



Loice Nandako Mola v Joram Kakai Ambale (Environmental and Land Originating Summons E009 of 2021) [2022] KEELC 3766 (KLR) (4 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3766 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2021
BN OLAO, J
JULY 4, 2022
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22, 7,
17 AND ORDER 37 CIVIL PROCEDURE RULES
AND
IN THE MATTER OF THE LAND PARCEL LR. NO. EAST
BUKUSU/NORTH SANG'ALO/840

BETWEEN

LOICE NANDAKO MOLA PLAINTIFF

AND

JORAM KAKAI AMBALE DEFENDANT

JUDGMENT

1. Loice Nandako Mola (the plaintiff) moved to this Court vide her Originating Summons filed on 4th August 2021 seeking a determination of the following questions with respect to the land parcel No East Bukusu/north Sang'alo/840 (the suit land) which measures approximately 4.0 acres and is registered in the names of Joram Kakai Ambale (the defendant). These are: -
 1. That the plaintiff be declared as the owner of a piece of land measuring approximately 4.0 acres known as East Bukusu/ North Sang'alo/840 which she has been in adverse possession of having occupied the same for over 30 years.
 2. That an order that the plaintiff herein has become entitled to be registered as the owner of a parcel of land measuring approximately 4.0 acres known as land parcel No East Bukusu/north Sang'alo/840 by operation of the law viz Sections 7, 17 and 38 of the *Limitation of Actions Act*.



3. That the defendant's names to the said parcel of land be removed and cancelled on the 4.0 acres of the said land parcel No East Bukusu/ North Sang'alo/840 and be replaced with the name of the plaintiff.
 4. That a declaration that the change of ownership from the name of Alphas Ambale Likhulu to the defendant in the year 2016 did not effect the plaintiff's rights to the land parcel No East Bukusu /north Sang'alo/840.
 5. That in the alternative and without prejudice to the averments 1, 2, 3, 4 and 5 (questions to be determined) a declaration that the defendant holds the title of land measuring 4.0 acres known as land parcel No East Bukusu/north Sang'alo/840 in trust for the benefit of the plaintiff.
 6. That costs of this Originating Summons be borne by the defendant.
2. The Originating Summons is predicated on the grounds set out therein and supported by the plaintiff's affidavit dated 14th June 2021 and the annexures thereto.
- (3) The plaintiff also filed a witness statement dated 22nd December 2021 and the following documents in support of her case: -
1. Land sale agreement dated 19th September 1986.
 2. Certificate of Official Search for land parcel No East Bukusu/ North Sang'alo/840.
 3. Photographs.
 4. Petition and answer to Petition in Divorce Case No 3 of 1988 Alpheaus Lihungu Ambale .v. Damary Mugalavai Ambale.
 5. Marriage Agreement dated 13th August 1958 between Alpheaus Lihungu Ambale And Loice Nandako Mola.
 6. Death Certificate for Alpheaus Lihungu Ambale.
 7. Decree Nisi in Divorce Case No. 6 of 1985 SRM'S Court Bungoma – Loice Nandako .v. Zablou Maruti Mola.
 8. Affidavit of Marriage dated 27th June 1988 between Alpheaus Lihungu Ambale And Loice Nandako Ambale.

Document No 8 does not appear in the list of documents dated 22nd December 2021 but is among the documents filed.

The plaintiff also filed statements of her following witnesses: -

1. Simon Nakiboli Mabonga (PW 2)
 2. Shadrack Wabomba Kibaba (PW 3)
 3. John Manyonge Kibaba (PW 4)
- (4) The fulcrum of the plaintiff's case is that in the year 1986, she married Alpheaus Ambale Lihungu (the deceased) who was then an Inspector of Schools in the Ministry of Education while she was the Principal Khachonge Girls Secondary School. They lived in Bungoma though both of them had previously been in other marriages and they agreed to live with all their children.
- (5) That they jointly purchased the suit land at a consideration of Kshs. 40,000/= which they contributed equally although it was registered in the names of the deceased. They developed the land by putting



