



**Okello v Kairu Enterprises Limited (Civil Suit 617 of 2005)
[2025] KEELC 14 (KLR) (16 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 14 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 617 OF 2005
JO MBOYA, J
JANUARY 16, 2025**

BETWEEN

CHARLES A OKELLO PLAINTIFF

AND

KAIRU ENTERPRISES LIMITED DEFENDANT

JUDGMENT

Introduction And Background

1. The instant matter is yet another case which brings to the fore serious question[s] about delayed justice and the aspirations contained in Article 159[2][b] of *the Constitution*, 2010. Pertinently, the instant suit was filed before the court on the 23rd May 2005. In this regard, there is no gainsaying that the suit beforehand has stayed in the corridors of justice for two decades [20 years].
2. Be that as it may, it suffices to state that the Plaintiff approached the court vide Plaint dated the 23rd May 2005; and which was thereafter amended on the 29th February 2024.
3. Vide the amended Plaint under reference, the Plaintiff seeks the following reliefs;
 - i. A declaration that the Defendant's claim to the suit property to wit house number Mara/ Savannah/137 on Land Reference Number Nairobi/Block/82/3134 was compromised by the settlement agreement entered into by the parties herein in 2017 and the subsequent payment of the agreed sum of Kshs. 120,000/- as the final purchase price, by reason of which the Plaintiff is entitled to the ownership of the said property.
 - ii. That the Court do issue a Vesting Order resting the property house number Mara/ Savannah/137 on Land Reference Number Nairobi/Block/82/3134 Nairobi on Charles A. Okello, the Plaintiff herein.

In the alternative to b above



- iii. A declaration that the Plaintiff is entitled to property house number Mara/Savannah/137 located within Land Reference Number Nairobi/Block/82/3134 by Adverse Possession.
 - iv. An order directing the Defendant to execute the transfer forms so as to effect valid transfer of house Number Mara/Savannah/137 located within Land Reference Number Nairobi/Block/82/3134 to the Plaintiff within 30 days of judgement and in default the Deputy Registrar or other authorized officers of this honourable court do execute the said forms on its behalf.
 - v. Specific performance of the agreement-dated-25th June-1994.
 - vi. Costs of this suit.
4. Upon being served with the original Plaint and summons to enter appearance, the Defendant duly entered appearance and thereafter filed a statement of defence. The statement of defence was subsequently amended in terms of the amended statement of defence dated the 15th March 2024. Instructively, the amended statement of defence is accompanied with a counterclaim and in respect of which the Defendant has sought for various reliefs.
5. For coherence, the counterclaim seeks for the following reliefs;
- a. A declaration that legally binding Settlement Agreement between parties to a suit must be signed by both parties for the same to be enforceable.
 - b. A declaration that the Plaintiff is not entitled to property house number Mara/Savannah/137 located within Land Reference Number Nairobi/Block/82/3134 by Adverse Possession.
 - c. A mandatory order compelling the Plaintiff to pay the balance of the purchase price being Kenya Shillings One Million, Two Hundred and Seventy-Seven Thousand Shillings (Kshs. 1,277,000/=) to enable the Defendant to hand over completion documents.
 - d. Costs of this suit and the costs of this counterclaim be awarded to the Defendant in any event.
 - e. Interest on (c) and (d) above, from the date of filing this suit until payment in full, at court rates.
- or in the alternative
- f. A declaration that in the absence of payment of the balance of the purchase price by the Plaintiff, the Defendant remains the absolute proprietor of the suit property being House Number Mara/Savannah/137 located within Land Reference Number Nairobi/Block/82/3134.
 - g. An order compelling the Plaintiff to deliver vacant possession to the Defendant within 30 days of this Honourable Court's judgement failure to which eviction orders shall issue without further reference to this Honourable Court.
 - h. permanent injunction restraining the defendant and his or her agents, servants from interfering with peaceful possession and/or demanding for payment of any further balance on the purchase price with respect to residential house Number Mara/Savannah/137 located within Land Reference Number Nairobi/Block/82/3134.
 - i. General damages and/or mesne profits for loss of the suit property from the date when the Plaintiff took possession until determination of this suit.



