



REPUBLIC OF KENYA



**Ladha & 3 others v Patel (Environment & Land Case 127 of 2010)
[2023] KEELC 16148 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 127 OF 2010**

JA MOGENI, J

MARCH 6, 2023

BETWEEN

**MAVJI RAMJI LADHA (REPLACED BY PRAMILA MAVJI RAMJI
LADHA) 1ST APPLICANT**
HARJI RAMJI PATEL 2ND APPLICANT
KASOBI RAMJI PATEL 3RD APPLICANT
MAHENDRAKUMAR RAMJI LADHA 4TH APPLICANT

AND

PURBAI GOPAL RAMJI PATEL RESPONDENT

JUDGMENT

1. The Applicants commenced this suit through Originating Summons dated 12/03/2010 against the Respondent, claiming to be a beneficiary, under trust, of possession of Maisonettes Number 7, 5, 4, 8 on Land Reference Number 209/45/6 and who claim in the alternative to have acquired the said property by adverse possession having lived on the same since years 1979/1980. They therefore seek determination against the Respondent for the following reliefs:
 1. That this Honourable Court do restrain the Respondent/ Respondent by herself, agents, servants and/or any other person from evicting the Applicants, interfering with the quiet possession or taking possession from the Applicants or in any other way interfering with the occupation of Maisonettes No. 7, 5, 4 and 8 on the Land Reference Number 209/45/6 occupied by the Applicants Number 1 to 4 respectively pending the hearing and determination of this suit.
 2. That there be a declaration that the Respondent holds the said property in trust of the Applicants herein.



3. That this Honourable Court do declare that the Applicants have acquired the said respective Maisonettes by way of adverse possession.
 4. That the Respondent be compelled to surrender and transfer the ownership of the said respective Maisonette to the Applicants herein.
 5. That costs of this suit be borne by the Respondent.
2. The Originating Summons is brought under Sections 2 of the *Trustee Act*, Section 38 of the *Limitation of Actions Act*, Order XXXVI Rules 1 and 3D and 5A of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and all the other enabling provisions of the law. I wish to point out that there is no Order 36 Rule 3D and 5A of the Civil Procedure.
 3. The summons are premised on the grounds cited in paragraphs (a) – (e) on the face of the application and particularly the annexed Supporting Affidavit sworn by Mavji Ramji Ladha, the 1st Applicant herein. I do not need to reproduce them here.
 4. In response to the Originating Summons, the Respondent filed a Replying Affidavit sworn by Purbai Gopal Ramji Patel on 16/04/2010 opposing the same.
 5. Upon pleadings thereby being closed, the suit proceeded by way of viva voce evidence. The Applicants called four (4) witnesses and the Respondent called two (2) witnesses. The parties testified on various dates; 28/04/2022, 8/06/2022, 17/10/2022 and 1/11/2022.

Applicants' case

6. The Applicants aver that at all times material to this suit they have been occupying the Maisonettes 7, 5, 4 & 8 on Land Reference Number 209/45/6 from 1979/1980. The 1st Applicant particularly avers he entered into the said property in the year 1979 when he together with the Applicants and the husband of the registered owner developed the maisonettes thereon and agreed that the same be registered in Deceased name and to hold for them in trust.
7. It is their case that the Respondent is the owner of the premises known as Land Reference 209/45/6 on 5 Parklands Avenue where the said Maisonettes stand having been registered by way of transmission upon the death of her husband one Gopal Ramji Ladha Patel.
8. That the Registered owner passed away on the 24/03/2004 and the Respondent took up the said property by way of transmission.
9. The Applicants contend that they had developed the property together with the Deceased and the Deceased was to hold the Title in trust for the Applicants and thus entitled therein and further, that the Applicants have occupied and have been in the said premises continuously and without any disturbance for over 30 years. That each of the Applicant was entitled to the Maisonettes they respectively occupy and have since been occupying the same openly continuously and uninterrupted from the said period.
10. They aver that the Respondent has now threatened to evict the Applicants and sell the said property. They stress that their families have been brought up in their respective houses and know of no other homes.

Applicants' Evidence

11. PW1 – Harji Ramji Patel confirmed that he is the 2nd Applicant. He stated that he filed this case against his sister in law. He adopted his witness statement at page 12 of the bundle, as his evidence before the



court together with a further list of documents from page 16 of the bundle to page 186. The same were marked as exhibits before the court. The list on page 41 and supplementary list on page 16 contain 3 documents which were marked as PW1-Exh. He concluded by stating that he is asking for possession of his house. He confirmed that he is still living there.

