Kimani v Mutua (The Administratix of the Estate of Titus Mutua Kilome - Deceased) & another (Environment and Land Case Civil Suit 121 of 2009) [2023] KEELC 19330 (KLR) (29 May 2023) (Judgment)

Neutral citation: [2023] KEELC 19330 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 121 OF 2009

JO MBOYA, J

MAY 29, 2023

BETWEEN

SIMON KENG'ETHE KIMANI ..... PLAINTIFF

AND

SAPHINA MULEE MUTUA (THE ADMINISTRATIX OF THE ESTATE OF TITUS MUTUA KILOME - DECEASED) ..... 1ST DEFENDANT

THE CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

JUDGMENT

1. The instant suit was commenced vide Plaint dated the 23rd March 2009; and in respect of which the Plaintiff sought various reliefs as against Florence Ndinda Mutua and John Mutio Mutua, respectively, who were described as the Administrators of the Estate of Titus Mutua Kilome, now deceased.

2. Owing to lapse of time, both Florence Ndinda Mutua and John Mutio Mutua passed on and the Plaintiff herein thereafter sought for and obtained Leave to amend the Plaint. In this respect, Leave to amend Plaint was granted on the 23rd November 2021.

3. Pursuant to and in line with the order granting Leave to amend, the Plaintiff proceeded to and filed an amended Plaint dated the 23rd November 2021; and in respect of which same has sought for the following reliefs;

    a. A Permanent injunction restraining the 1st Defendant whether by herself or through her servants, agents, employees, advocates or otherwise howsoever, from repudiating and/or terminating the agreement for sale dated the 9th June 2004 over land reference number 12251/31 (Original no. 12251/6/16) Nairobi.

b. A Permanent injunction restraining the 1st Defendant whether by herself, agents, employees, advocates or otherwise howsoever, from interfering with the Plaintiff's use and possession of land reference No. 12251/31 (Original No. 12251/6/16) Nairobi or otherwise transferring, assigning, alienating or interfering with land reference number 12251/31 (Original no. 12251/6/16) Nairobi.

c. An order of specific performance directing the 1st Defendant to duly execute and release to the Plaintiff a transfer over Land Reference No. 12251/31 (Original no. 12251/6/16) Nairobi in favor of the Plaintiff within 14 days of the orders herein, in default of which a deputy registrar of the environment and land court may execute the same.

d. The Plaintiff to pay the balance of the purchase price for Land Reference No. 12251/31 (Original no. 12251/6/16) Nairobi to the 1st Defendant or to deposit the balance of the purchase price in court within 14 days of the Plaintiff's receipt of the duly executed transfer signed either the 1st Defendant or a deputy registrar of the environment and land court.

e. In the alternative to prayer (c) herein above, a declaration that the Plaintiff has become entitled to Land Reference No. 12251/31 (Original no. 12251/6/16) Nairobi by way of adverse possession.

f. Pursuant to prayer (c) herein being allowed the 2nd Defendant hereby dispense with the requirement for the production of the original title for Land Reference No. 12251/31 (Original no. 12251/6/16) Nairobi and duly register the transfer for Land Reference No. 12251/31 (Original no. 12251/6/16) Nairobi in th Plaintiff's name within 14 days of the orders hereof.

g. Pursuant to prayer (e) herein above being allowed, the 2nd Defendant hereby duly register the Plaintiff as the Proprietor of L.R No. 12251/31 (Original no. 12251/6/16); Nairobi within 14 days of the orders hereof.

h. Costs of the suit.

i. Any further Relief that this court deems fit to grant.

4. Upon being served with the amended Plaint; the current 1st Defendant filed an amended Statement of Defense and counterclaim dated the 15th December 2021; and in respect of which the 1st Defendant/ Counter-claimer sought for the following reliefs;

a. The Plaintiffs suit be dismissed with costs.

b. The Plaintiff be evicted from L.R No. 12251/31 (Original no. 12251/6/1A) Nairobi.

c. Mesne profits.

d. Costs of the counterclaim

e. Interests on (c) and (d) above.

5. Instructively, upon being served with the amended Statement of Defense and Counterclaim, the Plaintiff herein filed a Reply to Defense and Defense to Counterclaim dated the 7th February 2022. For clarity, the Plaintiff herein disputed the allegations contained at the foot of the amended Statement of Defense and Counterclaim.

6. Even though the subject suit was filed and/or lodged before the court on the 23rd March 2009, the hearing in respect of the subject matter did not commence up to and including the 1st March 2022 when the Plaintiff herein testified and thereafter closed his case.

7. Be that as it may, the subject matter also went through the usual pre-trial conference, whereupon the Parties confirmed the filing and exchange, inter-alia, the List and Bundle of documents; List of witnesses; and witness statements.

Evidence By The Parties:

a. The Plaintiff's Case:

8. The Plaintiff's case revolves/ gravitates around the Evidence of Simon Kang'ethe Kimani, who testified as PW1.

9. It was the evidence of the witness that same resides within the City of Nairobi and furthermore that same is a Business person, engaged in various business activities and/ or ventures.

10. In addition, the witness herein testified that same entered into and executed a sale agreement with the original Defendants, namely, Florence Ndinda Mutua and John Ndindo Mutua, respectively, which agreement was dated the 9th June 2004. Further, the witness added that the sale agreement was in respect of L.R No. 12251/31 (Original No. 12251/6/16) Nairobi..

11. Other than the foregoing, it was the testimony of the witness that the purchase price over and in respect of the suit property was agreed in the sum of Kes.4, 000, 000/= only and that the witness was obligated to pay a stakeholder sum of Kes.400, 000/= only which sum the witness averred was duly paid and acknowledged at the execution of the sale agreement.

12. On the other hand, the witness testified that the sale agreement dated the 9th June 2004 stipulated that the completion date was capped at 90 days from the date of execution of the Sale Agreement. In this regard, the witness added that the completion dated was thus the 9th September 2004.

13. Other than the foregoing, which constitutes a bit of the evidence in chief, the witness alluded to a witness statement dated the 21st February 2022; and which the witness sought to adopt and rely on. In this respect, the witness statement dated the 21st February 2022; was duly adopted and constituted as the Evidence- in chief of the witness.

14. Additionally, the witness alluded to the List and Bundle of documents dated the 3rd February 2022; containing 20 Documents and which documents the witness sought to adopt and to produce in evidence as Exhibits.

15. In the absence of any objection to the admission on the documents at the foot of the List under reference herein, same were duly produced and marked as Exhibits P1 to P20, respectively.

16. Other than the foregoing, the witness herein was latter recalled and testified yet again. In this regard the witness stated that long after the close of his testimony in chief, same came across assorted documents relating to the instant matter and which would be of great assistance to the Honourable court in arriving at a just and fair determination of the dispute.

17. Furthermore, the witness alluded to the List and Bundle of Documents dated the 30th March 2022; and sought to adopt and rely on the two named documents.

18. Consequently and there being no objection to the admission to the said documents, same were admitted in Evidence as Exhibits P21 and P22, respectively.

