



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 161 OF 2017**

**LEONORA AUMA OINGO.....PAINTIFF**

**VERSUS**

**CLEMENTINA AMODING WAKASIKA.....DEFENDANT**

**J U D G M E N T**

On 19<sup>th</sup> November 2018, the parties agreed to have **BUNGOMA ELC CASE NO 161 OF 2017** and **BUNGOMA ELC CASE NO 66 OF 2015** consolidated for purposes of trial. It was further agreed that the plaint in **BUNGOMA ELC CASE NO 161 OF 2017** will be the plaint and the Originating Summons in **BUNGOMA ELC CASE NO 66 OF 2015** would be the defence and Counter – Claim. The replying affidavit to the Originating Summons would be the defence to the Counter – Claim and the lead file for purposes of proceedings would be **BUNGOMA ELC CASE NO 161 OF 2017**.

**LEONORA AUMA OLINGO** (the plaintiff herein) filed **BUNGOMA ELC CASE NO 161 OF 2017** against **CLEMENTINA AMODING WAKASIKA** (the defendant herein.) seeking Judgment in the following terms with respect to the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/2061** (the suit land): -

**(a) An order of eviction.**

**(b) General damages.**

**(c) Costs of this suit.**

**(d) Interest of this suit.**

**(e) Interest on (b) and (c) at Court rates.**

The basis of the plaintiff's claim is that she is the registered proprietor of the suit land of which she sold a portion measuring 3.3 acres to the defendant at a consideration of Kshs. 29,000/=. However, in breach of their agreement, the defendant only paid Kshs. 26,000/= leaving a balance of Kshs. 3,000/=. The defendant filed **BUNGOMA CMCC NO 104 OF 1990** seeking specific performance of the agreement but the suit was dismissed for want of prosecution on 7<sup>th</sup> December 2001. The plaintiff then filed **BUNGOMA CMCC NO 545 OF 2004** seeking orders to evict the plaintiff who counter – claimed seeking the suit land by way of adverse possession. Both prayers were however dismissed on 13<sup>th</sup> October 2010 for want of jurisdiction. In 2004, the defendant tried to illegally put up structures on the suit land but the plaintiff vehemently resisted and the defendant lodged a caution on the suit land which the plaintiff successfully removed. The plaintiff also blocked attempts by the defendant to bury her son on the suit land by filing **BUNGOMA CMCC NO 391 OF 2017**. She therefore seeks the orders as per her plaint.

Together with her plaint, the plaintiff filed a witness statement dated 13<sup>th</sup> December 2017 and a list of documents.

By a defence dated 9<sup>th</sup> April 2018 and filed on 12<sup>th</sup> April 2018, the defendant confirmed having purchased land from the plaintiff but added that it was the plaintiff who refused to collect the balance of Kshs. 3,000/=. She added that she has remained on the suit land peacefully for over 40 years a fact well known to the plaintiff and urged that this suit is bad in law as it raises issues already addressed by other Courts.

In a reply to the defence, the plaintiff pleaded that it was the defendant who breached the terms of their agreement and denied that this suit is sub – judice or res – judicata. She added that the defendant has never occupied the suit land and if she did, it was neither peaceful nor with the plaintiff's consent.

On the other hand, **CLEMENTINA AMODING WAKASIKA** (the defendant herein) filed an Originating Summons in **BUNGOMA ELC CASE NO 66 OF 2015** seeking against **LEONORA AUMA OINGO** (the plaintiff herein) the following orders: -

- 1. That she has become entitled to the suit land by adverse possession.**
- 2. That the plaintiff be found to be holding the title to the suit land in trust for the defendant and that it be cancelled.**
- 3. That the defendant be registered as the sole proprietor of the suit land in place of the plaintiff and in default, the Court do make an order authorizing the Deputy Registrar of this Court to sign and execute all the necessary documents to effect the transfer.**
- 4. Costs be borne by the plaintiff.**

The Originating Summons, as is required, was accompanied with her supporting affidavit, a Certificate of Search and the Land Certificate in respect to the suit land in the name of the plaintiff.

