amended Originating Summons dated 24th June, 2009 be and is hereby dismissed.
 - ii. The Defendants suit – ELC No. 121 of 2011 (ELC 13 of 2022) be and is hereby dismissed.
 - iii. The parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF JUNE, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Githinji for Plaintiffs

Mr. Kaburu for Defendant

Court Assistant: Tracy

ELC NO. 243 OF 2009

JUDGMENT

