



**Onjomah v Seth (Environment & Land Case 97 of 2015)
[2024] KEELC 5310 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 97 OF 2015**

**BN OLAO, J
JULY 18, 2024**

BETWEEN

LUCAS DA ONJOMAH PLAINTIFF

AND

VITALIS OUMA SETH DEFENDANT

JUDGMENT

1. Lucas D. A. Onjomah Opere (the Plaintiff) filed this Originating Summons on 3rd September 2015 against Vitalis Ouma Seth (the Defendant) claiming to be entitled to 2½ acres portion of the land parcel No Marachi/Bumala/958 (the suit land). He sought a determination of the following issues and orders:
 1. The ownership of 2½ acres of portion of L.R Marachi/Bumala/958 for reasons set out in the affidavit of the Plaintiff and reasons to be adduced.
 2. A declaration that the Plaintiff purchased from Shedhi Onyango Oluoch i 2½ acres of L.R Marachi/Bumala/958 in 1987 took vacant possession and has been in open, peaceful, uninterrupted adverse possession todate.
 3. A declaration that Shedhi Onyango Oluoch I and or the Defendants hold 2½ acres aforesaid in trust for the Plaintiff.
 4. A declaration that Shedhi Onyango Oluoch I and or the Defendant’s right and interest in the 2½ acres extinguished by operation of the law/adverse possession.
 5. That this Court do further order that:
 - a. 2½ acres be curved from L.R Marachi/Bumala/958 and be transferred to and be registered in the names of the Plaintiff.



- b. The Defendant be directed to sign all transfer documents in default the Deputy Registrar be authorised to do so.
- c. The Defendants do pay costs.

In support of the Originating Summons, the Plaintiff filed an affidavit dated 25th August 2015 in which he deposed, inter alia, that the Defendant is the son and legal representative of Shedhi Onyango Oluoch I alias Senzi Oluoch (the deceased) and has been sued both in his personal capacity and as a representative of the deceased's Estate having been so appointed vide Busia High Court Succession Cause No 376 of 2011. That in 1987, he purchased a portion measuring 2½ acres out of the suit land then registered in the name of the deceased and duly paid the purchase price after which the deceased got a surveyor to demarcate the said portion. He took possession and since then has used it peacefully continuously and un-interrupted for farming mainly. Neither the deceased nor the Defendant have ever interfered with his use of the 2½ acre portion of the suit land and he has placed a caution thereon to safeguard his interest. That the Defendant commenced succession proceedings in respect to the Estate of the deceased but did not include him. He therefore believes that at the expiry of 12 years, the deceased and the Defendant's right and interest in the 2½ acres got extinguished and the Defendant holds the title in trust for him.

2. The Plaintiff filed the statement of his witness Henry Okoth Oyugi (PW2) dated 17th December 2018. In the statement, the witness states that he knows both parties and was present on 1st January 1987 when the Plaintiff purchased the 2½ acres of land from the deceased out of the suit land at an agreed consideration of Kshs.18,600. That the sum of Kshs.14,600 was paid at the execution of the agreement and the Plaintiff was shown the portion. That he has occasionally been visiting the Plaintiff and found him using the said land.
3. The Plaintiff filed the following documents in support of his case:
 1. Copy of land sale agreement between him and the deceased dated 1st January 1987.
 2. Copy of register for the land parcel No Marachi/Bumala/958.

The Defendant filed a replying affidavit dated 18th February 2016 in response to the Originating Summons. He confirmed that he is the son to the deceased who died on 7th March 2009 leaving behind the following children:

1. John Ochiel
2. Vitalis Ouma Seth
3. Josephine Awuor
4. Mary Akoth
5. Gaudencia Awino (deceased)
6. Teresia Adhiambo
7. Veronica Apondi

That prior to his demise, the deceased had sold parts of the suit land to the following persons:

