



REPUBLIC OF KENYA



**Martim & another v Tanui & 3 others (Environment & Land Case
21 of 2021) [2023] KEELC 18289 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 21 OF 2021**

MN MWANYALE, J

JUNE 15, 2023

BETWEEN

SARAH JELAGAT MARTIM 1ST PLAINTIFF

SARAH JELAGAT MARTIM 2ND PLAINTIFF

AND

ALFRED KIBET TANUI 1ST DEFENDANT

ALFRED KIBET TANUI 2ND DEFENDANT

**DAVID KIPTOO MELI (SUED AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF KIELI ARAP KOGO 3RD DEFENDANT**

**DAVID KIPTOO MELI (SUED AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF KIELI ARAP KOGO) 4TH DEFENDANT**

JUDGMENT

1. This Judgment relates to three cases between the same parties that were consolidated vide the ruling delivered in this suit on 24th January 2022.
2. Two of the cases consolidated herein were commenced before the Environment and Land Court at Eldoret being case No. 612 of 2012 (formerly HCCC No. 53 of 2010) where Sarah Jelagat Maritim had commenced the suit via Originating Summons against Kimeli arap Kogo. While case No. 102 of 2014, was again commenced by Sarah Jelagat Maritim against Alfred Kibet Tanui and David Kiptoo Meli seeking injunctive prayers against the duo.
3. The third suit in the matter was still pending hearing determination having been filed before the Principal Magistrate's Court at Kapsabet being Kapsabet PMCC NO. 147/2008 being Kimeli arap Kogo v Sarah Jelagat Busio who is one and the same person as Sarah Jelgat Maritim. In respect



of the third suit, the same was transferred and consolidated with the two others for hearing and determination, case No. 102 of 2014 (now Kapsabet ELC No. 21 of 2021 being the lead file).

4. Upon consolidation of the three suits aforementioned the Court allowed substitution of Kimeli arap Kogo who is now deceased with Administrators of his Estate to wit Alfred Kibet Tanui and David Kiptoo Meli who were previous Defendants in their personal capacities but pursuant to the substitution and amendment are now Defendant's but as personal representative of the Estate of the late Kimeli arap Kogo.
5. In the Amended Complaint as well as the consolidated suits, Sarah Jelagat Maritim is the Plaintiff, while Alfred Kibet Tanui and David Kiptoo Meli are the Defendants.
6. The Plaintiff vide her amended complaint dated 16/3/2022, prayer (a) thereof, sought for declaration that she is the rightful occupier of Nandi/Kurgung/281 measuring 4.73 Ha having occupied thereof for more than 12 years. The said prayer finds basis on paragraph 4 of the said amended complaint where the Plaintiff sought adverse possession as she had originally pleaded in Originating Summons No. 612/2012 consolidated herewith.
7. Prayer (aa) in the amended complaint sought for a declaration that the late Kimeli arap Kogo (now deceased) held the suit property Nandi/Kurgung/281 in trust for the Plaintiff and for the Defendants to be compelled to transfer the suit land to the Plaintiff.
8. Prayer (aaa) sought for declaration that the succession proceedings in Eldoret High Court P&A No. 197 were conducted and concluded without the due regard to the Plaintiff's interest and that any subsequent subdivision thereof was illegal.
9. Prayer (b) sought for injunction against the Defendants therein and any person claiming under them from interfering, dealing and/or ploughing and/or planting and/or cultivating on Nandi/Kurgung/281.
10. Prayer (c) was for costs, while prayer (d) sought for any other relief that the Honourable Court may consider just to grant.

