



REPUBLIC OF KENYA



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Kimani v Total Kenya Limited t/a Total Energies Marketing Kenya PLC (Environment & Land Case E009 of 2022) [2023] KEELC 19062 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E009 OF 2022**

LN GACHERU, J

JULY 27, 2023

BETWEEN

MARGARET NJOKI KIMANI APPLICANT

AND

**TOTAL KENYA LIMITED T/A TOTAL ENERGIES MARKETING KENYA
PLC RESPONDENT**

JUDGMENT

1. The Applicant herein Margaret Njoki Kimani, brought this Originating Summons dated 25th April 2022, and sought for the following declarations;
 1. That an Order be and is hereby issued that the Applicant is entitled to 0.3238ha of land comprised in the title number Murang'a Municipality block 1/392, by way of transmission under section 62 of the [Land Registration Act](#), 2012 and/or due to subsistence of constructive trust, or by virtue of adverse possession and occupation of the said land for more than 12 years immediately preceding the presentation of the suit.
 2. That an Order be and is hereby issued directing the Respondent to transfer to the Applicant the suit property being 0.3238ha of land comprised in title number Murang'a Municipality Block 1/392, free from all encumbrances failing which the Deputy Registrar of this Court be authorised to sign all necessary papers of the said piece of land free from all encumbrances.
 3. That the costs of this suit be provided for.
2. This Originating Summons is supported by the Affidavit of the Applicant Margaret Njoki Kimani, wherein she averred that on or around 16th November 1993, her father Reuben Kimani Muiruri (deceased), acquired a portion of land comprising of 0.3238ha from Hezekiah Giceru Mwangi and Jerusha Njeri Mwangi, as per the attached sale agreement marked 'MNK1'



3. She further averred that the parcel of land acquired by Reuben Kimani Muiruri(deceased) emanated from the reparation of Murang'a Municipality Block1/392, into two parcels measuring 0.3228ha and 0.1398ha respectively. It was her contention that as per the transaction, the portion measuring 0.1398ha was to be disposed to a separate purchaser.
4. Further, that prior to the said acquisition, there was an agreement and understanding reached between the parties that the property would be enjoyed beneficially based on the respective ratios. That following the said acquisition, her father Reuben Kimani Muiruri remained in possession, control and occupation until the year 2007 when he bequeathed the said land to the Applicant. She contended that her father passed on in the year 2015, as per the death certificate marked MNK2.
5. She further contended that around 8th July 2014, without following the laid down procedure or even making reference to Reuben Kimani Muiruri(deceased), the Respondent was issued fraudulently and unlawfully with a certificate of lease purporting to be vested with proprietorship over the entire suit land. She annexed a copy of the green card as MNK3.
6. She also contended that the issuance of the certificate of lease on 8th July 2014, was done without the knowledge and consent of her father, Reuben Kimani Muiruri(deceased), who at all material time remained in possession and occupation of the portion of land measuring 0.3228ha. That unequivocally, there was a common intention that both her deceased father and subsequently whoever would acquire the remaining portion of the suit land, would have indefeasible beneficial interest. The Applicant further deposed that the enduring registration of title in the name of the Respondent which parcel of land measures 0.3228ha is inaccurate and detrimental to her legal rights as the said parcel of land belongs to her.
7. She also contended that she has enjoyed open, continuous, exclusive and notorious use of property, since the year 2007. It was her further contention that her utilization of the suit parcel of land has always been glaring and visible, making it patently apparent that she is the legal owner of the said parcel of land measuring 0.3228ha. That the said parcel of land is what the Respondent has been occupying at all material time.
8. The Applicant averred that an irrefutable constructive trust exists in relation to the said suit land and it would be unlawful and inequitable for the Respondent to negate her beneficial interest in the property. It was her further contention that the occupation of the parcel of land by her deceased father and later herself has always been without force, without secrecy and without persuasion. That the said occupation has never been interrupted by any means. Therefore, she is entitled to 0.3228ha of the suit property by way of transmission under Section 62 of the [Land Registration Act](#) 2012, and/or due to subsistence of constructive trust or by virtue of adverse possession, for having been in possession and occupation of the said land for more than 12 years immediately preceding the presentation of this suit. Therefore, it was her belief that she is entitled to be absolutely recognised as the proprietor of the 0.3228ha of the suit land, which is currently under her possession and occupation. She urged the Court to allow her Originating Summons.
9. The Originating Summons is vehemently opposed through the Replying Affidavit of Arthur Ombimah, the Network Development Manager of the Defendant herein. He averred that the Originating Summons herein is based on material misrepresentation, is baseless and without any factual and legal credibility.
10. It was his contention that the Applicant herein is a stranger to the Respondent who has never claimed any portion of the suit land nor had any portion of the said land registered in her name. that the said land is registered in the name of the Respondent herein.



