



Rutere (Suing as the administrator of the Estate of M'Rutere M'Munyange alias Rutere Munyungi (Deceased)) v Njuki & another (Environment & Land Case 61 of 2016) [2022] KEELC 15264 (KLR) (7 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 61 OF 2016
CK NZILI, J
DECEMBER 7, 2022**

BETWEEN

**FRANCIS MURITHI RUTERE PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF M'RUTERE
M'MUNYANGE ALIAS RUTERE MUNYUNGI (DECEASED)**

AND

**JULIUS MUTWIRI NJUKI 1ST DEFENDANT
PHINEAS MUTWIRI 2ND DEFENDANT**

JUDGMENT

1. By an amended plaint dated November 30, 2009 the plaintiff suing as administrator of the estate of the late M'Rutere M'Munyange alias Rutere Munyugi (hereinafter the deceased) as the then registered owner of LR No Abothuguchi/Kariene/1189 (hereinafter the suit land) sued the defendants, a father and son for trespass and erection of illegal structures on the land between 25.9.2009 and November 25, 2009 despite interim injunctive orders issued on 24.9.2009. He sought for an order of eviction and permanent injunction.
2. The defendants denied the claim by a further amended statement of defense and counterclaim dated 22.5.2017. The defendants pleaded that the plaintiff's case was statute barred and that they were validly entitled to the suit land by virtue of customary trust. By way of a counterclaim, the 1st defendant as the legal representative of the estate of Njuki Munyugi (deceased) pleaded that both the plaintiff and the defendants shared a common grandfather who had gathered the suit land, and eventually bestowed the 1st defendant, in the counterclaim's late father Francis Rutere Munyange to have the land shared equally between him and his late father in the counter claim for individual registration. Instead the deceased only gave the late Njuki Munyange LR No Abothuguchi/Kariene/1289 &



- 1189 but wholly retained LR No Kathera/Nkuene/433 and Abothuguchi/Kaongo/1098 and LR No Abothuguchi/Kariene/1330 in equal shares of 4 acres hereinafter the other parcels gathered by his deceased grandfather.
3. The plaintiff in the counterclaim averred that the 1st defendant's late father only partially complied with the late grandfather's directives by giving out only one acre and registering it in the names of Njuki Munyugi as LR No 1289.
 4. The plaintiff stated that the defendants in the counterclaim's late father breached the customary trust which upon his demise in 2007 was continued by the said defendants by refusing to do so and were now applying to evict the plaintiff in the counterclaim from his ancestral land and or refusing to disclose the trust in the estate of the deceased during the succession cause.
 5. The defendants and plaintiff in the counterclaim averred that in 1978, he sought permission from his late grandfather, settled on LR No 1189 and planted coffee thereon which the defendants in the counterclaim uprooted and planted in his half share of LR No 1330 which he was also entitled to four acres.
 6. As a consequence, the plaintiff averred that he had suffered loss and damage for the breach of the customary trust hence sought for declaratory orders that the defendants in the counterclaim were in breach; an order directing the Land Registrar and the Land Surveyor to amalgamate the resultant subdivision of LR No 1330 to revert half share of it to the estate of his late father and registration of LR No 1189 absolutely under his name.
 7. The defendant and plaintiff in the counterclaim averred that he had withdrawn originating summons No 175 of 2011 where he had sought for adverse possession against the suit land.
 8. The defendants in the counterclaim entered appearance dated November 13, 2017 while the plaintiff in the main suit filed a reply to the further amended defense and a defense to the counterclaim dated November 13, 2017 where he denied that his claim was statute barred as alleged for it arose between 25.9.2009 and November 25, 2009 following the illegal and forcible occupation which was in breach of a lawful court order issued on 24.9.2009 and confirmed in the ruling delivered on November 17, 2011.
 9. The plaintiff in the primary suit denied any alleged adverse possession or customary trust. He stated that the only family land under the use of the secondary plaintiff was LR No Abothuguchi/Kariene/2174 measuring about 4 ½ acres. With regard to paragraphs 18 (a) – (e) and 20 (iii) to (iv) of the counterclaim, he averred that no such claim was lodged by anyone during the land adjudication process and thereafter hence the claim was unsustainable both in fact and in law.
 10. In support of his claim the plaintiff in the primary suit relied on a list of witnesses and documents dated 1.12.2011, case summary and issues for determination dated 26.8.2015 and additional list of witnesses dated November 18, 2020. The defendants in the main suit and the plaintiff in the counterclaim relied on their list of witnesses dated 10.12.2012 and filed on 8.7.2017, list of documents dated 9.6.2017 and another list of witnesses dated 14.7.2021.
 11. PW 1 testified that he was a brother of Julius Njuki Munyugi the father of the defendant, their grandfather being known as Munyugi M'Imotho who used to own LR No Abothuguchi/Kariene/1189 measuring approximately 2.31 acres, LR No Kathera/Nkuene/433, LR No Abothuguchi/U-Kaongo/1098 and LR No Abothuguchi/Kariene/1330 where they have built.
 12. He told the court his grandfather had two sons namely; the father of the 1st defendant known as Njuki Munyugi. He stated that LR No 433 was given to his late father by their grandfather which was



exchanged with LR No 1011 while his late father was given LR Nos 1330 & 1189 & 1098, as the elder son. He denied that the 1st defendant's late father had any mental condition.

