



REPUBLIC OF KENYA



**Tipis & another v Mijoi & 3 others (Environment & Land Case
33 of 2019) [2024] KEELC 346 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 33 OF 2019
A OMBWAYO, J
JANUARY 31, 2024**

BETWEEN

SERAH SHILLO TIPIS 1ST PLAINTIFF

**ERIC TIPIS LENGESANI (SUIING AS A LEGAL REP OF JUSTICE KADET
TIPIS) 2ND PLAINTIFF**

AND

LEMERIAN OLE MIOJOI 1ST DEFENDANT

YUSSUF MOHAMED 2ND DEFENDANT

NANYIKU OLE NTUTU 3RD DEFENDANT

LOOYIEYIO OLE NTUTU 4TH DEFENDANT

JUDGMENT

Introduction

1. This matter commenced in the High Court at Nakuru on 15th March 2001 as High Court Civil case No. 411 of 2001 (O.S) It was later converted to Nakuru ELC case No.380 of 2013 (O.S) and later Nakuru ELC Case No.33 of 2019 (O.S). The plaintiffs are Serah S Shiloo Tipis, and Eric Tipis Lengeseni who are suing Lemerian Ole Mijoi Yussuf Mohammed, Nanyiku Ole Ntutu and Looyieyio Ole Ntutu . The plaintiffs claim is based on Order 37 rule 7 of the Civil Procedure rules which raises issues of adverse possession and of trust and gift. The plaintiff in the further amended Originating Summons prays for a Declaration that the under-delineated defendants' respective purported titles, namely: -

- i. L.R No.Cis-mara/Lemek/1757 allotted to Lemerian Ole Mijoi;
- ii. NO. Cis-mara/Lemek/ 1851 allotted to Yusuf Mohammed Hussein;



- iii. L.R No.Cis-Mara/Lemek/1862 allotted to Nanyiku Ole Ntutu;
 - iv. L.R No. Cis-Mara/Lemek/1863 allotted to Looyieyio ole Ntutu and/or any purported proprietary interest in any parcel of land forming a portion of the land adjacent to land reference number Cis-mara/Lemek/161 occupied by the plaintiff as part of the estate of the late Justus Kantet ole Tipis are held by the said defendants jointly and severally in trust for the plaintiffs.
2. That the plaintiffs be forthwith registered as the proprietor of the following purported parcels of land in place of the purported registered owners thereof, namely:-
- i. L.R No.Cis/mara/Lemek/1757 allotted to Lemerian Ole Moijoi;
 - ii. L.R No.Cis-mara/Lemek/1851 allotted to Yusuf Mohammed Hussein;
 - iii. L.R No.Cis-mara/LemeW1861 allotted to Nanyiku Ole Ntutu;
 - iv. LR.No.Cis-mara/Lemek/1862 allotted to Nanyiku Ole Ntutu;
 - v. LR No. Cis-mara/Lemek/1863 allotted to Nanyiku Ole Ntutu and
 - vi. LR No. Cis-mara/Lemek/1864 allotted to Looyieyio Ole Ntutu which parcels of land form a portion of the variously unregistered land adjacent to land reference number Cis-mara/Lemek/161 occupied by the plaintiffs as part of the estate of the late Justus Kantet Ole Tipi.
3. The plaintiffs further pray that accordingly the defendants be restrained by a permanent injunction from trespassing upon, wasting, alienating and/or interfering with the afore-delineated suit premises in any manner whatsoever prejudicial to the plaintiff's' property interests thereof. That costs of this suit be borne by the defendants jointly and severally.
4. This court observes that parties are bound by their pleadings and prayers and therefore I do find that the plaintiffs have come to this court for determination of the issues of trust and adverse possession. The Originating Summons is supported by affidavit of Rhoda Tipis now deceased who states that in or about 1971 the late Justus Kantet Ole Tipis and/or his family took possession of the portion of the then unregistered portion of land bordering and/or adjacent to LR. No. Cismara/Lemek/161 measuring approximately 1078 acres.
5. The plaintiff states that at all material times LR, NO. Cismara/Lemek/161 constituted and still forms part of the estate of the late Justus Kantet Ole Tipis. His family immediately took possession and/or went into occupation of the said portion. The said portion of land was then completely fenced off as the said Justus Kantet Ole Tipis and/or his family started utilizing the said land by way of cultivation and related activities. Since that time the said portion of land has always been exclusively, conspicuously and distinctly owned, occupied and/or utilized by the family of the late Justus Kantet Ole Tipis. The plaintiff states that indeed there is an informal merger of the said portion of land and LR. NO Cismara/Lemek/ 161 which may for all practical intents and purposes be regarded as an informal extension of the latter. The boundary marking out the said portion of land is largely comprised of wooden posts, eucalyptus and cyprus trees. Possession, occupation and use of the said portion of land is clearly borne out by the bundle of twelve (12) photographs.
6. The afore-described alienation of the said portion of land was re-confirmed by Lemek Group Ranch in 1992 vide its minutes of the annual general meeting held on September 1992 as it embarked on further distribution of its land to its members. At all material times the late Justus Kantet Ole Tipis and/or his family held and still do hold the said portion of land as a matter of right of ownership thereof. *



