



Abok & another v Andega & 5 others (Environmental and Land Originating Summons 33B of 2020 & Environment and Land Case Civil Suit 47 of 2020 (Consolidated)) [2024] KEELC 743 (KLR) (19 February 2024) (Judgment)

Neutral citation: [2024] KEELC 743 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 33B OF 2020 & ENVIRONMENT AND LAND CASE CIVIL SUIT 47 OF 2020 (CONSOLIDATED)

SO OKONG'O, J

FEBRUARY 19, 2024

MATTER OF THE LIMITATION OF ACTIONS ACT, CHAPTER 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. PLOT NO.44 AHERO TOWN

AND

IN THE MATTER OF AN APPLICATION BY LEUTINA ATIENO ABOK

BETWEEN

LEUTINA ATIENO ABOK APPLICANT

AND

MARGARET WERE ANDEGA 1ST RESPONDENT

JOHN ANDEGA 2ND RESPONDENT

KILLION ANDEGA 3RD RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE CIVIL SUIT 47 OF 2020

BETWEEN

LEUTINA ATIENO ABOK PLAINTIFF

AND

MARGARET WERE ANDEGA 1ST DEFENDANT



JOHN ANDEGA 2ND DEFENDANT

KILLION ANDEGA 3RD DEFENDANT

JUDGMENT

1. Leutina Atieno Abok (hereinafter referred to only as “the Applicant” for ease of reference) brought two suits against Margaret Were Andega, John Andega and Killion Andega (hereinafter referred to together only as “the Respondents” for ease of reference). The first suit by the Applicant was brought by way of Originating Summons dated 11th June 2020. The Originating Summons was brought under Order 37 Rule 7, Order 40 Rules 1, 2, 3(3), 4 of the Civil Procedure Rules, Sections 17 and 38 of the Limitations of Actions Act, Chapter 22 Laws of Kenya and Section 7 (d) of the *Land Act*, 2012. In the Originating Summons the Applicant sought the determination of the following questions;
 1. Whether the Applicant had acquired title to the parcel of land known as Plot No. Ahero/44, Ahero Town (hereinafter referred to only as “the suit property” by reason of adverse possession thereof since 1968.
 2. Whether the title of the Respondents to the suit property had been extinguished by the Applicant’s late husband’s adverse possession thereof for more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act*.
 3. Whether an order should be issued requiring and directing the Land Registrar Nyando to register the Applicant as the owner of the suit property.
 4. Whether the last original indentures or actions by the Respondents in respect of the suit property should be cancelled or nullified.
 5. Whether the costs of this suit should be provided for.
2. The application was based on the grounds that the Applicant had been in occupation of the suit property for over 50 years and that the Respondents had taken over the suit property making it impossible for the Applicant to use the same. The Applicant averred that she had been in adverse possession of the suit property for over 12 years before the filing of the Originating Summons and that the Respondents were in the process of illegally evicting her from the suit property.
3. In her Supporting Affidavit, the Applicant averred that she was the widow and the administrator of the estate of the late Jacob Abok Milaw, deceased (hereinafter referred to only as “the deceased”). That the suit property was allocated to the deceased and his two brothers, Joseph Oloo Milaw and George Andega Milaw. The brothers built a 3-door shopping unit on the suit property between 1965 and 1968 and each brother was allocated one shopping unit. Joseph Oloo Milaw later sold his unit to the deceased and relocated to Nyalenda-Kisumu.
4. She averred that the suit property was initially allocated to Samson Sure and Shem Dienya (hereinafter referred to as “the original allottees”) but they took too long to develop it and the same was reallocated to the deceased and his two brothers by Ahero County Council. When the original allottees complained about the allocation of the suit property to the deceased and his brothers, the original allottees were allocated new plots, Ahero No. 96 A and 91B. Although the suit property was reallocated to the deceased and his two brothers, the lease remained in the name of the original allottees. In 1982, the son of one of the original allottees, Samson Sure by the name Tuju gave the said lease to the deceased and one of his brothers, George Andega at the suit property. The deceased and his brother, George



Andega commenced the process of registering the suit property in their names but the process took long. The deceased died in 1995 and George Andega in 2018 before the property was transferred to their names. In 2005, George Andega requested Tuju to issue him with a letter to enable him to change the ownership of the suit property from the original allottees to that of the deceased and George Andega but the change did not go through. The Applicant averred that she only came to realise that George Andega had fraudulently succeeded in having the suit property registered in his sole name when his children and wife demolished the shopping units claiming that the suit property belonged to their father/husband. The Applicant averred that George Andega had the suit property transferred to his sole name without involving her or the family of his other brother, the late Joseph Oloo Milaw.