1. Benard Barasa



2. James Otengo
3. Nicholas Rabuk
4. Patrick Opondo Onyango
5. Lucas D. A. Onjomah Opere the Plaintiff

4. That prior to his demise, the deceased had differed with the Plaintiff and had refunded the purchase price together with interest to the chief. That the deceased had informed him that he (deceased) had entered into a verbal agreement with the Plaintiff for the purchase of a portion of the suit land at a consideration of Kshs.25,000 of which the Plaintiff made a part payment of Kshs.11,600 leaving a balance of Kshs.13,400 which he failed to pay and this led to the deceased cancelling the sale transaction. That the refund of Kshs.18,600 being the part payment of Kshs.11,600 plus interest of Kshs.7,000 was collected by the Assistant Chief one Mr Vitalis Odhiambo on 22nd November 2004 to refund to the Plaintiff.
5. That the Plaintiff never demarcated the portion of land which he had purchased nor took possession of the same to date. The Plaintiff instead cautioned the land but the caution was removed by the Defendant to enable him carry out succession and partition the suit land among the beneficiaries who were given their titles. That the Plaintiff has never physically used any portion of the suit land nor paid the full purchase price and his claim in adverse possession is feigned. Instead, the Plaintiff should collect his refund from the office of the Assistant Chief. His claim is incompetent and frivolous and should have been filed against the deceased.
6. The Defendant filed statements of the following witnesses in support of his defence:
 1. Albert Sikwe Oketch (DW2)
 2. Vitalis Onyango Odhiambo (DW3)He also filed a statement by one Benard Barasa who however did not testify.
7. In his statement dated 5th March 2021, Albert Sikwe Oketch (DW2) states that he knows the parties herein as well as the deceased because they were his subjects when he served as their chief. That in 2004, the deceased went to his office and lodged a complaint against the Plaintiff with whom he had an agreement to purchase the suit land at a consideration of Kshs.25,000 but had only paid a sum of Kshs.11,600. The deceased had therefore resolved to refund the said Kshs.11,600 to the Plaintiff and opt out of the transaction. So he summoned the Defendant and Plaintiff to his office and the Plaintiff agreed to the refund but insisted on being paid interest which was almost three (3) times what he had paid as part payment for the land. Eventually, the Plaintiff agreed to a refund of Kshs.18,600 made up of the principal of Kshs.11,600 plus interest of Kshs.7,000. So he referred the parties to the area Assistant Chief to draft an agreement on the refund of the money. Later, however, the deceased reported to him that the Plaintiff had failed to turn up before the Assistant Chief and so he (deceased) had left the money with the said Assistant Chief for collection. That the Plaintiff has never lived on the suit land.
8. Vitalis Onyango Odhiambo (DW3) recorded an un-dated statement in which he stated that he was the Assistant Chief of Bukhakala sub-location from 1994 to 2006 when he retired. The parties are therefore his subjects and he knows the location of the suit land. That the deceased went to his office complaining that he had sold land to the Plaintiff but they had not reached a proper agreement and that the deceased had therefore opted to refund the purchase price since the Plaintiff had not fully paid. So he summoned both parties and the deceased proposed to refund Kshs.11,600 but the Plaintiff insisted on Kshs.18,600 which included Kshs.7,000 as interest. It was then agreed that the deceased



would take the Kshs.18,600 to his office for collection by the Plaintiff. The money was taken to his office by the deceased on 22nd November 2004 and he summoned the Plaintiff to go and collect it but the Plaintiff did not do so nor offer any explanation.

9. The Defendant filed the following documents:
 1. A document headed “Refund of Disagreement of Land Sale Between Sendhi Onyango Oluoch And Lucas Ooko Opere ” signed by the Assistant Chief.
 2. Official Certificate of Search for the land parcel Marachi/Bumala/958.
 3. Letter by the Plaintiff’s then counsel Odhiambo Ouma dated 15th March 2005 and addressed to the deceased under reference “Refund for Purchase of Land.”
10. The hearing commenced before Omollo J on 1st December 2021 who heard the Plaintiff’s evidence. Following the Judge’s transfer, I took over the hearing on 5th July 2023 and heard the evidence of the Defendant and his witnesses. Both parties and their witnesses adopted as their evidence the contents of their statements which I have already summarised above. They also produced as their documentary evidence the documents filed herein.
11. Submissions were thereafter filed both by Mr Were instructed by the firm of Gabriel Fwaya Advocates for the Plaintiff and by mr wanyama instructed by the firm of Wanyama & Company Advocates for the Defendant.
12. I have considered the evidence by the parties and the submissions by the counsel.
13. The Plaintiff has approached the Court for an order that he has acquired by way of adverse possession a portion of the suit land measuring 2½ acres which he claims to have purchased from the deceased via a written sale agreement dated 1st January 1987 and for which he paid the full purchase price of Kshs.18,600 and has been farming thereon. The Defendant’s case is that his deceased father and the Plaintiff entered into an oral agreement in January 1987 but the purchase price was Kshs.25,000 of which he paid only Kshs.11,600 leaving a balance of Kshs.13,400 which he paid prompting the deceased to cancel the transaction. It was then agreed that the Plaintiff would refund Kshs.11,600 plus interest of Kshs.7,000 making a total of Kshs.18,600 and the Plaintiff never took possession of the land.
14. A party claiming land by way of adverse possession is entitled under Section 38(1) of the [Law of Limitation to Act](#) to approach the Court for appropriate orders. It reads:

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 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.”

In [Kasuve -v- Mwaani Investments Ltd & Another](#) 2004 1 KLR 184, the Court of Appeal stated thus:

“ 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 the discontinuation of possession by the owner on his own volition.”

Such possession must be without force, stealth or the permission of the owner – [Kimani Ruchine -v- Swift Rutherford Company Ltd](#) 1980 KLR 10. It must also be open, continuous, peaceful, notorious and with the knowledge of the owner – [Robert Shume & Others -v- Samson Kazungu Katana](#).



15. In the case of *Mtana Lewa -v- Kabindi Ngala Mwangandi* C. A. Civil Appeal No 56 of 2014 [2015 eKLR], the Court described the doctrine of adverse possession 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, the period 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 license of the owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act* ...”

It is also clear that a purchaser in possession of land having paid the purchase price is a party in whose favour an order claiming land by way of adverse possession can be made – *Public Trustee -v- Wanduru Ndegwa* C.a. Civil Appeal No. 73 of 1982 [1984 eKLR].

16. I shall be guided by those precedents and others in determining this dispute.
17. Before I do so, however, I must consider one issue which neither of the parties nor their counsel raised. Although the Plaintiff has filed this suit against the Defendant only, it is clear from the register of the suit land that it is registered in the names of the Defendant and other co-owners in the following shares:
1. Vitalis Ouma Seth (Defendant)- 4.9 Ha
 2. Benard Barasa – 1.6Ha
 3. Vincent Ogonda Juma – 0.8 Ha
 4. Grace Odhiambo Onyango – 0.4 Ha
 5. Evans Onyango Owuor – 0.4 Ha

Indeed in paragraphs 2 and 10 of his replying affidavit, the Defendant has deposed that the deceased had left children and that having taken out Letters of Administration in respect to his Estate, the Defendant distributed the suit land among them. Some of the beneficiaries sold their shares. He also confirmed in paragraph 4 of his replying affidavit that the deceased had, prior to his demise, sold a portion of the suit land to the Plaintiff. Section 91 (3) of the *Land Registration Act* provides as follows:

“An instrument made in favour of two or more persons and the registration giving effect to it shall show –

- a. Whether those persons are joint tenants or tenants in common; and
- b. The share of each tenant, if they are tenants in common”.

Since the register of each of the owners is indicated against their names, it is obvious that the Defendant and the other owners are tenants in common of the suit land. I have grappled with the issue, which the parties unfortunately did not canvass before me, as to whether given those circumstances, the Plaintiff was right in filing this suit against the Defendant only or whether he should have filed the suit against all the co-tenants. I have come to the conclusion that the Plaintiff was right in filing this suit against only the Defendant rather than as against all the co-tenants for the following reasons.

18. Firstly, although the Defendant has not been sued as the Administrator to the Estate of the deceased who was the owner of the suit land at the time of the events giving rise to this suit, it is clear from paragraph 9 of his replying affidavit that he obtained a Grant of Letters of Administration in respect



to the Estate of the deceased on 25th April 2013 and which was confirmed on 11th December 2014. So for all practical purposes, he is the legal representative of the deceased and it was in that capacity that he distributed the suit land to the other co-tenants on 5th March 2015 before this suit was filed on 3rd September 2015. The law is that change of ownership of the land does not interrupt a claim based on adverse possession – Githu -v- Ndeete 1984 KLR 776. On that basis therefore, the Plaintiff was entitled to sue the Defendant only rather than all the co-tenants.