7. The said possession and occupation has been open, exclusive and certainly as a matter of right of ownership thereof and therefore without the defendants' permission particularly the fifth defendant.
8. On several occasions in 1999 some of the incumbent officers of the defendants' group ranch started interfering with the quiet possession and peaceful occupation of the aforesaid portion of land in a bid to alienate the same to prospective buyers and/or alleged members of the said group ranch. The fifth defendant's agents and/or servants as well as the rowdy youths it had hired to execute several of those unlawful and provocative mission were effectively repulsed by the plaintiff's guards and workers.
9. On the 20 days of April , 1999 the fifth defendants' officers were accompanied by the Narok district land registrar, the land adjudication officer and a private surveyor for the manifest purpose of subdividing the aforesaid portion of land but they were once again successfully repulsed by her guards and workers.
10. All along the fifth defendant was aware of the plaintiffs open bid to be registered as the owner of the said portion of land on behalf of the estate of her late husband Justus Kantet Ole Tipis. Apparently the fifth defendant was maliciously taking advantage of the death of her late husband to renege on the aforesaid alienation and/or allocation of that portion of land to Justus Ole Tipis in 1971 .
11. The plaintiff states that there were other cases filed by the plaintiff such as HCCC No. 1361 of 1999. The court issued interim injunction in favour of the plaintiffs against the defendants. However, the case was discontinued.
12. The plaintiff contends that the prayers to the defendant were executed when the High Court case number 1361 of 1999 was pending. The plaintiff claims to be in uninterrupted possession of the land and that the deceased Justus Ole Tipis was allocated the land by the Lemeck Group Ranch.
13. Looyieyo Ole Ntutu filed a reply to the amended Originating Summons whose gist is that the Originating Summons is bound to fail because the plaintiffs are seeking orders and declarations which cannot be available under the Law. To this end he invites the court to go by section 6 (3) of the [Land Control Act](#) Chapter 302 of the Laws of Kenya and the previously decided High Court and Court of Appeal decisions.
14. He believes that the declarations sought are not only a misconception of the Law on the part of the plaintiffs but also a totally misplaced idea full of wishful thinking.
15. That the 2nd defendant was at all material times to this suit and as way back as in 1990s a registered member of Lemek Group and as such a beneficiary of the land he owns and his Title cannot be challenged. His Title and the plaintiffs' land are totally distinct and separate.
16. That the 2nd defendant with the 3rd Defendant were born and brought up in Lemek Group Ranch and became adults in that group and are by virtue of birth and the growing up truly entitled to the parcels of land allocated to them as beneficiaries. They were shown the respective parcels of land way back before they were issued Title Deeds and were all along cultivating their land.
17. The 2nd 3rd and 4th Defendants' parcels of land border the Plaintiffs parcel of land L-R. No. Cismara/Lemek/161 measuring about 1100 acres. That there existed a very clear boundary and beacons between the Plaintiffs' land and the 2nd, 3rd and 4th Defendants parcels of land until the 2001 when the Plaintiff out of sheer greed violently uprooted the beacons and started claiming their respective parcels of land.
18. The Plaintiffs violently invaded their land, started laying claims therein and despite their protests to the local administration, the Plaintiffs who believed that they were still wielding powers flexed their muscles on the defendants and persisted in forcefully occupying their land and resisting their use thereof.