19. It was the further testimony of the witness that Exhibits P21 and P22, respectively, are primarily important because same confirm that he indeed dealt with the rightful people, who were seized and possessed of the requisite mandate and authority to transact over and in respect of the Estate of Titus Kilome Mutua, deceased.

20. Moreover, it was the further testimony of the witness that prior to and before the entry into and execution of the sale agreement entered into on the 9th June 2004, the Grant of Letters of Administration in respect of the Estate of Titus Kilome Mutua, now Deceased, had hitherto been confirmed in favor of Florence Ndinda Mutua and Alice Mumbua Mutua, respectively.

21. Further and in any event, the witness also averred that same was also aware that the Family of Titus Kilome Mutua, deceased; had successfully completed other dealings and transactions over and in respect of sub-divisions of the same property to other people.

22. Other than the foregoing, the witness herein alluded to the amended Plaint dated the 23rd November 2021; and sought to be granted the reliefs contained at the foot thereof. In addition, the witness sought to have the counterclaim by and on behalf of the 1st Defendant to be dismissed with costs.

23. On cross examination, the witness confirmed that the sale agreement before the Honourable court was entered into and executed on the 9th June 2004. Further, the witness also pointed out that prior to and before entering into the said agreement, same undertook due diligence and in particular, carried out an official search to authenticate the registered proprietors of the suit property.

24. Additionally, the witness also stated that by the time same was entering into the sale agreement; the suit property was duly registered in the names of Florence Ndinda Mutua and Alice Mumbua Mutua, the latter, whom the witness stated had passed on as at the time of entry into and execution of the sale agreement.

25. Whilst under further cross examination, the witness averred that he was not aware of when Alice Mumbua Mutua had passed on. However, the witness reiterated that Alice Mumbua Mutua had died before the Sale agreement.

26. It was the further testimony of the witness that the deceased had various children; some of whom were reported to be in the United States of America, (USA).

27. On the other hand, the witness testified that the agreement which was entered into and executed on the 9th June 2004 does not show that the vendors were entering into same on behalf of the deceased. Further, the witness added that upon entering into the sale agreement, same paid the stakeholder sum amounting to Kes.400, 000/= only, in accordance with the terms of the Agreement.

28. Furthermore, the witness averred that the other monies, namely, the balance of the purchase price were to be paid as soon as the documentation relating to the transfer of the suit property were complete and ready. Nevertheless, the witness admitted and acknowledged that the balance of the purchase price has not been paid to date.

29. In addition, it was the testimony of the witness that the balance of the purchase price has never been paid to date because the vendors kept on asking for more time within which to ready and avail the Completion documents.

30. Other than the foregoing, the witness testified that he proceeded to and took possession of the suit property on the 21st December 2001, albeit on the instruction of the vendors.

31. Notwithstanding the foregoing, the witness stated that same thereafter proceeded to and filed the instant suit because the Vendors wrote to his (witness Advocates) threatening to evict him from the suit property.

32. Whilst still under cross examination, the witness stated that same resides on the suit property and that other than the residence thereon, he has also developed assorted Businesses on the suit property, which businesses generate an average of Kes.1, 000, 000/= per year.

33. Furthermore, the witness herein testified that same was constrained to and indeed sued the current 1st Defendant following the death of Florence Ndinda Mutua. In any event, the witness added that he was aware that Florence Ndinda Mutua, died in the year 2018.

34. Additionally, it was the testimony of the witness that John Mutio Mutua, who had been sued alongside Florence Ndinda Mutua also passed on/died on the 29th August 2019. However, the witness added that same amended the Plaint pursuant to and arising out of the orders issued on the 23rd November 2021.

35. On the issue as to whether the grant in respect of the Estate of Titus Kilome Mutua has since been confirmed, the witness herein pointed out that same has not been confirmed. Furthermore, the witness added that the succession cause in respect of the Estate of Titus Kilome Mutua was indeed scheduled for hearing of a Protest on the 28th March 2021.

36. On re-examination, the witness testified that the Sale agreement dated the 9th June 2004 was between himself and the Administrators of the Estate of the deceased.

37. In addition, the witness also stated that there was an application which same had filed in respect of the Succession cause in the matter of the Estate of Titus Kilome Mutua, deceased; but added that the said Application was dismissed. For good measure, the witness stated that the said application was in respect of the suit property.

38. With the foregoing testimony, the Plaintiff's case was closed.

b. The 1st Defendant's Case:

39. The 1st Defendant's case similarly revolves/ gravitates around the Evidence of one witness, namely, Saphina Mulee Mutua; who testified as DW1.

40. It was the Evidence of the witness that same was substituted in place of Florence Ndinda Mutua, now deceased; who was hitherto the 1st Defendant in respect of the subject matter. Further, the witness stated that the instant suit was previously filed against Florence Ndinda Mutua and John Mutio Mutua, respectively, who are both deceased.

41. It was the further testimony of the witness that previous Defendants, namely, Florence Ndinda Mutua and John Mutio Mutua, who entered into the sale agreement with the Plaintiff herein did not have the requisite capacity to enter into and execute the impugned sale agreement. In any event, the witness added that the sale agreement entered into was therefore null and void.

42. On the other hand, the witness stated that though the Plaintiff entered upon and took possession of L.R No. 12251/31 (Original no. 12251/6/16) Nairobi, the entry of the Plaintiff onto the suit property was illegal. In this regard, the witness had added that the Plaintiff therefore ought to be evicted from the suit property and further same ought to pay mesne profits.

43. Other than the foregoing, the witness alluded to the Witness Statement dated the 15th December 2021; and which same sought to adopt and rely on as her Evidence in chief.

44. Consequently and in this regard, the witness statement dated 15th December 2021; was thereafter admitted as the further evidence in chief of the witness.

45. Further and in addition, the witness also alluded to the List and Bundle of documents dated the 15th December 2021, containing three documents and which documents the witness sought to adopt to rely on as her Exhibits.

46. In the absence of any objection by the Plaintiff, the documents at the foot of the List dated the 15th December 2021; were admitted as Exhibits D1 to D3, respectively.

47. Moreover, the witness stated that same has also filed a Statement of Defense and Counter-claim and in this respect, the witness sought to adopt the contents of the amended Statement of Defense and Counterclaim. Besides, the witness intimated to the court that she currently holds a Temporary Grant of Letters of Administration over and in respect of Titus Kilome Mutua, now Deceased.

48. On cross examination, the witness herein admitted and acknowledged that same had hitherto filed documents and affidavits in respect of the succession matter. In this regard, the witness clarified that the document alluded to was a Response filed to a Protest which had been lodged by and at the instance of the Plaintiff herein.

49. On the other hand, the witness stated that she is not the A isdministrator of the Estate of Titus Kilome Mutua, now deceased. However, on further cross examination the witness conceded that she is indeed the Administratix of the Estate of Titus Kilome Mutua; even though the Grant of Letters of administration unto her has not been confirmed.

