



**Chudasama v Chudasama; Shah (Suing in her own right and also as the Legal Representative of the Estate of Harilal Mulji Chudasama) (Interested Party) (Environment & Land Case 1394 of 2016 & 249 of 2019 (Consolidated)) [2024] KEELC 574 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 574 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1394 OF 2016 & 249 OF 2019 (CONSOLIDATED)  
OA ANGOTE, J  
FEBRUARY 6, 2024**

**BETWEEN**

**JASWANT HARILAL CHUDASAMA ..... PLAINTIFF**

**AND**

**SHASHIKANT HARILAL CHUDASAMA ..... DEFENDANT**

**AND**

**NILABEN KARTIC SHAH (SUING IN HER OWN RIGHT AND ALSO AS  
THE LEGAL REPRESENTATIVE OF THE ESTATE OF HARILAL MULJI  
CHUDASAMA) ..... INTERESTED PARTY**

**JUDGMENT**

1. This Judgment is in respect of two matters, ELC No. 1394 of 2016 (O.S) and ELC No. 249 of 2019, which were consolidated on 23<sup>rd</sup> September, 2020.

**ELC No. 1394 of 2016 (O.S)**

2. ELC No. 1394 of 2016 (O.S) was commenced on 11<sup>th</sup> November, 2016 by way of an Originating Summons dated 31<sup>st</sup> October, 2016 by the above-named Plaintiff, who claimed to have acquired the Defendant's piece of land known as 209/3383 Nairobi (the suit property) by way of adverse possession. The Plaintiff asked the court to determine the following questions:-
  - a. Whether the Plaintiff in this suit has acquired the title to all that parcel of land known as L.R. No. 209/3383 by way of adverse possession having lived on the said parcel of land uninterrupted and continually for over 12 years and whether the same should be registered in the Plaintiff's name.



- b. Whether the Defendant is obliged to execute a transfer of the property to the Plaintiff and in default, the Deputy Registrar of the High Court do execute the transfer.
  - c. Whether a permanent injunction should issue against the Defendant restraining him either by himself, his agents, servants, employees or whosoever otherwise from entering, possessing or in any other way interfering with the Plaintiff's quiet and peaceful occupation and enjoyment of L.R. no. 209/3383 Nairobi.
  - d. Whether this Honourable Court is obliged to grant the Plaintiff a Declaration that he is entitled to the title over the said parcel of land known as L.R. No. 209/3383 by way of adverse possession having lived in the said parcel of land for over 12 years uninterrupted and continuously enjoying quiet and peaceful enjoyment of the said parcel of land.
  - e. Whether the Plaintiff is entitled to an order from this Honourable Court that he be registered solely and absolutely as the bona fide proprietor and owner of the said parcel of land namely L.R. No. 209/3383 where currently it is registered in the names of the Plaintiff and the Defendant.
  - f. Whether the Defendant shall bear the costs of this suit.
3. The Originating Summons was supported by the Affidavit of Jaswant Harilal Chudasama, the Plaintiff, sworn on 31<sup>st</sup> October, 2016. He swore that the suit property is located in parklands and was transferred to himself, the 1<sup>st</sup> Defendant and their deceased father, Harilal Chudasama on 5<sup>th</sup> July, 1974 upon which they charged it to Housing Finance Corporation of Kenya (HFCK) vide an instrument of Charge of even date and that the entire family, including the 1<sup>st</sup> Defendant moved into the suit property.
  4. The Plaintiff deponed that he serviced the loan through his salary from Express Kenya Limited; that his siblings moved out of the suit property, with the 1<sup>st</sup> Defendant and his family moving out between 1994-1995 after he purchased his own property and that by 1999-2000, only his family and his father remained on the suit property.
  5. It is the Plaintiff's case that his father passed away in October, 2002 and his father's interest was transferred to him in September, 2003; that he has lived continuously and interruptedly and solely paying for land rent and rates; that the family understood that the suit property belonged to him which is why they all moved out and he remained with his family and that the 1<sup>st</sup> Defendant however wrote to him through his Advocate claiming to still own a share of the suit property.
  6. It was deponed by the Plaintiff that the 1<sup>st</sup> Defendant cannot claim interest in the suit property because he has been living on the suit property peacefully and without interruption for over 12 years; that the 1<sup>st</sup> Defendant's name only appears on the title as security in trust that he would take care of his family, but that trust has been eroded and that the 1<sup>st</sup> Defendant only wants to unjustly enrich himself with a property he never contributed to. For the above reasons, the Plaintiff urged the court to order that the suit property be transferred to him.
  7. The 1<sup>st</sup> Defendant filed a Replying Affidavit sworn on 30<sup>th</sup> March, 2017 opposing the Summons. He deponed that the Plaintiff was his elder brother; that the property was purchased by the Plaintiff, himself and their late father and registered in their names and that since they are tenants in common, their shares in the suit property depends on their contribution.
  8. It is the 1<sup>st</sup> Defendant's case that their late father, and now his estate, held the largest share having contributed the 20% required to qualify them for the loan, and from time to time also making payments