Plaintiff's Case And Evidence: -

11. It is the Plaintiffs case that the Late Kimeli arap Kogo was fraudulently registered as proprietor of Nandi/Kurgung/281 measuring 4.73Ha; and that as an occupier of the suit land, she was seeking registration of as proprietor through adverse possession and that the Defendants had trespassed on the suit property.
12. On the strengths of the above the Plaintiff sought for the reliefs set out at paragraph 6 to 10 of this judgment.
Although the Plaintiff pleaded fraudulent registration of Kimeli Arap Kogo as a proprietor, the Plaintiff did not particularise the fraudulent actions.
13. Before hearing of the suit, the Court referred the matter to the Court Annexed Mediation after noting that the parties herein were related, the Plaintiff being a first cousin of the 2nd Defendant and an aunt to the 1st Defendant as the late Kimeli arap Kogo and the Plaintiffs' father were brothers.
14. However the mediation failed and the matter proceed before Court. On 18/7/2022, the Defendants Advocates in reply to a query by the Plaintiff's Advocate indicated to Court that no distribution of the Estate of Kimeli arap Kogo had been undertaken.



15. The Plaintiff testified as PW1, it was her testimony while adopting her witness statements dated 25/01/2013 and 11/11/2022 as part of her evidence in chief; that she was a daughter of the late James Kipyego arap Maritim hereinafter referred to as Arap Maritim who was an older brother to the late Kimeli Arap Kogo herein after referred to Arap Kogo; and that the 1st Defendant, Alfred was a grandson of Arap Kogo hence her nephew, while the 2nd Defendant was a son of the late Arap Kogo and was thus her first cousin.
16. In her witness statement dated 25th January 2013, the Plaintiff states that her late father Arap Maritim advanced his brother the late Arap Kogo kshs 3000 to buy for him land.
17. The Plaintiff stated that the land purchased from the said funds (Kshs 3000) is what was later registered and currently known as Nandi/Kurgung/281 purchased from a Mr. Kipngetich Maritim (now deceased) measuring about 4.73 Ha, the Plaintiff and her father settled thereon in 1970 and have occupied the same to date.
18. The Plaintiff further stated that the late Arap Kogo bought for his own use Nandi/kurgung/280 from one Jelel Bot Philemon where the late Arap Kogo settled his family upto date.
19. At the time of registration of Nandi/kurgung 281, the late Arap Kogo registered himself, and that these facts were pleaded by Arap Kogo himself in Kapsabet PMCC No. 147/2008, which suit was one of the suit that had been consolidated herein.
20. The Plaintiff produced the documents listed in her list of documents dated 25/01/2013 as well as in the supplementary list of documents dated 11/11/2022 all totalling to 20 exhibits. She prayed for the Court to allow the prayers in her amended plaint.
21. In cross – examination, the witness stated that Nandi/kurgung/281 was purchased in 1968 by Arap Kogo who wanted to subdivide, it take 5.7 acres. She stated that she was aware of the relief's that Arap Kogo had sought in Kapsabet SPMCC No. 147/2008, which were the property Nandi/kurgung/281, was to be subdivided into two for Arap Kogo to get 5.7 acres and Arap Maritim's family to get 6 acres, but she disputed the Same As Kimeli Arap Kogo Had His Own Property, To Wit Nandi/kurgung/280.
In further cross – examination, the Plaintiff stated that she utilised the whole property but her late father Arap Maritim had sold 3 acres to someone else, and her late father was buried in Nandi/kurgung/281. Her father had requested for a transfer of the suit property but the Arap Kogo had refused to effect the same.
22. In re-examination, she stated that her father Arap Maritim did not follow on the issue of the transfer as he was taken ill. She stated that her witness Hillary Kiptoo was her son, while the other witness Julius Yego was neighbour. That Arap Kogo had sued her but the elders had given her the whole property.
23. She stated that the 3 acres had been purchased by a Mr. Elly Chepkuto Kili, and had been sold by her late father during the life time of the Arap Kogo.
24. PW2, Hillary Kiptoo Busio, testified, it was his testimony that the Plaintiff was his mother and the late Arap Kogo was a brother to his late grandfather Arap Maritim.

Alfred Tanui, the 1st Defendant was a grandson of Arap Kogo, while David Melly the 1st Defendant was a son of Arap Kogo. It was his testimony while adopting his witness statement, that he bought 0.2 acres of Nandi/kurgung/280 From The Late Kimeli Arap Kogo Vide An Agreement Dated 4/9/1997 Which Agreement Was Produced As P Exhibit 22, He Was Born and Brought Up In Nandi/kurgung/281, Where His Mother Had Been Living On Before He Was Born.