11. He averred that the Respondent is alien to the purported Agreement for sale of land between Reuben Kimani Muiruri, Hezekiah Giceru Mwangi and Jerusha Njeri Mwangi. He also averred that the purported agreement for sale of land between the said Reuben Kimani Muriri. Hezekiah Giceru Mwangi and Jerusha Njeri Mwangi is inadmissible in evidence. Further that the Respondent is alien to the alleged reparation of Muranga Municipality Block 1/392, into two.
12. The deponent further contended that he is alien to the purported bequeathing of 0.3228ha by Reuben Kimani Muiruri to the Applicant herein. He also averred that there was no evidence of such conveyance.
13. The deponent denied that the Applicant and /or her late father Reuben Kimani Muiruri(deceased), have at any given time since 1994, ever had possession, occupied and or used any portion of the parcel of land known as Title No. Murang'a Municipality Block1/392. He further averred that the said parcel of land has never been subdivided. He also alleged that the Respondent has always been in exclusive possession of the suit property. He contended that the Respondent continues to be in exclusive possession of the suit property where it runs a Petrol Service Station, and which fact is known by members of the public.
14. It was the Respondent claim that the instant Originating Summons is fatally defective and is an abuse of the Court process and he urged the Court to strike it out for reasons that;
 1. The claim is Statute barred under the *Limitation of Actions Act*.
 2. The Originating Summons fail to comply with the mandatory provision of Order 37 Rule 7 of the Civil Procedure Rules.
15. The deponent also averred that the instant Originating Summons lacks merit, is fatally defective and the same should be dismissed and/or struck out with costs. That the same is an attempt to grab the Respondent's land parcel. He urged the Court to dismiss the Applicant's Originating Summons.
16. The Applicant Margaret Njoki Kimani, filed a Supplementary Affidavit dated 1st December 2022, and averred that based on the Respondent's false averments in its Replying Affidavit, she found it prudent to carry out a search at Murang'a County Government offices and she attached the said search as annexure SMNK1.
17. It was her contention that Murang'a County Government confirmed that there was a sale agreement in relation to the suit property and therefore the depositions in the Replying Affidavit was fictitious. Further that Murang'a County Government supplied the subdivision scheme that facilitated the reparation of the suit property into two parcels of land measuring 0.3228ha and 0.139ha respectively, as per annexure SMNK3.
18. She contended that the Respondent has knowingly and deliberately chosen to hide the relevant facts to Court so as to unjustly sway the course of justice and deprive the Applicant of her lawful entitlement to the suit property. Further that the allegations of technicalities are farfetched and have no factual or legal foundation and are inaccurate and misleading. She also denied that the prayers sought in the instant Originating Summons are misleading.
19. This Originating Summons was canvassed by way of viva voce evidence.
20. The Applicant gave evidence for herself and called no witness. The Respondent gave evidence through its one witness Arthur Ombimah, the Network development officer.



The Plaintiff's Case

21. PW1, Margaret Njoki Kimani, an Advocate of the High Court of Kenya relied on her Witness Statement and Supporting Affidavit as her evidence in chief. She also relied on her Supplementary Affidavit dated 1st December 2022, as part of her evidence. She further produced the list of documents as her exhibits.
22. In cross exam, the Applicant told the Court that she was given the suit land in 2007, by her father. Further that the said bequeathing was verbal and her father took her to the suit property and showed it to her and told her to use it. That the said property is near Total Petrol Station and her father did not give her any documents of title. However, her father passed on 27th March 2015, and they filed a Succession Cause. She testified that the suit property was not listed among the assets of her father's estate since it was not in his name. That since 2007, she has searched for documents relating to the suit property to no avail. However, the Applicant had a copy of the Sale Agreement between her father and the vendors Hezekiah Mwangi and Jerusha Mwangi. It was her testimony that she did not know the vendors and that her father paid the full purchase price, but she did not have any receipt for such payment.
23. The Applicant further testified that the Sale Agreement provided that should the vendor fail to honour the Sale Agreement, he was to refund the purchase price and 20% of the same. She claimed that the suit property was not transferred to the purchaser as per the agreement and her father did not enforce the sale agreement.
24. The Applicant also identified a document showing proposed subdivision in 1993 and she confirmed that there are two distinct parcels of land on the ground. Further that the registered owner is Total Kenya Ltd. That when she applied for the Green Card, it showed that the parcel of land had not been subdivided, but it remained one property.
25. In further cross exam, she indicated that she has planted arrow roots and tree nursery on the suit property. That though she has been conducting business on the suit property, she had never acquired a business permit. That she has never paid land rent and rates since 2007. However, she alleged that she has been using the land and has defaulted in payment of arrears. She also confirmed that Total Kenya has been paying the land rent and rates. It was her testimony that the sale agreement does not show that any stamp duty was paid at all. The Applicant confirmed that there is a drainage on the property.
26. On re exam, she stated that the transaction between her father and the vendor was completed and that the Respondent have encroached on the side that her father and or herself are entitled to.

