



**Gitau v Gitau & another (Environment & Land Case 190 of 2017)  
[2022] KEELC 3144 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3144 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 190 OF 2017**

**LN GACHERU, J**

**JUNE 9, 2022**

**BETWEEN**

**STEPHEN WAMAI GITAU ..... PLAINTIFF**

**AND**

**NELSON NJUGUNA GITAU ..... 1<sup>ST</sup> DEFENDANT**

**WAMAI NJUGUNA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Through a Complaint dated 26<sup>th</sup> January 2010, the Plaintiff sought for judgment against the Defendants jointly and severally for the following orders; -
  - a. Eviction and Vacant Possession of the said premises.
  - b. Injunction order to restrain the Defendants, their servants, employees and or agents from occupying disposing or in any manner dealing with the parcels of land.
2. It is the Plaintiff's averment that at all material times since 1971, he was and still is the registered owner of land parcel No. Makuyu/makuyu BLK 1/972. That the said land parcel was subdivided into Makuyu/makuyu BLK 1/ 1/6333 and Makuyu/makuyu/BLK 1/6334. That on or about the year 1988, the Plaintiff entered a verbal agreement with the Defendants herein and he allowed them to utilize the said portion of land for subsistence farming. That the Defendants are the Plaintiff's brother and nephew respectively.
3. The Plaintiff further averred that on or about the year 2005, he requested both Defendants to vacate the suit land, but they declined. That he has subsequently on many occasions asked the Defendants to vacate, but they have neglected and or refused to vacate. That he instituted the instant suit for vacation and /or eviction orders against the Defendants.



4. The suit is opposed by the Defendants vide an Amended Statement of Defence and Counterclaim dated 30<sup>th</sup> June 2021. The Defendants deny all the allegations made by the Plaintiff in the Plaint and averred that the Plaintiff is the registered owner of land parcel No. Makuyu/makuyu/BLK 1/972, which parcel of land the Plaintiff holds in trust for the Defendants since 1972. That any illegal subdivision on the suit land without the consent of the Defendants is illegal as it is jointly owned. The Defendants admitted to being the brother and nephew to the Plaintiff respectively, but denied having entered into any oral agreement with the Plaintiff. They reiterate that they have co-owned the suit land with the Plaintiff since 1972.
5. Further, it the Defendants averment that they received an unlawful Notice to vacate the suit land pursuant to which they filed a\*Land Dispute Case at Makuyu Division Land Disputes Tribunal, being LDT Case No. 4 of 2010.
6. In their Counterclaim against the Plaintiff, the Defendants averred that the suit land, Makuyu/makuyu/BLK 1/972, belonged to John Gitau Njuguna (deceased), who was the father of the Plaintiff and the 1<sup>st</sup> Defendant and also grandfather to the 2<sup>nd</sup> Defendant. That the suit land was registered in the name of the Plaintiff to hold it in trust for their entire family. That their father John Gitau Njuguna (deceased) subdivided the suit land into 3 portions which he intended they be given to the 1<sup>st</sup> Defendant, Plaintiff and their late mother. That they have always used their respective land portions as such, since the said subdivision. That the suit land is family land and their parents now deceased have been buried there on their portions. That the Defendants claim against the Plaintiff is that the title for land parcel No. Makuyu/makuyu/BLK 1/972, and any other titles issued pursuant to the subdivision of the suit land be cancelled and the suit land be shared equally between the Plaintiff and the 1<sup>st</sup> Defendant who are children of John Gitau Njuguna (deceased).
7. In the Counter Claim, the Defendants sought for Orders against the Plaintiff as follows;
  - a. That the Plaintiff's suit be dismissed with costs
  - b. A declaration that the Plaintiff's registration of Plot Title Number Makuyu/makuyu/BLK 1/972, was done in trust and is therefore held in trust for the Defendants.
  - c. That the relevant Land Registrar be ordered to cancel the Plaintiff's Title for Title Number Makuyu/makuyu/BLK 1/972, and the subsequent titles issued for Makuyu/makuyu/Block 1/6333 and Makuyu/Makuyu/block 1/6334 and/or any other titles issued pursuant thereto and the said land be shared equally between the Plaintiff and the 1<sup>st</sup> Defendant.
8. In Response to the Counterclaim, the Plaintiff filed a Defence to Counterclaim dated 11<sup>th</sup> August 2021. The Plaintiff denied all the allegations in the Counterclaim and reiterated his averments in the Plaint dated 26<sup>th</sup> June, 2010. He further averred that the suit land was not family property as alleged and that burials do not connote or confer ownership. That the Counterclaim is time barred under the *Limitation of Actions Act*, and is therefore a non- starter and should be dismissed.
9. The matter was set down for hearing and the Plaintiff gave evidence for himself and called one witness. The Defendant gave evidence through 1<sup>st</sup> Defendant and called one more witness.