25. In Cross – Examination, The Witness Stated That He Was Given Title For Nandi/kurgung/281 By Arap Kogo, In 2002 For Purposes Of Transfer As He Had Wanted The Share He Had Purchased From Arap Kogo. The Witness Indicated That He Had Bought In Nandi/Kurgung/280. The Witness Indicated That His Mother Was An Only Child With A Step Brother Namely David Yego. He Indicated That His Late Grandfather Had Been Buried In Nandi/Kurgung/281 And That The 1st Defendant Had Planted Sugarcane In Nandi/Kurgung/281.

In Re-examination, The Witness Indicated That Property Had Not Been Subdivided. He Stated That He Had Bought 0.2 Acres In Nandi/kurgung/280 And Not In Nandi/kurgung/281 As Evidenced Vide P Exhibit 22.

26. Pw3, Gideon Kiptoo Koskei, Testified. It Was His Testimony That He Knew The Plaintiff, The Late Kimeli Arap Kogo As Well As The Defendants. He Adopted His Witness Statement Dated 25/01/2013 As Part Of His Evidence In Chief.

27. In Cross – Examination, He Stated That His Property Neighbours Nandi/kurgung/281. It Was His Answer In Cross - Examination That The Two Brothers Arap Maritim And Arap Kogo Were Staying In Nandi/kurgung/281 And Nandi/kurgung/280 Respectively Have Sold Their Land At Lemet To Settle In Kurgung Area.

28. In Re-examination He Stated That The Arap Kogo, Lived In Nandi/Kurgung/280, While The Late Arap Maritim Stayed In Nandi/Kurgung/281.

29. Pw4, Julius Samoei, A Farmer From Kelubonik Testified, It Was His Testimony That He Knew The Plaintiff As Well As The Late Arap Kogo Now Deceased. He Adopted The Witnesses' Statement As Part Of His Evidence In Chief.

30. It Was His Testimony That On 5th Of May 2007, There Was A Dispute Presented Before A Council Of Elders Between The Two Brothers The Late Arap Kogo And The Late Arap Maritim, Which Involved Purchase Price Of Nandi/kurgung/281. The Purchase Price Of Nandi/kurgung/281 Had Been Found By The Elders To Be Kshs 2,340/= And Arap Maritim Had Given Kshs. 3000/= Towards The Purchase To Arap Yego So There Was A Balance Of Kshs 660/= That 3,000/= Would Have Purchased Kshs 15 Acres In The Said Period And The Elders Reached A Verdict That Nandi/Kurgung/281 Wholly Belonged To Arap Maritim Which Measured 11.7 Acres While Nandi/kurgung/280 Measuring 31 Acres Belonged To Kimeli Arap Kogo, And That The Two Families Stayed In Their Respective Portions Before Registration And Issuance Of Titles. Descendants Of Arap Maritim Live In 281 While Descendants Of Arap Kogo Live In Nandi/Kurgung/280 upto date.

31. In cross – examination, the witness stated that he was among the elders who passed the verdict in 2007, but did not have the documents. He stated that each person was buried in his own parcel.

32. In re-examination, he witness stated that he was one and the same person namely Julius Kipkosgei Yego Samoei although his statement had been signed as Julius Yego. He confirmed the witness statement as his, he confirmed that Arap Kogo was buried in Nandi/Kurugng/280 While Arap Maritim Was Buried In Nandi/kurgung/281. The witness confirmed that he was present during the elders meeting.

33. After the testimony of the four witnesses the Plaintiff case closed.

Defence Case And Evidence: -

34. The 1st and 2nd Defendants filed a joint Amended Statement of Defence through Messrs Momanyi Gichana Advocates.



In their defence, the Defendants pleaded that the late Arap Kogo was lawfully and legally registered as the proprietor of parcel of Nandi/Kurgung/281 measuring 4.73 Ha. They denied the Plaintiff was entitled to adverse possession as they have been in occupation and possession together with Arap Kogo of the suit parcel, and thus were not trespassers.