12. In cross-examination, he testified that he is claiming adverse possession for House No. 4. He was allowed by the late Gopal Patel to occupy the house. At paragraph 2 of his statement, he stated that the properties were bought by the brothers but he has no sale agreement nor anything to show. The only thing he produced is a title deed that bears the name of Gopal Ramji and not their names. The drawings at page 26 have been written Gopal Ramji & others. Their names are not there. The drawings are for the construction. There was no contractor. They built the houses using a foreman. It was a family project and there were no Bills of Quantities so the only thing he has brought to court are the drawings. They run a company called RLCO Steel Fabricators. There were two companies but the companies are closed so he did not have documents to show they were directors.
13. He testified that in paragraph 3, he stated that the construction was funded by the companies but he has no document to show this financing. He also has no certificate of occupation. On page 13, at paragraph 3, he states that after his brother died on 23/03/2004, his sister-in-law applied for letters of administration. He was not made aware. He signed for an affidavit for administration of the suit property though he did not have the document. Around 2005-2006, he signed for letters of administration for her sister in law. He is not aware that his brother left a will. At page 9 of the Defendant's documents, there is a will of the late Gopal Ramji, wherein he confirms his name and signature are seen on the will. Paragraph 3 of the will confirms that Gopal Ramji gave and bequeathed all his property to his wife and his daughters. The 4th Applicant was also there. He never raised any objection when he signed. Paragraph 6 on page 13, PW1 stated that the Respondent started demanding for rent. Before Gopal Ramji used to collect the rent himself when he passed on, the wife started collecting but they knew she needed the money for her children and she was widowed. He is aware that the title is being held by a bank on a loan obtained. He is not aware there is a case in court on the loan. He just heard about it but he is not a party in the matter. He does not know who the defendant in the case is. His brother informed him that he was fighting a case in court. His brother never asked them to help him. He never involved him. He got to know about this case around 2001 before his brother passed on. At paragraph 3 on page 14, PW1 stated that he has been seeking to resolve the issue but the respondent has not involved him. The property is still in the name of the late Gopal Ramji. At page 14, he stated that there has been a threat to his occupation and there have been interruptions.
14. In re-examination, it was his testimony that he occupies Maisonette no. 5, the 1st Applicant occupies Maisonette no. 7, the 2nd Applicant Maisonette no. 5, 3rd Applicant Maisonette no. 4 and 4th Applicant Maisonette no. 8. There are 8 maisonettes and 3 flats. The defendant occupies 3 and maisonettes no. 2, 6 and 1 are being rented. Two flats are on rent. There are 11 units in the entire compound. He confirmed that he never paid rent to his brother only electricity bills. After his brother passed on, he never paid rent to anybody. After his brother passed on, the wife began to collect rent for rented units. His brother used to collect rent but he never shared with them. They never asked him. He was the second born, he was the senior brother. They were 7 siblings. He has two sisters. One died and the other lives in Nairobi. She is not part of this case. When the construction was being done, his father was alive. They moved into the compound in 1979. His brother made him sign a document to be an administrator and manager of his property but he was handling everything as a family. He did not have any document to show this. In their Indian family, the elder brother handles the business of the family. They never argued about the defendant collecting rent. Everything was going smoothly. He signed the will as a witness. It does not mention any property. He did not raise any objection when respondent applied for letters of administration. In 2019, the defendant attempted to lock his house. He reported



to the police and they refused to open. He slept outside and the next day the police broke the padlock. The attempted eviction was done while suit is still pending in court. Construction was being done through the family company which is under receivership. He has not brought any documents to show the family company is under receivership. The documents on page 102 are receipts of water bills, page 59 and 56 are showing the bills that were being received by the company. His other brothers left the houses following the harassment. No. 7 comes on and off but the others are not allowed in the compound.

15. PW2- Mahendrakumar Ramji Ladha testified that he is the 4th Applicant. He adopted his witness statement dated 5/05/2022 as his evidence.
16. In cross-examination, it was his testimony that at paragraph 4, he stated that the suit property was registered in the name of his late brother Gopal Ramji. He confirmed that he had no document to prove that it was in the name of Gopal Ramji & others. The company had Gopal Ramji and Mavji Ramji as the directors. The company is closed down and is under receivership. He knows prime aluminum but does not know the directors. At paragraph 10, PW2 talks about contributions and dividends but he has no idea of the statements. There were no dividends. The developments of the company came from directors. He stated that he occupies house no. 8. When his parents were alive, they all stayed together in that house with Gopal Ramji. At page 17 of his statement, he stated that they lived in the house which was later sold by his late mother. Currently, he lives in a rented house. He vacated house no. 8 about 7 years ago. He left due to harassment. He was not living there in peace. They discussed with his brother about the property but there is nothing in writing. At page 8, paragraph 44, he states that the defendant's husband held the property in trust but there is no document to show. He had no idea about that. After his brother passed on, the role of the head of the family was not taken by anybody. He never paid rent between the time his mother died and his brother Gopal Ramji died. He moved out about 7 years ago when harassment started. According to his culture, the next of kin is the eldest brother to make decisions.
17. In re-examination, he testified that he had the keys of house no 8. He left because he was being harassed.
18. PW-3 Kasobji Ramji Patel testified that he is the fourth son and the 3rd Applicant herein. He adopted his witness statement dated 5/05/2022 as his evidence.
19. In cross examination, it was his testimony that he was in court claiming a particular Maisonette. For him, he is claiming house no. 4. Before he moved to no. 4, all the brothers were staying together but he cannot remember the number. At paragraph 4 of his statement, he contended that the property was held in trust for the entire family. He is not aware that there is a title showing that there is a title only in his name because all construction and drawings show Gopal Ramji and others. At page 6 of the defendant's documents, the document shows the name as that of Gopal Ramji only at entry no. 2. At paragraph 5, he stated that the culture and again it depends on the parents because technically it is the first born. Whatever they earned jointly they did not keep any collection. They passed to their brother. He never had his own company. The companies he mentions at page 3, paragraph 11, the directors for the first company was Gopal Ramji Ladha Patel and Mavji and for the second company, he did not recall. Ramji Ladha is his father. The late Ramji was earning a salary but records are not produced in court. The property was transferred to his brother in 1977 but he never looked at the title. RLCO and the earlier company are not operating. He added that he knew Prime Aluminum. The directors are Devendra Ladha and Harji Ramji Patel and he became a director two years ago. He testified that he is not aware about the succession of his brother's estate and he is not aware his brother left a will. He left Maisonette 4 where he stays at Taarifa Gardens, a property he bought. The 1st plaintiff also stays at Taarifa Gardens which is her house which she bought. He left the house about 10 years ago.



