



Wanyama (suing as widow, legal and personal representatives of the estate of Joseph Wanambisi Naliakho (Deceased)) v Wamukota (Environment and Land Case Civil Suit 14 of 2012) [2022] KEELC 14769 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14769 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE CIVIL SUIT 14 OF 2012
BN OLAO, J
NOVEMBER 17, 2022

BETWEEN

GRACE NANYAMA WANYAMA PLAINTIFF
SUING AS WIDOW, LEGAL AND PERSONAL REPRESENTATIVES OF THE
ESTATE OF JOSEPH WANAMBISI NALIAKHO (DECEASED)

AND

PATRICK WAMUKOTA DEFENDANT

JUDGMENT

1. The land parcel No South Malakisi/south Kulisiru/681 (the suit land) has since August 3, 2015 been registered in the name of Grace Nanyama Wamalwa (the plaintiff). Prior to the creation of the title to the suit land, it was part of the land parcel No South Malakisi/south Kulisiru/452 which was registered since June 20, 1972 in the names of five (5) proprietors including the late Joseph Wanambisi the deceased husband to the plaintiff and on behalf of whose Estate, this suit has been filed.
2. By her plaint originally filed on March 9, 2012 and subsequently amended and filed on March 22, 2017, the plaintiff sought judgment against Patrick Wamukota (the defendant) in the following terms:
 - a. A declaration that the sale agreement entered between the deceased Joseph Wanambisi Naliakho and the defendant between April 7, 1993 and June 15, 1993 for the sale of 1½ acres out of the title number South Malakisi/south Kulisiru/452 (now South Malakisi/south Kulisiru/681) is null and void.
 - b. A permanent injunction restraining the defendant by himself, his agents, servants or employees from entering upon, remaining thereon, removing from, wasting, sub-dividing, digging on, excavating, fencing, erecting or building any structure whatsoever or otherwise dealing with



1½ acres of the suit land all that property title number South Malakisi/southKulisiru/681 (formerly South Malakisi/south Kulisiru/452).

- c. A permanent injunction compelling the defendant by himself, his agents, servants and/or employees to vacate the suit property and demolish any structures put on it by the defendant.
 - d. A declaration that the defendant, his agents and/or associates are trespassers upon 1½ acres out of the land parcel number South Malakisi/south Kulisiru/681 (formerly South Malakisi/south Kulisiru/452) and an order for their eviction therefrom.
 - e. Mesne profits.
 - f. Costs.
 - g. Interest.
3. The plaintiff's case is premised on the pleadings that at all material times, her husband Joseph Wanambisi Naliakho(the deceased) together with Dismas Mulongo, Shadrack Khisa, John Tulula Naliakhoand Aggrey Wabombawere the joint registered proprietors of the land parcel SouthMalakisi/south Kulisiru/452 with each proprietor occupying a portion thereof. They were registered as proprietors of the said land parcel on June 20, 1972 but on May 31, 2015, the title was sub-divided to create several other parcels including the suit land, which is now registered in the name of the plaintiff but is occupied by the defendant. That between April 7, 1993 and June 15, 1993, the defendant entered into a sale agreement with the deceased for the purchase of 1½ acres which is now the suit land. It is the plaintiff's case that although the defendant took possession of the suit land, there was no consent of the Land Control Board contrary to the provisions of the law and therefore the sale transaction was void and the defendant is a trespasser on the suit land. Despite demands to vacate from the suit land, the defendant has refused to do so hence this suit. The plaintiff has pleaded further that there is no other suit pending between the parties except:
1. Bungoma High Court(OS) No 37 of2010
 2. Bungoma Misc Case No 8 of2007
4. Together with her plaint, the plaintiff filed her two statements. The first is dated January 16, 2012 and the second is dated November 14, 2016. She also filed three (3) lists of documents dated January 16, 2012, November 14, 2016 and August 29, 2017.
5. In her two (2) statements, the plaintiff who was the only witness who testified in support of her case confirms that she is the widow and legal representative of the Estate of the deceased who, together with others, owned the land parcel No South Malakisi/south Kulisiru/452. That land parcel has since been sub-divided to create other parcels including the suit land which is occupied by the defendant since April 7, 1993 although it is registered in her name.
6. That between April 7, 1993 and June 15, 1993, the deceased sold to the defendant 1½ acres now comprised in the suit land and which he took possession. However, there have been several court cases regarding the defendants' occupation of the suit land since April 7, 1993 to-date and by the time the deceased passed away, the defendant had not yet obtained a title to the said 1½ acres thus necessitating this suit.
7. The plaintiff filed the following lists of documents:
- January 16, 2012
1. Green card to the land parcel No South Malakisi/south Kulisiru/452.