### **Plaintiff's Case**

10. PW1, Stephen Wamai Gitau adopted his witness statement dated October 8, 2010, as evidence in chief. He also identified his list of documents dated 8<sup>th</sup> October 2010, which contained 37 documents and produced them as P.Exhibits 4–37. He marked for identification documents No.1-3. He urged the Court to allow his claim.



11. On cross examination, he testified that his father John Gitau Njuguna (deceased) started living on the suit land in 1977, and his mother also deceased had settled on the suit land in 1973. That Nelson, the 1<sup>st</sup> Defendant also started living on the suit land in 1977, and he has lived on the left side of the said land since then. That his father and mother died in 1996 and 2012 respectively, and they were all buried on the middle portion of the suit land, which he had given them to live on temporarily. That he on the other hand lived on the right side of the suit land and his wife moved there in 1984, and they build a home. That he divided in 1984 and his father and uncle were present and they decided how the land would be divided. That when the wife of the 1<sup>st</sup> Defendant died in 2003, she was buried on the left side of the suit land where the 1<sup>st</sup> Defendant stayed after he gave him. That he bought the land in 1971, and he had a title deed to that effect. That they subdivided the suit land for use by his father, brother, and his wife.
12. Further that contrary to the allegations made by the Defendants, the Plaintiff's father did not demand for the title before he died, and his mother did not say that the money used to purchase the suit land was given by their father. That the suit land was his and it was not family property as alleged. That he agreed out of good faith to host and/or allow his brother and parents to live on the suit land at all material times. That he had receipts from PundaMilia Farmers' Cooperative Society, that showed that he purchased the suit land.
13. In re-examination, PW 1 stated that he only allowed the 1<sup>st</sup> Defendant's wife to be buried on the suit land after he was persuaded by his mother. That when the 1<sup>st</sup> Defendant's 2<sup>nd</sup> wife died in 2006, she was buried at Lang'ata Cemetery, because he objected to her burial on the suit land. That he only allowed his family to stay on his land as they made plans to acquire land of their own. That the 1<sup>st</sup> Defendant had since acquired land in Utawala Nairobi but the 2<sup>nd</sup> Defendant, a son of the 1<sup>st</sup> Defendant, resided on the suit land.
14. PW 2, Isaac Mwoche Mwaniki, testified that he is the Chief of Makuyu area and he produced Documents 1, 2, and 3 of the Plaintiff's List of Documents dated 8<sup>th</sup> October 2021 and P.Exhibits 1, 2 and 3 respectively.
15. On cross examination, he stated that he became the Chief of Makuyu area in 2021. That the letter dated 20<sup>th</sup> February 1981, only has the name of Gitau Njuguna, and it was from the Chief. That the letter dated 16<sup>th</sup> September 2009, is on the Court Case between Nelson Njuguna and Stephen Wamai, and it had no ID Numbers, but it had a stamp of the Chief. In reference to the 2006 letter, he stated that it did not indicate that the parties had appeared before the Chief before. That the letter heads were different, but the same was authentic as it had a signature and stamp on the face of it.

