



**Kenduiywa (Being Next Friend and Guardian Ad Litem of
Sawe Cheroigin) v Cheroigin (Environment and Land Appeal
E007 of 2022) [2026] KEELC 540 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 540 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E007 OF 2022
LA OMOLLO, J
FEBRUARY 5, 2026**

BETWEEN

**PHILIP ARAP KENDUIYWA (BEING NEXT FRIEND AND GUARDIAN AD
LITEM OF SAWE CHEROIGIN) APPELLANT**

AND

CHELONG ARAP CHEROIGIN RESPONDENT

*((Being an appeal arising from the judgement of Hon. K.L Kiniale
on 19th September, 2022 in Bomet CM ELC Case No. 91 of 2018))*

JUDGMENT

Introduction.

1. By a Memorandum of Appeal dated 17th October, 2022 the Appellant challenges the decision of Hon. K.L Kiniale in Bomet CM ELC Case No. 91 of 2018.

Factual Background.

2. In the subordinate Court, the Respondent filed a suit against the Appellant herein vide a Plaint dated 31st August, 2016. The Plaint was then amended on 21st February, 2017. He sought the following orders;
 - a. An order of injunction restraining the Defendant by himself or his family members and or agents from trespassing upon 15 acres of land to be excised from LR No. Kericho/East Sotik S.S/220.
 - b. An order compelling the Defendant to effect the transfer of 15 acres.



- c. An order declaring that the Plaintiff has attained ownership of half of the suit land being LR No. Kericho/East Sotik SS/220 through adverse possession.
 - d. Costs of this suit.
 - e. Any other relief this Honourable Court deems fit and just to grant.
3. The Appellant filed a Statement of Defence dated 8th March, 2017 which statement of defence was amended on 21st March, 2022. In the Amended Statement of Defence the Appellant denied the averments in the Plaint and sought that the Respondent's suit be dismissed with costs.
 4. The Appellant also filed a Reply to the Amended Plaint dated 21st March, 2022 where he denied the averments in the Amended Plaint and sought that the Respondent's suit be dismissed with costs.
 5. The Learned Trial Magistrate delivered judgement on 19th September, 2022. The Judgment was in the following terms:
 - a. That a permanent injunction issues restraining the Defendant by himself or his family members and or agents from trespassing upon 15 acres of land to be exccesed (sic) from LR No. Kericho East Sotik SS/220.
 - b. An order compelling the Defendant to effect transfer of land of 15 acres to the Plaintiff as per (a) above.
 - c. A declaration does hereby issue that the Plaintiff has attained ownership of half of the suit land being Kericho/East Sotik SS/220 through adverse possession.
 - d. Costs follow the event and in this case to be borne by the Defendants.
 - e. That failure of compliance with prayer no (b) the Court Administrator/Bomet Law Courts to effect the transfer on behalf of the Defendant and or guardian ad litem.
 6. The Appellant being aggrieved by the said judgement approached this Court by way of Appeal.
 7. The appeal was admitted for hearing on 13th February, 2025 and the Court issued directions that it be heard by way of written submissions.
 8. The Appeal was mentioned severally to confirm filing of submissions and on 31st July, 2025 it was reserved for judgement.

The Appeal.

9. The grounds of appeal are as follows;
 - a. That the learned trial Magistrate erred in law and fact by invoking the doctrine of constructive trust in acquisition of the land by adverse possession without proof of evidence by the Respondent and the same was not pleaded for in the plaint and possessor of the suit land was not enjoined as a party to the suit. (sic)
 - b. That the learned trial Magistrate erred in law and fact by relying on nonexistence of sale agreement of sale of 15 Acres of suit property which was not proved by PW1, PW2, PW4, PW5 and rebutted evidence of DW1. (sic)
 - c. That the learned trial Magistrate erred in law and fact by basing her decision of suit land acquire adversely on award arising from minutes of elder's meeting which did not took place between the Appellant and the Respondent thereby arriving at a wrong and illegal decision. (sic)



- d. That the learned trial Magistrate erred misdirected herself in law and fact by misinterpreting the payment of Settlement Fund Trustee loan by the Respondent despite the receipts of payment clearly shows that the same was paid by the Appellant. (sic)
 - e. That the learned trial Magistrate erred in law and fact by not evaluating evidence of PW2, PW3, PW4 and PW5 who failed to tender evidence of Payment of purchase price of suit land purportedly (sic) acquired by the Respondent by adverse possession and further disregarded the evidence of DW1 of non-payment of the same. (sic)
 - f. That the learned trial Magistrate erred in law and fact by making a finding and holding that the Respondent's son were (sic) in possession of 15 Acres out of LR.NO.Kericho/East Sotik SS/220 when there was no evidence adduced before Court to that effect.
 - g. That the learned trial Magistrate erred in law and fact by failing to Critically analyze the evidence before here (sic) thereby arriving at illegal and unjust decision which was against the weight of evidence and therefore arriving at a wrong finding that the Respondent proved his case in balance of probabilities. (sic)
10. The Appellant prays for orders that;
- a. The Appeal be allowed.
 - b. The Judgment and decree in the lower Court be substituted with an order dismissing the Plaintiff's suit.
 - c. Costs of this appeal and those of lower Court be borne by the Respondent.

Issues For Determination.

11. The Appellant filed his submissions on 30th July, 2025 while the Respondent filed his submissions on 4th April, 2025.

Appellant's submissions.

12. The Appellant submits on each of the grounds of Appeal. On grounds 1, 2, 4 and 6, the Appellant submits that the Learned Trial Magistrate invoked the doctrine of constructive trust and adverse possession in finding that the Respondent had acquired a fifteen-acre portion of the suit parcel of land.
13. The Appellant submits that the Respondent contended that he had purchased a fifteen-acre portion of the suit parcel of land in the year 1973 but failed to provide any proof of purchase.
14. The Appellant also submits that witnesses who testified as PW2, PW4, PW5 and DW1 stated that they did not witness the alleged sale of a portion of the suit parcel of land.
15. The Appellant further submits that the Respondent testified that he purchased a fifteen-acre portion of the suit parcel of land and that PW2 and PW5 in their evidence testified that the portion of land that had been purchased measured approximately ten acres.
16. It is the Appellant's submissions that the portion of land that was allegedly purchased by the Respondent could not therefore be ascertained.
17. It is also the Appellant's submissions that even though the Respondent contended that there were Mauritius Thorns planted along the boundary, no evidence in the form of photographs was produced.