Defence Case

27. DW1, Arthur Ombimah, who works for the Respondent as network development manager told the Court that his job entails acquisition and disposal of Petrol Stations of the company across the country. He relied on his witness statement dated 13th February, 2023, as his evidence in chief. He also produced the list of documents as exhibits DExh 1-2. He further relied on his Replying Affidavit dated 30th September 2022, as part of his evidence.
28. In his witness statement, the Respondent averred that the Applicant claim is based on material misrepresentation and baseless averments without any factual and legal credibility.
29. He further testified and the Respondent is the bona fide registered proprietor of the suit property as per the produced exhibits. He further testified that the Respondent has been paying land rent and rates



- for the said property and also the business permit, which details are within Murang'a County Council offices.
30. It was the Respondent further testimony that the suit land was transferred from Hezekiah Giceru Mwangi and Jerusha Njeri Mwangi to Caltex Oil(K) Ltd on 8th June 1994, and a Certificate of Lease was issued on 17th June 1994, in the name of Caltex Oil(K) Ltd . Further that on 1st June 1999, Caltex Oil(k) Ltd changed its name to Total Marketing Ltd following acquisition of Caltex by Total Marketing. That on 30th October 2009, Total Marketing (k) Ltd, executed a transfer of lease to Total Kenya Ltd, which transfer was registered at the lands Registry.
 31. Therefore, the Respondent was alien to the purported agreement for sale of land between Reuben Kimani Muiruri and Hezekiah Giceru Mwangi and Jerusha Njeri Mwangi. That the Respondent was alien to the alleged reparcellation of the suit land into two parcels of land.
 32. Further that the title documents which were always in custody of Caltex Oil Ltd and now the Respondent has never been subject of any subdivision or reparcellation and such activity could not take place without the consent of the registered proprietor and the relevant authorities.
 33. The Respondent denied that the Applicant herein nor the late Reuben Muiruri Kimani, were ever in possession of the suit property. He denied knowledge of bequeathing of the suit property to the Applicant.
 34. It was the testimony of the Witness that the Respondent has always been in possession of the suit land where it runs a vibrant Petrol Service Station. He urged the Court to dismiss the Originating Summons on the basis that it lacked merit and was an attempt to grab the Respondent's land.
 35. On cross exam, the witness testified that Total Marketing Ltd, was initially known as Chevron(K) Ltd, and that there was a change of name. That Total(k) Ltd has mutated from Caltex Oil(K) ltd to Chevron(k) Ltd to Total Marketing Ltd. He also confirmed that the transfer of Lease to Total (k) Ltd was not captured, though he testified that the same was registered.
 35. It was his further testimony that Total (k) Ltd does not run the Petrol Station, but it is run by a dealer, though he did not attach the lease. He also confirmed that he had documents to show that Total (k) Ltd, paid the land rates. He further confirmed that he could not tell what transpired between the years 1994 and 2014, and that the change of names was not reflected in the Green Card. He agreed that the Green Card annexed did not capture all the transactions referred to.
 36. On re exam, the witness testified that though there was a change of name, the same was not reflected on the Green Card. He further testified that the change of a Company's name was not a land matter, but a commercial one and there was no legal obligation to register change of names at the Lands Registry. He also confirmed that there was payment of stamp duty and that the current dealer of the said Petrol Station was Awali Energies Ltd. He also stated that though the land rates were paid by Total (k) Ltd, the name Chevron appeared because the Murang'a County offices had not updated its records or Register. He restated that the Respondent is in exclusive possession of the suit property. It was his allegations that the name of the claimant was not in the Green Card and there was no title in the name of the claimant over the suit property. There was also no complaint to the Police that Total(k) Ltd has fraudulently taken over the suit property.
 38. The parties thereafter filed written submissions.
 39. Through Adrian Kamotho Njenga&Co Advocates, the Applicant filed her written submissions dated 17th March 2023, and submitted that the Applicant is entitled to 0.3238ha to be excised out of the suit property; Murang'a Municipality Block 1/392.



40. It was her submissions that her case revolved around three issues, Constructive trust, transmission and Adverse possession.
41. On the issue of constructive trust, she submitted that there was cogent evidence of an agreement of sale of land between Hezekiah Giceru Mwangi & Jerusha Njeri Mwangi, on one hand and Reuben Kimani Muiruri, on the other hand. That the said vendors were the original registered owners and Reuben Kimani was a purchaser. The said agreement was dated 16th November 1993, and the purchase price was Ksh. 1,700,000/= which amount was fully paid to the vendors. That the Respondent did not dispute that fact. Further that the vendors were to cause the suit property to be subdivided into two portions, and were to effect transfer of 0.3238ha to the Applicant's father. It was also submitted that the vendors applied for subdivision and lodged a proposed subdivision plan at Murang'a County Gov't offices, and therefore the intention of the vendors was identifiable from the exhibits produced in Court. That there existed an agreement of sale between the Applicant's father and the Vendors. Therefore, the transfer of this land to the Respondent was shrouded in mystery.
42. For the above, the Applicant relied on the case of *Twalib Hatayan Twalib & Another VS Said Sagar Ahmed Al-Heidy & Another* (20150 eKLR, where the Court defined a Trust as follows;
- “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).”
43. The Applicant further relied on a quote from the above case of *Twalib Hatayan* case, where the Court held;
- “... a constructive trust is 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... a constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit... for constructive trust, proof of the parties' intention is immaterial;.... imposition of a constructive trust is thus meant to guard against unjust enrichment.... in the present case, a constructive trust cannot be inferred or imposed, since the suit premises is yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled”
44. It was the Applicant's further submissions that since consideration had been paid and subdivision process initiated, then it can be inferred that the Respondent's registration was fraudulent and a trust can be implied. Reliance was placed on the case of *Charles Kangayia Vs Alfred Musavi & Another* (2020) eKLR; where the Court held;
- “in applying the principles to the case before us, all indications are that a constructive trust arose as between the Respondents' father and the appellant's father. As stated in the authority above, a trust will automatically arise in favour of the person who advances the purchase money. It is a finding of fact that the purchase money for the suit parcel was advanced by the Respondents' father and he was put in possession on the land in 1975”
45. On the issue of acquisition by transmission, the Applicant submitted that the available evidence showed that she was gifted 0.3238 ha of the suit property by her late father, Reuben Kimani Muiruri. That there was uncontroverted evidence that upon the death of her father, the accrued interest in the suit property was transmitted to her through operation of the law. Therefore, the interest in the suit



