



REPUBLIC OF KENYA



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**Mayabi v Wanjohi (Originating Summons E047 of 2022)  
[2024] KEELC 1279 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1279 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ORIGINATING SUMMONS E047 OF 2022**

**MD MWANGI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**WILLIS GERSHOM MAYABI ..... APPLICANT**

**AND**

**ELIZABETH WANGECHI WANJOHI ..... RESPONDENT**

**JUDGMENT**

**Background**

1. By the Originating Summons dated 23<sup>rd</sup> September, 2022, the Applicant initiated this suit under Section 38 of the *Limitation of Actions Act* and Order 37 Rule 3 of the Civil Procedure Rules seeking the following orders:
  - a. That a declaration be made that Willis Gershom Mayabi (the Applicant herein) has become entitled by way of adverse possession to the whole of the land known as Plot No. 681 in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m under the Registered *Land Act* (Cap. 300 Laws of Kenya now repealed) by having adversely occupied the same for over 20 years.
  - b. That the Respondent's title to the said land be declared extinguished and or invalid and the Applicant be registered as the proprietor of the suit land.
  - c. That the Respondent does execute all necessary documents to effect the transfer of the said Plot No. 681 in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m to the Applicant.
  - d. That in the Alternative And Without Prejudice To The Foregoing, a declaration be made that there exists a resulting trust in favour of the Applicant over land known as Plot No. 681



in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m by dint of payment in full of the purchase price as at 15/1/1992.

- e. That the trust under (d) above be dissolved and an order be issued directing that Plot No. 681 in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m be transferred from the name of Elizabeth Wangechi Wanjohi to the name of Major Willis Gershom Mayabi.
  - f. That Elizabeth Wangechi Wanjohi be and is hereby Ordered to release to the Plaintiff all completion documents necessary to effect this Judgement within 14 days after passing this Judgement.
  - g. That in default of the Respondent's compliance with (c) or (f) above, an order be issued to the Honourable Deputy Registrar of this Court authorizing the registrar to sign all necessary documents required to ensure the transfer orders in the Judgement are realized and the Registrar of Lands to accept such documents signed by the Deputy Registrar as being sufficient to effect transfer of the piece of land known as Plot No. 681 in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m to the Applicant.
  - h. The costs for this suit be borne by the Respondent.
  - i. Any other relief that this Honorable Court deems just and fair to grant.
2. The summons are premised on the grounds on the face of the application and particularly in the Supporting Affidavit of the Applicant sworn on the 23<sup>rd</sup> September, 2022.
  3. It is deponed by the Applicant that the Respondent sold the suit property to him in 1992 at the price of Kshs. 80,000/= pursuant to an Agreement of Sale dated 15<sup>th</sup> January, 1992 which he annexes thereto. The Respondent acknowledged receipt of the purchase price on the same date. On the very date of execution of the Agreement for Sale, the Respondent granted the Applicant a Power of Attorney to act on her behalf in relation to the suit property. He adduces a copy of the Power of Attorney to that effect.
  4. The Applicants states the pursuant to the said Power of Attorney, he has continued to pay the existing loans owed by the Respondent in relation to the property as well as all other statutory costs. The Applicant annexes copies of receipts to that effect.
  5. The Applicant avers that the Respondent has however never instituted the transfer process since 1992 in spite of receiving and acknowledging payment of the entire purchase price. The Respondent has never furnished him with the necessary completion documents to carry out the transfer which amounts to breach of contractual obligations. He states that he lost contact with the Respondent and her family thus hampering execution of transfer documents. The Applicant asserts that he has developed the suit property by building a 3 storey residential building with several rooms and rented them out. He prays that the court grants him the orders sought in the application.
  6. From the record, service of summons was effected on the Respondent by way of substituted service through publication in the Daily Nation Newspaper on the 25th August, 2023. Despite evidence of service of the aforesaid summons, there was no appearance by the Respondent. The matter then proceeded as an undefended suit.
  7. At the hearing, the Applicant testified as the sole witness in his case. By and large he adopted his evidence as contained in the supporting affidavit. He prays that the court grants him the orders sought in his case.



## **Applicant's submissions**

8. The Court directed the Applicant to file written submissions. The Applicant complied and filed his submissions dated 13th February, 2024.
9. Counsel for the Applicant identifies two issues for determination. The first one being whether the Applicant has acquired title to the suit property by way of adverse possession. In that respect, Counsel cites the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* (2015) eKLR, where Makhandia, JA restated the elements of adverse possession.
10. Counsel submits that the Applicant has established all the elements of adverse possession. He argued that the Applicant by virtue of having been in possession of the suit property for more than 30 years has acquired it through adverse possession. Counsel relies on the case of *Ng'angá Njoroge –vs- Daniel Kinyua Mwangi* (2015) eKLR, where the court stated that the Claimant's possession is deemed to have become adverse to that of the owner after the last payment of the last installment of the purchase price and that of the Claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.
11. It is submitted that the second issue for determination is whether there exists a resulting trust in favour of the Applicant over the suit property and if in the affirmative, whether the trust should be dissolved and the suit property registered in the name of the Applicant. It is argued that the Applicant has the right to beneficial enjoyment of the property as much as the property is still registered in the name of the Respondent. The Respondent having acknowledged receipt of the purchase price and having issued a Power of Attorney to the Applicant does confirm the parties intention for the Applicant to deal with the property as if he was the owner.
12. He therefore submits that in the event that an order for adverse possession is not granted, then the court should make a declaration that there exists a resulting trust in favour of the Applicant over the suit property. The court should declare that the trust be dissolved and an order be issued directing that the said land be registered in the name of the Applicant.