- towards the loan from the proceeds of his business; that consequently their late father's estate ought to be a party to these proceedings as the suit property should be sold and the proceeds of his late father's interest in it be divided amongst the nine siblings.
9. The 1<sup>st</sup> Defendant stated that the suit property was purchased in 1974 to move the family from a rented house that they lived in along River Road to their own property; that the house was purchased for KShs. 200,000; that the fees and stamp duty was KShs. 50,000; that the purchase was financed by HFCK of which their late father paid the 20% deposit (KShs. 40,000/-) and HFCK paid the remainder (KShs. 160,000/-) and that the loan was repaid in instalments by the Plaintiff and himself.
  10. It is the 1<sup>st</sup> Defendant's case that the bank acknowledged their joint application for an advance of KShs. 160,000 for purchase of the property vide a letter dated 3<sup>rd</sup> April, 1974, by which letter it required the Plaintiff's authority to deduct the instalments from his salary, which he gave and the bank was informed on 8<sup>th</sup> April, 1974 and that upon fulfilling all the requirements, the bank made an Offer to advance the monies for the purchase of the house on 10<sup>th</sup> May, 1974.
  11. It was averred by the 1<sup>st</sup> Defendant that some of the conditions that the bank gave for the release of the balance of the purchase price was that the property would be charged and his father was to make a Will, which he did, and that the deductions would be made from the Plaintiff's salary. It is the 1<sup>st</sup> Defendant's case that the Plaintiff, himself and their late father accepted the conditions, executed the transfer and charge on the same day and that they were both lodged at the land's registry on 5<sup>th</sup> July, 1974.
  12. In addition to all this, the 1<sup>st</sup> Defendant deponed that on 9<sup>th</sup> October, 1978, he paid KShs. 127,502.30 into the loan account, making it possible to repay the loan in 4 years instead of the agreed 15 years; that the loan was paid partly with the Plaintiff's salary, indirect contributions from himself and proceeds from their late father's business as he had the greatest resources of the three of them during that period.
  13. The 1<sup>st</sup> Defendant deponed that the reason he moved out of the house was because his growing family could not continue to live comfortably in the two rooms allocated to them in the suit property, that he purchased his own home, which he still lives in to date and that their late father died on 11<sup>th</sup> October, 2002 and his will was neither witnessed nor attested hence is invalid.
  14. Therefore, it was deponed, their father died intestate and Letters of Administration ought to have been obtained; that in 2015, he requested for a copy of the title from the Plaintiff only to realise their late father's interest had been transferred to the Plaintiff on 29<sup>th</sup> March, 2003 and that the transfer of their late father's interest in the suit property in the absence of a Grant of Letters of Administration is null and void.
  15. The 1<sup>st</sup> Defendant, noting the Plaintiff's advocates allegation that succession proceedings were not necessary, pointed out that the alleged transfer was not brought to his attention or any of his siblings, and neither was his consent sought, and further that the said transfer of the house does not mention him as one of the proprietors.
  16. The 1<sup>st</sup> Defendant refuted the Plaintiff's claim that he had lost his interest in the suit property since the Plaintiff had been living on it for over 12 years; that under the repealed Registration of Titles Act, Section 22(4)(a), persons who own a property in common are issued with one title describing them as such and that under Section 91(5) of the [Land Registration Act](#), the share of a dead co-tenant is treated as part of his estate.
  17. It is the Defendant's case that Section 91(6) provides that no tenant in common can deal with undivided share except with the consent of the remaining tenants; that case law dictates that possession



- by one heir is considered in law as possession of all other co-heirs, and that the mere non-payment of rent does not amount to their ouster.
18. He deponed further that the Plaintiff could not meet the requirements of adverse possession as he is a co-owner, thus the suit is a non-starter; that case law further provides that a co-owner's lack of interest in jointly owned property does not give the other co-owner title to the entire property and that the Plaintiff has not been living on the suit property adversely but as a family living on family property which he contributed to its purchase.
  19. Vide a Ruling delivered on 7<sup>th</sup> December, 2017, the court allowed the 1<sup>st</sup> Defendant's application converting the proceedings into a Plaint. The 1<sup>st</sup> Defendant was allowed by the court to file a Defence and Counterclaim, witness statements, list and bundle of documents as well as a statement of issues. The 1<sup>st</sup> Defendant was also allowed by the court to join the Administrator of the Estate of Harilal Mulji Chudasama to the suit.
  20. Nilaben Kartic Shah was joined as a 2<sup>nd</sup> Defendant to the suit as a representative of the Estate of Harilal Mulji Chudasama, the parties' deceased father. In the Defence and Counter claim, the 1<sup>st</sup> Defendant reiterated the contents of his Replying Affidavit.
  21. The 1<sup>st</sup> Defendant further averred in the Defence and Counter claim that the Plaintiff is a constructive trustee of the one third share of their late father's interest which he obtained through a fraudulent transfer having been in possession of the original title to the suit property and that having perpetuated the alleged fraud, the Plaintiff then went ahead to deny him his proprietary interest in the suit property and also now wants to force him to transfer his share of the suit property to him.
  22. In his Counterclaim, the 1<sup>st</sup> Defendant prayed for judgment against the Plaintiff in the following terms:
    - a. A declaration that the Plaintiff holds in trust for the estate of Harilal Mulji Chudasama one third share in L.R. No. 209/3383 whilst the 1<sup>st</sup> Defendant and the Plaintiff also hold one third share in the same.
    - b. An order for rectification of the Certificate of Title to include the estate of the late Harilal Mulji Chudasama as a registered proprietor as a tenant in common in equal shares with the Plaintiff and the 1<sup>st</sup> Defendant.
    - c. An order for the valuation of the suit property by an independent valuer for the purpose of determining the market value of it.
    - d. An order that the suit property be sold and the proceeds of sale be divided equally among the three proprietors as tenants in common in equal shares and thereafter, the late Harilal Mulji Chudasama's share be divided equally among his heirs.
  23. In his Reply to Defence and Defence to Counterclaim, the Plaintiff specifically denied that he committed any fraud and further denied the particulars of fraud pleaded in the said Defence and Counter claim.