20. His late brother was 7 years his senior. In 1977, his late brother was 29 years and PW3 was 22. When he moved from River road to Parklands, there were two houses, three brothers stayed in one house. At paragraph 8 of his statement, he testified that they stayed all together in one house, no. 8, including Harji Ramji, Gopal Ramji Ladha Patel stayed in house no. 3. In house no. 8, there was no extra room. No. 3 never showed that Gopal Ramji Ladha Patel was the owner of the property. He has not seen the will. He added that he owns the house at Taarifa Gardens. Prime Aluminum paid for 3 houses. One house by Ramji Mavji, the second house by Harji Ramji and the third house for Kasobji Ramji. All these were from Prime Aluminum and Prime Aluminum was not involved in the Parklands Property. Gopal Ramji Ladha Patel was not part of Prime Aluminum. He had properties in Muthaiga, Muthithi road and in Ngara. All were owned by family. There was no personal income and shares in Maasai Mara lodge. There were no properties outside Kenya. He never paid rent when he stayed in Parklands. He moved to house no. 7 through his mother's permission. He moved to house no. 4. He testified that they never argued on ownership with his brother. This became an issue when he passed on. They had an excellent relationship.
21. In re-examination, he testified that entry no. 2 at page 6 of the defendant's bundle was done on 1/11/1997. On the 2nd page, the date is 10/02/1995. He was still living on the property because he moved there in 1978/1979.
22. PW4- Pramila Ramji Ladha testified that she is the late Ramji's wife. She adopted her witness statement dated 12/05/2022 as her evidence and documents as exhibits in court. She testified that Paragraph 5 shows that she has only lived in that property together with Taarifa House. That she moved out in 2015 after her husband passed away. She lived in maisonette no. 7. She has produced a letter, evidence no.4 dated 1/09/2021. She has also produced a photograph for the walls and padlocks, exhibit no. 3. There was a letter written to Advocate Macharia Njeru.
23. In cross-examination, she testified that she moved out in 2015. She keeps on going in and out. She has the keys to the house and her things are in the house. The defendant is her sister in law. She got married in 1972. Her mother in law and father in law were there when she took residence of the house. Rent was never demanded from her by her sister in law or brother in law Gopal Ramji Ladha Patel. She testified that she got married in 1972, by that time the defendant was married. She moved in and found the house completed around 1978. She was not aware regarding developments of the house. She added that she is in court because she wants to stay there. She left maisonette no. 7 in 2015 after her operation.
24. Paragraph 5 of her witness statement states that house no. 7 has been her house and she has no other home or property but that is not correct. She has another house at Taarifa Gardens. The respondent is the registered owner of the property where maisonette no. 7 is. She added that she signed the statement but from what she saw then on paragraph 7 of her witness statement is not correct. He cannot tell who was controlling the resources of the property with regard to Paragraph 11 of her statement. At paragraph 13, she stated that the maisonette was given to her late husband by his mother. The letter dated 8/06/2009 which she has produced as exhibit no. 5 was written by her late husband. She got it from the file. It mentions three properties, parklands 5th avenue in the name of Gopal Ramji Ladha Patel & others. Her husband never told her in whose name the property was registered. Paragraph 3 is about a letter by Gopal Ramji Ladha Patel agreeing to transfer the property to the wives of the brothers. The second property is along Limuru Road. She is not aware of it. The last one is for Taarifa Gardens. Three brothers, Mavji Ramji, Harji Ramji and Kasobji Ramji. So she has another property at Taarifa Gardens.
25. In re-examination, she testified that as at paragraph 7, the only home she knows is the maisonette no. 7. Taarifa Gardens is an investment. The respondent claims to be the owner of the suit property. She



is not the landlord. At paragraph 11, she has explained it because of the Hindu culture. Gifted means it is understood that the children are given. Mahendra is the youngest of the brothers and he has to stay in the home. The letter dated 8/06/2009 talks about the property that was to be transferred to the five wives. She does not know about any other properties. Her husband was writing on behalf of her family. All brothers.