- j. Costs of this suit and the costs of this counterclaim be awarded to the Defendant in any event.
 - k. Interest on (h) and (i) above until payment in full.
 - l. Any other order or further relief as this Honourable Court may deem fit to grant.
6. For completeness, the Plaintiff duly filed a reply to the amended defence and defence to the counterclaim dated the 2nd May 2024. Thereafter the pleadings in respect of the instant matter closed.
 7. Notably, the matter came up for case conference on the 6th May 2024; whereupon the advocates for the parties covenanted that same had filed and exchanged the requisite pleadings; list and bundle of documents and the witness statements. In this regard, the parties confirmed that the matter was thus ready/ripe for hearing.

Evidence By The Parties:

Plaintiff's Case:

8. The Plaintiff's case is anchored on the evidence of one witness, namely, Charlse Auma Okello. Same testified as PW1.
9. It was the testimony of the witness [PW1] that same is the Plaintiff in respect of the instant matter. In this regard, the witness averred that by virtue of being the Plaintiff same [witness] is therefore conversant with the facts of the case.
10. It was the further testimony of the witness that same has since recorded and filed a witness statement dated the 6th November 2023. In this regard, the witness sought to adopt and rely on the contents of the witness statement as his evidence in chief.
11. Suffice it to state that the witness statement dated the 6th November 2023 was thereafter adopted and constituted as the evidence in chief of the witness. Additionally, the witness adverted to a list and bundle of documents dated the 6th December 2023. To this end, the witness sought to tender and produce the documents as exhibits before the court.
12. There being no objection to the production of the documents at the foot of the list dated the 6th December 2023, same [documents] were admitted as exhibits P1 to P62, respectively on behalf of the Plaintiff.
13. It was the further testimony of the witness that same has also filed a further list and bundle of documents. In this regard, the witness cited and referenced the list dated the 28th May 2024. Similarly, the witness sought to tender and produce the documents thereunder.
14. There being no objection to the documents at the foot of the further list and bundle of documents, same [documents] were duly produced and admitted as exhibits P63 to 67 on behalf of the Plaintiff.
15. Other than the foregoing, the witness referenced the amended Plaintiff dated the 24th February 2024; and the verifying affidavit thereto. In this regard, the witness sought to adopt the contents of the amended Plaintiff.
16. On cross examination, the witness averred that same [witness] entered into an agreement with the Defendant herein. The witness averred that the agreement was entered into and executed on the 26th February 1992. Furthermore, the witness averred that the terms of the sale agreement were understood by both parties.



17. It was the further testimony of the witness that the purchase price [agreed consideration] was Kes.850,000/ only. Nevertheless, the witness added that the purchase price was stated to be provisional.
18. Whilst under further cross examination, the witness averred that same [witness] has since paid a total of kes.847,000/= only, towards and on account of the Purchase price.
19. It was the further testimony of the witness that there was a letter dated the 28th July 1993. The witness averred that the letter in question varied/adjusted the purchase price that had been alluded to at the foot of the sale agreement.
20. It was the further testimony of the witness that thereafter the parties exchanged various correspondence over and in respect of the suit property. In this regard, the witness referenced the letter dated the 2nd October 2005.
21. Whilst still under cross examination, the witness averred that the letter dated the 2nd October 2005 related to the question of procurement of funding to clear the balance of the purchase price. However, the witness added that the intended funding did not materialize.
22. Other than the foregoing, the witness averred that the sale agreement that had been entered into and executed with the Defendant, was entered on the basis of a willing buyer/willing seller. In particular, the witness added that same was not coerced in signing the sale agreement.
23. It was contended that the Plaintiff [witness] has since paid the full purchase price. In addition, the witness avers that same has also develop the suit property.
24. On re-examination, the witness averred that same paid the balance of the purchase price to the Defendant herein. In particular, the witness added that the balance of the purchase price was paid vide Bankers cheque.
25. Whilst still under re-examination, the witness averred that the Bankers cheque was duly forwarded to the Defendant. In any event, the witness averred that the Bankers Cheque was neither rejected nor refunded back. In this regard, the witness averred that the Defendant has since received and retained the full purchase price over and in respect of the suit property.
26. Other than the foregoing, it was the testimony of the witness that same entered onto the suit property in 1992 and has remained in occupation thereof to date. Furthermore, the witness averred that same has undertaken various improvement[s] on the suit property.
27. With the foregoing testimony the Plaintiff's case was closed.