18. The Appellant submits that it was the Respondent's contention that he paid kshs. 11,250/= as purchase price.
19. The Appellant also submits that the Respondent failed to adduce evidence of the payment of the said purchase price. PW3, PW4 and PW5 who were the Respondent's witnesses did not corroborate the Respondent's evidence that he purchased a portion of the suit parcel of land.
20. The Appellant further submits that the Respondent did not therefore prove his claim on a balance of probabilities.
21. It is the Appellant's submissions that PW2's evidence was that he (PW2) was in possession of a portion of the suit parcel of land. It was also his evidence that in the year 1973, when the suit land was allegedly purchased, he was a young boy who was in school. He explains that PW2 is the son to the Respondent.
22. It is also the Appellant's submissions that the Respondent in his evidence, testified that he had never lived on the suit parcel of land. It is further the Appellant's submissions that since the Respondent had never lived on the land, then there were no dwelling houses where PW2 would have lived in his childhood.
23. It is further the Appellant's submissions that the Respondent testified that he paid kshs. 15,200/= to the Settlement Fund Trustee.
24. The Appellant submits that this was not true as it was him (Appellant) and his father one Sawe Cheroigin who repaid the Settlement Fund Trustee Loan.
25. The Appellant also submits that he produced original receipts issued by the Settlement Fund Trustee upon repayment of the loan.
26. The Appellant further submits that he produced a receipt dated 24th June, 2007 for Kshs. 15,200/=.
27. It is the Appellant's submissions that the Learned Trial Magistrate therefore erred in finding that the Respondent had repaid the loan issued by the Settlement Fund Trustee.
28. The Appellant also submits that he has been living on the suit parcel of land since the year 1964 and neither the Respondent nor his son have ever lived on the land.
29. The Appellant further submits that the Respondent's son briefly lived on the suit parcel of land when he (Appellant) employed him to work on the farm.
30. It is the Appellant's submissions that from the evidence adduced, the Respondent did not prove the elements of constructive trust.
31. The Appellant relies on the judicial decisions of *Fotos Korkontzikas Panagio vs Nick Soulus* [1987] 2 R.C.S, *Re Estate of Paul Muthiani Musau (deceased)* [2019] eKLR, *Cheromei V Muigai (Environment & Land Case E005 of 2023)* [2024] KEELC 5604 (KLR) (25 July 2024) (Judgement) and *NJA v ZJA alias ZP (Civil Appeal 55 of 2020)* [2023] KECA 937 (KLR) (28TH July, 2023) (Judgement) in support of his submissions.
32. The Appellant submits that the Respondent produced various minutes that he purported to be of meetings held to discuss the land dispute.
33. The Appellant also submits that the alleged meetings did not take off and the said minutes were therefore fake.



34. The Appellant further submits that PW4 and PW5 in their evidence confirmed that the said meetings did not take place.
35. It is the Appellant's submissions that the Learned Trial Magistrate therefore erred in relying on the said minutes in making her findings.
36. With regard to grounds 3 and 7 of the Memorandum of Appeal, the Appellant reiterates that the Learned Trial Magistrate erred in finding that the Respondent acquired a fifteen acre-portion of the suit parcel of land through adverse possession.
37. The Appellant relies on the judicial decisions of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR, *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR and submits that the Respondent in his evidence admitted that he was not in possession of the suit parcel of land.
38. The Appellant also submits that it was the Respondent's evidence that it was his (Respondent) son who lived on the land.
39. The Appellant reiterates that the Respondent's son testified as PW2. He also reiterates that PW2 confirmed that in the year 1973, when the Respondent alleges to have purchased the suit parcel of land, he was still in school and it was therefore not possible for him to have been in possession of the land.
40. The Appellant also reiterates that he briefly employed the Respondent's son in the year 1986.
41. The Appellant submits that they finished repaying the loan to the Settlement Fund Trustees in the year 2007 and adds that before the year 2007, the land belonged to the Settlement Fund Trustees and the Respondent could not therefore claim adverse possession.
42. The Appellant further submits that the Respondent did not join his son as a party to the suit before the trial Court before contending that he acquired a portion of the suit parcel of land by way of adverse possession.
43. It is the Appellant's submissions that the Respondent was given a license which allowed him to take possession of the land.
44. It is also the Appellant's submissions that the Respondent's son who testified as PW2 confirmed that he was chased away from the said portion of land in the year 2016.
45. It is further the Appellant's submissions that permissive possession ended in 2016 and if the 12-year statutory period begun to run from the year 2016, then it would have ended in the year 2028.
46. The Appellant reiterates that the Learned Trial Magistrate misdirected herself in finding that adverse possession had been proved.
47. The Appellant submits that any alleged possession of the suit parcel of land by the Respondent was not peaceful and submits that PW2, PW3, PW4 and PW5 testified that there were a series of disputes on the suit parcel of land which culminated in PW2 being violently chased away from the suit parcel of land.
48. The Appellant concludes his submissions by urging the Court to allow his appeal and set aside the judgement of the trial Court.

Respondent's Submissions.

49. The Respondent submits on the following issues;



- a. Whether there was a sale agreement between the Appellant and the Respondent.
 - b. Whether the trial Court was right in invoking the doctrine of constructive trust.
 - c. Whether adverse possession by the Respondent was proved. (sic)
 - d. Whether the Learned Trial Magistrate erred in law and in fact by making a finding and holding that the Respondent's son was in possession of 15 acres of Kericho/East Sotik SS/220 when there was no evidence adduced before the Court to that effect.
 - e. Whether the Learned Trial Magistrate erred in law and fact by interpreting that the payment of Settlement Fund Trustee loan was paid by the Respondent.
 - f. Whether the Respondent was entitled to costs in Bomet Principal Magistrates Court No. ELC No. 91 of 2018.
 - g. Who should bear the costs of the appeal.
50. On the first issue, the Respondent submits that in the year 1973 he purchased a fifteen-acre portion of the suit parcel of land from the Appellant through a land sale agreement.
 51. The Respondent also submits that the Appellant is his brother and he remained with the said sale agreement.
 52. The Respondent further submits that immediately after purchase, he took his son, one Richard Maritim to the land to take possession of it.
 53. It is the Respondent's submissions that the boundary of the said portion of land was marked by a Mauritius thorn fence and Eucalyptus trees.
 54. It is also the Respondent's submissions that PW1, PW2 and PW5 all testified that the boundary of the said portion of land was marked by a tractor immediately after sale.
 55. It is further the Respondent's submissions that during the hearing, the Appellant failed to produce the agreement that they had entered into.
 56. The Respondent submits that Section 3(3) of the *law of Contract Act* which requires that contracts for disposition of land be in writing came into force in the year 2003 and reiterates that he entered into an agreement for sale of land with the Appellant in the year 1973 and therefore Section 3(3) of the Contract Act is not applicable.
 57. It is the Respondent's submissions that since the Appellant failed to produce the written agreement for sale of land, their agreement should be dealt with as an oral agreement for sale of land.
 58. It is also the Respondent's submissions that during the hearing, he produced minutes dated 9th November, 2000. The said minutes were with respect to a land dispute over the suit parcel of land.
 59. It is further the Respondent's submissions that the Appellant had approached the Chief and lodged a complaint against him (Respondent) and that the Chief called the elders so that they can adjudicate over the dispute.
 60. The Respondent submits that during the hearing before the panel of elders, the Appellant stated that he had entered into an agreement with the Respondent for the sale of a portion of the suit parcel of land.



