Cherere v Wandarwa & another (Enviromental and Land Originating Summons 18 of 2020) [2024] KEELC 5445 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5445 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 18 OF 2020

LN GACHERU, J

JULY 18, 2024

BETWEEN

BENSON MWANGI CHERERE ..... PLAINTIFF

AND

CHARLES FRANCIS KIMINDIRI WANDARWA ..... 1ST DEFENDANT

STEPHEN MURAYA KAMURI ..... 2ND DEFENDANT

JUDGMENT

1. The Applicant herein Benson Mwangi Cherere, brought this instant Originating Summons dated 4th August 2020, and filed on 10th August 2020. The same is premised under Order 37 Rule 7, of the Civil Procedure Rules, Section 38 of the *Limitation of Actions Act*, Section 28 of the *Land Registration Act*, Section 3A of the *Civil Procedure Act*. The Applicant has sought for the following orders:

    a. That there be a declaration that the Applicant has acquired land parcel number LOC.GAKOIGO/975, by adverse possession and Respondents' rights thereto have been extinguished.

    b. A declaration that the applicant alternatively damage for breach of contract calculated at present cost since 2001 plus interest and costs. (which might have meant that the Applicant is entitled to damages for breach of contract).

    c. An order of transfer of land parcel LOC.GAKOIGO/975, from the Applicant to the Respondents. (which might have meant, an order of transfer of the suit land from the Respondents to the Applicant).

    d. Any other or better relief this Court may deem fit to grant.

2. This Originating Summons is based on the grounds set out on its face and in the Supporting Affidavit sworn by BENSON MWANGI, CHERERE, sworn on 4th August 2020.

3. It is the Applicant claims that he acquired land parcel number LOC.GAKOIGO/975 (the suit property), by adverse possession upon executing an agreement for the disposal of the said land dated 18th June, 2001 between himself and the 1st Respondent which agreement is on record. Further, he claimed that his occupation of the suit property has been continuous and uninterrupted for more than twelve (12) years.

4. It is the Applicant's further contention that he has developed the suit property extensively over the period he has resided thereon by planting about forty (40) Eucalyptus trees, forty (40) Mango trees, sixteen (16) orange trees and other crops.

5. The Applicant also claimed that the 1st Respondent covenanted to transfer the suit property to him pursuant to the terms of the sale agreement dated 18th June, 2001, on the pretext that the property was still under the name of the 1st Respondent's father (deceased), which meant that the Applicant had to wait for the 1st Respondent to succeed his late father as per the law.

6. Further, that the 1st Respondent eventually succeeded his father through Succession Cause No.173 of 2010 (Principal Magistrate's Court, Kangema), whereby, the 1st Respondent was granted ownership over the suit land courtesy of a Certificate of Confirmation of Grant dated 8th May, 2013, which is on record, but the 1st Respondent failed to effect the necessary transfer.

7. In his Supporting Affidavit, the Applicant Benson Mwangi Cherere, averred that he had sued the 1st Respondent in ELC. No. 152 of 2014, at Nyeri High Court, but the 1st Respondent changed ownership of the suit property to alter the nature of the suit. However, the said suit was eventually struck out for failure to attach a copy of the title deed in question. He added that he was not deterred and filed this suit so that he could get justice.

8. It was the Applicant's further averment that upon carrying out a search at the Lands Office, he discovered that his land had been demarcated into eleven (11) plots, as attested by his annexure "BC1". It was his testimony that the 1st Respondent subdivided the suit land with the aim of frustrating him.

9. The Respondents opposed this Originating Summons vide the 1st Respondent's Replying Affidavit dated 27th May 2022, which was filed on 3rd June, 2022. He averred that the original registered owner of the suit land died intestate in 1992, and a Succession Cause was filed in respect of the deceased's estate in year 2010.

10. The 1st Respondent also averred that the sale agreement dated 18th June, 2001, was void ab initio, as he was not the administrator of his father's estate at the execution of the aforesaid sale agreement.

