



**Mwaura & another (Sued in their Personal Capacity as the Legal Representatives of the Estate of Mwaura Kamau alias Kariuki Mungora - Deceased) v Ndungu (Environment and Land Appeal E008 of 2023) [2024] KEELC 6223 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6223 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E008 OF 2023  
LN GACHERU, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**JOYCE WAMBUI MWAURA ..... 1<sup>ST</sup> APPELLANT**

**FRANCIS KAMAU MWAURA ..... 2<sup>ND</sup> APPELLANT**

**SUED IN THEIR PERSONAL CAPACITY AS THE LEGAL REPRESENTATIVES  
OF THE ESTATE OF MWAURA KAMAU ALIAS KARIUKI MUNGORA -  
DECEASED**

**AND**

**PETER MBUGUA NDUNGU ..... RESPONDENT**

*(Being an Appeal against the Judgement of Hon. Susan Mwangi SRM,  
in Muranga CMCC NO. E074 OF 2022, delivered on 26th July 2023)*

**JUDGMENT**

1. The Appellant herein was the Defendant in Muranga CMCC NO. EO74 OF 2022, whereas the Respondent was the Plaintiff thereon, wherein the Plaintiff had sought to be declared to having acquired 0.50 acres out of land parcel no. Loc1/ Kigio/ 111, by virtue of adverse possession, and that the Defendant(Applicant)'s title to the suit land had become extinguished by operation of law.
2. The said claim was opposed by the Appellants herein as a Defendants in the said suit. After viva voce evidence, the trial court delivered a judgement 26<sup>th</sup> July 2023, in favour the Plaintiff, now Respondent herein.
3. Aggrieved by the said Judgement, the Appellants herein as the Defendants in the suit before the trial court filed the instant Appeal, vide a Memorandum of Appeal dated 10<sup>th</sup> August, 2023, and



challenged the decision and Judgement of the trial Court delivered on 26<sup>th</sup> July, 2023 in Muranga CMCC NO.EO74 OF 2022. The Appellants have sought for the following Orders:

- a. That the judgment of the trial Court be set aside.
  - b. That the lower Court suit be dismissed with costs.
  - c. That the appeal be allowed with costs to the appellant.
4. The suit before the trial was commenced by the Respondent herein by way of an Originating Summons dated 20<sup>th</sup> August, 2022, and was premised on the provisions of Order 37 Rule 7 of the Civil Procedure Rules and Sections 3 and 3A of the *Civil Procedure Act*. It was alleged that the Appellants are the children of Mwaura Kamau alias Kariuki Mungora-(Deceased), the original registered owner of land parcel number LOC1/Kigio/1111 (the suit property).
5. In its decision, the trial Court determined that the Respondent had been in occupation of the suit property for 13 years until year 2022, and the said occupation was uninterrupted, actual, open, exclusive and peaceful, and with the Defendants' (now Appellants) knowledge. Further, the trial Court found and held that the Appellants were in breach of the contract executed with the Respondent dated 2<sup>nd</sup> My, 2009, by enhancing the purchase price of the suit land following the appreciation in value of the same.
6. The Appeal is anchored on the following eight (8) grounds:
- a. That the trial Court erred in law and in fact in failing to understand, appreciate and apply the law on Adverse Possession, the ingredients thereof and especially when times starts to run for with regard to Adverse Possession in the context of purchase or sale of land, thereby arriving at an erroneous decision.
  - b. That the trial Court erred in law in fact by holding that the Respondent was in possession of a portion of land parcel number LOC1/KIGIO/1111, measuring 0.5 Acres for a period of over 12 years without proof of payment of the balance of the purchase price awaiting completion of the Succession Cause as provided for in the Sale Agreement dated 13<sup>th</sup> August 2012 thereby arriving at the erroneous conclusion that time had started running for purposes of Adverse Possession.
  - c. That the trial Court erred in law by faulting the Appellant for being of advanced age by stating that the she could not remember her own children's baptismal names yet the responded did admit to having received a refund of Ksh.195,000/-from one JANE MWAURA being the purchase price but the trial Court disregarded such crucial evidence thereby arriving at a wrongful decision.
  - d. That the trial Court erred in law by ignoring the admission of the parties to the effect that the balance of the purchase price would be paid after the Succession Cause of the deceased was finalized and the Respondent admitted to not having paid the same hence Adverse Possession could not have crystalized thereby arriving at an erroneous outcome.
  - e. That the trial Court erred in law and in fact by sanitizing a transaction done or entered into contrary to the provisions of the *Law of Succession Act* as the Appellant had ot obtained Letters of Administration in respect of the estate of Mwaura Kamau alias Kariuki Mungora to legally allow her to sell the portion of 0.5 Acres out of the suit land to the Respondent hence the Contract of sale was null and void abnition in the eyes of the law and which sale amount to intermeddling with the estate of the deceased.