61. The Respondent also submits that the Appellant stated that he was willing to transfer five acres to him (Respondent) because he had only paid kshs. 3,400/=.
62. The Respondent submits that the Appellant also stated that he had initially wanted to transfer 15 acres but he (Respondent) only made payment for five acres.
63. The Respondent also submits that from the said minutes, it is evident that the Appellant admitted that he had entered into an agreement for sale of land with him.
64. The Respondent further submits that even though no copy of the said agreement was produced, the Appellant's contention that there was no such agreement is not true.
65. The Respondent submits that the Learned Trial Magistrate did not err in dealing with the agreement for sale of land as an oral agreement.
66. The Respondent relies on the judicial decision of Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR in support of his submissions.
67. It is the Respondent's submissions that the Appellant has on appeal cast aspersions on the veracity of the said minutes.
68. It is also the Respondent's submissions that during the hearing before the trial Court, the Appellant did not object to the production of the said minutes and neither did he challenge their authenticity.
69. It is further the Respondent's submissions that the said minutes were forwarded through the Chief, Mutarakwa Location.
70. The Respondent submits that the Learned Trial Magistrate did not therefore err in relying on the said minutes.
71. The Respondent reiterates that his son has been in possession of the suit parcel of land since the year 1973 and submits that he produced minutes from two meetings held by the elders where the elders advised the parties to respect the existing boundaries.
72. The Respondent also submits that the Appellant's contention that his (Respondent) son entered the suit parcel of land in the year 1986 as a 'cowboy' was not true.
73. The Respondent further submits that the witness who testified as DW2 confirmed upon cross examination, that his (Respondent) son is in possession of the suit parcel of land.
74. It is the Respondent's submissions that it is inconceivable for his son to be in possession of a fifteen-acre portion of the suit parcel of land as a 'cowboy'.
75. It is also the Respondent's submissions that the only explanation that has been given as to why his son has been in possession of the said portion of land to date, is that the possession is on understanding and/or agreement of the parties.
76. On the second issue, the Respondent submits that the doctrine of constructive trust is invoked by Courts in instances where oral contracts for disposition of land have been partly performed.
77. The Respondent also submits that even though he is not in possession of a written agreement, he led evidence which showed that he purchased and took possession of a portion of the suit parcel of land.
78. The Respondent further submits that the Learned Trial Magistrate did not therefore err in invoking the doctrine of constructive trust.



79. The Respondent relies on the judicial decision of *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* [2014] eKLR in support of his submissions.
80. It is the Respondent's submissions that the Appellant contends that the Respondent did not raise the issue of constructive trust in his pleadings before the trial Court. The Respondent relies on the judicial decisions of *Onyango v Opondo; Opondo (Plaintiff to the Counterclaim); Onyango & 2 others (Defendant to the Counterclaim)* [2024] KEELC 3617 (KLR), *Aliaza v Saul* [2022] KECA 583 (KLR) where the Court held that constructive trust can be inferred by the Court.
81. On the issue why his son was not joined as a substantive party to the suit, the Respondent submits that his son testified that he was in possession of a portion of the suit parcel of land on his (Respondent) authority.
82. The Respondent also submits that the Learned Trial Magistrate appreciated the fact that his son was in possession of the suit parcel of land with his (Respondent) express authority which obviated the need for him to be joined to the suit.
83. On the third issue, the Respondent submits that during the hearing, PW2 and PW5 testified that he purchased a portion of the suit parcel of land in the year 1973.
84. The Respondent also submits that the Appellant is his brother and that Richard Maritim has been in possession of the suit parcel of land from 1973 to date.
85. The Respondent further submits that on cross examination, DW2 admitted that his son, Richard Maritim is residing on the suit parcel of land.
86. The Respondent reiterates that he produced minutes which show that the Appellant lodged a complaint at the Chief's Office in the year 2000 which was twenty-six years after his son took possession.
87. It is the Respondent's submissions that Courts have held that entry onto a parcel of land by a purchaser on the basis of a land sale agreement can mature into adverse possession if the sale transaction is not completed.
88. The Respondent relies on the judicial decision of *Wambugu vs Njuguna* [1983] KLR 172 as was cited in *Wilfred Kegonye Babu vs Henry Mose Onuko* [2019] eKLR, the judicial decision of *Public Trustee vs Wanduru* [1984] KLR 314 as was cited in *Peter Mbiri Michuki vs Samuel Mugo Michuki* [2014] eKLR and submits that he has proved that he acquired a portion of the suit parcel of land by way of adverse possession.
89. It is the Respondent's submissions that the Learned Trial Magistrate did not therefore err in invoking the doctrine of adverse possession.
90. On the fourth issue, the Respondent relies on the judicial decision of *Gatimu Kinguru vs Muya Gathangi* [1976] KLR 253 and submits that he led evidence that the land in dispute measured fifteen acres.
91. The Respondent submits that from the minutes he produced, the land in dispute was fifteen acres and that his witnesses also testified that the land in dispute measured fifteen acres.
92. The Respondent also submits that the said fifteen acres is clearly demarcated and fenced by Mauritius thorns.



93. The Respondent further submits that in his evidence, he testified that the agreed purchase price was Kshs. 750 per acre and he cumulatively paid Kshs. 12, 250/=.
94. On the fifth issue, the Respondent submits that he repaid the Settlement Fund Trustee Loan through his son in the presence of the Appellant.
95. It is the Respondent's submissions that he produced receipts of the payments made to the Settlement Fund Trustee which receipts were in the Appellant's name.
96. It is also the Respondent's submissions that the receipts were in the Appellant's name because it was the Appellant's name that was on the records of the Settlement Fund Trustee.
97. It is further the Respondent's submissions that the Appellant did not produce any receipts to show that he had made any payments.
98. The Respondent submits that it was the Appellant's evidence that he was given a title deed in the year 1986 which would mean that the loan to the Settlement Fund Trustee had been repaid.
99. The Respondent also submits that even though the Appellant made the said assertions, it was evident that he had receipts of payments issued by the Settlement Fund Trustees after the year 1986.
100. The Respondent further submits that after the elders gave their verdict, he was directed to repay the loan which he did and produced the receipts as evidence.
101. On the sixth issue, the Respondent relies on Section 27(1) of the *Civil Procedure Act*, the judicial decision of East African Standard Limited vs Guardian Limited (citation not given) and submits that the Learned Trial Magistrate did not err in awarding him costs.
102. On the seventh issue, the Respondent submits that he should be awarded costs of the appeal. He relies on the judicial decision of Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & another [2018] eKLR in support of his submissions.