### **Defence Case**

16. DW1 Nelson Njuguna Gitau, the 1<sup>st</sup> Defendant stated that the Plaintiff was his younger brother, while the 2<sup>nd</sup> Defendant was his son. He adopted his witness statement dated 22<sup>nd</sup> October 2021, as part of his evidence. He also produced his list of documents dated 22<sup>nd</sup> October 2021, containing one document as an exhibit and the same was marked D. EXB 1.
17. On cross-examination, he stated that he was aware of Land Tribunal Case No. 4/2010, and he was aware that the award was set aside. That he knew Chief Kariuki and that their father was not living on the their land, but on his own land. That he was not aware of the 1981 letter. That he knew Chief Muthaiga and who had said that the suit land belonged to the Plaintiff. That he has seen the letter of 2009. That the parties were before Chief Esther Wangechi Muchemi. That he was familiar with her, but he did not appear before her because there was something cheeky. That the Plaintiff had no case



with either their late father or their late mother. That their father used to send money to his mother and he bought other parcels of land. That he had even balloted on his father's behalf in other Cooperatives. That he entered the suit land after he got permission from his father. That their father claimed the land in Makuyu several times. That the Plaintiff demolished the structures that had been put up by their parents on the suit land. That he had built a temporary house and his son, the 2<sup>nd</sup> Defendant had also built a house there.

18. Further that his father did not have shares at Punda Milia Cooperative Society. That though the Plaintiff has produced documents showing he bought the land through Punda Milia, he had been sent by their father. That the ballot documents were picked by their mother and the ballot only showed where the land was located. That their mother had been sent by their father who had shares in Punda Milia Cooperative Society. That their father had another land in Mugoiri area, but he sold the same because he had land in Makuyu.
19. DW 2, George Ndungu Mwangi, stated that he lives in Makuyu and had lived there since 1976. That he knew Stephen Wamai, Nelson Njuguna and both their parents, who are now deceased. He adopted his witness statement dated 22<sup>nd</sup> October 2021, as part of his evidence.
20. On cross examination, he stated that he was not related to the parties herein, but he was their immediate neighbor in Makuyu. That he was very good friend of Gitau Njuguna and they used to relate well. That the said Gitau Njuguna, had told him that the middle portion of the suit land was to be shared equally between his sons. That the said Gitau was older than him and he was like his father. That Stephen Wamai did not buy the suit land and that Wamai did not have shares in the said Punda Milia Cooperative Society. That the shares claimed by the Plaintiff were registered in his name at the request of their mother. That the suit land was registered in the name of the Plaintiff at the request of his mother, but it did not belong to the Plaintiff. That the said Gitau Mwangi was working in Mombasa, and he sent money for his son and wife to purchase the suit land. That Stephen Wamai was in school in Mombasa when the suit land was purchased.
21. On re-examination, he stated that the mother to the Plaintiff and the 1<sup>st</sup> Defendant was not registered as the owner of the suit land when the same was acquired as she had no National Identity Card.
22. After close of viva voce evidence, the parties filed and exchanged their written submissions, which the Court has read and considered. The Plaintiff filed his submissions dated 20<sup>th</sup> April 2022, through the Law Firm of J.N. Mbutia & Co Advocates, and raised seven (7) issues for determination by this Court. The Plaintiff submitted that the prayers sought by the Defendants are not competent in law as the Defendants are not legally appointed as Administrators of the estate of Gitau Njuguna (deceased). They relied on the case of Daniel Njuguna Mbugua vs. Peter Kiarie Njuguna & 2others (2021) eKLR, where the court held that;

I find that the matter cannot be saved. It is plain- white- the Plaintiff has no locus and has not exhibited any cause of action. He has no mandate to bring the suit in the absence of letters of grant of administration.”