#### **ELC No. 249 of 2019**

24. This suit was commenced by way of a Plaint dated 25<sup>th</sup> July, 2019. The Plaintiff, Jaswant Harilal Chudasama (also the Plaintiff in the O.S), prayed for judgment against the Plaintiff in the following terms:



- a. A declaration that the Plaintiff has acquired title to the Defendant's one third share of L.R. no. 209/3383 by way of adverse possession having lived on the said parcel of land uninterruptedly and continually for over 12 years.
  - b. An order that the Defendant's portion of L.R. No. 209/3383 be transferred to the Plaintiff and registered in his name. In default of execution of the transfer by the Defendant, the Deputy Registrar of this honourable Court do execute the transfer.
  - c. An order directing the removal of the caveat registered by the Defendant against the title for L.R. No. 209/3383.
  - d. A permanent injunction do issue against the Defendant restraining him either by himself, his agents, servants, agents or whomsoever otherwise from entering, possessing or in any other way interfering with the Plaintiff's quiet and peaceful occupation and enjoyment of L.R. No. 209/3383 Nairobi.
  - e. Costs of the suit.
  - f. Any other relief or order that this Honourable Court may deem fit to grant.
25. The pleadings in this case are similar to the affidavit filed in support of the Originating Summons, which I have already summarised above. In his Defence dated 19<sup>th</sup> November, 2019, the 1<sup>st</sup> Defendant also reiterated the contents of his Replying Affidavit to the Originating Summons and his Defence and Counterclaim of the same date filed in ELC No. 1394 or 2016 (O.S).
  26. He reiterated that the transfer of his father's share in the suit property without issuance of a Grant of Letters of Administration constituted fraud; that the Plaintiff purported to deal with the deceased's property without a grant of letters of administration; that his consent as a co-tenant was not procured in transferring their late father's share in the suit property and that the transfer was registered 5 months after the death of their late father.
  27. The 1<sup>st</sup> Defendant once again averred that the Plaintiff is a constructive trustee of the one third share of their late father's interest which he obtained through a fraudulent transfer having been in possession of the original title to the suit property and that he offered to sell his share of the property to the Plaintiff but the offer was declined.
  28. Since the property cannot be partitioned, the 1<sup>st</sup> Defendant averred that the court ought to order that it be valued, sold and the proceeds be divided in equal shares between the Plaintiff, himself and their late father's estate and that this suit was filed contrary to the orders of the court made in ELC 1394 of 2016 (O.S) on 7<sup>th</sup> December, 2017.

### **Hearing and Evidence**

29. The matter first proceeded for hearing on 4<sup>th</sup> October, 2022 before this court. The Plaintiff testified as PW1, and adopted his Affidavit in support of the Originating Summons sworn on 31<sup>st</sup> October, 2016 and his witness statement in ELC No. 249 of 2019 as his evidence in chief, which I have already reproduced. PW1 also produced the annexures on the Affidavit as Plaintiff Exhibit 1.
30. It was his evidence that he has lived on the suit property since July, 1974 and remained there after his brother and sisters married and moved out; that the first one to move out was their sister after she got married around 1983; that the 1<sup>st</sup> Defendant left around 1994-1995 and did not communicate any intention of coming back to the suit property and that the 1<sup>st</sup> Defendant never asked him to vacate the land.



31. It was the evidence of PW1 that he wanted to be registered as the sole proprietor of the land; that the latest entry on the title was a transfer to himself dated 29<sup>th</sup> September, 2003 and that it was his father, who died almost 20 years ago, who transferred his share in his favour.
32. According to PW1, the limited letters of administration ad litem were given to their sister, the 2<sup>nd</sup> Defendant, in 2019; that his exhibit JC3 is a transfer executed by his father in 1996 which was presented for registration after their father's death and that the transfer was with the lawyer and it was not necessary for him to obtain a Grant before transferring his father's share.
33. PW1 Further stated that the 1<sup>st</sup> Defendant was not entitled to one third share of the suit property because he had vacated; that they all entered the land in 1974 as tenants in common; that all his brothers and sisters moved into the suit property in 1974 but he could not recall when the 1<sup>st</sup> Defendant married and that the suit property was registered in the three names but they allowed all the family members to live in the house.
34. It was the evidence of PW1 that it was only him and their late father who paid the purchase price, that the 1<sup>st</sup> Defendant did not contribute; that the purchase price was KShs. 200,000, of which their late father paid KShs. 40,000 and KShs. 160,000 was financed by HFCK in whose favour the Charge, which was signed by the three registered owners, was registered.
35. The 2<sup>nd</sup> Defendant testified on 26<sup>th</sup> April, 2023 as DW1 and gave a sworn testimony. DW1 adopted her witness statement dated 14<sup>th</sup> May, 2021 as her evidence in chief. DW1 testified that the Plaintiff never committed any fraud against their late father's estate; and that the family had always agreed that the suit property belonged to the Plaintiff.
36. DW1 testified that the Grant Ad Litem was for purposes of prosecuting HCCC No. 1394 of 2016 (O.S); that she had no authority to defend ELC Civil Suit No. 249 of 2019; that the suit property was registered in their late father's name and that of the Plaintiff and 1<sup>st</sup> Defendant as tenants in common and that their father transferred his share and therefore it was not distributed to his children.
37. According to DW1, the transfer was made between their late father and the Plaintiff and was registered after their late father died; that the transfer was endorsed on the title as entry number 7; that their other siblings believed that the property belonged to the Plaintiff and the siblings further agreed that the share of their late father go to the Plaintiff and that they had never been to a succession court to agree on that position.
38. DW1 testified that there is no other sibling laying claim to the suit property; that the house was big enough and the siblings only moved out after purchasing their own homes; that their late father was alive on the date the transfer was alleged to have been executed and the signature belonged to him and that the suit property does not generate any rent.
39. The 1<sup>st</sup> Defendant testified as DW2. He adopted his witness statement as his evidence in chief and produced the documents in his list of documents as 1<sup>st</sup> Defendant's Exhibit 1. He testified that was the Plaintiff who serviced the loan when the suit property was still charged and that his contribution was buying food for the entire family as well as paying for water and electricity in the house.
40. DW2 stated that the Plaintiff had been on the property since 1978; that he is a shareholder in the property and he wanted a valuation to be done, the land to be sold and to be given his share and that their late father never transferred his share to the Plaintiff as alleged.