2. Sale agreement between the deceased and the defendant dated April 7, 1993.
3. Sale agreement between the deceased and the defendant dated June 15, 1993.
4. Ruling in Bungoma High Court Misc Civil Application No 8 of 2007.
November 14, 2016
1. Title deed for land parcel No South Malakisi/south Kulisiru/681.
2. Green card for title No South Malakisi/south Kulisiru/452.
3. Sale agreement between the deceased and the defendant dated April 7, 1993.
4. Sale agreement between the deceased and the defendant dated June 15, 1993.
5. Ruling in Bungoma High Court Misc Civil Application No 8 of 2007.
August 28, 2017
1. Decree in Bungoma High Court Civil Suit No 37 of 2010.
2. Certificate of taxation in Bungoma High Court Civil Suit No 37 of 2010.
8. In his defence dated April 2, 2012, the defendant averred that on April 7, 1993 he purchased 1½ acres of land from the deceased and took possession thereof and has done so for 12 years interrupted. That the orders sought by the plaintiff are therefore scandalous, frivolous, vexatious and meant to prejudice, embarrass or delay the fair trial in an earlier suit which he has filed being Bungoma High Court Civil Suit No 37 of 2010 in which the plaintiff is the 4th defendant. The defendant pleaded further that he obtained an order of injunction in Bungoma High Court Civil Suit No 37 of 2010 on June 7, 2011. That this suit is therefore res judicata due to the pendency of Bungoma High Court Civil Suit No 37 of 2010 and a preliminary objection would be raised at the earliest opportunity. The plaintiff prayed that this suit be dismissed with costs since the lack of consent of the Land Control Board cannot surpass his claim which amounts to adverse possession.
9. The plaintiff filed a reply to the defence in which she joined issues with the defendant and reiterated the contents of her plaint. She denied the contents of the defendant's defence and put her to strict proof thereof.
10. The defendant filed his statement and that of his witness Martin Juma Kibalachi (DW2) both dated April 2, 2012. In his statement, the defendant confirms that the plaintiff is the widow of the deceased who, vide an agreement dated April 7, 1993, sold to him 1½ acres out of the land parcel No South Malakisi/south Kulisiru/452. That the said land was registered in the joint names of the deceased and his siblings Dismas Mulongo, Shadrack Khisa, John Tulula and Aggrey Wabomba. That the defendant has remained in quiet possession of the said 1½ acres having taken possession thereof on April 7, 1993 to date a period of over 12 years and filed Bungoma High Court Civil Suit No 37 of 2010 claiming the said land by way of adverse possession and which suit is still pending. That the 4th defendant (sic) filed Bungoma Land Disputes Tribunal Case No 9 of 2009 and Bungoma High Court Case No 8 of 2007 against him (it is not clear who this 4th defendant is but in Bungoma High Court Case No 8 of 2007 which it was Judicial Review Application, the plaintiff was Applicant and the defendant was the Interested Party). That neither of the cases have interfered with his possession of the suit land on which he has built several semi-permanent houses and on which he also practices farming. That the suit land is the only place he calls home. He therefore urged the court to dismiss the plaintiff's suit with costs.
11. In his statement, Martin Juma Kibalachi (DW2) states that the land parcel No South Malakisi/south Kulisiru/452 was registered in the names of the deceased and his siblings Dismas Mulongo,



Shadrack Khisa, John Tulula and Aggrey Wabomba. That the deceased sold his portion measuring 1½ acres to the defendant vide an agreement dated April 7, 1993 and he was among the witnesses to the same. That the defendant took immediate possession of the said 1½ acres where he has constructed semi-permanent houses and also does farming. That the plaintiff who is the widow to the deceased has refused to facilitate the transfer of the said 1½ acres to the defendant.