- up a house thereon in 1986 although the deceased died in 1991 before it was completed. She took care of the 4 children being 3 boys and 1 girl. The deceased was buried at his other home in Ingavila South Kabras Within Kakamega County where the children moved and joined their mother and they never returned to the suit land.
- (6) In 2016, the defendant requested her to give him the title deed to the suit land for purposes of processing a title deed for her. She later discovered that the defendant had transferred the title into his own names.
 - (7) That she was neither informed and neither did she participate in the succession proceedings relating to the Estate of the deceased. Instead, she was treated like a stranger by the deceased's first family. She has remained in exclusive possession of the suit land openly, quietly, peacefully and un – interrupted for over 30 years having extensively developed it by constructing buildings thereon and also cultivating it.
 - (8) She therefore seeks an order that she be registered as the proprietor of the suit land in place of the defendant whose title has now been extinguished.
 - (9) Simon Nakiboli Mabonga (PW 2) recorded a statement also dated 22nd December 2021. He states that the plaintiff who is his niece has been living on the suit land openly, peacefully, continuously and un-interrupted since 1986. That she has extensively developed it by constructing permanent houses where she lives and also plants crops. That in 1988 he was present when the deceased and his clan paid dowry for the plaintiff including two cows which he personally delivered to one Elam Kibaba the plaintiff's father.
 - [10] Shadrack Wabomba Kibaba (PW 3) also states in his statement dated 22nd December 2021 that the plaintiff who is her sister contracted a customary marriage with the deceased in 1986. She was then the Principal of Kachonge Secondary School while the deceased was an Inspector of Schools in Bungoma.
 - (11) That the plaintiff and deceased purchased the suit land where they constructed residential houses where the plaintiff has been living peacefully, continuously, openly and un – interrupted and when the deceased died, on 3rd October 1991, he was buried at Ingavila In Kakamega County although the two were still living as man and wife and had not divorced. That following the demise of the deceased, the defendant who is his son commenced succession proceedings to which the plaintiff was not a party and transferred the suit land in his names.
 - (12) On his part, John Manyonge Kibaba (PW 4), who is also a brother to the plaintiff, recorded his statement dated 22nd December 2021 in which he confirms that he accompanied his father and other relatives to the home of the deceased where dowry discussions were held culminating in customary marriage between the plaintiff and the deceased. His father was given cash Kshs. 5,500/= and other items including cattle. The customary marriage was also reduced in writing.
 - (13) The Originating Summons was opposed and the defendant filed both a replying affidavit dated 13th August 2021 and a statement dated 12th November 2021.
 - (14) He confirms that he is the fourth child of the deceased who owned the suit land as well as other parcels of land. That the plaintiff was only a friend of the deceased who charged his other land at Chevoso to raise funds to purchase the suit land. He denied that the deceased and his first wife who is the mother to the defendant had divorced although they had their normal matrimonial problems. He however denied that the deceased and the plaintiff were married. That although the deceased had five (5) children being three (3) boys and two (2) girls, he had given the suit land to the defendant and the plaintiff was only allowed to live there as a licensee and that she only went to live there after the deceased had already



constructed the houses thereon. That he and his siblings still visit the suit land and they did not see the need of evicting her since she treated the deceased well.

(15) The defendant adds further that the succession process was done openly and the plaintiff has her own property but only wants to grab the suit land. He denied having informed the plaintiff that he needed the title deed to transfer the suit land into her names but rather, that he informed her that he needed it for purposes of transferring it into his names as per the confirmed Grant. She requested for a portion of the suit land but he told her that he would consult the family. That the plaintiff has another parcel of land neighbouring the suit land and should be comfortable with that. His title to the suit land has therefore not been extinguished.

(16) The defendant also filed statements of his two witnesses being: -

1. Damary Mugalavai Ambale (PW 2) and,
2. Nathan Luhungu Andala (DW 3)

In her statement dated 12th November 2021, Damary Mugalavai Ambale (DW 2) confirmed that she is the mother to the defendant and the widow to the deceased. She denied that there were any divorce proceedings between her and the deceased but added that due to inevitable circumstances, she lived at their Kakamega home while the deceased and the children live in Bungoma where he worked. That when the deceased died, he was buried at Kakamega. The witness states further that when her husband died, she was busy educating her children the eldest being at Kericho TTC while the last born was in class 5 and so she had no energy to fight over land.