35. The Defendants further pleaded that the succession cause over the Estate of late Arap Kogo had been undertaken and the suit parcel Nandi/Kurgung/281 had distributed to the beneficiaries hence the Court lacked jurisdiction to redistribute, and that the Plaintiff never raised any objections and cannot claim that the succession proceedings were unprocedural, the Defendants further claim that his Court lacked jurisdiction to review and/or set aside orders made in the succession cause.
36. The Defendants testified as the only witnesses in support of the defence case.
37. DW1 was David Kiptoo Melly, a farmer who lived in parcel No. Nandi/kurgung/280. He adopted his witness statement as part of his evidence in chief.
38. It was his testimony that the Plaintiff was his cousin. He stated that his late father Arap Kogo had purchased Nandi/Kurgung/281 and that he had received kshs. 3,000 from Arap Maritim. That the late Arap Kogo bought 11.7 acres and he topped up the difference as an acre was Kshs 500/= at the time. In 1994 the two brothers wanted to subdivide and a dispute was taken to Chepkumia elders, where the elders passed a verdict that 5.7 acres belonged to Arap Kogo and 6 acres to Kipyego arap Maritim.
39. That his late father sold to Hillary Kiptoo 0.2 acres in Nandi/kurgung/281 as confirmed in D Exhibit 1 an Agreement For Sale Dated 4/9/1997. Nandi/kurgung/281 was registered in the name of his late father Arap Kogo as confirmed by the green card D Exhibit number 2. The search equally confirmed the same and he produced the search dated 24/6/2022 as P exhibit 3, while a copy of certificate of confirmation of grant dated 17/10/2019 in Kapsabet SPM Succession Cause No. 197/2014 was produced as D exhibit 4. In 2008 the Plaintiff had claimed the whole property and the Defendants father the late Arap Kogo sued for the property.
40. Upon demise of the late Arap Kogo the witness undertook succession cause No. 197/2014 at Kapsabet, and there was no objection to the same.
41. In cross – examination, the witness indicated that his father had been given kshs 3000/= by Mr. Arap Maritim, and property purchased was Nandi/kurgung/281, and he had been told by his father the purchase price was kshs 500/= per acre. He did not have supporting documents to support the issue of the purchase price. On being shown P Exhibit 2 a transfer form relating to Nandi/kurgung/281 he stated that the consideration indicated therein was Kshs 2,340/=. He thus did not know how the purchase price of Kshs 500/= per acre was arrived at. Plot number Nandi/kurgung/280, belonged to his father he did not know how much it had been paid for although he said kshs 9060/= had been paid for 12.63 Ha. He stated that Arap Maritim had lived in Nandi/kurgung/281 with his family while Arap Kogo lived in Nandi/Kurgung/280. He stated that the Plaintiff lives in 281 and utilises the same since his father's life time.
42. In re-examination, he stated that his father had told him that an acre was purchased for Kshs 500/=. He stated that he farmed on Nandi/kurgung/281, and he wished the elder's decision in Chepkumia held in 1994 to be followed by the Court.
43. The 1st Defendant, testified as DW2 and adopted his witness statement as part of his evidence in chief. It was his testimony that he took out letters of administration of the Estate of his late grandfather together with his uncle David Kiptoo they were appointed as Administrators. There was no objection



to the succession proceedings. He was aware of the case, which involved Nandi/kurgung/281 which he cultivated thereon since the lifetime of his grandfather.