50. Whilst under further cross examination, the witness testified that the sale agreement entered into on the 9th June 2004; was never entered into or executed on behalf of the Estate of Titus Kilome Mutua, now Deceased.

51. While still under further cross examination, the witness acknowledged and admitted that the certificate of title which has been produced before the Honourable court shows that the suit property had indeed been transferred to and was registered in the names of Florence Ndinda Mutua and Alice Mumbua Mutua, respectively.

52. On the other hand, the witness admitted that the Mother title, namely, L.R No. 12251/6/16; has since been subdivided and that there were other buyers. However, the witness pointed out that the other buyers do not have titles.

53. Additionally, the witness herein stated that no other buyer has been allowed to take possession of the subdivisions arising out of the mother title. In any event, the witness added that same has opposed the sale of the various portions of the Mother title.

54. It was the further testimony of the witness that she did not know why the suit property was being sold. Further, the witness stated that same was however aware that the Estate of Titus Mutua Kilome, the deceased; had debts and that the sale of the suit property was calculated to pay off some of the debts.

55. On re-examination, the witness herein clarified that same currently holds the Grant of Letters of Administration over and in respect of the Estate of Titus Mutua Kilome, now deceased. However, the witness added that the Grant of the Letters of administration herein have not been confirmed to date.

56. Besides, it was the testimony of the witness that same is not aware whether any of the other purchasers have been granted title over and in respect of portions of the suit property or any other property belonging to the Deceased.

57. Additionally, the witness testified that the vendors who sold the suit property to and in favor of the Plaintiff herein did not have the requisite capacity to sell the property. In any event, the witness also added that the said vendors did not have a valid title capable of being sold to the Plaintiff herein.

58. Finally, it was the testimony of the witness that the Grant in respect of the Estate of Titus Kilome Mutua, now deceased; has not been confirmed to date.

59. For good measure, the witness pointed out that the succession cause is currently scheduled for hearing of a Protest on the 28th March 2022; which was approximately 27 days from the date of the testimony of the witness herein. For clarity, the evidence of the witness was taken on the 1st March 2022.

c. The 2nd Defendant's Case

60. Though the 2nd Defendant was impleaded vide the amended Plaint and thereafter served with both the amended Plaint and summons to enter appearance, same however neither entered appearance nor filed the Statement of Defense.

61. Consequently and in the premises, the 2nd Defendant's case was closed without any Evidence being tendered in that respect.

Submissions By The Parties:

62. Following the completion of the hearing, the advocates for the respective Parties sought liberty of the court to file and exchange written submissions. In this respect, the Honourable court proceeded to and directed the advocates for the respective Parties to file and exchange written submissions within set timelines.

63. It is instructive that the Plaintiff herein thereafter proceeded to and filed written submissions dated the 24th March 2023; and in respect of which Learned counsel for the Plaintiff has raised, highlighted and canvassed five issues for due consideration by the Honourable court.

64. For good measure, the Honourable court has taken cognizance of the various issues raised at the foot of the Plaintiff's written submissions. Furthermore, the court is also alive to the various decisions which have also been cited and relied upon.

65. On the other hand, the 1st Defendant also filed written submissions dated the 24th March 2023; and in respect of which same has also raised a total of five issues for due consideration and determination by the Honourable court.

66. Instructively and good measure, one of the issues that has been highlighted and canvassed by Learned counsel for the 1st Defendant and which may be critical in the determination of this suit relates to whether or not the instant suit had abated as at the time when the Plaintiff sought for and obtained Leave to file the amended Plaint dated the 23rd November 2021.

67. Nevertheless, it is imperative to state and underscore that the court has also read through the written submissions filed by and at the instance of the 1st Defendant. Further and in addition, the court has also taken cognizance of the various decisions cited and relied upon by Learned Counsel for the 1st Defendant herein.

Issues for Determination

68. Having reviewed and evaluated the amended Plaint dated the 23rd November 2021; and the amended Statement of Defense dated the 15th December 2021; and having taken into account the oral testimonies by and on behalf of the Parties and upon consideration of the written submissions filed by the advocates for the respective Parties, I am of the opinion that the following issues do arise and are thus worthy of determination;

    i. Whether the Plaintiff's suit stood abated as at the time when the amended Plaint dated the 23rd November 2021; was filed and/or lodged.

    ii. Whether the Plaintiff's suit, if same had abated was revived and if not; what is the Legal consequence of abatement of a suit.

    iii. Whether the Plaintiff herein is entitled to an order of Specific Performance either as sought or at all.

    iv. Whether the Plaintiff is entitled to a Declaration on account of Adverse Possession, premised on the duration of occupation/use of the suit property.

    v. Whether the Plaintiff is entitled to be declared as the proprietor of the suit property on the basis of Constructive and Resulting Trust.

    vi. Whether the 1st Defendant is entitled to Mesne Profits as against the Plaintiff or otherwise.

Analysisand Determination

Issue Number 1 and 2

1. Whether the Plaintiff's suit stood abated as at the time when the amended Plaint dated the 23rd November 2021 was filed and/or lodged.

2. Whether the Plaintiff's suit, if same had abated was revived and if not; what is the Legal consequence of abatement of a suit.

69. The subject dispute touches on and or concerns the execution of a sale agreement which was entered into and executed on the 9th June 2004 between the Plaintiff herein (as the purchaser); and Florence Ndinda Mutua and John Mutio Mutua, (as the vendors). Furthermore, there is no dispute that the Plaintiff indeed proceeded to and paid the 10% stakeholders sum, which payment was duly received and acknowledged.

70. Nevertheless, even though the completion date was agreed upon to be 90 days from the date of execution of the sale agreement, the completion was never perfected and thereafter on the 11th March 2009, the vendors through their advocate wrote to the Plaintiff signaling that same were repudiating the sale agreement.

71. It is the Letter dated the 11th March 2009, wherein the vendors sought to repudiate the sale agreement, which provoked the filing of the instant suit. For good measure, it is instructive to point out that the initial suit was filed against Florence Ndinda Mutua and John Mutio Mutua, respectively.

72. First forward, it is admitted and acknowledged that both Florence Ndinda Mutua and John Mutio Mutua, passed on during the pendency of the instant suit. In this regard, the Plaintiff thereafter sought

for and obtained Leave to file an amended Plaint, which amended Plaint was ultimately filed on the 23rd November 2021.

73. At this juncture, it is important to take note that the Application dated 28th September 2021, which was filed by and on behalf of the Plaintiff and which culminated into the orders issued/granted on the 23rd November 2021, only sought for Leave to file and serve an amended Plaint.

74. Additionally, having sought for and obtained the Leave to file an amended Plaint, the Plaintiff thereafter filed an amended Plaint and in respect of which same not only added various averments/ reliefs; but also substituted the initial Defendants, who admittedly had long passed on and/or died.

75. Nevertheless, at the point in time when the Plaintiff sought for and obtained Leave to amend the Plaint, same however did not disclose to the Honorable court, the timeline (read, Date) when the original Defendants passed on.