- f. That the trial Court erred in law in fact by failing to appreciate the submissions and the authorities cited by the Appellants which were contrary to the trial Court's holding thereby failing to appreciate the question of the hierarchy of the courts and the binding effect of the decisions of the Superior Courts on the subordinate Courts.
  - g. That the trial Court erred in law and in fact by failing to apply the legal principle that the courts cannot rewrite contracts for the parties in dispute whereas the parties freely consented to adjust the purchase price of the land in question in year 2012 following a general increase in the price of land.
  - h. That the trial Court erred in law and in fact by disregarding the evidence, submissions and testimony of the Defendant while placing weight on the Plaintiff's evidence in the proceedings before it.
7. At the trial Court, the Respondent claimed that on or about 2<sup>nd</sup> May, 2009, he entered into an Agreement with the Defendants (now Appellants), for the disposal of a portion measuring 0.5 Acres to be carved out of the suit property for a consideration of Ksh.60,000/=(sixty thousand). The Respondent stated that he made an initial payment of Ksh.30,000/= (thirty thousand) and a further payment of Ksh.15,000/- on 8<sup>th</sup> May, 2009, and the same was acknowledged by the Appellants as attested to by his EXHIBIT 3.
  8. It was his further contention that thereafter he moved into the portion of the suit property and carried out developments thereon with the approval of the Appellants. He added that on 13<sup>th</sup> August 2012, the Agreements executed with the Appellants was formalized through his lawyers with various variations thereto as attested to by his Exhibit 4.
  9. Further, the Respondent stated that the Agreement executed with the Appellants stipulated that the balance of the purchase price would be paid after the confirmation of grant of the deceased's estate, and also following the obtaining of the consent of the Land Control Board by the Appellants. It was his further allegation that all payments made to the Appellants were premised on the condition that the Appellants were taking steps to procure completion documents related to the suit property.
  10. Further, the Respondent as the Plaintiff argued that the Appellants reneged on the Contract dated 2<sup>nd</sup> May, 2009, by issuing a letter dated 1<sup>st</sup> August, 2022, through their Advocates wherein they stated that they had cancelled the transaction entered into with the Respondent in its entirety. The Respondent also claimed that he had been in occupation of the suit land openly, continuously, exclusively and without force or secrecy from year 2009, with the consent of the Appellants.
  11. He further claimed that the registration of the title to the suit property in the Appellants' names did not interrupt his possession of the same pursuant to the doctrine of Adverse Possession.
  12. The 1<sup>st</sup> Appellant Joyce Wambui Mwaura opposed the Plaintiff(Respondent's) suit before the trial Court through her Replying Affidavit dated 19<sup>th</sup> October, 2022 wherein, she admitted to have executed an Agreement dated 2<sup>nd</sup> Mya, 2009, with the Respondent for the disposal of 0.5 Acres to be excised from the suit land for the consideration of Kshs. 60,000/=.
  13. She alleged that the said Agreement was renegotiated and replaced by the Agreement dated 13<sup>th</sup> August 2012, which increased the purchase price to Ksh.200,000/= (two hundred thousand) out of which the Respondent paid Ksh.155,000/= (one hundred and fifty-five thousand) leaving a balance of Ksh.85,000/= (eighty-five thousand). She contended that the balance of Ksh.85,000/= was expressed to be payable by the Respondent after the confirmation of Grant in favour of the Appellants. That the



Grant in question was confirmed on 28<sup>th</sup> January 2021, but the Respondent failed to offset the balance of the purchase price as covenanted.