26. With that evidence, the Applicants closed their case.

Respondent's case

27. The Respondent's case is that her late husband, Gopal Ramji Ladha Patel acquired L.R. No. 209/45/6 in his sole name and to the exclusion of anyone following the registration of the transfer on or about 1/11/1997.
28. She confirmed that she is aware that the Deceased developed Maisonette Numbers 4, 5, 7 & 8 erected on L.R. No. 209/45/6 on his own and did not seek the assistance of the Applicants.
29. Further to the foregoing, she contended that if there was any agreement to the effect that the Deceased was to hold the said properties in trust for the Applicants (which is denied), then the same ought to have been reduced into a duly stamped trust instrument.
30. She believes that her husband, Gopal Ramji Ladha Patel (now Deceased) allowed the Applicants to occupy the said premises out of love and affection with no intention of conferring beneficial and/or proprietary interest on them. That in the absence of a trust instrument, and given that the Deceased was the sole registered proprietor of the suit premises to the exclusion of anyone, no trust can be implied thus the Applicants' continuous occupation of the suit premises is illegal.
31. Prior to the demise of her late husband, he executed a Will wherein he bequeaths unto her all of his movable and immovable properties (L.R. No. 209/45/6 included) for her own benefit absolutely with no regard to either of the Applicants. That the Deceased only appointed the 2nd and 4th Applicants to be his executors.
32. Further to the foregoing, she used the said Will to apply for Letters of Administration and a Certificate of Confirmation of Grant was issued thereafter. At all material times, the Applicants did not raise any objection to the confirmation of the said Grant in her name neither did they claim any interest in the Deceased properties.
33. It is the Respondent's contention that L.R. No. 209/45/6 where the suit premises are developed, has been the subject of Nairobi (Milimani) HCC No. 352 of 2009 and Nairobi CACA No. 213 of 2009 (UR 146/2009), which cases she has solely involved herself in with a view to protecting the said property from being sold. That that if the Applicants had an interest in the suit premises as alleged, then they ought to have applied to Court to be enjoined as interested parties to the said cases.
34. She avers that the Applicants' claim for adverse possession falls short of the conditions to sustain the same thus it cannot stand. That the Applicants have rushed to this Honourable Court to defeat the proprietary interest of the Estate of the Deceased in the suit premises without any beneficial interest and/or valid claim to the suit premises.
35. She contends that the Estate of the Deceased has been solely meeting the costs of land rent and land rates imposed on the suit premises thus the Applicants' continuous stay on the suit premises has been detrimental to the Estate.
36. Lastly, it was the Respondent's case that the Estate of the Deceased would be deprived of its rightful properties if the Applicants' claim is allowed thus leading to a miscarriage of justice.



Respondent's Evidence

37. DW1 - Purbai Gopal Ramji adopted her witness statement dated 29/09/2020 as her evidence in chief. She testified that the second paragraph should read 1/11/1977 and not 1997. She produced a list of documents from page 6-194 as her exhibits. She testified that the 4th plaintiff stated that he vacated from house no. 8 due to constant harassment but she denies having harassed anybody to vacate the house.
38. In cross examination, it was her testimony that she got married to her husband Gopal at the age of 11 and the brother together with the parents were living in the city center. They moved from town to parklands in 1979. February. When she went to Parklands, she occupied a house with the family. Her mother in law instructed her to shift houses in 1981 with her husband and children. She was allocated a house by her mother in law. Her husband allocated his brothers their houses. Mahendra continued to stay in the first house when she shifted. He has stayed there all along. Harji was allocated the house by her husband. He allocated the houses as the elder of the family. Her father in law passed away in March 1979 and by then they were in Parklands. Her husband was in charge of the family even when her father in law was alive. Her mother in law passed away in 1987. Mahendra was living with her. Kasobji was occupying a house although she contended that she didn't recall the number.
39. It is her case that her husband built the house and when they were ready, he allocated them to each brother. She did not know the terms of allocation. She confirmed that none of her brothers had paid rent to her. They paid the utility bills but service charge was paid by her husband. There are 8 maisonettes and two flats. Her brothers in law occupy 4 of them. Her husband used to run the other maisonettes and flats for income. The income was used to pay for service charge. She confirms that she still gets rent from one maisonette and two flats. That they lived together until 2010 when the family frictions cropped up. This started when her husband died in March 2004. The problem is that there were documents in Mahendra's name which she refused to sign. The document stated that all the property was to be transferred in the name of Mahendra so she refused to sign. She stated that her husband left a will as seen on page 8-10. The executors were the 2nd and 4th plaintiffs. The documents she refused to sign were because she was told they were not for the executor but for transfer to the 2nd and 4th plaintiff. She was not told that the executors had to transfer the property to themselves first then to the beneficiaries. The property LR no. 209/45/6 is not mentioned in the Will. Page 12 has a certificate of confirmation of grant. It does not mention any property and it was issued on 22/03/2006. From that date, she has not transferred the property to herself because there were some signatures forged for some property. The documents are with the lawyer of Mahendra and the person they wanted to transfer it to. The grant has not been registered with Registrar of Lands. She has not used it to transfer any property. She did not use it for the property that was in Muthaiga nor the property in India. She confirmed that the title to the suit property was issued on 10/02/1995 from the information on record at page 7. From page 29-37 there are documents from income tax in the name of Patel Purbai Gopal Ramji but some are in the name of Patel Mavji Ramji and the reason is that sometimes it was her eldest daughter or her brother in law when she lost her husband. Her husband and the 1st Plaintiff Mavji Ramji were Kenyan citizens. Her father in law held a British citizenship. She was not aware that the 1st plaintiff held the suit property on behalf of the brothers because they had not Kenyan citizenship. She added that her daughter handles the income tax. She testified that she attached photos of the house and that they are not in her possession. She is control of the gate, however, the houses are locked. The houses have extra padlocks and chain to enhance security and ensure that the things are safe. She instructed her son in law. The houses were opened by intervention of Parklands Police station. She installed CCTV for security reasons when she travelled to India. The CCTV is at the gate and there are the dogs installed



for her own security, the dogs had been abandoned by neighbors so she took them in. they are always in their kennel near her brother in law's house.