(17) After the death of her husband, she filed succession proceedings in Kakamega High Court Succession Cause No 7 'A' of 2004 and the matter was duly gazetted and therefore the process was not clandestine. She then distributed the Estate to her three (3) sons with the defendant getting the suit land and there was no objection by the plaintiff. The plaintiff is therefore only a licensee and that license expired with the filing of this suit.

(18) Nathan Luhungu Andala (DW 3) is a younger brother of the deceased. In his statement dated 12th November 2021, he confirms that the deceased was married to Damary Mugalavai Ambale but adds that he never filed for divorce. He states that her sister in law has always lived in the homestead and that following the demise of the deceased, his children informed him that they would be filing succession proceedings.

(19) He adds that he has never seen the plaintiff and is surprised that she was married to the deceased. He also wonders why the plaintiff never attended the deceased's funeral if indeed she was his wife.

[20] The defendant filed the following documents in support of his case: -

1. Green Card for the land parcel No South Kabras/Shamberere /384 in the name of Eric Tatuli Ambale.
2. Sale agreement for the land parcel No East Bukusu/North Sang'alo/840 between the deceased as purchaser and Peter Wanjala Mbaya as Vendor dated 19th September 1986.
3. Gazette Notice for 30th July 2004.
4. Grant of letters of Administration issued to Damary Mugalavahi Ambale in respect of the Estate of Alpheaus Lihungu Ambale on 9th December 2004 in Kakamega H.C P & A No 7'A' of 2004.



5. Certificate of Confirmation of Grant issued in Kakamega H.C P & A No 7 'A' of 2004 showing that the defendant's share was the whole of the suit land.

The trial commenced and ended on 17th January 2022 when the plaintiff and her three (3) witnesses as well as the defendant and his two (2) witnesses testified. They all adopted as their testimonies their affidavits and statements contents of which I have already summarized above. They also produced their respective lists of documents as per the lists filed. Before the end of the trial, the parties by consent agreed to produce the Green Card to the suit land which the plaintiff's Counsel had inadvertently forgotten to file. It shows that the suit land was first registered in the names of one Zakayo Lipolio Mang'oli on 3rd March 1969. The deceased acquired ownership on 10th March 1987 from Peter Wanjala Mbaya and on 2nd August 2016 it was transferred to the defendant and his mother Damaris Mugalavahi Ambale.

- (21) Submissions were thereafter filed both by Mr D. Were instructed by the firm of Were & Company Advocates for the plaintiff and by Ms Muleshe instructed by the firm of Phoebe Munihi Muleshe & Company Advocates for the defendant.
- (22) I have considered the evidence by both parties as well as the submissions by Counsel.
- (23) The plaintiff's case is that although the defendant is the registered proprietor of the suit land, she is entitled to be registered as the proprietor thereof by way of adverse possession having occupied it peacefully openly, quietly and un – interrupted since 1986 when she and the deceased purchased it while living as man and wife. In the alternative, she claims that the defendant holds it in trust for her. The defendant's case is that infact the plaintiff was never married to the deceased who was his father and neither did she contribute anything towards it's purchase. That she is only a licensee on the suit land. The following are not in controversy: -
 1. The suit land is currently registered in the names of the defendant as per the Certificate of Search. The confirmed Grant confirms as much and so too did the defendant and his mother Damaris Mugalavahi Ambale. The title deed was not availed.
 2. The plaintiff is currently in occupation and possession of the suit land since 1986 to date.

As the registered proprietor of the suit land, therefore, the defendant "is the absolute and indefeasible owner" thereof subject only to the encumbrances, easements, restrictions and conditions endorsed in the title which is not subject to any challenge except as set out in Section 26 (1) of the [Land Registration Act](#). Section 25(1) of the same Act similarly provides that the rights of a proprietor are "held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject" to the leases encumbrances liabilities etc. set out in Section 25(a) and (b). Those privileges include the right to evict trespassers and terminate the licences of licensees. It is the defendant's case that the plaintiff is infact a licensee on the suit land. However, Section 25(2) of the same Act provides that: -

"Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."