Defendant's Case:

28. The Defendant's case revolves around the evidence of one witness, namely, Patrick Maina Kairu. Same testified as DW1.
29. It was the testimony of the witness [DW1] that same is a director of the Defendant company. In this regard, the witness averred that same is therefore conversant with the facts of the case. Furthermore, the witness added that same has been authorized to attend court and testify on behalf of the Defendant.
30. In addition, it was the testimony of the witness that same has since recorded and filed a witness statement in respect of the instant matter. To this end, the witness cited and referenced the witness statement dated the 22nd January 2024 and which statement the witness sought to adopt and rely on as his evidence in chief.



31. Suffice it to point out that the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.
32. Additionally, the witness adverted to the list and bundle of documents dated the 22nd January 2024; and which documents the witness sought to tender and produce before the court as exhibits on behalf of the Defendant.
33. There being no objection to the production of the assorted documents, same [documents] were tendered and admitted as exhibits D1 to D66, respectively on behalf of the Defendant.
34. It was the further testimony of the witness that the Defendant herein filed an amended statement of defence and counterclaim. In this regard, the witness reiterated that amended statement of defence and counterclaim is dated the 15th March 2024.
35. On cross examination by learned counsel for the Plaintiff, the witness averred that same is a director of the Defendant company. In addition, the witness testified that the Plaintiff and the Defendant herein entered into and executed a sale agreement. Furthermore, the witness averred that the purchase price was agreed in the sum of kes.850, 000/= only.
36. Whilst still under cross examination, the witness testified the Plaintiff proceeded to and paid the deposit of the purchase price. In any event, the witness confirmed that the deposit was duly acknowledged and received by the Defendant herein.
37. It was the further testimony of the witness that the balance of the purchase price was to be paid by the Plaintiff in accordance with clause 3 of the sale agreement. Furthermore, the witness averred that the balance of the purchase price was to be procured by financing.
38. It was the further testimony of the witness that the purchase price that was agreed upon at the foot of the sale agreement was provisional. In this regard, the witness clarified that the parties could vary the amount of the purchase price.
39. It was the further testimony of the witness that the parties herein exchanged various correspondence, which have been produced before the court. Furthermore, the witness admitted that the Defendant herein intimated to the Plaintiff that same [Defendant] was ready to transfer the suit property to the Plaintiff. In this regard, the witness referenced the letter at page 34 of the Plaintiff's bundle of documents.
40. Nevertheless, it was the testimony of the witness that the Defendant did not transfer the suit property to the Plaintiff.
41. Whilst under further cross examination, the witness stated that even though the Defendant was ready to transfer the suit property, the intended transfer did not materialize. In particular, the witness averred that the Plaintiff failed to pay the balance of the purchase price.
42. Other than the foregoing, it was the testimony of the witness that the title in respect of the suit property was charged to Pan African Bank. In addition, the witness testified that the title had not been discharged.
43. On the other hand, it was the testimony of the witness that the sale agreement which was entered into and executed by the parties contained a clause pertaining to the timelines for the payment of the balance of the purchase price. In this regard, the witness averred that the balance of the purchase price was to be paid within 7 days from the date of successful of registration of transfer in favour of the Plaintiff herein.



44. Notwithstanding the foregoing, the witness confirmed that the suit property has not been transferred to and in favour of the Plaintiff.
45. However, whilst still under cross examination, the witness made an about-turn and stated that the suit property was transferred to the Plaintiff.
46. It was the further testimony of the witness that the Plaintiff herein did not comply with the terms of the sale agreement. In any event the witness averred that the sale agreement had timelines for payment of the balance of the purchase price. To this end, the witness referenced the special conditions contained in the body of the said agreement.
47. It was the further testimony of the witness that the Plaintiff herein paid the sum of Kes.120, 000/= only vide Bankers cheque. The witness confirmed that the Bankers cheque under reference was received by the Defendant. Furthermore, it was the testimony of the witness that the bankers cheque was not rejected.
48. Whilst under further cross examination, the witness averred that the Bankers cheque has never been returned to the Plaintiff. In addition, the Witness clarified that the payment at the foot of the Bankers cheque was stated to be the final balance of the purchase price.
49. On re-examination, the witness averred that even though the Defendant received the Bankers cheque in question, same [bankers cheque] was never encashed.
50. It was the further testimony of the witness that the transaction between the Plaintiff and the Defendant was not completed. On the contrary, the witness averred that same failed to perform the terms of the contract.
51. On the other hand, the witness testified that the contract herein was breached by the Plaintiff.
52. Suffice it to point out that after re-examination, the witness [DW1] was examined by the court on a number of issues. In response, it was the testimony of the witness that the sale agreement was entered into in 1992. Furthermore, the witness averred that the Plaintiff herein entered upon and took possession of the suit house in the year 1992.
53. Additionally, the witness testified that the Defendant herein received the Bankers cheque in the sum of kes.120, 000/= only. Nevertheless, the witness averred that the Bankers cheque was never encashed.
54. It was the further testimony of the witness that the said Bankers cheque was also not rejected. At any rate, the witness conceded that the Bankers cheque is still under the custody of the Defendant.
55. Other than the foregoing, it was the testimony of the witness that the Bankers cheque in question was indicated to be in payment of the balance of the purchase price. Finally, it was the testimony of the witness that even though the Defendant has filed a counterclaim, same [witness] is aware that the Plaintiff has been in occupation of the suit property since the year 1992.
56. With the foregoing testimony, the Defendant's case was duly closed.

