



Mukindia v Mutwiri (Sued as the Legal Representative of the Estate of Febian Mutwiri Rugiri – Deceased) & 6 others (Environmental and Land Originating Summons E007 of 2023) [2024] KEELC 6344 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6344 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023
CK NZILI, J
SEPTEMBER 25, 2024**

BETWEEN

LAWRENCE MURORI MUKINDIA PLAINTIFF

AND

LAWRENCE MWORIA MUTWIRI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FEBIAN MUTWIRI RUGIRI – DECEASED) 1ST DEFENDANT
ISABELLA NGUGI 2ND DEFENDANT
ALICE KAGWIRIA MUTWIRI 3RD DEFENDANT
ROSEMARY KAGENDO 4TH DEFENDANT
JANE KIENDE 5TH DEFENDANT
KELVIN MWENDA KINYUA 6TH DEFENDANT
FESTUS MBAABU MBAJO 7TH DEFENDANT

JUDGMENT

1. Through an amended originating summons dated 18.12.2023, the plaintiff seeks to be declared owner of one acre of title to L.R No. Abothuguchi/Igane/783 held by the defendants by virtue adverse possession. An affidavit of Lawrence Munori Mukindia of the even date supports the application.
2. At the trial, Lawrence Munoru Mukindia testified as PW 1. He relied on his supporting affidavit to the originating summons and a witness statement dated 18.12.2023 as his evidence in chief. It was the plaintiff's testimony that L.R No. Abothuguchi/Igane/783 was registered in the name of the 1st defendant following the issuance of a confirmed grant of letters of administration in Githongo



SPM Succession Case No. E042 of 2022, out of which the 1st defendant subdivided the initial land on 24.5.2023 into L.R No's Abothuguchi/Igane/3537 – 3541 during the pendency of this suit. He produced copies of the green card, certificate of confirmation of grant dated 1.2.2023 and an official search as P. Exh No. (1) & (2).

3. Further, PW 1 told the court that he bought one acre of the initial land from the late Febian Mutwiri Rugiri over 23 years ago, who unfortunately did not transfer the portion to him until he passed on. He produced the sale agreement dated 3.7.2000 and acknowledged notes for the payments dated 3.7.2000, 3.11.2000, and 8.5.2001 as P. Exh No's (3) – (6).
4. PW 1 stated that he moved into the land in 2001 and has fully developed the portion which has mature avocado, banana and assorted trees on top of other subsistence crops. Similarly, PW 1 said that the portion under his occupation is distinct and fully fenced with clear boundaries to it.
5. Again, PW 1 told the court that he had used the land openly and continuously and had undertaken the enumerated activities exclusively without interruptions since 2001. He relied on copies of the certificate of official search for the subdivisions as attached to his supporting affidavit and marked as LMM 3 (a) – (e) respectively.
6. In cross-examination, PW 1 told the court that entry into the land occurred following the sale agreement dated 3.7.2000 and has never been ejected out of the land by the defendants. Further, PW 1 admitted that the court issued him with interim orders of injunction. However, he has never cited the defendants for contempt of court orders. He made admission further that some of the acknowledgment notes were not witnessed or signed by him and that the signatories' signatures appeared different. Nevertheless, PW 1 insisted that the signatures belonged to the seller. As to whether the land was ancestral, PW 1 told the court that he could not ascertain the position since the land was about three kilometers from his homestead.
7. PW 1 also stated that after he bought the land, it was surveyed and beacons erected on its boundaries by a land surveyor, paving the way for his possession and cultivation using rainwater.
8. PW 1 said that as a purchaser, he never objected to the subdivisions in 2024, nor did he file a protest in the succession cause. He stated that after there was an alleged aborted threat to remove him from the land by the 1st defendant in 2023, he lodged a report with the police. Similarly, he said that he had no crop damage assessment report for the alleged crop destruction of his food crops in 2021.
9. PW 1 said that the mother title was approximately four acres. After the subdivisions, he said he was unable to verify under which parcel of land where his portion was situated on the ground, given that he never engaged a land surveyor to verify that fact before filing the suit; otherwise, his exact portion, out of long occupation was known and identifiable by all. Additionally, PW 1 said that until the attempted crop destruction and threats of eviction, he had been utilizing the portions peacefully and openly with no hostility from the defendants for over 12 years.
10. In addition, PW 1 said that the duty was on the seller as per the sale agreement to apply for a land control board consent for the transfer and in case of default, there was a clause on the way forward.
11. PW 1 said that even after the seller declined to make the application for land control board consent, he never demanded in writing the same until the seller died in 2018. He insisted that between 2001 and 2018, there was no interruption of his occupation or dispute as to his occupation status of the land. PW 1 said that his portion was distinct, identifiable and a neighbor to where the 1st defendant had allegedly erected a house. He could, however, not confirm if the 7th defendant had bought a piece of land next to the claimed portion.