## Submissions

41. The Plaintiff's advocate submitted that the 1<sup>st</sup> Defendant was only included in the transfer and title as a guarantor to ensure payment of the loan and to protect his and their late father's interest in the property should something happen to them and that the Kshs. 127,502.30 allegedly paid by the 1<sup>st</sup> Defendant for the house was in fact given to him by himself (the Plaintiff).
42. Counsel submitted that the 1<sup>st</sup> Defendant never made any contribution direct or otherwise towards purchase or development of the suit property and that there is no documentation of any such contribution.
43. On the issue of adverse possession, the Plaintiff submitted that the doctrine is embodied under Section 7 of the *Limitation of Actions Act* and espoused in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where the court set out the requirements to be met in a claim for adverse possession.
44. Counsel for the Plaintiff submitted that the Plaintiff had been living on the suit property peacefully, continuously and interruptedly for 23 years; that his occupation was visible and apparent and that the 1<sup>st</sup> Defendant being aware of the state of affairs never felt the need to stake his claim at the time he moved out or upon their father's death.
45. It was submitted that where one tenant in common occupies property as a sole owner and acts in a manner to deprive his co-tenants of the property, then his possession should be regarded as adverse from the time the co-owners have knowledge of such acts or occupation. Counsel relied on *Ruga Gituku v Charles Gachau Wachira & 10 Others* [2017] eKLR where it was held that:-

“The plaintiff is a co-tenant of the defendants. In the case of *Ahmed Abudulkarim & another Vs Member for lands and Mines & another* [1958] EA 436 at 441 the East African Court of Appeal held that it is well settled that as between tenants in common, there must be some overt act amounting to ouster before possession of a co-tenant becomes hostile. The word “Ouster” is defined in Black’s law Dictionary 9<sup>th</sup> edition as the wrongful dispossession or exclusion of someone (esp. a co tenant) from property.”
46. The Plaintiff's Counsel submitted that the Plaintiff has been in occupation of the suit premises continuously for over 12 years from the date the 1<sup>st</sup> Defendant moved out; that from the date the 1<sup>st</sup> Defendant moved out, the Plaintiff has held the suit property to the exclusion of the 1<sup>st</sup> Defendant, as well as solely paying for utilities and that as a result, the Plaintiff had acquired the 1<sup>st</sup> Defendant's share of the property.
47. The Plaintiff's counsel submitted that the transfer of their late father's share was not fraudulent; that the question of whether the transfer was fraudulent is a matter for determination in the succession proceedings and that although under Section 47 of the *Law of Succession Act*, this court had jurisdiction to hear disputes of succession relating to land, however it should be appreciated that the alleged fraud should be dealt with by the family division of the High Court.
48. Counsel relied on the case of *Salome Wambui Njau* (Suing as Administratrix of the Estate of Peter Kiguru Njuguna) v *Caroline Wangui Kiguru* [2013] eKLR.
49. In addition, the Plaintiff's Counsel submitted that it was the prerogative of the legal representative of the estate to raise the issue of fraud in the transfer and not the 1<sup>st</sup> Defendant and that a suit for or against the estate of a deceased person can only be brought by or against the administrator. Counsel relied on the case of *Nephant Kiguta Kingori & 2 Others v Jane Gathoni Kingori* [2015] eKLR).