## **Issues for determination**

13. Having looked at the Applicant's pleadings the evidence adduced and the submissions filed, I frame the following issues for determination;
  - a. Whether the Applicant is entitled to an order of adverse possession.
  - b. Whether there exists a resulting trust in favour of the Applicant over the suit property.
  - c. Which orders should the court issue?

## **Analysis and determination**

### **A. Whether the Applicant is entitled to an order of adverse possession**

14. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*].



15. Secondly, the Claimant must prove that he has enjoyed possession without force, without secrecy, and without persuasion [nec vi, nec clam, nec precario] for the prescribed limitation period of twelve (12) years.
16. Thirdly, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property.
17. Finally, the possession must be continuous; it must not be broken or interrupted.
18. In *Titus Kigaro Munyi vs Peter Mburu Kimani*, CA No. 28 of 2014, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.
19. The doctrine of adverse possession has its statutory underpinnings in Sections 7, 9, 13, 37 and 38 of the *Limitation of Actions Act*. The Applicant took out the present Originating Summons under Section 38 of the *Limitation of Actions Act* which provides as follows:
  38. Registration of title to land or easement acquired under Act;  
“
    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.
    3. A proprietor of land who has acquired a right to an easement under Section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
    4. The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
    5. The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.”
20. It is evident that as per records of the Nairobi City County (the successor in title to the defunct City Council of Nairobi) - Housing Development Department, the suit property is in the name of the Respondent. Indeed, the rates payment receipts and the loan repayment receipts adduced by the Applicant herein, the suit property belongs to the Respondent. No evidence in the form of a certificate of lease or title has been availed to confirm that the suit property is registered under any of the legal regimes in this country.
21. The tenor and import of the provision of Section 38 of the *Limitation of Actions Act* is that an order of adverse possession issues against the registered proprietor of land. The essence of an order of adverse possession under the said section is that it directs the Land Registrar to alter the land register by registering the adverse possessor as the new registered proprietor in place of the hitherto existing



registered proprietor. For this reason, a claim of adverse possession under Section 38 of the *Limitation of Actions Act* would only lie against a registered proprietor.

22. As such an order of adverse possession would not issue in this case.

**b. Whether there exists a resulting trust in favour of the Applicant over the suit property**

23. The Applicant has sought an alternative prayer of a declaration of existence of a resulting trust.

24. Halsbury's Laws of England, 4<sup>th</sup> 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.”

25. While discussing the burden of proving trust, the Court of Appeal in the case of *Heartbeat Limited - vs- Ng'ambwa Heartbeat Community Children's Home & Rescue Center* [2018] eKLR stated that:

“Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley – Civil Appeal No. 75 of 2016* (unreported). It was upon the respondent to establish that it was the parties' intention that the appellant would purchase and hold the suit parcels in trust for it...”

26. 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.”

It is therefore the Applicant's burden to prove that the trust he alleges existed.

27. From the Documents produced by the Applicant, the agreement for sale for the suit property produced as Pexh 1 indicate that the Applicant did purchase the suit property and paid the purchase price to that effect. The Applicant has further adduced a Power of Attorney confirming the intention of the parties that the Applicant would use the suit property as if he was the owner.



28. The relationship between the parties herein is one of a vendor and purchaser. The law is that a Court will not easily impute a trust. In *Peter Ndungu Njenga .vs. Sophia Watiri Ndungu* (2000) eKLR the Court of Appeal held as follows:-

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

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

“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.....”

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

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (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)....”

30. Guided by the above cases I conclude that the Applicant has proved the existence of a resulting trust with regards to the suit property.

31. The upshot from the foregoing is that the Court finds and holds that the Applicant has proved his case on a balance of probabilities. Therefore, judgement is entered in favour of the Applicant against the Respondent in the following terms:

A. A declaration is hereby issued that there exists a resulting trust in favour of the Applicant over land known as Plot No. 681 in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m by dint of payment in full of the purchase price as at 15/1/1992.

B. That the resulting trust be and is hereby dissolved and an order is issued directing that Plot No. 681 in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m



be transferred from the name of Elizabeth Wangechi Wanjohi to the name of Major Willis Gershom Mayabi.

- C. That the Respondent is hereby Ordered to release to the Plaintiff all completion documents necessary to effect this Judgement.
- D. That in default of the Respondent's compliance with (b) or (c) above, an order be issued to the Honourable Deputy Registrar of this Court authorizing her to sign all necessary documents required to effect transfer of the piece of land known as Plot No. 681 in Section A2 of Kayole Site and Service measuring approximately 75m x 20.5m to the Applicant.
- E. The Applicant is also granted the of the suit as prayed.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024**

**HON. JUSTICE M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Kariuki for the Plaintiff

N/A for the Respondent

Court Assistant; Yvette

**HON. JUSTICE M.D. MWANGI**

**JUDGE**