40. She confirmed that she instructed her son in law to lock the gates with padlocks for security. Mr. Yogesh is her son in law. He never did anything wrong. This problem all started when the house of Kasobji, 3rd applicant was vacant and she requested to have the keys to rent out the house but this was rejected and she gave instructions to her son in law to lock the house because the uncle went to the police and told them that he was being harassed. Her son in law is in the picture to assist. The houses are not required because the occupants did not repair them. She has never refused them to touch any repair work. Her brother in laws never tried to deal with the issue of the loan at the bank. They have never talked to her. She did not know how much the bank loan balance was. She is not aware that they wanted to help her with the loan. It is not true that she got them chased away because they refused to buy her a house elsewhere.
41. Further, she testified that she saves animals every other day. She used to have a parrot and now she has two dogs which she has put in a kennel next to the other house. It is not near Mahendra's house. The compound has 8 maisonettes and two flats. The design of all maisonettes is the same. Each has different bedrooms. The houses are all the same size but each individual improved it. When she moved from town, she moved to house number 8. The house in town belonged to them because they all lived under one roof and when they moved they all moved to parklands house number 8 and 9. Nobody decided that Mavji and Kasobji should take up house no. 7. It is her husband who gave them the house. Then she together with her family and her father in law moved to house no. 8. Later, her father in law instructed her to move from house number 8 to number 6 when the children grew up. The relationship between her father in law and his sons was okay. The father in law wanted all the sons to stay together amicably. However, as any family there were internal problems.
42. In her statement, she speaks about love and affection being the force behind this. Gopal wanted his brothers to stay together but the love and affection started being a problem in 2010. In 2007, the tension started when she could not sign the court documents that her brother in law sent to her. Her husband died in 2004. She is the one who has sworn the affidavit dated 12/11/2004. Mr. Mahendra Ramji and Harji Ramji Patel were not executors of her husband's estate but she is aware of the will. She confirms that they are executors of the will but all she is aware of is that her husband confirmed that all the properties were to be in her name only. The 2nd and 4th plaintiff would be executors not beneficiaries. When her husband writing all documents, they had a sick son and her husband did not handle most of the issues including when the auctioneer came to the house. She is not aware of anything except what the four brothers have done. She did not know where the document Mavji Ramji wanted her to sign are. She has not mentioned them in her pleadings. Civil Appeal No. 213 of 2009 is the case she has been handling alone. She has never gone for any assistance from them. She went to seek help and her brothers in law demanded money and they wanted her to contribute to redeem the property. The brothers wanted money and she refused. She has not instituted any claim for forgery or fraud. Her husband asked her brother-in-law to move out, but she has no document to show this action in court.
43. In re-examination, she testified that she saw the will after her husband passed away. Somewhere in 2004. That is when she got to know of the two brothers in law being executors. Her husband was in financial need and he went for assistance to them to move out to allow him to rent it out. This was around 2002-2003. Her husband and his siblings used to have problems. She is in control of two maisonettes and two flats. She did not know how much rent the properties are drawing as her daughter is the one managing them. Her brothers in law have never approached her for repair of the properties. She reiterated that she put the dogs for security purposes and not so that her brothers in law don't come to the house. There are two tenants on the property and they are not affected by the dogs. The 2nd



