



**Muchene v Mwaura (Environment & Land Case 368 of 2017)
[2022] KEELC 13722 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13722 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 368 OF 2017**

**JO MBOYA, J
OCTOBER 19, 2022**

BETWEEN

RAOUL EMANUEL MUCHENE PLAINTIFF

AND

RACHAEL NDUTA MWAURA DEFENDANT

JUDGMENT

1. Vide Amended Plaintiff dated the October 3, 2021, the Plaintiff herein has approached the Honourable Court seeking for the following Reliefs;
 - i. A Declaration that the suit property, Dagoretti/Uthiru/884(Mother Title), having been gifted to the Plaintiff's father, the late Godfrey John Muchene by the late grandfather, Caxton Mukiri Muchene for love and affection and transferred to him by his grandfather in the year 1992; the Plaintiff's father immediately upon the transfer became the absolute registered proprietor.
 - ii. A Declaration that the Plaintiff having been gifted and had a transfer registered in respect of the suit property, Dagoretti/Uthiru/884(Mother Title),for love and affection; he became the absolute registered proprietor effective the April 11, 2016 when he was issued with the Title Deed.
 - iii. A Declaration that the Defendant has no proprietary right over the said Suit Property, Dagoretti/Uthiru/884,(Mother Title), recognizable in law;
 - iv. An Order of Mandatory Injunction directing the Defendant to surrender and handover possession of the suit property to the Plaintiff;
 - v. Further and without prejudice to the foregoing, Orders of Eviction of the Defendant from the suit Property to be executed by the Officer Commanding Kabete Police Station; and
 - vi. Costs of the Suit.



2. Upon being served with the amended Plaintiff, the Defendant responded thereto and filed an Amended Statement of Defense and Counterclaim dated the October 19, 2021 and in respect of which the Defendant sought for the following reliefs;
 - a. Dismissal of the Plaintiffs' suit with costs to the Defendant;
 - b. An order of Declaration that there exists a customary implied trust over that entire house, developments erected on the suit property. And/or in alternative a declaration that the defendant is entitled to the said parcel of land under the doctrine of adverse possession.
 - c. An order of Permanent Injunction restraining the Plaintiff's either by themselves, their agents, servants, employees or any one acting under their instructions from evicting, harassing, selling, transferring or in any interfering with the Defendant's quiet and peaceful enjoyment of the suit Property being land parcel number Dagoretti/ Uthiru/ 884.
 - d. Costs of the suit and Counter claim.
 - e. Any other relief that this Honourable Court may deem just to grant
3. Thereafter, the Plaintiff filed a Reply to Defense and Defense to Counterclaim, wherein same denied/ disputed the allegations contained in the counterclaim.
4. Subsequently, the pleadings in respect of the subject matter closed and the suit was thus ready/ripe for hearing.

Evidence By The Parties:

Plaintiff's case:

5. The Plaintiff's case is premised on the evidence of the Plaintiff herein, who testified as PW1 and also the evidence of Penninah Kanyi Munene, who testified as PW2.
6. It was the Plaintiff's testimony that the suit property, namely, Dagoreti/Uthiru/884, was hitherto registered in the name of Godfrey John Muchene, now deceased, who was the father of the Plaintiff.
7. Besides, the witness also stated that on or about the year 2016 Godfrey John Muchene, now deceased executed a transfer instrument and thereafter caused the suit property to be transferred and registered in the name of the witness/Plaintiff herein.
8. Upon the transfer and registration of the suit property, the witness testified that same became the lawful and legitimate proprietor over and in respect of the suit property.
9. Nevertheless, the witness added that prior to and before the transfer and registration of the suit property in his name, the suit property belonged to and was registered in the name of Godfrey John Muchene.
10. On the other hand, the witness also testified that Godfrey John Muchene, now deceased acquired the suit property by way of gift from his own Father, namely, Caxton Mukiri Muchene, now deceased.
11. Further, the witness also testified that during the time when the suit property was registered in the name of Caxton Mukiri Muchene, Deceased, same allowed and authorized the Defendant herein to remain in occupation and continue to use the suit property, insofar as Godfrey John Muchene, was at the material time resident in and working in Landon, in the United Kingdom.