44. In cross – examination, he stated that he was the grandson of Kimeli Arap Kogo and that the Plaintiff's family had been served with the succession cause and the Plaintiffs family was not part of the beneficiaries. He did not know how his grandfather acquired the 5.7 acres in Nandi/Kurgung/281.
45. At the time of his birth, Arap Maritim was on Nandi/kurgung/281, where he died and buried on his homestead, while Arap Kogo was buried in Nandi/Kurgung/280. He did not know when Sarah came to the property, but Sarah the Plaintiff had a home on the property and the Plaintiff's mother was alive and stayed in Nandi/kurgung/281. The witness stated that he had cultivated on 281 since his grandfather was alive, and he knew Hillary Kosgey lived in Nandi/kurgung/281, and is a son of Sarah Jelagat. The witness stated that he had built in 280 and so did his uncle David Melly.
46. In re-examination, he stated that their Advocate must have served the succession cause. He stated that Hillary was his cousin and had purchased in Nandi/Kurgung/281 0.2 acres. The witness urged Court to follow the wishes of the late Arap Kogo and 6 acres be given to Plaintiff and 5.7 to them out of which 0.2 acres would be given to Hillary.
47. With the two witnesses, the Defendants case was closed and the Court invited the parties to file submissions. Both sets of submissions were filed.

Plaintiffs Submissions: -

48. Plaintiff submitted on three issues;
 - a. Whether the Plaintiff has demonstrated entitlement under adverse possession.
 - b. Whether Kimeli arap Kogo held land in trust for Kipyego Maritim.
 - c. Issue of Eldoret High Court P & A 197/2014.
49. On issue number 1, the Plaintiff while relying on the decisions in *Maweu v Liu Ranching and Farming Co-operative Society* (1985) KLR as well as *Tabitha Waittherero Kimani v Joshua Nganga* submits that she had proven the ingredients of adverse possession and is entitled to the same.
50. To further buttress this point the Plaintiff has relied on the decision in *James Maina Kinya v Gerald Kwendaka* [2018] (eKLR) as well as *Public Trustee v Wanduru*, submitting that time started running in 1968 and 12 years period have since crystallised and urged the Court to allow the claim on adverse possession; as the same has been proved.
51. On the second issue on whether Kimeli Arap Kogo held the suit property in trust for Kipyego Maritim. The Plaintiff submits placing reliance on Blacks Law Dictionary on constructive trust be can be implied from the circumstances of this Court and urges the Court to determine the existence of a trust. In submitting so the Plaintiff has placed reliance in the case of *Peter Ndungu Njenga v Sophia Watiri Ndugu* (2000) eKLR), where it was held that Courts could infer Trust from circumstances of a case.
52. The Plaintiff submits that Kimeli arap Kogo in his pleadings before the Kapsabet PMCC No. 147/2008 *Kimeli arap Kogo versus Sarah Jelagat Busio* admitted receipt of Kshs 3000/= from Arap Maritim. Thus the intention to purchase by Arap Maritim having been established the Court ought to find in favour of a constructive trust in favour of the Plaintiff.
53. The Plaintiff thus submits placing reliance in the decision of *Charles Kungavia v Alfred Musavi and another* for the proposition that “a constructive trust is an equitable concept which acts on the



conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”

54. On issue number 3, the Plaintiff submits that the issue of ownership of Nandi/kurgung/281 ought to have been left for this Court to decide and not the succession Court; and the Plaintiff cite the decision in *Joseph Koori Ngugi v Stephen Ndichu J. Mukina* (2017) eKLR.
55. On the strength of the above submissions the Plaintiff urges the Court to allow her claim.