19. He states that they are in actual possession of the land but with lots of difficulties because whenever they plant crops on the land the Plaintiff imports other communities and strangers who storm into it and mow down their crops.
20. Whenever their crops are mowed in hours of darkness by the Plaintiffs and their servants, they are totally disabled because they cannot have them prosecuted without evidence. In fact it has been made nearly impossible and impracticable for them to fully and adequately use their land.
21. Their parcels of land do not form part or parcel of the Plaintiff's land and to this end they would appreciate if the District Land Registrar and the District Land Surveyor were first ordered to carry out a survey and make findings whether the Plaintiffs land and their parcels of land overlap each other or if their parcels of land can be found as forming part and parcel of the Plaintiff's parcel of land. A report to this end would truly settle the issues in controversy here.
22. No grounds of any fraud have been alleged in the Further Amended Originating Summons or even in the original and Amended Originating Summons against any of the 2nd 3rd and 4th defendants by the Plaintiff contrary to the Civil Procedure Rules.
23. According to the defendants, the Originating Summons as Amended and Further Amended Originating Summons lack merit and are incompetent. The same should be dismissed with costs. The 2nd 3rd and 4th Defendants are too willing that the court appoints the District Land and the District Land Registrar of Narok County to go by the available maps in the Government Offices, visit the grounds and establish whether the Plaintiff's land has been invaded by registration of the 2nd, 3rd and 4th Defendants' Titles and if so to what extent and to establish whether or not the 2nd, 3rd and 4th Defendants parcels of land are quite distinct and separate from the Plaintiffs land and the exact boundary and location of beacons between the Plaintiff's parcel of land and the 2nd, 3rd and 4th Defendant's parcels of land.
24. Lemerian Ole Karia filed a replying affidavit for the 5th defendant whose import is that the family of Justus Ole Tipis took possession of the unregistered parcel of land which was next to L-R. No. Cismara/Lemek/161 in 1971. That in 1979 the latter was registered in the names of Justus Ole Ntutu. The former is the subject of this suit. There is no unregistered parcel of land in Lemek Group Ranch area and that all titles issued by the Group Ranch came from their registered Title and not from unregistered parcel.
25. The 5th defendant states that the titles were fraudulently obtained because the documents were forged. Moreover, that the 1st, 3rd and 4th defendants are not members of the Lemek Groups Ranch. However the 5th defendant admits that the 2nd defendant is a member of Lemek Group. The 5th defendant was withdrawn from the proceedings.

Evidence On Record.

26. The plaintiff first called PW1 Lemerian Ole Karia the chairman of Lemek Group Ranch elected in 1977 who stated that Justus Ole Tipis was their member of parliament and an elder of the society. They gave him parcel L-R. No. Cismara/Lemek/161 first and he took possession and lived there but later gave him the unregistered land to assist him access the parcel of land L-R. No. Cismara/Lemek/161 due to the impassable road. Though Ole Tipis was not living there he was given the land. He denied having signed the documents of transfer form for the parcels obtained by the 1st – 4th defendants. On cross examination by Mr. Maina learned counsel for the defendants, he states that the land was given to Ole Tipis in 1987 but was added land later since he was a community leader but not a member of the Lemek Group Ranch. The extra land was given on 3rd September 1992. He states that he became



- chairman in 1997. He emphasizes that Ole Tipis was not a member of the Lemek Group Ranch but was given Land as a Community Leader. There was no resolution to allocate land to Justus Ole Tipis.
27. PW2 Martin Ole Barafe states that Justus Ole Tipis requested for land from Lemek Group Ranch and was given the same. He was shown the land in 1976 and took possession but requested for more land because the land allocated to him was in the lowland and prone to flooding. He was allocated extra land which is now under contention. The land was allocated to the plaintiff and not defendants. On cross examination he states that the group Ranch was dissolved in 1997. He admitted that in their defence in Nairobi HCCC No. 1361 of 1999 Lemek Group Ranch indicated that Ole Tipis was allocated only one parcel of land thus L-R. No. Cismara/Lemek/161.
 28. PW3, Eric Tipis Longeseni is the son of the late Ole Tipis born in 1982. He testified that his family lived in parcel no L-R. No. Cismara/Lemek/161. According to the mutation they were allocated parcel no L-R. No. Cismara/Lemek/161 plus the adjoining parcel that was not demarcated at that time. They farmed maize on the parcel of land. Lemek Group Ranch gave the land to his father Ole Tipis. On cross examination by Mr. Maina, he states that his father was allocated the land in 1972/73. His father left a will but never mentioned the disputed land. He admitted that there were no resolution for allocation of the land to his father. In cross examination he states that his claim is adverse possession.
 29. The Defence called Lemerian Ole Moijo as DW1 who states that he is the registered owner of L.R No.Cis-Mara/Lemek/1757 having been allocated by Lemek Group Ranch. He was residing within the Ranch. The land was allocated through adjudication process that started in 1993. He was shown the land and started utilizing the same. He took a loan in the year 2006 and repaid in 2011. The dispute has always been the boundary between their parcels of land and parcel no L.R No.Cis-Mara/Lemek/161. The Lemek Group Ranch once filed a defence in case number Nairobi HCCC No.1361 of 1999 and denied that they allocated the land to Hon Justus Ole Tipis.
 30. DW2, Yusuf Mohammed a medical doctor stated that he is the registered proprietor of parcel number parcel no L-R. No. Cismara/Lemek/1851. He obtained it legally. He took possession and grew grass on the land. The Ole Tipis family has utilized his land without his will. The will by Ole Tipis does not mention the parcel of land. He states that he was a bonafide member of Lemek Group Ranch. He states that he inherited the land from his family members. According to the witness, the transfer of land was signed before a lawyer known as Wainaina and the three officials of Lemek Group Ranch were present.
 31. DW3, Raphael Patite Parkine, a former secretary of Lemek Group Ranch and a former Chief of Ngori Ngori location states that Lemek Group Ranch was within Ngori Ngori location. He states that Ole Tipis was given L.R No.Cis-Mara/Lemek/161 and no other land. He states that the purported meeting that gave Justus Ole Tipis land did not have the required quorum of 60% of the 2000 members. He further states that the 1st and 2nd defendants were members of Lemek Group Ranch whereas the 3rd and 4th defendants were given land to accommodate non Maasai who were residing in the area. The 3rd and 4th defendant were using the land even when Justus Ole Tipis was alive.