12. The defendant also filed a list of documents containing:
 1. Agreement dated April 7, 1993 between the deceased and the defendant.
 2. Copies of pleadings in Bungoma High Court Civil Suit No 37 of 2010.
 3. Green card for the land parcel No South Malakisi/south Kulisiru/452.
 4. Official search for the land parcel No South Malakisi/south Kulisiru/452.
13. The plenary hearing commenced on May 25, 2021 when the plaintiff who was the only witness in support of her case testified and adopted as her testimony her two statements dated January 16, 2012 and November 14, 2016. She also produced as her documentary evidence, the documents filed vide her lists of documents dated January 16, 2012, November 14, 2010 and August 28, 2017.
14. Due to various reasons that are clear from the record, it was not until February 3, 2022 that the defendant and his witness Martin Juma Kibalachi (DW2) testified. They too adopted as their testimonies their respective statements dated April 2, 2012 contents of which I have already summarised above. The defendant also produced as his documentary evidence the list of documents dated April 2, 2012.
15. At the end of the plenary hearing, submissions were filed both by Mr Bw'onchiri instructed by the firm of Omundi Bw'onchiri Advocates for the plaintiff and by Mr Makokha instructed by the firm of Makokha, Wattanga & Luyali Associates Advocates for the defendant.
16. I have considered the evidence by both parties as well as the submissions by counsel.
17. Before I interrogate the merits or otherwise of the parties respective cases, there are three (3) important issues which I must resolve.
18. The first issue is what I consider to be shoddy pleadings on the part of the defendant's then counsel MS CK Areba & Company Advocates. While it is clear from paragraph 4 of the defence dated April 2, 2012 that the defendant claims to have been in occupation and possession of the suit land for 12 years and is therefore entitled to be registered as the owner by way of adverse possession, no such counter-claim was filed to that effect. It would appear to me that the lapse was due to the fact that by the time the defendant filed his defence, Bungoma High Court Civil Suit No 37 of 2010 in which he was seeking orders in adverse possession against the plaintiff and three (3) others with respect to a portion measuring 1½ acres out of the land parcel No South Malakisi/south Kulisiru/452 was still pending. However, that suit was later dismissed by Mukunya J on May 11, 2017 for want of prosecution. The defendant should have amended his defence after May 11, 2017 to include a counter-claim. That was not done. Further, in his statement dated April 2, 2012, the defendant makes reference to a 4th defendant yet he is the only defendant in this case. The defendant has also only filed a list of four (4) documents but has proceeded to produce more than four (4) documents although there was no objection by the plaintiff. I must however again remind counsel about the importance of drafting proper pleadings as this makes it easier both for the parties themselves and the court to understand what needs to be determined.
19. The second issue is whether the plaintiff's suit is res-judicata in view of Bungoma High Court Civil Suit No 37 of 2010 which was a claim for adverse possession of the suit land filed by the defendant against



the plaintiff and three (3) others. By a ruling delivered by Omollo J on a date which is not indicated in April 2013, the Judge directed that this suit be stayed pending the hearing and determination of Bungoma High Court Civil Suit No 37 of 2010. That suit, as is clear from the submissions by plaintiff's counsel, was dismissed for want of prosecution on May 11, 2017. Although the Court of Appeal has taken divergent views as to whether or not the dismissal of a suit for want of prosecution amounts to res-judicata – see *Njue Ngai -v- Ephantus Njiru Ngai* (where such a dismissal was held to be res-judicata), the predominant view appears to be that res-judicata only applies where a suit has been heard and determined on the merits – see *Tee Gee Electrical & Plastick Company -v- Kenya Industrial Estates Ltd 2005 2 KLR 97*, *Caneland Ltd & others -v- Delphis Bank Ltd CA Civil Appeal No 20 of 2000* and also *Michael Bett Siror -v- Jackson Koech Ca Civil Appeal No 53 of 2016 (2019 eKLR)*. In *Francis Alijo Okuso -v- Dorcus Omega 2019 eKLR*, I took the view, which I still do, that res-judicata only applies where a case has been heard and determined on its merits. Indeed section 7 of the *Civil Procedure Act* which provides for the doctrine of res-judicata provides that:

7. 'No Court shall try any suit on issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court' Emphasis mine.

Clearly, Bungoma High Court Civil Suit No 37 of 2010 was dismissed for want of prosecution. It was not heard on the merits and finally determined. Res-judicata therefore does not apply in this case.