property must accrue to the Applicant as a beneficiary. Reliance was once more placed in the case of Kangayia (supra) where the Court held;

“in the circumstances of the case, the equitable doctrine of constructive trust and proprietary estoppel are applicable and enforceable. The Respondents in the instant case are beneficiaries of the estate of the buyer, the late Timona Amukubi. The appellant’s father all along acted on the basis and represented that the Respondents were to obtain proprietary interest in the suit property. 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”

46. On Adverse possession, it was submitted that the Applicant’s father was in possession of 0.3238ha, from 1993, when he purchased it and he occupied the same until 2007, when he bequeathed it to the Applicant. That the Applicant has continued to be in possession and occupation to date. Therefore, the Applicant and her father have been in occupation of the suit property for over 12years. That the Applicant has never been evicted from the suit property. For this, the Applicant relied on the various cases, among them the case of Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau (suing in his capacity as the Administrator of the Estates of Kimingi Wairera(deceased) and of Mwangi Kimingi (deceased) (2022) eKLR, where the Court held;

“it is trite that a claim for adverse possession is attached to land and not title and it matters not that the land was owned by either Kimingi Wairera or Mwangi Kimingi. This was the position in Maweu Vs Liu Ranching & Farming Cooperative Society (1985) eKLR, as quoted in Civil Appeal No.164 of 2011: Gachuma Gacheru Vs Maina Kabuchwa(2016) eKLR, where the Court held “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title.”

47. Further, the Applicant submitted that there was a trail of irregular changes in the identity as well as an array of controversies in the transactional veracity of the Respondent. That the Respondent has over the years evolved in different names and there is a mischief in this evolving identity of the Respondent as most of those names do not feature in the Green Card. That the evidence tendered by the Respondent was contradictory, as whereas the Respondent stated that it was in exclusive possession of the suit land, it emerged in cross exam that the Petrol Station is operated by different entity known as Awali Energies Ltd. Further that the land rates were paid by Chevron(k) ltd, which does not feature in the Green Card or any legal land records. It was therefore submitted that the certificate of lease registered in the name of the Respondent could not have been regularly acquired. Therefore, the Respondent is fraudulently registered as the owner of the entire property; Muranga Municipality Block1/392 instead of 0.1398ha.
48. On the conduct of the Respondent in the course of the proceedings, it was submitted that while the Court was seized of the matter, the Respondent commenced various activities which were prejudicial to the Applicant and amounted to interference with the subsisting state of affairs and which were meant to derail the course of justice. That the Respondent’s actions were meant to steal a march against the Applicant. The Court was urged to take judicial notice of the Respondent’s actions which lacked bona fides.
49. On whether the Applicant is entitled to 0.3238 ha, the Applicant submitted that the sale agreement was very clear that the Applicant’s father bought a portion of Muranga Municipality block1/392 measuring 0.3238 ha and the said agreement detailed how subdivision was to be done and the



subsequent transfer. For this, the Applicant relied on the case of Stephen Mwangi Gatunge(supra), wherein the Court held;

“for a claim of adverse possession to issue, it is important that the said land is clearly identified as was held by the Court in Wilson Kazungu Katanga & 101 others Vs Salim Abdalla Bakshwein & Another (2015)eKLR, where the Court observed;

“ the identification of land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession.....”

50. This Court was urged to follow the above reasoning and directs that the Applicant is entitled to 0.3238 ha out of Murang'a Municipality Block 1/392, as clearly stated in the Green Card and subdivision plans.
51. Ultimately, the Applicant submitted that she has proved her case on the required standard of balance of probability and she urged the Court to allow her claim.
52. The Respondent through the Law Firm of Walker Kontos &Co Advocates, filed its written submissions dated 27th March 2023, and submitted that the Applicant's claim does not disclose the nature of occupation and use of the suit property by the Applicant since the year 2007. It was submitted that the Applicant and her late father Reuben Kimani Muiruri, were never in possession and occupation of the suit property since 1994. Further that the suit property has never been subdivided and that the Respondent has always been in exclusive possession and use of the suit property where it runs a vibrant Petrol Station business.
53. The Respondent submitted too that the suit herein is fatally defective and Statute barred under Section 4(1) of the *Limitation of Actions Act*. That the claim is based on a sale agreement dated 16th November 1993, and therefore the same ought to have been filed within a period of 6 years from the date of breach of the obligations.
54. Further that the Originating Summons, is also fatally defective for failure to comply with the Mandatory provision of Order 37 Rule 7 of the Civil Procedure Rules, as the Applicant failed to annex a certified extract of the title of the land in question.
55. The Respondent further relied on the case of Aloise Kariuki Ireri Vs. Jackson Ngari Nthia & Another (2010) eKLR, where the Court stated;