76. Notwithstanding the foregoing, upon being served with the amended Plaint, the 1st Defendant herein filed an amended statement of defense and counterclaim and in respect of which same stated, inter-alia;

> " Paragraph 6
>
> That even though if the 1st Defendant had not filed a replying affidavit, the counsel could have informed the court that the suit abated along time ago since Florence Ndinda Mutua passed on the 16th February 2018; and her co-Defendant passed away on the 20th August 2019.

77. Other than the foregoing, the 1st Defendant herein also filed List and Bundle of documents and in respect of which same adduced before the Honourable court copies of the Certificate of death of Florence Ndinda Mutua and John Mutio Mutua respectively. For good measure, it is evident that indeed Florence Ndinda Mutua died on the 16th February 2018; whilst John Mutio Mutua died on the 20th August 2019, respectively.

78. Moreover, during the cross examination of PW1 by Learned Counsel for the 1st Defendant, same is on record as having testified as follows;

> " I sued the Defendants herein after the death of Florence Ndinda Mutua, Florence Ndinda Mutua passed on in the year 2018. John Mutio Mutua passed on 29th August 2019".

79. From the foregoing, it is evident that the Plaintiff herein was knowledgeable and aware of the death of both Florence Ndinda Mutua and John Mutio Mutua, respectively. In any event, the Plaintiff confirmed the respective dates of death in respect of both the original Defendants.

80. Nevertheless and despite being privy to and knowledgeable of the death of the Defendants, it is apparent that the Plaintiff herein did not take any appropriate steps to cite the beneficiaries/heirs of the Estate of Titus Mutua Kilome, deceased, with a view to provoking same to taking out Grant of Letters of administration.

81. On the other hand, even after the current 1st Defendant sought for and obtained Grant of Letters of administration over and in respect of the Estate of Titus Kilome Mutua, deceased, it appears that the Plaintiff herein was neither bothered nor concerned with the taking out of a suitable application for revival of the suit herein prior to and before seeking leave to amend the Plaint and to implead, inter-alia, the 1st Defendant.

82. Clearly and to my mind, the Plaintiff herein ought to have been aware of the import and tenor of the provisions of Order 24 of the Civil Procedure Rules, which essentially stipulates the timeline within which to carryout and undertake substitution and in default of which the suit abates.

83. Furthermore, even when the Plaintiff was served with the amended Statement of Defense and Counter-claim which raised and espoused the issue of abatement of the suit, the Plaintiff herein still did not deem it fit and/or expedient to approach the Honourable court with a suitable application for revival and/or reinstatement of the suit, which evidently appears to have long abated.

84. To the contrary, the Plaintiff herein was content with the obtaining state of affairs and indeed the suit was prosecuted on the basis of the amended Plaint dated the 23rd November 2021; as though the suit beforehand was alive and in existence.

85. Sadly though, it is evident that by the time the Plaintiff was seeking for Leave to amend the Plaint and by extension substituting the original Defendants, the Statutory 12 Months had long lapsed from the date when John Mutio Mutua passed on. For good measure, John Mutio Mutua, deceased, admittedly died on the 29th August 2019.

86. To my mind, by the time the Plaintiff herein sought for and obtained the Leave to amend the Plaint and thereby substituted, inter-alia, the 1st Defendant, the entire suit had abated and thus stood dismissed, on the basis of abatement. In this respect, there was actually no suit capable of being amended in the first place.

87. It is worthy to state and underscore that the abatement of a suit terminates the existence of such a suit and thereafter no more legal proceedings can be undertaken and/or continued on the basis of such a suit. Simply put, the suit becomes dead, unless revived pursuant to an appropriate Application and thereafter, order of the Court.

88. On the other hand, it is also my considered view that upon the lapse of 12 months from the date of death of a Party to the suit, the suit abates automatically, even without an order of the court declaring same to have abated. Instructively, the abatement of a suit is a natural consequence arising out from the lapse of Twelve months from the death of the dead party.

89. Put differently, the abatement of a suit arises by operation of law and hence the issuance of the formal court order merely confirms that which had hitherto accrued and transpired. In this respect, there cannot be any worthy argument that the subject suit herein had not been dismissed on account of abatement and thus the suit remained alive and capable of being prosecuted.

90. To buttress the foregoing position, it is appropriate to take cognizance of the elaborate illumination of the issue pertaining to abatement of suit; as canvassed in the holding in the case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, where the court stated as hereunder;

> " There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M'mboroki M'arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in *KFC Union v Charles Murgor (Deceased)* NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit.

We borrow the statement of Lord Denning in *MacFoy v United Africa Co. Limited* [1961] 3 All ER 1169, that

"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so...."

It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.

91. Furthermore, the legal implication and consequence of abatement of a suit was re-visited by the Court of Appeal in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, where the court of appeal stated and held as hereunder;

> " The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in Said Sweilam (supra) the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.
>
> Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined

> within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers.
>
> But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in the manner he did.

92. From the foregoing, there is no gainsaying that the suit against Florence Ndinda Mutua abated on the 15th February 2019 whereas the suit against John Mutio Mutua abated on the 28th August 2020, respectively. Apparently, by the time the suit abated, no application had been made to substitute the legal administrator/administratix of the Estate of the named Defendants or by extension the appointed administrator of the Estate of Titus Kilome Mutua, deceased.

93. Better still, the Plaintiff herein had the opportunity to plead with the court to extend time within which to file an application for revival or reinstatement of the suit. However, the Plaintiff did not seek to avail himself of the provisions of Order 24 Rule 7 of the *Civil Procedure Rules,2010*; which provides a window for extension of time within which to file an application for revival and/or reinstatement of abated suit.

94. In view of the foregoing, it is my humble position that by the time the Plaintiff procured and obtained the orders for Leave to amend the Plaint and thereafter filed the amended Plaint dated the 23rd November 2021, there was no suit capable of (sic) being amended either as sought by the Plaintiff or at all.

95. Before departing from this issue, the Plaintiff may very well argue and/or contend that the court proceeded to and granted unto same Leave to amend and that the mere fact of granting of the Leave would thus suffice in respect of the subject matter.

96. Be that as it may, it must be pointed out that where a suit has abated, same is Dead and unless duly revived by an order of the court, same shall remain Dead. For good measure, revival cannot be assumed.

97. Additionally, insofar as the suit had long abated before the filing of the Application for amendment and the eventual amendment, it is therefore common ground that the order of the court issued on the 23rd November 2021; and by extension the amendment of the Plaint were therefore made in vanity.

98. Simply put, both the order of the court and the amended Plaint filed in respect thereof were void ab initio.

99. In respect of the foregoing position, it is appropriate to invoke and adopt the *Doctrine of Ex-Nihilo Nihil Fit*, meaning out of nothing comes nothing. Suffice it to point out that the implication of the

said Doctrine was underscored by the Court of Appeal in the case of *Kenya Ports Authority v Modern Holdings (EA) Ltd* [2017]eKLR, where the court highlighted the doctrine in the following terms;

> We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, ex nihilo nihil fit (out of nothing comes nothing).