20. Finally, during the hearing of the defence case on February 3, 2022, Mr Bwonchiri counsel for the defendant objected to Martin Juma Kibalachi (DW2) testifying as a defence witness on the ground that he had been sitting in court when the defendant testified and had heard the questions put to the defendant and his answers thereto. Mr Makokha counsel for the defendant's response to that objection was that the evidence of the witness was already on the record and no prejudice would be caused to the plaintiff.
21. After hearing counsel's submissions on the objection, I made a brief ruling in which I confirmed that I had indeed observed the witness sleeping in court and asked him to leave. I however allowed him to testify and directed that I would give full reasons in this judgment. I shall do so now.
22. It is a well-known practice that as soon as a matter is called up for hearing, it is the responsibility of counsel to call out the witnesses of the respective parties to step out of the court as the parties testify. The rationale is that it would be unfair and prejudicial to the other side for a witness to one party to be physically present in court hearing what that party has to say in evidence in chief and cross-examination and thereafter for the same witness to enter the witness box to testify in support of that party. This is really a matter of common sense and proper judicial practice. However, it is not unusual for parties and their counsel sometimes to forget to ask their witnesses to step out while in some cases those witnesses may in fact walk into the court when the trial is in progress and not being conversant with court processes, sit in while the party is testifying. At times both the parties and counsel may not be aware that in fact the witnesses is seated in the court. Should a witness who was in court when the party who called him is testifying but allowed to testify after hearing the party's testimony? In my brief ruling on February 3, 2022 when I overruled Mr Bwonchiri's objection to Martin Juma Kibalachi (DW2) taking the witness stand to testify as a defence witness, I stated that the witness could testify but added that the court would consider that fact in assessing the probative value of his evidence. And although I did not cite any authority at that time, I was guided by the decision in *Waitbaka & another -v- R 1972 EA 184* where the court stated that the evidence of such a witness can be taken but the fact



that he was present in court listening to the testimony of the party whose case he seek to support would be considered by the court while determining what weight to attach to such evidence.

23. The view I take of the matter is that the court should retain the discretion whether or not to allow such a witness to testify. That should be governed by the circumstances of each case. To insist on a hard and fast rule that such a witness should be excluded from testifying may result in obstructing, rather than enhancing, the course of justice. Where, however, there is clear evidence of an intention to subvert the course of justice, then the court may be inclined to stop the witnesses from testifying.
24. It is also important to remember that under both Order 3 Rule 2 and Order 7 Rule 5 of the Civil Procedure Rules, both the plaintiff and defendant will have filed and exchanged statements of their witnesses and the documents to be relied upon during the trial. Therefore all the parties will have known in advance the other side's case and the testimony to be rebutted. Trial by ambush has largely been minimised under the rules. And as is clear from the provisions of Order 2 Rule 6(1) of the Civil Procedure Rules, the parties and their witnesses are largely expected to confine themselves, during the trial to the pleadings already filed and disclosed to the opposing party. In any event, should any witness during his evidence in chief purport to give factual statements completely at variance with what has previously been filed, there will be an opportunity for the other party or counsel to impeach his credibility and value of his evidence during cross-examination.
25. It is in view of the above that I overruled the objection by Mr Bw'onchirion February 3, 2022 and allowed Martin Juma Kibalachi (DW2) to testify on behalf of the defendant.
26. Having disposed off those preliminary issues, I consider the following to be the matters that call for my determination in this case with respect to the ownership of the suit land:
 1. Whether the defendant is a trespasser on the suit land from which he should be evicted, made to pay mesne profits and permanently enjoined from re-entering.
 2. Whether in fact the defendant has any rights to the suit land recognized in law.
27. It is common ground that the defendant took possession of the suit land, now registered in the name of the plaintiff, following the execution of sale agreements on April 7, 1993 and June 15, 1993 between him and the deceased. He remains in possession and occupation of the suit land to date. During cross examination, the plaintiff tried to suggest that the defendant still owned the deceased a balance of Kshs 6,000 out of the purchase price of Kshs 18,000. This is what he said when cross-examined by Mr Makokha:

' It is true that in my statement dated January 16, 2012, I have not mentioned that the defendant owes me Kshs 6,000. Even in my plaint, I have not mentioned the Kshs 6,000. But I insist that he owes me Kshs 6,000. I am old. I have forgotten. I want the defendant to be evicted because he has my balance of Kshs 6,000 and also did not get the consent of the Land board. The agreement of June 15, 1993 shows that the defendant had a balance of Kshs 6,000'.

