



**Wafula & another v Wesonga (Environment & Land Case  
E031 of 2021) [2024] KEELC 3444 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3444 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E031 OF 2021**

**BN OLAO, J**

**APRIL 29, 2024**

**BETWEEN**

**DAVID WABWIRE WAFULA ..... 1<sup>ST</sup> APPLICANT**

**STEPHEN WERE OUNDO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GEORGE ODONGO WESONGA ..... RESPONDENT**

**JUDGMENT**

1. This Judgment was due on 22<sup>nd</sup> February 2024 but I was not able to deliver it as I had taken my late step-mother to hospital. She eventually passed away on 14<sup>th</sup> March 2024 and was buried on 30<sup>th</sup> March 2024. The delay in delivering this Judgment is regretted but was inevitable in the circumstances.
2. David Wabwire Wafula and Stephen Were Oundo (the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein and suing as the personal representatives of the Estate of Peter Oundo Wafula) approached this Court vide their Originating Summons dated 11<sup>th</sup> June 2021 in which they impleaded George Odongo Wesonga (the Defendant herein). They claimed that the said Peter Oundo Wafula (wafula) had acquired by way of adverse possession a portion of land being  $\frac{2}{3}$  of the land known as BMC/LH/7983/165 (the suit land). They therefore sought a determination of the following questions:
  - a. Whether Wafula was in open and notorious possession of  $\frac{2}{3}$  of the portion of land out of BMC/LH/7983/165 for a continuous un-interrupted period exceeding 12 years.
  - b. Whether the Defendant's title to the  $\frac{2}{3}$  portion of land out of BMC/LH/7983/165 became extinguished at the expiry of 12 years from the time the deceased took possession of the portion.
  - c. Whether the Plaintiffs, in their capacity as Administrators have now acquired title to the  $\frac{2}{3}$  portion out of BMC/LH/7983/165 by virtue of adverse possession.



- d. Whether the registration of the Defendant as the owner of the  $\frac{2}{3}$  portion out of the BMC/LH/7983/165 should be cancelled and the Plaintiffs be registered as the owners of the said parcel in their capacity as Administrators.
- e. Costs of the suit.
- Arising out of determination of the above issues, the Plaintiffs sought the following orders:
- 1) That the Defendant's right over the  $\frac{2}{3}$  portion out of BMC/LH/7983/165 got extinguished by adverse possession upon expiry of 12 years from the date the deceased came into possession.
  - 2) That there be and is hereby ordered that the Defendant holds a portion measuring  $\frac{2}{3}$  out of BMC/LH/7983/165 in trust for the Plaintiffs.
  - 3) That the Defendant be perpetually barred from taking or using  $\frac{2}{3}$  of the portion out of BMC/LH/7983/165.
  - 4) That the Plaintiffs be registered as the proprietors of  $\frac{2}{3}$  of the portion out of BMC/LH/7983/165 in their capacity as Administrators.
  - 5) That the Defendant do execute all the relevant documents to facilitate the transfer of the suit land into the names of the Plaintiffs and in default, the Deputy Registrar do execute the same in place of the Defendant.
  - 6) That the Defendant do pay for the costs of this cause.
3. In support of the Originating Summons, the 1<sup>st</sup> Plaintiff with the authority of the 2<sup>nd</sup> Plaintiff swore a supporting affidavit of even date in which he deposed, inter alia, that the deceased Wafula was his brother and the father to the 2<sup>nd</sup> Plaintiff. That both Plaintiffs are co-Administrators of the Estate of Wafula who owned a portion measuring  $\frac{2}{3}$  out of the suit land also known as plot 108 Busia Town while one Dodofiko Wesonga alias Wesonga Okwanda Were (hereafter Dodofiko) owned  $\frac{1}{3}$  share thereof as per the attached Rates Register and Valuation Roll issued by the County Government of Busia. That the deceased Wafula developed  $\frac{2}{3}$  portion of the suit land from which he has received rent from the tenants as per the annexed tenancy agreement dated 29<sup>th</sup> December 2008. That Wafula made joint payments in respect of BMC/LH/7983/165 alongside the said Dodofiko as per the attached receipts from the County Government of Busia. That the family of Dodofiko has always maintained separate tenants with whom they have separate tenancy agreements. That the family of Wafula has continued to use the  $\frac{2}{3}$  portion of the suit land openly, peacefully, continuously and without interruption for a period exceeding 12 years since the year 1979 to-date to the exclusion of the Defendant. However, the Defendant obtained a grant for the whole of the suit land in Busia High Court Succession Case No 68 of 2012 by concealing material facts that  $\frac{2}{3}$  of the portion of the suit land had been developed and is being used by the family of the late Wafula which the Defendant has never taken possession of. The 1<sup>st</sup> Plaintiff also recorded a statement dated 11<sup>th</sup> June 2021.
4. In support of their case, the Plaintiffs also filed the statements of the following witnesses:
- 1) Aggrey Mangeni Wafula – (PW2)
  - 2) Godfrey Njuguna Mwangi – (PW3) and
  3. Gabriel Otwane Isiya (PW4)