19. Secondly, it is also clear from the register to the suit land that the Defendant owns the largest portion of the suit land being 4.96 Ha (12.3 Acres). The other co-tenants own smaller portions ranging from 1.6 Hectares (3.9 Acres) to 0.4 Hectares (0.9 Acres). The Plaintiff's claim is 2½ acres which can therefore only be apportioned from the Defendant's share.
20. Finally, it is also clear from the list of the deceased's children, as provided by the Defendant himself in paragraph 2 of his replying affidavit, that other than the Defendant, none of the other co-tenants are children of the deceased. The other co-tenants appear to be purchasers of portions of the suit land. The Plaintiff was therefore at liberty to pursue his claim against the Defendant only because his portion of the suit land is identifiable.
21. Having said so, has the Plaintiff proved his claim to 2½ acres of the suit land by way of adverse possession?
22. The basis of the Plaintiff's claim is that he purchased the 2½ acres through a written agreement dated 1st January 1987. That the purchase price was Kshs.18,600 of which he paid the sum of Kshs.14,600 to the deceased on the date of execution of the sale agreement. As per the sale agreement a copy of which was produced, he paid the balance of Kshs.4,000 on 4th May 1987. In opposition to the Originating Summons, the Defendant filed a replying affidavit in which he has deposed that infact the agreement between the deceased and the Plaintiff was an oral agreement, that the purchase price was Kshs.25,000 of which the Plaintiff paid only Kshs.11,600 leaving a balance of Kshs.13,400 which remains un-paid thus leading to the cancellation of the agreement by the deceased. This is how the Defendant has deposed in paragraph 4 of that affidavit.

“That as relayed to me by the deceased, the applicant entered into a verbal agreement with the deceased in January 1987 to purchase a portion of land at a price of Kshs.25,000 of which the applicant made part payment of Kshs.11,600 leaving a balance of Kshs.13,400.”
Emphasis mine.

It is clear from the above that what the Defendant is referring to is what he was allegedly informed by the deceased. He was not a party to any agreement, oral or written, between the deceased and the Plaintiff over the suit land. And what he purports to confirm, therefore, is mere hearsay. I did not hear him claim that the sale agreement dated 1st January 1987 executed between the deceased and the Plaintiff for the sale of 2½ of land is a forgery. The said agreement speaks for itself. It bears the thumbprint and identity card details of the deceased. It shows that the sum of Kshs.14,600 was paid on 1st January 1987 and the balance of Kshs.4,000 was paid on 1st May 1997 being the final instalment of the full purchase price of Kshs.18,600. The Defendant who was not a party or witness to the said agreement cannot now lead hearsay evidence to the effect that the deceased and the Plaintiff had an oral agreement in which the purchase price was Kshs.25,000 of which Kshs.11,600 was paid leaving a balance of Kshs.13,400. The sale agreement dated 1st January 1987 was a written agreement whose authenticity has not been challenged. It speaks for itself and cannot be varied by oral evidence which is itself hearsay. The parole evidence principle is that evidence is not admissible to contradict or qualify a complete written contract.



23. The Defendant produced as part of his evidence a document dated 22nd November 2004 signed by the Assistant Chief Bukhakhale location Vitalis Odhiambo (DW3). It is headed:

“Refund of Disagreement Of Land Sale Between Sendhi Onyango Oluoch And Lucas Ooko Opere ”

It purports to be an agreement between the deceased and the Plaintiff by which the deceased gave the said Assistant Chief the sum of Kshs.18,600 to be collected by the Plaintiff as refund of the purchase price. However, there is a demand letter from the Plaintiff’s then advocate Odhiambo Ouma & Company Advocates dated 15th March 2005 and addressed to the Defendant demanding a refund of the purchase price. If the Plaintiff had collected the purchase money in 2004, it is not possible that his counsel would be making a demand of the same in 2005. Indeed when this witness was cross-examined by Mr Wanyama on 31st January 2024, he said:

“I know the location of the land. The Plaintiff was to be refunded his money Kshs.18,600 through my office. The money was brought to my office and I summoned the Plaintiff to receive it but he did not turn up.”

The bottom line is that the document dated 22nd November 2004 having not been executed by either of the parties cannot bind any of them. It is my finding that the Plaintiff purchased a portion of the suit land measuring 2½ acres vide a written agreement dated 1st January 1987 and paid the whole purchase price. He first paid Kshs.14,600 on the date of execution of the sale agreement and the balance of Kshs.4,100 on 4th may 1997. So for purposes of adverse possession, time started running on 4th May 1997 when he paid the final instalment.