Similarly, among the rights to which registered land is subject include, as provided in Section 25(b) of the same Act, the rights and overriding interests recognized by Section 28 of the same Act. Those overriding interests include under paragraph (h) of that Section: -

- (h) “rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Section 7(d) of the *Land Act* also recognizes among the methods in which title to land can be acquired as being through “prescription.”

- (24) It is therefore clear from all the above that a title to land is subject to other prescriptive rights. It is those rights that the plaintiff is pursuing in this case.
- (25) I have identified the following as the key issues for my determination in this case: -
1. Have the defendant’s rights and interest in the suit land been extinguished by operation of the law and/or is he a mere trustee holding the title thereto in trust for the plaintiff.
 2. Is the defendant’s title absolute and not liable to any of the prescriptive rights thus rendering the plaintiff a mere licensee.

Adverse Possession

It is common ground that the defendant is the proprietor of the suit land holding title thereto. The Certificate of Official Search confirms the same. However, under Section 38(1) of the *Limitation of Actions Act*, it is provided that: -

“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 proprietor of the land.”

That is the first remedy which the plaintiff seeks. In *Kasuve .v. Mwaani Investments Ltd & Others* 1 KLR 184, the Court of Appeal said: -

“And 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 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWANo 2 1984 KLR 284.”

It is not in doubt that the plaintiff has been living on the suit land since 1986. And although she claims to have contributed towards it’s purchase, this has been denied by the defendant who has testified that it was his deceased father who bought it. The sale agreement dated 19th September 1986 shows the parties to the agreement to have been the deceased and one Peter Wanjala Mbaya. That notwithstanding, adverse possession is about the occupation and possession of the land in dispute. That is a matter to be observed on the land and to – date, the plaintiff is still on the land long after the 12 years’ statutory period.



- (26) But that is not enough. In *SISTO WAMBUGU .V. KAMAU NJUGUNA C.A CIVIL APPEAL No 10 of 1982 [1983 eKLR]*, *CHESONI Ag JA* (as he then was) cited with approval the words of *LINDLEY MR* in *LITTLEDALE .V. LIVERPOOL COLLEGE [1900 1 CH 19]*:-

“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

The Court went on to cite *BRAMWEL L. J* in *LEIGH .V. JACK (1879) 5 Ex D 624* as follows:-

“Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. If this is the right way to approach the problem, the question becomes ‘has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period?’ rather than, ‘Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years? It certainly makes it easier to understand the authorities if one adopts the first formulation.”

Dispossession or discontinuation of possession by the title owner is therefore crucial in a claim of land by way of adverse possession. Further, as was held in *MWINYI HAMIS ALI .V. A – G & PHILIEMON MWAISAKA WANAKA C.A CIVIL APPEAL No 125 of 1997*, adverse possession does not apply where possession is with the consent of the owner of the land.

- (27) The plaintiff asserts that she entered the suit land as a spouse of the deceased. That relationship has been refuted by the defendant who says she was only a friend. Either way, irrespective of how she entered the suit land, she was certainly there with the consent of the deceased from 1986 until 3rd October 1991 when the deceased passed away. Therefore, between 1986 and 3rd October 1991, the plaintiff’s claim could not have been adverse to that of the deceased. Thereafter, it was not until 9th December 2004 that the defendant’s mother *DAMARY MUGALAVAH I AMBALE (DW 2)* obtained a Grant of Letters of Administration to the Estate of the deceased vide *KAKAMEGA H.C P & A CASE No 7 “A” of 2004*. This was confirmed on 31st October 2012 when the Estate was distributed and the defendant became the sole beneficiary of the suit land while his siblings *ERIC AMBALE* and *MAURICE AMBALE* were beneficiaries of two other parcels. Although *DAMARY MUGALAVAH I AMBALE (DW 2)* obtained the Grant of Letters of Administration to the Estate of the deceased, she was not sued and it was not until 2nd August 2016 that the defendant was registered as proprietor of the suit land.
- (28) Taking all the above into account, I hold the view that the claim based on adverse possession cannot be sustained for the following reasons. Firstly, as between 1986 and 3rd October 1991 when the deceased passed away, the plaintiff was on the suit land with the consent of the registered proprietor. And as is now well settled, adverse possession does not apply when the claimant is on the land with the consent of the owner – *MWINYI HAMIS ALI .V. A – G & PHILIMON MWAISAKA WANAKA (supra)*.
- (29) Secondly, between 1991 and 9th December 2004 when *DAMARY MUGALAVAH I AMBALE (DW 2)* obtained the Grant of Letters of Administration in respect of the Estate of the deceased, there was no party who could have been impleaded as representing that Estate. And although the plaintiff could have pursued a claim for the suit land by way of adverse possession against *DAMARY MUGALAVAH I AMBALE (DW 2)* from 9th December 2004 when she (*DW 2*) acquired the legal capacity to represent that Estate, the plaintiff did not do so. Instead, the plaintiff waited until 4th August 2021 to file this suit. Even then, the said *DAMARY MUGALAVAH I AMBALE (DW 2)* is not a party in this suit.