In his statement dated 9<sup>th</sup> September 2021, AGgrey Mang'eni Wafula (PW2) and who is the brother to the 1<sup>st</sup> Plaintiff states that on 3<sup>rd</sup> September 2016, a joint family meeting was held by the families of



- Wafula and Dodofiko (both deceased). During the meeting of which he was the secretary, it was agreed that since the suit land was occupied by the two families, it was better that the suit land be shared equally since the rent was being shared equally. The meeting resolved that the two families should continue with the joint ownership of the suit land.
5. In his statement dated 20<sup>th</sup> August 2021, Godfrey Njuguna Mwangi (PW3) states that he is a businessman dealing in the sale of garments and repair of sewing machines. That the Plaintiffs are his landlord on the suit land where he occupies one shop for which he has been paying a monthly rent of Kshs.4,500 since 2008. That he has always paid the rent to the Plaintiff and not to the Defendant. That he recognizes Plaintiffs as his landlord.
  6. Gabriel Otwane Isiya (PW4) did not record any statement. He is employed as the Land Rates Clerk at the County Government of Busia. He told the Court that as per the minutes of the County Government of Busia Town Planning Market and Housing Committee held on 17<sup>th</sup> August 1979, the land rates for the suit land were being paid by Wafula and Dodofiko amounting to Kshs.5,400 per year. However, they only paid the said rates for the period 2013, 2014, 2015 and 2016. That both parties were utilizing the suit land although it is not clear what portion each of them was occupying. That from 1979, each of the two was paying half of the rates but following the succession proceedings in Busia High Court Succession Cause No 68 of 2012 filed by the Defendant in respect of the Estate of Dodofiko, the Defendant started paying the whole of the rates. That according to the Rates Register for the suit land, it was registered in the names of Wafula and Dodofiko from 1<sup>st</sup> July 2007 upto 1<sup>st</sup> January 2018 – That the Valuation Roll for the suit land show Wafula & Dodofiko as the owners of the suit land and the rate payers but he could not tell who occupies what portion thereof although each was receiving rent and among the tenants is Frankmart Super Market.
  7. In support of their case, the Plaintiffs filed two lists of documents the first dated 11<sup>th</sup> June 2021 and the further list dated 18<sup>th</sup> February 2022.
  8. The following document were filed vide the list dated 11<sup>th</sup> June 2021:
    1. Minutes of the Town Planning, Market and Housing Committee of the Busia County Council held on 17<sup>th</sup> August 1979.
    2. Receipts for payments of rates to the County Government of Busia.
    3. Rate clearance certificate dated 18<sup>th</sup> June 2013.
    4. Demand Notice for Rates and Land Rent dated 3<sup>rd</sup> March 1997 for the suit land.
    5. Rates Register for the suit land for the period 2007 to 2018.
    6. Valuation Roll for 1994.
 The further list dated 18<sup>th</sup> February 2022 had the following documents:
    1. Minutes of the Busia County Council Town Planning & Markets Committee held on 19<sup>th</sup> January 1979.
    2. Minutes of the joint family meeting for the families of Dodofiko & Wafula held on 3<sup>rd</sup> September 2016 at the home of Ojiambo Peter Wesonga.
    3. Bundle of rent payment receipts.
    4. Certificate of confirmation of Grant issued to the Plaintiffs in respect to the Estate of Wafula on 14<sup>th</sup> March 2019 in Busia CM's Court Succession Cause No 505 of 2017.