When he was re-examined by his counsel, the defendant said:

' I bought a total of 1½ acres but through two (2) agreements. I do not owe even a single cent to the vendor.'
28. The deceased and the defendant attached two sale agreements with respect to the suit land as already indicated above. The said agreements did not have any completion date and the purchase price was being paid in instalments which were acknowledged by the deceased. Both parties provided as their



documentary evidence copies of the sale agreements dated April 7, 1993 and June 15, 1993. However, the defendant's copy of the sale agreement dated June 15, 1993 and which was not contested, was an acknowledgment dated September 8, 1993 and signed by the deceased. The agreements were drafted by the parties themselves in Kiswahili language but no English translation was availed as required but again, these are some of the lapses that I referred to earlier in this judgement. However, both Kiswahili and English are our National and official languages by dint of Article 7 of the Constitution and although section 23 of the Environment and Land Court act provides that; the languages of this 'court shall be English; I have previously held that notwithstanding that provision a court can admit a document in Kiswahili language by invoking its inherent powers under Article 159 (2) (d) of the Constitution – see, Simon Khaemba Mwanja -v- Jamin Wasike Khaemba & another 2020 eKLR. And since I understand Kiswahili language, I shall take the liberty to translate the last acknowledgment dated September 8, 1993 in the sale agreement dated June 15, 1993. It reads;

' Leo tarehe September 8, 1993 Patrick Wanyonyi amelipa pesa za mwisho yaani Kshs 250/= ambazo zilikuwa zimebaki kwa ekari ½ ambayo nilimwongeza sasa hakuna deni.

Ni mimi, Joseph Wamalwa Naliakho'.

The English translation is:

' Today the September 8, 1993 Patrick Wanyonyi has paid the last instalment being Kshs 250 which was outstanding for the ½ acre which I added him. Now there is no debt.

It's me. Joseph Wamalwa Naliakho'.

29. As I have already stated above, although it was the duty of counsel to have the English translation of the agreement certified and filed, I believe nothing stops this court from invoking its inherent jurisdiction vide section 3A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution to translate any document couched in a language which I understand. I do not consider doing so to be descending into the arena of the conflict between the parties. Rather, I consider it to be the most prudent thing to do in ensuring that justice is done to the parties in this case. If the sale agreements had been couched in a language that is strange to me, it would have been improper for the court to get a third party to translate it and thereafter purport to use it in evidence. In such a case, the court would have downed its tools and made no reference to it. It is clear from that acknowledgment that the defendant made the final payment towards the purchase of the suit land on September 8, 1993.
30. This court further takes note of the fact that in neither of her two (2) statements dated January 16, 2012 and November 14, 2016 has the plaintiff complained that the defendant did not complete paying for the suit land. Indeed in paragraph four (4) of her statement dated January 16, 2012, the plaintiff states:
4. 'That between April 7, 1993 and June 15, 1993, my late husband sold to the defendant 1½ acres out of the suit parcel herein and the defendant took possession'.
31. If the defendant had defaulted in paying the purchase price in full, nothing would have been difficult in stating so in her statements. Therefore, any suggestion that the defendant still owed the deceased Kshs 6,000 being a balance of the purchase price can only be an afterthought construed to mislead this court. It cannot therefore be correct for the plaintiff's counsel to submit as he has done at page six (6) of his submissions that:

' Further, the plaintiff has established that though the defendant entered into a sale agreement for 1½ acres out of the suit land with her late husband, the defendant failed to clear the



purchase price the reasons why the plaintiff's late husband filed a case at the Sirisia Tribunal for the balance of Kshs 2,800. It is thus clear that the defendant is a trespasser on the plaintiff's land on a daily basis'.

32. This court finds that the defendant fully paid the purchase price of the suit land. It therefore flies in the face of the evidence for the plaintiff to refer to him as a trespasser. This court must reject that assertion as unfounded.

33. My understanding of the plaintiff's claim is that she seeks this court to declare the sale agreement between the deceased and the plaintiff as null and void for the lack of the consent of the Land Control Board. That is what she has pleaded in paragraph 4A of her amended plaint where she has pleaded in part that:

'Despite the defendant having taken possession, no Land Control Board consent was obtained in line to the provisions of Chapter 302 Laws of Kenya and thus rendering the transaction void. The defendant's presence on the land parcel No South Malakisi/south Kilisuru/681 amounts to trespass on a duty (sic) basis'.

And in paragraph six (6) of her statement dated January 16, 2012, she states:

6: 'That todate, the defendant has not obtained title to the 1½ acres due to lack of consent upto the time my husband passed on.'