Parties' Submissions

Plaintiff's Submissions:

57. The Plaintiff filed written submissions dated the 26th November 2024; and wherein same has raised and canvassed a plethora of issues. In particular, the Plaintiff has contended that the sale agreement entered into and executed between the parties in 1992 remains in force and is therefore valid. In this



regard, the Plaintiff has contended that the parties herein have variously acknowledged and confirmed the existence of the sale agreement.

58. Further and in any event, the Plaintiff avers that the parties entered into and arrived at a resolution in the year 2017, whereupon it was agreed that the Plaintiff would pay the sum of Kes.120.000/= only in full and final settlement of the balance of the purchase price.
59. Secondly, the Plaintiff has contended that the Defendant having received and retained the purchase price that was paid on account of the suit property, it is deemed that the Defendant herein holds the suit property on trust for the Plaintiff. To this end, the Plaintiff has invoked and relied upon the doctrine of constructive trust.
60. Thirdly, the Plaintiff herein has also submitted that the settlement agreement/addendum entered into in 2017 compromised the entire suit. In this regard, the Plaintiff has invited the court to find and hold that the parties herein are bound by the settlement agreement which is evidenced in writing. At any rate, the Plaintiff has posited that having been paid and having retained the sum of Kes.120, 000/= only at the foot of the bankers cheque, the Defendant herein is estopped from reneging on the terms of the settlement agreement.
61. Fourthly, the Plaintiff herein has submitted that other than the fact that the contract was consummated between the parties and thus the Plaintiff is entitled to be registered as the owner of the suit property, the Plaintiff is also said to have acquired the suit property on the basis of adverse possession.
62. Regarding the contention that the Plaintiff has acquired the suit property vide adverse possession, the Plaintiff herein posits that same entered into and occupied the suit property in the year 1992. In this regard, it has been contended that any claim seeking recovery of vacant possession is time barred.
63. Finally, the Plaintiff has submitted that the Defendant's counterclaim which seeks to recover vacant possession of the suit property/ designated house is prohibited by the provisions of Section 7 of the [Limitation of Actions Act](#), Chapter 22, Laws of Kenya.

Defendant's Submissions:

64. The Defendant filed written submissions dated the 13th September 2024; and wherein the Defendant has contended that the sale agreement that was entered into between the Plaintiff and the Defendant on the 26th February 1992 was provisional in nature. In any event, the Defendant has contended that both parties understood and appreciated the terms of the said contract.
65. Additionally, it has been submitted that the contract in question was thereafter varied by the parties and hence the Plaintiff herein cannot purport to procure specific performance on the basis of the said agreement.
66. Be that as it may, the Defendant has submitted that specific performance can only be granted where there exists a valid and enforceable agreement/contract. However, it has been posited that where an agreement is defective, invalid and/or illegal, then such an agreement cannot underpin a claim for specific performance.
67. Additionally, it was the Defendant's submissions that the parties herein did not enter into a binding agreement in the year 2017. For good measure, the Defendant has contended that for there to be a binding agreement, then same ought to have been reduced to writing and thereafter signed by the parties.
68. Other than the foregoing, the Defendant has submitted that the Plaintiffs claim for adverse possession is not legally tenable. In any event, it has been submitted that the Plaintiff's occupation and possession



of the suit property was anchored on a sale/purchase agreement. In this regard, it has been submitted that the Plaintiff's occupation has never been adverse/hostile to the rights and interests of the Defendant.