23. On whether there exists a trust, the Plaintiff submitted that no such trust exists. That the evidence on record did not show any monetary contribution made by the late Gitau Njuguna, his wife, and / or the Defendants herein towards purchasing the suit land. That the actual purchase happened long before a ballot was picked by the Late Josephine Njeri. That in any case, the ballot is for the purpose of showing the exact position of the plot and is not prove of ownership or title. That the occupation of the suit land was allowed in good faith and was gratuitous and cannot therefore confer ownership. That the Defendants are licensees and/or occupiers of the suit land at the will of the Plaintiff, and hence



an eviction and/or vacation order should issue against them as they have refused and/or neglected to vacate voluntarily. The Plaintiff urged the Court to allow his prayers as sought in the Plaint dated 26<sup>th</sup> June 2010, and to dismiss the Defendants' Counterclaim with costs.

24. The Defendants on the other hand filed their written submissions dated May 6, 2022, through the Law Firm of Wambui Ngugi & Co. Advocates and raised two (2) issues for determination.
25. On whether the Plaintiff holds the suit land in trust, it is their submissions that Gitau Njuguna (deceased), is the one who solely provided funds to purchase the suit land and that the Plaintiff contributed nothing towards the purchase of the suit land. That the registration of the Plaintiff as the owner of the suit land was purely as a trustee and there was no intention to confer interest in the suit property upon him. That it can be inferred from the pleadings and the evidence of the witnesses that the family of the late Gitau Njuguna had a beneficial interest in the suit land and constructive trust had therefore been established.
26. On whether adverse possession was tenable in this suit, it was submitted that the ingredients of adverse possession were discussed in the case of *Mtana Lewa vs. Kabindi Ngala Mwangandi* (2005) eKLR where it was held ;

Adverse Possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits and/or neglects to take action against such person in assertion of his title for a certain period in Kenya 12 years”

27. Further, the Defendants submitted that they have proved that they have been on the suit land since 1977. That they are entitled to the suit land because the late Gitau Njuguna was their father and grandfather respectively. In conclusion, the Defendants submitted that there was a constructive trust created and this Court should therefore treat the suit land as trust land and share the same equally between the Plaintiff and the 1<sup>st</sup> Defendant.
28. In response to the Defendants submissions, the Plaintiff filed further submissions dated 17<sup>th</sup> May 2022. The Plaintiff submitted that the Counter claim is entirely on trust and adverse possession is a prayer that must be pleaded and proved. That the submissions of the Defendants are a complete departure from his pleadings.
29. Reliance was placed on the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR where the Court held as follows;

It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR, which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.””

- 30 The Plaintiff urged this Court to dismiss the attempt by the Defendants to introduce new evidence at submissions stage as the same amounted to giving evidence from the bar and was not acceptable.
31. The Court has carefully read and considered the pleadings by the parties, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;
- i. Whether the Plaintiff held the suit land in trust for the Defendants
  - ii. Whether the orders sought in the Counter Claim are merited
  - iii. Whether the orders sought in the Plaint dated 26/10/2010 are merited
  - iv. Who should bear the cost of the suit?
32. From the pleadings on record and the exhibits produced, it is not in doubt that the Plaintiff is the registered owner of the suit land, more specifically being land title Number Makuyu/makuyu/BLK 1/972. That Plot the said land parcel Makuyu/makuyu/BLK 1/972, was subdivided into Makuyu/makuyu/BLK 1/6333 and Makuyu/makuyu/BLK 1/6333 which is the subject of this suit.
33. Further, it is not in doubt that the Plaintiff and the 1<sup>st</sup> Defendant are brothers and the 2<sup>nd</sup> Defendant is a son to the 1<sup>st</sup> Defendant and a nephew to the Plaintiff. It is also not in contention that all the parties herein are in active occupation of the suit land and have been at all times material to this suit. That the parents of the Plaintiff and the 1<sup>st</sup> Defendant resided on the middle portion of the suit land from about 1973, upto the time of their demise, and they were buried there as well.
34. It on this background that the instant suit has been lodged by the Plaintiff who is seeking to evict the Defendants from his suit land. The Defendants on the other hand claim that the suit land is a family, land which was bought by the late Gitau Njuguna, and the Plaintiff was registered to hold it in trust for the rest of the family. The Defendants based their Claim on trust have urged this Court to cancel any already existing subdivisions and titles and then direct subdivision of the suit land equally between the Plaintiff and the 1<sup>st</sup> Defendant.