In the supporting affidavit, the defendant avers that on 17<sup>th</sup> December 1982 she entered into a land sale agreement with the plaintiff and paid Kshs. 26,000/= before the firm of **ONYINKWA & CO ADVOCATES**. She took possession of the suit land on which she constructed a house in which she had lived for 30 years by the time the Originating Summons was filed. The plaintiff filed **BUNGOMA CMCC NO 545 OF 2004** seeking to evict her but that suit was dismissed. That she has been unable to obtain the title to the suit land which is still in the plaintiff's names and the plaintiff is attempting to refund the purchase price but her title has been extinguished by time.

The Originating Summons is opposed and the plaintiff filed a replying affidavit dated 11<sup>th</sup> April 2016 in which she has deponed inter alia, as follows: -

**?That she is the registered proprietor of the suit land and that the defendant had sued her in BUNGOMA CMCC NO 10 OF 1996 seeking orders that the suit land be transferred to her. That suit was dismissed.**

**?That the plaintiff filed BUNGOMA CMCC NO 545 OF 2004 seeking to evict the defendant but that suit was dismissed for want of jurisdiction.**

**?That the defendant cannot continue to remain on the suit land on the basis of the agreement dated 17<sup>th</sup> December 1982 because the sum of Kshs. 26,000/= was refunded but the defendant refused to collect it.**

**?That the defendant has never been in open, continuous, peaceful and uninterrupted occupation of the suit land as there are many cases in Court.**

**?That the plaintiff refunded the defendant the deposit because she was unable to pay the balance of Kshs. 3,000/= as per their written agreement.**

**?That the plaintiff has continuously asserted her ownership of the suit land because the defendant breached their agreement and she cannot therefore claim the suit land by way of adverse possession.**

**?That the defendant has never been in occupation for a period in excess of 12 years peacefully, continuously openly and un – interrupted and her Originating Summons is laced with falsehoods and the same should be struck out.**

Annexed to that replying affidavit are some proceedings in the following cases: -

**1: BUNGOMA CMCC NO 104 OF 1990**

**2: BUNGOMA CMCC NO 545 OF 2004**

The parties were the only witnesses in their respective cases. The plaintiff adopted as her evidence the witness statement and list of documents both dated 13<sup>th</sup> December 2017. She also relied on her replying affidavit in response to the defendant's Originating Summons.

In the said statement, she confirms that in 1982, she sold the suit land to the defendant at a consideration of Kshs. 29,000/= but in breach of their agreement, the defendant only paid Kshs. 26,000/= but failed to pay the balance and so the plaintiff refunded the deposit to the defendant through her lawyers **ONYINKWA & COMPANY ADVOCATES**. The defendant then sued her in **BUNGOMA CMCC NO 104 OF 1990** to compel the plaintiff to transfer the suit land to her but the suit was dismissed for want of prosecution and the defendant was ordered to pay costs of Kshs. 60,000/=. The defendant placed a caution on the suit land which was removed by a Court order. In 2004 the plaintiff filed a suit seeking orders to evict the plaintiff from the suit land while the defendant counter – claimed seeking orders in adverse possession. The case was dismissed for want of jurisdiction. In the same year, the defendant attempted to put up structures on the suit land but the plaintiff obtained an injunction. The plaintiff also filed **BUNGOMA CMCC NO 391 OF 2017** and obtained orders restraining the defendant from burying her son **PETER WAKASIKA** on the suit land. That she has been denied the use of her land by the defendant's illegal acts and therefore seeks her eviction.

The defendant similarly adopted as her evidence the witness statement dated 26<sup>th</sup> October 2017 as well as her supporting affidavit dated 26<sup>th</sup>

July 2015. She also relied on her list of documents dated 12<sup>th</sup> August 2017.

In the statement dated 26<sup>th</sup> October 2017, she has narrated how she entered into an agreement for sale of land with the plaintiff and paid the sum of Kshs. 26,000/= leaving a balance of Kshs. 3,000/=. She took possession of the suit land and started farming and later constructed a house. That she has been in peaceful occupation of the suit land for over 12 years and is entitled to have the title registered in her names and they have had Court disputes since 1989 in an effort to have the plaintiff transfer the suit land to her. That she is willing to clear the balance of Kshs. 3,000/= but if the plaintiff wants to refund the purchase price, then it ought to be at the current market price because the land is now worth millions of shillings.