5. She averred that she had been collecting rent from one of the shops since 1968 until 2020 when the defendants demolished the shopping units. Initially, the deceased had two shopping units but in 1989, he gave George Andega the shop that belonged to their brother Joseph Oloo Milaw. George Andega (also deceased) did not interfere with her rent collection from the said shop until he died in 2018. She averred that her problems started when George Andega's sons demolished the shopping units in 2020 and even took away her iron sheets. She stated that she had been collecting rent from the said shopping unit for over 50 years.
6. The Applicant's second suit, Kisumu ELC Suit No. 47 of 2020 was instituted by way of a plaint dated 11th June 2020. In her plaint, the Applicant reiterated the contents of her affidavit in support of the Originating Summons that I have highlighted above save that in the plaint, the Applicant claimed to still own two of the shopping units. The Applicant averred that she had rented out the said two shops and was collecting rent from the same until the shops were demolished by the Respondents who claimed ownership of the same. The Applicant averred that the said demolition was illegal and amounted to trespass. The Applicant averred that the demolition caused her and her tenants loss and damage.
7. The Applicant averred that when she threatened the Respondents with legal action, the Respondents informed her that the suit property was registered in the name of the 1st Respondent's husband and the 2nd and 3rd Respondents' father, George Andega Milaw. The Applicant averred that upon carrying out investigations, she learnt that George Andega Milaw had connived with the officials of the defunct Kisumu County Council and fraudulently caused the suit property to be registered in his sole name. The Applicant averred further that George Andega Milaw was to hold the suit property in trust for himself and his two brothers and that George Andega Milaw's act of registering the suit property in his sole name was in breach of the said trust.
8. The Applicant sought judgment against the Respondents in the plaint for; a declaration that the late George Andega Milaw and his successors held the leasehold interest in the suit property in trust for the three families which were involved in the purchase thereof, general damages for breach of trust, a permanent injunction restraining the Respondents their agents, servants, assigns or relatives from remaining on, occupying, continuing to occupy, constructing a structure on, selling, trespassing and or encroaching and in any other manner interfering with the suit property. The Applicant also prayed for the costs of the suit.

The Respondents'/Defendants' Case

9. The Respondents opposed the Originating Summons through a replying affidavit sworn by the 2nd Respondent, John Andega, on 14th September 2020. The 2nd Respondent stated that, on 20th October 1961, his late father George Andega Milaw (hereinafter referred to only as "Andega") applied to the District Commissioner, Central Nyanza to be allocated a plot at Ahero in Kano Location. Following the said application, the District Commissioner, Central Nyanza allocated to Andega the suit property.