69. Finally, the Defendant contends that the Plaintiff herein can only be entitled to ownership to the suit house subject to payment of the entire balance of the purchase price. Nevertheless, it has been contended that the Plaintiff has never paid the entire purchase price and hence same cannot be heard to lay a claim to ownership of the suit property.
70. Arising from the foregoing, the Defendant has implored the court to find and hold that the Plaintiff's claim is not merited and hence the same [Suit] ought to be dismissed. On the contrary, the Defendant has invited the court to grant the reliefs sought at the foot of the counterclaim.

Issue For Determination:

71. Having reviewed the pleadings, the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination;
 - i. Whether the agreement entered into between the Plaintiff and the Defendant on the 26th February 1992 has remained in force or otherwise.
 - ii. Whether the Plaintiff and the Defendant entered into a binding compromise/contract in 2017 and whether the compromise, if any, is binding on the parties.
 - iii. Whether the Plaintiff is entitled to the suit property on the basis of adverse possession or otherwise.
 - iv. Whether the Defendant's counterclaim is barred by the Limitation of Action or otherwise.

Analysis And Determination

Issue Number 1 Whether the agreement entered into between the Plaintiff and the Defendant on the 26th February 1992 has remained in force or otherwise.

72. It is common ground that the Plaintiff and the Defendant entered into and executed a sale agreement [contract] dated the 26th February 1992. Instructively, the sale agreement touched on and concerned the sale of House No. 137 situate on L.R No. Nairobi/Block 82/3134 [suit property]. Furthermore, there is no gainsaying that the suit property belonged to and was registered in the name of the Defendant.
73. Additionally, the sale agreement under reference contained various terms and clauses which were agreed upon between the parties. Suffices to state that the terms of the sale agreement included the agreed purchase price; the Payment scheme and the timeline for payment of the balance of the purchase price. Pertinently, clause [G] of the sale agreement stipulated that the balance of the purchase price shall be paid within 7 days from the date of successful registration and charge in favour of..... [blank].
74. Other than the sale agreement which was entered into and executed between the parties, there was consensus that the parties herein variously exchanged correspondence, touching on and concerning a number of issues.



75. Notably the defendant herein generated a letter dated the 7th September 1999 and wherein same [Defendant] confirmed that the Plaintiff herein paid all the fees to facilitate the transfer and registration of the suit house in favour of the Plaintiff.
76. Additionally, DW1 also intimated that vide the Letter under reference, the Defendant invited the Plaintiff to execute the transfer instrument. In particular, DW1 posited that the Defendant was willing and ready to transfer the suit property/ house in favour of the Plaintiff.
77. It is also imperative to take cognizance of the letter dated 1st March 2019; which forwarded the sum of Kes. 120, 000/ only. Instructively, the letter forwarding the bankers cheque was acknowledged by the Defendant.
78. Other than the correspondence, it is also important to take cognizance of the evidence that was tendered by DW1. In the course of cross examination, DW1 acknowledged that the Plaintiff herein paid the sum of Kes.120, 000/= only vide bankers cheque. In addition, DW1 confirmed that the bankers cheque was duly received by the Defendant.
79. To my mind, the manner in which the parties herein continued to interact even after the filing of the suit, demonstrate that both parties acknowledged the existence of the sale agreement/ contract that was entered into in the year 1992. Pertinently, both parties demonstrated that same were still keen to abide by the terms of the contract.
80. Other than the foregoing, it is important to underscore that by accepting and retaining the payment of kes.120, 000/= only vide Bankers Cheque and which was paid in the year 2017, the Defendant herein cannot now be heard to contend that the sale agreement had lapsed/extinguished.
81. In my humble view, the conduct by the Defendant, which was amplified by DW1 in the course of his evidence before the court, brings into play the doctrine of estoppel. To this end, the Defendant herein cannot now be heard to renege from representation[s] made to and in favour of the Plaintiff. [See Section 120 of the *Evidence Act*, Chapter 80 Laws of Kenya] [See also the decision in 748 Air Services Limited v Theuri Munyi (Civil Appeal 310 of 2014) [2017] KECA 419 (KLR) (Civ) (14 July 2017) (Judgment)].
82. Consequently and arising from the foregoing, it is my finding and holding that the sale agreement/ contract that was entered into and executed by the Plaintiff and the Defendant, remained in existence. For good measure, the existence of the sale agreement and its enforceability were acknowledged by both parties, either by representation or conduct.