100. In any event, the legal implication of a Court order which is void, was succinctly spoken to and elaborated upon in the case of *MacFoy v United Africa Co. Limited* [1961] 3 All ER 1169, that

> " If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so...."

101. As a result of the foregoing discourse, I come to the conclusion that the entire suit herein had long abated and therefore ceased to exist by the time when the Plaintiff sought for and obtained Leave to amend the Plaint and thereafter substituted the 1st Defendant in place of the original Defendants.

102. In a nutshell, the entire proceedings and orders that have since been made in respect of the subject matter after the 27th September 2020, are all invalid and thus devoid and bereft of any legal import and tenor.

103. Simply put and for good measure, the suit herein is Dead and in the morgue.

104. Consequently and in view of the foregoing, I would have been obligated to dispose of the suit on this singular issue. However, having enumerated other issues for determination, it is imperative that same be calibrated upon and addressed for the sake of completeness.

Issue Number 3 Whether the Plaintiff herein is entitled to an order of Specific Performance either as sought or at all.

105. There is no dispute that the Plaintiff indeed entered into and executed a sale agreement relating to and in respect of L.R. No. 12251/31 (original number 12251/6/16), which agreement was entered into with Florence Ndinda Mutua and John Mutio Mutua, respectively.

106. It is instructive to note that at the time of entry into and execution of the sale agreement, the Estate of Titus Mutua Kilome, Deceased, had hitherto been succeeded and a Grant of letters of administration had been issued to and in respect of Florence Ndinda Mutua and Alice Mumbua Mutua, respectively.

107. Furthermore, the Grant of Letters of Administration which had been issued in favour of the named Administratix had similarly been confirmed and a Certificate of confirmation of Grant had been issued to the name of the Administratix. For clarity, the Certificate of confirmation of Grant was issued on 18th July 1985.

108. From the foregoing, there is no gainsaying that by the time when the Plaintiff entered into and executed the sale agreement with Florence Ndinda Mutua and John Mutio Mutua, respectively, one of the Vendors, namely, Florence Ndinda Mutua, was indeed holding a certificate of confirmed Grant.

109. Consequently, it is instructive to note that by dint of the provisions of Section 81 of the *Law of Succession Act*, Chapter 160, Laws of Kenya, the said Florence Ndinda Mutua was therefore authorized and mandated to alienate or dispose of any portion of the Estate of the deceased, on account of being the Survivor of the Appointed Administrators of the Estate.

110. In view of the foregoing, I come to the conclusion that by the time the Plaintiff entered into and executed the land sale agreement, dated the 9th June 2004, same entered into a lawful and legitimate transaction, which transaction was essentially binding on the Estate of the deceased.

111. Consequently and in the premises, if the determination of whether or not the Plaintiff herein could be entitled to specific performance was to be based on the basis of the validity of the sale agreement; then I would be obliged to make a positive verdict in favour of the Plaintiff.

112. Nevertheless, it is common ground that an order of specific performance is a remedy in Equity and therefore the Honourable court is called upon to calibrate on a number of issues, before determining whether or not to grant such an order.

113. To appreciate the nature and circumstances to be taken into account before granting an order of specific performance, one needs to take cognizance of the decision in the case of *Gurdev Singh Birdi & Narinder Singh Ghatora As Trustees Of Ramgharia Institute Of Mombasa v Abubakar Madhbuti*[1997] eKLR, where the honorable court stated and held thus;

> " It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of *Halsbury's Laws of England*, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:
>
> "must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.
>
> Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."
>
> The latter was the position taken by Lord Esher, M. R. in *Coatsworth v Johnson*,[1886] 54 L. T. 520 at page 523 when he said that:
>
> "The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract, ... the court of equity would refuse to grant specific performance and would leave the parties tot heir other rights. Then if the court of equity would not grant specific performance, we are not to consider specific performance as granted. Then the case is at an end."
>
> When the appellants came to court seeking the relief of specific of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice."

114. Furthermore, the legal implication of the Equitable reliefs/remedy of specific performance was also canvassed and underscored in the case of *Reliance Electrical Engineering v Mantrac Kenya Ltd* [2006] eKLR , where Maraga J. (as he then was) stated that:-

> " Specific performance like any other equitable remedy is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable"

115. Having taken cognizance of the foregoing decisions, it is now appropriate to venture and consider whether the Plaintiff herein has met the requisite ingredients or better still satisfied the threshold, to warrant the grant of an order of specific performance.

116. First and foremost, the Plaintiff herein testified that the sale price over and in respect of the suit property was agreed in the sum of Kshs.4,000,000/= only. Further, the Plaintiff also testified that it was also an express term of the sale agreement that the Plaintiff will pay the 10% stake holder sum at the execution of the sale agreement. For good measure, the Plaintiff confirmed that the 10% stakeholder sum was indeed paid and was duly acknowledged by the vendors.

117. On the other hand, it was the Plaintiff's further testimony that despite having paid the 10% stake holder sum, the entire balance of the purchase price, amounting to Kshs.3,600,000/= only, has not been paid to date. Instructively, it was the Plaintiff's testimony that the said balance was not paid because the Vendors kept postponing the completion date and making requests for accommodation to enable same to procure and obtain the requisite completion documentation.

118. Be that as it may, it was the further testimony of the Plaintiff that on or about the 21st of December 2004, the Purchasers allowed same to enter upon and take possession of the suit properties, pending effective transfer and registration of the suit property in favour of the Plaintiff.

119. Nevertheless, it was the further testimony of the Plaintiff that on or about the 11th of March 2009, the Advocates for the Vendors wrote to and unto and signalled their desire to repudiate the contract. Indeed, it is the Letter under reference, namely, the one seeking repudiation of the contract, which precipitated the filing of the instant suit.

120. From the foregoing explication, two things do arise. Firstly, there is no dispute that the Plaintiff herein did not conclude and or pay the balance of the purchase price to and in favour of the Vendors or at all. Furthermore, there is also no evidence that the said balance of the purchase price was ever tendered to and in favour of the Vendors, for their acceptance or otherwise, during the lifetime of the sale agreement.

121. As a result of the foregoing, it is evident and apparent that a substantial chunk of the purchase price, indeed 90% thereof, was never paid. In addition, the said monies have not been paid to date and in this regard, the Plaintiff is seeking a relief that the court be pleased to direct that the balance of the purchase price be paid to the 1st Defendant, sic within fourteen (14) days from the date of execution and surrender of the transfer instruments.

122. My understanding of the foregoing position drives me to the conclusion that the Plaintiff herein has not performed his part of the bargain as pertains to and in respect of the sale transaction. Clearly, if the Plaintiff was keen to partake of and or benefit from an order of specific performance, then it behoved

the Plaintiff herein to make tender in terms of payments of the balance of purchase price to the Vendors or their duly appointed Advocates.