- 30] Thirdly, it is clear the defendant was only registered as the proprietor of the suit land on 2nd August 2016. This suit was filed on 4th August 2012 before the expiration of the 12 years' statutory period. As against the defendant, time could only start running after 2nd August 2016 because before then, he was neither the registered proprietor of the suit land nor the legal representative of the Estate of the deceased. In the circumstances, he could neither be sued nor initiate any proceedings against the plaintiff with respect to the suit land. He only became clothed with the relevant locus standi as from 2nd August 2016.
- (31) Finally, as I have already stated above citing *SISTO WAMBUGU .V. KAMAU NJUGUNA* (supra), adverse possession is essentially premised on whether the land owner has been dispossessed of his land or discontinued his possession of it. In the circumstances, of this case, it is clear that the defendant has not been disposed of the suit land. In his statement dated 12th November 2021 and which he adopted as his evidence during the plenary hearing, he states: -

“When my dad died, I was in class 6 and young and my brothers and sisters were also in school.

I did not have capacity to file any case however the family registered an emembrance (sic) on the land meaning we had an interest on the land and we protected our interest. I cleared college and tarmacked before I was employed. However, we used to visit there and even now we still go there as we know that's our inheritance. We didn't see the need of evicting her since she treated as well when our father was alive.” Emphasis mine.

The import of the above is that the defendant his family still access the suit land and have not really been dispossessed of the same by the plaintiff.

- (32) I would therefore agree with MS MULESHE's submissions that the claim for the suit land based on adverse possession has not been proved.

Trust

The plaintiff has made an alternative claim to the suit land based on trust. On that issue, MS MULESHE has submitted as follows: -

“Having obtained title by transmission on 2nd August 2016, there is no trust that was established by the plaintiff over the defendant's title. It was the defendant's testimony in his statement that the houses alleged to have been constructed by the plaintiff were only improvements of the houses commenced by their deceased father and the plaintiff did not controvert this piece of evidence.”

On his part, MR WERE is of the view that there is sufficient evidence upon which this Court can find for the plaintiff on the basis of a constructive trust. Citing *TWALIB HATAYAN TWALIB HATAYAN & ANOTHER .V. SAID SAGGAR AHMED HEIDY & OTHERS* 2015 eKLR, Counsel has submitted thus: -

“The defendant admitted that he did not inform the plaintiff when he filed the succession proceedings well aware that the plaintiff was in possession of the land for over 30 years. Infact he was aware that she was the one who had been keeping possession of the title to the land. He had to trick her into releasing it to him.”

Section 28 (b) of the *Land Registration Act* 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 their being noted on the register –



- a. –
- b. Trusts including customary trusts.”

It is now well established that the registration of land in the name of a party does not extinguish the right and interest of another who is entitled to the land by way of a trust including a customary trust - *KANYI .V. MUTHIORA* 1984 KLR 712.

- (33) Having pleaded a trust, the onus was on the plaintiff to prove that the defendant holds the suit land in trust for her. In *PETER NDUNGU NJENGA .V. SOPHIA WATIRI NDUNGU* 2000 eKLR, the Court of Appeal stated that: -

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may pressure a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

See also *Gichuki .v. Gichuki* 1982 Klr 285 And *Mbothu & Others .v. Waitimu & Others* 1986 KLR 171.