5. Tenancy agreement between the Plaintiffs and one Francis Muli Maingi being in respect of a building on the suit land.
9. In response to the Originating Summons, the Defendant filed a replying affidavit dated 3<sup>rd</sup> August 2021. He described the Originating Summons as vexatious, frivolous inept and a non-starter which should be dismissed with costs. He added that the suit land is Government Land and he had been advised that there can be no claim for adverse possession for such land. He averred that his late father Dodofiko was the sole proprietor of the suit land which had been allocated to him in the 1950's by the County Government of Busia and for which his late father and himself have been paying land rent. That Dodofiko died on 4<sup>th</sup> September 1988 before completing the process of acquiring the lease for the suit land and following his demise, the Defendant obtained the confirmed Grant in respect of the deceased's Estate in Busia High Court Succession Cause No 68 of 2017. That the Plaintiffs applied for revocation and annulment of the said Grant alleging that they had an interest in the said land but the application was dismissed. That the Defendant has now applied, as the Administrator to the Estate of Dodofiko, for the allotment letter to the suit land so that he can complete the process of acquiring a 99 year lease for the suit land and the application is awaiting the approval of the National Land Commission. The Plaintiffs cannot therefore be allocated  $\frac{2}{3}$  of the suit land and neither can their claim for adverse possession succeed since the suit land is Government property. That while he cannot ascertain how genuine the copies of the land rates receipts produced by the Plaintiffs are, it is his testimony that since 1974 to-date, the land rates have been paid in the sole names of Dodofiko and following his demise, by the Defendant. That the rental premises erected on the suit land belong to Dodofiko and the Plaintiffs have been illegally and unlawfully collecting the rent without his consent or that of the family of Dodofiko. He asserts further that the said Dodofiko is the sole proprietor of the suit land since it was allocated to him by the County Government of Busia and has been transmitted to him following the succession process. That Wafula was never registered as a co-owner of the suit land with Dodofiko.
10. The Defendant filed two lists of documents in support of his case. The first was dated 3<sup>rd</sup> August 2021 and a further list of documents dated 25<sup>th</sup> March 2022.
11. The list dated 3<sup>rd</sup> August 2021 had the following documents:
  1. Receipts for payments of land rent from 1979 to 2021.
  2. Rate clearance certificates dated 31<sup>st</sup> January 2012 and 6<sup>th</sup> February 2012.
  3. Letter from Assistant Chief Busia Township dated 9<sup>th</sup> February 2012.
  4. Letter from County Government of Busia dated 28<sup>th</sup> January 2014.
  5. Letter from County Government of Busia dated 29<sup>th</sup> August 2013.
  6. Letter from County Government of Busia dated 1<sup>st</sup> August 2013.
  7. Application for letter of allotment dated 16<sup>th</sup> May 2017.
  8. Letter from National Land Commission County Coordinator Office Busia dated 9<sup>th</sup> May 2017.
  9. Letter from National Land Commission County Coordinator Office Busia dated 19<sup>th</sup> September 2017.
  10. Letter from Ministry of Land and Physical Planning dated 19<sup>th</sup> September 2017.



11. Copy of approval of allocation of land dated 30<sup>th</sup> August 2017.
12. Development application Form dated 16<sup>th</sup> May 2017.
13. Letter from County Government of Busia dated 12<sup>th</sup> May 2017.
14. Letter from Physical Planning Department Busia County dated 11<sup>th</sup> September 2017.
15. Letter from National Land Commission dated 5<sup>th</sup> September 2017.
16. Letter from National Land Commission Count Coordinator Busia dated 21<sup>st</sup> May 2019.
17. Internal Memo from County Government of Busia dated 24<sup>th</sup> February 2017.
18. Death certificate for Wesonga Okwanda Were.
19. Grant of letters of Administration issued to George Odongo Wesonga in respect to the Estate of Wesonga Okwanda Were in Busia High Court Succession Cause No 68 of 2012.
20. Confirmation of Grant issued in Busia High Court Succession Cause No 68 of 2012.
21. Ruling delivered on 25<sup>th</sup> May 2021 in Busia High Court Succession Cause No 68 of 2012.
22. Proceedings in Busia Chief Magistrate's Court Succession Cause No. 505 of 2017.

The Defendant also filed the following documents vide his further list of documents dated 25<sup>th</sup> March 2022:

- 1) Land Rate receipt dated 9<sup>th</sup> February 2022.
12. The hearing commenced before Omollo J on 13<sup>th</sup> June 2022 who heard the evidence of the 1<sup>st</sup> Plaintiff and his witness Aggrey Mang'eni Wafula (PW2). They adopted as their testimony the contents of their respective statements which I have already summarized above. The 1<sup>st</sup> Plaintiff also produced as their documentary evidence the documents filed herein which I have also already referred to above.
13. Thereafter, I heard the evidence of Godfrey Njuguna Mwangi (PW3) who also adopted as his evidence the contents of his statement dated 20<sup>th</sup> August 2021. Gabriel Otwane Isiya (PW4) the Land Rates Clerk at the County Government of Busia did not record any statement but I have already summarized his oral testimony above.
14. The Defendant was the only witness who testified in support of his case. He did so before me on 15<sup>th</sup> November 2023. He too adopted as his evidence the contents of his replying affidavit dated 30<sup>th</sup> August 2021 filed in reply to the Originating Summons. He also produced as his documentary evidence the documents filed vide his list of documents dated 30<sup>th</sup> August 2021 as well as his further list of documents dated 25<sup>th</sup> March 2022.
15. Submissions were thereafter filed both by Mr Bogonko instructed by the firm of Bogonko Otanga & Co. Advocates for the Plaintiffs and by MS Achala instructed by the firm of Abalo & Co. Advocates for the Defendant.
16. I have considered the evidence by the parties herein including the documents filed as well as the submissions by counsel.
17. The Plaintiff's case is that their late father Wafula was entitled to a portion of  $\frac{2}{3}$  of the suit land by way of adverse possession and alternatively, the Defendant holds the said portion in trust for them. The Defendant's case is that at no time was his late father Dodofiko a co-owner of the suit land jointly with Wafula as the same was never allocated jointly to Wafula and Dodofiko by the County Government