Defendant’s Submission: -

56. The Defendants filed their submissions and framed 4 issues as here follows;
 - a. Whether the Plaintiff has established that she is the lawful occupier of Land parcel known as Nandi/Kurgung/281.
 - b. Whether a declaration that the succession proceedings in Eldoret High Court P & A 197 of 2014 were unprocedural and illegal is warranted.
 - c. Whether the Plaintiff has established that the Defendants are holding the suit land in trust for the Plaintiff.
 - d. Whether an order of permanent injunction as prayed in sub-paragraph (d) is warranted
57. On the first issue the Defendants submits and admit that the late Arap Kogo was advanced Kshs 3000/=, by the Plaintiff’s father sometime in 1969. The Defendants submit that an acre was sold for Kshs 500/=, so the Kshs 3000 only bought 6 acres while Kimeli arap Kogo topped up the rest as the size purchased was 11.7 acres, hence the Plaintiff’s father was entitled to only 6 acres while the Defendants were entitled to get 5.7 acres; but the Defendant’s father Kimeli Arap Kogo registered the whole portion in his name.
58. The Defendant submit the Plaintiff has only proved to be in occupation and entitlement of 6 acres rightfully belonging to her father.
59. The Defendant submit that as the Plaintiff has been in occupation of his family’s portion, the ingredients of adverse possession have not been proven.
60. On issue number 2, the Defendant submits, the Court cannot sit and discuss merits of a succession Court and that this Court has no jurisdiction to review the certificate of confirmation of grant dated 17th December 2019 as this Honourable Court jurisdiction is found on Section 13 of the Environment and Land Court Act.

To buttress this point the Defendant places reliance on the decision of *Isaac Kinyua v 3 others v Hellen Kaigongi* (2018) eKLR.
61. On the 3rd issue as to whether there is a trust, the Defendants submit that the Kimeli arap Kogo only held in trust a portion measuring 6 acres and not the whole portion.
62. The Defendant submits that the Plaintiff is not ultimately entitled to a prayer of injunction for reason that she failed to disclose of the existence of a previous case on the same subject matter to wit Kapsabet PMCC No. 147/2008.

That the Plaintiff produced a fake version of the original sale agreement dated 4/9/1997 between Arap Kogo and Hillary Busio for 0.2 acres in Nandi/kurgung 280. When it should have been in Nandi/kurgung/281.



Issues For Determination: -

63. Upon perusal of the pleadings, the evidence on record and submissions of the parties, the Court frames the following as issues for determination;-
- a. Whether or not the Plaintiff proved adverse possession.
 - b. Whether or not Plaintiff proved trust
 - c. Whether or not Plaintiff is entitled to the reliefs sought in the Amended Plaintiff
 - d. Who bears the costs of the suit?

Analysis and Determination: -

64. Before delving into the issues for determination, it is important to take note of the other facts in the case that have either been admitted or do not form part of the issues for determination.
65. From the pleadings and evidence on record, it is common ground that the Plaintiff and the Defendants are close relatives being cousins and a nephew. It is also common ground that the suit property Nandi/kurgung/281 was inhabited by Arap Maritim and his family and the Plaintiff has been living thereon since in 1970's when it was purchased. From the evidence on record it is undisputed that Arap Kogo and his descendants lived in Nandi/Kurgung/280, Kipyego Arap Maritim was buried in Nandi/kurgung/281 Arap Kogo was buried in Nandi/Kurgung 280.
66. Both the Plaintiff and the defence witnesses confirmed that the late Kimeli arap Kogo received kshs 3,000/= from Kipyego arap Maritim to purchase land on his behalf and that the land purchased was later registered as Nandi/Kurgung/281 in the name of the late Kimeli arap Kogo.
- DW1 stated that the purchase price was kshs. 500/=, per acre, hence the late Arap Maritim from the Kshs 3,000/= he advanced was entitled to only 6 acres while the acreage of Nandi/kurgung/281 was 11.7 acres hence the extra 5.7 acres belonged to the Kimeli arap Kogo since he topped up the difference.
67. The evidence by DW1 was not corroborated and the Court does not find any basis that suggests that the purchase price to have been Kshs 500 per acre as stated by DW1, because firstly, the transfer document produced by Plaintiff as P Exhibit 2, from Kipngetich Maritim to Kimeli arap Kogo, put the consideration for purchase of Nandi/Kurgung/281 at kshs 2,340/= secondly the witness did not indicate how much Arap Kogo topped up, if indeed, the purchase price was kshs 500/= per acre.
68. DW3 a village elder, indicated that kshs 3,000/= would have purchased about 15 acres in the 1970's and both in the green card produced as P Exhibit number 1, entry 3 thereof records the consideration therein Kshs. 2,340/=. This was the purchase price equally captured on the application for land control board consent for Nandi/kurgung/281, produced as P Exhibit 7, as well as the letter of (LCB consent) consent dated 15/12/1970 which all indicate the purchase price as Kshs 2,340/=.
69. Since the fact that the Plaintiff's father gave the late Kimeli arap Kogo kshs 3,000/= is undisputed and the purchase price was Kshs 2,340/=. It follows that there was no top up that Arap Kogo made towards the purchase of Nandi/kurgung/281, and the Court thus finds that the suit property was wholly and entirely purchased by finances from the Plaintiff's father; and the Plaintiff's father was entitled to the entire acreage so purchased of 4.73Ha.
70. The Defendant did not challenge the documentary evidence. In support of the purchase price, and DW1 testimony of purchase price of kshs 500 per acre, is at best hearsay.