- (34) The plaintiff did not draw out her plaint in the traditional manner whereby the particulars of trust would be pleaded. However, that is not fatal to her claim. In the case of *Twalib Hatayan Twalib Hatayan & Another .v. Said Saggat Ahmed Al Heidy & Others* (supra), the Court adopted the definition of trust in *BLACK’S LAW DICTIONARY 9TH EDITION* as: -

“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).”

It is not in dispute that the suit land was acquired when the plaintiff and the deceased were living together. The plaintiff says she was married to the deceased under customary law and an affidavit to that effect has been produced as part of the plaintiff’s documentary evidence. Her testimony has also been supported by her witness who were present when the deceased paid dowry for her hand in marriage. The defendant’s testimony however is that the deceased never divorced *DAmary Mugalavahi Ambale(DW 2)* and that the plaintiff was only his “father’s friend.”

It is also clear from the land sale agreement dated 19th September 1980 that it was executed between the deceased as purchaser and one *Peter Wanjala Mbaya* as vendor.

- (35) Whether or not the plaintiff and deceased were man and wife or just friends, the following undisputed facts stick out like a sore thumb and are sufficient, in my view, to support the plaintiff’s claim that the defendant holds the title to the suit land in trust for her.
- (36) Firstly, the defendant did not purchase the suit land from his own proceeds. It was purchased by the deceased in 1986 and during cross – examination, the defendant confirmed that he was aged about 9 years at that time. He cannot therefore claim to be the sole proprietor of the suit land.
- (37) Secondly, the title to the suit land has always been in the custody of the plaintiff until the defendant took it from her in August 2016 some 15 years after the demise of the deceased. It cannot be far-fetched for this Court to conclude that the only reason the deceased gave the title deed to the suit land to the plaintiff and not *DAmary Mugalavahi Ambale(DW 2)* is because he recognized the plaintiff’s interest in the suit land. Therefore, even when the defendant transferred the title to the suit land in his names,



that was always subject to the plaintiff's overriding interest therein and which was not extinguished by that transfer.

- (38) Fourthly, the plaintiff has always been, and continues to be, in occupation and possession of the suit land from the time it was purchased in 1998 to – date. Such occupation and possession are elements which this Court can invoke to determine that infact there exists a trust in favour of the plaintiff and that the defendant is merely holding the title to the suit land in trust for the plaintiff.

Is The Plaintiff A Licensee?

- (39) It is the defendant's case that the plaintiff is a mere licensee on the suit land. In paragraph 23 of his replying affidavit, he has deponed as follows: -

23: "That since the Applicant was well known to us and the family at large as our father's friend, we did not see any need to evict her and allowed her to live on our father's land as a licensee."

On her part, Damary Mugalavahi Ambale(DW 2) has stated as follows in the penultimate paragraph of her statement dated 12th November 2021: -

"She lives there as a licensee and the license has expired by the filing of this case."

A license, as defined in the [Land Act 2012](#),

"Means a permission given by the commission in respect of public land or proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit." Emphasis mine.

A licensee on the other hand, as defined in the [Land Registration Act 2012](#): -

"Means the person occupying land in accordance with the term of a license." Emphasis mine.

While the term licensor under the same Act: -

"Means the person granting or given a licence." Emphasis mine

It is common ground that the plaintiff has been in occupation and possession of the suit land living there with the deceased who was the proprietor of the suit land long before the defendant acquired ownership of the same in 2016. If, as the defendant asserts, the plaintiff was only a "friend" to the deceased and therefore a licensee, that license came to an end when the deceased passed away in 1991. However, even when Damary Mugalavahi Ambale(DW 2) obtained the Grant of Letters of Administration in respect of the deceased's Estate on 9th December 2004 and which were confirmed on 31st October 2012, no attempt was made to terminate the said license. And eve when the defendant acquired the registration of the suit land in his names on 2nd August 2016, the plaintiff continued occupying the land. Most significantly, it is instructive to note that to – date, neither the defendant nor Damary Mugalavahi Ambale (DW 2) have filed any suit seeking orders against the plaintiff with respect to the suit land. Indeed, the defendant has not even filed any Counter – Claim herein seeking orders to evict the plaintiff from the suit land on the basis that her license has expired and that she is a trespasser thereon. That would have been the most prudent step to take in the circumstances. However, instead of taking that decision in 1991 following the demise of the deceased or in 2004 when Damaris Mugalavahi Ambale (DW 2) was appointed as the legal representative of the deceased's Estate, both