12. Be that as it may, the witness added that on or about the year 2016 Godfrey John Muchene came back to the country and sought to procure the suit property from the Defendant, but the Defendant herein failed, refused or neglected to hand over vacant possession over to the father of the witness.
13. Having made efforts to procure and obtain vacant possession of the suit property, but which attempt was thwarted and frustrated by the Defendant, Godfrey John Muchene, now deceased was constrained to and indeed issued and served Eviction notice upon the Defendant.
14. Nevertheless, the witness has added that upon being issued and served with the notice, the Defendant herein, proceeded to and filed a suit vide Milimani CMCC No 993 of 2016.
15. However, the witness added that the said suit/civil proceedings, was terminated summarily, on account of lack/want of jurisdiction.
16. Be that as it may, the witness added that despite the dismissal of her suit, wherein same sought to procure positive orders over and in respect of the suit property, the Defendant herein failed and or neglected to hand over vacant possession.
17. In the premises, the Defendant herein is said to have continued to occupy, possess and live on the suit property, even without the permission, authority or permission of the registered owner.
18. Premised on the failure and refusal of the Defendant to vacate, the witness testified that Godfrey John Muchene and himself (witness) were constrained to and indeed filed the subject suit.
19. Nevertheless, the witness has testified that during the pendency of the suit, Godfrey John Muchene passed on, leaving only the Plaintiff herein, as the surviving Party.
20. In the premises, the witness maintained that same is therefore entitled to vacant possession and recovery of the suit property.
21. In short, the witness testified that by virtue of being the registered proprietor and owner of the suit property, same is therefore entitled to recover vacant possession and to take occupation of the suit property.
22. In any event, the witness added that the Defendant herein was duly granted her shares of the Family Estate at the same time when Caxton Mukiri Muchene, now Deceased, was distributing his Estate.
23. Owing to the foregoing, the witness stated that the Defendant herein, therefore has no lawful rights or basis to remain and continue to occupy the suit property, either on the basis of laying a claim thereto on the basis of Customary Trust or otherwise.
24. Other than the foregoing, the witness adopted the written statement dated the October 3, 2021. In this regard, the said witness statement was admitted in evidence and deemed as the witness' further Evidence in Chief.
25. On the other hand, the witness also adopted and relied on the List and Bundle of Documents dated the October 3, 2021. For clarity, the said list contained a total of 15 documents, which the witness sought to rely on as exhibits.
26. Pursuant to and in line with the request, the said Documents were produced and marked as P1 to P15 respectively.
27. Besides, the witness also referred to the Supplementary/Further list of documents dated the 10th November 2021. The documents were thereafter admitted in Evidence as further exhibits in the matter.



28. For completeness, the documents at the foot of the further list of documents dated the November 10, 2021 were admitted and produced as exhibits P16 to 21.
29. On cross examination, the witness herein stated that the suit property was initially owned or belonged to his Grandfather, namely, Caxton Mukiri Muchene, now Deceased, who was the Father of Godfrey John Muchene.
30. At any rate, the witness added that it was his grandfather who transferred the land to his father and a Sale agreement was duly executed between his Grandfather and the witness' Father, now deceased.
31. Nevertheless, the witness added that when his grandfather transferred the suit property to Godfrey Muchene, the transfer clearly indicated that the suit property was being transferred to the Plaintiff's Father, without any encumbrance or at all
32. Other than the foregoing, the witness stated that by the time the suit property was being transferred to and registered in the name of his Father, the Defendant herein was however, still residing in one of the Houses situated on the suit property.
33. Be that as it may, the witness added that the occupation of a portion of the suit land by the Defendant was initially on the basis of permission, consent and authority of one Caxton Mukiri Muchene, now deceased.
34. However, the witness stated that after the death of Caxton Mukiri Muchene, the witness own Father allowed the Defendant to continue residing in and occupying a portion of the suit property because the Plaintiff's Father was still working in the United Kingdom.
35. Further, the witness also clarified that the Defendant herein was also gifted properties by her Father, namely, Caxton Mukiri Muchene, now Deceased, when same was distributing/alienating his Estate to his children.
36. At any rate, it was stated that the Defendant proceeded to develop the properties which were gifted to her by her Father.
37. Other than the foregoing, the witness clarified that the Defendant herein is residing in the permanent house, which is standing on a portion of the suit property. However, the Witness added that the said occupation was anchored on the basis of permission and not otherwise.
38. Whilst under further cross examination, the witness added that the permanent house that the Defendant is residing was constructed on or about the year 1970 and that same belonged to his grandfather, who is buried in the neighborhood of the said house.
39. In answer to yet another question in cross examination, the witness added that the permanent house wherein the Defendant is staying falls within the suit property and that same was at any rate, gifted to the witness' own Father.
40. On re-examination, the witness pointed out that it was his own Father who first filed and commenced the suit and in respect of which his said Father was seeking to recover vacant possession over and in respect of the suit property from the Defendant.
41. Further, the witness has also added that the Defendant herein did not have any lawful rights, Interests and entitlement over the suit property.