13. PW1 stated that the 1st defendant allegedly entered into the suit land in 2007 by force and denied that he was given any permission to occupy the said land by his late grandfather in 1978. He stated that coffee trees were planted on the suit land in 2010. However, he admitted that the 1st defendant had illegally erected a house on the suit land where he was living with his family. He denied that the said land was family or ancestral land since their late grandfather had already divided his land among the beneficiaries with the 1st defendant's late father acquiring 4 ½ acres of land a kilometer away from LR No 1189 which was registered LR No Abothuguchi/Kariene/2174. He testified that his (PW 1) late father exchanged LR No 433 with LR No 1011 which was 3 ½ acres while LR No 1330 was 8 acres. PW 1 said that LR No 1189 was 2.31 acres. In sum, the plaintiff told the court that his late father acquired 14 acres while the 1st defendant's father received 4 ½ acres out of his grandfather's total land.
14. In addition, PW 1 denied that the succession of his late father was hurriedly done or that he had acquired the land alone. He denied that his late father had for a long time declined to share the land with the 1st defendant's late father.
15. PW 1 further denied that their late grandfather had prior to his demise in 1979, visited the 1st defendant in the suit land and told him that the land was his. Similarly, he denied allegations that his late father ever uprooted any coffee trees on Parcel LR No 1180 to plant them on Parcel LR No 1338.
16. Further PW 1 denied that their late grandfather ever said that the suit land be divided into half since he was the one who shared LR No 1289 to the 1st defendant's father.
17. PW 1 also said that he did the succession cause as indicated and shared out the deceased's land to his siblings the defendants in the counterclaim after he became an administrator to his late father's estate with full knowledge of the defendants who never protested to the probate court. PW 1 told the court that the confirmed grant had not been challenged. He objected to item No 4 in the list of the defendant's documents dated 9.6.2017, since it was not an authenticated official map from the Survey of Kenya or certified by the maker with a date.
18. As to the grant listed as item No 3 in the defendants list of documents, the plaintiff stated that LR No 1189 was erroneously and or mischievously listed among the assets of the defendant's deceased father, which eventually was removed by the court.
19. Additionally, PW 1 said his late grandfather shared out his properties in December 1979 and no one complained about the distribution including the 1st defendant's late father during his lifetime until he died in 1998. Further, the plaintiff said that from 1998 to 2007 when his father passed on, the 1st defendant never lodged a claim over any customary trust. PW 1 denied the alleged mental sickness of the 1st defendant late father since he held a senior church position at a local church. As regards Parcel Nos 433, 1338 and 1098, PW 1 said that his late father gathered the parcels by himself, since the same were never in the name of the late grandfather. PW 1 insisted that the date of entry into the suit land by the defendants was 2006/7 and not 1978 as alleged. PW 1 stated that the subject land was in Kirirwa area and therefore the letter dated 21.11.2011 by an assistant chief of another sublocation was misleading.
20. Charles Murangiri was PW 2. He testified that the 2nd defendant was a son of the 1st defendant a neighbour in Kirirwa area. He confirmed that the 2nd defendant had planted coffee on Parcel No 1189 and has a homestead therein. PW2 stated that the defendants were born on Parcel No.2174 but moved into Parcel No 1189 in 2009 by force. He stated further that the defendant's late father was buried in



- parcel No 21274 in 1998. PW 2 said that Parcel No 1189 was initially being utilized by the plaintiff and that the defendant's late father never made a claim over the land prior to his demise.
21. Fabiano Mwobobia was PW 3. He associated his evidence with that of PW 2 save to add that PW 1 was no longer on the land because of the court case. He testified that as an immediate neighbour, he was not aware of any pending dispute over the land ownership between the late parents of the parties herein prior to their deaths in 1998 and 2007 respectively.
 22. Grace Gaicugi Rutere was PW 4 and the 5th defendant in the counterclaim. She adopted her witness statement dated November 18, 2020. Specifically, she attacked the witness statement of Michael Mwitari M'Mbiria as misleading. She denied that any children of the late Zipporah M'Munyugi had demanded for a share of the plaintiff's land. She clarified that it was a brother of the plaintiff who had given her ¼ an acre of LR No 1330 alongside her other siblings as per the confirmed grant.
 23. Robert Mutembei Rutere was the PW 5 and the 6th defendant in the counterclaim. He adopted his witness statement dated November 18, 2020 as his evidence in chief. He insisted that none of the daughters of the late M'Munyugi had claimed any land from the plaintiff. He confirmed that he was occupying Parcel No.1330. He said that they followed the desires of their late father in sharing the suit parcels and at no time had the defendants raised any objection prior to and during the Succession Cause.
 24. Basilio Andrew Magungu was PW 6 who confirmed that PW 1 gave out the land to the PCEA church and that no one had complained about it including the late Munyugi 's wife. PW 7, 8 & 9 largely adopted their written witness statements associating their evidence with that of the previous plaintiff witnesses. They denied that the plaintiff's late father had cheated his late brother Njuki M'Munyugi to build a church on their land.
 25. Julius Mutwiri Njuki, the 1st defendant and the plaintiff in the counterclaim adopted his witness statement as his evidence in chief and produced his list of documents namely a green card as D. Exh No. (1), six copies of title deeds for LR No. 1289, 1189, 433, 1098, 1330 and 1011 as D. exh 1 (a) – (f), copies of grant in Succession Cases No. 367 of 2009 and 471 of 2007 as D. Exh 2 and 3 respectively. He termed the plaintiff's evidence as lies.
 26. In cross examination the 1st defendant told the court that his complaint was over Parcel Nos.1189 and 1330 which formed part of the family land. As regards his prayers in the further amended defense and counter claim for the land to be registered in the name of the late Njuki Munyugi, DW 1 told the court that he should get Parcel No 1189 even though his late father had not lodged any such claim before his death in 1998 over the two parcels of land since he was mentally challenged. DW 1 failed to produce a medical document or any letter from either the area assistant chief or chief to that effect.
 27. Further, DW 1 said that his parents together with him had not lodged such a claim for and on behalf of his deceased father, on account of insanity 1 admitted that D Exh (1)(b) & (e) were issued on December 15, 1966. In his view, the land originated from their late grandfather Munyugi M'Imotho though his name was not indicated on Parcel No.1189 nor was it indicated that the late Rutere Munyugi was registered in trust for his late father.
 28. Similarly, DW 1 admitted that on Parcel No 1330 the name of Munyugi Imathiu was not indicated as well as the issue of holding the parcel in trust for his late father Njuki Munyugi.
 29. Regarding the green card marked as D Exh 1 (a) namely parcel No 1289, DW 1 admitted that it was registered in the name of his late father Njuki Munyugi on December 15, 1966, the same day the late Rutere Munyugi was registered as the owner of Parcel No's 1189 and 1330.