Analysis And Determination.

103. The issues that arise for determination are as follows;
 - a. Whether the Learned Trial Magistrate erred in finding that there was a contract for sale of a fifteen-acre portion of land parcel No. Kericho/East Sotik S.S/220.
 - b. Whether the Learned Trial Magistrate erred in failing to find that there was no evidence of payment of the purchase price.
 - c. Whether the Learned Trial Magistrate erred in finding that the Respondent repaid the Settlement Fund Trustee Loan.
 - d. Whether the Learned Trial Magistrate erred in finding that the Respondent's son was in possession of a fifteen-acre portion of land parcel No. Kericho/East Sotik S.S/220.
 - e. Whether the Learned Trial Magistrate erred in invoking the doctrine of constructive trust and finding that the Respondent had acquired the suit parcel of land by way of adverse possession.
 - f. Who should bear costs of the appeal.



A. Whether the Learned Trial Magistrate erred in finding that there was a contract for sale of a fifteen-acre portion of land parcel No. Kericho/East Sotik S.S/220.

104. This question for determination addresses Ground (2) of the Appellant’s Memorandum of Appeal.
105. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] Eklr wherein it was held as follows;
- “An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.” (Emphasis mine)
106. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;
- “This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.” (Emphasis mine)
107. The Appellant contends that the Learned Trial Magistrate erred in relying on a non-existent land sale agreement.
108. The Appellant also contends that neither the Respondent nor his witnesses proved the existence of the alleged land sale agreement.
109. The Appellant further contends that he did not enter into any land sale agreement with the Respondent for the sale of a fifteen-acre portion of the suit parcel of land.
110. The Respondent on the other hand submits that he entered into a land sale agreement with the Appellant in the year 1973 for the purchase of a fifteen-acre portion of the suit parcel of land.
111. The Respondent also submits that the said agreement was in possession of the Appellant.
112. The Respondent further submits that the Appellant failed to produce the said land sale agreement before the trial Court.
113. It is the Respondent’s submissions that as at the year 1973, Section 3(3) of the *Law of Contract Act* which requires that contracts for disposition of land be in writing had not been enacted and therefore, the agreement between him and the Appellant was correctly regarded as an oral contract by the Learned Trial Magistrate.
114. The Learned Trial Magistrate at Page 11 of the judgement delivered on 19th September, 2022 held as follows;
- “I therefore am persuaded by the authorities quoted by the Plaintiffs (sic) Counsel that indeed despite there being no written agreement as per Section 3(3) of the Law of Contracts Act which provides that;
- “No suit based on a contract of disposition of interest of land can be entertained unless the contract is in writing executed by the parties and attested. “(sic) This



law came into effect in 2003. The agreement in this case was done in 1973 when that provision was not in force.

Be that as it may there is a provision that

“provides that such a suit shall not be prevented by reason only of the absence of writing where an intending purchase or lessee who has performed or is willing to perform his part of a contract;-

Has in part performance of the contract taken vacant possession of the property or any part thereof or;

Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

...I find that in the instant case (sic) the Plaintiff has proved constructive possession through his son PW2 who stays on the land by virtue of having a beneficial interest and on the authority of his own father PW1 and therefore thus (sic) possession has further been confirmed by DW1 and DW2 who are at pains to explain it. It is therefore a finding of this Court that from the Plaintiff's testimony has (sic) witnesses and evidence adduced before the Court, the Court finds he has on a balance of probabilities established the existence of a contract between the Plaintiff and Defendant the Court further finds the contract is validated by part performance and occupation of the Plaintiff on the said land through his son who has beneficial interest and express authority of the Plaintiff to be on the said land (sic).”

115. It is evident that the Learned Trial Magistrate found that there was a contract between the Appellant and the Respondent which contract was validated by part performance and occupation by the Respondent's son. The Learned Trial Magistrate was not explicit on whether his finding as to the existence of a contract was in respect of a written or oral agreement.

116. The Respondent at paragraph 6 and 7 of the Amended Plaint dated 21st February, 2017 averred as follows;

“6. The Plaintiff avers that in the year 1973 at Sach Angwan village, Leldaet Sub-location in Bomet County he entered into land sale agreement with Defendant (sic) to purchase 15 acres of land to be excised from the Defendant's land parcel No. Kericho/East Sotik S.S/220.

7. The Plaintiff's (sic) further avers after the sale, the Defendant without any reasonable cause breached the sale agreement breached the sale agreement (sic) by failing to effect the transfer of 15 acres despite the Plaintiff having vacant possession.”

117. At the trial Court, the Respondent testified as PW1. During cross examination, he stated as follows;

“There was a sale agreement between me and the Defendant. I left the agreement with the Defendant as we were friends. There was no written agreement as the agreement was made before the elders...”



118. The Respondent's evidence was contradictory. On one hand he testified that there was a written land sale agreement which he left with the Appellant and on the other hand he stated that there was no agreement, as the agreement was made before the elders. It is important to note that the Respondent did not call the elders who allegedly witnessed the said agreement.
119. Richard Maritim the Respondent's son testified as PW2. During cross examination he stated as follows;
- “...I was not present when the land was sold as I was in school. I however saw the land being sub-divided in the year 1973. The land was sold in the year 1973. (Witness not clear on his evidence even after being asked to clarify).
- I did not witness the sale agreement to the land.”
120. Richard Kipsang Rotich testified as PW5. Upon cross examination he stated as follows;
- “When the agreement for the sale of land was written down, I was not present...I know that the sale agreement took place as the two parties sought for each other.(sic)”
121. The Appellant testified as DW1 and it was his evidence that he had not seen any land sale agreement for the sale of a portion of the suit parcel of land.
122. From the evidence adduced before the trial Court, the Respondent contended that he purchased a portion of the suit parcel of land vide an agreement for sale of land. Which agreement for sale of land he alleged to have left with the Appellant.
123. PW2 admitted that he did not witness the said land sale agreement while PW5 confirmed that he was aware that there was a land sale agreement though he was not present when it was being written.
124. The Appellant denied that there was ever any written land sale agreement with the Respondent.
125. It is evident that the Respondent's evidence was that he purchased a portion of the suit parcel of land from the Appellant vide a written land sale agreement.
126. It is also evident that no such agreement was produced before the trial Court.
127. It is my view that the Learned Trial Magistrate erred in finding that the alleged possession of the suit parcel of land by PW2 validated the contract.
128. It is also my view that the fact of possession and the existence of a contract for sale of land are mutually exclusive.
129. The Court of Appeal in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR held as follows;
- “We have carefully considered the judgement of the superior Court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof



should fail. It also follows that a Court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings.” (Emphasis mine)