“the law is very clear on this point....Order xxxvi Rule 3D(2) which is a applicable in this case clearly states;

“ the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed”

56. The Respondent submitted that the said requirement is couched in mandatory terms, and has no place for certificate of search. Further reliance was placed on the case of Kasuve Vs Mwaani Investments Ltd & 4 others (2004) eKLR, where the Court of Appeal held that certified copies of the extract of title had to be annexed to the Originating Summons and certificates of title annexed thereon could not suffice.
57. It was also submitted that the purported Sale Agreement was inadmissible as it had not been stamped and stamp duty was not paid. That was contrary to Section 5 of Stamp Duty the Act, which imposes



an obligation for payment of stamp duty on sale agreements. It relied on the case of Athumman Juma Mwakuandika Vs Martha Wangui Muriithi & another (2018)eKlr, where the Court held;

“I have perused the agreement dated 26th Oct 1973. The same is not stamped. It is clear that the same does not comply with the provisions of the Stamp Duty Act. I find that the objection raised is merited and the same is allowed and sustained. The Court declines to admit the said agreement as evidence in the suit..”

58. Further that the Respondent was not a party to the purported Sale Agreement referred to by the Applicant. Again, the alleged vendors were not parties to this suit. Moreover, the legal Representative to the estate of the late Reuben Kimani Muiruri (deceased), was not a party to this suit. That the suit property herein had not been indicated as among the assets of the late Reuben Kimani Muiruri in the succession cause. Further that there was no evidence of payment of the purchase price by the alleged Purchaser, Reuben Kimani Muiruri. That is was evident that the official govt records show that the land ownership is for the Respondent. It was submitted that the purported Sale Agreement was a worthless document and of no relevance in this matter.
59. On whether the Applicant has acquired the suit property by transmission, it was submitted that the said claim is misconceived and misplaced as the suit property had not even been indicated among the assets left behind by her late father. She is not the Legal Administrator of her father’s estate and therefore she has no locus to institute this suit. The Respondent relied on the case of Daniel Njuguna Mbugua Vs Peter Kiarie Njuguna & others(2021)eKLR, wherein the Court held;”

“any party that purports to file a suit or deal with the estate of the deceased prior to obtaining letters of grant of administration is in law intermeddling and is committing a crime punishable in law.

Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor or those claiming under him, to complete or perfect it except.....”

60. On Constructive trust, it was submitted that this was an illusion which was misplaced as there was no evidence that the Respondent acquired the suit property by wrong doing. That though the Applicant accused the Respondent of fraud, there was no evidence of Fraud that was adduced. It was submitted that the Respondent was a bona fide purchaser for value without notice, Relima was placed on the case of Charles K. Kandie Vs Mary Kimoi Sang (2017) eKLR, where the Court of Appeal held;

“.....there was no constructive trust since Mzee Chekoros did not acquire the property by wrongdoing and no unjust enrichment arises”

61. Further that if the Applicant late father had any dealings with the former proprietors and money had changed hands, then the legal representative of his estate should have pursued the former proprietors.
62. On Adverse possession, it was submitted that the Applicant merely alleged that her father occupied the suit property since 1993- until 2007, when he allegedly bequeathed the same to the Applicant. That though the Applicant alleged to have been in occupation of the suit property from then and had been running a business of selling tree seedlings, she availed no such evidence even through photographs- to show such seedlings and business. No single witness was called to support her claim of open occupation and use of the land. The case of Kweyu Vs Omutut(1990) KLR, was quoted as follows;

“ by adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous”



63. The Respondent further submitted that no iota of evidence was produced to support or proof any of the above ingredients.
64. The Respondent further relied on other decided cases and submitted that the Applicant suit is based on sheer allegations which were not backed by any evidence.
65. On the issue of conduct of the Respondent, it was submitted that the fencing of the suit property was done to secure it and that act did not waste the suit property at all and the Respondent continue to use it as it has always done since 1994. The Court was urged to dismiss the instant Originating Summons as the Applicant failed to proof her allegations on the required standard.
66. The above being the pleadings, the available evidence and the Written Submissions, the Court has carefully considered the same and finds the issues for determination are;
1. Whether the Applicant is entitled to 0.3238 ha to be excised out of Land parcel Murang'a Municipality Block 1/392 by way of constructive trust, transmission and/or Adverse possession?
 2. Who should bear costs of the suit?
67. From the available evidence there is no doubt that the Applicant herein is claiming that she is entered to 0.3238ha which was intended to be excised from Land Parcel No. Murang'a Municipality Block 1/392, which parcel of land had been purchased by her late father Reuben Kimani Muiruri and which he later bequeathed to her in the year 2007. That she has been in occupation and possession of the said 0.3228ha since 2007, but the Respondent has fraudulently gotten it registered in its name and thus depriving the Applicant of her lawful acquired property.
68. It is also evident that the Respondent has denied the Applicant's claim and has averred that the suit property has been its property since 1994, and it has had possession, has been in occupation and use of the said parcel of land – Murang'a Municipality Block 1/392, and that the said parcel has never been subdivided. It was its claim that there is a vibrant Petrol Station on the suit property, and the Applicant has never been on the suit land or even demanded the same from the Respondent.
69. It is trite law that "he who alleges must proof". Further it is also trite that the burden of proof lies on the person who alleges as provided by Sections 107 and 109 of the Evidence Act, which Provides;
- 107.
- (1) 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.
109. 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
70. From the above provisions of Law, it is clear that the Legal burden of proof rests on the claimant and in the instant case, it is the Applicant herein who bear the said burden of proof.
71. See The Husbury's laws of England 4th Edition, Volume 17 Para 13 and 14 where it is stated;
- "The legal burden of proof which remains constant throughout a trial: It is the burden of establishing the facts and contention which will support a party's case.....The legal burden