42. As concerns whether the suit property was registered in the name of his Father to hold on Trust for his brothers and sisters, the witness maintained that the transfer and registration of the suit property in the name of his Father, was meant to confer lawful rights and entitlement in favor of his Father.
43. In this regard, the witness added and pointed out that each and every child of Caxton Mukiri Muchene, now deceased, was granted an independent and exclusive piece of land.
44. Premised on the foregoing, the witness contended that the suit property was not registered in the name of the witness' Father to enable same to hold the property on Trust for the Defendant, either as claimed or at all.
45. Besides, the witness clarified that the claim by the Defendant to have acquired lawful rights over and in respect of the suit property, are also misleading and misconceived.
46. Finally, the witness reiterated that the Defendant's occupation, possession and use of the suit property was informed by the fact that the Defendant herein was a Sister to Godfrey John Munene (who is deceased).
47. In view of the foregoing, the witness added that the claim for Customary Trust or in the alternative, adverse possession are therefore legally untenable. In any event, the Witness added that such claims by the Defendant were borne out of greed and desire to defraud the witness of the Land.
48. PW2 was one Pennina Kanyi Munene. According to the said witness, the Plaintiff's Father and the Defendant herein are blood siblings and there is no way that same would have acquired adverse possession.
49. Other than the foregoing, the witness testified that the Defendant herein had long been married but same divorced her husband and that is how the Defendant returned to occupy a portion of the suit property.
50. Nevertheless, the witness pointed out that the Defendant herein was given her own Plots/properties by her Father and that the Defendant does not have any lawful rights to and in respect of the suit property.
51. On cross examination, the witness pointed out that same is related to one Caxton Munene, who was originally the owner of the suit property.
52. Further, the witness stated that Caxton Muenene, now Deceased who was her brother thereafter subdivided his property and upon such subdivision, same gave portions to each and every of his children, including the Defendant herein.
53. As concerns the place where the Defendant is currently residing, the witness pointed out that the Defendant is residing and staying within the permanent house, which was built by Caxton Mukiri Muchiri.
54. However, the witness added that the Defendant was merely accommodated in the suit property, premised on the basis that same had divorced her husband and therefore had no place to occupy.
55. Be that as it may, it was clarified that the Defendant herein returned to and continued to occupy a portion of the land on account of permission, authority and consent of the registered owner thereof.
56. On re-examination, the witness added that the current Plaintiff is her Nephew and that same is currently working and living in the United Kingdom.
57. Further, the witness stated that the Plaintiff is the lawful and rightful owner of the suit property, same having been transferred unto him by own Father, namely, Godfrey John Muchene, now Deceased.



58. For completeness, the witness stated that the Defendant herein returned to and was allowed entry into and occupation of the house standing on a portion of the suit property, initially by her Father, but latter on by the Plaintiff's Father, who was still working and residing in the United Kingdom.
59. In view of the foregoing, the witness thus stated that the Defendant ought to vacate and grant vacant possession of the Suit Property to and in favor of the Plaintiff.
60. Finally, the witness reiterated that the land was transferred to and registered in the name of the Plaintiff's Father as the lawful owner and proprietor thereof.
61. In view of the foregoing, the witness reiterated and affirmed that the Defendant herein has no legal or equitable capacity to continue occupying and/or remaining in occupation of the suit property.
62. With the foregoing, the Plaintiff's case was closed.

Defendant's case:

63. The Defendant's case revolves around the Evidence tendered by the Defendant herself and wherein same testified and underlined that she is indeed a sibling to one Godfrey John Muchene, now deceased, who was the Father of the current Plaintiff.
64. Further, the witness has stated that during the lifetime of their parents, namely, Caxton Mukiri Muchene and Hotensia Gichiru Mukiri, now Deceased, respectively, same built and established a home on a portion of LR No Dagoreti/Uthiru/884.
65. Further, the witness has added that though same got married, the marriage did not work and hence same filed for divorce and finally same returned to her maiden home.
66. On the other hand, the witness has stated that when same returned home, her late Father, namely, Caxton Mukiri Muchene, welcomed her back and accommodated her within the suit property.
67. Other than the foregoing, the witness also added that thereafter, same has occupied and remained in possession of the suit property to date.
68. Be that as it may, the witness has added that she has been peacefully and quietly living and residing on the suit property ever since the death of her Father and that no one has ever disturbed her peace.
69. Notwithstanding the foregoing, the witness has testified that on or about the year 2015, her elder Brother, namely, Godfrey John Muchene demanded that she vacates from the suit property contending that same was illegally occupying the house standing thereon and by extension the suit property.
70. Further, the witness testified that same was surprised by the demand or action of her eldest brother, namely, Godfrey John Muchene.
71. Nevertheless, the witness has stated that the house wherein she is living belonged to her Father and hence there is no way that the suit property would have been secretly and fraudulently transferred to Godfrey John Muchene, now deceased.
72. In any event, the witness has testified that if the property was transferred and registered in the name of Godfrey John Muchene, now deceased, such registration was only perfected to allow the said Godfrey John Muchene to hold same on Trust on behalf of the Defendant herein together with her siblings and not to own same exclusively.