30. Similarly, DW 1 admitted that he had no confirmation letters from the land adjudication office to the effect that the two parcels of land originally belonged to the late Munyugi M'Imotho his grandfather, neither did he have any proceedings showing any land committee, arbitration board A/R objection or an appeal to the Minister cases by his late father regarding Parcels No 1189 and 1330.
31. Further DW 1 admitted that he had no records from the land disputes tribunal over any disputes relating to the two parcels of land subsequent to their registration in 1966.
32. Regarding objections during succession proceeding in D Exh No 2, DW 1 admitted that he raised no protest over Parcel LR No 1330 currently under the occupation by the family of the late Rutere Munyugi represented by the defendants to his counterclaim whose remains and those of his late wife were buried therein. DW 1 told the court the said families have permanent developments on Parcel No.1330 and that he did not object to the burial of the late Rutere Munyugi and his late wife on the said land. He also confirmed that the defendants had developments on Parcel No 1330. DW 1 said that he was born in 1952 and therefore as at 1966 he was only 8 years old though he was certain that the suit land was gathered by his late grandfather.
33. Regarding the wish of his late grandfather in (1968), DW 1 said that at the time he was only 16 years old when the words were uttered in the presence of elders among them his neighbor Isaaya Nderi, a cousin by the name Mwiko Mwitari, one John Mkamari and one Joseph Kiamba (deceased). DW 1 admitted knowledge that his late father subdivided parcel No 1289 and gave a portion to the church which he termed as made under duress from the late Francis Muriithi, his uncle.
34. DW 1 told the court that his late father never lodged a complaint over the two parcels of land between 1994 and 1998 over the alleged duress. Similarly, he admitted that his mother never raised any such complaints with the land control board. DW 1 claimed he had made a report to the area chief about the same but lacked documents to that effect. Similarly, he said that there was no complaint he lodged against the PCEA church over the land allegedly transferred to them by his late father.
35. DW 1 told the court that he did not seek to evict the church from the land. Additionally, DW 1 stated that in 1978 he was allowed to construct on Parcel LR No 1189 by his late grandfather, his late uncle Rutere and his late father Njuki who though mentally retarded, he was able to give him permission to build therein.
36. DW 1 said that he was born on Parcel LR No 1330 but later relocated to Parcel LR No 1289 in 1967 in which his late father gave a portion to the church. He said that his late father was left with Parcel LR No 2174 where he was buried at his homestead in 1198. DW 1 said that he demolished the said homestead in 2008 and relocated to Parcel No1189. Further DW 1 said that it was in 2008 when he took his mother to Parcel No 1189 from Parcel No.2174 where she used to live until 2008.
37. DW1 said that Parcel No 2174 was 4.25 acres in size which has now undergone transmission. He also admitted that there were various developments farming activities and piped water in Parcel No.2174. Regarding developments on parcel No.1189, DW 1 said that he had built a timber house, a kitchen, latrine, canteen which he put up in 1978 with the assistance of his late uncle Francis Murithi while the children's house was built between 1992 – 1993.
38. DW 1 admitted that in the replying affidavit to the application for temporary injunction, he never indicated that he had erected any such buildings in 1978 or 1992 nor did he oppose the injunction.
39. DW 1 also said that the late Francis Rutere used to have a coffee farm on Parcel No.1189. However, though he alleged Rutere gave him the land, DW 1 admitted he never asked why the said registered



- owner was not transferring the land to him since at the time there was no dispute to that effect nor did he request him to write an agreement to that effect.
40. Similarly, DW 1 told the court he showed his son DW 2 where to build in 2009 at which time the plaintiff filed the suit. According to DW 1 Munyugi and Rutere told him to go and live on Parcel L.R No.1189.
 41. In reexamination DW 1 said that his late grandfather had stated that Parcel No.1330 be shared between his late father M’Njuki and the plaintiff’s late father who did not comply. Similarly, his son Francis Murithi, the plaintiff in the main suit failed to comply and instead filed this case after sharing out Parcel L.R No.1330 with the defendants in the counterclaim. DW 1 stated that his mother is called Terasio Njuki aged 110 years or so but had not called her as a witness.
 42. In his view, the late Francis Rutere had claimed that he was not going to transfer the land to him since there was a high likelihood of him selling the land to third parties. DW 1 was emphatic that his uncle the late Rutere was living with him peacefully and that problem only started at the time the plaintiff took over the succession cause.
 43. DW 2 M’Nderi M’Mwari told the court that he was from the same clan known as Abongiri with the parties as well as a neighbor of DW 1, though he could not recall his own parcel number gathered by his late father an agemate of M’Munyugi M’Imotho and a close friend of him.
 44. Further, DW 2 told the court that as a sub area, there was time which he could not recall when the late M’Munyugi called elders to his land and told them how he wanted his land to be shared. He denied that the late Francis Rutere Munyugi had capacity to gather any land or was registered as the owner of the land. DW 2 said that the late M’Njuki fell sick or was mentally ill though he had no documents to that effect.
 45. During the alleged meeting of sharing the land, DW 2 alleged the late M’Njuki was well but fell sick thereafter. DW 2 claimed that he was present during the land registration in Meru town. DW 2 admitted that the late M’Njuki never complained about the registration in the names of his late brother during their lifetime since he was mentally unstable. He could not recall if his wife ever lodged a claim under the land adjudication internal dispute mechanism.
 46. DW 3 was Michael Mwitari, a resident of Kirirwa village and a member of Abongiri Matikine clan. He claimed that he acquired the history of the suit land from his mother and grandfather though he had no documents over the record of existing rights at the time the land was registered in 1966.
 47. In addition, DW 3 said that at the time he became an adult, the late M’Njuki was mentally unstable and in his view the plaintiff’s late father was registered as the owner of Parcel No. 1189 in trust for the late M’Njuki though. DW 3 said that he used to live with the late M’Njuki who told him the land was his and came to be registered under the name of his brother out of trust and hoped that his brother would transfer the same to his wife and children.
 48. DW4 was Rael Ngugi. She stated that the late M’Munyugi Njuki M’Imotho her grandfather had several parcels of land and only one was in the name of the late M’Njuki. She could not remember if the late M’Njuki ever made an objection during the adjudication process though she was not certain if the late Francis was the first registered owner of the four parcels of land.
 49. She could not tell whether her deceased father gave his wishes to the intended beneficiaries neither was she aware of any complaints by Julius Mutwiri over the Kirirwa land. DW 4 stated his late brother unknown to them, registered the four parcels of land under his name, which was recently discovered since his late brother M’Njuki was mentally unstable.