14. The 1<sup>st</sup> Appellant further alleged that she issued a Demand Notice dated 1<sup>st</sup> August 2022, to the Respondent through her Advocates wherein, she reimbursed Ksh.195,000/= being the purchase price rendered by the Respondent plus expenses incurred in respect to the suit land. Vide the same Demand Notice, she communicated to the Respondent that he was no longer allowed to cultivate the suit property.
15. The 1<sup>st</sup> Appellant explained that she refunded Ksh.195,000/- being the purchase price rendered by the Respondent, plus expenses because the Respondent never completed payment of the entire purchase price. It was her further contention that the contract executed with the Respondent on 2<sup>nd</sup> May, 2009, was void ab initio and tainted with illegality.
16. That as provided by the Law of Succession Act, she did not possess the requisite leave of Court to enable her to dispose of the deceased's property including the suit land. She further argued that time does not begin to run for the purposes of adverse Possession until the entire consideration has been paid off by the Purchaser.
17. The Appeal was admitted as provided by Section 79B of the Civil Procedure Act, with directions that the same be canvassed by way of written submissions.

### **The Appellants' Submissions**

18. The Appellant filed written submissions on 14<sup>th</sup> February, 2024, through the Law Firm of Kanyi Kiruchi & Company Advocates. They submitted that the Respondent failed to clear the remainder of the purchase price of Ksh.85,000/= which amount was expressed to be payable following issuance of the confirmed grant to the Appellants, and which Grant was confirmed on 28<sup>th</sup> January, 2021.
19. It was their further submission that the Respondent failed to communicate to them following the issuance of the Confirmed Grant, which led the Appellants to convene a meeting of their family members, wherein it was resolved to reimburse the amount paid by the Respondent, to be accompanied by a demand that the Respondent desist from further cultivating the suit property . Consequently, Notice of Demand to that effect was issued to the Respondent on 1<sup>st</sup> August, 2022.
20. The Appellants further submitted that they refunded to the Respondent the sum of Ksh.195,000/= being the amount received from the Respondent, plus any expenses he may have incurred in the transaction. They reiterated that the claims advanced at the trial Court that the Respondents together with themselves renegotiated and executed new Contract dated 13<sup>th</sup> August, 2012, which increased the value of the land in question to Ksh.200,000/= out of which the Respondent paid Ksh.155,000/=. Further, that the Respondent never paid off the balance of Ksh.85,000/=.
21. It was further submitted that at the trial Court, the Respondent admitted to not having cleared off the balance of the purchase price, and also admitted to having received Ksh.195,000/=:,which amount the Respondent claimed not to know its source.
22. The Appellants sought reliance on the holding of the court in the cases of Samuel Miki Waweru Vs Jane Njeru Rich, Civil Appeal No. 122 of 2001; Mwinyi Hamis Ali vs Attorney-General and Philemon Mwaisaka Wanaka Civil Appeal No. 125 of 1997; Wambugu V Njuguna (1983) KLR 172; and, Public Trustee V Wanduru (1984) KLR 314, concerning the constitutive elements of the doctrine of adverse Possession.



23. On the issue of costs, reliance was placed in the decision of the Court in the case of DMG V EWG [2021] eKLR, where the Court referenced the reasoning of the Court in the case of Party of Independent Candidate of Kenya & Another V Mutula Kilonzo & 2 Others (2013) eKLR, which decision cited with approval the holding of the Court in the case of Levben Products V Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227.