Whereas it is true that the defendant did not avail any consent of the Land Control Board for the land sale transaction, there is nothing in the parties' 'home-made' agreements to suggest that they were subject to the consent of the Land Control Board. This court cannot therefore read into the said agreements a requirement which the parties themselves did not include in their transaction. I consider that issue to be a mere red herring introduced by the plaintiff to bolster an otherwise weak case and which is also infact hopelessly statute barred.

34. Among the remedies sought by the plaintiff is an order declaring the defendant, his agents and associates to be trespassers on the suit land. Trespass is defined in *Black's Law Dictionary 10th Edition* as:

' An unlawful act committed against the person or property of another; especially wrongful entry on another's real property'.

In *Clerk & Lindsell on Torts 18th Edition*, the same term is defined as:

' Any unjustifiable intrusion by one person upon the land in possession of another.'

Section 3(1) of the *Trespass act* provides that:

' Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence'.

35. It is common ground that the defendant entered and took possession of the suit land in 1993 following the execution of two (2) sale agreements between him and the deceased who was then registered as among the proprietors of the land parcel No South Malakisi/south Kulisuru/452 before its sub-division to create the suit land. His entry on the suit land can hardly be described as 'wrongful', 'unjustifiable intrusion' or 'without reasonable excuse'. The prayer for his eviction or a permanent



injunction restraining him his agents, servants or employees from entering or remaining on the suit land is therefore without merit.

36. The plaintiff also sought an order of mesne profits. The term mesne profits is defined in section 2 of the [Civil Procedure Act](#) as follows:

' In relation to property, means those profits which the person in wrongful possession of suit property actually received or might with ordinary diligence have received therefrom, together with interests on such profits, but does not include profits due to improvements made by the person in wrongful possession'.

Mesne profits are in the nature of special damages which, as was held in [Hahn-v- Singh1985 KLR 716](#), must be specifically pleaded and strictly proved. Other than pleading for an order of mesne profits, the plaintiff neither quantified nor proved what amount of money should be awarded to him as mesne profits. I can only describe that claim as a fishing expedition which I must also dismiss.

37. The up-shot of all the above is that there is nothing in the sale agreements to suggest that the transactions were subject to the consent of the Land Control Board and are therefore null and void for want of that consent. The defendant entered and took possession of the suit land pursuant to sale agreements executed in 1993 and he cannot be a trespasser thereon. He cannot therefore be evicted or enjoined therefrom nor made to pay any mesne profits for it's use.

Finally the plaintiff ought to have filed this suit before the expiry of twelve (12) years after 1993 because section 7 of the [Limitation of Actions Act](#) provides thus:

7. 'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'

This suit was filed 19 years after the defendant took possession and entered the suit land. That was well after the time within which a claim for the recovery of land ought to have been filed. It must therefore be dismissed. I must also add at this point that the evidence of the defendant's witness Martin Juma Kibalachi (DW2) was simply to confirm that he was a witness to the sale agreement between the deceased and the defendant dated April 7, 1993 and further that the plaintiff is the widow to the deceased who, jointly with others, owned the original land parcel No South Malakisi/south Kulisiru/452 from which the suit land was hived. All those are un-contested issues and that evidence has not in any manner prejudiced the plaintiff. This court would still have arrived at the same decision without that evidence.

38. Having dismissed the plaintiff's claim to the suit land, this court must proceed to make further orders with regard to the ownership of the suit land in order to bring this dispute to an end. In so doing, this court is not oblivious to the fact that even as it dismisses the plaintiff's case, she continues to hold the title deed to the suit land dated August 3, 2015. And unless an order is made with regard to that title, the plaintiff will continue to hold the said title deed while the defendant will remain in occupation and possession of the suit land. A rather untidy scenario will continue ad-infinity creating prospects of further disputes should the plaintiff dispose off the suit land to other unsuspecting parties.
39. That brings me back to the issue which I referred to earlier in this judgment about the shoddy pleadings by the defendant's then counsel. In drafting the defendant's defence, counsel did not make



any counter-claim against the plaintiff with regard to the suit land. There was only a fleeting reference to a claim by way of adverse possession when in paragraph 4 of his defence, the defendant pleaded that:

4. 'The defendant denies the allegations as enumerated together with particulars in paragraph 4 of the plaint and reiterates that he bought 1½ acres of land from one Joseph Wanambisi Naliakhoon the 7/4/1993 and that he has stayed on the suit land for over 12 years uninterrupted which amounts to adverse possession and hence issue (sic) land control board consent cannot surpass the latter and the plaintiff shall be put to strict proof.'