of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the Court or tribunal that the condition which entitle him to an award has been satisfied....”

72. The Legal burden is discharged by way of evidence with the opposing party having a corresponding duty to adduce evidence in rebuttal.
73. Taking into account the above, the Court finds and holds that the Applicant herein having alleged, had the duty to call evidence to discharge her burden of proof.

1. Whether the Applicant is entitled to 0.3238ha to be excised out of land parcel No. Murang’a Municipality Block 1/392 by way of constructive trust, transmission and/or adverse possession.

74. Before this Court determines the above issue, it is important to answer the question as to whether the suit herein is Statute barred under Section 4(1) of the *Limitation of Actions Act* to the extent that the purported Sale Agreement relied upon is dated 16th November 1993. That such claim ought to have been brought within a period of 6 years from the date of breach. The said section provides;-

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- (1) The following actions may not be brought after the end of six years from the date of which the cause of action accrued; -
 - a. Actions founded on contract.

75. The above section is available as a bar to a claim if the said cause of action is based on breach of contract or enforcement of the contract in issue. A look at the present claim shows that the Applicant is basing her claim on a constructive trust, transmission and adverse possession.
76. The Sale Agreement was produced merely to show when her late father Reuben Kimani Muiruri allegedly bought the suit property.
77. However, this Court finds that the said Sale Agreement has not been produced for purposes of enforcement of the same and therefore, the suit herein is not statute barred as the claim herein is not for enforcement of a contract.

Has the Applicant herein availed sufficient evidence to prove that she has acquired 0.3238ha. which is intended to be excised from Murang’a Municipality Block 1/392, through Constructive trust?

78. To support her claim, the Plaintiff produced a Sale Agreement dated 16th November 1993, which was entered between Reuben Kimani Muiruri, as a purchaser who was the Applicant’s father and Hezekiel Gaiceru Mwangi and Jerusha Njeri Mwangi, as the vendors. The said Vendors were to sell 0.32238ha. out of the land parcel No. Murang’a Municipality Block 1/392, which comprised 0.4636ha. The Vendors were to attend Murang’a Municipality Council offices for subdivisions and subsequent transfer.
79. Further the Applicant produced SNMK 2, a letter from Murang’a County Government, which indicated that the suit property is currently in the name of Total Kenya Ltd, but there was a Sale Agreement for sale of a portion of the said parcel of Land Block 1/392 to Reuben Kimani Muiruri dated 16th November 1993, and a proposed subdivision of the plot into two portions. It was also indicated that the parties did not finalize the process of subdivision and transfer.



80. From the above letter, it is clear that the suit property was never subdivided as alleged by the Applicant herein and was also never transferred to Reuben Kimani Muiruri.
81. A Constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing. This description was expounded in the case of *Twalib Hatayan & Another(Supra)* as quoted by the Applicant herein.
82. From the various Court decisions relied by the parties herein and which have been considered by this Court, it is evident that a constructive trust is formed as a remedy to prevent unfair results. Further constructive trust can be formed when a property is acquired through fraud, duress, undue influence, misrepresentation or through breach of fiduciary duty or mistake. Therefore, it is clear that Constructive trusts are imposed by a Court to avoid unjust enrichment of the person who is holding the property on behalf of another.
83. For the Applicant herein, she had a duty to prove that the Respondent herein acquired the said suit property. It is clear from the Applicant's exhibits produced and her evidence, that the suit property was allegedly purchased by Reuben Kimani Muiruri from Hezekiah Giceru Mwangi and Jerusha Njeri Mwangi. Reuben Kimani Muiruri did not purchase the suit property from the Respondent herein. The Applicant also had the duty to prove that the purchaser performed all his duty, under the Sale Agreement, but due to the wrong doing of the vendors, the property was not transferred to him.
84. It is evident that the Sale Agreement in issue is not between Reuben Kimani Muiruri and Total Kenya Ltd, the Respondent herein, but other vendors. If there was any wrong doing, then it was done by the alleged vendors who sold the suit property to Reuben Kimani Muiruri but not the Respondent herein who is the registered owner of the whole suit property.
85. As admitted by the Applicant, there was no evidence of payment of the purchase price; there was no evidence of payment of land rent and rates by Reuben Kimani Muiruri and later the Applicant. The exhibit SMNK2, is clear that the process of subdivision and transfer was not completed. So the Applicant cannot be heard to say that there was reparation of the suit property into two parcels of land and that the Applicant was entitled to 0.3238ha of the suit property.
86. Reuben Kimani Muiruri allegedly purchased the suit property from the two Vendors as is evident from the Sale Agreement produced. The two vendors are the same ones who sold the suit property to Caltex Oil (K) Ltd. There is a consent from Murang'a Municipal Council dated 8th June, 1994 allowing Hezekiah Mwangi and Jerusha Mwangi to transfer the suit property to Caltex Oil Ltd. There was no such consent to support the transfer to Reuben Kimani Muiruri. The Applicant did not call the said Hezekiah Giceru Mwangi and Jerusha Mwangi as witnesses to confirm whether the sale went through and whether Reuben Kimani Muiruri took possession. Failure to call such witness was detrimental to the claimant's case. This Court cannot over emphasize the burden of the claimant to lead evidence.
87. The Court will concur with the submissions by the Respondent and the cited case of *Mwanzani Mwakitu v Chandaria Industries Co. Ltd (2015)eKLR*, where the Court reiterated the position as follows;
- “This Court has held on several occasions that the presumption in law is that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him”.
88. It is right that this Court cannot control the type of witnesses the claimant should have called, but it is alive to the burden the Claimant has. In the case of *Lukutsa v Sebenzia Achitsa Amuti (Suing as the Personal Representative of the Estate of Abraham Mukanzi alias Ibrahim Mukanzi) (Civil Appeal 43*