123. On the other hand, it would also have been incumbent upon the Plaintiff to pay out and or deposit the money with the court simultaneously with the filing of the instant suit on the 23rd March 2009. However, it is not lost on the Honourable court that no such payment or tender was ever made at the time of the filing of the suit or otherwise.

124. To my mind, in so far as the Plaintiff did not perform his part of the bargain, the Plaintiff herein cannot now come before the court and seek to procure an equitable relief of specific performance either in the manner sought or at all.

125. The second limb that also merits mention and deliberations; relates to the fact that the impugned sale agreement, in respect of which the Plaintiff is seeking to procure an order of specific performance, was also repudiated. In any event, the Plaintiff is also before the court challenging the repudiation of the said sale agreement, which repudiation has not been ruled on or determined. Consequently, there is a debate as to whether a specific performance can issue on the basis on an agreement that has since been repudiated.

126. On the other hand, it is also imperative to recall that the sale agreement dated the 9th of June 2004, also stipulated the timeline for completion. For good measure the impugned agreement stated and provided that completion would be ninety (90) days from the date of execution thereof. Notably, the Plaintiff has calculated and stipulated at the foot of Paragraph 5 of the amended Plaint that the last date for completion was the 9th of September 2004.

127. In my humble view, by the time the Plaintiff filed the suit before the Honourable court, namely, the 23rd March 2009, it appears that the sale agreement had already lapsed by effluxion of time and there is no evidence that the lifespan of the sale agreement was indeed extended.

128. Furthermore, it is important to state that being an agreement for the sale and the disposition of an interest in land, it behooved all the players, namely, the Plaintiff and the original Defendants, to ensure that there was a memorandum of sale or better still an addendum, in compliance with the provisions of Sections 3 (3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya.

129. However, during the entirety of the evidence tendered by the Plaintiff, no evidence was placed before the Honourable court to confirm and establish that the Parties to the sale agreement dated the 9th June 2004, which had lapsed, agreed and executed an addendum extending the life span of the said agreement.

130. Be that as it may, I am alive to the various correspondences which were produced by the Plaintiff and emanating from the Advocate for the Vendors and in respect of which the Vendors herein kept on asking for further indulgence. Granted, the Vendors are reported to be asking for further indulgence, but there was no addendum extending the life span of the sale agreement.

131. In any event, it is my humble view that the various indulgences which had hitherto been sought by and on behalf of the Vendors, if at all, same can be construed to constitute extension, were indeed terminated vide the Letter dated 11th of March 2009, whose terms and contents were clear and explicit.

132. For good measure, my understanding of the letter dated 11th March 2009, was to the effect that the Vendors were now not keen to proceed with the sale agreement dated the 9th June 2004, which in any event, I have found to have lapsed and or stood extinguished by effluxion of time.

133. Lastly, while still on the question of specific performance; it is also important note that there was a dispute pertaining to and concerning the Estate of Titus Mutua Kilome, namely, HCC No. 614 of 2006, which dispute was pending before the Honourable High Court. Furthermore, during the pendency of the said suit, an order was issued by the court on the 16th November 2006; wherein it was ordered or directed that transactions including the sub-division of the original parcel of land be nullified.

134. Instructively, the Plaintiff herein got to know of the said suit and the resultant orders which were made on the 16th November 2006, which orders affected inter-alia the suit property herein. Consequently, the Plaintiff filed an application to be joined in the said suit and essentially to review the portion of the order, which touched on the suit property.

135. Nevertheless, it is common ground that the Application which was filed by and on behalf of the Plaintiff herein and in respect of which same sought to challenge the order issued on the 16th November, 2006, was dismissed. For good measure, the Plaintiff herein confirmed that his application was indeed dismissed during cross-examination by the 1st Defendant as well as during the re-examination by his own counsel.

136. Arising from the foregoing, it is therefore imperative to state and underscore that the suit property, namely, L.R. No. 12251/31; which is the subject of this suit, does not legally exist on the basis of the orders of the Honourable court (read, High Court) made on the 16th November 2006 vide HCC No. 614 of 2006.

137. In view of the foregoing, it is therefore my humble position that even though the Plaintiff herein has impleaded specific performance, over and in respect of the suit property, same is however aware of and privy to the orders which were made by the High Court on the 16th November, 2006.

138. In a nutshell, I come to the conclusion that the prayer for specific performance which has been sought by the and at the instance of the Plaintiff herein, is neither available nor tenable, taking into account the totality of the evidence and circumstances obtaining in respect of the subject matter.

Issue Number 4 Whether the Plaintiff herein is entitled to adverse possession

139. Other than the claim premised and anchored on specific performance, founded on the basis of the sale agreement dated the 9th June 2004, the Plaintiff herein has also impleaded a claim based on adverse possession.

140. According to the Plaintiff, upon entering into and executing the sale agreement, the Vendors undertook to conclude and complete the sale process within ninety (90) days. However, when it became difficult to complete the sale transaction within the stipulated time line, the Vendors allowed and authorized him the Plaintiff to enter upon and take possession of the suit property, pending formalization/completion of the sale agreement.

141. Instructively, it was the testimony of the Plaintiff that pursuant to and with the authority of the Vendors, same entered upon and took possession of the suit property on the 21st of December, 2004. For good measure, the Plaintiff himself stated that the Vendors allowed him to enter the suit property and in so far as same were still asking for more time to finalize the transaction.

142. From the evidence placed before the Honourable court, it is the Plaintiff's position that his entry onto and taking possession of the suit property was premised both on the existence of a sale agreement and on permission of the Vendors. Quite clearly, the Plaintiff entered upon and took possession of the suit property with the consent and permission of the Vendors, who were later on the original Defendants.

143. In view of the foregoing, the question that needs to be addressed and resolved is whether the Plaintiff who entered upon and took possession of the suit property on the basis of sic the sale agreement and with the consent of the original Defendants, can now stake a claim of adverse possession.

144. In my humble view, a person who enters onto the land of another, in this case, the Plaintiff with the consent and permission of the adverse Party, cannot lay a claim premised on adverse possession whatsoever, during the subsistence of the consent and or permission.

145. In this respect, it is imperative to recall and reiterate the holding of the Court of Appeal in the case of *Sisto Wambugu v Kamau Njuguna*, 1983 eKLR, where the court stated and observed as hereunder;

> " There have been several cases, of which the Livingstone Ndeete case is one, in which the claimant of land puts his case in the alternative, that is to say by pleading the agreement under which he is entered, and then asking for an order based on subsequent adverse possession. For instance in *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held 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. In Jandu v Kirpal (supra) Chanan Singh J held that:
>
> "The rule on 'permissive possession' is that possession does not become adverse before the end of the period during which (the possessor) is permitted to occupy the land."

146. Furthermore, it is also not lost on this court that the Plaintiff has been propagating a claim on specific performance, which effectively means that the Plaintiff is conceding to the existence of a live sale agreement or contract. In this respect, it is therefore necessary to also ascertain whether a person who lays a claim to the suit property on the basis of a contract can similarly implead a claim for adverse possession.