### **The Respondent's Submissions**

24. The Respondent filed his written submissions dated 8<sup>th</sup> March, 2024, through the Law Firm of Gatuiku Mwangi & Company Advocates.
25. After setting out the background of the dispute herein, the Respondent elaborated on the ingredients of adverse Possession, and referred to the provisions of 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.”

26. Reliance was placed on the case of *Gachuma Gacheru vs Maina Kabuchwa [2016] eKLR Civil Appeal nO. 164 of 2011*, wherein the Court referred to the holding in the case of Maweu vs Liu Ranching & Farming Cooperative Society [1985] eKLR, in support of the proposition that adverse Possession is a factual matter that cannot be seen in the title in question.

27. Further reliance was placed in the decision of the Court in the cases of Gabriel Mbui vs Mukindia Maranya [1993] eKLR; and, Mombasa Teachers Co-operative Savings and Credit Society Limited V Robert Muhambi Katana and 15 others [2018] eKLR, where the court held;

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

28. Turning to the issue of the validity of the sale Agreements dated 1<sup>st</sup> August 2022, and 13<sup>th</sup> August 2012, it was submitted that those Agreements were null and void on account of the death of the registered owner of the property which land was being conveyed. It was the Respondent's further submission that the administrators of the estate of the deceased MWAURA KAMAU, were only appointed to that capacity in year 2014, while the Grant in respect to the deceased's estate was confirmed in year 2021.
29. It was his further submissions that at the time of his entry into the suit land, the Appellants lacked the requisite legal capacity to execute a contract in regard to the estate of the deceased, as they had not taken out letters of Administration and grant had not been confirmed.
30. The Respondent submitted that the claim advanced by the Appellants that they reimbursed to him the monies which he had paid to them is inconsequential because the suit at the trial Court concerned adverse Possession, rather than Specific Performance.
31. Further, he submitted that the said reimbursement was done following his 12 years of occupation of the suit property. He denied the claim that the foregoing reimbursement was done by the Appellants and argued that in the proceedings before the trial Court, the 1<sup>st</sup> Appellant failed to establish the identity of one JANE MWAURA who sent Ksh.195,000/- to the Respondent via MPESA.



32. The Respondent sought further reliance on the provisions of Section 45 of the *Law of Succession Act* and on Sections 6 (1) and 8 of the *Land Control Act*, which sections deal with the issue of intermeddling with the estate of the deceased and consent from the Land Control Board.
33. On the question of costs, the Respondent cited the provisions of Section 27 of the *Civil Procedure Act* to advance the proposition that costs are awarded to the successful party in a suit.
34. This court has considered the Memo and Record of Appeal herein, the rival written submissions and the relevant provisions of law and finds the issues for determination are:-
  - I. Whether the Appeal herein is merited?
  - II. Who shall bear the costs of the Appeal?

### **Whether the Appeal is merited?**

35. The Court has carefully considered the pleadings, evidence and rival written submissions of the parties, and renders itself as follows; This being a first appeal, this Court is bound to re-evaluate the evidence adduced before the trial Court as is contained in the Record of Appeal, and then arrive at its own conclusion, while bearing in mind that it never saw nor heard the witnesses as did the trial Court.
36. In the case of *Selle V Associated Motor Boat Co.* [1968] EA 123, the Court held that:

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”
37. Section 13 of the *Limitation of Actions Act* provides 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 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
  - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
  - (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”



38. Further, Section 38 of the *Limitation of Actions Act* provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

39. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the Court understood the meaning and import of the doctrine of Adverse Possession as follows:

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

40. Further, in the case of *Ngugi v Kimunio (Environment & Land Case E006 of 2023)* [2024] KEELC 1518 (KLR) (20 March 2024) (Judgment), the Court held as follows:

“... for adverse possession [to take effect], these questions must be answered.

1. How did the Applicant take possession of the suit property?
2. When did he take possession and occupation of the suit property?
3. What was the nature of possession and occupation?
4. How long has the applicant been in possession of the land?”