12. In the re-examination, PW 1 told the court that the sale was on a willing buyer willing seller basis, for the seller needed the money to educate the defendants, who were in school at the time. PW 1 said that it was the deceased who handed over vacant possession to him in 2001. He said that the seller's children had been aware of the sale and the occupation since 2001.
13. Similarly, PW 1 stated that the acknowledgment notes were made at his lawyer's office. He said that he had exclusively been utilizing the land from 2001 up to March 2022, when the 1st defendant allegedly attempted to remove him from the land forcefully. PW1 said that he resisted the attempted removal by making a report at the police station, who visited the land, took some photographs of the developments and advised him to stay away from the land for security purposes.
14. The defendants opposed the claim through the 2nd – 5th and 7th defendants replying to affidavits sworn on 16.1.2024, 8.2.2024 and 8.2.2024, respectively, terming the claim as false, lacking merits, and as unsustainable, since the alleged sale agreement was repudiated in 2011 for non-payment of consideration and the plaintiff be ordered to vacate the land by the deceased.
15. Lawrence Mworira Mutwiri, as DW 1, told the court that on behalf of the estate of the late Fabian Mutwiri Rugiri, that he was aware of the mother title L.R No. Abothuguchi/Igane/783 was a family land where all his siblings were born and brought up and where their late father was also buried.
16. As part of his duties as a legal administrator, D.W. 1 said that he subdivided the land as per how his late father bequeathed it to the beneficiaries. After the confirmation of the grant, DW1 said that he transmitted the resultant portions to beneficiaries' names lawfully and procedurally with the respective beaconing of each portion, where after the beneficiaries took exclusive control over their parcels of land.
17. DW 1 denied that the plaintiff was in possession of one acre of the initial land as alleged or at all with the alleged defined boundaries going by a land surveyor's report dated 31.7.2023. DW1 said that the plaintiff was unable to pinpoint where his alleged portion was located and insisted that DW 1 was in exclusive control of Parcel No. 3537, free of any adverse claim by the plaintiff, where he has planted crops and established a permanent residence and a fence as per his photographs.
18. Again, DW 1 told the court that it was not in dispute that his late father had initially entered into a sale agreement with the plaintiff for Kshs.90,000/= for one acre to be excised from the mother title. However, D.W. 1 said that the plaintiff defaulted in honoring the sale agreement and made irregular payments, which led to bad blood between the seller and the buyer. He termed the acknowledgment notes as tailor-made to hoodwink the court, which were also was full of discrepancies for lack of authentication of the signatures and witnesses to the same.
19. Additionally, DW 1 told the court that in 2011, his late father called a family meeting and informed them that his relationship with the plaintiff had been severed for lack of total consideration for the land and proceeded to repossess and bequeath the children of his land as per the respective portions herein.
20. Again, DW 1 said that in 2011, the plaintiff, who was then working with Kenya Wildlife Service (KWS), failed to clear the consideration, yet the land was getting wasted as it had been deserted; his late father repossessed it and started utilizing the same by planting crops and connecting water to it, only for the plaintiff to threaten a suit against him, which was never filed until he passed on in 2018. DW 1 said that the defendants have been involved in several disputes, altercations and tilts with the plaintiff over the suit's land; hence, the occupation has not been peaceful.
21. DW 1 stated that though the plaintiff was aware of the succession cause, he never filed a protest to assert any purchaser's interest and instead has been using force and the police to regain possession after his late father passed on. He produced a copy of the confirmation of the grant as D. Exh No. (1).