of Busia. In any case, the Plaintiff's use of the said <sup>2</sup>/<sub>3</sub> of the suit land is illegal and their claim thereto should be dismissed. I consider the following to be the three issues that need to be determined:

1. Whether the Plaintiffs are entitled to an order that they have acquired <sup>2</sup>/<sub>3</sub> out of the suit land by way of adverse possession.
2. Whether the Defendant holds a share of <sup>2</sup>/<sub>3</sub> of the suit land in trust for the Plaintiffs.
3. Who shall bear the costs of this suit?

### **Adverse Possession**

18. Section 38(1) of the *Limitation of Actions Act* which allows a party to approach this Court seeking for an order to be registered as the proprietor of land by way of adverse possession provides that:

38(1): "Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land."

It is now well established that the combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act* is to extinguish the title of the proprietor of the land in favour of the adverse possessor of the same at the expiry of 12 years of the adverse possession – Benjamin Kamau -v- Gladys Njeri C.A. Civil Appeal No 2136 of 1996. In the case of Kasuve –v- Mwaani Investments Ltd & others 2004 1 KLR 184, the Court of Appeal set out the threshold of what a party claiming land by way of adverse possession must prove. It said:

" And in order to be entitled to the land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition..."

Adverse possession is a fact to be observed on the land itself – Maweu -v- Liu Ranching & Farming Society LTD 1985 KLR 450. It must not be by force or stealth but it must be nec vi, nec clam nec precario (no force, no secrecy, no persuasion) - Kimani Ruchine -V- Swift Rutherfords & Co. LTD 1980 KLR 10. It must also be open, continuous, peaceful, notorious and with the knowledge but without the permission of the owner – Robert Shume & Others – v- Samson Kazungu Kalama 2015 eKLR. Finally, in the case of Mtana Lewa –v- Kahindi Ngala Mwagandi C.a. Civil Appeal No. 56 of 2014 [2015 eKLR], the doctrine of adverse possession was described by Makhandia J.A in the following terms:

" Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act* ..."



19. I have considered the evidence herein to see if the Plaintiffs' claim to <sup>2</sup>/<sub>3</sub> of the suit land by way of adverse possession meets the threshold set out in the law and the precedents some of which I have cited above. It is clear to me that the Plaintiffs' claim to <sup>2</sup>/<sub>3</sub> of the suit land by way of adverse possession cannot be sustained for the simple reason that the suit land is not registered in the name of the Defendants or Dodofiko. In paragraph 10 of his replying affidavit dated 3<sup>rd</sup> August 2021, the Defendant has deposed thus:

10: "That there was no error and/or concealment of any material fact indicating that the late Dodofiko Wesonga was the sole registered proprietor of the suit plot NO BMC/LH/7983/165 of which the same was wholly transmitted to me as the son and the legal beneficiary of the Estate of the late Wesonga Okwanda Were alias Dodofiko Wesonga."

A claim in adverse possession is ordinarily a claim against the proprietor of the land in dispute. That is clear from the provisions of Section 38(1) of the *Limitation of Actions Act* cited above. The suit land, as is clear from the documentary evidence filed herein, has always been the property of the then Busia Town Council now the County Government of Busia. The Defendant's application to acquire a leasehold interest in the suit land is, at least as at the time of this trial, yet to materialize. For instance, in its letter dated 28<sup>th</sup> January 2014 and addressed to the Chairman National Commission, the Town Manager County Government of Busia has written as follows:

"Dear Sir

Re: Busia Township Plot No 7983/135, 134 and 165B

Your letter of NLC/1432/6 dated 19<sup>th</sup> November 2013 refers.

The owners of the above plots have been cleared by the County Government. Kindly assist them process their leases. The plots are developed and were allocated way back in early 1960 while the town was still a market.

Yours sincerely,

J.K.K. Chebon

Town Manager."