It is clear from the above paragraph that the defendant believes he is entitled to the suit land by way of adverse possession. However, he did not plead any counter-claim. The last paragraph of his defence, and which the plaintiff responded to vide her reply to this defence, simply sought the dismissal of the plaintiff's suit with costs.

40. That notwithstanding, both parties in their respective submissions, addressed this court on the issue as to whether or not the defendant is entitled to orders that he is entitled to the suit land by way of adverse possession. At page 5 of his submissions, counsel for the plaintiff has made the following submissions:

' Your Lordship a clear observation of the statement by the plaintiff dated October 16, 2014 in the defendants originating summons in Bungoma High Court Civil Case No 37 of 2010 and in particular the letter from the Chief Sirisia Locationshow of a long standing dispute between the defendant and the plaintiff's late husband and which dispute continued to-date. The above thus reveal that the defendant's stay on suit land has never been peaceful but one characterized with one dispute after another. It is thus the plaintiff's submission that the defendant is just but a trespasser.'

Counsel then cites the Court of Appeal's decision in the case of [*Wilfred Kegonye Babu-v- Henry Mose Onuko CA Civil Appeal No 82 of 2014 \(2019 eKLR\)*](#) as to whether a purchaser can claim land by way of adverse possession.

41. On the other hand, counsel for the defendant has cited various cases on adverse possession including [*Mtana Lewa-v- Kabindi Ngala Mwangandi 2015 eKLR*](#) and submitted at page 6 paragraph 18 that:

' We humbly submit that the defendant has been in occupation and possession of the 1½ acres with the full knowledge of the plaintiff's husband Joseph Wanambisi Naliakho and the plaintiff herself admitted that before she brought the suit, the defendant had been in occupation and that the same had not been interrupted for a period of more than 20 years and should be legally registered as a proprietor herself.'

42. It is clear to this court therefore that notwithstanding the rather casual manner in which the defendant made reference to a claim to the suit land by way of adverse possession, that issue was raised by the parties and left for this court's determination. I shall therefore be guided by the decision in the case of *Odd Jobs-v- Mubia 1970 EA 476* where the Eastern Africa Court of Appeal held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for its determination. And whereas it has been stated that parties are bound by their pleadings and that the court will not grant a remedy which has not been sought, the decision in *Odd Jobs-v- Mubia* (supra) continues to be followed by courts in this country. In [*Ann Wairimu Wanjobi-V- James Wambiru Mukari CA Civil Appeal No 144 of 2017 \[2021 eKLR\]*](#) the court while



appreciating that 'pleadings are the primary documents which guide the court as the parties concerning the claim and the contesting positions of the parties', it nonetheless went on to add as follows:

' In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, *Odd Jobs-v- Mubia* (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matter in issue, the court may determine a suit on the unpleaded issue provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determine or awarding a relief that was not specifically sought in the pleadings.'

43. Each case must in my view, be determined on its own peculiar circumstances. In this case, the defendant's pleadings, as I have already stated above, can hardly be described as elegant. But it must have been obvious from paragraph 4 of the defence and the submissions by both counsel, that the issue of adverse possession was always alive in the minds of the parties and was left to the court to decide. This court will therefore consider it.

44. It is not in doubt that the defendant has been in occupation and possession of the suit land since April 7, 1993 following a sale agreement with the deceased. In paragraph 5 of her statement, the plaintiff states thus:

5. 'That the defendant's stay on the 1½ acres has not been peaceful since the April 7, 1993 as we had several court cases over his stay'.

To be entitled to land by way of adverse possession, the claimant must prove that he has the actual possession of the land in dispute, un-interrupted, peacefully, without force or the consent of the registered owner and who has therefore been dispossessed of the same for a period of twelve (12) years. The fact that the plaintiff seeks to evict the defendant from the suit land is clear evidence that the plaintiff has been dispossessed of the same. The plaintiff's response to paragraph 4 of the defence is that there have been 'several court cases' over the land. The evidence shows that infact the first such case was only filed by the deceased at the Sirisia Land Disputes Tribunal being case No 7 of 2005 and which was determined in favour of the defendant. The Tribunal's award was adopted as a judgement of the Bungoma Magistrate's Court in case No 9 of 2006. However, that award was set aside by Muchemi J on December 8, 2009 in Bungoma High Court Judicial Review Application No 8 of 2007. By the time the deceased filed his complaint at the Sirisia Land Disputes Tribunal in 2005, the defendant had been in open, peaceful and un-interrupted possession of the suit land for 12 years having paid the full purchase price on September 8, 1993. In the circumstances, the defendant's claim though not so well crafted, that he is infact entitled to the suit land by way of adverse possession, appears to me to be well merited. By the time the plaintiff filed this suit in March 2012, his interest in the suit land had long been extinguished by operation of the law. It matters not that the plaintiff only acquired the title deed to the suit land in her name on August 3, 2015 long after filing this suit. This is because, as was held in *Githu -v- Ndeete 1984 KLR 776*, the mere change of ownership of the suit land did not interrupt the defendant's claim by way of adverse possession.