22. In cross-examination, DW 1 told the court that he was aware of the sale agreement for one acre of land, though he was not privy to it. Further, he said that the plaintiff only paid the 1st installment of KShs.29,000/= and refused to clear the balance. DW 1 said that the plaintiff was evicted from the land for non-payment of the purchase price in 2011 therefore he had no reason to disclose or involve him in the succession cause.
23. D.W. 1 termed the acknowledgment notes as forgeries. He also said that after his father passed on, they involved other third parties, such as the 7th defendant, who facilitated the costs for the succession cause and in the clearance of the hospitalization and medical bill, hence the agreement dated 20.8.2022 to transfer to him a portion after the completion of the succession cause.
24. According to D.W. 1, the plaintiff had been on the land since 2001 but voluntarily vacated in March 2011 and not 2022, as alleged.
25. DW 1 admitted that the plaintiff had lodged a police complaint on crop damage and threats, whereafter, the 1st defendant was summoned to the police for malicious damage but told the police that the plaintiff had no portion of land to claim. DW 1 denied that criminal charges were leveled against him following the police complaint. Given intimidation efforts from the plaintiff, DW 1 said that he opted to apply for an order to maintain the status quo in court.
26. Further, DW 1 confirmed signing a sale agreement with the 7th defendant. Concerning P. Exh No. (1) D.W. 1 said that it was silent on the exact locality of the land sold to the plaintiff. D.W. 1 said that the plaintiff was chased away from the land in 2011 for non-payment of full consideration and after harvesting his farm produce, only for him to stake his claim in 2023.
27. DW 1 said that all of the defendants were utilizing $\frac{1}{4}$ acre of the mother title, a bequeathed to them by their late father. DW 1 insisted that due to the failure of the plaintiff to pay the consideration on time or at all he had to drop out of college after one semester for lack of school fees.
28. DW 1 also said that during the funeral of his late father in 2018 the clan leader announced any claimants against the deceased estate to come forward, but the plaintiff raised none.
29. Alice Kagwiria testified as DW 2 on behalf of the 2nd, 3rd, 4th, and 5th defendants following an authority to plead dated 7.2.2024. She confirmed that all her siblings were born and brought up in the suit land and that during the lifetime of the late father, he subdivided the mother title and gave each of her siblings and their mother a portion. DW 2 confirmed that the portion sold to the plaintiff was repossessed in 2011 for lack of full consideration, and the plaintiff was evicted from the land.
30. DW 2 said that in 2022, her brother and mother sold their respective portions to acquire funds for the filing of a succession cause to clear and hospitalization fees due to sickness. DW 2 said that after the grant was confirmed, a land surveyor visited the land, subdivided the same as per the wishes of their late father, and effected the beacons for the respective resultant portions in the open and with the knowledge of the plaintiff.
31. Additionally, DW 2 said that as joint and exclusive owners of L.R No. Abothuguchi/Igane/3538, together with her sisters, have been planting seasonal crops. DW 2 produced a copy of the authority to plead gazette notice, certificate of confirmed grant order dated 1.2.2022, ground survey report, surveyors report dated 31.7.2023, registry index map, and copy of a death certificate as D. Exh No's. 1-8, respectively.
32. In cross-examination, D.W. 2 told the court that the plaintiff took possession of the land while she was 15 years old, but by 2018, when the late father shared the land, the plaintiff had left the portion in



2011. DW 2 said that the plaintiff was not involved in the succession proceedings, for he had already vacated the land, though he had not been refunded his deposit. Further, DW 2 denied the alleged crop destruction or criminal charges leveled against the 1st defendant at the instance of the plaintiff.
33. Festus Mbaabu Mbaajo testified as D.W. 3. He told the court that he was the owner of L.R No. Abothuguchi/Igane/3540 and 3541, measuring 0.25 acres and 0.50 acres, respectively, acquired from the 1st defendant and Margaret Gaceru Mutwiri to enable them to get monies for the succession cause.
 34. DW 3 said that before he purchased the land, he conducted due diligence and found no third party in possession of the land, took vacant possession in August 2022 planted crops, assorted trees and a fence on the portion with defined boundaries. He insisted that he was an innocent purchaser for value without notice and hence none had ever trespassed on anybody's land to be a necessary party in this suit.
 35. Again, DW 3 said that he had known the family of the deceased as a neighbor for a long time. He produced copies of the title deed for L.R No. Abothuguchi/Igane/3540 and 3541 sale agreement dated 23.3.2022 & 19.4.2022 and a bundle of photos as D. Exh No. 9-13(a) (b) & (c).
 36. Further, DW 3 said that he bought the parcels of land after the deceased passed on and before the succession process commenced since he was aware of the deceased wishes, the respective subdivisions and their beneficiaries on the ground. He said that he paid the consideration to the 1st defendant without knowledge of the initial sale of the land to the plaintiff by the late Fabian Mutwiri. D.W. 3 said that the land that he bought was vacant and under the utilization of the deceased's family at the time.
 37. Godfrey Bundi testified as DW 4. As the chief Mwangathia location he relied on a witness statement dated 21.7.2024 as his evidence in chief. He told the court that he was not privy or aware of the sale of land between the deceased and the plaintiff, even though the two have a long-ranging dispute. He denied witnessing the plaintiff utilizing the land even though he was a neighbor to the defendants. D.W. 4 said that it was true that the plaintiff had attempted to reclaim possession of the land in 2021, on account of a purchaser's interest.
 38. At the close of defense testimony, parties were directed to file and exchange written submissions. The plaintiff relied on written submissions dated 9.8.2024. Relying on Mbui vs Maranya Civil Appeal No. 283 of 1990, the plaintiff submitted that he had proved the ingredients of adverse possession to the required standards to be entitled to the reliefs sought, given that from 2001, after completing payments, he took vacant possession of the land up to 2022 when his crops were damaged and a report made to the police against the 1st defendant.
 39. The plaintiff submitted that during that period, he was in open, exclusive, continuous and uninterrupted possession from (2001 – to 2022), hence dispossessing the defendants from the land, for the titles to the land held to become extinguished.
 40. Relying on Mary Wangari Macharia vs Edwin Onesmus Wanjau (2022) eKLR, the plaintiff submitted that his evidence was clear on when and how he took possession, the nature of his possession and the length of his possession. Further, relying on Hosea vs Njiru & others (1974) E.A 526, it was submitted that once the plaintiff made the last payment, possession became adverse going by the acknowledgment notes produced.
 41. The defendants relied on written submissions dated 21.8.2024. On adverse possession, the defendants submitted that there was an outstanding consideration and abandonment of the suit land as of 2011 when the plaintiff vacated the land, a fact which the plaintiff has not disputed or called a witness to prove to substantiate his claims that he was in occupation and undertook developments activities thereon. Reliance was placed on Andrew Kiplagat Bii vs Charles Kipkurui Koech (2017) eKLR.