- plaintiff is staying on the property too. The dog has not interfered with him. She has involved Yogesh in the property because the only son passed away and so he is the eldest son. She asked him to assist in running affairs of the property. She never went to ask her in law for help concerning the case because before her husband died, he instructed her not to seek help from in laws. All of the four brothers were asking for money from her including their lawyer one Mr. Lalji.
44. DW2- Sangeeta Gopal Ramji Patel testified that she takes care of her mother. She lives on 5th parklands avenue LR No. 209/45/6. She adopted her witness statement dated 22/04/2022 as her evidence before this court. She proceeded to state that paragraph 9, she had written that the late Mavji's wife left in 2015 but it is 2018 and Mahendra the 4th Plaintiff left in 2017 not 2018 as she indicated.
45. In cross-examination, she contended that her mother testified but she left when the advocate sent someone to tell her to leave so she left. She is the second born of the defendant. When she was born, the family resided in town. She was 4 years old. They moved when she was 4 years and she could not know what was happening. She did not know how the movement was planned nor how the houses were shared. At the age of 6, she knew they were residing in house no. 8. They lived there with Gopal, Harji (2nd plaintiff) and his wife, Mahendra (4th plaintiff) and her grandparents. The other house, no. 7, was occupied by the 1st plaintiff and the 3rd plaintiff. Then they moved to house no. 6, that it the defendant and her family. They left the 2nd and 4th plaintiffs and her grandparent's in house no. 8. Later, they moved to the flats built in 1983, then they moved to house no. 3. Mahendra stayed in house no. 8 and Harji moved to house no. 4 and the occupants for house no. 7 stayed. The 2nd plaintiff then moved to house no. 5 and the 3rd plaintiff moved to house no. 4. The 4th plaintiff stayed in house no.8. The houses she has mentioned in court are the same houses they are claiming in court.
46. The houses are locked by the plaintiff. The defendant has no access to these houses which are still under the control of the plaintiffs. There were dogs introduced in the compound and their kennels were built and placed against the wall near house no. 4. Her uncles and her dad used to have meetings but she never attended any of the meetings. She would not know why they moved from town to stay in the same businesses. Her uncles and her dad worked in the same business including her grandfather. She does not know if the 1st plaintiff was a citizen. The 2nd and 4th plaintiffs were not citizens then. She confirmed that the property was in her father's name since he was a citizen. They requested the 1st and 4th plaintiffs to pay some money in form of rent to help them in dealing with the case they have. They never demanded rent from house no. 2, 6, flat no. 1, ground floor and 1st floor. They have four tenants and they pay rent. They even filed returns. They have also declared returns to the government. They have not declared income for house occupied by the plaintiffs. The property is not registered in her mum's name. Probate was done and confirmed. They did not present the grant documents for registration because they do not have the land registration documents. According to the will, the 2nd and 4th plaintiffs were to be executors. Instead, her mother applied to be the administrator. She has seen the plans of the property and the plan approved was for Gopal Patel and others and this could be anybody. There is nobody else who has come claiming to be part of the property except her uncles who are the plaintiffs.
47. She testified that she keeps the accounts of the rent they collect. Before her father passed on, the rent they received was used to maintain services including taxes paid. Her amending paragraph 9 on the dates is to show that the 1st and 4th plaintiffs have not been staying at the house since 2017 and 2018 respectively. Yogesh is her brother in law. He has on occasions been summoned to parklands police station for disturbing the 2nd plaintiff. In 2007, the 2nd plaintiff brought the police at night accusing DW2 of talking to him rudely. There was a time he was blocked from his house and he could not access his medicine. They put the chains on the houses with Yogesh and when police intervened, they removed



the chains. The plaintiffs did not have things in the house. It was only Mavji who had medicine in the house, this was in 2017-2018 and this matter was in court. As at the time of filing the suit, all plaintiff were in their houses. So they moved out since they were not in talking terms. They never put CCTV cameras facing their doors neither are the dogs in front of their houses. Her uncles participated in all ceremonies including her sister's wedding. Yogesh did not know her uncles before marrying her sister. The plaintiffs were not part of the source of funds to develop the suit property. By the time they moved to parklands, the houses were constructed. They were constructed when she was young. She asked her dad about the information.

48. DW2 testified that her dad started his own business. He was kind, considerate and humble. He was a good natured man and he taught her to be the same. He treated his brothers in a good natured way. In 1998, the trust was broken when the 1st plaintiff and the 4th plaintiff forged her dad's signature. All the uncles, themselves and the grandparents moved to House no. 8. The 1st plaintiff and the 3rd plaintiff moved to House. No. 7. The other uncles moved in as the houses got completed. Her father died on 23/03/2004. At the time of his death, his relationship with his brothers was bad. The trust was broken. The will was done in 2003. The witnesses to the will were the 2nd plaintiff and the 4th plaintiff. Though the trust was broken, he still allowed them to witness his will. The will refers to all movable and immovable assets which were left to the use of her mother. Her father asked them to pay rent in her mother's presence. He even told them to move out verbally. All of them were independent. Three of her sisters are married. They married in 1993, 1998 and 2007 to their spouses. Her uncles attended the ceremonies. They attended the wedding sessions only as elders. They asked for rent for extra funds though she did not put this in the statement. They never gave them the monies. The property was charged to the bank and her mother is fighting the case alone. In 2021, she wrote a letter seeking to have the 1st plaintiff's wife leave the house when the case was abated. It was the lawyer's advice that informed her to write the letter. At paragraph 10, she states that they have not harassed the widow of the 1st plaintiff. She moved out on her own. She did not know when they last spoke but she moved out on her own. She sold her household goods and moved to stay with her son. They never harassed her. It was her choice to stay or not to stay. They brought dogs in for compassion and security. They gazette the letter of administration application for 21 days. No one challenged it. She did not know why they did not challenge the advert. They were not good people. The brothers opened a company in 2003 and never asked anything from her dad and they never asked anything from them. DW2 was 30 years old when her father passed on.
49. In re-examination, it was her testimony that the dogs were brought into the compound out of sympathy since they were being kicked out but also for security. She reiterated that they are near the 4th plaintiff's house. They do not interfere with anyone. The wall was built so that the 1st and 4th plaintiffs do not throw dirty water on their house compound. The doors were chained and locked for security reasons. Yogesh is her brother in law and he is accused of harassing the 2nd plaintiff. He has never been charged in a court of law. At page 183 of the defendant's bundle, there is a document/letter dated 16/09/2019. At paragraph 2, the DPP states that the offence of creating disturbance was not proven. She testified that her mother is not able to register the property in her name because the title is with Kingdom Bank. There was a loan taken on behalf of her dad in 1998. Her dad was not aware of it. They do not have the documents because there is a case going on with the bank. Her mother applied for administration letter because 10 months after her dad had passed on, her uncles had not done anything to bring out the content of the will. The will has never been challenged by her uncles. The suit property is part of the will though not indicated in the will. It specifically states all immovable and movable properties.
50. With that evidence, the Respondent closed her case.