The letter is copied, to among others, the Defendant. In another letter dated 1<sup>st</sup> August 2013 written by the same J.K.K Chebon and this time addressed to the Regional Lands Officer Bungoma, he writes:

"Dear Sir

Re: Plot No. 7983/134

Our letter ref. BMC/C/1/16 VOL II/232 dated 12<sup>th</sup> May 1993 refers. The above named plot is among the six plots allocated in 1950's at Busia Market by the then Bungoma County Council. The plots are well developed with storey buildings. These are the first plots at Busia Market in the early fifties. There is need for their documentation at the National level. It is well documented at the Municipal and they have been paying rates since 1950s. Your urgent action in processing leases will help them use the document to access loans etc.

Yours faithfully

Jared K.K. Chebon

Town Clerk."



Finally there is a letter dated 16<sup>th</sup> May 2017 written by the Defendant and addressed to the National Land Commission as well as the Land, Housing & Urban Development Committee Member of the County Government of Busia. It reads:

“Dear Sir

Re: Application for Letter of Allotment

The above matter refers.

I hereby kindly request for letter of allotment on plot No. MCB/CH/165 allocated in Busia Town.

Thanks in advance.

Yours faithfully

George Odongo Wesonga

Administrator of Plot No. MCB/CH/165/00”

What is clear is that having been appointed and confirmed as the Administrator to the Estate of Dodofiko in Busia High Court Succession Cause No. 68 of 2012, the Defendant started pursuing to be registered as the proprietor of the leasehold interest in the suit land. That did not happen and neither has he acquired any allotment letter. Essentially therefore, the suit land is still the property of the County Government of Busia. I therefore agree with the Defendants’ counsel when she submits that:

“In this instant case before your Lordship, the suit property BMC/LH/7983/165 still belongs to the Busia County Government. The Respondent is still an Applicant for the allotment of the said suit property. The Respondent is yet to be registered as a leaseholder for a given time subject to such terms and conditions in the lease once his application/allotment is fully approved. There is no lease title for BMC/LH/7983/165 registered in the names of the Respondent for the statutory time of 12 years to start running against such registered title. A close look at the list of documents filed by the Respondent, the allocation has not yet been approved and the same is still awaiting approval from the National Land Commission.”

Counsel for the Defendant then goes on to submit, and rightly so in my view, that:

“The Respondent is not yet the legal registered owner of the suit property BMC/LH/7983/165 as provided for under the Registration of title Act CAP 300 so that time can start running against the title deed. It is also trite law that for one to claim adverse possession against a title, the title must be legally registered in the names of a known owner against whom he/she seeks to acquire by way of adverse possession.”

20. The long and short of all the above is that the suit land is, for all intent and purposes, still the property of the County Government of Busia. Neither the Defendant nor his late father Dodofiko hold a lease, title deed or even a letter of allotment. The suit land is therefore still Public land which, as is provided in Article 62(2) of *the Constitution*;

“... shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their behalf by the National Land Commission ...”



Section 41 of the *Limitation of Actions Act* excludes public land from the application of the Act. It provides in sub-section (a) that:

- 41: “This Act does not –
- a. enable a person to acquire any title to, or any easement over -
    - (i) Government land or land otherwise enjoyed by the Government;
    - (ii) mines or minerals as defined in the *Mining Act* (Cap. 306);
    - (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
    - (iv) water vested in the Government by the *Water Act* (Cap. 372);
    - (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered *Land Act* (Cap. 300)); or
    - (vi) land vested in the trustees of the National Parks of Kenya; or ...”

Further, in the case of *Benson Mukuwa Wachira –v- Assumption Sisters of Nairobi Registered Trustees C.A. Civil Appeal No. 121 of 2006* [2016 eKLR], the Court of Appeal held at paragraph 18 thus;

“But can time run where the owner of land only holds a letter of allotment to the land (which is not yet registered in his (owner’s) name) but is otherwise registered under any of the statutes referred to in Section 37 of the *Limitation of Actions Act*? If the land is registered in favour of the Government of a County Government, the doctrine of adverse possession would not apply to it and the claim would fail.”

In this case, the Defendant does not even hold a letter of allotment and neither is the suit land registered under any of the laws cited in Section 37 of the *Limitation of Actions Act*. However, the suit land is clearly reposed in the COUNTY GOVERNMENT of BUSIA as is evident from the documents filed herein.

21. The Plaintiff’s claim to  $\frac{2}{3}$  of the suit land by way of adverse possession cannot be sustained. It is for rejection.