41. Again in the case of *Samuel Miki Waweru -vs- Jane Njeri Richu* (2007) eKLR, the Court of Appeal expressed itself as follows:

“It is trite Law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.”

42. Further, in the case of *Wambugu -vs- Njuguna* (1983) KLR 173, the court reasoned as follows:

8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order on subsequent adverse possession, the rule is: the claimant’s possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.



43. In the case of *Mageta Enterprises Limited v Tilak Company Ltd* [2020] eKLR, the Court declared as follows:
- “ [T]he claimants possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price and that the claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.”
44. Further, in the case of *Public Trustee -vs- Wanduru* (1984) KLR 314, the Court of Appeal held as follows:
- “ [T]hat the full purchase price for the land having been paid on the same day, viz March 16, 1967, the learned judge ought to have held that the second appellant had completed adverse possession of the suit land for over twelve years before the institution of the suit on April 2, 1979.”
45. In the case of *Tilak Company Ltd v Mageta Enterprises Ltd (Civil Appeal E080 of 2021)* [2024] KECA 342 (KLR) (15 March 2024) (Judgment), the Court reasoned as follows:
- “ In *Sisto Wambugu v. Kamau Njuguna* (supra), the Court accepted as correct the principle stated in *Hosea v. Njiru & Others* [1974] EA 526 that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. However, in *Sisto Wambugu* the Court found that the respondent had neither paid the purchase price, nor repudiated the contract.”
46. In the instant Appeal, the Appellants argued and submitted that the Respondent failed to render the full purchase price for the purchase of 0.5 Acres, out of the suit land as contracted. They submitted that the Respondent owed them a balance of Ksh.85,000/= at the time when they obtained a confirmed grant in respect of the estate of their deceased father, and which he neglected to pay, leading them to cancel the contract for the disposal of the suit property executed with the Respondent.
47. It is curious that the Appellants contended that the entire purchase price upon renegotiation was Ksh.200,000/=, and further, they acknowledged that the Respondent made a payment of Ksh.155,000/=. In their calculation, the foregoing leaves a balance of Ksh.85,000/=. However, according to this Court’s own computation, the balance of Ksh.200,000/= minus Ksh.155,000/= is Ksh.45,000/= and not Ksh.85,000/= as claimed by the Appellants.
48. Be that as it may, there remained a balance of the purchase price of Ksh.45,000/= which was not rendered and or paid fully by the Respondent to the Appellants.
49. For his part, the Respondent termed the Agreement executed with the Appellants as void ab initio, and which amounted to intermeddling with the estate of a deceased person, contrary to the provisions of Section 45 of the *Law of Succession Act*. Indeed, the Appellants could not sell the suit property before succession of the estate of the deceased had been finalized. The contract of sale was therefore illegal.
50. The Respondent entered the suit land on the basis of the Agreement for sale of 0.5 Acres, thereof executed with the Appellants in May 2009. It is evident that the Respondent entered into the suit land as a purchaser, albeit a purchaser who had not rendered the entire purchase price, which initially was expressed to be Ksh.60,000/= and out of which he paid Ksh.45,000/=. The said purchase price was reportedly enhanced to Ksh. 200,000/= in year 2012, with the consent of all the parties.