50. The Plaintiff's counsel submitted that under Section 107 of the [Evidence Act](#), he who alleges must prove, and the standard of proof in fraud is higher than on a balance of probabilities; that the 1<sup>st</sup> Defendant did not prove his allegations of fraud and that in fact, the transfer of the deceased share was a gift in his lifetime as envisaged under Section 28(d) of the [Law of Succession Act](#).
51. Counsel submitted that such a gift does not fail even if registration of the transfer is done after the death of the donor (Re Estate of Gedion Kitivi Ndambuki (Deceased) (2014) eKLR and that further, the Plaintiff did not need the 1<sup>st</sup> Defendant's consent as is required under Section 91(6) of the [Land Registration Act](#) because the transfer was being made to a co-owner and not a third party.
52. Plaintiff's Counsel concluded by submitting that the 1<sup>st</sup> Defendant had failed to discharge his burden of proof; that the Plaintiff had demonstrated that the 1<sup>st</sup> Defendant's Counterclaim is devoid of merit; and that the Plaintiff had proved his case and urged the court to grant the prayers sought in the Plaint.
53. The 1<sup>st</sup> Defendant's counsel submitted that a tenant in common holds an interest separate from the other co-tenant, which upon his death devolves to his estate and that where a co-owner exceeds his interest in the joint property, they commit a trespass. Counsel relied on the case of Bull v Bull [1955] 1 QB 232 as well as the Law of Real Property by Robert Megary & H.W.R Wade 4<sup>th</sup> Ed.
54. On the issue of fraud, it was submitted that the transfer of the deceased's share of the suit property is part of a big fraud and intermeddling in the estate of their late father which the Plaintiff and his two brothers are perpetuating against the other siblings and that in Justus Thiora Kiugu & 4 Others v Nkatha Kiugu & Ano. [2015 eKLR, it was held that in the course of distribution of an estate, the siblings can decide to give their share of the inheritance but must do so in writing, failure to which the court will distribute the estate as per the provisions of section 35 of the [Law of Succession Act](#).
55. It was further submitted that only a legal representative can transfer property of a deceased person (Nairobi Civil Appeal No. 234 of 2010, Pauline Njoki Mogwanja & Another v Rosken Investments Limited & 3 Others); and that in the same breath, the Court of Appeal in Trouistik Union International & Another vs Mbeyu & Another [1993] KLR 230 held that only holders of a grant are empowered to deal with the affairs of a deceased person's estate, as is provided under Section 45(1) of the [Law of Succession Act](#).
56. Counsel submitted that the 1<sup>st</sup> Defendant's claim was not time barred; that Section 20 of the [Limitation of Actions Act](#) provides that periods of limitation do not apply where fraud has been perpetuated, or where there is an action by a beneficiary to recover trust property and that in any event, he was never informed of the existence of the transfer which was allegedly executed in 1996.
57. Counsel submitted that even though he is a co-tenant, he is not described as such in the transfer and neither was his consent sought contrary to the provisions of Section 91 of the [Land Registration Act](#); that under the law, a party has six years from the time they find out about a fraud to lodge a claim; that he only found out about the fraud in 2016 and that he filed his counterclaim in 2019.
58. It was submitted that under Section 26(1) of the [Land Registration Act](#), the Certificate of Title issued by the Registrar is prima facie proof that the person named therein is the registered proprietor, and such registration can only be challenged in grounds of fraud, misrepresentation, illegality or that the registration was acquired through a corrupt scheme (Wambui v Mwangi & 3 Others [2021] KECA 144 KLR and Samuel Ariga Bosire v Abagusii Otenyo Self Help Group [2021] eKLR)
59. On adverse possession, it was submitted on behalf of the 1<sup>st</sup> Defendant that the Plaintiff had not met the criteria for adverse possession; that the claim was misconceived because all tenants in common have



a right to possession and that also since the property was bought for use as a family home, all the tenants in common licensed the family members to live on the suit property.

60. While the 1<sup>st</sup> Defendant as a co-owner had licensed the Plaintiff, his brother, to occupy his share of the suit property without paying rent, it was submitted that the Plaintiff's claim fails the element of non-permissive, hostile or adverse use because being a co-owner, his possession cannot be adverse to other co-owners. Reliance was placed on the Indian case of *P. Lakshmi Reddy v Lakshmi Reddy* [[1957] AIR SC 314.
61. Counsel further submitted that mere non-participation in rent and profits from the property by a co-owner does not amount to an ouster as to give title by way of adverse possession to the co-owner in possession. Counsel relied on the Indian case of *Karbala Begum v Mohammed Sayeed & Another* [1980] 4 SCC 396. It was submitted that in any event, the 1<sup>st</sup> Defendant never charged the Plaintiff rent for the occupation of his share of the suit property.
62. Counsel also relied on the case of *Njenga Kimani & 2 Others v Kimani Nganga Wainaina* [2017] eKLR, where the court noted that it is common for relatives to allow each other possession where one would not expect to be kicked out before 12 years merely to defeat a claim for adverse possession. Counsel also cited the case of *Bernard Ndung'u v David Kamau Mukumbu* [2021] eKLR to urge the court towards a finding that the Plaintiff's claim for adverse possession cannot stand.
63. With regard to what remedies the court could issue, counsel submitted that where the property owned under a tenancy in common cannot be sub-divided, under Section 96 of the [Land Registration Act](#), empowers the court to order that it be sold and the proceeds shared according to the interest of each co-tenant; that the Plaintiff's case ought to be dismissed and that the court ought to cancel the transfer and revert the interest of the late Harilal Mulji Chudasama to his estate.
64. The 2<sup>nd</sup> Defendant submitted that the registration of the suit property in the three names was for the security of the family and not to necessarily imply that the rest of the family members were licensees of the three registrants and that the execution of the Transfer by their father was a demonstration of the fact that the property would be left in the hands of the Plaintiff.
65. It was submitted that the transfer form was executed by both the transferor and transferee, and was attested to by an Advocate of the High Court of Kenya and that the same bears the mark of revenue stamps implying that stamp duty was paid.
66. It was submitted that although the 1<sup>st</sup> Defendant cast aspersions on the legitimacy of the transfer from the Deceased to the Plaintiff by alleging fraud, he did not even attempt to prove the alleged fraud; that there is no criminal claim of the alleged fraud or that a report of the same was made to the police and that the onus of proving fraud, rested with the 1<sup>st</sup> Defendant.
67. It was submitted that consent of co-tenants is only required when dealing with third parties, and not when dealing with other tenants in common as per Section 91 (6) of the said Act and that the transfer between the deceased and the Plaintiff was well-within the law and therefore valid.
68. Counsel submitted that he is alive to the position in common law that for tenancy in common, each tenant in common has a right to occupy the whole of the property and that the possession of one is deemed the possession of all.
69. According to the 2<sup>nd</sup> Defendant's counsel, co-tenants out of possession can be ousted by way of adverse possession once they have been notified of the intention of the co-tenant in possession to oust them. Counsel relied on the case of *Kane vs Harrington*, 30 LCR 580 [2022] where the Court held that ouster may be shown by inaction of the co-tenant sought to be dispossessed.



70. Counsel further relied on the words of Prof. Joseph William Singer of the Harvard School of Law, in an article titled “Ouster of tenant in common shown from very long exclusive possession” published on the Harvard University Website on 12<sup>th</sup> December, 2022 who observed as follows:

“Only when a tenant in common actually excludes another cotenant from the property (or tells them they are not welcome to use the property and does not allow them access) does the statute of limitations for adverse possession begin. That moment of “ouster” does start the clock running and the interest can be lost to the possessory tenant unless the ousted tenant brings a claim for partition or a right to re-enter the premises.”