Rival Submissions

32. The gravamen of the plaintiff's submissions is that Justus Ole Tipis was allocated the suit land by Lemek Group Ranch and that at the time of allocation the same was not registered but was bordering L.R No.Cis-Mara/Lemek/161. Justus Ole Tipis immediately took possession of the land and occupied the same and planted trees and began cultivation. The plaintiff's claim though not crystal clear in the pleadings is based on adverse possession. The plaintiff relies on the case of Maweu vs Liu Ranching & farming co –operative Society Ltd (1985)KlR at page 432 line 40 where the court of appeal held that in principle, it is a thing of wonder that title and adverse possession can ever be confused, since adverse



possession by definition is an antithesis of title and that adverse possession is a fact to be observed upon the land. It cannot be seen in a title even under cap 300 (repealed). Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect land for 12 years after he has acquired it.

33. The plaintiff relies on the treatise of Harlbury's Laws of England 5th Edition 2008 Volume 68 paragraph 1078 on what constitutes adverse possession as being a question of fact and degree and depends on all circumstances of each case in particular the nature of the land and the manner in which the land of that nature is being used. There is no general principle that, to establish possession of an area of land, the claimant must show that he made physical use of the whole land. That the factual possession must be physical, exclusive for the benefit of the possessor.
34. The defendant on their part submit that the plaintiffs cannot base their claim on a gift and adverse possession at the same time. They have to choose one. That if they claim to be on the land by virtue of a gift then they cannot claim adverse possession.
35. Moreover, the defendants submit that the land was not legally allocated to the late Justus Ole Tipis as there was no quorum for conducting business on behalf of the Lemek Group Ranch hence the alleged granting of possession of the suit property to the late Justus Ole Tipis was null and void. The defendants further submit that in 1998, Lemek Group Ranch distributed the property to its members and that Justus Ole Tipis or Rhoda ole Tipis was not a member.
36. On the issue of adverse possession, the defendants submit that the plaintiff have not been in occupation of the suit land which is registered in the names of the defendants. The defendants submit that the plaintiffs were in possession of parcel no L.R No.Cis-Mara/Lemek/161. The plaintiffs did not annex a will left by the late Justus Ole Tipis in respect of the suit parcel of land.

Analysis and Determination

37. The register for the land in dispute was first opened on 21st July 1992 as L.R No.Cis-Mara/Lemek/203 measuring 49,707.7 ha and registered in the name of the Lemek Group Ranch on the said date. Title was issued on 23rd July 1992. The title was closed on 6th January 1999 on subdivision and new titles were created thus L.R No.Cis-Mara/Lemek/584 to 1872. The suit property were the beneficiaries of the subdivision and were allocated parcel numbers 1757, 1851, 1861,1862, 1863 and 1864 which were transferred to them in the year 2000 after adjudication process that affected thousands of people. The suit herein was filed in the year 2001. The plaintiff claims adverse possession, gift and trust.

The first issue to be determined is whether the plaintiffs have satisfied the doctrine of adverse possession.

38. This court identified five conditions in the case of Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] eKLR to be met to perfect the title of the adverse party as follows;

".....Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party."