24. However, for the Plaintiff to be entitled to the orders which he seeks, he was also required to prove that indeed he took possession of the 2½ acres of the suit and has continued to be in occupation and possession thereof peacefully for the statutory period of 12 years. The importance of such occupation and possession being peaceful was re-emphasised in the case of *Mtana Lewa -v- Kabindi Ngala Mwagandi* C.a. Civil Appeal No 56 of 2014 [2015 eKLR] where the Judges cited with approval the following passage from the judgement of the Supreme Court of India in the case of *Karnataka Board Of Wakf -v- Government Of Indida & Others* 2004 10 SCC 779:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is ‘nec vi, nec clam, nec precario’, that is peaceful, open and continuous. The possession must be adequate in continuity in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.” Emphasis mine.

The above was also reiterated in the case of *Robert Shume & Others -v- Samson Kazungu Kalama* C.a. Civil Appeal No 32 of 2015 [2015 eKLR] where the Court of Appeal stated thus:

“By dint of Section 7 of the *Limitation of Actions Act*, the appellants ought to have demonstrated that the respondent had lost the right to bring the action to recover the property on account of the former having been in quiet and continuous occupation and use



of the property in a manner inconsistent with the respondent's title for a period of 12 and more years. Stated differently and bearing in mind that possession is a question of fact, they were expected to show that their possession was nec vi, nec clam, nec precario, that they were in exclusive possession of the property, that their possession was open, continuous, peaceful and notorious with the knowledge but without permission of the owner. Emphasis mine.

In *Black's Law Dictionary* 10th Edition the term peaceable possession is defined as:

“Possession (as of real property) not disturbed by another's hostile or legal attempts to recover possession; esp wrongful possession that the rightful possession has appeared to tolerate.”

The same Dictionary defines peace as:

“A state of public tranquillity; freedom from civil disturbance or hostility. The absence of war, fighting or other hostilities. The termination or absence of armed conflict between countries.”

For the purposes of this judgment, peace should be looked at as the absence of “hostility”. If the Plaintiff was indeed in possession of the suit land, and my next consideration is whether in fact he was, then clearly that possession was not peaceful. This is because, as is clear from the evidence of Vitalis Onyango Odhiambo (DW3), and who was the parties' Assistant Chief, the deceased approached him complaining that the Plaintiff had not paid the full purchase price. The deceased therefore opted to refund the purchase price and the Assistant Chief summoned both of them to his office to settle the issue. That was followed by a letter dated 15th March 2005 produced by the Defendant in which the Plaintiff's counsel wrote to the deceased demanding a refund of the purchase price failure to which legal proceedings would be instituted. That was eight (8 years) after the Plaintiff had paid the last instalment of Kshs.4,000 on 4th May 1997. Given those circumstances, the Plaintiff's possession of the suit land if at all, can hardly be described as having been peaceful. The deceased's hostility towards the Plaintiff's possession of the suit land appears to have been made clearly long before the expiry of the 12 years statutory period after the Plaintiff had made the last payment.

25. The next issue is whether the Plaintiff was indeed in occupation and possession of the suit land. In paragraphs 7 and 8 of his supporting affidavit, the Plaintiff has deposed thus:

7: “That the deceased with the help of a surveyor demarcated and marked on the ground 2½ acres purchased.”

8: “That the deceased did give me and I took possession of the 2½ acres aforesaid and commenced development and use.”

The above averments have been denied by the Defendant who in paragraphs 7 and 12 of his replying affidavit has deposed thus:

7: “That Lucas never demarcated the portion of land that he purchased and were so, he never took vacant possession of the same and as such the said land was never occupied or used by Lucas from the time it was purchased up to date”.

12: “That the Applicant has never physically possessed or used any portion of the suit land as imputed in his feigned claim of adverse possession.”

Having pleaded that he had taken possession of the 2½ acres out of the suit land, demarcated and developed the same, the burden of proof was on the Plaintiff to prove that allegation. This is clear from the provisions of Sections 107, 108 and 109 of the *Evidence Act* which provide that:



(1) “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.”