71. It was submitted that the 1<sup>st</sup> Defendant admitted that he left the suit property over 23 years ago, during which period the Plaintiff lived thereon with his family unperturbed as the sole and exclusive owner of the suit premises.

### **Analysis and determination**

72. The court has read and carefully considered the pleadings filed by the parties, the evidence produced, submissions of the parties and the authorities relied on. The following questions arise for determination:

- a. Whether the Plaintiff fraudulently effected the transfer of the 1/3 share in the suit property from the late Harilal Mulji Chudasama.
- b. Whether any trust was created in respect of the suit property.
- c. Whether the Plaintiff has acquired the 1<sup>st</sup> Defendant’s 1/3 share of the suit property by way of adverse possession?

73. By way of a brief background, what can be deduced from the undisputed facts of this case is that the parties herein are all children of the late Harilal Mulji Chudasama. The 2<sup>nd</sup> Defendant was joined to this suit by virtue of being the legal representative of the estate of their late father, the said Harilal Mulji Chudasama, vide a grant ad litem issued on 18<sup>th</sup> June, 2019 in High Court Succession Cause No. 89 of 2018.

74. It is undisputed that sometime in the year 1974, the Plaintiff, the 1<sup>st</sup> Defendant and their father, the late Harilal Mulji Chudasama, bought the suit property. The property was purchased for use as a family home, which the entire family occupied.

75. The suit property was registered in the names of the Plaintiff, the 1<sup>st</sup> Defendant and their late father as tenants in common in equal undivided shares. The level of contribution by each party towards the purchase of the suit property is disputed.

76. All the siblings eventually moved out of the suit property having purchased their own properties, with the 1<sup>st</sup> Defendant moving out in the year 1994. Their father passed away in the year 2002, at which point only the Plaintiff and his family were left on the suit property.

77. Five months after their father’s death, the Plaintiff acquired his 1/3 share by way of a transfer dated 24<sup>th</sup> September, 1996 and registered on 29<sup>th</sup> March, 2003. According to the 1<sup>st</sup> Defendant he only discovered about the said transfer when he asked for the title document to institute succession proceedings in relation to their late father’s estate.

78. Other than the 1/3 that he acquired from his father, which the 1<sup>st</sup> Defendant has contested, the Plaintiff has moved the court seeking a declaration that he has acquired the 1<sup>st</sup> Defendant’s share of the suit



property by way of adverse possession, having been in exclusive, open and uninterrupted possession of the same for over 12 years with the 1<sup>st</sup> Defendant's knowledge.

79. The 1<sup>st</sup> Defendant having alleged that the registration of the transfer was done fraudulently, the 1<sup>st</sup> Defendant had the legal burden to prove that assertion. Section 107 of the *Evidence Act* provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
80. In *Central Kenya Ltd v Trust Bank Limited & 4 Others* [1996] eKLR, it was held, inter alia, that allegations of fraud must be strictly proved; that great care needs to be taken in pleadings containing allegations of fraud or dishonesty; that there must be sufficient evidence to justify the allegation; and that the burden of proof for fraud is slightly much higher than that of balance of probability.
81. The Plaintiff did produce a copy of the Transfer dated 24<sup>th</sup> September, 1996 executed by their late father as the transferor and the Plaintiff as the Transferee.
82. The Plaintiff's assertions are corroborated by the 2<sup>nd</sup> Defendant who is the legal representative of the Estate of the late Harilal Mulji Chudasama, who testified that the deceased did execute the Transfer document before his passing on.
83. This court agrees with the 2<sup>nd</sup> Defendant that the law does not set a time frame within which a transfer is required to be lodged for registration after it is executed. Therefore, the mere fact that the transfer was executed in 1996 but registered in 2003 is not proof of fraud, and neither is the fact that it was registered after the death of the Transferor.
84. The 1<sup>st</sup> Defendant raised the issue that his consent was not sought with regards to the transfer. The 2<sup>nd</sup> Defendant submitted and correctly so, that consent of co-tenants is only required when dealing with third parties, and not when dealing with other tenants in common as per Section 91 (6) of the *Land Registration Act*, which provides as follows:
- “No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”
85. The transfer between the deceased and Plaintiff was done between two co-owners and therefore consent was not necessary for effecting the transfer. This was the position of the court in *David Njoroge Kimani & another v James Mukuha Njau* [2003] eKLR, where it was held that as follows:
- “In both cases of co-ownership, if one of the co-owners disposes of his interest in the property so owned or held, the sale, conveyance, mortgage, assignment, or other disposal is only to the extent of his fractional interest, and it is limited to the extent of the share of the co-owner who is divesting himself of his interest in the property. As between co-owners as such, there is no fiduciary relationship: hence, one co-owner can dispose of his interest, and he is not liable to account to his co-owners, provided that he does nothing prejudicial to the other co-owner's interest or provided that he is not in breach of legitimate covenants...The consent of the appellants as co-owners was not a requisite one; and it did not have to be sought and obtained by the selling co-owner.”
86. The 1<sup>st</sup> Defendant did not lead evidence to show how the transfer of the suit land to the Plaintiff was fraudulent. To prove fraud the 1<sup>st</sup> Defendant for example ought to have called the Land Registrar to explain how the land was transferred after the death of their father, or an expert's report to show that their late father did not sign the transfer document before he died.