Submissions were thereafter filed by **MS SHIMOLI** instructed by the firm of **SHITSAMA & COMPANY ADVOCATES** for the plaintiff and by **MR SICHANGI** instructed by the firm of **SICHANGI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by the parties both oral and documentary as well as the submissions by counsel.

The following are not in dispute: -

- 1: That the plaintiff is the registered proprietor of the suit land and holds a title thereto issued on 13<sup>th</sup> April 1979.**
- 2: By an agreement dated 17<sup>th</sup> December 1982, the plaintiff sold the suit land to the defendant for a consideration of Kshs. 29,000/=.**
- 3: The defendant only paid a sum of Kshs. 26,000/= leaving a balance of Kshs. 3,000/= un-paid to-date.**

I must at this stage point out that although both parties referred to the sale agreement dated 17<sup>th</sup> December 1982 and the defendant even listed it as document **NO 1** in her list of documents dated 12<sup>th</sup> August 2017, I could not trace the said agreement in the record at the time of drafting this Judgment. However, the salient features of the said agreement could easily be picked from the other pleadings herein.

The plaintiff's case, as I stated at the beginning of this Judgment, is that as the registered proprietor of the suit land, she is entitled to orders to evict the defendant therefrom and also to an award of general damages. The defendant, however, claims that in fact the plaintiff's title to the suit land has been extinguished by her open, peaceful and un-interrupted occupation of the suit land to which she is now entitled to by way of adverse possession.

By virtue of being the registered proprietor of the suit land, the plaintiff is entitled to all the rights and privileges belonging or appurtenant thereto as provided in **Section 24 of the Land Registration Act**. Those rights and privileges no doubt include the right to evict trespassers. It is her case that the defendant is a trespasser on the suit land. The plaintiff's title is also evidence that she is the indefeasible owner of the suit property and his title can only be impeached where it is established that it was obtained through fraud, misrepresentation illegally, un-procedurally or through a corrupt scheme as set out in **Section 26(1) of the Land Registration Act**. That notwithstanding, the plaintiff's registration as the proprietor of the suit land does not relieve her of any duty or obligation to which she is subject as a trustee. That is clear from the provisions of **Section 25(2) of the Land Registration Act**. Similarly, the plaintiff's registration as the proprietor of the suit land is also subject to the overriding interests set out in **Section 28 of the Land Registration Act** one of which is recognized in **Section 28(h) of the said Act** as follows: -

***28(h) "rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription"***

That right is the right to claim the suit land by way of adverse possession. It is those rights of adverse possession and trust that the defendant is agitating for with respect to the suit land. That the defendant may be entitled to the suit land by way of adverse possession or trust notwithstanding the fact that it is registered in the names of the plaintiff is well established by a long line of precedents. See for example **MUMO .V. MAKAU 2004 1 KLR**, **KANYI .V. MUTHORA 1984 KLR 712**, **WAMBUGU .V. NJUGUNA 1982 – 88 1 KAR 117** and even **WILLY KIMUTAI KITILIT .V. MICHAEL KIBET 2018 eKLR** on which both counsel placed reliance in their respective submissions. All that, however, depends on the evidence. I shall therefore now consider whether the defendant is entitled to the suit land by virtue of those overriding rights based on the evidence herein.

**ADVERSE POSSESSION:** -

**Section 38(1) of the Limitation 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 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."***

A person claiming land by way of adverse possession must establish that his occupation of the land in dispute is not by force, secrecy or persuasion (*nec vi nec clam nec precario*) – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**. Such occupation must also be open, peaceful, un-interrupted and with the knowledge of the owner. It is now well established that the combined effect of the relevant provisions of **Sections 6, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the registered proprietor of the land in dispute in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996**.