71. The evidence of occupation on the entire suit property by the late Kipyego Arap Maritim was corroborated by PW3 and PW4, with the Defence witnesses equally confirming that each family resided in own parcel; and each patriarch buried near his homestead in their own parcels.
72. With regard to the issue of adverse possession and whether the Plaintiff has proven the elements that constitute adverse possession as stated in various decision and in this case as stated in the case of *Mbira v Gachuri* 2002 /EALR 137 cited by Counsels of both parties herein.
73. The Court has found the parties herein to be close relatives, being Cousins and an aunt and nephew.
74. With regard to the issue of adverse possession, between relatives, the Courts have held that the doctrine is not applicable in cases where the parties are related as in this case.

The Court of Appeal in the decision in the case of *Samuel Kihamba v Mary Mbaisi* (2015) eKLR observed as follows;-

“could the doctrine of adverse possession apply against the parties to the suit before the Learned Judge who were related by being mother and stepson. We think not, we are persuaded by various dicta which we have quoted and relied upon in this judgment and must state, it would create havoc for families and society in Kenya generally if the principle of adverse possession applied within families against close relatives.”

75. Similarly the High Court in the decision in the case of *Gabriel Mbui v Mukindia Maranya* (1993 eKLR) had as early as 1993 declined to grant adverse possession between relatives and the 2014 High Court decision in *Rodgers Mwabonje v Douglas Mwabonje*, (2014) eKLR followed suit.
 76. It follows thus that adverse possession as pleaded herein is not available to the Plaintiff as she is a relative of the Defendants and issue number 1 is answered in the negative.
 77. On issue number 2, the Plaintiff pleaded Trust and submitted that she had proven constructive trust.
 78. The Court of Appeal decisions in *Twalib Hatayan and Another v Said Saggur abamed al-beidy and others* (2015 eKLR) as well as the decision in *Mark Kiprotich Sistrma v Sosten Kiplagat Singoei* (2022) KECA 708 KLR have discussed the various trust that exists. In relation to a constructive trust, the Twalib Hatayan case defined “a constructive trust as an equitable remedy imposed by Court against one who has acquired property by wrong doing (see Blacks law dictionary); and it arises where a who is already a trustee takes advantage of his position for his own benefit.....”
- While a resulting Trust is defined in the said case (Twalib Hayatan) as 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 (see Black laws dictionary.....) the general rule is that a resulting trust will automatically arise in favour of the person who advances the purchase money.”
79. In both cases i.e. the Twalib Hatayan case and the Mark Kiprotich Saina case, the general rule as regards resulting Trust, is that transferee holds title for the transferor or the one who provided the purchases money as Equity does not assume gifts.
 80. In the case of *Peter Ndungu Njenga v Sophia Watiri Ndungu* (2000) eKLR cited by both Counsels, it was held that the Court could imply a trust from circumstances of a case.
 81. The Plaintiff has pleaded trust, the Plaintiff has submitted on constructive trust, while the Defendant submitted that trust existed in relation to 6 acres only, and under the decision of Peter Ndungu Njenga cited above, the Court in the circumstances of this case shall imply trust, and from the above cited



cases, the Twallib Hatayan and Mark Kiprotich case, the Trust that the Court implies herein, is the resulting trust as opposed to the constructive trust, as submitted by the Plaintiff.