50. DW 4 also admitted that after the injunction was issued, the 2nd defendant went to live elsewhere but could not tell if Julius Mutwiri defied the orders and instead put up a residential house on the suit land. He clarified that there were no eviction orders issued since he had gone into the land prior to the injunction.
51. Phineas Mutwiri the 2nd defendant was DW (5) who adopted his witness statement dated 14.1.2021 as his evidence in chief. Saying that he was born in 1983, he stated that he learned of the events of 1978 from DW 5 who confirmed the parcels of land were owned by Rutere Munyugi except Parcel No.2174 but could not tell if his father ever raised any objections over the said parcels of land. He clarified that Parcel No.1189 had coffee trees on it though he lacked photographs to that effect. Further DW 5 told the court he built his house on parcel No.1189 in 2009 before the injunction was issued since it was his said construction which generated the case. He confirmed that eventually he vacated the land but his father was left therein where he resides to date. DW 5 told the court he had no documents to show that the land was left for his father but only learned about it from DW 1.
52. With leave of court parties filed written submissions dated 24.8.2022 and 3.10.2022 respectively. The plaintiff and defendants in the counterclaim have submitted that trespass by the defendants occurred on 15.8.2009 and the 1st defendant hurriedly built a homestead despite service upon him of the injunctive orders issued on 24.9.2009.
53. As to the list of issues for determination, the plaintiff and the defendants in the counterclaim submitted that they produced P Exh (1) a grant issued on 21.8.2009 and green card as P Exh No (2) showing that the late Rutere was a first registered owner of the parcel No Abothuguchi/Kariene/1189, which title was never challenged during his lifetime and hence the plaintiff is entitled to protection in terms of sections 24 (a) and 25 (1) of the Land Registration Act as read together with article 40 (a) & (b) of the Constitution, which land the deceased had developed till his death.
54. The plaintiff submitted that his evidence had been corroborated by PW 2, PW 3 & PW 4 as neighbors to the subject land as well as PW 5 & 6 who double up as 5th and 6th defendants in the counterclaim, his siblings. Further, the plaintiff submitted his evidence had also been strengthened by PW 7, PW 8 and PW 9 as independent witnesses who were categorical that the late M’Njuki Munyugi the 1st defendants’ late father was of sound mind until his death in 1998, as well as church treasurer, which evidence was not challenged, controverted or shaken during cross examination.
55. The plaintiff further submitted that there was no evidence if the late M’Njuki, his wife or defendants objected to the adjudication and subsequent registration of the suit land and further thereafter, including during the succession proceedings hence as a registered owner the court should protect the subject land by granting the prayers sought, otherwise the defendants are trespassers and or squatters thereon. The plaintiff relied on John Mutuma M’Ikiao v Isaya M’Kirera Kiambati & another Meru ELC No 6 of 2020, Josephine Chepkurgat Ruto & another v William K Meli [2013] eKLR.
56. The 2nd issue according to the plaintiff and the defendants in the counterclaim is whether the 1st defendant in the main suit is the only plaintiff in the counterclaim and if he has proved customary trust to deserve the prayers sought. The plaintiff submitted the evidence to found a trust going by the caselaw of Juletabi African Adventure Ltd & another v Christopher Michael Lockley [2017] eKLR, Gichuki v Gichuki [1982] KLR 285, Mbotbu & 8 others v Waitimu & 11 others [1986] KLR 171 was not produced and proved to the required standard by the plaintiff to the counterclaim.
57. The plaintiff and the defendants in the counterclaim submitted that the 1st defendant did not prove his late father was of unsound mind, or provide particulars of customary trust in his defense and counterclaim. Reliance was placed on order 2 rule 6 (1) & 2 (10) (1) of Civil Procedure Rules, Samson



Emuru v Ol Suswa Farms Ltd [2006] eKLR, *Beatrice Kuri Francis v Susan Gatiria M'Mukira & 5 others* Meru ELC No 81 of 2019.