Written Submissions

51. The Court gave directions on filing of written submissions on 1/11/2022 which they did and I have considered them. The 2nd, 3rd and 4th Applicants filed their submissions dated 21/12/2022 on 22/12/2022, the 1st Applicant filed his submissions dated 31/01/2023 on 28/02/2023 and the Respondent filed her submissions dated 30/01/2023 on the even date.

Issues for determination.

52. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the plaintiffs and the authorities cited. The issue for determination is: -
- a. Whether the Applicants have proved that the Respondent is the registered proprietor of land parcel number LR No. 209/45/6?
 - b. Whether Gopal Ramji Ladha Patel (now deceased) held land parcel number LR No. 209/45/6 in trust for the Applicants.
 - c. Whether or not the Applicants have established ownership by way of adverse possession?

Analysis

Whether the Applicants have established that the Respondent is the registered proprietor of land parcel number LR No. 209/45/6?

53. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

54. Section 26 (1) of the [Land Registration Act](#) 2012 states as follows:

“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, unprocedurally or through a corrupt scheme.”

55. The law is clear and the courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and conclusive evidence of proprietorship to land and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



56. I have perused the records before me and it is my finding that Gopal Ramji Ladha Patel (now deceased) is the registered proprietor of the suit property as per Certificate of Title issued on 1/11/1977. DW1 testified that the suit property belonged to her husband and that when he passed on, he bequeathed unto her all his movable and immovable property whatsoever and wherever situated for her own benefit through a Will dated 4/07/2003. The Respondent's husband died on 23/03/2004. The Respondent was issued with a Certificate of Confirmation of Grant on 22/03/2006. DW1, who is the Respondent herein has testified that she has not transferred the suit property to herself. The Applicants' witnesses also confirmed that the property is still registered under the name of Gopal Ramji Ladha Patel (now deceased).
57. In light of the above, the Court finds and hold that the Respondent is not the registered proprietor of the suit property known as LR No. 209/45/6.

Whether Gopal Ramji Ladha Patel (now deceased) held land parcel number LR No. 209/45/6 in trust for the Applicants.

58. According to the Black's Law Dictionary, 9th Edition; a trust is defined as:
- “ 1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”
59. Under the *Trustee Act*, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”
60. It is common ground that the Applicants and the deceased are brothers. It is common ground that the family used to live together at the city center, where they all lived under one roof and they all moved to Parklands in 1979 and that the family all occupied house number 8 and 9. That there were two house and three (3) brothers lived in one house. That the deceased later allocated each of the brothers a house in the compound. It was also brought out that the houses are all the same size. I note that the drawings adduce do indeed read that they were for Gopal Ramji and others. I disagree that the term ‘other’ could mean anybody else in this context as has been submitted by the Respondent's learned counsel, as the drawings were particularly for LR No. 209/45/6. It is also common ground that the Applicants never paid rent to the Gopal Ramji (now deceased). They only took care of the utility bills for the houses they occupied.
61. Conversely, it was the Applicants allegation that the property in issues was bought by the brothers as a family in 1977. That after buying the same, the Applicants together with Gopal Ramji (now deceased) developed the maisonettes thereon and agreed that it be registered in the deceased's name and to hold for them in trust. It is their case that the construction was commenced using family funds from the family companies. That all the brothers were running a company called RLCO Steel Fabricators and Ramji Ladha & Co. Ltd. DW1 testified that she was not aware that the 1st Applicant held the suit property on behalf of the brothers because they had not obtained Kenyan citizenship. The Applicants did admit that they never produced any evidence to demonstrate the said allegations. They did not demonstrate that the property was bought by the brothers by producing a sale agreement. They did not produce a CR12 of the companies showing the Applicants/the brothers were directors of the alleged companies. I opine that information on directorship and/or shareholding can be found/demonstrated even though a company is no longer operational, dissolved or under receivership.
62. Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws



of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiaries. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises is yet to be transferred to the Respondent. Therefore, there is no unjust enrichment to be forestalled.

63. This leaves us with resulting trusts. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra). As earlier stated, it is not in doubt that Gopal Ramji Ladha Patel (now deceased) is the registered owner of property known as LR No. 209/45/6. There was no evidence before this Court of the Respondent's husband's intention. By applying the definition of trust earlier stated, it is the Respondent's husband who became the settlor and the Applicants the beneficiaries. As established herein above, the Applicants together with their parents, the deceased and his family all moved from one house in the city center to the two houses in Parklands and lived together since 1979 even after the Respondent's husband passed on. It has also been confirmed that the Applicants never paid rent since they moved into the property known as LR No. 209/45/6. However, it was alleged that the property was purchased by the brother through the family companies which are allegedly no longer operational. They did not demonstrate that the property was purchased by the brothers by producing a sale agreement or a board resolution authorizing the purchase of the suit property. They did not produce a CR12 of the companies showing the Applicants/the brothers were directors of the alleged companies. The Court has looked at the circumstances of this present case and the circumstances have not established that the deceased intended to confer a beneficial interest upon the Applicants herein.
64. In view of the foregoing, I find and hold that Gopal Ramji Ladha Patel (now deceased) did not hold land parcel number LR No. 209/45/6 in trust for the Applicants.

Whether or not the Applicants have established ownership by way of adverse possession.