51. From the evidence adduced by the parties and on the admission of the Appellants, it is evident that as at May, 2009, when the parties executed a contract for the disposal of 0.5 Acres out of the suit land, the same belonged to the deceased, and no succession proceedings had been commenced or finalized with regard to the estate of the deceased.
52. In view of the foregoing, the Court finds and holds that the Appellants lacked the necessary legal capacity to enable them to dispose off the suit property, which property belonged to a deceased person, and no letters of administration had been issued.
53. In the case of *Ngugi v Kimunio* (Environment & Land Case E006 of 2023) [2024] KEELC 1518 (KLR) (20 March 2024) (Judgment), the Court reasoned as follows:-
- “The suit land is not in the name of the Defendant, and he could not give what he does not have. This position is emphasized by the principle of ‘nemo dat non-quod habet’, which was enunciated by the Court in the case of *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim* [2019] eKLR as follows: “The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”
54. In the instant Appeal, the Appellants argued that they obtained a Confirmed Grant in respect of the estate of their deceased father in year 2021. Further, that the Respondent did not render the remainder of the purchase price following the issuance of a Confirmed Grant in their favour, which led them to cancel the agreement executed with the Respondent in year 2022.
55. In the case of *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, the Court reasoned as follows: -
- “Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in *Wanyoike v Kahiri* [1979] Kenya LR 236 at 239; also see among others, Simpson J (as he then was), in *Hosea v Njiru and others* [1974] E A 526 at 529, 530).”
56. Further, in the case of *Cheromei v Muigai* (Environment & Land Case E005 of 2023) [2024] KEELC 5604 (KLR) (25 July 2024) (Judgment), the court held as follows: -
- “It is a well-known fact that time cannot begin to run even if the purported contract becomes null and void by operation of law, until the permission initially granted to occupy the land is expressly revoked. This revocation may be done by the Vendor, or by the adverse possessor making it clear that they no longer remain on the land under the auspices of the said permission. This is so that the registered owner is made aware of the risk of losing his title if no take steps are taken to evict the purchaser from the land. Furthermore, one of the requirements of adverse possession is open possession, without secrecy and the acquisition of rights in such a clandestine manner would in essence defeat the very important ingredients of openness of possession. Hence, a purchaser in possession cannot sit quietly enjoying rights of possession of land under a contract, and at the same time acquire rights as an adverse possessor over the property without first making it clear to the vendor that they are no longer relying on the permission granted by virtue of the contract.”



57. In the case of Wambugu –Vs- Njuguna (1983) KLR the Court stated that:

“Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchase pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated.”

58. It is evident that the Appellants revoked the contract executed with the Respondent in August 2022, during which time they argued and submitted that they reimbursed the sum of ksh.195,000/- to the Respondent being the amount received from the latter towards purchase of 0.5 Acres, out of the suit land, plus any expenses incurred by the Respondent.

59. Therefore, it is not in doubt that that the Respondent’s occupation of the relevant portion of the suit property between May 2009, and the revocation of contract by the appellants in August 2022, was as a purchaser. For that reason, it follows that the Respondent could not become an adverse Possessor of the said portion of the suit land during the period between May 2009 and August 2022.

60. Consequently, the Court holds and finds that the Respondent has not occupied the suit property for the statutory 12-year period which would entitle him to claim ownership of the said portion of land on the basis of adverse Possession.

61. The Respondent entered into the suit land as a purchaser and with the permission of the Appellants and therefore his occupation was not hostile or adverse to the Appellants.

62. Accordingly, the Appeal before the Court dated 10<sup>th</sup> August, 2023, is found merited and said Appeal is hereby allowed entirely. Consequently, the Judgement of the trial Court dated 26<sup>th</sup> July, 2023, is upset and is hereby set aside and the Respondent’s suit before the trial court be and is hereby dismissed entirely.

63. In event that the Respondent has already procured a title deed for the 0.5 Acres out of the suit land pursuant to the impugned Judgement of the trial Court, the said title shall be cancelled and is hereby cancelled, and the title to revert to its original status, before the impugned Judgement.

**(ii) Who shall bear costs of this Appeal?**

64. On the issue of costs, it is trite that costs follow the event, and costs is ordinarily awarded to the successful party in a suit. The Appellants are the successful parties and are thus awarded the costs of this Appeal and the suit before the trial Court.

65. For avoidance of doubt, the Appeal herein is allowed with costs to the Appellants.

Appeal is allowed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**L. GACHERU**

**JUDGE**

**26/9/2024**

**Delivered online in the presence of:**

Joel Njonjo – Court Assistant



Mr Wachira H/B for Mr Kanyi

N/A for the Respondent

**L. GACHERU**

**JUDGE**

**26/09/2024.**