73. Other than the foregoing, the witness added that same has been staying in the house situate on the suit property and essentially her Parents house, both before and after their death. In this regard, the witness reiterated that the house where she is staying was left for her by her parents and that her occupation, possession and use has been lawful, as opposed to the Plaintiff, who currently holds the title.
74. At any rate, the witness has added that there exists a customary trust over and in respect of the suit property. Consequently, the witness has testified that the Plaintiff's title herein is not absolute, but same is subject to her rights, claim and interests premised on Customary Trust.
75. Other than the foregoing, the witness adopted her witness statement dated the June 7, 2019, which Witness statement was thereafter admitted as the witness further Evidence in chief.
76. On the other hand, the witness also referred to the List and Bundle of documents dated the June 7, 2019. In this regard, the witness sought to adopt and rely on the said exhibits.
77. Pursuant to the said request, the documents at the foot of the lists dated the June 7, 2019 were thereafter admitted in evidence and marked as exhibits D1 to D5, respectively.
78. On cross examination, the witness admitted that her late Father, namely, Caxton Mukiri Munene, now Deceased, actually caused subdivision over his land, namely LR No Dagoreti/Uthiru/105 and thereafter gave a portion to each of his children. In this regard, the witness admitted and acknowledged that same was given her portion of land at Uthiru.
79. Further, the witness also admitted and acknowledged that her brother, namely, Godfrey John Muchene was also given his portion and that the portion which was given to Godfrey John Muchene included the family house wherein same currently resides or occupies.
80. The witness also stated and acknowledged that she is truly residing on and occupying the house which is standing on the suit property.
81. Other than the foregoing, the witness stated that she is aware that the suit property was previously registered in the name of her brother, namely, Godfrey John Muchene, but currently the suit property is registered in the name of the Plaintiff.
82. In answer to a question as to who transferred the suit property to Godfrey John Muchene, now deceased, the witness acknowledged that it was transferred by Caxton Mukiri Muchene, who was her Father.
83. At any rate, the witness further acknowledged that when the suit property was transferred to Godfrey John Muchene, same did not object to the transfer and registration of the suit property in favor of Godfrey John Muchene.
84. In answer to a question relating to the basis upon which same returned to and continue to occupy the house sitting on the suit property, the witness added that she returned thereto as a Daughter of one Caxton Mukiri Muchene, now Deceased.
85. Be that as it may, the witness admitted that by the time the suit Property was being transferred and registered in the name of Godfrey John Muchene, now Deceased, same was already staying thereto but stated that same did not object to the transfer of the suit property to the name of her brother, namely, Godfrey John Muchene.
86. Nevertheless, the witness added that despite the fact that the land is registered in the name of the Plaintiff, the land however lawfully belongs to her. In this regard, the witness underlined that the land belongs to her on the basis of Customary Trust.



87. Other than the foregoing, the witness also stated that she is also claiming ownership of the land on the basis of Adverse Possession. In this regard, the Witness added that same has been in occupation of the Suit Property, contrary to the rights and Interests of the Plaintiff herein.
88. In any event, the witness reiterated that she has been in occupation of the suit property for more than 40 years.
89. Whilst still under cross examination, the witness admitted that at the time when the land was transferred to and registered in the name of Godfrey John Muchene, now Deceased, same was transferred without any Third Party claim. In fact, the witness added that the land was to belong to her said Brother exclusively.
90. On re-examination, the witness stated that same was present when the suit property was transferred to and registered in the name of her brother, namely, Godfrey John Muchene.
91. At any rate, the witness also stated that the transfer and registration of the suit property to and in favor of Godfrey John Muchene, now deceased was done at the same time when the rest of the siblings also got their respective titles.
92. Finally, the witness confirmed that same was aware of an agreement which was entered into between Caxton Muchiri and Godfrey John Muchene, relating to the suit property and same admits that the suit property was being transferred to Godfrey John Muchene without any Third Party claims and that Godfrey John Muchene was to become the lawful owner of the said property.

Submissions By The Parties:

Plaintiff's Submissions:

93. The Plaintiff filed two sets of written submissions. The first set of written submission is dated the August 8, 2022, whilst the other set is dated September 20, 2022.
94. In respect of the two sets of submission, the Plaintiff has raised, amplified and highlighted three issues for determination. Firstly, the Plaintiff's counsel has submitted that the suit property having lawfully been transferred to and registered in the name of the current Plaintiff by the previous owner, the current Plaintiff has acquired lawful and legitimate title to and in respect of the suit property.
95. At any rate, counsel for the Plaintiff has added that the Plaintiff's predecessor held an absolute and exclusive title to the suit property and hence same was bestowed with the capacity to alienate, transfer and dispose of the suit property, without any restriction, limitation or hindrance.
96. In view of the foregoing, counsel for the Plaintiff has therefore reiterated that upon the transfer and registration of the suit property in his name, the Plaintiff became the absolute owner and same is entitled to exclusive occupation, possession and use.
97. To this end, counsel for the Plaintiff has invited the Honourable court to take cognizance of the provisions of Sections 24, 25 and 26 of the [Land Registration Act, 2012](#) and essentially to underscore that the Plaintiff's rights and Interests to the suit property cannot be defeated at the instance of Defendant.
98. Secondly, counsel for the Plaintiff has submitted that the suit property was lawfully transferred to the Plaintiff's predecessor by one Caxton Mukiri Muchene, now deceased at the same time when the Defendant herein was also given her portion of land.