65. For a party to succeed in summons for Adverse Possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an Adverse Possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in Court evidence to prove that the suit land where he/she is claiming Adverse Possession indeed belongs to the Defendant.



66. It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. In the case of *Mwinyi Hamisi Ali and AG & Anor CA No 125 of 1997*, the Court held that:
- “Adverse Possession can only be claimed against a properly registered owner that is to say the possession must be adverse to that of the Registered proprietor.”
67. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*.
68. In the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR*, the Court of Appeal held that:
- “At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.”
69. This principle is also articulated in the case of *Littledale v Liverpool College (1900)1 Ch.19, 21*, where Lord Lindley MR said:
- ‘In order to acquire by the 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.’
70. Section 38 of the Limitations of Actions Act provides that:
- “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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 proprietor of the land.” [Emphasis mine].
71. This Court is guided by the authorities listed above. It is clear that the Applicants are to institute a claim against a registered owner of the suit property. As stated somewhere in this Judgment, the Court found the registered owner of the suit property is Gopal Ramji Ladha Patel (now deceased). The Respondent herein is a beneficiary of the Estate of the late Gopal Ramji Ladha Patel. She has been granted letters of administration. The same were confirmed on 22/03/2006. This is within the knowledge of the Applicants. The Respondent was not made a party to this suit as a legal representative but in her own capacity as the wife of Gopal Ramji Ladha Patel (now deceased) because she was bequeathed upon all the deceased’s movable and immovable property. She also confirmed that she had not transferred the suit property to herself. The Applicants also confirmed that they were aware that the Respondent had not transferred the suit property to herself. The claim for adverse possession is therefore misconceived.



72. Equally, in *Kasuve Vs Mwaani Investments Limited & Others* 1KLR, the Court of Appeal stated that a claim for Adverse Possession has to prove as follows:

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation by the owner of his volition.”

73. A perusal of the record demonstrates that both the Applicants and the Respondent have been in occupation of the suit property since 1979 and continued to be in occupation long after the registered owner passed on. It is evident that that the Applicants were invited to move into the suit property as established by the testimonies given before this Court.

74. In the case of *Joseph Kamau Gichuki (Suing as the Administrator of the Estate of Gichuki Chegeg(Deceased) vs James Gatheru Mukora & Another* [2019] eKLR the court held that:

“Under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, death of a registered owner of land does not stop time from running for the purposes of adverse possession.”

75. Further, it is trite that a claim for Adverse Possession can be urged against the estate of a deceased person, I rely on the case of *Titus Kigoro Munyi v. Peter Mburu Kimani* (2015) eKLR where it was observed:

“It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors. (See *Peter Thuo Kairu – v- Kuria Gacheru*, (1988) 2 KLR 111).”

76. I also I adopt the decision in *Karuntimi Raiji v. M’Makinya M’itunga* (2013) eKLR where the Court of Appeal observed: -

“...Another issue raised by the appellant is that a claim for Adverse Possession does not survive a deceased person. Section 30 (f) of the Registered Lands Act and Section 2 of the *Law Reform Act* provide an answer to the issue. Section 30 provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

- a.;
- b.;
- c.;
- d.;
- e.;
- f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Section 30 (f) preserves rights being acquired by virtue of limitation of actions.....



Section 2 (1) of the Law Reform Act stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of, his estate. The proviso to the sub-section indicates the causes of action that do not survive

77. Adverse possession is not one of the causes of action that do not survive the deceased against whose title to land it lay.
78. It is clear from the foregoing provisions of the law and case law that a claim for Adverse Possession can be urged against the estate of a deceased person. Section 30(f) of the Registered Land Act (repealed) is similar to section 28 (h) Land Registration Act currently applicable, but it is clear that the Applicants' occupation does not meet the threshold of ownership by way of adverse possession. They did not claim against the Estate of the registered owner. It is also trite law that an adverse possessor must prove that his act of possession was not as result of permission or license given to him by the owner. The Applicants did not establish that their occupation was without the true owner's permission and lastly it is evident that they dispossess the rightful owner; ".....not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land" (See Chevron (K) Ltd (supra)).
79. It is against the background of decided case law and the evidence adduced in affidavits that the Court finds and holds that the essential elements of adverse possession have not been proved and therefore the claim must fail. It is my finding that the Applicants have not proved their case on a balance of probabilities.

Costs

80. On the issue of costs, costs normally follow the events, and the successful party is always awarded costs. The Respondent herein is the successful party and the Court finds no reasons not to exercise its discretion in her favour.

Disposal orders

81. Having now carefully considered the available evidence and the rival written submissions, it is the court's finding that the Applicants have not satisfied the criteria for acquisition of title under the doctrine of adverse possession and the claim for entitlement to title by way of adverse possession should fail. Furthermore, the Court also finds and holds that that Gopal Ramji Ladha Patel (now deceased) did not hold land parcel number LR No. 209/45/6 in trust for the Applicants.
82. The Applicants' claim of title under the doctrine of adverse possession and trust therefore wholly fails and the suit is dismissed for lack of merit. I award costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY MARCH 2023.

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MOGENI J

JUDGE

In the virtual presence of: -

Mr Mbaabu for the 2nd & 4th Plaintiffs



Mr Okalo for the 1st Plaintiff

Mr Odoyo for the Defendant

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