11. Further, he asserted that he lacked the requisite legal capacity to enter into an agreement for disposal of the suit property, having not been named as an administrator of the estate, although he was entitled as a beneficiary of the same estate.

12. It was his further assertion that the time can only start running against him once he was issued with a title deed, and that the Plaintiff/Applicant admitted he knew that the 1st Respondent was not in possession of the title.

13. In his Witness Statement dated 27th May 2022, the 1st Respondent described the occupation of the suit property by the Applicant as illegal and amounting to the offence of "intermeddling", without further explanation.

14. The 2nd Respondent also opposed the instant suit through his Replying Affidavit dated 28th April 2023, and averred, that the suit property was transferred to him in year 2014, hence the Applicant's claim of Adverse Possession has not crystalized against him.

15. He also averred that if the Applicant was in occupation of the suit land, then he occupied the same as a trespasser. Further, that according to his own observation, when he visited the suit property, the said land was "furrow", which the Court has interpreted to mean "fallow or not planted with crops".

16. He claimed that the only crops on the suit land is a Mango tree and some Silk Oaks, planted by his late father's brother. He refuted the Applicant's contention that there is any person in possession of the suit land as at the date of filing his Replying Affidavit.

17. He also stated that the Plaintiff/Applicant's suit could only be sustained if there was a valid sale agreement between the Applicant and the 1st Respondent, which is not the case herein. He characterized the sale agreement executed between the Applicant and the 1st Respondent as amounting to intermeddling with the estate of a deceased person, which is punishable as a criminal offence. Therefore, he contended that the Applicant should not be allowed to benefit from his criminal activities.

18. The suit proceeded by way of viva voce evidence, wherein the Plaintiff/Applicant gave evidence for himself and called no witness. Each of the Defendant also gave evidence for himself and called no witness, Thereafter, the parties filed and exchanged written submissions.

PLAINTIFF'S CASE

19. PW1; Benson Mwangi Cherere, told the court that he lives in Mbombo area, and he adopted his witness statement dated 2nd May 2023, as his evidence in chief.

20. It was his evidence that he is peasant farmer, and he also produced the list of documents as P. Exhibits 1-2 . He adopted his Further list of documents dated 5th October 2023, as P Exhibit 3.

21. In his witness statement, he stated that he has known the Defendants since they were young and they were neighbors. That when the 1st Defendant stopped farming on the suit land, he leased it for 4 years from 1996 to 1998. Thereafter, the land was leased to another person.

22. He further told the court that the suit land was sold to him in 2001, and he has occupied it since then.

23. That when he was sold the suit land, he entered into full occupation as the owner, and he completed payment of the purchase price on 14th November 2001, and thus became the full owner of the suit land.

24. Further, that he sought the services of the surveyor to pick out the boundaries, who marked the boundaries and restored the beacons. He did this by planting eucalyptus trees, and different fruits.

25. He claimed that since then, he has continued to occupy the suit land without interruption, and free from hindrance by the 1st Defendant. That thereafter, he asked the 1st Defendant to transfer the land to him, but to no avail.

26. That the 1st Defendant had told him that he was awaiting the completion of the succession cause over the estate of his father, and that during the succession proceedings, he would include his name in the list of beneficiaries, which he did not do.

27. He claimed that he learnt that the succession cause was completed in 2013, and thereafter, the 1st Defendant told him he was not interested in selling the suit land to the Applicant, and thus declined to transfer the land to him.

28. It was his evidence that he had filed an earlier suit, which was struck out for failure to attach a copy of title. He carried a search at the Lands registry and realized that the suit land was transferred to the 2nd Defendant, Stephen Muraya Kamuri.

29. That he has built a semi-permanent house on the suit land, has planted 40 eucalyptus trees and 40 mango trees, 16 orange fruits, and the value of the land has tremendously gone up.

30. He insisted that he has been in occupation of the suit land for a period of 12 years, uninterrupted, and thus has acquired the suit land by adverse possession.