## TRUST

22. In prayer NO 2 of their Originating Summons, the Plaintiffs seek an order that the Defendant holds a portion of  $\frac{2}{3}$  of the suit land in trust for him. He does not however identify what trust he has in mind to entitle them to the order sought. What is clear however is that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are a brother and son respectively of WAFULA. But the law never implies a trust. It is the duty of the party pleading a trust to lead evidence to prove the same. In the case of *Peter Ndungu Njenga -v- Sophia Watiri Ndungu* 2000 eKLR, the Court held that:

“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 a trust is implied.” Emphasis mine.



The above was approved in the case of Juletabi African Adventure Limited & Another -v- Christopher Michael Lockley 2017 eKLR. See also Gichuki -v- Gichuki 1982 KLR 285 and Mbothu & 8 Others -v- Waitimu & 11 others 1986 KLR.

23. Evidence has been adduced in this case which shows, firstly, that as far back as 1979, the suit land also known as plot No 10 'B' Busia Township was allocated by the then Busia County Council to Dodofiko and Wafula. Minute NO 4 M & T 19/79 of the minutes of the meeting held on 17<sup>th</sup> August 1979 under "Application for Transfer/sale" reads:

"The following were approved –

- 1) -
- 2) -
- 3) -
- 4) Ludofiko Wesonga to Ludoviko Wesonga & Peter O. Wafula – PT Plot No. R 10 'B' Busia Township South Teso – Transfer."

In paragraphs 6, 7 and 8 of his supporting affidavit also sworn on behalf of the 2<sup>nd</sup> Plaintiff, David Wabwire Wafula the 1<sup>st</sup> plaintiff and brother of the deceased Wafula has deposed as follows:

- 6: "That my deceased brother owned a portion of land measuring approximately  $\frac{2}{3}$  out of BMC/LH/7983/165 also known as Plot 10 B Busia Township while one Dodofiko Wesonga alias Wesonga Okwanda Were (deceased) and who was the father of the Respondent herein owned  $\frac{1}{3}$  of the share"
- 7: "That my deceased brother made joint payments in respect of BMC/LH/7983/165 alongside one Dodofiko Wesonga alias Wesonga Okwanda Were."
- 8: "That the family of Dodofiko Wesonga alias Wesonga Okwanda Were and Peter Oundo Wafula have always maintained separate tenants with whom they have separately entered tenancy agreements."

In rebuttal to those averments, the Defendant deposed in paragraph 4 of his replying affidavit dated 3<sup>rd</sup> August 2021 thus;

- 4: "That it is not true that the late Peter Oundo Wafula owned  $\frac{2}{3}$  out of BMC/LH/7983/165 because this property was allotted to my late father Wesonga Okwanda Were alias Dodofiko Wesonga by County Government of Busia in early 1950s and the suit land to-date is solely registered in the names of the late father."

The minutes of the Busia County Council dated 17<sup>th</sup> August 1979 clearly show that even if the suit land was previously allotted to the Defendant's father in the 1950's it was subsequently transferred to both Dodofiko and Wafula in August 1979.

24. Secondly, there are receipts for land rates produced herein which bear the names of both Dodofiko and Wafula. When he testified on 20<sup>th</sup> April 2023 Gabriel Otwane Isiya (PW4) and who is the Land Rates Officer in the County Government of Busia, said:

"From 1979, there were two people paying the said rates and rent i.e. Ludoviko Wesonga and Peter O. Wafula".



And when he was cross-examined by MR Bogonko, the Defendant said:

“I can see the Plaintiffs’ list of documents dated 11/6/2021. I have seen the minutes of Town Planning held on 17/8/1979. I am not aware that my father transferred the land to Lodoviko Wesonga and Peter O. Wafula. I saw those minutes when my advocate showed them to me. I have no reason to doubt the authenticity of the said document.”

That Wafula had an interest in the suit land cannot therefore be disputed.

25. Thirdly is the evidence of Godfrey Njuguna Mwangi (PW3) one of the tenants who was leasing premises on the suit land. This is what he said in paragraphs 3 and 4 of his statement dated 20<sup>th</sup> August 2021:

3: “That I know the Plaintiff as my landlord on LR. BMC/LH/7983/165 where I occupy one of the shop premises herein since 2008 to-date paying monthly rent of Kshs.4,500/.

4: “That since I became the Plaintiffs’ tenant in 2008, I have always paid rent to the Plaintiffs herein and not the Defendant.”