87. There being no grant, and the 1<sup>st</sup> Defendant having not proved that the transfer of their deceased father's interest in the suit property was transferred to the Plaintiff fraudulently, it follows that the deceased's interest in the suit property was transferred to the Plaintiff as a gift inter vivos, which is "A gift of personal property made during the donor's lifetime and delivered with the intention of irrevocably surrendering control over the property."
88. The nature of a gift inter vivos is that the owner of the property or asset donates it to another without expectation of death. A gift inter vivos is made and settled during the lifetime of the deceased and is identified, awarded and settled on the person to whom it has been given. It is made to a beneficiary during the lifetime of the donor and the law requires that it is considered when distributing the net intestate estate.
89. The gift, once settled, does not form part of the deceased's estate. In *Micheni Aphaxard Nyaga & 2 Others v Robert Njue & 2 Others* [2021] eKLR the Court of Appeal held that:-
- "...the gift must have passed from the deceased to the recipient for it to be valid. This means that the gift is no longer the property of the deceased but for the purpose of distribution of the estate to the dependants it will be traced and taken into account when distributing the estate with respect to the beneficiary who received the gift."
90. Similarly, the Court of Appeal in *Nyeri Civ App No. 21 of 2017, Kagina vs Kagina & 2 Others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) adopted the words of the court in *Gitau & 2 Others v Wandai & 5 Others* [1989] JKR 231 where he held as follows:
- "... if a deceased person has during his life time sold, transferred, disposed or in any manner given out his properties either in exchange of consideration or as gifts inter vivos, such gifts or properties whether transfer had been registered or not do not form part of the deceased's estate. In fact, the Law of Succession in my view protects and preserves transactions made by the deceased during his life time."
91. All the above resonate well with the current suit. It goes without saying that in the absence of evidence of fraud, since the Plaintiff was able to procure registration of the Transfer without further assistance of the deceased, then it was a complete gift. It is of no import that at the time of the Donor's death, the transfer was yet to be registered.
92. It is clear that the deceased executed all the documents required to transfer a gift, the fact that the same had not been registered at the time of his death does not invalidate the gift. The Court of Appeal in *Registered Trustees Anglican Church of Kenya Mbeere Diocese v David Waweru Njoroge* [2007] eKLR borrowed the author's words in *Snell's Equity* 29<sup>th</sup> Edition, at page 122 that:-
- "where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person."
93. It is well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gift. The delivery of the gift in this case was by executing and handing over the transfer document to the Plaintiff. It follows then that at the time their late father passed on, all that remained was the registration of the transfer, which was done and finalized after the death of the deceased.



94. For the above reasons, this court finds that the transfer of a portion of the suit property from the deceased to the Plaintiff was not fraudulent. Consequently, there is no basis for this court to issue orders for cancellation of the title and to have the deceased's share revert back to his estate.
95. The Plaintiff argued in the alternative that the registration of the suit property in the Plaintiff's favour created a resulting trust. It is trite that a resulting trust automatically arises in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial.
96. In this matter, the suit property was bought and registered in the names of Harilal Mulji Chudasama, Jaswant Harilal Chudasama and Shashikant Harilal Chudasama as tenants in common. From the bundle of correspondence between the three and HFCK prior to the said purchase and registration, the three moved with a collective goal in the transaction.
97. It is common ground, that the Plaintiff's salary was to be used to service the loan advanced for purchase of the suit property. The issue arising therefrom at this point is the contribution by the 1<sup>st</sup> Defendant in settling the said loan.
98. The 1<sup>st</sup> Defendant informed the court that they agreed that since the Plaintiff's salary was being used to service the loan, him and their late father were to meet the other maintenance costs and household expenses and utilities for the entire family. The court notes that the 2<sup>nd</sup> Defendant did not comment on this aspect, even though it is possible she may not have been aware of the arrangement.
99. This court is unable to reconcile the contradictions between the evidence of the Plaintiff and 1<sup>st</sup> Defendant on how much each party contributed, directly or indirectly towards the purchase of the suit property. Proof of contribution is critical for one to rely on the doctrine of a resulting trust. That evidence was not adduced.
100. For all intents and purposes, entry No. 4 on the Certificate of Title produced in court indicates that suit property was transferred to the three individuals as tenants in common in equal shares. Section 26(1) of the [Land Registration Act](#) provides that:-
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”
101. Without any evidence pointing towards any fraud, misrepresentation, illegality or corrupt scheme on the part of the 1<sup>st</sup> Defendant, this court is bound to believe that the registration of the 1<sup>st</sup> Defendant as a co-owner in the suit property as prima facie proof that he is a co-proprietor, and is entitled to his share.



102. The last issue to deal with is whether the Plaintiff has acquired the 1<sup>st</sup> Defendant's 1/3 share of the suit property by way of adverse possession. Section 7 of the Limitations of Actions Act, provides as follows:-

“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.”

103. After the expiration of 12 years, a party may approach the High Court (ELC) under Section 38 of the Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession. Section 38(1) of the Act states as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as a proprietor of the land.”

104. For a claim of land by adverse possession to succeed, the applicant must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In the case of *Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another 1977*] eKLR Kneller J. stated as follows;

“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec pricario (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

105. These principles were explained at length by the Court of Appeal in *Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another [2015]* eKLR in the following terms:-

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others [2004]* 1KLR 184 and *Wanje v saikwa (2) (supra)*. In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the *Wanje* case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be



said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land.”