Issue Number 2 Whether the Plaintiff and the Defendant entered into a binding compromise/ contract in 2017 and whether the compromise, if any, is binding on the parties.

83. Having found and held that the sale agreement which was entered into between the Plaintiff and the Defendant on the 26th February 1992 remained in existence and having found that its life-span was the subject of various correspondence, the question that does arise relates to whether the parties entered into a binding addendum.
84. According to the Plaintiff, the parties herein entered into a mutual arrangement/resolution wherein it was agreed that the Plaintiff was to pay the sum of kes.120, 000/= only towards and on account of the balance of the purchase price.
85. Additionally, the Plaintiff testified that arising from the mutual agreement/resolution same [Plaintiff] proceeded to and forwarded a Bankers cheque for the sum of Kes.120, 000/= only. For good measure, the Plaintiff testified that the Bankers cheque was forwarded vide dated the 1st March 2017.



86. On the other hand, it is worthy to recall that DW1, who testified on behalf of the Defendant, confirmed and acknowledged that the Defendant indeed received the bankers cheque of kes.120, 000/= only.
87. For ease of appreciation, it is apposite to reproduce the salient aspects of the evidence/testimony of DW1 relative to the bankers cheque. To this end, the testimony of DW1 whilst under cross examination by learned counsel for the Plaintiff is reproduced as hereunder;
- “The Plaintiff herein paid the sum of Kes.120, 000/= only vide bankers cheque. The Defendant did not reject the payment. The Defendant herein did not return the cheque to the Plaintiff. I do confirm that the bankers cheq was not returned. I d confirm that the Defendant herein acknowledges receipt of the sum of Kes, 120, 000/=”.
88. Whilst still under cross examination DW1 stated thus;
- “The payment was indicated to be the final payment of the purchase price. The bankers cheque was to clear the balance of the purchase price”.
89. My understanding of the evidence tendered by DW1, drives me to the conclusion that there existed a mutual understanding between the Plaintiff and the Defendant. In addition, the testimony by the witness confirms receipt and retention of the payment of the cheque.
90. Notwithstanding the foregoing, the pertinent aspect of the evidence of DW1 is to the effect that the bankers cheque which was forwarded to and received by the Defendant clearly indicated that same [bankers cheque] was to clear the balance of the purchase price.
91. To my mind, if the Defendant was averse to the contents of the letter forwarding the bankers cheque and the intimation that the payment was towards the final balance of the purchase price, the Defendant would have protested the said sentiments.
92. From the evidence under reference, there is no gainsaying that the Defendant did not dispute the contents of the letter.
93. Worse still, DW1 acknowledged and confirmed that the Defendant herein neither rejected nor returned the bankers cheque to the Plaintiff. Curiously, the conduct of the Defendant herein speaks volumes.
94. Nevertheless, it is my finding and holding that on the basis of the letter forwarding the bankers cheque and coupled with the retention of the bankers cheque by the Defendant, there arose a mutually binding agreement. In any event, it is not lost on the court that the engagements between the Plaintiff and the Defendant were engagements in furtherance of the sale agreement entered into on the 26th February 1992; which Sale agreement remained in existence by virtue of the various acknowledgments between the parties.
95. Arising from the foregoing, it is my finding and holding that the mutual agreement entered into between the Plaintiff and the Defendant in the year 2017 and which culminated into the payment of the Bankers cheque for the sum of Kes 120,000 only, created a binding contract.

Issue Number 3 Whether the Plaintiff is entitled to the suit property on the basis of adverse possession or otherwise.

96. Other than contending that the Plaintiff herein has acquired ownership to the suit property on the basis of the settlement agreement entered into in the year 2017, the Plaintiff herein also raised and canvassed the doctrine of adverse possession.