In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184** the Court of Appeal set out what a claimant to land by way of adverse possession must prove. It said: -

***“In order to be entitled to land by adverse possession, the claimant must prove that he had 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 discontinuation of possession by the owner on his own volition”***

The need for such occupation to be open, continuous and peaceful was emphasized in the case of **ROBERT SHUME & OTHERS .V. SAMSON KAZUNGU KALAMA 2015 eKLR** where the Court of Appeal held:-

***“By dint of Section 7 of the Limitation of Actions, Act, the Appellant ought to have demonstrated that the Respondent had lost the right to bring the action to recover the property on account of the former having been in quiet and continuous occupation and use of the property in a manner inconsistent with the Respondent’s title for a period of twelve (12) and more years. Stated differently and bearing in mind that possession is a question of fact, they were expected to show that their possession was nec vi nec clam nec precario, that they were in exclusive possession of the property, that their possession was open, continuous, peaceful and notorious with the knowledge but without the permission of the owner”*** Emphasis added.

From the evidence herein, I have no doubt that the defendant took possession and occupation of the suit land in 1982 following the parties’ agreement dated 17<sup>th</sup> December 1982. Counsel for the plaintiff has submitted that since the defendant did not complete paying for the suit land, she cannot be entitled to the same by way of adverse possession. There have been divergent views on when time begins to run for purposes of adverse possession where the entry is by way of a purchase. In **WAMBUGU .V. NJUGUNA** (supra) the Court took the view that where the claimant is a purchaser under a contract of sale, the possession only becomes adverse when the contract is repudiated or the agreement becomes void. A similar view was taken in **SAMUEL MIKI WAWERU .V. JANE NJERI RICHU C.A CIVIL APPEAL NO 122 OF 2001**. However, in **MBUGUA NJUGUNA .V. ELIJAH MBURU WANYOIKE & ANOTHER C.A CIVIL APPEAL NO 27 OF 2007**, the Court held that where a transaction for sale becomes void for lack of consent, time starts to run from the day the claimant is put in possession. The Court in **PETER MBIRI MICHUKI .V. SAMWEL MUGO MICHUKI C.A. CIVIL APPEAL NO 22 OF 2013 [2014 eKLR]**, said: -

***“On our part, we are of the view that there are four alternative timeliness that could be used to compute when time begins to run for purposes of the plaintiff’s claim for adverse possession. These are 1964, 1970, 1971 or 1978. The year 1964 is the year of the sale agreement between the parties and in this year, the plaintiff took possession of the suit property”***

In **PUBLIC TRUSTEE .V. WANDURU NDEGWA C.A CIVIL APPEAL NO 73 OF 1982 – [1984 eKLR] [1984 KLR 314]** **MADAN J.A** put it very succinctly as follows: -

***“Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive .....***”

I would take the view that for purposes of adverse possession, time started run from 1982 because that is when the plaintiff put the defendant in possession of the suit land upon payment of the deposit of Kshs. 26,000/= . The proper way of assessing proof of adverse possession is whether or not the title owner was dispossessed. The fact that the plaintiff is seeking orders to evict the defendant is a clear demonstration that he was dispossessed of the suit land.

However, the defendant has not demonstrated that her possession and occupation of the suit land was peaceful which is a key ingredient in a claim for adverse possession. The cases of **ROBERT SHUME .V. SAMSON KAZUNGU KALAMA** (supra) and **GRACE WAIRIMU SORORA .V. CHAKA LTD** (supra) clearly illustrate that there can be no adverse possession if it is not peaceful. In a recent exposition on the doctrine of adverse possession, the Court in **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL NO 56 OF 2014 [2015 eKLR]** also reiterated on the element of peaceful occupation when it said:-

***“The essential pre – requisite being that the possession of the adverse possession is neither by force or stealth or 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.”*** Emphasis added.

It is clear from the record herein that in 1990 (8 years after their agreement) the parties were already in Court litigating over the suit land in **BUNGOMA CMCC NO 104 OF 1990**. That was clear demonstration that the defendant’s possession and occupation of the suit land was not peaceful by any standards. In her own statement dated 26<sup>th</sup> October 2017, the defendant has stated as follows in paragraph 6 of her statement in support of her claim for adverse possession: -

***“That my efforts to have the defendant to transfer the suit land into my names has been fruitless hence this suit for adverse possession and we have been in several Court disputes as from 1989.”***

And in her replying affidavit dated 11<sup>th</sup> April 2016 in response to the defendant’s Originating Summons, the plaintiff has averred as follows in paragraph 12: -

***“That the Applicant is using force to remain in possession of my land as a mere trespasser since I refunded her money since she was unable to clear my balance of Kshs. 3,000/= as per the terms of the Agreement made on 17/12/1982. Annexed hereto and marked “LAO 4” is a copy of the Agreement.”***

It is common ground therefore that the parties have had disputes over the defendant's occupation of the suit land long before the expiration of the statutory 12 years' limitation period that would have entitled the defendant to orders that he is entitled to the suit land by way of adverse possession. That prayer must therefore be dismissed.