99. Given that the Plaintiff's predecessor was given the suit property, at the same time when the Defendant was given hers, counsel has submitted that the issue of Customary Trust which is being alluded to by the Defendant, does not arise and ensue.
100. At any rate, counsel for the Plaintiff has added that the claim based and founded on Customary trust, has neither been suitably pleaded nor proved.
101. Owing to the fact that the claim founded on customary trust has not been suitably pleaded nor particularized, counsel has underlined that such a claim cannot therefore be granted.
102. Thirdly, counsel for the Plaintiff has submitted that the claim based or founded on Adverse Possession is legally untenable, insofar as the Defendant's return to, occupation of and activities on the suit property were informed by the fact that the Defendant was a Daughter of the original owner of the property who allowed same to return and occupy the suit property on the basis of the said relationship.
103. Further, counsel for the Plaintiff has also added that after the death of one Caxton Mukiri Muchene, Father of the Defendant, one Godfrey John Muchene, who was a brother of the Defendant allowed same to continue residing in the permanent house located on the suit property, albeit on the basis of the relationship between the Defendant and the said Godfrey John Muchene.
104. Premised on the foregoing, counsel for the Plaintiff has submitted that the Defendant's possession, occupation and use of the suit property was therefore not hostile to the title of both Caxton Mukiri Muchene and Godfrey John Muchene, respectively.
105. If anything, counsel for the Plaintiff has submitted that the entry onto and continued occupation on the suit property, both during the lifetime of Caxton Mukiri Muchiri and Godfrey John Munene, respectively, was informed by the consent, permission and authority of the registered owners of the suit property.
106. Essentially, counsel for the Plaintiff has thus submitted that the Defendant herein has neither proved nor established her claim of ownership in respect of the suit property, either on the basis of Customary Trust or Adverse Possession.
107. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on various decisions *inter-alia* [Mbui versus Maranya](#) (1993)eKLR, [Njenga Kimani & 2 Others versus Kimani Nga'ng'a K Wainaina](#) (2017)eKLR and [Samuel Kihamba versus Mary Mbaisi](#) (2015)eKLR.

Defendant's Submissions:

108. On behalf of the Defendant, written submissions were filed on the September 16, 2022 and in this regard, the Defendant has raised and highlighted two pertinent issues.
109. The first issue raised and ventilated by the Defendant, relates to Customary Trust. According to the Defendant, same got married, but the marriage did not work. Consequently, she returned to her Father's home and same was accepted and continued to reside thereat until her Father Caxton Mukiri Muchene passed on.
110. In any event, the Defendant has further contended that she has resided in and occupied the house standing on a portion of the suit property for more than 40 years and that such occupation has conferred upon her equitable rights to the suit property.
111. Nevertheless, the Defendant has further submitted that even when her late father transferred the suit property to her brother, now deceased, the transfer was carried out on the face of her occupation and possession of the said land.



112. Premised on the foregoing, the Defendant has thus submitted that the transfer and registration of the suit property to and in the name of her brother now deceased, was therefore not meant to confer absolute and exclusive title to her said brother, now Deceased.
113. By extension, the Defendant has further submitted that to the extent that her own Brother did not have exclusive rights to and over the suit property, then the Plaintiff herein cannot also not claim to have exclusive rights to the suit property.
114. Either way, the Defendant has submitted that the Plaintiff's title is subject to existing Customary Rights/Trusts, underpinned by the Defendant's occupation and possession of the suit property.
115. Secondly, counsel for the Defendant has also submitted that the Defendant's occupation, possession and use of the suit property has also been adverse to the rights of Plaintiff and the Plaintiff's Predecessor in title.
116. To the extent that the Defendant's occupation has been adverse to the Plaintiff's title, Learned counsel for the Defendant has therefore contended that the Defendant has acquired Adverse Possessory rights to and in respect of the suit property.
117. In view of the foregoing, Learned counsel for the Defendant has therefore implored the court to find and hold that the Defendant herein is entitled to ownership of the suit property, either on the basis of Customary Trust or better still, on account of Adverse Possession.
118. To buttress his submissions, Learned counsel for the Defendant has invoked and relied on the decision in the case of *Mtanan Lewa versus Kabindi Ngala Mwangandi* (2015)eKLR.

Issues for Determination:

119. Having reviewed the Pleadings filed by the Parties, the witness Statements and Bundle of Documents and having reviewed the Oral evidence tendered; and similarly, having considered the written submissions which were filed, the following issues are pertinent and are thus worthy of determination;
 - i. Whether the Plaintiff herein is the lawful and legitimate owner of the suit Property and if so, whether same is entitled to exclusive occupation thereof.
 - ii. Whether the plea of Customary Trust was duly pleaded, particularized and suitably proved.
 - iii. Whether the claim for Adverse Possession has been established or better still, whether claim for Adverse Possession can arise in respect of the obtaining circumstances.

Analysis and Determination

Issue number 1 - Whether the plaintiff herein is the lawful and legitimate owner of the suit property and if so, whether same is entitled to exclusive occupation thereof.

120. It is common ground that the suit property herein was hitherto part and parcel LR No Dagoreti/Uthiru/105 belonging to and registered in the name of Caxton Mukiri Muchene, who subdivided same and thereafter giving rise to various subdivision.
121. It is also common ground that the suit property was hitherto registered in the name of Caxton Mukiri Muchene, now deceased, who thereafter executed the requisite transfer instrument and caused the suit property to be transferred to and registered in the name of Godfrey John Muchene, now deceased.