(2) “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

108: “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

109: “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

It was therefore the duty of the Plaintiff to prove that he took possession of the suit land, demarcated and developed it including farming thereon. After all, as was held in *Maweu -v- Liu Ranching & Farming Co-operative Society* 1985 eKLR:

“Adverse possession is a fact to be observed upon the land. It is not to be seen in a title.”
Emphasis mine.

Therefore, having deposed that he had taken possession of the suit land, demarcated and developed it, the burden was on the Plaintiff to demonstrate the development on the suit land. The word development is defined in the same *Black’s Law Dictionary* as:

“A substantial human-created change to improve or unimproved real estate, including the construction of the building or other structures. An activity, action or alteration that changes undeveloped property into developed property.” Emphasis mine.

If the Plaintiff had done any developments or planted any crops on the suit land, nothing would have been easier than filing photographs of such development or crops. He may even have filed photographs of the boundary marks if, as he has deposed in paragraph of his supporting affidavit, the surveyor had “demarcated and marked on the ground 2½ acres purchased.” However, not a single photograph has been filed by the Plaintiff to support the averments that he developed and was involved in farming on the suit land. This Court finds it rather inconceivable that from 1987 when he says he took possession of the 2½ acres, upto 2015 when he filed this suit (a period of 28 years), there is nothing on the ground to demonstrate his occupation and possession of the suit land. Without that evidence, the Plaintiff’s claim to the 2½ acres of the suit land by way of adverse possession must collapse. The inevitable conclusion which this Court must make is that whereas the Plaintiff paid for the 2½ acres of the suit land, he never actually went into occupation nor took possession of any portion of the suit land.

26. Notwithstanding the collapse of the Plaintiff’s claim to the suit land by way of adverse possession, this Court notes that in paragraph 16 of his supporting affidavit, the Plaintiff deposed as follows:

16: “That the deceased and or the Respondent holds the 2½ acres of the subject matter in trust for the applicant to whom it should be transferred/registered.” Emphasis mine.

What I understand the Plaintiff to be saying is that the Defendant holds the 2½ acres in trust for him and the same should therefore be registered in the Plaintiff’s names. Of course the claim to the suit land by way of a trust ought to have been embodied in the main prayers in the Originating Summons because that is the pleading. After all, it is the pleadings which determine what remedies the Court may grant a party. Secondly, the Plaintiff did not even identify the nature of trust which he had in mind.



27. That notwithstanding, there are trusts which are equitable remedies that can be imposed by the Court. This was considered by the Court of Appeal in the case of *Twalib Hatayan & Another -v- Said Saggar Ahmed Al-beidy* C.a. Civil Appeal No 51 of 2014 [2015 eKLR]. After adopting the definition of a trust as defined in *Black's Law Dictionary* 9th Edition, the Court went on to state as follows:

“Trusts are created either expressly (by the parties) or by operation of the law. An express trust arises when the trust property, its purpose and beneficiaries have been clearly identified (see Halsbury's Law of England Vol. 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A Constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing ... 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 law of England supra at para. 1453. As earlier stated, with Constructive trusts, proof of the 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. In the present case, a Constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.

This leaves us with resulting trusts; upon which the appellant had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention Therefore, unlike Constructive trusts where unknown intentions may be 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 advance the purchase money. Whether or not the property is registered in his name or that of another is immaterial.” Emphasis mine.

28. This Court has already found that there was a written agreement between the Plaintiff and the deceased on 1st January 1987 by which the Plaintiff purchased 2½ acres of land from the deceased and paid Kshs.14,600 at the execution of the sale agreement and Kshs.4,000 on 4th May 1997. The Plaintiff therefore paid the total purchase price of Kshs.18,600. There was no clause in the said sale agreement stipulating that the balance of Kshs.4,000 be paid within a specific period. Therefore, by the time the deceased went to complain to the Assistant Chief Vitalis Onyango Odhiambo (DW3) on 11th November 2004 seeking to opt out of the sale agreement and instead refund the purchase price, it was already too late. The fact is that by 11th November 2004, the Plaintiff had long paid the full purchase price 7 years earlier. And as I have already also found above, the document dated 22nd November 2004 signed by the said Assistant Chief by which the deceased left Kshs.18,600 to the witness as a refund was never signed by the Plaintiff or even the deceased. The Assistant Chief (DW3) also confirmed in his testimony that the Plaintiff did not go back to collect the said Kshs.18,600. The witness did not



tell the Court whether he took the money to the deceased or was still holding it. That is a matter for the Defendant to pursue. What is important however, is that vide a letter dated 15th March 2005, the Plaintiff's counsel wrote to the deceased in reference to the suit land and addressed him as follows in paragraphs three (3) and four (4) as follows:

“We are instructed that you agreed to transfer ownership and possession of the said parcel of land to our client upon full payment of the purchase (sic) of Kenya shillings 18,600. Our client further paid to you a sum of Kenya Shillings 1,800 to enable you avail your sons from Nairobi to facilitate the transactions on this land.