42. The defendants submitted that if the plaintiff was allegedly on the land up to 2022, as a neighbor of the defendants, he would have been aware of the subdivisions and beacons and perhaps sought for a redress. In any event, the defendants submitted that between 2001 and 2011, it was only ten years; hence, adverse possession could not lie, following interruptions in 2011 and futile attempts to regain possession of the subdivisions and transfer to third parties.
43. The defendants submitted that the plaintiff's case was more or less a case of much ado without nothing since no evidence was tendered other than the sale agreement and acknowledgment notes, on any cultivation by way of pictorial evidence, a surveyor's report, eyewitnesses or a valuation report, which testimony was controverted by a credible defense testimony, eliciting no rebuttal evidence from the plaintiff.
44. The defendants submitted that going by the sale agreement, vacant possession was to occur from March 200; hence, any entry thereof was permissive and consensual therefore adverse possession could not be invoked. Reliance was placed on Gladwel Muthoni Njoroge vs Wangaruro Mbugua & others (2018) eKLR citing with approval Wanje vs Saikwa C.A No. 72 of 1982.
45. As to a cause of action against the 7th defendant, the defendants submitted that none was established for vacant possession was handed over to the 7th defendant in 2022 after he bought a defined portion for value without notice of the alleged interest of the plaintiff, who in any event had vacated the land in 2011 for non-payment of the consideration.
46. The court has looked at the pleadings, evidence tendered, written submissions, and the law. The issues for determination as drawn from the pleadings are:
 - i. If there was a valid and an enforceable sale agreement between the plaintiff and the late Fabian Mutwiri Rugiri for one acre of L.R No. Abothuguchi/Igane/783.
 - ii. If there was termination of the sale agreement and re-possession of the portion from the plaintiff in 2011.
 - iii. If the plaintiff has proved the ingredients of adverse possession.
 - iv. If the failure by the plaintiff to enforce the sale agreement during the lifetime and the succession proceedings estopped him from raising a claim on adverse possession.
 - v. If the transmission, subdivisions, sale and transfer of the initial title and the resultant subdivisions were subject to the claim by the plaintiff based on adverse possession.
 - vi. If the 7th defendant was an innocent purchaser for value without notice of the plaintiff's claim.
 - vii. If the plaintiff is entitled to the reliefs sought.
 - viii. What is the order as to costs?
47. For a contract on land disposition to be valid, it has to comply with Section 3 (3) of the *Law of Contract Act* and Section 38 of the *Land Act*. See Daniel Mwangi & others vs Sayani Investment Ltd & others (2015) eKLR. In Njoroge vs Karuku (Civil Appeal E069 of 2022) (2024) KECA 553 (KLR) (24th May (2024) (Judgment), the court observed that to determine whether an agreement was lawfully terminated, the court has to examine whether time was of the essence. The court cited Sagoo vs Dourado (1993) eKLR 365, that time will not be considered to be of the essence unless the parties expressly state so the consideration of the nature of the subject matter, the surrounding circumstances showing that time was of the essence and or where a party who has been subjected to unreasonable