130. He who alleges must prove and parties are bound by their pleadings. In the pleadings, the Respondent contends that he entered into a written land sale agreement.
131. The Respondent cannot on one hand contend that he purchased a portion of the suit parcel of land vide a written agreement and in the same breath submit that since the written agreement was not produced, then he purchased the land by way of an oral agreement.
132. I concur with the finding of the Learned Trial Magistrate that Section 3(3) of the *Law of Contract Act* which requires that contracts for disposition of land be in writing came into effect in the year 2003 and did not therefore apply in the year 1973. However, in the present case, since the Respondent contended that he entered into a written land sale agreement, then he was bound to lead evidence as to the existence of the said land sale agreement or tender the said agreement in evidence.
133. It is therefore my finding that the Learned Trial Magistrate erred in finding that there was a contract for sale of land and yet no such contract was produced and no witnesses were called to testify as to the existence of the agreement for the sale of a portion of the suit parcel of land.
134. This ground of appeal therefore succeeds.

B. Whether the Learned Trial Magistrate erred in failing to find that there was no evidence of payment of the purchase price.

135. This question for determination addresses ground (5) of the Memorandum of Appeal.
136. The Appellant contends that the Learned Trial Magistrate erred in failing to find that there was no evidence of payment of the purchase price.
137. The Appellant also contends that it was his evidence that there was no payment of any alleged purchase price and this was confirmed by the evidence of PW2, PW3, PW4 and PW5.
138. The Appellant submits that no evidence was adduced on the payment of the alleged purchase price of Kshs. 11,250/=.
139. The Respondent submits that he negotiated with the Appellant and purchased a fifteen-acre portion of the suit parcel of land at Kshs. 750/= per acre.
140. The Respondent also submits that he paid Kshs. 12,250/= as the purchase price.
141. The Learned Trial Magistrate did not address the issue of whether or not the Respondent paid the purchase price and only addressed the issue of whether the Respondent made payments to the Settlement Funds Trustees.
142. I will address the issue of the alleged payments to the Settlement Funds Trustees under issue (c).
143. At the hearing, the Respondent testified that he paid Kshs. 11,250/= as the purchase price for a portion of the suit parcel of land. Richard Maritim who testified as PW2 also stated that the Respondent paid kshs. 11,250 as the purchase price but admitted that he did not witness the said transaction.
144. It is important to note that Richard Arap Cheruiyot who testified as PW3 was stood down as soon as he introduced himself.
145. Zakayo Siele who testified as PW4 and Richard Kipsang Rotich who testified as PW5 did not give evidence as to the payment of the purchase price.



146. It is also evident that the issue of whether or not there was evidence of payment of the purchase price was not raised by the Appellant before the trial Court and instead the parties focused on the issue of repayment of the loan to the Settlement Funds Trustees.

147. The Court of Appeal in the judicial decision of *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR held as follows;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, CA No. 39 of 2015 and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned Judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the appellate Court would become a trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See *North Staffordshire Railway Co. v. Edge* [1920] AC 254).” (Emphasis mine)

148. It is my view that since the Appellant did not raise the issue of whether or not the Respondent produced evidence of payment of the purchase price before the trial Court, he is precluded from raising it on appeal.

149. This ground of appeal therefore fails.

C. Whether the Learned Trial Magistrate erred in finding that the Respondent repaid the Settlement Fund Trustee Loan.

150. This question for determination addresses ground (4) of the Memorandum of Appeal.

151. The Appellant contends that the Learned Trial Magistrate erred in finding that it was the Respondent who repaid the Settlement Funds Trustee loan and yet the receipts produced had Sawe Cheroigin’s name.

152. The Appellant submits that Sawe Cheroigin is his father and that he was the one who repaid the Settlement Fund Trustee Loan. The Appellant also submits that he produced a receipt dated 24th June, 2007 for Kshs. 15,200/=.

153. On the other hand, the Respondent submits that he produced minutes of a land dispute verdict (sic) dated 9th November, 2000.

154. The Respondent also submits that the Appellant had lodged a complaint with the Chief who called the elders to determine the dispute.

155. The Respondent further submits that the Appellant contended that he (Appellant) wanted to transfer a five-acre portion of the suit parcel of land to the Respondent since he had only paid Kshs. 3,400/=.

156. It is the Respondent’s submissions that from the minutes he produced, the elders asked him (Respondent) to pay the outstanding dues to the Settlement Funds Trustees.



157. It is also the Respondent's submissions that he sent his son Richard Maritim who testified as PW2 to the Settlement Funds Trustee Offices to repay the said loan.
158. It is further the Respondent's submissions that his son paid Kshs. 15,200/= and was issued with a receipt. The receipt was issued in the name of the Appellant since the loan was in his (Appellant) name.
159. On one hand, the Appellant contends that his father was the one who repaid the Settlement Fund Trustee loan while on the other hand, the Respondent contends that he was the one who repaid the Settlement Fund Trustee Loan.
160. The Respondent contends that he repaid the said loan after the elders directed him to do so and adds that he tendered minutes in evidence to prove this fact.
161. The Appellant challenges the veracity of the said minutes and contends that no meetings took place and therefore the minutes were fake.
162. In response to the allegations that no meetings with the elders took place, the Respondent contends that the Appellant did not challenge the said minutes before the trial Court.
163. The Learned Trial Magistrate held as follows at page 10 of the judgement;

“...The 3 witnesses further confirm the Defendant with his sons began raising issues sometime in the year 2000 and it was infact (sic) the Defendant who lodged a complaint with the village elders and wanted to take back his land after he claimed the Plaintiff failed to pay the remaining installments.

The minutes of the respective meeting were produced in Court as PEX 2 and I have had an opportunity to peruse the original minutes certified with the stamp of the Assistant Chief Mutarakwa. The Defendant through his Counsel never objected to the production of these minutes if he indeed maintains that there was never such a sitting with the elders.