**TRUST:** -

The term trust is defined in **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** as follows: -

***"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title."***

There are several types of trusts but in her Originating Summons, the defendant did not specify which trust she had in mind. In paragraph 2 thereof, she has simply pleaded as follows: -

***"That the Respondent be found to be holding title to parcel NO. E. BUKUSU/S. KANDUYI/2016 in trust for the Applicant and it be cancelled."***

The only relationship between the parties herein is one of a vendor and purchaser. So there can be no suggestion of any trust based on family or custom. The law is that a Court will not easily impute a trust. In **PETER NDUNG NJENGA .V. SOPHIA WATIRI NDUNGU [2000 eKLR]** the Court of Appeal held as follows:-

***"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity the Court may presume 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 trust is implied."***

See also **GICHUKI .V. GICHUKI 1982 KLR 285** and **MBOTHU & OTHERS .V. WAITIMU & OTHERS 1986 KLR 171**. Having pleaded a trust, it was the duty of the defendant to lead evidence as proof of the fact that the plaintiff holds the suit land in trust for her. Even if this Court is to imply the existence of either a constructive or resulting trust which are equitable remedies imposed by the Court, the onus, as per **Section 107 of the Evidence Act**, lay on the defendant to place before the Court sufficient material upon which such trusts can be implied. This is because there is no evidence to suggest the creation of an express trust between the parties. This Court can therefore only apply the circumstances obtaining herein to see if they can support any of the trusts created by the law. Such trusts were considered by the Court of Appeal in the case of **TWALIB HATAYAN TWALIB HATAYAN & ANOTHER .V. SAID SAGGAR AHMED AL HEIDY 2015 eKLR** where the Court, having quoted **BLACK'S LAW DICTIONARY** on trusts stated as follows with regard to a constructive trust: -

***"A constructive trust is an equitable remedy imposed by the Court against one who had acquired property by wrong doing ..... 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."***

The Court went on to describe a resulting trust in the following terms: -

***"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 ..... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention."***

In the circumstances of this case, I am un – able to find the existence of any constructive or resulting trust in favour of the defendant with respect to the suit land. There is no evidence to suggest that the plaintiff took any advantage of her position as the proprietor of the suit land to acquire any benefit for herself with respect to the suit land. It must also be remembered that a trust being an equitable remedy, any a party seeking it must approach the Court with clean hands. The defendant does not appear to have approached the Court with clean hands for the simple reason that although she paid the deposit of Kshs. 26,000/= on 17<sup>th</sup> December 1982 in respect of the suit land, she did not pay the balance of Kshs. 3,000/= within the agreed period. Earlier on in this Judgment, I stated that a copy of the parties' sale agreement was not part of the record. Indeed, the record shows that when the defendant was cross – examined by **MS SHIMOLI** on 27<sup>th</sup> February 2020 she confirmed this when she said: -

***"I have the sale agreement and the official search. I cannot see the sale agreement in the list of documents. I gave the plaintiff Kshs. 26,000/= in 1982. There was a balance of Kshs. 3,000/= which I was to pay but she refused to take it. She said the title was in the Bank."***

That seems to suggest that it was the plaintiff who flouted the sale agreement on refusing to accept the balance. However, further on when she was cross – examined by **MS SHIMOLI**, she said: -

***"It is true that in 1989, the plaintiff went to the Land Registrar to complain that I had not paid the balance. I don't remember what the Land Registrar said. It is true that the balance was left with the firm of ONYINKWA ADVOCATES."***