- Andega was issued with a letter of allotment dated 18th January 1967. In 1967 or thereabouts, Andega constructed three shopping units on the suit property.
10. He stated that Andega paid for the issuance of a lease in respect of the suit property in 1970. The lease was however erroneously issued in the names of Samson Sure and Shem Dienya (the original allottees of the suit property) instead of being issued in the name of Andega. He stated that the Commissioner of Lands wrote to the Clerk to Council-Kisumu County Council on 10th April 1980 requesting him to prevail upon the original allottees to surrender the lease for the suit property that was erroneously issued to them instead of Andega. He stated that the original allottees' parcel of land was Plot No. Ahero/96 and not Plot No. Ahero/44(the suit property). Andega subsequently wrote to the Commissioner of Lands on 15th December 1982 requesting for the correction of the error in the name of the lessee in respect of the suit property.
 11. He stated that on 28th November 2005 after the death of Samson Sure, one of the original allottees, his son John Tuju Sure wrote to the Provincial Land Office Nyanza, confirming that the suit property belonged to Andega and not the original allottees. He stated that on 30th November 2005, the District Land Registrar -Kisumu wrote to the Commissioner of Lands confirming that the suit property was allocated to Andega and that the lease had since expired. The Land Registrar requested the Commissioner of Lands to renew the lease in favour of Andega. He stated that a similar request was made on 24th January 2006 by the Town Clerk, Ahero Town Council. The 2nd Respondent stated that before the death of Andega, he was diligently and dutifully paying land rates in respect of the suit property. He stated that after his death, Andega's family had been paying rates in respect of the said parcel of land.
 12. He stated that in 1998 or thereabouts, Andega rented out 2 shopping units on the suit property to Caroline Odhiambo t/a Smacco Enterprises contrary to the Applicant's assertion that she was the one who rented out one of the shopping units to Caroline Odhiambo t/a Smacco Enterprises and that she had been collecting rent from her. He stated that the Applicant was born in 1963 and was 58 years old at the time of filing suit. He stated that the Applicant was peddling lies when she claimed that she had been collecting rent from the suit property for over 50 years and that she started collecting the rent from the suit property in 1978. He stated that the suit property belonged to his late father Andega and that he had the right to renovate the three shopping units constructed thereon. He stated that he had no obligation to consult the Applicant's family since the family had no interest in the property.
 13. The 2nd Respondent stated that since Andega died in 2018, no administrator had been appointed to administer his estate. He denied that the Respondents were the administrators of the estate of Andega. He stated that the Respondents had no legal capacity to be sued on behalf of the estate of Andega. He termed the Applicant's Originating Summons an abuse of the process of the court. He stated that the family of Andega were up to date in the payment of land rates for the suit property and had been issued with a certificate of payment of rates dated 22nd July 2020 by the County Government of Kisumu. He stated that on 14th October 1982, Samson Sure wrote to Andega confirming that the suit property belonged to Andega and that he had instructed his son John Tuju Sure to surrender the lease for the said property to Andega. He stated that the Applicant's Originating Summons was misconceived and raised no cause of action. He urged the court to dismiss the same.
 14. The Respondents also filed a defence in ELC Suit No. 47 of 2020 on 23rd September 2020 in which they denied the Applicant's claim in the plaint in its entirety. The Respondents averred that the Applicant having filed ELC Suit No. 33B of 2020(O.S) in which she raised similar issues as those raised in the plaint filed in ELC Suit No. 47 of 2020, the latest suit amounted to duplicity of suits and as such an abuse of the court process.



15. At the trial, the Applicant (PW1) adopted her witness statements filed in the two suits as her evidence in chief. She also produced the documents attached to her list of documents dated 11th June 2020 filed on 28th July 2020 in ELC Suit No. 47 of 2020 as exhibits. PW1 stated that her husband was deceased and that the suit property belonged to her husband. PW1 stated that the houses on the suit property which she was claiming were built between 1965 and 1968 and that she had receipts for the building materials that were purchased by her husband. She stated that in 1978, her husband owned two shops. She stated that her husband surrendered one shop to Andega and was left with one shop which she used until the death of her husband in 1995. PW1 stated that the building on the suit property was demolished and she reported the matter to the Police. She stated that she had rented the shop to a tenant, Caroline Odongo who used to pay her a rent of Kshs. 3,000/- per month.
16. PW1 stated that she was granted an order of injunction restraining the Respondents from dealing with the suit property. She stated that the Respondents disobeyed the said order and constructed a new structure on the suit property from where they were operating a bar and an M-pesa shop. She stated that the lease dated 12th June 1967 was in the name of the original allottees, Samson Sure and Shem Dienya. She stated that the original allottees agreed to surrender the suit property in exchange with Plot No. 96A and Plot No. 96B.
17. She stated that although the suit property was surrendered to her deceased husband, the lease for the property remained in the name of the original allottees. PW1 produced rent payment receipts to show that Smacco and Caroline Odhiambo were her tenants and that they were one and the same person. PW1 stated that what she told the court was from her personal knowledge and from the records that were left in her custody by her co-wife Leonida Juma who died in 2019.
18. On cross-examination, PW1 stated that she was born in 1962 and was married in 1978 and not 1979. She stated that the suit property had three shops which were put up by her deceased husband. She stated that she had not been married at the time the structures on the suit property were put up but she had receipts for the purchase of the building materials that were used in the construction and the same bore her deceased husband's name. She admitted that her deceased husband had another plot at Awasi. She stated that the plot belonged to her co-wife and that she was given the suit property. In re-examination, she stated that she had no dispute over the suit property with Andega while he was alive. Upon examination by the court, she stated that the structure on the suit property was demolished partly.
19. The Applicant's next witness was John Tuju Sure (PW2). PW2 told the court that he had known the Applicant for several years and that he also knew her husband who had a property in Ahero (the suit property). He stated that he was the son of Samson Sure. He stated that the suit property was allocated to Samson Sure and Shem Dienya (the original allottees) in 1966 who delayed in developing it. He stated that the original allottees later found out that the Applicant's husband and his brothers had developed the plot and when they lodged a complaint, they were given an alternative plot. He stated that the original allottees thereafter surrendered the suit property to the Applicant's husband and his brothers because they had developed the same. PW2 stated that the structures on the suit property were put up by the Applicant's husband and his brothers. He stated that after the death of his father in 1984, George Andega went to see him together with the Applicant's husband. He stated that they asked him to give them the lease for the suit property. He stated that he gave the lease to George Andega. He stated that Andega also asked him to give him a letter confirming that he (PW2) had no claim over the suit property.
20. On cross-examination, PW2 confirmed that he was not present when the structures on the suit property were being put up. He stated that his father gave him the lease and informed him that the