Our client instructs us that consequent upon receiving these sums from our client, you have since changed your mind against the said sale and have thus refused to effect the appropriate transfer of the stated land to our client. A meeting was once convened by the local chief in which you declared that you no longer want to honour the agreement.

Kindly Note that we are under strict instructions to demand from you, which we hereby do, a refund of the said sum of Kenya Shillings 20,400 together with accumulated interest of Kenya Shillings 51,365 plus our debt collection charges amounting to Kenya Shillings 13,000 within 14 days from the date of this demand.”

The deceased did not reply to that letter or if he did, none has been produced by the Defendant. The result is that the deceased kept the purchase price and did not transfer the 2½ acres to the Plaintiff. Nothing would have been easier than for the deceased replying to the said letter and enclosing the sum claimed or picking the Kshs.18,600 from the Assistant Chief and handing it over to the Plaintiff if indeed there was any such agreement or even complaining that the sum of Kshs.51,368 was too high. Given those circumstances, this Court must invoke and apply the doctrine of a resulting trust because equity frowns upon unjust enrichment.

29. This Court has already found that the Plaintiff is not in occupation and possession of the suit land because the deceased did not formalise their transactions. However, the fact that the Plaintiff is not in occupation or possession of the suit land does not defeat his claim thereto on the basis of a resulting trust. In the case of *Isack M'inanga Kebia -v- Isaaya Theuri M'intari & Another* Supreme Court Case No 10 of 2015 [2018 KESC 22 KLR] the Court was dealing with a case of a customary trust and said the following on the issue of occupation and possession of the land while agreeing with the Court of Appeal:

“To prove a trust in land; one need not be in actual physical possession and occupation of the land.”

My view is that it matters not whether the trust is an express, constructive, resulting or any other trust. This is because, in any trust, the trustee has a fiduciary duty and obligation to the beneficiary of the trust. A fiduciary is defined in *Black's Law Dictionary* 10th Edition as:

“Someone who is required to act for the benefit of another on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care and disclosure.”

Having received the purchase price for the 2½ acres of the suit land from the Plaintiff, the deceased and his successor in title were under an obligation to transfer the same to the Plaintiff unless there were compelling reasons militating against such transfer. In this case, there are no such compelling reasons because the deceased appears to have simply changed his mind about the transaction. And as is already



clear from the case of *Twalib Hatayan & Another -v- Said Saggat Ahmed Al-heidy* (supra), a resulting trust automatically arose in favour of the Plaintiff who had advanced the purchase price. See also the case of *Charles Kandie -v- Mary Kimoi Sang* C.a. Civil Appeal No 141 of 2012 [2017 eKLR], where the Court of Appeal similarly took the view that such a trust arises in favour of a purchaser. By that reasoning, the Plaintiff is entitled to an order that the Defendant owes him a duty to transfer the 2½ acres out of the suit land to him since he holds it in trust for the benefit of the Plaintiff. Such a right is an equitable one which this Court is entitled to impose upon the Defendant. The remedy of a resulting trust is basically founded on the notions of fairness and justice arising out of the peculiar circumstances of each case. The fact that it can be imposed by the Court means that it is also a discretionary judicial remedy.