45. Most significantly, as I have already stated above, it is clear from paragraph 6 of the plaintiff's statement that the thrust of her case is that there was no consent of the Land Control Board obtained for the



purchase of the suit land by the defendant and therefore the sale agreement is null and void. This was also reiterated by her counsel at page 6 of his submissions as follows:

' The plaintiff produced two sale agreements and which show that the defendant failed to clear the balance and he also failed two (sic) obtain consent within the stipulated period hence a trespasser on a daily basis on the suit land'.

46. I have already found above that infact the defendant made the last instalment of the purchase price on September 8, 1993 and that is why that issue was never raised in the plaintiff's statements and has only came up as an afterthought. And with regard to the lack of consent of the Land Control Board, the Court of Appeal has held in Willy Kimutai Kitilit -v- Michael Kibet Ca Civil Appeal No 51 of 2015 [2018 eKLR], 'that the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.' And a constructive trust, as was held in Twalib Hatayan Twalib Hatayan & another -v- Said Saggah Ahmed Al Heidy & others 2015 eKLR,

' Is an equitable remedy imposed by the court against one who has acquired property by wrong doing. 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.'

The court went on to add that:

' Imposition of a constructive trust is thus meant to guard against unjust enrichment.'

47. The use of the word 'impose' simply means that the court will use its authority to force a party to accept something. That would mean therefore that even if a constructive trust has not been pleaded, if the court finds that it is in the interest of justice to impose it in the circumstances of a particular case, it may apply its coercive and inherent powers to do so. In the circumstances of this case, it is conceded by the plaintiff that the defendant purchased the suit land for valuable consideration in 1993 from her deceased husband. He has remained in occupation and possession thereof since then. The plaintiff nonetheless proceeded to have the title thereto registered in her names in 2015 notwithstanding her knowledge of those undisputed facts. The only flaw is that no consent of the Land Control Board was obtained and the plaintiff now seeks inter alia, to evict the defendant from the suit land. But as is now clear following the decision in Willy Kimutai Kitilit-v- Michael Kibet(supra), it would be inequitable to grant that prayer and the plaintiff, notwithstanding the registration of the suit land in her name, is only a constructive trustee holding the title thereto in trust for the defendant.

48. With regard to costs, they follow the event but are nonetheless within the discretion of the court. I have elsewhere in this judgment expressed my concern about what I consider to have been 'shoddy pleadings' on the part of counsel for the defendant. As a sign of this court's deprecation of those flaws, the order that commends itself to make is that each party meets their own costs of the suit.

49. The upshot of all the above is that having considered all the evidence herein, this court makes the following disposal orders:

1. The plaintiff's suit is dismissed.
2. Judgment is entered for the defendant in the following terms:



- a. The plaintiff holds the title to the land parcel No SouthMalakisi/south Kulisiru/681 in trust for the defendant.
 - b. That trust is hereby determined.
 - c. The Land Registrar Bungoma is hereby directed to register the defendant as the proprietor of the land parcel No South Malakisi/south Kulisiru/681 and cancel the name of the plaintiff from the register.
 - d. The plaintiff shall within 30 days of this judgment surrender the title deed to the land parcel No South Malakisi/South Kulisiru/681 to the Land Registrar Bungoma to facilitate the above but in default, the Land Registrar shall be at liberty to cancel the same.
3. Each party shall meet their own costs.

B.N OLAO

JUDGE

17TH NOVEMBER 2022

JUDGMENT DATED AND SIGNED AT BUSIA ON THIS 17TH DAY OF NOVEMBER 2022.

IT IS DELIVERED AT ELC BUSIA THIS 17TH DAY OF NOVEMBER 2022 WITH NOTICE TO THE PARTIES BY WAY OF ELECTRONIC MAIL.

Right of Appeal.

B. N. OLAO

JUDGE

17TH NOVEMBER 2022