58. The plaintiff and defendants in the counterclaim submitted that the issue of occupation and utilization since 1966 was not disputed by all the witnesses and given there was no challenge to the title and occupation thereof, the claim for customary trust was belated, an afterthought and lacking merits. As to the prayers sought, it was submitted that the prayers to be registered absolutely cannot succeed since the plaintiff in the counterclaim pleaded he was bringing the case as a legal representative and on behalf of his late father whereas DW 1, DW 5 all testified that the land should go to his late father M'Njuki Munyugi. Therefore, the prayers and the evidence were at variance since nowhere did the 1st defendant file the suit in his own personal capacity and submit evidence on that line.
59. On their part, the defendants to the main suit and the plaintiff in the counterclaim submitted that they have been on the suit land as a matter of right through the doctrine of constructive and customary trust even prior to the injunction which was obtained through material non-disclosure.
60. The defendants submitted the parties had a common grandfather who in his lifetime moved the defendant to parcel LR No 1189, causing the plaintiff to remove his coffee which facts were not disclosed by the plaintiff in the main suit at the probate case.
61. The defendants submitted that guided by *Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & another* [2018] eKLR, occupation was not a necessary ingredient though relevant. Relying on *Ishmael Kagode Havi v Dan Amena Atinga* [2022] eKLR, the defendants also submitted that since the land was admitted as ancestral, the court should subdivide it in fulfillment of the trust.
62. Lastly the defendants and the plaintiff in the counterclaim submitted that guided by *Kiebia v M'Lintari* case supra, they had established the key ingredients of customary trust.
63. The court has carefully gone through the pleadings, evidence tendered, the written submissions and the law applicable.
64. The issues for determination are:
 - a. Whether the plaintiff and the defendants in the counterclaim have proved that they are bonafide and exclusive owners and occupiers of LR No Abothuguchi/Kariene/1189.
 - b. If the defendants trespassed into the suitland on 25.9.2009 and made any developments therein with effect from November 25, 2009.
 - c. If the defendants were justified in entering into and starting developments on the suit land from the referenced dates.
 - d. If the main claim is time barred.
 - e. If the plaintiff in the main case is entitled to the prayers sought in the amended plaint.
 - f. If LR No Abothuguchi/Kariene/1189 was gathered by the grandfather of the plaintiff in the counterclaim and registered in the name of M'Rutere M'Munyange alias Rutere Munyungi (deceased) the father to the main plaintiff in trust and to be equally shared between him and the father to the plaintiff in the counterclaim including LR No's Abothuguchi/Kariene/433, Abothuguchi/Kaongo/1098, Abothuguchi/Kariene/1330.



- g. If the plaintiff in the counterclaim has proved breach of the customary trust against the defendants in the counterclaim and the predecessor in title.
 - h. If the plaintiff in the counterclaim is entitled to the prayers sought.
 - i. What is the order as to costs?
65. The plaintiff in the main suit pleaded that his deceased father was the first registered owner of the suit land with effect from December 15, 1966 up to his death on 6.7.2007, which devolved to his children who continued to utilize it until 15.8.2009 when the defendants trespassed into the land claiming ownership rights and started therein illegal development despite a court order stopping such developments. In support of his testimony, the plaintiff produced a limited and confirmed grant dated 21.8.2009 and 28.3.2011 in Meru High Court Succession No 367 of 2009, a green card for the suit land and a demand letter dated 27.8.2009.
66. The copy of records produced confirms that the register of the suit land was opened on December 15, 1966 and a title deed issued on 14.11.1979 in favor of the late Rutere Munyugi. As regards the confirmed grant, the same was issued on 28.3.2011 whereof LR No. Abothuguchi/Kariene it was equally shared among 2nd, 3rd, 4th and 5th defendants in the counterclaim. LR No. Abothuguchi/Kariene/1189 was similarly shared equally in favour of the 1st, 6th and 7th defendants in the counterclaim; LR No Abothuguchi/Igane/1011 in favour of 1st, 6th and 7th defendants in the counter claim equally and LR No Abothuguchi/Kaongo/1098 in favor of the 4th defendant in the counterclaim.
67. On their part the defendants in the primary suit, have pleaded the suit was statute barred and that they deserve the land on account of customary trust since the 1st defendant was granted the land by his late grandfather in 1978 but after the demise in 2007 of his uncle, the plaintiff and the defendants in the counterclaim went against the wishes of both their grandfather and father and failed to share the land equally including other four parcels of land belonging to the said grandfather. The 1st defendant urged the court to find him lawfully on the land since it was held in trust for him and should be absolutely registered in his favour together with half of LR No Abothuguchi/Kariene/1330.
68. To buttress his case the 1st defendant produced a copy of records for LR No Abothuguchi/Kariene/1289 opened on December 15, 1966 in favour of his late father Njuki Munyugi and which was later on 3.5.2002 subdivided into LR No's 2173 – 2174, copy of record for the suit land, copy of record for LR No Nkuene/Kathera/433 opened on 3.4.1963 in favour of M'Rutere M'Munyage, copy of records for LR No Abothuguchi/Upper Kaongo/1098 opened on 23.6.1977 Anthony Mukira Rimberia, copy of record for LR No Abothuguchi/Kariene/7330 opened on December 15, 1966 in favour of record for LR No Abothuguchi/Igane/1011 in favour of Joseph Mugambi opened on 2.3.70, copy of confirmed grant issued on 28.3.2011 in favour of the estate of Rutere Munyugi, copy of confirmed grant in HC Meru Succession Case No 367 of 2009, copy of confirmed grant dated 19.3.2009 for the estate of the late Njuki Munyugi alias Rutere Munyugi in Meru HC Succession Case No 471 of 2007, a sketch map and a chiefs letter dated November 21, 2011.
69. In a rejoinder, the plaintiff and defendants to the counterclaim filed a reply and defence to counterclaim dated 13.11.2017. They averred that the cause of action arose after the illegal entry and illegal erection of structures on 15.8.2007, 25.9.2009 and November 25, 2009 respectively which was not only forceful, illegal but also contrary to an injunction issued on 24.9.2009, extended and confirmed by a ruling dated November 17, 2011.