31. On cross-examination by counsel for the Respondents, he asserted that he purchased the property from a beneficiary of the estate of the deceased. He admitted that succession proceedings in respect of the estate of the deceased registered owner of the suit property had not been completed at the date of the sale agreement dated 18th June, 2001. Further, that said succession proceedings were commenced in year 2010, and he had purchased the 1st Respondent's share of his inheritance of his father's estate.

33. He testified that he entered into the suit land in year 2001, and that he resides on the suit land and engages in farming activities and has built a semi-permanent house thereon. He added that he was unaware that the suit land was no longer in existence although he confirmed that he was aware that the land had been subdivided.

34. On further cross-examination, the Applicant stated that there was an agreement in place wherein the 1st Respondent, Charles Francis Kimindiri Wandarwa, as the vendor was selling his share of his own inheritance. He gave the acreage of the suit land as 1.5 Acres, and confirmed that he has never been required to vacate the suit property.

35. With this evidence, the Applicant's case was closed as he had no other witnesses.

RESPONDENTS' CASE

36. DW1; Charles Kimindiri Wandarwa, a peasant farmer from Muranga, adopted his witness statement dated 27th May 2022, as his evidence in chief. He also produced his list of documents as D. EXHIBITS1 -11.

37. In his witness statement, he stated that the suit land, Loc 7/ Gakoigo/ 975, was registered in the name of Benedict Wandarwa Muna, who died in 1992, and intestate proceedings over his estate commenced in 2010.

38. He further stated that the purported sale agreement between himself and the Applicant was null and void, as he was not the administrator of the estate of his father, Benedict Wandarwa Muna. He claimed that he had no capacity to enter into a sale agreement over the suit land.

39. Further, he alleged that if there was any occupation of the suit land by the Applicant, then that was intermeddling with the deceased person property, and it is a criminal offence.

40. On cross-examination by counsel for the Applicant, he stated that he was registered as the proprietor of the suit property in year 2013, not in 2010. He admitted to having seen the Green Card in respect of the suit land dated 2010. He denied that there was any misrepresentation regarding the disposal of the suit property and placed blame on the delay in determination of the suit relating to the estate of his father.

41. Further, he stated that he comes from Kangema area while the suit property is located in Gakoigo area. He asserted that his late father was the proprietor of the suit property, and that he had leased the suit land to the Plaintiff/Applicant herein.

42. He confirmed that he did not have in his possession any sale agreements or leases in respect of the suit property. Further, that the Plaintiff/Applicant used to plant subsistence crops on the suit land, between years 2001 and 2013. He also admitted that he does not use the suit property.

43. Upon re- exam, he stated that nobody is using the suit land at the moment, and that the title deed in respect of the suit land is in the name of Muraya (the 2nd Respondent), and not in the Applicant's name.

44. He confirmed that the Applicant was using the suit land previously but pursuant to his permission. It was his evidence that the registered owner of the suit land as at 2001 was his deceased father, and that his family asked the Applicant to stop using the land.

45. DW2 STEPHEN MURAYA KAMURI, a peasant farmer from Mathioya area, adopted his Witness Statement and List of documents which documents were marked D Exht 3-4.

46. It was his evidence that the suit property was bushy and lacks any sort of developments, when he purchased it. Further, that he was aware of the sub-divisions on the suit land and he did not object to them.

47. It was his testimony that he did not know the Applicant herein, and he bought the suit land in 2014, and though he does not use it, he visits this land often.

48. He also stated that he only learnt about the Applicant when he sued the 1st Respondent in ELC No. 234 OF 2017, and he was still the registered owner, although he had not been enjoined in that suit.

49. He claimed that the Applicant is not in occupation of the suit land, and admitted that the same has been subdivided into eleven plots. Therefore, the Applicant has not been in exclusive occupation of the suit land for period of over 12 years

50. He argued that in any event, time could have started to run against the 1st Defendant when he was registered as a proprietor on 20th December 2010.

51. On cross-examination by counsel for the Applicant, he testified that he purchased the suit land in 2014, and he has never sued the Applicant for using his land. He also confirmed that he does not live on the suit land, though he is the registered owner of the said land. 24. The court directed the parties to file written submissions.