she and the defendant have been content with kicking the can down the road only to make a feeble plea that the plaintiff is a licensee. And this was only as a reaction after the plaintiff moved to Court in 2021. But that is hardly surprising because it is borne out of the fact that the defendant is aware that the plaintiff's presence on the suit land is certainly not that of a licensee. Far from it, the conduct of the deceased was a clear demonstration that he wanted the plaintiff to retain the suit land and even if not as a whole, but at least to have a share of the same.

[40] It is also clear that the defendant was not transparent in the manner in which he registered the suit land in his names. Both he and Damary Mugalavahi Ambale(DW 2) insist that the succession process was open. The defendant has put it in the following terms in his statement: -

“We filed succession which was an open process and the succession cause was duly gazetted.

The statement that it was secretly done was a lie since gazette notice is a public documents.”

And in paragraph 21 of his replying affidavit, he says: -

21: “That there was not clandestine process as the succession cause was dully gazetted and the Applicant was aware of the same and she never objected thereto.”

In her statement Damary Mugalavahi Ambale(DW 2) addressed the issue as follows: -

“I filed Kakamega High Court Succession CauseNo 7 “A” of 2004 and the cause was duly gazetted. A gazette notice is a public document and nobody can say it was a clandestine process.”

No doubt the Gazette Notice is a matter which this Court can take Judicial notice of under Section 59 of the *Evidence Act*. There is no doubt that a notice was published in the Kenya Gazette confirming that Damary Mugalavahi Ambale (DW 2) had been appointed as the personal representative and Administrator to the deceased's Estate. And although the defendant and Damary Mugalavahi Ambale (DW 2) claim that they kept the plaintiff informed about the succession process, the plaintiff has stated in paragraph 11 of her supporting affidavit: -

11: “That in around 2016 August, one of the deceased son who is the Respondent herein came and requested for the title deed of the suit land from me for the purpose of processing my title only for me to learn later that he transferred the title into his own names (see copy of Certificate of Official Search hereto and marked (LNM 02).”

She repeated the same in her witness statement dated 22nd December 2021. However, when the defendant was cross – examined by MR WERE, he owned up to the fact that the plaintiff was not informed. This is what he said: -

“I confirm that the plaintiff has been living on the suit land for over 30 years. I did not inform the plaintiff when I filed for the succession proceedings. She is the one who was keeping the title deed to the suit land.”

On her part,Damary Mugalavahi Ambale(DW 2) responded as follows: -

“I could not have informed the plaintiff about the succession proceedings because I did not even know her.”



Clearly therefore, the defendant acted fraudulently when he informed the plaintiff that he was going to transfer the suit land in her names only to have himself registered as the sole proprietor. The plaintiff was entitled to believe that the defendant would keep his word. He didn't.

As for Damary Mugalavahi Ambale(DW 2), she cannot claim not to have known the plaintiff. This is because, when the deceased filed divorce proceedings in Kakamega High Court Divorce Case No 3 of 1988, she filed an answer to the petition and said the following in paragraph 2 (h): -

“That the Petitioner was adulterous and used to go for our neighbor's wife whom they had a baby with and even went as far as informing me that he was married to a second wife in 1985.”

Now, unless the deceased was the proverbial “Rolling Stone” or was the character depicted in the 1972 hit song “Papa was a rolling stone” by the American Group “The Temptations,” the “second wife” whom Damary Mugalavahi Ambale(DW 2) was referring to could only have been the plaintiff. It cannot therefore be true that she did not know the plaintiff because even in her own statement dated 12th November 2021 she says: -

“When my husband died, he was buried in our matrimonial home as per the Luhya customs. The Applicant did not even participate in the burial arrangements.”