70. Further, the plaintiff and the said defendants averred that the family land under utilization by the defendants in the main suit was LR No Abothuguchi/Kariene/2174 measuring about 4 ¼ acres and that there was no cause of action disclosed against their deceased father. The said pleading was met by a reply to defense to counterclaim dated November 20, 2017, joining issues raised therein with the counterclaim.
71. There is no doubt that the plaintiff's documentary evidence is clear and consistent that the suit land was first registered in the name of the late M'Rutere M'Munyange alias Rutere Munyugi on December 15, 1966 and was shared out through a confirmed grant dated 28.3.2011 to the plaintiff and the defendants in the counterclaim.
72. The defendants and the plaintiff in the counterclaim however averred and urged this court to find that the suit property among others were encumbered by customary trust which started in 1966 and was not defeated by the subsequent transmission to the plaintiff and his siblings by the probate court hence the court should declare it ancestral land and confirm his rights which outweigh the prayers sought for eviction and permanent injunction.
73. The defendants and plaintiff in the counterclaim averred, testified and submitted that they took possession in furtherance of the trust in 1978 when the late grandfather showed them the land which neither the plaintiff nor their late father asked him to leave until his demise, hence the right to occupy the land as a legal representative of his late father subsists.
74. Customary trust is one of the overriding interests hinged on a land as per sections 24, 25, 26, 27 and 28 (b) of the Land Registration Act. Such a right need not be noted in the register. It runs with and subsists on the land. If it exists, the registered owner becomes a trustee under the customary law.
75. In Mbui v Mukangu CA No 281 of 2000, the Court of Appeal recognized it as a concept of intergeneration equity where the land is held by one generation for the benefit of succeeding generations. The court went on to state that possession and occupation are key elements in determining the existence of a customary trust.
76. At the root of this suit is a dispute with the plaintiff and defendants to the counterclaim insisting it was first registration in favour of their deceased father while the defendants and plaintiff in the counterclaim claim an overriding rights based on customary trust based on their late grandfather's wishes who instructed the plaintiff's deceased father to register it in trust but who betrayed the trust and only registered one parcel out of a total of five in favour of the Njuki Munyugi, said to have been mentally retarded and took away the rest hence could only have been holding the land in trust for them.
77. It is trite law that customary trust must be proved by way of evidence. The key elements to prove and to establish a customary trust stand settled in Kiebia supra case. The court held thus:
- “ Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land will qualify as a customary trust. Some of the elements that would qualify a claimant as a trustee are:
- a. The land in question was before registration, family, clan or group land.
 - b. The claimant belongs to such family, clan or group.
 - c. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim stale or adventurous.



- d. The claimant could have been entitled to registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - e. The claimant is directed against the registered proprietor who is a member of the family, clan or group.
78. There is no dispute that the parties herein share a patriarch and are therefore all related. Both have produced copies of records for the five parcels of land alleged by the defendants and the plaintiff in the counterclaim as forming the ancestral or family land.
79. LR No 1289 was opened on December 15, 1966 in favor of the late Njuki Munyungi, while LR No's 433 was upon on 3.4.1963, 1098 on 23.6.1977 for Antony Rimberia; LR No.1330 on December 15, 1966 in favour of Rutere Munyugi, LR No 1011 in favour of Joseph Mugambi on 2.3.1970.
80. These copies of records were produced by the defendant as D Exh 1 (a) – (f). D Exh (2) was the confirmed grant in favour of the plaintiff and the defendants in the counterclaim which occurred on 28.3.2011 while D Exh (3) was the confirmed grant for the estate of the late Njuki Munyugi issued to Julius Mutwiri M'Njuki and Mary Kanyua Kaburia on 19.3.2009 for LR No Abothuguchi/Kariene/2174.
81. The defendant in the primary suit admitted that that late father passed on 1998 while this late uncle Rutere Munyugi passed on 2007. They alleged that their late grandfather, Munyugi M'Imotho gathered the parcels and though registered in the name of his late uncle, the intention of the grandfather was that the parcels be all registered and or shared among his two sons which the late uncle ignored and or breached and registered only one Parcel No 1289 in his father's name.
82. He averred that the trust was made clear in 1978 when his late grandfather, late uncle and father allowed him to take over and occupy the suit land upon his request. DW1 admitted in his written statement dated 27.5.2017 that his late uncle was in occupation of the land before his request though he knew it was not his and only held it as a trustee. Further DW1 said that though the land had his late uncle's coffee plants, he agreed he took over the whole land and made construction thereon. The 1st defendant called DW 2 said to be a confidant of his late grandfather who claimed the deceased uttered the wishes in front of a panel of elders in his presence on a date he could not recall. He testified that the defendant's late father had mental infirmities hence the reason he did not object to the registration in favor of his late brother before his death together with his wife.
83. DW 3 seemed to support the version given by DW 2 over the legal incapacity of the late Njuki Munyugi and the customary trust. Similarly, DW 4 an elder sister to the late Njuki Munyugi could not tell if the wishes of his late father M'Imotho had been conveyed to all the beneficiaries and on whether his late brother Njuki Munyugi had raised any complaint before his demise in 1998 over his rights to the suitland. DW 5 testified that the registration of the suit land was secretly done and was only discovered late. He clarified that the suit land had coffee plants and that his construction of a house in 2009 was the one which elicited the dispute. He said that after the injunction, he left the suit land but DW 1 still continued staying therein. DW 5 said that it was DW 1 who told him about the wishes of his late great grandfather.
84. The burden of proof rests with whoever desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts under sections 107, 109 and 112 of the *Evidence Act*. The plaintiff terms the defendants as trespasses whose entry was on 2009. In *Park Towers Ltd v John Mithamo Njika & 7 others* [2014] eKLR, Mutungi, J held that where trespass is proved a party need not prove any damage suffered.