52. After the viva voce evidence, parties filed and exchanged written submissions. The Applicant filed his submissions on 16th Feb 2024, through the Law Firm of Kimwere Josphat& Co Advocate. On their party, the Respondents filed their written submissions on 11th March 2024, through Mwaniki Warima& Co Advocates.

53. In his written submissions, the Applicant reiterated the averments contained in his Supporting Affidavit. Further, he placed reliance on the provisions of Sections 37 and 38 of the *Limitation of Actions Act*, and on the decision of the Court in the cases of *Chevron (K) Limited V Harrison Charo Washutu (Malindi Civil Appeal no. 17 of 2016)* and *Wesley Barasa V Immaculate Awino Obongo (Kisumu Civil Appeal no.115 of 2015*.; Mariba *V Mariba (civil Appela no. 188 of 2002*) and, JANET NGENDO V MARY WANGARI MWANGI (CIVIL APPEAL NO.175 OF 2003).

54. Ultimately, the Applicant urged the court to allow his suit with costs, to be borne by the Respondents.

55. It was his submissions that his entry onto the suit property was legal, proper and uninterrupted for more than twelve (12) years, and thus, he is entitled to the prayers sought in his claim.

56. In their written submissions the Respondents refuted the Applicant's contention that he has planted various crops on the suit land. It was their further submissions that no photographs were produced in Court as exhibits to support these allegations that the Applicant has planted various crops on the suit land.

57. Further, they submitted that the Applicant failed to substantiate the claim that he was in occupation of the suit land, openly and exclusively for a period of over 12 years. It was their further submissions that the Applicant did not prove that he had built the semi-permanent structure on the suit land. The 1st Respondent also claimed that the said structure was put up by his relative.

58. Relying on the decision of the Court in the case of Elizabeth Cheboo V Mary Cheboo Gimnyei (civil Appeal no. 40 of 1978); and, Mbuthia Chiragu V Kiarie Kaguru (civil Appeal no. 87 of 1996) the Respondents submitted that lack of the consent from the Land Control Board renders an agreement for the disposal of land void.

59. Further reliance was also placed in the case of Mombasa Teachers Cooperative Savings & Credit Society Ltd V Robert Muhambi Katan & 15 others (2018) eKLR; Sisto Wambugu V Kamau Njuguna (1983) eKLR; and, Samuel Miki Wawer V Jane Njeru Richu (Civil Appeal no. 122 of 2001), on the requirements required to be established in order for an applicant to acquire land through adverse possession.

60. Citing the provisions of Section 55 of the *Law of Succession Act*, the Respondents submitted that the property of a deceased person cannot be dealt with lawfully unless authorized by the law. Further reliance was placed in the cases of Francis Munyoki Kilonxo & Another V Vincent Mutua mutiso (2013) eKLR; and, McFoy V United Africa Co. Ltd (1961) 3 All ER 1169.

61. The court has considered the above pleadings, the annexures thereto, the evidence adduced in court, exhibits produced and the written submissions, and finds the single issue for determination is; whether the Plaintiff/Applicant entitled to the orders sought?

62. The doctrine of adverse possession can be traced from Section 7 of the *Limitation of Actions Act*, which 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."

63. Further, the *Limitation of Actions Act* provide for adverse possession in Section 13 as follows:

> "(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 afresh 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."

64. Section 38 of the *Limitation of Actions Act*, specifies that the High Court as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land. The section provides 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, 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) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) ....

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section."

65. Further, Order 37 Rule 7 of the Civil Procedure Rules provides procedure of instituting a claim for adverse possession, as follows:

(1) 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.

(3) The court shall direct on whom and in what manner the summons shall be served.