That is clear evidence that not only did Damary Mugalavahi Ambale(DW 2) know the plaintiff but also that she knew about the plaintiff's occupation of the suit land. It is highly unlikely that the defendant did not inform her about this fact. Given the above circumstance, it was an act of bad faith and dishonesty on the part of the defendant and Damary Mugalavahi Ambale(DW 2) not to disclose, during the succession proceedings, that the plaintiff had been living on the suit land since 1986 and was still in occupation and possession thereof at the time of filing those proceedings. This, in my view, is a case where this Court must involve the equitable remedy of a constructive trust and treat the defendant as a trustee. And although the defendant alleges that the plaintiff “has her own property and her children have inherited from their father as well,” no evidence was placed before this Court to prove that assertion. In any event, the fact that a party has other land elsewhere is not a bar to claiming land to which he is entitled to by way of a trust.

- (41) Having considered all the evidence in this matter, I am satisfied that the plaintiff is entitled to an order declaring that the defendant holds the suit land in trust for her. However, the plaintiff is not entitled to the whole 4 acres comprised in the suit land. It is clear from the confirmed Grant dated 31st October 2012 and issued in Kakamega High Court Succession Cause No 7 “A” of 2004 that the defendant's share of the deceased's Estate was the whole of the suit land. His siblings Eric Tatuli Ambale and Maurice Bulinda Ambale inherited the land parcels South Kabras/Shamberere/553 respectively. The land parcel No South Kabras/Shamberere/384 measures 4.4 Hectares as per the Green Card but no document was produced to show the size of the land parcel No South Kabras/Shamberere/553. If the whole of the suit land is awarded to the plaintiff, the defendant will be left without a share of his father's land. Equity also demands that the plaintiff gets a share of the suit land which she says she not only contributed towards it's purchase and has made further developments thereon but also continues to occupy the same since 1986 to – date. In sharing out the suit land, this Court must also take into account that the plaintiff has made improvements thereon as was confirmed by the defendant in paragraph 24 of his replying affidavit where he says: -

24 “That the development she alleges to have made were done by our father during his lifetime and she only but made improvements thereon.”



However, in her supporting affidavit dated 14th June 2021, the plaintiff deponed in paragraph 7 as follows: -

6. “That we began occupying the house situated on the land in the year 1986 before the house was completed and he passed on in the year 1991 before it was fully completed.”

The photographs produced by the plaintiff show several houses on the suit land. Taking all that into account, this Court is persuaded that the plaintiff and the deceased went into occupation and possession of the suit land when there was only one house and since the deceased passed on 5 years later in 1991, all the other houses were constructed by the plaintiff. The Court must therefore take that into account while making its final disposal orders in this suit.

(42) Ultimately therefore and having considered all the evidence herein, this Court makes the following disposal orders in determination of this suit: -

1. The defendant holds the land parcel No East Bukusu/north Sang’alo/840 in trust for both himself and the plaintiff.
2. The trust is hereby determined in the following terms: -
 - a. The plaintiff’s share out of the land parcel No East Bukusu/ North Sang’alo/840 shall be 2.5 acres while the defendant’s share shall be 1.5 acres.
 - b. The defendant shall within 30 days from the date of this Judgment surrender the title deed to the land parcel No East Bukusu/ North Sang’alo/840 to the Land Registrar Bungoma for purposes of cancellation to create two (2) titles to be registered in the names of the plaintiff and the defendant as directed in (a) above.
 - c. In default of (b) above, the Land Registrar and County Surveyor Bungoma shall be at liberty to cancel the title deed to the land parcel No East Bukusu/north Sang’alo/840 and issue new title deeds in the names of the plaintiff and the defendant in the ratio described in (a) above.
 - d. The Deputy Registrar shall be at liberty to execute any documents on behalf of any defaulting party to facilitate the registration of the resultant sub – divisions in the names of either party.
 - e. The parties shall equally share the costs of the sub – division and preparation of the title deeds.
3. In the alternative, the suit land shall within 90 days from the date of this Judgment be valued by a valuer jointly appointed by the parties and the costs of the valuation be equally shared.
4. Either party shall thereafter be at liberty to buy out the share entitlement of the other party should they deem it fit to do so.
5. In the circumstances of this case, each party shall meet their own costs of this suit.
6. Either party shall be at liberty to apply for any further orders if need be.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 4TH DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 2ND MARCH 2022.



Right of Appeal explained.

Boaz N. Olao.

J U D G E

4th July 2022.