building on the suit property belonged to Milaw family. He stated that what he recorded in his witness statement was what his father told him about the suit property. In re-examination, he stated that when Andega asked him to give him a letter confirming that he (PW2) had no claim over the suit property, Andega did not show him the lease. He stated that when Andega asked for the lease, Andega was with Jacob Abok (the Applicant's husband) and when he took the lease to him, he was alone in his shop.

21. The Applicant's next witness was Lorna Adiyio (PW3). PW3 stated that she was the widow of Joseph Oloo Milaw who died in 2000. She stated that George Andega (Andega), Jacob Abok and Joseph Oloo were brothers. She stated that the three brothers owned the suit property. PW3 could not remember when the structures on the suit property were put up. She stated that each of the brothers owned one shop. She stated that her husband, Joseph Oloo was given money by Jacob Abok and he surrendered his shop Jacob Abok. She stated that Jacob Abok, the Applicant's husband had two shops while Andega had one shop. On cross-examination, she stated that the suit property belonged to the three brothers. PW3 stated further that the Applicant had been using a shop on the suit property. She stated that the Applicant had rented out her shop and was receiving rent.
22. The Applicant's last witness was Caroline Odhiambo (PW4). PW4 told the court that she was a business lady carrying out business at Ahero Town. She stated that she had been carrying out business since 1998. She stated that she had known the Applicant since 1998. She stated that the Applicant was her landlady in the suit property from 2006. She stated that she became a tenant on the suit property for the first time in 1998 through the 3rd Respondent. She stated that she occupied one shop and was paying rent to George Andega(Andega). She stated that one shop was occupied by the 2nd Respondent who was running a bar and that the Applicant's deceased son, Omondi was also running a bar in one of the shops. She stated that when Omondi died, his wife continued to run the business and after her death, her sister took over the business. PW4 stated that after the death of Omondi's wife's sister, the Applicant took over the shop and rented it out. She stated that when the tenant left, the Applicant rented the shop to her. She stated that she paid rent to the Applicant from 2006 until when the building was demolished.
23. PW4 stated that after the death of Andega, the Respondents wanted to take over the shop that was rented out to her. She stated that she moved out after some time but retained the Applicant's shop. On cross-examination, she stated that she did not know how the Applicant came to occupy the suit property. She stated that she found the Applicant on the property.
24. The 2nd Respondent, John Otieno Andega (DW1) gave evidence for the Respondents. DW1 stated that he was a son of the late George Andega (Andega). He stated that the 1st Respondent was his mother while the 3rd Respondent was his brother. DW1 adopted his witness statements filed in each of the consolidated suits as his evidence in chief and produced the documents attached to his lists of documents filed in both suits as exhibits. He stated that the Applicant placed no evidence before the court showing that the suit property was owned by her deceased husband, Jacob Abok. He stated that the building on the suit property was put up by his late father. He stated that his father rented out the whole building and one of his tenants was Caroline Odhiambo (PW4). On cross-examination, he stated that he was the one using the suit property and that the lease that they had still bore the names of Shem Dienya and Samson Sure (the original allottees). He stated that he had evidence showing that it was his father who had constructed the building on the suit property. He stated that he did not however see his father doing the construction.
25. He stated that his father did not have any dispute with the Applicant's deceased husband, Jacob Abok. He stated that Caroline Odhiambo (PW4) was occupying two shops while the other shop was occupied by a lady known as Emily. He stated that Caroline Odhiambo (PW4) failed to pay rent at one point for 7 months. He stated that the Applicant's stepson, Tom Abok was a tenant of his (DW1) father in



one of the shops. DW1 stated that after Tom Abok died, he left the shop to his (DW1) father, Andega. He denied that Joseph Oloo surrendered his shop to the Applicant's husband.