- delay, gives notice to the party in default making time of the essence. It is a trite law that courts do not rewrite contracts. See *National Bank of Kenya vs Pipeplastic Samkolit (K) Ltd (2001)* eKLR.
48. The subject sale agreement before this court is not disputed at all that it was made on 3.7.2000. The land was agricultural as per clause (5) thereof. The *Law of Contract Act* at the time required evidence of the performance of part of the contract and the taking of possession or some other act in furtherance of the contract. In *Peter Mbiri Michuki vs Samuel Mugo Michuki (2014)* eKLR, the court held that there was actual or constructive possession since 1964 in an open, uninterrupted and continuous occupation till the filing of the suit. The court said that Section 3 (3) of the *Law of Contract Act*, which came into effect in 2003, was inapplicable to oral contracts for the sale of land concluded before 2003.
49. Courts do not rewrite sale agreements but enforce them unless vitiated by fraud, coercion, undue influence or illegality. The court looks at the four corners of the contract to derive its meaning without resorting to parole evidence. See *National Bank of Kenya vs Pipe Plastic Samkolit (k) Ltd*. In the sale agreement before this court, consideration was agreed for Kshs.90,000/=, Kshs.29,000/= deposit was paid on 3.7.2000. The remaining monies were to be paid during the opening or starting of college terms at Kshs.25,000/=. Vacant possession was to take place from March 2001. The vendor was to apply and obtain a land control board consent in May 2001 after which the transfer of title was to take place. Subdivisions and transfer charges were to be met by the purchaser. Any default was to attract liquidated damages of Kshs.50,000/=. The sale agreement was witnessed and signed by the parties before Gikunda Anampiu advocate.
50. Acknowledgment notes for Kshs.29,000/=: 25,000/=: and 36,000/= before Wilson P. Mburugu & Co. Advocates on 3.7.2000, 3.11.2000, and 8.5.2001 were produced before this court without any objection on authenticity, veracity and relevance. They were not disputed by way of a forensic document examiner's report on account, forgery, or disputation that they were not signed by the vendor and witnessed by the said law firm on the stated dates. The defendants failed to call the makers of the documents to deny that they were not prepared and or signed by their late father or that the monies stated therein were not paid or received by their late father in front of Mr. Mburugu Advocate. Extrinsic evidence by the defendants, per se, cannot be used to challenge a document without expert evidence on forgery or fraud. To allege non-clearance of the consideration by the plaintiff despite clear evidence to the contrary, in my view, left the defendants' defense hollow and unsubstantiated in vitiating the contract of sale.
51. Having found that the contract of sale was valid, and based on the said acknowledgment receipts, it is apparent that the last payment was made on 8.5.2001. The law required that the land control board consent be sought and obtained within six months; otherwise, the agreement would be null and void. See *Willy Kitilit vs Michael Kibet (2018)* 2018
52. The plaintiff pleaded that he was put into possession in March 2001. After making the last payment on 8.5.2001 and there being no valid land control board consent, the plaintiff remained on the suit land not as a licensee but as a person whose rights were adverse to the registered owner. In *Mwinyi Hamisi Ali vs AG & Mwaisaka C.A No. 125 of 1997*, the court held that adverse possession does not apply where the possession is by consent and that in a court of law, sympathy takes a second stand as statutes govern a court.
53. As to the termination of the sale agreement, there is no evidence that the deceased applied for the land control board consent on time or at all. There is equally no evidence that the plaintiff paid for the subdivisions and transfer charges to put into motion the process of hiving off his portion. None of the parties appear to have given the other a completion notice after the set timelines were not met. Nevertheless, there is evidence that the plaintiff was put into possession of the land in 2001. According



to the plaintiff, he was on the land up to 2022, while the defendants insist that he vacated in 2011. Since I have found there was evidence of clearance of the balance by 8.5.2001, the evidence by the defendants is to be taken with a pinch of salt.