39. The first condition is being in open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If the legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could



be expected to know about. The period of possession should be 12 years. To determine the nature of possession, this Court is guided by the decision in *Kisumu Civil Appeal No. 27 of 2013*; - Samuel Kihamba v Mary Mbaisi [2015] eKLR where the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

40. Does the Justus Ole Tipis family meet this condition? The facts of this case are that Lemek Group Ranch was registered on 21st July, 1992 and therefore the adverse period began running on the said date and therefore 12 years lapsed in 2004 and yet the suit was filed in 2001 thus 3 years before lapse of the 12 years required term and therefore the principle of adverse possession does not apply.
41. The second condition is the Continuous use of the property. The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. This court finds that the plaintiffs have not demonstrated a continuous use of the property as the defendants demonstrated that at one time they were in possession of the property but the plaintiffs used force to eject them and that the issue of possession has not been static.
42. The third condition is the exclusive use of the property– The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There was evidence that the defendants would cultivate land but the plaintiff would proceed to plant on the cultivated land using force and later the defendants would mow the planted crops.
43. The fourth condition is actual possession of the property– The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking, grazing or hunting on land does not establish actual possession. The actions of the adverse party must change the state of the land, as by clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements. If the property is residential, such actions may include mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. The plaintiff did not demonstrate actual possession of the land as the same was full of shrubs and indigenous trees save for some old cypress and eucalyptus trees and the plaintiffs had no evidence that they planted the same. There was no evidence of actual possession.
44. The last and most important condition is Non-permissive, hostile or adverse use of the property– The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The plaintiff cannot term their possession as non- permissive



because they were given permission by the Lemek Group Ranch to enter and use the land because their land was prone to floods as it was low lying and that the late Justus Ole Tipis used to get stuck in mud while using his car. In the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.

45. Moreover, the plaintiffs cannot claim adverse possession and at the same time claim that they were allocated the land as a gift and claim that the defendants obtained title through fraud.
46. The second issue to be determined is whether the plaintiff has established the existence of constructive trust.
47. Halsbury’s Laws of England, 4th Edition Vol. 48 at paragraph 597 defines a resulting trust as:

“A resulting trust is a trust arising by operation of law:

- i) Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or
- ii) Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
- iii) Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.”

48. Section 107 of the [Evidence Act](#) Cap 80 of the laws of Kenya provides that: -

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

49. The Court of Appeal in the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, while dealing with the issue of trust stated as follows:-

“Dealing with the first issue, according to the Black’s Law Dictionary, 9th Edition; a trust is defined as:

- “1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the [Trustee Act](#), “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...” Trusts are created either expressly (by the parties) or by operation of law. An



express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England Vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand.

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra)....”

50. The plaintiffs have not demonstrated that the late Justus Ole Tipis obtained the land legally. To begin with, he was not a member of Lemek Group Ranch and therefore entitled to be allocated the land in dispute. Moreover, the allocation was not done in accordance with the Land (Group Representatives) Act Cap 287(repealed). Section 15 subsectios 5, 6 and 7 provide that all members of the group shall be entitled to attend a meeting of the group and to vote and that no business shall be transacted at a meeting of a group unless at least 60% of the members of the group are present at the meeting and that a resolution at a meeting of a group supported by the votes of not less than 60% of the members of the group present at the meeting shall be treated as the decision of the group. The minutes of the meeting that is presumed that the Lemek Group Ranch gifted the suit property to Justus Ole Tipis do not disclose the total number of those who attended the meeting and that the members were given notice of the meeting and therefore there is no proof that section 15 of Land (Group Representatives) Act Cap 287(repealed). was complied with and therefore no evidence that the plaintiffs obtained the land procedurally.
51. The next issue is whether the defendants obtained title through fraud. To begin with I do find that fraud is not properly pleaded in the originating Summons as the particulars are not clearly brought out. Moreover, it is improper to plead fraud in an originating summons for adverse possession and therefore the claim based on fraud is misplaced.



52. Even if the claim based on fraud is properly before this court the same has not been proved as required in law. In the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] EKLK the Court of Appeal stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.. “..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

53. In this case the plaintiffs have not proved that the defendants obtained their title fraudulently and therefore any claim based on fraud fail as the burden of proof was not discharged by the plaintiffs.

54. The *Land Registration Act* has made provisions for the rights of a proprietor of land at section 25(1) of the Act which provides that:

‘The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.’

55. Section 26(1) of the *Land Registration Act* provides that:

‘The certificate issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except: -

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

56. I do find that the plaintiffs claim has not been proved and the same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF JANUARY 2024

A.O.OMBWAYO

JUDGE