106. Parties in the instant suit are in agreement with regards to how the suit property was acquired, the nature of the title, the developments thereon and the period for which the Plaintiff has been in occupation. It is also acknowledged that the said occupation was for a long time without any interference.
107. The only issue that arises for determination is whether the Plaintiff has established that he has acquired the 1<sup>st</sup> Defendant’s 1/3 undivided share in the suit property by adverse possession and whether he is entitled to the reliefs sought.
108. From the facts, evidence and testimony of the parties, the suit property was initially registered in the names of the Plaintiff, the 1<sup>st</sup> Defendant and their deceased father as tenants in common in equal undivided shares. On 29<sup>th</sup> September, 2003 the deceased’s share of the suit property was transferred to the Plaintiff. The Plaintiff now owns 2/3 share of the entire suit property.
109. The remaining 1/3 share of the suit property still belongs to the 1<sup>st</sup> Defendant, which share the Plaintiff through this suit claims to have acquired by adverse possession. The court has been called upon to determine whether a co-tenant in land held under tenancy in common can acquire the share of another co-tenant through adverse possession.
110. Okong’o J in *Saiqua Sultana Hassan Haroon & 2 Others v Abdul Malik* [2016] eKLR had occasion to deal with the issue of adverse possession between co-tenants as follows:

“It is clear from the foregoing that until the tenancy in common is severed by the subdivision of land so that each tenant in common can have his share of the land, each tenant in common owns the “whole” land. Until the subdivision is done, the portion of land that belongs to each tenant in the entire parcel which is jointly owned is unidentifiable. It follows that, when the deceased occupied the suit property, he occupied the whole of it by virtue of his interest therein as a tenant in common. It cannot be said that he was occupying his share in the said property and that of the defendant. The plaintiffs are the daughters of the deceased. Between 1976 and the year 2003 when the plaintiffs are said to have been occupying the suit property with the deceased, they must have been occupying the premises with the permission of the deceased. The deceased’s and the defendant’s interest in the suit property were common and undivided. The plaintiff’s occupation of the suit property could not therefore be said to have been adverse to the interests of the defendant and the deceased.”

111. In *Ruga Gituku v Charles Gachau Wachira & 10 Others* [2017] eKLR, the court held as follows:

“The plaintiff is a co-tenant of the defendants. In the case of *Ahmed Abudulkarim & Another vs Member for Lands and Mines & another* (1958) EA436 at 441 the East African Court of Appeal held that it is well settled that as between tenants in common, there must be some overt act amounting to ouster before possession of a co-tenant becomes hostile. The word “Ouster” is defined in *Black’s law Dictionary* 9<sup>th</sup> edition as the wrongful dispossession or exclusion of someone (esp a co-tenant) from property.”



112. In law, co-owners do not lose a commonly-held property interest merely because they do not use it. All co-owners have the right to possess the entire property and by such possession, they do not commit a trespass against other co-owners. It is only when a tenant in common actually excludes another co-tenant from the property or denies them access and/or entry into the property does the statute of limitations for adverse possession begin.
113. Knowledge of adverse possession by the registered owner of the land is critical. It can be inferred that the co-tenant being so ousted should have notice that he is being denied access to the property since mere non-use does not mean an owner has abandoned his interest.
114. It would therefore follow that mere use by a co-tenant in possession does not suggest an intent to exclude another co-owner from possession. This court is persuaded by the Indian case of *P. Lakshmi Reddy v L. Lakshmi Reddy* [1957] AIR 314, where the Indian Supreme Court held as follows:
- “But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession, who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir’s title.”
115. The presumption that possession by a co-owner is possession by all co-owners negates the contention that the Plaintiff was living on the suit property as a licensee of the 1<sup>st</sup> Defendant. Being a co-owner, he had a right to occupation of any part or share of the suit property because the respective shares of the co-tenants are not identifiable, and the co-tenants have a right to the entire property subject of the co-tenancy.
116. From the facts of this case, the parties herein all moved into the suit property to live together. It had been purchased for use as a family home. When the 1<sup>st</sup> Defendant moved out, it was not because of any hostilities. He moved out because he purchased his own property to cater for the needs of his growing young family. He did not need to lay claim to the property seeing as it was still being used to house the entire family, including his father and other siblings, as it was meant to do.
117. There was no evidence to show that he could not return to the house after moving out. Indeed, as a family member and a co-owner of the house, he had a natural right to return to their family home.
118. It is common ground that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu vs Kirpal* [1975] EA 225, possession does not become adverse before the end of the period for which permission to occupy has been granted.
119. To the extent that the Plaintiff was in occupation of the entire suit property with the permission of the 1<sup>st</sup> Defendant, until 2016 when the two fell out, it is the finding of this court that the Plaintiff has not proved the claim of adverse possession. The said claim fails.
120. In the circumstances and in light of the foregoing, the court makes the following findings:



- a. That the transfer of the 1/3 share of parcel of land known as L.R. No. 209/3383 from the late Harilal Mulji Chudasama to the Plaintiff was not fraudulent having been done pursuant to a gift inter vivos from the deceased to the Plaintiff.
- b. That the Plaintiff's prayer that he be declared owner of the 1st Defendant's 1/3 share of the suit property fails for reason that the period for which the Plaintiff's has been in adverse occupation of the suit property has not attained the prescribed period of 12 years.
- c. The 1st Defendant is entitled to 1/3 of the suit property as a co-tenant.
- d. An order for the valuation of the suit property be and is hereby made by an independent valuer for the purpose of determining the market value of L.R. No. 209/3383.
- e. An order be and is hereby made that the suit property be sold and the proceeds of the sale to be divided in the ration of 2/3:1/3 between the Plaintiff and the 1st Defendant respectively, with the Plaintiff having the first option of purchasing the 1st Defendant's share.
- f. Each party to bear his/her own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

**Mr. Kahera for Plaintiff**

**Ms Nduta Kamau for Defendant**

**Mr. Onyango for Ngetich for Interested Party**

**Court Assistant - Tracy**