85. In *Julius Mutunga Wambuga v Joseph Mutisya Kilundo & 4 others* [2019] eKLR, cited with approval *Clerk & Lindsell in Torts* 17th Edition and section 3 (1) of the *Trespass Act* 284 Laws of Kenya where trespass is defined as an unjustifiable entry on a land in possession of another without reasonable excuse including erecting structures thereto. The court was dealing with a situation where two brothers during their lifetimes stayed together, one having invited the other to live on his land, which was registered under one's name, with no evidence of any eviction notice to the invitee. The court inferred a customary trust and held that the invitee could not be termed as a trespasser. In absence of a counter claim, the court nevertheless declined to issue an eviction order and allow a claim for general damages on an account of trespass.
86. In this suit, the plaintiff filed an application dated 22.9.2009 accompanying the plaint for temporary injunction. In the supporting affidavit the plaintiff attached an annexure marked FMR "3", a copy of an affidavit, stating that while filing Meru HCC Succession 471 of 2007 the 1st defendant and plaintiff in the counterclaim had erroneously and mischievously included the suit land as forming part of his late father's estate which was excluded by a consent order dated 17.3.2009. In the said supporting affidavit at paragraph 8 the plaintiff deposed that the defendant had never laid a claim over or utilized any portion of the suit land during the deceased lifetime but were all living on Parcel No 2174. He urged the court to issue a restraining order against the defendants from entry into, claiming the land, trespassing into or howsoever interfering with the suit land.
87. In response, the 1st defendant swore an affidavit on 9.11.2009 alleging fraudulent registration and issuance of title, or in adjudication of the land under his late father during adjudication as per a survey map and specifically stated that there was only a house belonging to his son, the 2nd defendant on the land.
88. The defendants filed the 1st defense dated 9.11.2009. In a supplementary affidavit sworn on November 16, 2009 the plaintiff denied that the suit land had ever been registered under the name of his grandfather or the defendant's late father as alleged. The plaintiff admitted that his deceased father would not have raised any objection since the defendants were never on the land.
89. The defendants filed an amended defense dated 9.12.2009 raising a defense of adverse possession which the plaintiff responded to by way of a reply to defense insisting that the defendants date of trespass was on 15.8.2009 and terming the claim based on prescription as misguided.
90. The court by a ruling dated November 17, 2011 restrained the defendants from entering into, trespassing into, cultivating, digging a foundation and or interfering with the suit land until the suit was heard and determined.
91. Both parties filed witnesses' statements on 2.12.2011 and December 10, 2012. The 1st defendant in his witness statement admitted at paragraph 1 that, his late grandfather had gathered 16.75 acres and died in 1964 but the plaintiff's father took advantage of his brother's insanity and registered the land to his name. Eventually, the defendant sought leave to file a further amended defense and counterclaim which he filed on 29.5.2017.
92. The plaintiff and defendants in the counterclaim filed a reply dated November 13, 2017 in which they averred that the defendants had raise a claim of adverse possession in Meru HCC No 175 of 2011 (OS) which they withdrew with costs.
93. The defendants filed a fresh list of witnesses statements dated 14.1.2021 among them that of one Michael Mwitari M'Mbiwira, DW 3 whose written witness statement stated the late Munyugi



- M’Imotho died in 1980’s, had two wives, mother of Rutere Munyugi and mother to Munyugi Njuki. This issue of two wives was also confirmed by Rael Ngugi DW 4.
94. The defendants to the main suit adduced evidence to challenge the manner in which the late Rutere Munyugi became a first registered owner of the suit land which evidence has not been consistent, convincing and reliable. Njuki Munyugi passed on in 1998. No evidence has been tendered by way of medical report to ascertain and verify that during his lifetime he was adjudged insane or mentally unstable. There is no evidence that his property was placed under a guardianship order on account of mental illness. Evidence was tendered that his wife was still alive but her evidence was not brought before court yet she was the best suited to claim for the customary trust.
 95. The defendants and 1st defendant as the sole plaintiff in the counterclaim averred that he was counterclaiming as the legal representative of the estate of Njuki Munyugi who was his father based on land gathered by his late grandfather but bestowed upon the 1st defendant to the counterclaim to share equally between him as a follow up to clear instructions by their late grandfather to the late Rutere Munyange, which he breached by failing to honour the wishes and for failing to disclose in the succession cause that the property was held in trust. He urged the court to declare the trust, have the parcels revert to his late father’s estate at paragraph 2 of the counterclaim.
 96. However, at the prayers to the counterclaim the declaration sought is for a customary trust for LR No 1330 to revert to his father’s estate while LR No 1189 to be registered absolutely under his name. The letters of administration by DW1 were issued to two administrators. Only one has filed the defense and counterclaim. One that account alone the counterclaim fails for lack of legal capacity since the grant is inseparable in law. See [Abubakar Juma Zaida v Mbukoni Holdings Limited & another](#) [2018] eKLR.
 97. A party coming to court is bound by his pleadings and issues flow from pleadings. See order 4 rule 3 & 5 [Civil Procedure Rules](#) and [Peter Gichuki Kinyuru v IEBC & 2 others](#) Nyeri Civil Appeal No 31 of 2013.
 98. Order 8 rule 7 (3) of the [Civil Procedure Rules](#) governs the manner on how further amendments should be undertaken. In [Peter GN Nganga & another v Kenya Finance Bank Ltd](#) [2014] eKLR cited with approval [Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others](#) [2013] eKLR where the court held that rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed.
 99. Further the court held that it would not aid in the bending or circumventing of rules and a shifting of goal posts. The further amended defence and counterclaim herein do not contain everything in the previous defences alluded above so that the court may know what was included, excluded and or re-included prior to the further amended statement of defence and counterclaim.
 100. The defendants and the plaintiff in the counterclaim have filed several witness statements and affidavits at various stages in this suit which are inconsistent, contradictory and at variance with their primary pleading, the further amended defense and counterclaim. For instance, nowhere has the defendants and plaintiff in the counterclaim pleaded in all his defenses that his late grandfather had two wives and that his father belonged to the 2nd “house” while the plaintiff and the defendants in the counterclaim are from the first house.
 101. The defendants have also pleaded and testified that the suit parcels of land were gathered by their grandfather who instructed his step uncle to register it equally for the two brothers.,
 102. DW 1 in his witness statement dated 27.5.2017 stated the grandfather passed on in 1964 yet his evidence has been that it was his grandfather who showed him and took him to occupy the land in 1978. Did he resurrect?