Surely the plaintiff could not have gone to complain to the Land Registrar, a 3<sup>rd</sup> party for that matter, if the defendant had indeed paid the balance of the purchase price as agreed. In any case, in paragraph 12 of her replying affidavit which I have already cited above, the plaintiff averred that the defendant was ***"un – able to clear my balance of Kshs. 3,000/=as per the terms of the Agreement made on 17.12.1982."*** Further, when she was cross – examined by **MS SHIMOLI** during the trial, the defendant confirmed the same and said: -

*“It is true that I have never paid the plaintiff the balance of Kshs. 3,000/=.”*

Having breached the sale agreement dated 17<sup>th</sup> December 1982, it would not be equitable for the defendant to demand of this Court, the exercise of its discretion to grant her a remedy founded on the principles of equity. In his submissions on behalf of the defendant, **MR SICHANGI** has relied heavily on the Court of Appeal’s decision in the case of **WILLY KIMUTAI KITILIT .V. MICHAEL KIBET C.A. CIVIL APPEAL NO 51 OF 2015** (supra). **MR SICHANGI** has then submitted as follows: -

*“The Court was faced with a similar scenario where the seller sold off his portions of land to several purchasers and put them in occupation. In an action by the seller to repossess the said parcels of land and refunded the purchase price saying the agreements were void for lack of consent by Land Control Board, the learned trial Judge followed the decision in another Court of Appeal decision of MACHAMA MWANGI MAINA AND 86 OTHERS .V. DAVIDSON MWANGI KAGIRI 2014 eKLR. In that later case of MACHARIA the Court observed that when the seller receives the purchase price and puts the purchaser in possession of the suit land, it creates a constructive trust in favour of the purchaser and the Honourable Judge granted an order for specific performance. The Court held that the possession of the land by purchasers was an overriding interest in favour of the purchaser.”*

That submission is of course correct. But I do not hear the Court of Appeal to be laying down an inexorable rule that any person in occupation and possession of land belonging to another can claim ownership of the same by pleading the existence of a trust in his favour. Each case must be determined on its peculiar facts. This is what the plaintiff told the Court during cross – examination by **MR SICHANGI**: -

*“I received a deposit of Kshs. 26,000 only. To –date, she has not paid the balance of Kshs. 3,000. That was on 17<sup>th</sup> December 1982 when she paid the Kshs. 26,000. She was to pay the balance in March 1983. She never paid.”*

It would be unconscionable for a Court of equity to look favourably towards a party such as the defendant herein who, for reasons best known to herself, failed to keep her part of the bargain yet seeks the Court to invoke equitable principles in her favour. Indeed, even in the **WILLY KIMUTAI KITILIT** case (supra), the Court noted that even the application and enforceability of the equitable doctrines of constructive trust and proprietary estoppel are *“subject to the circumstances of the particular case.”* I do not consider this to be one such case where the circumstances warrant a finding that the defendant is entitled to orders that she be registered as the proprietor of the suit land in trust. I would therefore dismiss that claim.

The up – shot of the above is that the defendant’s Counter – Claim is for dismissal.

The plaintiff, as the registered proprietor of the suit land is entitled to all the rights and privileges that belong or are appurtenant thereto. Her title is not impeachable and must be afforded the protection provided for under **Section 24 of the Land Registration Act** and **Article 40 of the Constitution**. Whereas such registration does not relieve the plaintiff of any obligation to which she is subject as a trustee as provided for under **Section 25(2) of the Land Registration Act**, I am not satisfied from the evidence herein that the defendant has made out a case to warrant this Court impose any trust against the plaintiff in her favour. She may have entered the suit land as a purchaser but from the moment she breached the sale agreement in 1983, she became a trespasser. A trespass is a continuing tort and is not defeated by the Limitation of Actions Act. The plaintiff is therefore entitled to an order to evict the defendant from the suit land.

The plaintiff has also sought an order for general damages. Trespass is actionable per se i.e. without proof of any actual damage or loss. The plaintiff’s counsel did not make any submission on what would be a reasonable sum in the circumstances. In his submissions, the counsel even went further to urge the Court to award *“damages for loss of user of the suit land.”* There was nothing in the plaint showing what use the plaintiff intended to put the suit land to. A party is bound by his pleadings. The suit land was sold for Kshs. 29,000/= in 1982 and no doubt its value almost 40 years later has appreciated. Again, however, nothing was placed before me to indicate the current value of the suit land. Taking all that into account together with the circumstances obtaining herein, I think that a nominal sum of Kshs. 20,000/= will meet the ends of justice on account of general damages for trespass.