26. DW1 stated that they gave Caroline Odhiambo notice to vacate because she was in rent arrears. He stated that when a court order was made for the maintenance of the status quo, the building on the suit property was already occupied. He stated that he did not believe the receipts that were produced by PW1 which suggested that it was the Applicant's husband, Jacob Abok who had put up the building on the suit property. On re-examination, DW1 confirmed that the lease in respect of the suit property was in the name of the original allottees. He stated that the suit property belonged to his father because he was the one who applied to be allocated the land in 1961.

The Applicant's submissions

27. The Applicant filed her submissions on 26th January 2023 in which she raised a number of issues for determination. The first issue framed by the Applicant was whether the Applicant acquired title to the suit property by adverse possession. The Applicant relied on Prof. Tom Ojienda's book titled "Principles of Conveyancing in Kenya" for the definition of adverse possession. The Applicant submitted that adverse possession is defined in the book as the acquisition of land by limitation of actions. She submitted further that adverse possession can be defined as the method of gaining legal title to real property by actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law which is 12 years as per the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The Applicant cited Section 7 of the Limitations of Actions Act, *Adnam v. Earl of Sanwich* (1877)2QB 845, and *Gachuma Gacheru v. Maina Kabuchwa*[2016]eKLR in support of this submission. The Applicant further cited *Wambungu v. Njuguna* [1983] eKLR, *Kasuve v. Mwaani Investments Limited & 4 Others* [2004]1 KLR 184, *Mbira v. Gachuhi* [2002]1 EARL 137, and *Ruth Wangari Kanyagia v. Josepine Muthoni Kinyanjui* [2017]eKLR for the law on adverse possession
28. The Applicant submitted that she had been in exclusive and uninterrupted occupation of the suit property since 1968 and as such had occupied the suit property for over 12 years before the filling of the suit. The Applicant submitted that she had acquired the title to the suit property by adverse possession. The Applicant cited *Peter Okoth v. Ambrose Ochido Andajo & Benedict Odhiambo Okech* [2021] eKLR in support of the submission.
29. The second issue framed by the Applicant for determination was whether the title of the Respondents to the suit property had been extinguished by the Applicant's late husband's adverse possession thereof for more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions act*. The Applicant submitted that she had been in occupation of the suit property for over 12 years. The Applicant submitted that she had been in continuous occupation and use of the suit property without any interruption from the Respondents and the Respondents had never raised any alarm or instituted any suit against her as concerns the portion of the suit property that she was occupying. The Applicant submitted that the Respondents' title to the portion of the suit property that was occupied by the Applicant had been extinguished and the Applicant was entitled to be registered as the owner of the suit property.
30. On the issue of costs, the Applicant relied on section 27 of the *Civil Procedure Act* (Chapter 21 Laws of Kenya) and the cases of *Hussein Jan Mohamed & sons v. Twentsche Overseas Trading Co. Ltd* [1967] EA 287 and *Republic v. Ihururu Dairy Farmers Co-Operative Society Ltd.*, and *Rosemary Wairimu Munene* (Ex parte Applicant), Judicial Review Application No.6 of 2004 and submitted that costs follow the event and the same is at the discretion of the court. The Applicant prayed for the costs of the Originating Summons.



31. On the issue of breach of trust raised in ELC Suit No. 47 of 2020, the Applicant cited Isack M'Inanga Kiebia v. Isaaya Theuri M'Lintari & Another, Supreme Court Petition No. 15 of 2015 and submitted that from the evidence on record, the brothers who bought the suit property had the intention of creating a trust. The Applicant submitted that there was sufficient evidence that trust existed and as such the Applicant was entitled to her share of the suit property.
32. The Applicant submitted further that the relationship between the Applicant's deceased husband and the 1st Respondent's husband and the 2nd and 3rd Respondents' father brings into operation the doctrine of proprietary estoppel. The Applicant invited the court to conclude that in the circumstances of this case, equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable. The Applicant submitted that constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. In support of this submission, the Applicant cited Kiplagat Kotut v. Rose Jebor Kipngok [2019] eKLR and Willy Kimutai Kitilit v. Michael Kibet [2018] eKLR.
33. The Applicant submitted that she had proved her claims against the Respondents on a balance of probabilities and urged the court to grant the reliefs sought.