54. There is equally no evidence that the plaintiff was given any formal notice to clear any pending consideration by 2011 and, in default, to vacate the suit land. There is equally no evidence that the deceased, during his lifetime, disputed the acknowledgment notes and caused them to be subjected to forensic investigations, if at all, he was denying receipt of the payments. There is no evidence that the deceased disputed the acknowledgment notes during his lifetime and insisted to the plaintiff on non-receipt of the alleged summons between May 2001 and his death in 2018.
55. In *Public Trustee vs Wanduru* (1984) KLR 314, the court observed that time for adverse possession should be calculated from the date of payment of the purchase price for the entire span of twelve years, if the purchaser takes vacant possession of the property because from this date the actual owner stands dispossessed of possession to his land.
56. In this scenario, once the plaintiff cleared the balance and took vacant possession, he required no permission or license to remain on the land. Therefore, in the absence of demand of the balance or termination, or eviction notice, by the seller between 2001 and 2013, when 12 years elapsed, the title held by the registered owner became extinguished by operation of Section 38 of the Law of Limitation Act.
57. From the evidence tendered, the plaintiff, after 12 years with effect from 8.5.2001, had acquired equitable rights binding on the land as of 8.5.2013. See *Public Trustee vs Wanduru* (supra) and *Mwangi & another vs Mwangi* (1986) KLR 328. The claim for adverse possession survives the death of the registered owner. It binds not only the predecessor but also the successor in title with no interval of time between the death of the registered owner and the grant of letters of the administration going by Section 16 of the *Limitation of Actions Act* Cap 22, so by 8.5.2013 and 18.7.2018 vis a vis 1.2.2023 when the confirmed grant was issued, adverse rights held by the plaintiff could not be said to have been interrupted for he had accrued overriding rights to this land.
58. By virtue of the relation back, the confirmed grant dated 18.7.2018 dated back to the date of death. In the evidence tendered before this court and in the pleadings, evidence of occupation of the land exclusively by the plaintiff between March 2001 and 2011 is not disputed.
59. The plaintiff was there as an adverse possessor with the knowledge of the registered owner, who, unfortunately, between 2001 and 2018, did not make an effective entry to drive him out of the land for non-payment of any pending consideration, nor apply for legal proceedings of eviction. Equally, as to the time, the 1st defendant is alleged to have ordered the plaintiff to vacate the land or stopped him from occupying the land in 2022, he had no legal capacity to assert title or eject the plaintiff from the land. In any event, the title held by the successor or the predecessor in title had been extinguished by 8.5.2013. The registered owner would only have been holding the title subject to the overriding rights of the plaintiff.
60. The 1st defendant had no capacity to drive out the plaintiff from the land, for he was not a registered owner between 2011 and 2022 nor was he a legal owner. Assertions of title take the form of effective entry to the land to drive out an intruder or the filing of recovery proceedings. See *Githu vs Ndeete* (1984) KLR 776. A demand letter or a police report is not enough. Succession proceedings do not amount to assertion of title.
61. The plaintiff remained on the land between 2001 and 2018 with a clear intention to own, dispossess and discontinue possession of the valid owner. See *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR.



- There is no evidence that the defendants and their late father co-existed with the plaintiff on the disputed parcel between 2001 and 2022 or thereabouts. The steps taken by the seller and the defendants to assert their claims on the land before 2022 through the area chief or the police do not amount to assertion of title in law and for that matter did not interrupt time from running. In *Amos Weru Murigu vs Murata Wangari Kambi & another* (2009) eKLR, the court said that for there to be interruption, the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace, the institution of a suit against a trespasser does interrupt and stop time from running.
62. In my view, therefore, the warning by the police or area chief to the plaintiff to stay away from the disputed land for the sake of security during the pendency of the succession case proceedings did not amount to an interruption of time. Occupation can be actual or constructive. The plaintiff continued asserting animus possidendi, by lodging a malicious damage claim to his developments on the land. That is why the police visited the land and also why the 1st defendant moved the court for orders of status quo to be issued. Consequently, I find no basis to find interruption of time and or admission of the defendants' title or handover of vacant possession to them by the plaintiff in between 2011 and the filing of this suit.
 63. On the identification of the portion claimed for adverse possession in *Wilson Kazungu Katana & 10 others vs Salim Abdalla Bakshwein & another* (2015) eKLR, the court observed that the burden as held in *Githu vs Ndeete* (supra), must be discharged by specifically identifying or even describing the portions, sizes and the locality of the respective portions in possession from the large suit premises.
 64. In this suit, the sale agreement is not disputed. The portion sold and occupied by the plaintiff between 2001 and 2022 and the date the land surveyor made entry to subdivide the land was known to the defendants. Adverse possession goes with the land and not the title. The locality of the portion to which the accrued rights of the plaintiff had crystallized after 12 years could not change at all after the change of ownership on transmission, subdivisions, and the subsequent transfers to the defendants.
 65. The resultant subdivisions and transfers to the defendants were subject to the overriding rights of adverse possession to the land that accrued after 12 years against the predecessor and were binding on the successors to the land and titles to it. In *Malakwen vs Kogo* (Civil Appeal 290 of 2019) (2024) KECA 912 (KLR) (26th July 2024) (Judgment), the court cited *Chevron (K) Ltd vs Harrison Charo wa Shutu* (2016) eKLR that to prove adverse possession a party must prove not only the period but also that his possession was without the true owner's permission that the owner was disposed or discontinued his possession of the land that the adverse possessor has done acts on the land that were inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use it.
 66. In this suit, there is undisputed evidence of exclusive and uninterrupted occupation of the land by the plaintiff between 2001 and the filing of this suit. There is evidence that the true owner by 2018 had not personally made an effective entry to the land to drive out the adverse possessor or initiated any legal proceedings to evict him from the land.
 67. In *Wakio & 101 others vs Mombasa* (Civil Appeal E061 of 2021) (2024) KECA 316 (KLR) (22nd March 2024) Judgment, the court cited *Mtana Lewa vs Kahindi Ngala Mwagandi* (2015) eKLR, that adverse possession is a situation where a person takes possession of land and asserts his right over it and the title holder omits or neglects to take action against such person in the assertion of his title for 12 years and that the prerequisites being the adverse possessor in occupation neither by force or stealth nor under license of the owner.
 68. Further, in *Wines and Spirits (K) Ltd & another vs. George Mwachira Mwangi* (2018) eKLR, the court said that knowledge by the registered owner about the trespasser is critical. Additionally, in *Wambui Gikwa vs Paul Kimani Muraba* (2016) eKLR, the court said that time stops when the adverse possessor