147. It must be recalled that adverse possession denotes a situation where the claimant is contending that same entered upon and took possession of a land belonging to an adverse party, without the consent and or permission of the adverse Party and thereafter same has remained in occupation thereof continuously and uninterruptedly with the full knowledge of the adverse Party for a duration of more than twelve (12) years.

148. For good measure, the ingredients that underscore the Doctrine of adverse possession were succinctly elaborated upon and discussed upon by the Court of Appeal in the case of *Kweyu v Omuto* [1990]KLR, at page 716; stated and held as hereunder;

> " By adverse possession is meant a possession which is hostile, under a claim or color of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Color of title is that which is a title in appearance, but not in reality). Adverse possession is made out by the Co-existence of two distinct ingredients: the first, such a title as will afford color; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or color of title") mean nothing more than the intention of the dispenser to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to

> the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a color of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, down publicly and notoriously."

149. Furthermore, the Court of Appeal in the case of *Catherine Koriko and 3 others v Evaline Rosa* [2020] eKLR stated that a claim for beneficial ownership or better still ownership arising out of a contract, like the one before hand, cannot be raised and ventilated simultaneously with a claim for adverse possession.

150. For good measure the Court of Appeal stated and underscored that a claim of adverse possession is antithetical to and cannot co-exist with/ alongside a claim for beneficial, nay, contractual ownership.

151. For coherence and in this regard, the court stated thus;

> 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. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.

152. Arising from the foregoing, I am afraid that the Plaintiff herein who entered onto and took possession of the suit property with the consent and permission of the original Defendants cannot by side wind now contend that the same is entitled to the suit property on account of adverse possession. For clarity, the Plaintiff's entry onto and taking possession of the suit property was not hostile to the vendors title, at the point in time of entry, to warrant a plea of adverse possession.

153. Notwithstanding the foregoing, it is also not lost on the court, that immediately the Vendors issued and served the Plaintiff with a letter dated the 11th March 2009, wherein same sought to repudiate the sale agreement, the Plaintiff herein approached the court and filed the instant suit. In the premises, if there was any time line that the Plaintiff ever occupied the suit property without the consent and permission of the original Defendants, then same relates to the period between the 11th March 2009 to 23rd March 2009; when the suit was filed before the court.

154. In my humble view, the duration between the 11th March 2008 and 23rd March 2009, by any stretch of imagination cannot meet the requisite threshold to warrant the grant of an order for adverse possession.

155. In any event, it is important to point out that the filing of a suit terminates the running of time for purposes of computation of a claim for adverse possession. Consequently, and in this regard, immediately the Plaintiff filed the instant suit, which was then challenged by the original Defendants; time for laying a claim for adverse possession, if any; stopped running.

156. In this respect, I am guided by the ratio decidendi in the case of *Mwangi Githu v Livingstone Ndeete* [1980] eKLR, where the court observed as hereunder;

> Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*. The appellant did not assert his right to the whole suit plot until he commenced suit No 1056 of 1976 on April 30, 1976.

157. In short, I am afraid that the Plaintiff herein, whose entry onto the suit property was informed by the consent of the vendors and in pursuance of the contract of sale dated the 9th June 2004, cannot also now propagate and or sustain a claim for adverse possession.

Issue Number 5. Whether the Plaintiff is entitled to the suit property on the basis of Constructive and Resulting trust or otherwise

158. The Plaintiff herein has also contended that having entered into and executed a sale agreement with the original Defendants, namely, the Vendors; and upon payment of the stake holder sum, the Vendor remained as the registered owners of the suit properties albeit on trust for the Plaintiff. In this regard, the Plaintiff has invoked and impleaded the doctrine of constructive trust.

159. It is important to point out that had the Plaintiff paid the entire purchase price over and in respect of the suit property, pending formal transfer and registration of the suit property in his name, then the Plaintiff herein would have a lawful basis to stake a claim to ownership of the suit properties on the basis of constructive trust.

160. In my humble understanding, the foregoing position was aptly canvassed and elaborated upon by the Court of Appeal in the case of *Public Trustee versus Wanduru Ndegwa* [1984] eKLR, where the court stated as hereunder;

> "The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser."

161. However, in respect of the subject matter, the Plaintiff himself admitted and acknowledged that the only money which same paid to and in favour of the Vendors was the paltry sum amounting to Kshs.400,000/= only, which left a substantial portion of the purchase price owing, due and payable.

162. Can the Plaintiff, who has not paid the full purchase price lay a claim on the basis of constructive trust. Unfortunately, and in my humble view, such a Plaintiff like the one before hand, cannot stake a claim to ownership of the suit property on the basis of constructive trust.

163. Be that as it may, I am alive to the position which has been relied upon by the Plaintiff herein and in particular the holding of the Court of Appeal in the case of Mwangi Macharia and 87 others Vs Davidson Mwangi Kagiri 2016 eKLR where the court stated and held as hereunder;

> 1. The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the *Land Control Act* is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of Madan, JA (as he then was) in *Chase International Investment Corporation and Another v Laxman Keshra and Others*, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

"If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed...."

164. Nevertheless, is not lost on the court that the circumstances that were obtaining in the *Mwangi Macharia case* (*supra*), were different from the one obtaining in respect of the instant case. Notably, the Purchasers in the Mwangi Macharia case had fully paid the agreed purchase price, before same were authorized to enter and take possession of the suit property therein, pending the issuance of the requisite Land Control Board Consent.

165. In my humble view, the fact that the Purchasers in the said case had fully paid the purchase price by the time same entered upon and took possession of the suit property were of critical importance and thus influenced the mind of the Court of Appeal to invoke and apply the Equitable doctrine of constructive trust. For good measure, the position taken by the court of appeal in the Mwangi Macharia case was to the effect; that the registered proprietor becomes a trustee of a purchaser who has fully paid the purchase price accords with the position that was underlined in the case of *Public Trustee versus Wanduru Ndegwa* [1984] eKLR.

166. Contrarily, the Plaintiff herein was authorized and mandated to enter upon and take possession of the suit property, merely on the basis of the payment of the stake holder sum. In any event, the Plaintiff has enjoyed and benefited from the suit property to date, albeit on the basis of paltry sum of Kshs.400,000/= only.

167. In my view, the doctrine of equitable trust does not apply to and in favour of the Plaintiff herein. Furthermore, other than seeking a relief on constructive trust, no evidence, (save, for the Written submissions of Counsel), was placed before the Honourable court to prove the claim founded and anchored on constructive trust.

168. Suffice to point out that it is not enough to plead constructive trust and then throw same on the face of the court, seeking to be granted such an order without availing any evidence at all. Clearly, it behooved the Plaintiff to tender before the court cogent and plausible evidence to vindicate the claim on constructive trust.

169. In the case of *Kazungu Fondo Shutu & another versus Japhet Noti Charo & another* [2021] eKLR, the Court of Appeal pronounced itself on the parameters to be met and satisfied by a claimant seeking to procure a favourable order premised on the constructive trust.