The Respondents' submissions

34. The Respondents filed their submissions on 2nd March 2023 in which they framed the following issues for the court's determination;
 - a) Who is the owner of Plot No.44-Ahero (the suit property)?
 - b) Who constructed the building on the suit property?
 - c) Whether the Applicant in the Originating Summons acquired title to the suit property by adverse possession thereof having occupied the same since 1968.
 - d) Whether the Respondents in the Originating Summons who are the Defendants in Kisumu ELC No.47 of 2020 have the capacity to be sued and to sue over the estate of George Andega Milaw (deceased)(Andega).
 - e) Whether the Applicant in the Originating Summons who is the Plaintiff in Kisumu ELC No.47 of 2020 is entitled to the prayers sought therein.
 - f) Who is entitled to the costs of this suit?
35. On the issue of the ownership of the suit property, the Respondents submitted that according to the Respondents' exhibits 6 and 22, the lease in respect of the suit property was erroneously issued and registered in the names of Samson Sure and Shem Dienya (the original allottees) instead of George Andega Milawo alias Milau a fact that was confirmed in a letter dated 10th April 1980 from the Commissioner of Lands to the Clerk to Council, Kisumu County Council produced as the Respondents' exhibits 7 and 23. The Respondents submitted that upon the death of Samson Sure, his son John Tuju Sure wrote to the Provincial Lands Office-Kisumu on 28th November 2005 confirming that the suit property belonged to George Andega (Andega) and not the original allottees. The letter was produced as the Respondents' exhibits 9 and 25. The Respondents submitted that the Town Clerk Ahero Town Council also wrote to the Commissioner of Lands on 24th January 2006 confirming that the suit property belonged Andega. The letter was produced in evidence as the Respondents' exhibits 11 and 27. The Respondents submitted that the land rates in respect of the suit property



- were also being paid by Andega. The court was referred to the Respondent's exhibits 12 and 28. The Respondents submitted that the suit property belonged to Andega (deceased).
36. On the issue of who constructed the building erected on the suit property, the Respondents submitted that the same was constructed by Andega. The Respondents submitted that the Applicant failed to prove that the building on the suit property was constructed by her husband. The Respondents submitted that the receipts that were produced by the Applicant in evidence to prove that the building on the suit property was constructed by her husband did not indicate that the items that were purchased were to be used on a building that was being constructed on the suit property. The Respondents submitted that the Applicant did not witness the construction of the said building. The Respondents submitted that the building was constructed between 1965 and 1967 before the Applicant got married to Jacob Abok. The Respondents submitted that since Andega was the owner of the suit property and there was no evidence that the Applicant's husband constructed the building on the property, the logical conclusion was that the said building was constructed by Andega.
37. On the issue of whether the Applicant acquired title to the suit property by adverse possession, the Respondents submitted that the Applicant failed to prove that she had been in continuous uninterrupted occupation of the suit property for 12 years before the filing of the Originating Summons to warrant a finding that she had acquired the suit property by adverse possession. The Respondents submitted that PW4 (Caroline Odhiambo) who claimed to have been a tenant of the Applicant on the suit property did not produce any tenancy agreement between her and the Applicant. The Respondents submitted further that there was no evidence that PW4 paid any rent to the Applicant as she had claimed.
38. On whether the Respondents could be sued on behalf of the estate of Andega, the Respondents submitted that the 1st Respondent was a widow while the 2nd and 3rd Respondents were sons of Andega, deceased. The Respondents submitted that they were not the administrators of the estate of Andega and as such could not sue and be sued on behalf of his estate.
39. On the issue of whether the Applicant was entitled to the reliefs sought, the Respondents submitted that the Applicant had failed to prove that she owned the suit property and that the building on the property was constructed by her late husband, Jacob Abok. The Respondents submitted that the Applicant's claim should be dismissed. On the issue of costs, the Respondents relied on section 27 of the *Civil Procedure Act* and urged the court to award them the costs of the suit.