#### **i. Whether the Plaintiff holds the suit land in trust for the Defendants**

35. The rights of a registered owner of land are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:
24. Subject to this Act
- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
35. Section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#), as not requiring noting in the register.



36. Section 28 of the [Land Registration Act](#) provides that:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) .....
- (b) trusts including customary trusts;”

37. The concept of trust must however be proved. In the case of *Mumo v Makau* [2002] 1EA.170, the Court held that: -

trust is a question of fact to be proved by evidence.....”

38. See also *Gichuki Vs Gichuki* C.A Civil Appeal No. 21 of 1981, where the Court of Appeal states that trust is a question of fact to be proved by evidence.

39. In [Juletabi African Adventure Limited & another v Christopher Michael Lockley](#) [2017] Eklr, the Court dealt with the issue of trust at length. The Court made reference to *Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others* [2015] Eklr and re-stated the law on trusts as follows: -

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

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

Under the [Trustee Act](#), “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

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).”

40. Another trust prescribed under Section 28 of the *Land Registration Act* 2012, is customary trust. Customary trust was well explained by the Supreme Court in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, where it held as follows:

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

41. In the case of *Susan Mumbi Waititu –VS-Mukuru Ndata & 4 others* (19 of 2007) eKLR, the Court stated that:-

“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1<sup>st</sup> defendant has deponed that he purchased the suit premises for value. Accordingly, it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1<sup>st</sup> defendant in favour of the plaintiffs”.

42. The argument by the Defendants was that though the Plaintiff was the registered owner of the suit land, money to purchase the said land was provided by their father Gitau Njuguna (deceased), and the intention was that the Plaintiff would hold the land in trust for the entire family. From the aforementioned descriptions of various trusts, the trust that the Defendants are implying if established could either be a resulting trust or a customary trust.

43. As earlier stated, the existence of a trust is a question of evidence. In the *Juletabi* case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:

The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of



the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

44. The onus to prove existence of a trust in the instant suit lay squarely on the Defendants. Section 107 of the *Evidence Act* provides that:

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

45. In addition, section 108 of the same Act provides as follows:

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.”

46. Further, the said *Evidence Act* in Section 109 provides that:

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.”

47. From the above, it is clear that the onus was on the Defendants to prove that there indeed existed a trust and the Plaintiff held the suit land in trust for him and their family.

48. This Court will now move to establish which trust if any existed between the parties herein. As above stated, it is not in dispute that the suit land is registered in the name of the Plaintiff and that the Defendants are in physical occupation of some portion of the suit land. It is also not in dispute that the parents of the Plaintiff and the 1<sup>st</sup> Defendant resided on the suit land from about 1974, to the time of their demise.

49. The Defendants claims in their pleadings that the Plaintiff was registered as the owner of the suit land to hold it in trust for the family. That their father purchased the suit land through the Plaintiff, and their had the intention of subdividing it among his sons to wit being the Plaintiff and the 1<sup>st</sup> Defendants. Further, the Defendant claimed that the said contribution of their father paired with their long time of occupation gave rise to a trust.

50. On whether a customary trust has been proved, this Court finds and holds that the same has not been supported by any evidence because the suit land was not ancestral land, but a purchased land. A perusal of the Plaintiff’s exhibits is indicative on exbt 4 that the Plaintiff was a member of Punda Milia Cooperative Society, and it is through that Society that he purchased the suit land. The Claim by the Defendants that the late Gitau Njuguna is the one who purchased the suit land through the Plaintiff was not supported by any documentary evidence or otherwise.