In paragraph 8 of his supporting affidavit which I have already cited above, the 1<sup>st</sup> Plaintiff confirmed what this tenant was stating with regard to the joint ownership of the suit land and the premises thereon. And when he was cross-examined by MR BOGONKO on this issue, the Defendant said:

“The plot in question has shops which have tenants. Some of the tenants still pay me rent while others pay the Plaintiff. It is true that the tenants who used to pay my father are the ones who pay me. Then there are others who used to pay Peter Oundo Wafula and they still pay the 1<sup>st</sup> Plaintiff rent. It is true that on one side of the shop, the rent is paid to me while on the other side, they pay the Plaintiffs. The portion where they get rent is bigger. My portion is  $\frac{1}{3}$  and theirs is  $\frac{2}{3}$ .”

Again, that is evidence that the deceased Wafula had an interest in the suit land and that is what the Plaintiffs, as his legal representatives, are pursuing.

26. Fourthly, there is the evidence of the family meeting held on 3<sup>rd</sup> September 2016 by the families of Dodofiko and Wafula. The minutes of the said meeting and which were produced by the Plaintiff show that the main agenda was about the relationship of the two families and the ownership of the suit land. Under minute No. 6 which is titled “Way Forward”, among the issues captured are:

1. “That there is no party either side which has a right to send/stop/deny the other family from collecting rent/owning plot NO 165 BUSIA-KISUMU Road but harmony should continue since these families have lived together for a long time”.

2. “That even if there is no documents from Dodofiko Wesonga or Alex Wafula Munyororo concerning the division of plot NO 165 BUSIA-KISUMU road. The two families should continue owning the plot as joint tenants as we shall agree upon.”

The minutes show that the Defendant was present at that meeting and signed the attendance sheet just as was the 1<sup>st</sup> Plaintiff. I did not hear the Defendant dispute the minutes as captured in that meeting. The import of all the above is that the Defendant and his family did recognize that the late Wafula and his family as represented by the Plaintiffs have an interest in the suit land.



27. It is also instructive to note that whereas the Defendant has in paragraph 17 of his replying affidavit averred “that the late Wesonga Okwanda Were alias Dodofiko Wesonga and the late Peter Oundo Wafula have never been co-registered owners to the suit plot BMC/LH/7983/165 nor did they share the said plot in the ratio of  $\frac{1}{3}$ ,  $\frac{2}{3}$  respectively,” the evidence which I have already referred to above shows clearly that the Plaintiffs’ claim to the suit land is neither hollow nor incompetent as the Defendant would like this Court to believe. This Court also takes cognizance of the fact that even as the Defendant seeks the dismissal of the Plaintiffs’ claim to the suit land, he has not filed any counter-claim nor sought orders evicting the Plaintiffs’ tenant from the suit premises or directions that those tenants do pay him rent henceforth. He appears to be content with the status quo prevailing on the suit land even as he avers in paragraph 14 of his replying affidavit that the Plaintiffs “have illegally and/or unlawfully been collecting rent” without his consent. This Court would have expected, under those circumstances, that the Defendant would have sought an order for the Plaintiffs to be directed to refund the rent which they have been “illegally and/or unlawfully” collecting from Godfrey Njuguna Mwangi (PW3) and other tenants. I need to point out that the Defendant filed two replying affidavits both dated and filed on 3<sup>rd</sup> August 2021 in response to the Originating summons. One is headed “Respondents Replying Affidavit to the Originating Summons” while the other is headed “Respondents Affidavit Evidence.” Both form part of the record herein and since the Defendant intended both to be part of his evidence, this Court will oblige him bearing in mind what I have stated above that both are dated 3<sup>rd</sup> August 2021 and were filed on the same day.
28. The Defendant appears to be riding on the fact that he was issued with a confirmed Grant in respect of Dodofiko’s Estate in Busia High Court Succession Cause No 68 of 2012 and that the Plaintiffs’ application to revoke the same was dismissed. He is now in the process of applying for an allotment from the National Land Commission and subsequently acquire the registration of the suit land in his name. That is the thread that runs through paragraphs 7, 8 and 9 of his replying affidavit. Again, to emphasize that the Plaintiffs have no right to the suit land, the Defendant has annexed the ruling delivered by Karanja J on 25<sup>th</sup> May 2021, where the Plaintiffs were the objectors, as proof that the Plaintiffs cannot claim any interest in the suit land. I have looked at the ruling and indeed Karanja J dismissed the Plaintiffs’ application for revocation of the Grant which was on the basis of concealment of material facts. In dismissing the Plaintiffs’ application, however, the Judge made the following observation in paragraph 6 of the said ruling:
- 6: “The objectors cannot therefore be heard to say that the Petitioner obtained the grant by concealment of material facts in relation to plot No 165. If they genuinely believe or hold that they have an interest in the property, then their remedy lies not in this Succession Court but in the Environment and Land Court. As it were, this Court lacks the necessary jurisdiction to deal with a claim of ownership of land and indeed, any claim based on an interest in land.”
29. The above paragraph captures the correct position in law. It is not the function of the Succession Court to determine a dispute over property ownership especially once probate has been confirmed. That is the preserve of this Court. Therefore, the fact that the Succession Court distributed the Estate property does not deprive this Court of the jurisdiction to determine a dispute based on trust or adverse possession which are the two issues raised in this case.
30. Having said so, I must now determine whether the Defendant is only a trustee holding  $\frac{2}{3}$  of the suit land in trust for the Plaintiffs. I have in the proceeding paragraph of this Judgment quoted the Defendant’s own testimony in which he admits that the Plaintiffs’ share of the rent from the suit land is  $\frac{2}{3}$  while his is  $\frac{1}{3}$ . There is also evidence that indeed both Dodofiko and Wafula have at one time or another both paid the land rates and rent for the suit land. That the Plaintiffs are in possession of part