There is no claim that the minutes produced by the Plaintiff have been forged or fraudulently obtained or contain misrepresentations and falsehoods.”

164. The Respondent testified as PW1 and he produced minutes from a meeting held by elders on 7th October, 2000 as Exhibit P2. During cross examination, he admitted that the Appellant's name did not appear on the said minutes.
165. The document produced as Exhibit P2 is dated 7th October, 2000 and its contents are as follows;

“Land Case

Sawe Cheroigin vs Chelong

Cheroigin

The village elders heard the above case and resolved that Chelong Arap Cheroigin should clear the remaining loan and the boundary should remain the same.

42 (Fourty Two) people attended the case.

Witnessed by;

1. Kikwai Katam
2. Kimalel Serem



3. Peter Turgat
4. Moriro Turgat
5. Robert Korir (village elder)
6. Chemitan Cheruiyot.”

166. Exhibit P2 is signed by all the witnesses and it is important to note that the parcel number in respect of the dispute is not disclosed.
167. The Respondent also produced a document dated 9th November, 2000 as Exhibit P3. The contents of the said document are as follows;

“Land Dispute Plot No. Ker/East Sotik/220/Between Sawe Cheroigin and his brother Chelong Arap Cheroigin.

Complainant. I want to transfere (sic) to him five acres (5) since the amount he pays (sic) is for those five acres. He paid to me Kshs 3400/= and the value of the shamba by then was Kshs. 700/= and therefore if he didn't wants (sic) this five acres, I cannot compromise. Also it was me who put the existing boundary – since I thought he would pay the whole amounth (sic) infull (sic) previously I wanted to give him fifteen acres but he didn't mananged (sic) to pay.

Accused Chelong Cheroigin- I have bought the farm infull (sic) – I paid him Kshs. 11,250/= the value of farm by then was 750/= per acre. I have tried to ask him to transfere (sic) this farm to me, but he has refused. Also after I had complete (sic) paying in 1974. He showed meth (sic) boundary existing todate(sic), therefore I don't see any reason why he is disputing, yet the farm I have stayed for 26yrs. His son was the secretary for this agreement by then...

Verdict (Resolution)

1. The panel resolve that the farm which was sold 26 years ago, should be transfered (sic) to his brother.
2. There is a clear evidence that the farm was properly, bought, as stated by the witness.
3. The existing boundary was marked by Sawe Cheroigin himself.
4. Repayment of loan amount to kshs. 9000/= will be paid by Chelong Cheroigin.”

168. It is on the basis of these minutes that the Respondent contends that he made payments to the Settlement Fund Trustees.
169. The Appellant in his evidence testified that there were no disputes over the sale of a portion of the suit parcel of land and neither did the elders nor the Chief sit and rule that the Respondent should be given the said parcel of land.
170. It is evident that before the trial Court, the Appellant denied that there were any meeting held to resolve the alleged land dispute over the suit parcel of land.



171. It is also evident that other than the said denials, the Appellant did not raise the issue of whether or not the minutes produced as Exhibits P2 and P3 were fake.
172. It is only in this appeal that the Appellant alleges that Exhibits P2 and P3 were fake.
173. In the judicial decision of Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto (supra) cited above, the Court held that new issues cannot be raised on appeal.
174. Since the Appellant did not raise the issue of Exhibit P2 and Exhibit P3 being fake before the trial Court, he is precluded from raising it on appeal.
175. I will now address the issue of the payments made to the Settlement Funds Trustee.
176. The Learned Trial Magistrate held as follows at paragraphs 5 and 6 of page 10 of the judgement;
- “...In the dispute it is actually the Defendant who was complaining and wanted to take back some of his land and not the other way. The elders found that the Defendant should transfer the portion he sold to the Plaintiff and the Plaintiff to pay the outstanding loan.
- If the Defendant did clear the loan in installments how come he never had any other receipt other than the one the Plaintiff produced (sic) PW2 confirms he went until the Defendant in person (sic) to pay the said loan and the receipt was issued in the Defendant’s name. How come the Defendant has no original receipts to confirm how much money he has been paying over the period it was outstanding (sic).”
177. The Respondent produced receipt No. 7873155 dated 24th June, 2007 issued under the Settlement Funds Trustee vote head for Kshs. 15,200 for plot No. 220 as Exhibit P4. The receipt is for Plot No. 220 East Sotik Scheme.
178. The Respondent testified that he gave his son who testified as PW2 the money to pay the Settlement Funds Trustees for the suit parcel of land.
179. Upon cross examination the Respondent confirmed that the receipt was issued in the name of the Appellant and it was for repayment of a loan.
180. Richard Maritim (PW2), the Respondent’s son testified that in the year 1993, the Respondent gave him money to pay for a loan at the Kericho Settlement Office.
181. He also testified that he went to the settlement office in the company of the Appellant and made payments after which they were issued with the receipt produced as Exhibit P4.
182. It is evident that there are glaring inconsistencies in the Respondent’s evidence.
183. First, the Respondent contends that it was the elders who told him on 7th October, 2000 to repay the Settlement Fund Trustee Loan. He then sent his son (PW2) who made the payments and was issued with a receipt dated 24th June, 2007.
184. Conversely, PW2 who was allegedly sent to make the said payment testified that he paid the money in the year 1993 and was issued with a receipt dated 24th June, 2007.
185. The Appellant also produced receipt No. 7873155 dated 24th June, 2007 for kshs. 15,200/= paid under the Settlement Fund Trustee vote head for Plot No. 220 East Sotik Scheme. Richard Arap Sawe testified as DW2 and it was his evidence that the Appellant paid for his land and was issued with the said receipt.



186. Essentially, both the Appellant and Respondent produced receipts bearing same date, name, serial number and amount.
187. I am inclined to interrogate the importance of this payment for the reason that both the Appellant and Respondent were hopeful that the trial Court would make a finding that either one had repaid the Settlement Fund Trustee loan.
188. It is not disputed that the Appellant is the registered owner of land parcel No. Kericho/Sotik East S.S/220. The Appellant produced a copy of the green card of the said parcel of land as Exhibit D2.
189. Entry No. 1 on the said green card is dated 26th February, 1980 when the Settlement Funds Trustees was registered as the owner.
190. Entry No. 2 is dated 28th July, 1986 when Sawe Arap Cheroigen (sic) was registered as the owner. Entry No. 3 is also dated 28th July, 1986 when the land certificate was issued.
191. Richard Maritim who testified as PW2 confirmed that the Settlement Funds Trustees could not issue a title deed before the loan is repaid. Taking this evidence as true, it is apparent that the Appellant was issued with a title deed in the year 1986. Why then were payments being made by both parties to the Settlement Funds Trustee in the year 2007?
192. No documents have been produced to show the outstanding loan if any and no evidence has been adduced to justify the payment of Kshs. 15,200/= to the Settlement Funds Trustee by both parties.
193. Nonetheless, this ground of appeal succeeds and I find that the Learned Trial Magistrate erred in finding that it was the Respondent who repaid the Settlement Fund Trustee loan.