admits the title holder's right, where there is an assertion of title by instituting legal proceedings to regain possession whether or not the proceedings succeed.

69. In this suit, the successors and predecessor to the titles appear to have stood by. They took no positive steps to assert their title through judicial proceedings or by making an effective entry before time for adversity accrued between 2001 and 2013. See *Peter Kamau Njau vs Emanuel Charo Tinga* (2016) eKLR.
70. The defendants have submitted that what is before the court is not adverse possession but an enforcement of a sale agreement. In *Tilak Co. Ltd vs Magenta Enterprises Ltd* (Civil Appeal E080 of 2021 (2024) KECA 342 (KLR) (15th March 2024) (Judgment), the court found such submissions or contention lacking merits. The issues for determination dated 9.8.2022, as framed by the defendants, speak to adverse possession in line with the replying affidavit and witness statements filed herein. I find the argument misconceived. Adverse possession is a question of fact.
71. In *Samuel Miki Waweru vs Jane Njeri Richu* (2007) eKLR, the court observed that a purchaser of land under a contract of sale in possession of land pending completion could not lay a claim of adverse possession of such land unless and until the contract of sale has first been repudiated or rescinded by parties for the date of adverse possession to start running.
72. The defendants urge the court to find that by the time the plaintiff was evicted in 2011, 12 years had not lapsed and, hence, cannot claim adverse possession since he had been out of the land. Evidence of effective entry and the driving out of the plaintiff from the land has to be cogent.
73. As indicated above, the deceased did not give a repudiation or rescission notice of the sale agreement between 2011 and 2018 or by 1.2.2023 when the 1st defendant became the legal administrator of the estate or after the rest of the defendants acquired title deeds. In *Peter Njau Kairu vs Stephen Ndungu Njenga & another* C.A 57 of 1997, the court observed that the trespasser need not be all time in possession. Evidence of the Kariene police station summons for alleged crop destruction against the 1st defendant is dated 27.4.2023. The 1st defendant had just obtained a confirmed grant on 1.2.2023. There is no evidence of when the mutation form was signed and registered. Evidence of notice to vacate by the deceased or the defendants between 2011 and 2023 after the confirmed grant was issued is lacking.
74. Evidence of the use of force by the plaintiff to occupy the land between 2001 and 2022 is lacking. The defendants have urged the court to find that failure to file a protest in the succession cause was fatal to the plaintiff's case and so was the failure to seek specific performance during the lifetime of the seller. Similarly, the defendants have urged the court to find that the failure to produce pictorial evidence, valuation crop assessment and land surveyor's report on top of a sale agreement was fatal.
75. A succession cause is filed for purposes of distribution of the estate of a deceased person. A succession court has no power to handle disputes of a third party claiming the estate of a deceased person. See *Re Mumbua (deceased)* (2017) eKLR case. A succession cause is also not an eviction claim against the intruder to land belonging to the estate. In *Isaac Cypriano Shingore vs Kipketer Togon* (2016) eKLR, the court observed that by the time the respondent filed the originating summons in November 2006, he had been in possession of the land for about 24 years and that registration through transmission to the appellant in April 2000 and lack of attempt to assert title before registration and the filing of the originating summons did not interrupt the time for adversity.
76. Further, in *Benson Mukuwa Wachira vs Assumption Sisters of NRB* (2016) eKLR, the court cited *Amos Waweru Murigu vs Marata Wangari Kambi & another* (*supra*) that an advocate's or chief's letter