of the suit land where they get rent is not in doubt and the family meeting held on 3<sup>rd</sup> September 2016 confirm as much. It is clear that the intention of Dodofiko and Wafula was to jointly own the suit land. The Defendant has only been emboldened by the confirmed Grant to try and bring that relationship to an end and is now engaged in the process of acquiring the allotment letter and, subsequently, the lease in his own name by shoving away the interest of the Plaintiff. The Defendant is trying to unjustly enrich himself but, as was held in the case of *Macharia Mwangi Maina & 87 others –V- Davidson Mwangi Kagiri 2014*, a Court of equity “shall suffer no wrong without remedy. No man shall benefit from his own wrong doing and equity detests unjust enrichment.” It is clear to me, as deposed in paragraphs 7 and 8 of the 1<sup>st</sup> Plaintiff’s supporting affidavit, that Wafula and Dodofiko “made joint payments in respect of BMC/LH/7983/165” and “have always maintained separate tenants with whom they have separately entered tenancy agreements.” If the Defendant, as he is preparing to do, succeeds in acquiring the lease to the suit land registered in his sole name, that will clearly amount to an “unjust enrichment”. This Court must not allow that to happen. It is also common ground that the Defendant is yet to be registered as the proprietor of the lease to the suit land. There is documentary evidence filed by the Defendant himself showing that the County Government of Busia through their letter dated 28<sup>th</sup> January 2014 and Addressed to the National Land Commission, as well as the Busia County Co-ordinator of the National Land Commission through his letter dated 19<sup>th</sup> September 2017 and addressed to the Secretary/CEO of the National Land Commission Nairobi approve the issuance of the lease to the Defendant. Dodofiko and Wafula may not have expressly reduced their relationship with respect to the suit land in writing. Therefore, there was no express trust created between them as to how they would utilize the suit land among them. However, there are trusts created by the law and which the Court, based on the evidence before it, will impose on the parties. In the case of *Twalib Hatayan Twalib Hatayan & Another –v- Said Saggar Al-heidy & others 2015 eKLR*, the Court of Appeal described such trusts in the following terms:

“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.....

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 ..... 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.”  
Emphasis mine.

Notwithstanding his own admission on oath that both he and the Plaintiffs, and before them, both DODOFIKO and WAFULA, have always shared the rental proceeds from the suit land, the Defendant now wishes to have it registered in his sole name. This Court must now tell him that all the processes which he is now undertaking with respect to the acquisition of the lease to the suit land are basically as a trustee. Both he and the Plaintiffs have a legal interest in the suit land which this Court must uphold on the basis of the evidence before it.

31. I am satisfied from the evidence that the Plaintiffs have proved their claim to the suit land on the basis of a trust. The Plaintiffs are entitled to a share of  $\frac{2}{3}$  out of the suit land.
32. There shall be Judgment for the Plaintiffs as against the Defendant in the following terms:



1. The Defendant holds a portion measuring 2/3 out of the land parcel No BMC/LH/7983/165 in trust for the Plaintiffs.
2. The Plaintiffs shall be registered as proprietors of 2/3 of the land parcel No BMC/LH/7983/165.
3. The Defendant shall execute all the relevant documents to facilitate the registration of 2/3 of the land parcel in the names of the Plaintiffs.
4. In default of (3) above, the Deputy Registrar shall be at liberty upon request to sign all such documents on behalf of the Defendant.
5. The parties shall meet their own costs of this suit.

**BOAZ N. OLAO**

**JUDGE**

**29<sup>TH</sup> APRIL 2024**

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS  
29<sup>TH</sup> DAY OF APRIL 2024 WITH NOTICE TO PARTIES.**

Right of Appeal.

**BOAZ N. OLAO**

**JUDGE**

**29<sup>TH</sup> APRIL 2024**