D. Whether the Learned Trial Magistrate erred in finding that the Respondent's son was in possession of a fifteen-acre portion of land parcel No. Kericho/East Sotik S.S/220.

194. This question for determination addresses ground (6) on the Memorandum of Appeal.
195. The Appellant submits that the Respondent conceded that he was not in possession of a portion of the suit parcel of land.
196. The Appellant also submits that Respondent testified that it was his son one Richard Maritim who was in possession of the land.
197. The Appellant further submits that Richard Maritim who testified as PW2 gave contradictory evidence. He testified that at the time of the alleged purchase of a portion of the suit parcel of land in the year 1973, he was in school and at the same time he was in possession.
198. It is the Appellant's submissions that it was therefore not possible for the said Richard Maritim to be in possession of the land as at the year 1973.
199. The Respondent submits that he led evidence before the trial Court which was to the effect that his son was in possession of a fifteen-acre portion of the suit parcel of land.
200. The Respondent also submits that the boundary of the said parcel of land was demarcated by a Mauritius Thorn Fence and Eucalyptus trees.
201. The Respondent further submits that he produced minutes which confirmed the said possession.
202. It is the Respondent's submissions that even though the Appellant testified that his (Respondent) son took possession of the land in the year 1986 after he was employed as a 'Cowboy', his (Appellant's)



witness who testified as DW2 confirmed that Richard Maritim was in possession of a portion of the suit parcel of land.

203. The Learned Trial Magistrate at pages 10 and 11 of the judgement held as follows;

“...From the Defendants (sic) witnesses they acknowledge indeed that PW2 is in occupation of the said parcel of land but DW2 cannot explain how and why DW1 asserted that PW2 was employed to herd cows by the Defendant but PW2 declined that and maintained that after they put up a fence and planted trees he took vacant possession of the land from his father and has stayed there until in 2000 (sic) when the Defendants began interfering with quiet possession (sic). I therefore do not find it credible that PW2 was employed yet he occupied about 10 acres of the said land (sic) fully demarcated and fenced and DW2 and even (sic) DW1 cross examination confirms this...

I find that in the instant case (sic) the Plaintiff has proved constructive possession through his son PW2 who stays on the land by virtue of having a beneficial interest and on the authority of his own father PW1 and therefore thus (sic) possession has further been confirmed by DW1 and DW2, who are at pains to explain it.”

204. In his examination-in-Chief, the Respondent testified that he was in possession of a portion of the suit parcel of land. He also testified that he took possession of the land in the year 1973 and he was still in possession.

205. Upon cross examination, he admitted that he does not live on the suit parcel of land. He also admitted that it was his son one Richard Maritim who was in possession.

206. Richard Maritim testified as PW2 and it was his evidence that he lived on a portion of the suit parcel of land since the year 1973 when the Respondent allegedly purchased the land.

207. He also testified that he was present when the land was subdivided and the boundary marked. He further testified that trees were planted along the boundary.

208. It was his evidence that his father paid kshs. 11,250/= as the purchase price. It was also his evidence that at the time of the said purchase he was young and he did not witness it.

209. Upon cross examination, he admitted that he was not present when the land was sold as he was in school. He clarified that he however witnessed the land being subdivided. He reiterated that a portion of the suit parcel of land was sold in the year 1973 and the Learned Trial Magistrate observed that he was not clear in his evidence even after he was asked to clarify when a portion of the suit parcel of land was allegedly sold.

210. Upon further cross examination, he stated that by the year 1973 he had married and that is when he took possession of the land.

211. It is evident that the evidence of Richard Maritim on when he took possession of the suit parcel of land is contradictory and as the Learned Trial Magistrate noted, he was not clear even when asked to clarify when a portion of the suit parcel of land was allegedly sold.

212. Richard Kipsang Rotich testified as PW5. It was his evidence that Richard Maritim has been in possession of a portion of the suit parcel of land since the year 1973.

213. The Appellant testified that Richard Maritim was employed by his father in the year 1986 and that is when he went to live on a portion of the suit parcel of land. He also testified that he (Richard Maritim) later left.



214. Richard Arap Sawe testified as DW2. It was his evidence during examination-in-Chief that he did not know Richard Maritim. Upon cross examination, he confirmed that the Appellant was in possession of the suit parcel of land together with Richard Maritim.
215. He also admitted that he could not remember when he (Richard Maritim) took possession of the land and why.
216. From the totality of the evidence adduced before the trial Court, it is evident that the Respondent is not living on the suit parcel of land but his son one Richard Maritim is living on a portion of the said parcel of land.
217. The Learned Trial Magistrate did not therefore err in finding that the Respondent's son was in possession of the suit parcel of land. Issue (e) shall deal with the question whether the portion occupied by the Respondent is 15 acres.
218. Therefore, this ground of appeal fails.

E. Whether the Learned Trial Magistrate erred in invoking the doctrine of constructive trust and finding that the Respondent had acquired 15 acres of the suit parcel of land by way of adverse possession.

219. This question for determination addresses ground (1) of the Memorandum of Appeal.
220. The Appellant contends that the Learned Trial Magistrate erred in invoking the doctrine of constructive trust and finding that the Respondent had acquired the land by way of adverse possession.
221. The Appellant also contends that the Respondent did not plead constructive trust and neither was Richard Maritim who is in possession of the land, a party to the suit.
222. The Respondent in his submissions relies on judicial decisions where the Court held that constructive trust can be inferred where it is not specifically pleaded.
223. The Respondent also submits that it was not necessary for his son who is in possession of a portion of the suit parcel of land to be a party in the suit as he was in possession of the land with his (Respondent) permission.
224. The Learned Trial Magistrate at pages 12, 13 and 14 of the judgement held as follows;

“I find that in the instant case (sic) the Plaintiff has proved constructive possession through his son PW2 who stays on the land by virtue of having a beneficial interest and on the authority of his own father PW1 and therefore thus possession has been confirmed by DW1 and DW2 who are at pains to explain it...