66. In the case of *Mistry Valji vs Janendra Raichand & 2 Others C.A No. 46 of 2015*, reported in (2016) e K.L.R, the Court of Appeal set out the principles to be considere3d in a claim for adverse possession as follows:

i. Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted there can be no claim for adverse possession.The occupation of the land must be nec vi, nec clam, nec precario.

ii. The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued.

iii. It is equally established that adverse possession does not arise merely by occupation and use.

iv. The filing of a suit for recovery of land or any other recognized assertion of title to the land by owner stops time running for purposes of Section 38 of Cap. 22".

67. In the instant suit, the Applicant contended that he entered into and resides on the suit property pursuant to a sale agreement executed with the 1st Respondent 18th June, 2001, in his capacity as the heir of the registered proprietor of the suit land. The 1st Respondent argued and submitted that the

said sale agreement was null and void, as the 1st Respondent lacked capacity to dispose of the suit land as per the contract dated 18th June, 2001.

68. It is very clear that Section 45 of the *Law of Succession Act* provides as follows: -

> "(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
>
> (2) Any person who contravenes the provisions of this section shall-
>
> (a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
>
> (b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

69. It is trite that in a claim based on adverse possession, where the Applicant's claim is founded on purchase, the time begins to run from the date of payment of the final instalment. In the case of WAMBUGU VS KAMAU NJUGUNA CIVIL APPEAL NO. 10 OF 1982, the Court held as follows:

> "...If a purchaser has not paid the full purchase price, time for adverse possession does not begin to run, and that it will only be deemed to start running after the full purchase price is paid".

70. The Applicant herein asserted that he paid the entire purchase price in respect of the suit property pursuant to the terms of the agreement dated 18th June, 2001. From a perusal of the said sale agreement, it is evident that the purchaser who is the Applicant was required to pay Kshs.20,000/= within three (3) months from 18th June, 2001, and a further Ksh 20,000/= in three (3) months from the preceding date.

71. In the Applicant's annexure "BCM2" dated 15th November, 2001, the 1st Respondent acknowledged receipt of the sum of Kshs.40,000/=, from the Applicant being the balance of the purchase price for the suit land as per the contract dated 18th June 2001.

72. The 1st Respondent has not denied executing the said contract of sale of the suit land, nor rejected the acknowledgement of receipt for the remainder of the purchase price dated 15th November, 2001. The 1st Respondent's argued that the sale agreement in issue is null and void due to his lack of capacity to deal with the suit property as he was not the administrator of his father's estate and this property was still registered his deceased father's name.

73. On his part, the Plaintiff/Applicant argued that the 1st Respondent explained to him at the time of entering into the sale agreement dated 18th June 2001, that he was selling the suit land to him in order to secure the resources necessary to file for succession cause, in respect of his late father's estate wherein, he was a heir.

74. This filing of Succession Cause was later confirmed by the Confirmed Grant that was issued on 8th May, 2013, which distributed and transmitted the suit property to the 1st Respondent herein. Though money changed hands, and there was an agreement between the Applicant and the 1st Respondent

for disposal of the suit land, and a further acknowledgment of receipt of Ksh 40,000/= as balance of sale price, time could not start running, from the date of the acknowledgement dated 15th November 2001, when the alleged balance of ksh 40, 000/=, was paid, as the 1st Respondent had no capacity to sale the suit land.

75. It is not in doubt that the suit land was not in the name of the 1st Respondent, and he was not the administrator of the estate of his deceased father. Whatever action he carried on the estate of his father was a nullity.

76. In the case of In re Estate of M'Etirikia Nthaka (Deceased) [2021] eKLR, the Court reasoned as follows:

> " There are indeed processes which a party seeking to transfer a deceased's property before confirmation of grant is issued is permitted to make. This is would be done by way of an application for partial confirmation of grant to allow them to sell a portion of the deceased's property. The Petitioner and his brothers would essentially have argued that their pursuit of funds to finance the Succession cause could not wait for final confirmation of grant. Partial confirmations have previously been issued by the High Court including in the case of In re The Matter Of The Estate Of Michael Kimando Mwangi (Deceased) Succession Cause No. 550 of 2015 [2016] eKLR. The Petitioner and his brothers ought to have done this. This Court is nonetheless aware of the possibility that they may not have had the funds to even move the Court in this way and this is part of the reason that the Court will not entirely fault them for entering into the sale agreement with Siberia before confirmation of grant."