82. In the Mark Kiprotich Sirma case above, the Court of appeal observed that “a common tread between a resulting trust and/or constructive trust is that they both serve the same objective; to defeat unjust enrichment and to return property to the true owner.”
83. The Court having found that Nandi/Kurgung/281 was wholly and entirely purchased at Kshs 2,340/= out of the Kshs 3,000/= given to the late Kimeli arap Kogo by the late Kipyego Arap Maritim, and it follows that the registration of Kimeli Arap Kogo was in Trust for Kipyego arap Maritim and his beneficiaries and the Plaintiff being a beneficiary as a daughter of Kipyego arap Maritim has a cause of action against the Estate of Kimeli arap Kogo (as trustee) under Section 20 (2) of the Limitation of Actions Act.
84. On issue number 2, the Court finds that the Plaintiff has proved Trust and a resultant Trust exists in the registration of Arap Kogo as proprietor of Nandi/kurgung/281 on funds paid wholly by Arap Maritim. The registration of Kimeli arap Kogo was thus as a trustee of Arap Maritim and the Plaintiff has proven the existence of the Trust; and her interest in Nandi/kurgung/281; thus issue number 2 is answered in the positive.
85. With regard to the issue number 3 on the reliefs available. The reliefs sought by the Plaintiff appear at paragraph 5 – 10 of this judgment.
86. The Court notes that Nandi/kurgung/281 was registered in the name of Arap Kogo who is now deceased and the property is subject of succession cause No. P & A No. 197 of 2014, which is pending distribution.
87. The Court having found that the property was registered in name of the late Arap Kogo as trustee, and having found that the Plaintiff has proven resulting Trust, it follows that the property though forming part of Estate of Kimeli arap Kogo by virtue of Kimeli arap Kogo being the registered owner thereof; and by virtue of the resultant trust should revert to the Plaintiff as the rightful owners.
88. The Court makes a finding that the Plaintiff is the rightful owner of Nandi/kurgung/281 by virtue of resulting trust. nandi/kurgung/281 measures about 11.7 acres, and the plaintiff having admitted that his father sold 3 acres to elly chepkuto killy, the plaintiff’s interest in nandi/kurgung/281 would be 8.7 acres while elly chepkuto killy has a purchasers interest of 3 acres in nandi/kurgung/281; which is not disputed.
89. As the matter is subject of succession cause pending distribution. The reliefs sought by the Plaintiff are not tenable as that would amount to usurping the jurisdiction of the succession Court.
90. Having made a finding that the Plaintiff has demonstrated in proved interest of 8.7 acres in Nandi/Kurgung/281, While 3.0 In Nandi/Kurgung/281 belong to Elly Chepkuto Killy, it is incumbent upon the Plaintiff to move the succession Court for rectification of the Grant or as she may deem appropriate.

Disposition: -

91. In the final result, judgment is entered in favour of the Plaintiff as against the Defendants as follows;
 - i. The Plaintiff has proven entitlement to 8.7 acres in Nandi/kurgung/281 pursuant to a resulting trust and a declaration is hereby issued that she is entitled to the 8.7 acres in nandi/kurgung/281, while 3.0 acres in nandi/kurgung/281 belong to Elly Chepkuto Killy as purchaser.



- ii. The Defendants having no proprietary interest in Nandi/Kurgung/281 Are Permanently Restrained From Interfering With The Plaintiffs Ownership Possession And Occupation Of Nandi/kurgung/281.
- iii. The Plaintiff shall have costs of this suit.

DELIVERED AND DATED AT KAPSABET THIS 15TH DAY OF JUNE 2023.

HON. M. N. MWANYALE

JUDGE.

In the presence of;

Mr. Kiboi for the Plaintiff

Ms. Moronge holding brief for Mr. Gichana for Defendants.