97. It was the Plaintiff's contention, albeit in the alternative that same [Plaintiff] has acquired ownership of the suit property on the basis of adverse possession. In this regard, the Plaintiff has posited that same has been in occupation of the suit property for a duration in excess of 27 years.
98. Furthermore, the Plaintiff contended that his possession, occupation and use of the suit property, has been continuous and uninterrupted for over 12 years. To this end, the Plaintiff invited the court to find and hold that same [Plaintiff] is entitled to invoke and rely on the doctrine of adverse possession.
99. My answer to the Plaintiff's claim is twofold. It is the Plaintiff herein who has contended that the sale agreement/contract which was entered into between the parties was still in existence. Furthermore, it is not lost on the court that the parties herein [Plaintiff and the Defendant] tendered/ produced before the court a plethora of correspondence dating up to the year 2022 relating to the contract beforehand.
100. Flowing from the contents of the various correspondence, the Plaintiff herein cannot be allowed to espouse a position that the sale agreement/contract is still in existence; and at the same time, contend that his [Plaintiff's] occupation of the suit property was adverse/hostile to the Defendant's title.
101. Without belabouring the point, the inconsistent position adopted and deployed by the Plaintiff herein amounts to approbating and reprobating. Instructively, the deployment of the inconsistent position is not only unacceptable in the eyes of the law, but same also constitutes an abuse of the due process of the court.
102. Furthermore, there is no gainsaying that the plea based on contract and adverse possession are mutually exclusive and inconsistent. Consequently, same cannot be agitated in the same cause. To this end, it suffices to cite and reference the decision in the case of Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR, where the court held as hereunder;

In Haro Yonda Juaje –v- Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR it was stated:

- (29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. [Emphasis supplied].

103. The fact that one cannot stake a claim to the suit property on the basis of a contract and at the same time implead adverse possession was also highlighted in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi (Civil Appeal 110 of 2016) [2020] KECA 942 (KLR) (31 January 2020) (Judgment), where the Court of Appeal stated as hereunder;
43. Comparatively, the Supreme Court of India in Mohan Lal –v- irza Abdul Gaffar, 1996, 1 SCC 639 faced with an inconsistent claim of title by agreement and adverse possession stated that since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit, the plea of adverse possession was not available to the appellant.



That having come into possession by agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor and that the latter had acquiesced to his illegal possession during the entire period of 12 years.

44. Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant's claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant in 1970.
104. Secondly, the claim by and on behalf of the Plaintiff founded on adverse possession would still fail on the basis that the Plaintiff herein generated and paid the bankers cheque in the sum of Kes.120, 000/= only, in acknowledgement of the fact that the suit property still belonged to the Defendant. For good measure, the payment in question was meant to settle/liquidate the balance of the purchase price and [sic] facilitate the transfer of the suit property unto the Plaintiff.
105. In my humble view, the Plaintiff was making the payment under reference whilst knowing that the contract between himself and the Defendant was in existence. To this end, it cannot lie in the mouth of the Plaintiff to contend that the his [Plaintiff] occupation and possession of the suit property was adverse/hostile to the rights of the Defendant.
106. Without belabouring the point, there is no gainsaying that a claimant desirous to partake of a claim founded on adverse possession must demonstrate that his/her occupation, possession and use has been inconsistent with and hostile to the right of the Respondent [land owner]. [See *Mwangi Githu v Livingstone Ndeete* (Civil Appeal 24 of 1979) [1980] KECA 35 (KLR) (Civ) (8 July 1980) (Judgment)]. [*Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR].
107. In a nutshell, my answer to issue number three [3] is to the effect that the Plaintiff's claim founded on adverse possession is not only premature and misconceived, but same is legally untenable.

Issue Number 4 Whether the Defendant's counterclaim is barred by the Limitation of Action or otherwise.

108. The Defendant herein though confirming and acknowledging that the Plaintiff entered into and took possession of the suit property in the year 1992, same [Defendant] has sought for various reliefs including an order for delivery of vacant possession. Pertinently, the order for delivery of vacant possession translates to and constitutes an endeavour to recover possession of the suit property from the Defendant. Instructively, what the Defendant is seeking is an Order of Eviction.
109. Other than the prayer for recovery of vacant possession, the Defendant herein has also sought to recover [sic] the balance of the purchase price on the basis of the sale agreement that was entered into in the year 1992.
110. Additionally, the Defendant has also sought to recover mesne profits. Suffice it to posit that mesne profits can only be recoverable from a trespasser and not from a person who is in occupation on the basis of a contract.
111. Nevertheless, it is not lost on the court that the endeavour to recover vacant possession is premised on the basis that the sale agreement between the Plaintiff and the Defendant was breached by the Plaintiff



on the basis that same [Plaintiff] failed to pay the balance of the purchase price in accordance with the contract.