51. Having found that a customary trust has not been substantiated, this Court will now move to interrogate if a resulting trust, has been established.

52. It is trite that the Court will not imply a trust unless the intention of the parties are clearly determined. See the case of *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR, where the Court of Appeal held,

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.”

53. A resulting trust as defined in the Halsbury’s Laws of England as quoted in the foregoing case arises by operation of law:
- i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or
  - ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
  - iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.
54. From the above definitions and the pleadings of the Parties, this Court finds that a resulting trust does suffice in the instant suit. The evidence on record points to the fact that the Plaintiff solely purchased the suit land. While the Defendants have alleged that the Late Gitau Njuguna contributed to its purchase, the same has not been substantiated with any evidence. However, the Defendants through the evidence of DW 1 and DW2, alleged that indeed the land was purchased and registered in the name of the Plaintiff in favor of the late Gitau Njuguna. It was their evidence that the only reason the documents of the Plaintiff were used to register the suit land is because the actual purchaser (Gitau Njuguna) was working in Mombasa at the time, and his Identity Card was not availed and his wife Josephine Njeri (deceased), was not legally mandated to possess an Identity Card. It is their further statement that indeed Josephine accompanied the Plaintiff to Pundamilia Society for purposes of balloting. This statements have not been entirely contested by the Plaintiff, but he stated that he raised the money through his employment to purchase the suit land and that by the time he acquired the suit land, his father the late Gitau Njuguna had long retired. It is evident that the Plaintiff is being truthful as from EXB 4, he became a member of Pundamilia in 1983, and the suit land title was issued in his name in 1988.
55. As to the issue of possession, it is evident that both the Plaintiff and the Defendants occupy the suit land. The Plaintiff avers that he allowed the Defendants and his parents to live and occupy the suit land out of good faith. He further alleged that he allocated his parents the middle portion to occupy and he allocated his brother the portion to the left, while he kept the portion on the right. It is his submissions that the permission he gave them was temporary and he did not wish away his rights to ownership. That it was his expectation that they would move upon acquiring their properties, but they never did. The 1st Defendant on the other hand alleged that he was shown the portion to occupy by their father and he has lived there since then and that his wife and parents have been buried on the suit land.
56. This Court notes that the Defendants have lived on the suit land for a period of over 20 year, despite the same being owned by the Plaintiff. Occupation however does not confer ownership, unless the same was not permissive and an application for adverse possession is made.
57. What flows from the pleadings is the existence of a family dispute. While the Plaintiff allowed the Defendants to occupy the suit land, he seem to have done out of good faith and out of sheer respect and honour of their parents, because as soon as their parents died, the Plaintiff seems to have initiated the process of reclaiming his land.



58. Based on the foregoing, the Court finds and holds that the Defendants have failed on a balance of probability to establish the existence of a resulting trust. While the Court acknowledged the Defendants have been in occupation for a rather long time, it is trite that parties are bound by their pleadings. The Court cannot descend into the arena and grant prayers that have not been made simply because it sees that a party should have prayed for something else or crafted his pleadings differently. Further, the Court cannot imagine that the party wanted to plead or craft his/ her prayers to mean something else. Again, the Court cannot put itself in the shoes of a party to substitute for him or her another prayer different from what they asked for. The Supreme Court of Kenya in its ruling in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

59. The Defendants have in their submissions sought ownership through adverse possession. However, submissions are not pleadings, but are merely persuasive to the Court. See the case of; [Robert Ngande Kathathi v Francis Kivuwa Kitonde](#) [2020] eKLR where the court stated as follows;

Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007\*:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

60. Further, the Court of Appeal in [Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another](#) [2014] eKLR:

Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

61. Based on the foregoing, this Court will not consider the prayer for adverse possession as the same was not pleaded in the Counterclaim and the Plaintiff herein has not been accorded an opportunity to litigate on the same.