122. Suffice it to point out that though Caxton Mukiri Muchene, now deceased, was the father of Godfrey John Muchene, similarly now deceased, the transaction between the two was anchored on the basis of an Agreement for sale and in respect of which the vendor covenanted that the transfer in favor of the transferee, namely, Godfrey John Muchene, was being done free of any Encumbrance.
123. On the other hand, it was also an express term of the Sale agreement that at the time of the execution of the agreement for sale and the transfer instrument, the transferee was being placed in possession of the entire of the suit property.
124. True to it, the transfer in favor of Godfrey John Muchene, now Deceased, was perfected and ultimately registered. In this regard, Godfrey John Muchene became the lawful and legitimate proprietor of the suit property.
125. First forward, Godfrey John Muchene, now deceased and who was the registered owner of the suit property, chose to transfer the entire of the suit property to and in favor of the current Plaintiff.
126. It must be remembered that when Godfrey John Muchene, now deceased acquired the suit property, the acquisition was clear of any encumbrance. However, at that particular point in time, the Defendant herein was residing in one of the houses situate on the suit property, courtesy of being a Daughter of Caxton Mukiri Muchene, deceased.
127. Nevertheless, the important point to note is that Godfrey John Muchene having acquired the suit property clear of any encumbrance, from his Late Father, same was mandated and authorize to dispose of the Property, at his pleasure.
128. In the circumstances, there is no gainsaying that indeed Godfrey John Muchene was at liberty to transfer, alienate and or dispose of the suit property to the Plaintiff.
129. Be that as it may, evidence was tendered before the court that Godfrey John Muchene indeed transferred the entire of the suit property to and in favor of the Plaintiff. Indeed, the transfer in favor of the Plaintiff was duly registered and the Plaintiff was issued with a title deed on the 11th April 2016.
130. It is appropriate to point out that upon being issued with the title deed over and in respect of the suit property, the Plaintiff herein became the lawful and registered proprietor of the suit property. Consequently, the Plaintiff was thereafter conferred, imbued and bestowed with the rights and privileges attendant to the registration of title.
131. In my considered view, upon being issued with the title over and in respect of the suit property, the Plaintiff acquired lawful and legitimate rights and interests thereto and same is thus and entitled to vacant occupation and possession, subject only to known statutory limitations.
132. At this juncture, it is appropriate to take cognizance of the provisions of Section 24 and 25 of the [Land Registration Act, 2012](#). For convenience, the said provisions are reproduced as hereunder;

"Interest conferred by registration.

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease,



together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. Rights of a proprietor.

25. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
133. Other than the foregoing provisions, it is also imperative to acknowledge, endorse and reiterate the dictum in the case of *Ocean View Plaza Ltd v Attorney General* [2002] eKLR, where the Honourable Court observed as hereunder;

“Allotment of land to a citizen or others protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act.”

134. Premised on the foregoing, the issuance of certificate of title/title deed has therefore conferred upon the Plaintiff herein, lawful rights to and in respect of the suit property and such rights are deserving of protection by the Honourable court.
135. In the premises, I come to the conclusion that by virtue of being the registered proprietor of the suit property, which was lawfully transferred to and registered in his names at the instance of the previous registered owner, the Plaintiff is entitled to benefit from and enjoy the rights attendant thereto.
136. To this end, it is also worthy to reiterate and endorse the holding of the Honourable court in the case of *Paul Ngashema Kamau versus Halima Said* [2020] eKLR, where the court stated as hereunder;

“Further, in the case of *Willy Kipsongok Morogo v Albert K Morogo* (2017) eKLR the Court held as follows: ‘the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.’

From the legal provisions cited above, as well as associating myself with the quoted decision, I hold that since the Plaintiff is one of the co absolute proprietor of the suit land and their Certificate of title having not been challenged, he is entitled to all rights and privileges belonging or appurtenant thereto and hence entitled to protection of the law as envisaged in sections 24, 25 and 26 of the Land Registration Act. Further, based on these findings, I hold that the Defendant should indeed be evicted from the suit land”.



137. In a nutshell, my answer to issue number one is that the Plaintiff is the lawful and registered proprietor of the suit property. Consequently, same is entitled to exclusive occupation and possession thereof, against the whole world, the Defendant not excepted.

Issue number 2 - Whether the plea of customary trust was duly pleaded, particularized and suitably proved.

138. The Defendant herein has contended and thereby raised a plea that same is entitled to the suit property on the basis of Customary Trust.

139. According to the Defendant, the suit property was hitherto registered in the name of her Father, namely, Caxton Mukiri Muchene, now deceased and that same had expressed a desire to have the suit property registered in her name.

140. On the other hand, the Defendant further contended that the suit property comprised of the Matrimonial home, where her parents lived and resided.

141. In the premises, it is the Defendant's case that by virtue of being the home belonging to her Parents, there is no way the entire suit property could be transferred to her brother, namely, Godfrey John Muchene, now Deceased, to be the lawful and exclusive owner thereof.