112. Flowing from the contents of paragraph 7 of the statement of defence and counterclaim, the Defendant seems to suggest that the breach occurred in the year 2005, when the Plaintiff disregarded the demand at the foot of the letter dated the 22nd April 2005.
113. Assuming that the contract [sale agreement] was breached in the year 2005, it behoved the Defendant to file a suit for recovery of vacant possession [if any] within 12 years. [See Section 7 of the [Limitation of Actions Act](#), Chapter 22, Laws of Kenya].
114. Be that as it may, it is worthy to recall that the counterclaim beforehand was not filed until the 15th March 2024. Quite clearly, the counterclaim was filed outside the Limitation period and hence the same [Counter-claim] is certainly barred under the Law.
115. Having been filed outside the limitation period, it is my finding and holding that the Defendant's rights to recover the suit property lapsed and is extinguished by effluxion of time.
116. To this end, it suffices to take cognizance of the decision in the case of IGA VS Makerere University [1972] EA 65 where the court [Mustafa, J.A] elaborated on the implication[s] of the law of limitation.
117. For coherence, it was held as follows:-

“ A Plaintiff which is barred by limitation is a Plaintiff “barred by law”. Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court “shall reject” his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought.”

Law, Ag. V. P. in the same case inter alia stated thus:

“ ... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaintiff, the Plaintiff must be rejected.”

118. The effect[s] of the statute of limitation on a cause of action was also highlighted in the case of Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321 where it was stated thus;

“ The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case”.

119. Other than the foregoing decisions, the implication of the law of limitation on a cause of action was also adverted to and espoused in the case of Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981)[1982] eklr:

“ The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”



120. In my humble albeit considered view, the claims canvassed by and on behalf of the Defendant at the foot of the counterclaim are statute barred. In this regard, the diverse claims at the foot of the Counterclaim stand extinguished by effluxion of time.

Final Disposition:

121. Flowing from the analysis, [which have been highlighted in the body of the judgment], it suffices to state that the Plaintiff herein has been able to establish and/or prove his entitlement to and in respect of House No. 137 situate on the suit property.

122. On the contrary, the court has found and held that the Defendant's counterclaim [which essentially seeks recovery of vacant possession], is statute barred.

123. In the circumstances, the final orders of the court are as hereunder;

- i. A declaration be and is hereby made that the Defendant's claim to the suit property to wit house number Mara/Savannah/137 on Land Reference Number Nairobi/Block/82/3134 was compromised by the settlement agreement entered into by the parties herein in 2017 and the subsequent payment of the agreed sum of Kshs. 120,000/- Only, as the final purchase price, by reason of which the Plaintiff is entitled to the ownership of the said property.
- ii. There be and is hereby granted a Vesting Order resting the property house number Mara/Savannah/137 on Land Reference Number Nairobi/Block/82/3134 Nairobi in favour of Charles A. Okello, the Plaintiff herein.
- iii. Further and in any event, the Defendant be and is hereby ordered to execute the transfer forms so as to effect valid transfer of house Number Mara/Savannah/137 located within Land Reference Number Nairobi/Block/82/3134 to the Plaintiff within 30 days of judgement and in default, the Deputy Registrar or such other authorized officers of this Honourable court do execute the said forms on its behalf.
- iv. In default by the Defendant to execute the transfer documents in terms of clause [iii] within 30 days from the date hereof, the deputy registrar shall be at liberty to execute the transfer documents in lieu of the Defendant.
- v. There be and is hereby permanent injunction restraining the defendant and his or her agents, servants from interfering with peaceful possession and/or demanding for payment of any further balance on the purchase price with respect to residential house Number Mara/Savannah/137 located within Land Reference Number Nairobi/Block/82/3134.
- vi. The Defendant's counterclaim be and is hereby dismissed.
- vii. Costs of the suit and the counterclaim be and are hereby awarded to the Plaintiff.
- viii. Any other order not expressly granted is declined.

124. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY 2025

OGUTTU MBOYA

JUDGE

In the presence of:



Benson – court Assistant.

Mr. Andrew Wandabwa for the Plaintiff

Ms. Mwangi h/b for Mr. Tom Macharia for the Defendant