Analysis and Determination

40. I have considered the Applicant's two claims brought against the Respondents and the response thereto by the Respondents. I wish to determine the adverse possession claim that was brought by way of Originating Summons first. The adverse possession claim was directed at the estate of George Andega Milaw, deceased (Andega). Andega died on 5th January 2018 while his brother, Jacob Abok Milaw, deceased (hereinafter referred to only as "Abok") who was the Applicant's husband died on 22nd April 1995. It has not come out clearly whether the Applicant brought the Originating Summons in her personal capacity or in her capacity as the administrator of the estate of Abok. Whatever the case, the Originating Summons was directed at the estate of Andega. I say so because Andega died on 5th January 2018 and the Originating Summons was filed on 15th June 2020 about 2 ½ years after his death. The Respondents in the Originating Summons had no proprietary interest in the suit property until after the death of Andega. The Applicant's adverse possession claim could therefore be brought and sustained only against the estate of Andega. The Respondents have contended that they are not the administrators of the estate of Andega. The burden was on the Applicant who sued them to demonstrate that they had been issued with a Grant of Letters of Administration in respect



of that estate. No such proof was tendered at the trial. The Applicant's Originating Summons was therefore incompetent to the extent that it was brought against the Respondents who were not the administrators of the estate of Andega. Even if it is assumed that the Originating Summons was brought against the Respondents in their individual capacities, it would still fail. An adverse possession claim can only be brought against a legal owner of a property. There is no evidence that any of the Respondents was registered as the owner of the suit property. Due to the foregoing, I find the Applicant's Originating Summons incompetent and bad in law. Having reached that conclusion, I do not need to consider the merit of the application.

41. I doubt if the Originating Summons would have succeeded even if it were considered on merit. The Applicant's case as I understood it was that the suit property was allocated to three brothers, the Applicant's husband Abok, Andega and Joseph Oloo. The Applicant contended that Joseph Oloo sold his share in the property to Abok and as such, Abok and Andega became joint owners of the suit property. In the circumstances, it was the Applicant's case that Abok entered the suit property as an owner thereof. The Applicant who is the administrator of Abok's estate also entered the property in the same capacity. Their entry and occupation of the suit property could not therefore be said to be adverse to the interest of Andega who was a co-owner of the property according to the Applicant's case. The Applicant's ownership claim over the suit property was inconsistent with her adverse possession claim. The Applicant could not claim land that belonged to her by adverse possession.
42. The Applicant's claim in ELC No. 47 of 2020 was based on trust. In her pleadings, the Applicant is not clear as to the type of trust her case was based. In her submissions, she moved back and forth from customary trust to constructive trust. In *Juletabi African Adventure Limited & another v. Christopher Michael Lockley* [2017] eKLR, the Court of Appeal stated as follows:

“27. In *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others* [2015] eKLR, this Court examined and stated the law on trusts as follows:

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as

SUBPARA 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...”

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. ... 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 para 1453). 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. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (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).

28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, 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. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant. See also Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR.”

43. In Mwangi Mbothu & 9 others v. Gachira Waitimu & 9 Others [1986] eKLR, the court stated that:

The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

44. From the evidence on record, the Applicant did not prove that Andega held the suit property in trust for Abok. The evidence before the court shows that it was Andega who applied to be allocated land at Ahero Market on 20th October 1961 and that the suit property was allocated to Andega on 13th January 1967. The evidence further shows that it was Andega who paid the required fees and had over the years paid land rent and rates for the property. There is no evidence that Abok was a party to the application for allocation of the suit property or that he contributed money towards the payment of the allocation fees and other charges. As correctly submitted by the Respondents, there is nothing in the receipts that were produced by the Applicant in evidence showing that the items the subject thereof were used for the construction of a building on the suit property. I am also of the view that even if Abok had contributed towards the construction of a building on the suit property that was owned by Andega, that could not qualify him as a co-owner of the suit property. If his contribution was on the understanding that he would be a co-owner of the building, that could be a basis for a plea



of proprietary estoppel that would entitle him only to compensation. The Applicant never pleaded proprietary estoppel in the plaint neither did she claim compensation. Due to the foregoing, I find no merit in the Applicant's claim in ELC No. 47 of 2020. I wish to add that the claim was also incompetent and bad in law as it was brought against persons who were not the administrators of the estate of Andega.

45. The upshot of the foregoing is that there is no merit in the Applicant's two suits. Both suits are dismissed. Since the parties are related, each will bear its costs of the two suits.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF FEBRUARY 2024

S. OKONG'O

JUDGE

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Mwamu for the Plaintiff/Applicant

N/A for the Defendants/Respondents

Ms. J.Omondi-Court Assistant