30. Even if it can be argued that the remedy of a resulting trust was not specifically pleaded and is therefore not available to the Plaintiff, there is judicial precedence that a Court may base its decision on an unpleaded issue. In the case of *Odd Jobs -v- Mubia* 1970 E.A. 476, the then Court of Appeal for Eastern Africa stated that a Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for its decision. That decision has been followed by many cases in the same Court including *Nkalubo -v- Kibirige* 1973 E.A. 102 and *Railways Corporation -v- East African Road Services Ltd* 1975 E.A. 128. It has also been followed by the Court of Appeal of Kenya including in *Herman P. Steyn -v- Charles Thys* C.a. Civil Appeal No 86 of 1996 [1997 eKLR] among other cases. In this case, the issue as to whether the Plaintiff had in fact paid for the suit land and is therefore entitled to the 2½ acres is the common thread running through the parties evidence. In paragraphs 3, 4 and 5 of his supporting affidavit, the Plaintiff has deposed that he fully paid for the 2½ acres as agreed. In paragraph 13 of his replying affidavit, the Defendant however averred that the Plaintiff “never paid the full purchase price.” The same theme runs through the submissions by counsel. In his submissions, MR WERE counsel for the Plaintiff states:

“It is the Plaintiff’s case that he paid all the agreed purchase price of Kshs.18,600 in 2 instalments. Kshs.14,600 on the material day of the agreement and Kshs.4,000 on 4/5/1997.

The Defendant referred to some refund of money from the seller to the Plaintiff. It is therefore not in dispute that the Plaintiff purchased 2½ acres of land from the Defendant’s father. All the witnesses, including the Defendant’s confirmed as much. Indeed at paragraph 4 of his replying affidavit sworn on 18/2/2016, the Defendant admits as much save that he describes the agreement as having been verbal and that the purchase price was Kshs.25,000. He did not call any witness to confirm whether indeed the agreement was verbal or to confirm if the purchase price was Kshs.25,000. Regardless, it is not disputed that there was a sale.”

On his part, Mr Wanyama counsel for the Defendant has submitted as follows on the same issue:

“Taking into account the events of refund which took place in the year 2004, the respondent’s case is that the applicant entered into an agreement to purchase land from the respondent’s father at Kshs.25,000 but the applicant only paid Kshs.11,600 and remained with the balance of Kshs.13,400. The applicant’s purchased portion of land had never been demarcated on the ground because the full purchase price was yet to be paid. It was not possible for the applicant to take possession of a portion of 2½ acres that was yet to be demarcated for him. Eventually the refund issue was settled at Kshs.11,600 that had been paid by the applicant plus interest of Kshs.7,000 which made up the total sum of Kshs.18,600. This sum was deposited with the then area Assistant Chief named Vitalis Onyango Odhiambo for collection by the applicant as had been agreed in the previous



meeting that was held before him on instructions from the area Chief. We urge that the applicants claim be dismissed with costs due to the following reasons”

Therefore, the issue as to whether or not the Plaintiff paid the full purchase price for the 2½ acres out of the suit land was also raised by the parties in their respective affidavits and was followed up by counsel in their submissions. It was left to the Court for determination leading to the conclusion that since the Plaintiff had made the full payment for the 2½ acres, the deceased, and thereafter the Defendant as his successor in title, held it on the basis of a resulting trust as described above.

31. It is the finding of this Court that although the Plaintiff has been unable to prove that he is entitled to be registered as the proprietor of the 2½ acres out of the suit land by way of adverse possession, he has however adduced sufficient evidence to prove that he is entitled to the said 2½ acres on the basis of a resulting trust. That trust must therefore be determined to enable the Plaintiff acquire his title to the said 2½ acres and since the Defendant’s share of the suit land is 4.96 Hectares (12.3 Acres), the Plaintiff’s portion will be demarcated from that share.
32. The up-shot of all the above is that having considered all the evidence herein, this Court enters judgment for the Plaintiff as against the Defendant in the following terms:
 1. The Defendant holds a title to a portion measuring 2½ acres out of his share of 4.96 Hectares in land parcel NO Marachi/Bumala/958 in trust on behalf of the Plaintiff.
 2. That trust is hereby determined.
 3. The Defendant shall within 45 days of the delivery of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel NO Marachi/Bumala/958 and execute all relevant documents to facilitate the demarcation thereof so that a portion measuring 2½ acres out of the Defendant’s share is surveyed and registered in the name of the Plaintiff.
 4. In default of (3) above, the Deputy Registrar of this Court shall execute all such documents on behalf of the Defendant and the Land Registrar and Surveyor Busia shall proceed as directed notwithstanding the absence of the original title deed to the Land parcel NO Marachi/Bumala/958.
 5. The Defendant shall meet the Plaintiff’s costs.

BOAZ N. OLAO

JUDGE

18TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL.

Right of Appeal.

BOAZ N. OLAO

JUDGE

18TH JULY 2024