103. Some of the defendant's witnesses including DW 2, DW 3, DW 4 and DW 5 gave the date of his death as 1980's which was at variance yet the date of the creation of the customary trust is a critical feature.
104. Further none of the defense witnesses brought any credible evidence that the properties prior to the registration date as stated in this judgment were in the name of the late M'Imotho.
105. In *Gathiba v Gathiba* [2001] 2 EA 342, the court held that there must be an understanding by way of an express agreement or implied conduct of trust for example by the beneficiaries living on or using the disputed property.
106. In this suit, the only reason raised why the late Njuki Munyugi did not raise and or object since 1966 was on account of an alleged mental illness. Such an allegation has not been substantiated by any accompanying mental medical records.
107. Similarly, the defendants waited until the registered owner passed on in 2007 to lodge the claim and or move into the suit land. No evidence of prior occupation has been produced by way of scientific or photographic reports. Affidavits sworn prior to the further amended defence and counterclaim suggest that at the time the temporary injunction was issued, the defendants were not in full occupation of the suit land. The photographs attached to those affidavits prior to the hearing were not authenticated in line with the *Evidence Act*. If the defendants were actually in occupation by 1978 and had developed the suit land during the lifetime of the registered owner there would have been no need to wait until his death so as to seek to allege the land formed part of the estate of the late Njuki Munyugi, given land records are public documents which are accessible to any person.
108. The defendants did not also file a protest to the succession proceedings which in any event are public in nature since the process has to be gazetted and displayed in court.
109. There is evidence that despite the court order, DW 1 continued to disregard the same. Even if he was in occupation, there is no explanation, why DW 1 did not seek for review of the order and bring before the court at the very earliest verified photographic, surveyors or any other officers report that they actually were in permanent occupation at the time the initial orders were made. It is quite apparent that after the court alluded to lack of a counterclaim that the defendants took, que and amended their pleadings so as to bring the claim of customary trust and or adverse possession. Strangely as at the time, the defendants did not seek for vacant possession and or permanent injunction against the defendants to the counterclaim.
110. DW 1 in his own evidence admitted that initially his late father had a matrimonial home elsewhere which he demolished and moved his mother to the suit land.
111. Looking at all this evidence the defendants and plaintiff in the counterclaim are unable to show and prove the suit land was ancestral or family land prior to 1966. Secondly, they have given no plausible explanation why their late father while registered as the owner of LR No 1289 would not lodge a claim against his step brother and or fail to regularize the occupation of the defendants to the suit land during his lifetime and that of his late step brother if at all they had been in occupation since 1978. Third the defendants and plaintiff in the counterclaim have not established the exact date of the death of the said grandfather, the exact date or the year of the expression of the wishes and the date of takeover of the suit land.
112. Further the defendants and the plaintiff in the counterclaim have been unable to demonstrate some clear intervening circumstances showing why DW1's late father was not registered as an owner or at the very least why he did not lodge any claim to ensure the that his step brother the late Rutere Munyugi



- actualized the transfer if at all he had admitted the existence of the customary trust and had gone to an extent of uprooting his coffee plants to pave way to his son's full occupation.
113. In *Moses Mbugua v Mary Nyambura Ngethe* [2012] eKLR Nyamweya, J as she then was faced with a claim for the failure to lodge a claim during the lifetime of the registered owner and lack of evidence of occupation. Similarly, there was also evidence that the claimant was 11 years old when the registration and transactions were taking place. The court found such evidence unreliable to found a claim of customary trust. It proceeded to find the defendant lacking a legitimate claim over the land hence issued a permanent injunction stopping any further trespass on the land.
 114. In *Salesio M'Itonga v M'Thara & 3 others* [2015] eKLR the Court of Appeal cited with approval *Gichuki v Gichuki* Civil Appeal No 21 of 1981 that customary trust must be proved through credible evidence. In *Susan Mumbi Waititu v Mukuru Ndata & 4 others* [2007] eKLR the court held that customary trust could not be imputed but must be proved. In *Juletabi African Adventure Ltd & another v Christopher Michael* (*supra*) the court observed that the law does not imply a trust and a court should not presume a trust unless in the case of absolute necessity.
 115. In *Njenga Kimani and 2 others v Kimani Nganga K Wainainai* [2017] eKLR the court cited with approval *Mbui v Maranya* [1993] KLR 726, that it was not unusual for Africans to allow relatives to live on one's land and that such a custom did not by itself prove a customary trust hence a party must do more to prove it. In *Alice Wairimu Macharia v Kirigo P Macharia* [2019] eKLR the court held that one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.
 116. There are two "houses" in this suit. The defendants and the plaintiff in the counterclaim are a grandson to the patriarch while the 1st defendant is a step son of the initial registered owner.
 117. In *Oliver Gachubu v Peter Wamwaki Gichimu & another* [2020] eKLR, the court observed that the plaintiff had the duty to convince the court that his uncle called him and allowed him to build a permanent house on the premises and show how he had been integrated into the family of his uncle by way of adoption so as to become an automatic beneficiary, since his family remained a distinct unit from the 2nd defendant's family.
 118. In my considered assessment of the evidence by the defendants and the plaintiff to the counterclaim I find the claim remote, adventurous and tenacious. There is no evidence that DW1 was gifted the land by his late grandfather. His late father did not help the situation by confirming and actualizing the gift or the position with his step brother during their lifetimes.
 119. The defendants and the plaintiff in the counterclaim have not helped their case due to inconsistent witness statements, affidavits and uncertainty on whether to found their claim on either adverse possession or customary trust.
 120. The upshot is, I find the title deed held by the plaintiff in the primary suit tamper proof. I allow the prayer for eviction after the requisite notice of ninety days from the date hereof in default of which execution to issue.
 121. A permanent injunction is also issued restraining the defendants from trespass and or further interference with the suit land. The further defense and counterclaim dated May 22, 2017 is dismissed with costs to the plaintiff in the main suit and the defendants to the counterclaim.
 122. Costs of the primary suit to the plaintiff in any event.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 7TH DAY OF DECEMBER, 2022.

In presence of:

C/A: Kananu

Koech for C.P Mbaabu for plaintiff in the main suit

Mrs. Mwanzia for defendants

Parties

HON. C.K. NZILI

ELC JUDGE