Before I end this Judgment, there is an important issue that counsel, perhaps by oversight, did not address me on. It is clear from the documents filed herein that the suit land has been the subject of previous litigation between the parties and therefore the plea of res – judicata was always lingering in the background. Indeed, **MR SICHANGI** glossed over it in his submissions when he said as follows in reference to a previous suit filed by the plaintiff herein over the same the same land: -

*“The plaintiff then sued for eviction and demanded that she be allowed to refund the purchase price of Kshs. 26,000/= without any interest. Their actions as we had discussed earlier were all dismissed and they brought the present proceedings. As lawyers we all bent backwards to enable justice to be done on substantive level other than on a technical level. We therefore both acquiesced to the fresh evidence and re – evaluation of the matter.”*

What I understand **MR SICHANGI** to be saying, in not very clear language, is that whereas this suit may be in fact res – judicata, both parties have decided to have it determined afresh. Counsel no doubt had in mind **BUNGOMA CMCC NO 545 OF 2004** where the plaintiff had sued the defendant also seeking an order for eviction and injunction. The defendant had filed a Counter – Claim seeking the same land by way of adverse possession. The case was heard and completed and in a Judgment delivered on 13<sup>th</sup> October 2010, **HON. R. NYAKUNDI – CHIEF MAGISTRATE**, (as he then was) found that he had no jurisdiction either to determine the plaintiff’s claim for trespass nor the defendant’s claim for adverse possession. He therefore dismissed both claims. In the cause of this trial, I considered whether in fact this suit was res – judicata. I reached the conclusion that it was not res – judicata for the simple reason that a claim of adverse possession could not have been determined by the subordinate Court. That means that the Judgment dated 13<sup>th</sup> October 2010 was a nullity as the Chief Magistrate’s Court was not competent. A Judgment delivered by a Court not competent to determine the dispute before it cannot operate as res – judicata since such a Judgment is of no effect – see **MULLA, THE CODE OF CIVIL PROCEDURE 18<sup>TH</sup> EDITION**

page 285. Indeed, it is clear from **Section 7 of the Civil Procedure Act** that for res – judicata to apply, the previous suit must have been heard in a competent Court. If there had been a previous suit involving the parties herein over the same subject matter and which had been heard and finalized by a competent Court, then the plea of res – judicata would have been a complete bar to any other subsequent proceedings by the parties herein over the same subject. In that case, no amount of persuasion or consent would have clothed this Court with the jurisdiction that has been taken away by the law.

I have found it appropriate to address this issue in order to disabuse counsel of any notion that a Court can **“bend backwards to enable justice to be done on a substantive level other than on a technical level”** and that both parties **“acquiesced to the fresh evidence and re – evaluation of the matter.”** No amount of acquiescence can clothe a Court with jurisdiction which it doesn’t have.

Ultimately therefore and having considered all the evidence herein, there shall be Judgment for the plaintiff against the defendant in the following terms: -

**1. The defendant’s Counter – Claim is dismissed.**

**2. The defendant shall vacate the land parcel NO EAST BUKUSU/SOUTH KANDUYI/2061 within 6 months from the date of this Judgment and in default, she be evicted therefrom in accordance with the provisions of Section 152 E of the Land Act.**

**3. The plaintiff is awarded general damages of Kshs. 20,000/= for trespass.**

**4. The plaintiff will also have costs of her suit and the dismissed Counter – Claim.**

**Boaz N. Olao.**

**J U D G E**

**29<sup>th</sup> June 2020.**

**Judgment dated, delivered and signed at BUNGOMA this 29<sup>th</sup> day of June 2020.** To be delivered by email with notices to the parties in keeping with the guidelines following the **COVID – 19** pandemic.

**Boaz N. Olao.**

**J U D G E**

**29<sup>th</sup> June 2020.**