of 2019) [2021] KECA 241 (KLR) thought the facts are discernable from the facts herein, the Court observed the need for the Appellant therein to call a witness to buttress his case. The Court held:

Although the appellant asserts in his submission that it is the respondent who should have called the Lands Registry staff to disprove his claim, our position on that assertion is that, since it is the appellant who asserted and alleged that he had a valid claim to the contested suit property, it was incumbent upon him to call Lands Registry staff to confirm that the process undertaken by them to vest him with title to the contested suit property was regular, legal and procedural.”

89. Further the Applicant did not call any evidence from Murang’a County Government to give credence to the letter dated 21st November 2022.
90. In fact, the said letter shows that there was no transfer and subdivision. When does land changes hand? When there is transfer. There is evidence of transfer of the suit land from Hezekiah and Jerusha Mwangi to Caltex Oils Ltd, but no evidence of transfer from the alleged vendors. Hezekiah and Jerusha Mwangi to Reuben Kimani Muiruri.
91. It is evident that Constructive trust is imposed by the Court. However, in the instant suit, there is no sufficient evidence availed by the Applicant for this Court to impose a Constructive trust which is equitable remedy.
92. The Court in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, held:

“It is settled that the onus lies on a 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 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.”

93. On the 2nd issue of whether the Applicant has proved that she acquired the suit property by transmission, it was her evidence that her late father bequeathed the suit property to her orally. That her father took her to the suit property, showed it to her and bequeathed the same to her. Therefore, the said suit property is supposed to be a gift inter vivo.
94. The *Land Act* 2012 provides for several ways when one can legally acquire land in Kenya. Transmission is one way of such acquisition. In this mode of acquisition, there is valid ownership of land which passes to the proprietor following death, bankruptcy or liquidation of a Company through a Court process. For ownership to accrue through a Court transmission, a Succession cause is filed on behalf of the estate of the deceased. A Legal Representative is appointed and the assets of the deceased are identified and then distributed through Confirmation of grant. Once the distribution is done, then the land is transmitted to the beneficiaries.
95. Section 61 (1) & (2) of the *Land Registration Act* which provides that:
 - “(1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as



executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may be.

- (2) Upon confirmation of a grant, and on production of the grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—
- (a) any transfer by the personal representative; and
 - (b) any surrender of a lease or discharge of a charge by the personal representative
96. For the Property to be transferred and registered in favour of a beneficiary through transmission, the said land ought to have been registered in the name of the deceased. It should be remembered that for the gift to pass, the same must have been perfected by parties. This Court finds some great guidance from the case of *In re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR, where the Court expressed itself on the effect of Gift Intervivos as hereunder:

“31. From the case law above, the principle that emerges is that any gift inter vivos should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case such property would remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death. Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that the deceased intended to make a gift inter vivos. That would be the case where the deceased has complied with the *Land Control Act*, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary. That would mean practically everything had been done to perfect or complete the gift were it not for the demise of the deceased. The mere fact of being shown a piece of land and given permission to occupy and use it, without more, is not adequate proof for a gift inter vivos. The deceased, as registered proprietor of the land in question, would have the right to licence a person to occupy the land and use it. A child who has been shown a piece of land to build on and to till, is not in the shoes of an owner, but a mere licensee. The death of the deceased would not upgrade the licence to ownership, if anything the death of the proprietor could mean that the license comes to an end, and the licensee continues to occupy and work the land at the mercy of the administrator.