The defence while submitting that the Plaintiff could not claim an interest in land after the expiry of 12 years; the reverse is true. This is a right an occupier has against the registered owner and in this case the registered owner is the Defendant and the Plaintiffs (sic) is in constructive possession of the said land which is an overriding interest set out in Section 28 of the *Land Registration Act* and therefore recognized in law.

As per *Macharia Mwangi Maina & 81 Others vs Davidson Mwangi Kagins* [2014]eKLR the Court of Appeal observed that “a constructive trust is based on common intention which is an agreement arrangement or understanding actually reached between the parties and relied on and acted upon by the Claimant.”



Further in *William Kipso Sigei vs Kipkoech Aruse & Another* [2019]eKLR the Court of Appeal stated

“...We are of the view that the fact that the Appellant herein received the full purchase price for the property allowed the 1st Respondent to take possession and for a period of at least 14 years let him remain on the property undistributed (sic) a constructive trust has been created...that an oral agreement was still enforceable as the basis of a constructive trust or proprietary estoppel.”

I therefore find in the instant case that the Defendant had let the Plaintiff through his son to occupy the land from 1973 until 2000 undisturbed which is a period of 26 years and further to that the Defendant took him before the elders who found in favour of the Plaintiff and whose minutes have not been challenged should not be disturbed that indeed these are averring intenses (sic) against the title of the Defendant who is now legally bound to transfer the suit land as per the boundary he had showed them and fixed in their presence.” (sic)

In the circumstances I find that the Defendant merely has denied (sic) the existence of the land transaction and possession or that the Plaintiff repaid the loan on his behalf but has not managed to rebuilt (sic) the evidence adduced by the Plaintiff.

Considering the totality of the evidence before me I find the Plaintiff is entitled to the orders sought and grant them as follows...”

225. It is evident that the Learned Trial Magistrate relied on judicial decisions on constructive trust but made a finding that there was constructive possession.
226. There is no express finding that the Respondent had proved constructive trust and therefore the issue of whether or not constructive trust was pleaded and/or proved is moot.
227. I will now address the issue of whether the Respondent proved that he acquired a portion of the suit parcel of land by way of adverse possession.
228. Section 38 (1) and (2) of the *Limitation of Actions Act* provides as follows:

- “(1) 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

229. The Court of Appeal in *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184 held 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 of possession by the owner on his own volition”. (Emphasis mine)



230. In the judicial decision of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR the Court of Appeal held as follows;

- “ 40. A person who claims adverse possession must inter alia show:
- (a) on what date he came into possession.
 - (b) what was the nature of his possession?
 - (c) whether the fact of his possession was known to the other party.
 - (d) for how long his possession has continued and
 - (e) that the possession was open and undisturbed for the requisite 12 years.”

231. Therefore, possession and the period of time one has been in possession are important components of a claim of adverse possession.

232. Under issue (d) above, I have made the finding that Richard Maritim, the Respondent’s son’s is in possession of a portion of the suit parcel of land.

233. I have also made the finding that from the totality of the evidence adduced before the trial Court, it is not clear when the Respondent’s son took possession.

234. The Appellant submits that the Respondent did not adduce evidence as to the acreage of the suit parcel of land that he alleged his son to be in possession of.

235. The Respondent submits that he produced a Chief’s letter which stated that the portion of land that his son is in possession of is fifteen acres. The Respondent also submits that through his evidence and the evidence of his witnesses, it is clear that the disputed portion is clearly demarcated and fenced with Mauritius thorns.

236. The Respondent further submits that the Learned Trial Magistrate did not therefore err in finding that he had proved the size of the portion of land that he was in possession of.

237. The Learned Trial Magistrate at page 11 of the judgement found as follows;

“I therefore do not find it credible that PW2 was employed yet he occupied about 10 acres of the said land (sic) fully demarcated and fenced...”

238. The Learned Trial Magistrate issued the following orders at page 14 of the judgement;

- a. “That a permanent injunction issues restraining the Defendant by himself or his family members and or agents from trespassing upon 15 acres of land to be exceded (sic) from LR No. Kericho East Sotik SS/220.
- b. An order compelling the Defendant to effect transfer of land of 15 acres to the Plaintiff as per (a) above.
- c. A declaration does hereby issue that the Plaintiff has attained ownership of half of the suit land being Kericho/East Sotik SS/220 through adverse possession.
- d. Costs follow the event and in this case to be borne by the Defendants.



- e. That failure of compliance with prayer no (b) the Court Administrator/Bomet Law Courts to effect the transfer on behalf of the Defendant and or guardian ad litem.”
239. Essentially, the Learned Trial Magistrate found that the Respondent had proved his claim for fifteen acres and that he had been in possession for more than 12 years; which is the minimum number of years that one must have been in possession to succeed in a claim for adverse possession.
240. The judicial decision of *Gatimu Kinguru vs Muya Gathangi* [1976] KLR 253 was cited in *Oduor (Suing as the personal administrator of the Estate of Lucas Oduor Osowo - Deceased) v Ojode & another* [2024] KEELC 1061 (KLR) where the Court held as follows;
- “the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”
241. It is my finding that the Respondent’s evidence that his son was in possession of a portion of the suit parcel of land that was fenced with Mauritius thorns and eucalyptus trees was not controverted.
242. Richard Maritim who is the son of the Respondent and who is in possession of the land confirmed during cross examination that they had not measured the size of land that he was in occupation of.
243. Even though the portion of land is clearly identified, no evidence was led as to its size. Since the Respondent sought to be declared to have acquired a fifteen-acre portion of the suit parcel of land by way of adverse possession, then he ought to have led evidence to prove that the land his son was in actual possession of was fifteen acres.
244. The Learned Trial Magistrate therefore erred in finding that the Respondent had acquired a fifteen-acre portion of the suit parcel of land by way of adverse possession.
245. This ground of appeal therefore only succeeds on the ground that the Learned Trial Magistrate erred in finding that the Respondent had acquired a fifteen-acre portion of the suit parcel of land by way of adverse possession.

F. Who should bear costs of the appeal.

246. The general rule is that costs shall follow the event. This is in accordance with the Provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

DISPOSITION.

247. In the result I find that this appeal has merit and I order as follows:
- a. The judgement delivered in Bomet CM ELC Case No. 91 of 2018 on 19th September, 2022 is hereby set aside.
 - b. The Appellant shall have costs of the suit.
 - c. The Appellant shall have costs of the appeal.
248. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 5TH DAY OF FEBRUARY, 2026.

L. A. OMOLLO



JUDGE

In the presence of: -

Mr. Koske for the Appellant.

The firm of J.K. Koech for the Respondent - Absent

Court Assistant; Mr. Joseph Makori.