77. Further, in the case of Virginia Mwari Thuranira vs. Purity Nkirote Thuranira [2017] eKLR (Gikonyo J), held as follows:

> " As for the assertion that the Respondents mother sold 1 ½ acres of land to Elias Mugambi Mwongera, I have this to say. The said sale agreement is null and void for violating Section 82 (b) (ii) of the *Law of Succession Act*, as the said Julia Thuranira had not obtained Letters Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court...Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity."

78. Further, in the case of the case of Re Estate of Benson Maingi Mulwa (deceased) (2021)eKLR, the Court held that:

> " In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is properly entitled to protect his or her interest in the estate."

79. Again in the case of Veronica Njoki Wakagoto (Deceased) (2013) eKLR, the Court outlined the meaning and import of Section 45 of the *Law of Succession Act* as follows:

> " The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."

80. The court will also refer to the case of In Re Estate of M`Ngarithi M`Miriti (2017) eKLR, where the Court understood the term "intermeddling" as follows:

> " Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."

81. In this suit, wherein the 1st Respondent is alleged to have sold the suit land to the Applicant, there was no partial confirmation of grant in respect of the estate of Benedict Wandarwa Muna deceased), the father to the 1st Respondent. The Applicant allegedly relied on the 1st Respondent's status as the deceased's son, and heir to enter into the sale agreement for disposal of the suit land dated 18th June, 2001.

82. In Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates vs. National Bank of Kenya Limited (2016) eKLR the Court of Appeal stated as follows: -

> " Likewise, we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable."

83. Being guided as above by the various decided cases, the question that presents itself before this Court is whether there was a valid sale agreement, between the Applicant and 1st Respondent, wherein, the 1st Respondent could legally sale the suit land to the Applicant.

84. This court having found that the purported sale agreement entered between the Applicant was null and void, for being a sale agreement over a deceased person's property before succession proceedings had been undertaken, the court further finds that sale agreement is unenforceable, and the Applicant is not entitled to the prayer no b, of damages for breach of contract.

85. Even if the last instalment was paid, or the full purchase price was paid by the Applicant, dealing with the property of a deceased person before Confirmation of grant was an illegality, and that action

amounted to intermeddling in the estate of the deceased estate. The 1st Respondent had no capacity to deal with the said land, and thus time could not start running for the purpose of adverse possession. This court cannot enforce an illegality. See the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR; where the court held;

> " Remaining in the land and holding on to possession thereof after the arrangement under which you entered became void by operation of the law is to persist in an illegality, to commit a crime, and to do that which is prohibited by the law; it is not to acquire title by adverse possession. When anything is prohibited directly, it is also prohibited indirectly. ..... This means that nothing will be upheld which is a mere device for carrying into effect that which the legislature has said shall not be done. ..... Do not forget the related doctrine, Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud, whose usual English version is that when anything is prohibited, everything relating to it is prohibited.
>
> ..... And when you start off as a purchaser whose buying has been avoided, the lapse of time which sees you twelve or more years in possession does not cure the defect and that which was bad from the beginning. And your beginning is when you start holding onto possession in defiance of the statute, when you commit crime of furthering an avoided transaction, agreement or intention."

85. The issue that should be addressed by the court is whether the 1st Respondent should be allowed to benefit from an illegality to which he was a party to, and upon which he has relied in these proceedings to oppose the Plaintiff/Applicant's claims.

86. The courts in the cases of Mohamed versus Attorney General (1990) KLR 146; and, Nyeri Civil Appeal No. 40 of 2001 and Nyeri County Council versus Monicah M. Mwangi), held that no Court ought to enforce an illegal contract or allow itself to be made instrument of reinforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality.