97. In cases of incomplete gifts, the Halsburys? Laws of England, 4th Edition Volume 20(1) at paragraph 67 states as much:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”



98. The Applicant herein admitted that the suit property was never registered in the name of Reuben Kimani Muiruri. She is also not the Legal Representative of the estate of the deceased. It was the Applicant's evidence that the suit property was never included among the Assets of deceased Reuben Kimani Muiruri. Given that the suit property was never included among the assets for distribution over the estates of Reuben Kimani Muiruri, the Court cannot find that it was transferred to the Applicant through transmission.
99. Further, the Applicant did not adduce evidence to confirm that she was a beneficiary of the Estate of Reuben Kimani Muiruri, and she did not call any independent witness to confirm that indeed the late Reuben Kimani Muiruri bequeathed her the suit property. In any event, Reuben Kimani Muiruri, was not the proprietor of the suit property and therefore he could not bequeath the said suit property as a gift inter vivos, which suit property was not registered in his name. The Court in the case of *In re Estate of The Late Gedion Manthi Nzioka (Deceased)*[2015]eKLR observed that "a person cannot gift that which he or she does not own."
100. Having analysed the available evidence, the Court finds too that the Applicant failed to marshal sufficient evidence to prove that she acquired the suit property herein through transmission.
101. On whether the Applicant has acquired the suit property by virtue of Adverse Possession, it was incumbent upon the Applicant to avail the relevant evidence to support her claim.
102. As provided by Section of the *Land Act*, one can acquire legitimate title to land through Adverse Possession. Adverse Possession comes about when a person occupies, possesses and uses the land that is not his or her for a continuous period of 12 years, without opposition from the registered owner. Both the Applicant and Respondent have submitted at length to support their respective allegations.
103. However, it is evident that for the Applicant herein to succeed in her claim, for Adverse Possession, she has to prove that she has been in open and continuous possession of the suit land for at least 12 years, and that during that time, she had the intention to possess the land as if she was the time owners. There should be evidence that the Respondent was dispossessed of the said land by the action of the Applicant.
104. The Applicant herein need to prove and demonstrate that she has occupied the suit land openly, without secrecy, without force and without licence or permission of the land owner, with the intention to have the land. These principles were enunciated in the case of *Mount Elgon-Beach Properties Limited v Kalume Mwanongo Mwangaro & another* [2019] eKLR, where the Court held:
-this Court stated that for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force and without licence or permission of the owner and with the intention to have the land."
105. Further, in the case *Mbira v. Gachuhi* (2002) 1 EALR 137:the court stated as follows;
- ... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption..."
106. Adverse Possession is proved by way of calling evidence.
107. One of the Ingredient of Adverse Possession is that the claimant should have entered the suit property without permission. The Applicant herein alleged that her late father entered into the suit property



after purchase and payment of purchase price. There is a Sale Agreement to support her claim. Therefore, from that evidence, the initial entry was with permission of the vendor.

108. However, Court have held that after payment of the last instalment, the purchaser occupation of the suit property becomes adverse to the proprietor. This was observed in the case of Hosea v Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577, where the Court expressed itself 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.
109. The Applicant alleged that after her late father Reuben Kimani Muiruri paid the purchase price, he took possession of the said parcel of land. That allegation is denied by the Respondent herein who alleged that the suit land was sold to Caltex Oils Ltd in 1994, and it was vacant when it was purchased and a vibrant Petrol Station was built on the suit property and has been operating from the 1990s to date. That the said Petrol Station occupies the whole suit land and there is even a drainage on the area allegedly claimed by the Applicant.
110. As the Court analysed earlier, the alleged Vendors were not called to confirm whether they gave vacant possession to the late Reuben Kimani Muiruri. There was also no evidence availed of what or how the late Reuben Kimani Muiruri was using the land for or how he held it. There was no evidence called to confirm that the late Reuben Kimani Muiruri was ever in possession of the suit land.
111. There was no evidence of payment of land rent or rate by either the late Reuben Kimani or the Applicant herein. There was also no independent witness called to support the allegations that Reuben Kimani was in exclusive possession of 0.3238ha of the suit property.
112. Though Applicant alleged that from 2007, she has been using the suit land where she has planted tree seedlings and she runs a business of selling tree seedlings, she did not produce the business Permit, nor photographs of how she uses the said land and she never called any witness who would support her evidence that she has been in exclusive, continuous occupation of the suit property. There was evidence that the suit property was registered in the name of the Respondent in 2014, and has a vibrant Petrol Station and that the said Petrol Station is run or operates on the whole suit land.
113. The Applicant admitted too that there is a drainage built with concrete on the portion of land claimed by her. The available evidence does not support an allegation of exclusive and possession of the suit property by the Applicant herein.
114. Therefore, the Applicant has failed to prove that she owns the suit land by virtue of adverse possession.

(ii) Who should bear costs of this suit?

115. Costs do follow the evident and costs are normally awarded to the successful litigant. The Respondent herein being the successful litigant is entitled to costs of this suit.
119. Having carefully considered the available evidence, the Court finds and holds that the Applicant herein has failed to prove her case on the required standard of balance of probabilities.
120. For the above reasons, the Applicant's Originating Summons dated 25th April 2022, is found not merited. The same is dismissed entirely for lack of sufficient evidence, with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27TH DAY OF JULY, 2023.



L. GACHERU

JUDGE

Delivered online in the presence of; -

Dr Adrian Kamotho for the Applicant

Mr Kimani for the Respondent