**(ii) Whether the orders sought in the Counter Claim are merited**

62. In the said Counterclaim the Defendants pray for Orders against the Plaintiff as follows;



- a. That the Plaintiffs suit be dismissed with costs
- b. A declaration that the Plaintiff's registration of land parcel No. Makuyu/makuyu/BLK 1/972, was done in trust and is therefore held in trust for the Defendants.
- c. That the relevant Land Registrar be ordered to cancel the Plaintiff's title for Title Number Makuyu/makuyu/BLK 1/972, and the subsequent titles issued for Makuyu/makuyu/block 1/6333, and Makuyu/makuyu/block 1/6334, and/or any other titles issued pursuant thereto and the said land be shared equally between the Plaintiff and the 1<sup>st</sup> Defendant.

63. The Plaintiff has opposed the said Counterclaim and averred that the same should be dismissed as it offends the provisions of the *Limitation of Actions Act*.

64. Section 7 of the *Limitation of Actions Act* Cap 122 Laws of Kenya states to wit as follows;

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

65. The Plaintiff acquired and was registered as the owner of the suit land in 1988, which is about 34 years ago. Subsequently the suit land was sub divided in October 2009, which is about 13 years ago. It is trite that jurisdiction is everything and without it the Court must down its tools. It is also trite that equity does not aid the indolent. A perusal of EXB 1 and 2 indicate that the Plaintiff began the process of exerting the ownership over the suit land in 2006 and in 2010, a Land Dispute Case was filed before the Land Disputes Tribunal in 2010, and decision delivered in 2010, in favor of the Complainant who is the 1<sup>st</sup> Defendant herein. The Plaint herein was filed and subsequently the Counterclaim was filed in June 2021, about 11 years after the Plaint was filed and served.

66. Based on the foregoing, it is evident that the cause of action complained of by the Defendants arose in 2010, and therefore this Court finds and holds that the same is not time barred and is rightly before the Court.

67. Having found that the Counterclaim is not time barred and that the Defendants have on a balance of probability failed to establish the existence of a trust, this Court finds and holds that the Counterclaim dated 30<sup>th</sup> June 2021, is not merited and the same is dismissed with costs.

**(iii) Whether the orders sought in the Plaint dated 26/10/2010 are merited**

68. The Plaintiff sought orders against the Defendants as follows;

- a. Eviction and Vacant Possession of the said premises
- b. Injunction order to restrain the Defendants, their servants, employees and or agents from occupying disposing or in any manner dealing with the parcels of land.

69. The right to own and acquire property in Kenya is premised on article 40 of the *Constitution of Kenya*, 2010. The said Article provides as follows;

- (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.



- (2) Parliament shall not enact a law that permits the State or any person--
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

...”

- 70. As stated herein the *Land Registration Act* (supra) section 24(a) provides that the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Further, section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act.
- 71. This court has already established herein above that the plaintiff is the registered owner of the suit land and that the Defendants have on a balance of probability failed to make a case for the existence of a trust.
- 72. Having now carefully considered and analysed the available evidence and the rival written submissions therein, the Court finds that the Plaintiff herein has proved his case on the required standard of balance of probabilities. For the above reasons, the Plaintiff’s claim as contained in the Plaint dated 26<sup>th</sup> October 2010, is found merited and the same is allowed entirely.
- 73. The Defendants are directed to voluntarily move out of the Plaintiff’s suit land within a period of 90 days from the date hereof, failure of which eviction order to issue. The Plaintiff is entitled to costs of the suit.
- 74. However, the Defendants’ Counterclaim dated June 30, 2021, is found not merited. The same is dismissed entirely with costs to the Plaintiff.
- 75. It is so ordered.



DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9<sup>TH</sup> DAY OF JUNE 2022.

L.GACHERU

JUDGE

**Delivered virtually in the presence of;**

Joel Njonjo - Court Assistant

Mr Mbutia for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

L.GACHERU

JUDGE

9/6/2022