170. Instructively, the honourable Court of Appeal stated and held as hereunder;

> 28. The concept of trust must however be proved. This Court in the case of Mumo v Makau [2002] 1EA.170, held that "trust is a question of fact to be proved by evidence....." See also Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 1982.
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> 29. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, this Court dealt with the issue of trust at length. The Court made reference to Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR and re-stated the law on trusts as follows: -
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> "According to the *Black's Law Dictionary*, 9th Edition; a trust is defined as
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> "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

30. The argument by the appellants was that there was a constructive trust which was breached by the 1st respondent. The 1st respondent on the other hand argued that he inherited the suit property from his late father, and that the suit property was just a small portion of Plot M5 which belonged to his late father.

31. As earlier stated, the existence of a trust is a question of evidence. In the Juletabi case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:

"The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

32. The onus to prove existence of a trust lay squarely on the appellants. Section 107 of the *Evidence Act* further provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

33. Section 108 of the *Evidence Act* provides as follows:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

34. Section 109 of the aforementioned *Act* again provides that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

171. On the other hand and in respect of the claim based on resulting trust, it is important to point out that a Party who seeks to implead a claim on resulting trust, is called upon not only to implied resulting trust, but also to particularize and supply the circumstances under which the resulting trust does arise.

172. In this respect, the provisions of Order 2, Rule 10, (1) of the *Civil Procedure Rules 2010*, are imperative and peremptory.

173. For ease of reference, the provisions (supra) are reproduced as hereunder:-

10.	Particulars of pleading [Order 2, rule 10.]

(1)	Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a)	particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
(b)	where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

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(b)	where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

174. Other than the foregoing, the importance and necessity to implead and supply the requisite particulars relating to inter-alia resulting trust, was underscored by the Court of Appeal in the case of *John Gitiba Buruna & another v Jackson Rioba Buruna* [2007] eKLR, where the court observes as follows;

> Mr. Makoloo is also correct that the resulting trust on which the learned Judge relied was not pleaded by the respondent. Under Rule 8 (1) (a) of Order VI *Civil Procedure Rules*, a plaint should contain the specified particulars including particulars of trust on which a party relies.

175. In addition, the importance of impleading and supplying particulars of a claim as required under the law was also emphasized and underscored by the Court of Appeal in the case of *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, where the court stated as hereunder;

> Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) which requires in mandatory terms that:
>
> "every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –
>
> (a) particulars of a ny .....fraud ..... on which the party relies.
>
> (b) Where a party pleading alleges .....fraudulent intention.....particulars of the facts on which the party relies."
>
> In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention. Fraud is a serious quasi – criminal imputation and ir requires more than proof on a balance of probability though

not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.

176. Whereas no evidence was tendered to prove and/or demonstrate the circumstances to warrant the invocation and application of the equitable doctrine of constructive trust, the claim anchored on resulting trust was however neither pleaded nor particularized. In this respect, the claim for resulting trust was stillborn.

Issue Number 6. Whether the 1st Defendant is entitled to Mesne profits as against the Plaintiff.

177. It is instructive to point out that upon being substituted in place of the original Defendants, the 1st Defendant herein duly filed an amended statement of defense and counterclaim dated the 15th December 2021; and in respect of which same sought, inter-alia, payment of Mesne profits, premised on the duration of occupation of (sic) the suit property by the Plaintiff.

178. First and foremost, it is not lost on the court that by the time the 1st Defendant filed and mounted the counterclaim before the Honourable court, the suit against which the counterclaim was being mounted was itself non-existent. In this regard, it is common ground that the counterclaim was thus being mounted in vacuum.

179. Arising from the foregoing, it is my humble position that the 1st Defendant's amended statement of defense and the counterclaim, which were filed in response to the amended Plaint, would similarly stand invalidated and rendered void.

180. Nevertheless, assuming that the counterclaim is legally tenable, (which I am afraid is not the case), there is the question as to whether the claim for Mesne profits was suitably and appropriately pleaded. For good measure, it is imperative to state and underscore that a claim for Mesne Profits must be particularly pleaded, more or less, like a claim for special damages.

181. Furthermore, once a claimant has duly and suitably pleaded a claim for Mesne profits, then it behooves the claimant, in this case the 1st Defendant to tender and place before the Honorable court cogent, credible and plausible evidence in proof of the claim for Mesne profits.

182. Without belaboring the points as pertains to the nature of pleadings that are required as concerns to a claim for Mesne profits, it is imperative to adopt and reiterate the decision of the Court in the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR, where the court stated and observed as hereunder;

> " This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*."

183. Though the 1st Defendant had claimed payment of Mesne profits, same neither supplied particulars of how the Mesne profits was to be reckoned and/or otherwise. In addition, the 1st Defendant also did not tender any evidence to enable the Honourable court to undertake assessment of (sic) the Mesne profits that was sought.

184. In the premises, I am afraid that the claim anchored and founded on Mesne profits, has neither been established, demonstrated and/or proved, either as required by the law or at all.

185. Consequently and in the absence of proof, no award can issue and/or be granted in favor of the 1st Defendant.

Final Disposition:

186. In conclusion, the Honourable court has addressed and analyzed the various perspectives that arose out of the dispute beforehand. Most importantly, it is worthy to recall that the court found and established that by the time the Plaintiff sought to amend the Plaint, culminating into the issuance of the orders made on the 23rd November 2021, the Plaintiff's suit stood abated and was thus extinguished, by operation of the Law.

187. Having come to the foregoing conclusion, which was elaborated upon whilst discussing issues number 1 and 2, respectively, the natural consequence of such a finding is that the entire suit beforehand together with the counterclaim, were null and void ab initio and thus merit being struck out.

188. In a nutshell, the Plaintiff's claim vide amended Plaint dated the 23rd November 2021, be and is hereby struck out. In the same vein, the 1st Defendant's counterclaim dated the 15th December 2021; is similarly struck out.

189. Based on the nature of orders that have been granted, (details in terms of the preceding paragraph), it is evident that the scales have evenly balanced. In this respect, the order that commends itself as pertains to costs is that either Party shall bear own costs of the suit and the counterclaim.

190. Notwithstanding the foregoing, I have found that the Plaintiff herein did not pay the balance of the purchase price, which comprise of a substantial chunk of money, amounting to Kes.3, 600, 000/= only. In this regard, there would be no legal basis to allow the Plaintiff to remain in occupation and retain possession of the suit property, albeit in the absence of any legal right thereto.

191. Consequently and in the premises, and coupled with the fact that a court of law is called upon to issue appropriate, effective and just remedy, essentially to avert any further proceedings, that would merely operate to clog the wheels of justice, I hereby order and direct that the Plaintiff shall vacate and hand over vacant possession of (sic) the suit property within 120 days from the date hereof and in default same to be evicted.

192. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29{TH DAY OF MAY, 2023.**

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court assistant

Ms. Mutisya- Otieno for the Plaintiff.

Ms. Waweru h/b for Ms. Kamau Kinga for the 1st Defendant.

N/A for the 2nd Defendant