87. Further, Court in the case of Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & another [2016] eKLR cited Chitty on Contracts Twenty-Eighth Edition Volume 1 General Principles page 839 the Court held as follows:

> " Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract. The benefit of the public and not the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract. "The principle of pubic policy," said Lord Mansfield, "is this ex dolo malo non oritur action. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, form the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, potior est condition defendentis". The rules on illegality have been criticized as being unprincipled but a better way of viewing them, as the previous dictum from Holmon. Johnson illustrates, is as "being

indiscriminate in their effect and are capable therefore of producing injustice. The "effect of illegality is not substantive but procedural"; it prevents the plaintiff from enforcing the illegal transaction. The ex turpi causa defence", as was stated by Kerr L. J. in Euro-Diam Ltd. v Batharst, rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts". As will be seen later, illegal contracts are not devoid of legal effect, but the ex turpi causa maxim entails that no action on the contract can be maintained."

88. Being informed and guided by the findings of the court in the above case law, this Court holds and finds that it would offend public policy to enforce the contract executed by the Plaintiff/Applicant and the 1st Respondent on 18th June, 2001 as the same offends the provisions of Section 45 of the *Law of Succession Act*.

89. However, in a departure from the foregoing position, the Supreme Court of United Kingdom in Patel versus Mirza (2016) UKSC 42, reasoned that just as policy considerations create a bar against a claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefited from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is unsustainable. The Court in Patel versus Mirza(Supra), declared as follows:

> " Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

90. In the above cited case, the Court borrowed from the reasoning of the Court in the case of Neville versus Wilkinson (1782) 1 Bro CC 543, where the Court held as follows:

> " [I]n all cases where money was paid for an unlawful purpose, the party, though particeps criminis, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before."

91. In the same breath, this Court will not countenance unjust enrichments, especially by the 1st Respondent herein. In the case of Macharia Mwangi Maina & 87 Others -Vs- Davidson of Mwangi Kagiri[2014]e KLR, the Court of Appeal addressed the issue of unfair enrichment in the following terms:

> " This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical or procedural justice".

92. Consequently, this Court, upon considering the reliefs sought by the Plaintiff/Applicant in the current suit is satisfied that the Applicant did not seek for an order compelling the 1st Respondent to refund the entire amount received as purchase price in respect of the suit land and interest thereon.

93. It is trite that parties are bound by their pleadings. See the case of Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinda Mule & 3 Others [2014] eKLR, where the Court held as follows:

> "...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averment of the pleadings goes to no issue and must be disregarded....In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation."

94. However, the court notes that in prayer No d, the Applicant urged the court to order; Any other or better relief this court may deem fit to grant.

95. Considering the above prayer, and the provisions of section 3A of the *Civil Procedure Act*, which donates power to this court to issue orders that are necessary for the end of justice to be met, and also being guided by the decided cases that a person should not benefit from his/her own wrong, this court directs the 1st Respondent to Refund to the Applicant any money /monies he may have received from the Applicant as purported purchase price, with interests from the date of this Judgment until payment in full.

96. Accordingly, the Court finds and holds that with regards to the prayers for adverse possession and breach of contract, the Applicant has not proved his case on the required standard of balance of probabilities. For the above reasons prayers no a, b and c of the instant Originating Summons dated 4th August 2020, are found not merited and are dismissed entirely.

97. However, on prayer no d, the court directs the 1st Respondent to refund any monies he purported to have received from the Applicant as purchase price forthwith, with interest from the date of this Judgement until the time of payment in full.

98. Consequently, the Applicant's suit is dismissed entirely in terms of prayers No. a, b and c, with costs to the 2nd Respondent. Prayer No. d, is allowed on the above specified terms.

99. The 1st Respondent to bear his own costs for having executed the contract for disposal of the suit property dated 18th June, 2001 with the Plaintiff/Applicant, before the estate of his father was fully distributed.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JULY 2024.

L. GACHERU

JUDGE

18/7/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Mr. Kimwere for the Plaintiff/Applicant

Ms Waititu for the Defendants/Respondents

L. GACHERU

JUDGE

18/7/2024