142. Premised on the foregoing averments, the Defendant has therefore contended that the same are entitled to the suit property on account of Customary Trust and coupled with the fact that same has been residing therein for more than 40 years.

143. Be that as it may, the starting point to addressing the plea of Customary Trust is a requirement that such kind of Trust, not being Constructive Trust, must not only be pleaded but must be particularized.

144. In respect of the subject matter, it is conceded and acknowledged that the Defendant has indeed pleaded Customary Trust in the body of the amended statement of defense and counterclaim. However, the Defendant herein has neither particularized nor supplied the facts underpinning the claim for such Customary Trust.

145. It is imperative to note that where the law requires that a particular cause of action be pleaded and particularized, a failure to specifically plead and particularize the cause of action/claim, disentitles the claimant from pursuing that cause of action.

146. Consequently, in the absence of particulars of the Customary Trust and how such a claim arises, it is my finding and holding that the plea of Customary Trust, which is akin to Resulting Trust, has been made in vacuum.

147. To this end, it is appropriate to recall the provisions of Order 2 Rule 10(1) (a) of the [*Civil Procedure Rules 2010*](#), which provides as hereunder;

"10. Particulars of pleading:

[Order 2, rule 10.]

(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—



- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
- (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies."

148. To further buttress the foregoing observation, it is also appropriate to take cognizance of the dictum in the case of *Virani T/a Kisumu Beach Resort Hotel versus Phoenix of East Africa Company Ltd* (2004)eKLR, where the court observed as hereunder;

"Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) which requires in mandatory terms that:

"every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –

- (a) particulars of anyfraud on which the party relies.
- (b) Where a party pleading allegesfraudulent intention.....particulars of the facts on which the party relies."

In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention. Fraud is a serious quasi – criminal imputation and/or requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation".

149. Granted, the Court of Appeal was dealing with the requirement for particulars as pertains to fraud and fraudulent intention. However, the necessity for provision of such particulars applies mutatis mutandis to a claim based on Trust, with the exception of Constructive Trust which is based on construction by the Honourable Court in accordance with established procedure.

150. Perhaps, it is also important to refer to the decision in the case of *John Gitiba Buruna & Another versus Jackson Rioba Buruna* (2007)eKLR, where the Court of Appeal stated as hereunder;

"Mr Makoloo is also correct that the resulting trust on which the learned Judge relied was not pleaded by the respondent. Under Rule 8 (1) (a) of Order VI Civil Procedure Rules, a plaint should contain the specified particulars including particulars of trust on which a party relies. The respondent did not however, rely on a breach of a trust. The finding that there was a resulting trust was merely an inference arising from the facts as accepted by the learned Judge. The learned Judge however, with respect, erroneously categorized the trust arising from the circumstances of the case as a resulting trust rather than a constructive trust which arises by operation of law. Generally speaking, a constructive trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property."



151. In my considered view, the claim premised on Customary Trust, which has not been suitably pleaded and particularized in accordance with the prescription of the law, therefore fails.
152. Notwithstanding the foregoing, the evidence that was tendered by the Defendant herself during cross examination destroys the Defendant's plea and claim premised on Customary Trust.
153. In this regard, it is appropriate to reproduce the salient aspects of the Defendant's evidence while under cross examination. For completeness, the testimony was as hereunder;

“I am also claiming the land on the basis of customary trust. The land belongs to me. The land was transferred to my brother in the year 1989. I confirm that the land was given to my brother without any Third Party claim. The land was to belong to my brother. It was to belong to him exclusively. The land herein is currently registered in the name of the Plaintiff”

154. On re-examination, the witness further stated as hereunder;

“The land was transferred and registered in the name of my brother at the same time when the rest of us were also given their portions of land. I do confirm that I was given my portion of land. I can see the agreement between my brother and my late father Caxtone Mukiri Muchene, now Deceased. The agreement confirms that the land was transferred to my late brother to be the owners thereof. The land was transferred without any restriction as to third-party claim. I was not involved at the time of the transfer of the land to my brother. I did not object to the transfer of the land.

155. From the foregoing excerpts, what becomes clear is that the transfer of the suit property to and in favor of Godfrey John Muchene, now deceased, who was the Plaintiff's predecessor in Title, was to invest in same full and exclusive rights over the suit property.
156. Clearly, the Defendant acknowledges and admits that her late brother was not holding the land in trust.
157. If anything, the Defendant confirms that each and every sibling, was given his/her share and that the suit property exclusively belonged to her late brother, namely, Godfrey John Muchene, now Deceased.
158. Based on the foregoing evidence, even assuming that the Defendant had pleaded and particularized her claim for customary trust, (which is not the case), it would still be difficult to grant the Defendant's claim.
159. Simply put, the Defendant did not tender credible and sufficient evidence to discharge the burden of proof, which squarely lay on her shoulders in line with the provisions of Sections 107, 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya..
160. In this respect, it is appropriate to restate and reiterate the observation of the Court of Appeal in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, where the court stated as hereunder;

With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:

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



That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."