does not amount to an interruption. The plaintiff testified that after the police summons in 2023, he was advised to stay away for security purposes.

77. As indicated above, those acts did not amount to an effective entry or an eviction of the plaintiff from the suit land by the 1st defendant. There is no evidence that the 1st defendant gave a notice of eviction to the plaintiff in line with Section 152A – F of the *Land Act*. There is evidence that the plaintiff, after 2011 and before filing the suit, was still asserting his accrued rights to the land. None of the defendants pleaded or testified on whether the plaintiff was notified to collect or was entitled to a refund of the deposit if, at all, he had not cleared the entire purchase price. The totality of this evidence shows that the plaintiff had a consistent claim and would not merely be ejected from the land without addressing his rights, even if the sale agreement had been repudiated in 2011.
78. As to whether the 7th defendant was an innocent purchaser for value without notice, the 7th defendant testified that he was a neighbor of the deceased and the rest of the defendants. Each of the defendants has not disputed the sale agreement made in 2001 and the possession of the portion in dispute by the plaintiff up to 2022. The 1st defendant signed the sale agreements dated 22.3.2022, 19.4.2022 and 22.8.2022 before he sought and obtained letters of administration as a legal representative to deal with the estate of the deceased. Therefore, he could not deal with the estate before he became a legal representative under Section 54 of the *Law of Succession Act*.
79. In *Wambui vs Mwangi & others Civil Appeal No. 465 of 2019 (2021) KECA/KLR 144* (19th November 2021 (Judgment), the court cited *Lawrence Mukiri vs A.G. & others (2013) eKLR*, that an innocent purchaser is one holding a title acquired in good faith without knowledge of the fraud has a valid title and who is not a party to the fraud. In *Samuel Kamere vs Land Registrar (2015) eKLR*, the court held that a person to be considered a bonafide purchaser must prove that he acquired a valid and legal title and secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title and that he paid a valuable consideration for the title.
80. Other than the three sale agreements, D.W. 4 failed to tender any evidence of clearance of the considerations, produce transfer forms and stamp duty payments. When a title deed is under attack, it is not enough to waive the title document without documents showing the root of the acquisition. See *Munyu Maina vs Gathiha Hiram (2013) eKLR* and *Dr. Ngok vs Moijjo Ole Keiwua (1997) eKLR*. In *Kilimo Shutu & others vs Godfrey Karume (2017) eKLR*, the court found that the respondent had failed to take any steps to recover the land within 52 years and hence was permanently barred from recovering it after the title had extinguished by virtue of Section 17 of the *Limitation of Actions Act*.
81. It is not enough to conduct an official search. A party must do more as part of due diligence, including establishing who was in occupation of the land. In *Torino Enterprises Ltd vs. AG Petition 5 (E006 of 2022) (2023) KESC 79 (KLR) 22nd September 2023 (Judgment)*, the court said that an innocent purchaser must be aware of what he was purchasing by inspecting the suit premises, as a buyer must be aware.
82. The 7th defendant must have been aware of the long-ranging dispute between the deceased and the plaintiff. He took the risk of purchasing the land before confirmation of a grant and the subdivisions were effected and a mutation form registered. The 7th defendant never called the land surveyor who took him to the land in 2022 and showed him the subdivisions.
83. At the time, there is evidence that the plaintiff was asserting accrued overriding interests to a portion of the suit land. I find no basis to declare the 7th defendant an innocent purchaser for value without notice of the plaintiff's claim.



Additionally, a claim based on adverse possession affects both a predecessor and successor to the title. The upshot is that I find the plaintiff entitled to the reliefs sought. Costs to the plaintiff. The defendants shall within two months from the date hereof execute the transfer forms in favour of the plaintiff in default the Deputy registrar to sign the transfer forms.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU *ON THIS 25TH DAY OF SEPTEMBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Parties

Miss Murungi for the plaintiff

Mwirigi B for the 2st, 2nd, 3rd, 4th, 5th & 7th defendants