Issue number 3 - Whether the claim for adverse possession has been established or better still whether claim for adverse possession can arise in respect of the obtaining circumstances.

161. Other than the plea and claim based on Customary trust, which has been addressed and deliberated upon in the preceding paragraphs, the Defendant herein also laid a claim to the suit property on the basis of adverse possession.
162. Before venturing to address whether or not the doctrine of Adverse Possession is relevant and applicable herein, it is appropriate to recall the circumstances under which the Defendant gained entry and remained in occupation of the suit property.
163. It is not lost on the Honourable court that the Defendant herein was the Daughter of Caxton Mukiri Muchene, now deceased, who was the original owner of the suit property.
164. It is also common ground that when the Defendant's marriage broke down and collapsed, she returned to her parents home, which was situated on the suit property.
165. On the other hand, upon her return back home, the Defendant was accepted and remained residing on the suit property as a Daughter of the previous registered owner.
166. Subsequently, the land was transferred to and in favor of the Defendant's Brother. Indeed, the Defendant also got a share of land transferred to and registered in her name.
167. Nevertheless, because the Defendant's brother was working and residing in the United Kingdom, the Defendant's brother, now deceased, allowed the Defendant to remain in occupation of the suit property, certainly on the basis of the existing relationship.
168. What becomes apparent and or evident is that the Defendant's entry upon, occupation and use of the suit property was premised on the basis of consent, permission and authority of the Proprietor thereof.
169. Can such a situation give rise to a claim for Adverse Possession. Clearly, my answer is in the Negative.
170. To this end, the decision of the Court of appeal in the case of *Sisto Wambugu V Njuguna* 1983 KLR 172, is succinct and apt. For coherence, the Honourable Court held as hereunder:

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence



the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

171. Further, it is also important to adopt the dictum in the case *Samuel Miki Waweru V Jane Njeri Richu* CA No 122 of 2001 (UR), where the Court of Appeal, similarly stated as hereunder;

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise.”

172. In a nutshell, it is my considered view that the plea premised or based on Adverse Possession is similarly misguided and borne out of greed aimed at defrauding the Plaintiff of the suit property.

173. Additionally, the Claim based and premised on Adverse Possession is a disguised attempt by and at the Defendant to defeat Sibling indulgence and the Ubuntu, namely, the Spirit of brotherhood that underpinned the permission which was granted to and in favour of the Defendant.

Final Disposition:

174. From the foregoing analysis, what becomes apparent and evident is that the Plaintiff has placed before the Honourable court, sufficient and credible evidence to warrant a finding in his (Plaintiff's), favor.

175. Contrarily, the Defendant herein has failed to establish and prove her twin claims in respect of Customary Trust and Adverse Possession.

176. At any rate, the evidence tendered by the Defendant demonstrates an attempt to defeat, defraud and otherwise abuse the courtesy and indulgence that had hitherto been extended unto her (Defendant), by her brother, now deceased.

177. Be that as it may, I find and hold that the Plaintiff has proved his case on a balance of probabilities. Consequently, I enter judgment in favor of the Plaintiff in the following terms;

- i. A Declaration be and is hereby issued declaring that the suit property, Dagoretti/Uthiru/884(Mother Title), having been gifted to the Plaintiff's Father, the late Godfrey John Muchene by the late grandfather, Caxton Mukiri Muchene for love and affection and transferred to him by his grandfather in the year 1992; the Plaintiff's father immediately upon the transfer became the absolute registered proprietor.
- ii. A Declaration be and is hereby issued declaring that the Plaintiff having been gifted and had a transfer registered in respect of the suit property, Dagoretti/Uthiru/884(Mother Title),for love and affection; he became the absolute registered proprietor effective the April 11, 2016 when he was issued with the Title Deed.
- iii. A Declaration be and is hereby issued declaring that the Defendant has no Proprietary right over the said suit property, Dagoretti/Uthiru/884,(Mother Title), recognizable in law;
- iv. The Defendant be and is hereby directed to vacate the suit property and to grant vacant possession thereof to the Plaintiff within a duration of 120 days from the date hereof.
- v. In default to vacate and grant vacant possession of the suit property within the designated 120 days, the Plaintiff shall be at liberty to evict the Defendant from the suit property.



- vi. In the event of the Eviction being carried out and undertaken by the Plaintiff, the costs/ expenses incurred in levying the Eviction shall be certified by the Deputy Registrar and same shall be borne by the Defendant.
- vii. An order of Permanent Injunction be and is hereby granted to restrain the Defendant whether by herself, servants, employees and/or any one claiming under the said Defendant, from remaining on, re-entering upon and/or otherwise interfering with the Plaintiff's Title to and in respect of LR No Dagoreti/Uthiru/884
- viii. The Defendant's counterclaim be and is hereby Dismissed.
- ix. Cost of the suit and the Counter-claim be and are hereby awarded to the Plaintiff.

178. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19th DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Danstan Omari and Omaiyo for the Plaintiff

Mr. Kimathi for the Defendant

