



**Mwangi v Mwangi (Environmental and Land Originating Summons
E005 of 2021) [2024] KEELC 5521 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2021
LN GACHERU, J
JULY 11, 2024**

BETWEEN

MARY NJERI MWANGI APPLICANT

AND

ANTONY KIMANI MWANGI RESPONDENT

JUDGMENT

1. The Applicant herein Mary Njeri Mwangi, brought this Originating Summons dated 15th September 2021, against her brother Antony Kimani Mwangi, wherein she sought for determination of the following issues; -
 - a. That the Applicant has customary law rights over land parcel no LOC 15/ Kangure/ 2034, and that the Respondent herein holds the suit land as a trustee for the Applicant and the other siblings of Ephantus Mwangi Rurung'a. That in the alternative, the Applicant has acquired ownership of 3 acres from the suit land through adverse possession.
 - b. That the trust herein be dissolved and the Respondent to be ordered to transfer the land to the respective beneficiaries: in the alternative, the Respondent be ordered to transfer 3 acres of land out of the 10 acres to the Applicant.
 - c. That costs of the suit shall be in favour of the Applicant.
2. This Originating Summons is anchored on the Supporting Affidavit of the Applicant, Mary Njeri Mwangi, who averred that she lives on land parcel no, Loc 15/ Kangure/ 2034, which is the suit land, and the said parcel of land is a family land. She alleged that initially, the suit land was registered in the name of their late father – Ephantus Mwangi Rurung'a, as is evident from annexure MNM1. That thereafter, the suit land was transferred to the Respondent to hold it in trust for himself and his three sisters, the Applicant included.



3. It was her allegations that at the time of transfer, their father was ailing, and was also going through a tribunal case, and he was facing imminent execution and attachment, as a result of the said Co-operative Tribunal Case No 39 of 2007, and thus reasons for the said transfer.
4. The Applicant averred that their father never intended the Respondent to own the suit land absolutely, but to hold it in trust for his siblings, and that is the reasons why the Applicant is still on the suit land, and therefore, she has a customary right over the suit land.
5. In the alternative, she averred that if the Respondent disputes her claim on customary trust, her claim lays in adverse possession as she has been in possession of 3 acres out of the suit land for more than 12 years.
6. She alleged that she has occupied approx. 3 acres of the suit land since 2004, wherein she has built her matrimonial home, practice farming, and generally use the suit land, openly, notoriously, and without any interference since then. She annexed several photos marked as MNN 2 to support her claim.
7. It was her claim that the Respondent acquired the suit land in 2007, and he has never interfered with her occupation nor interrupted it at all for the last 14 years. That he occupation and possession has been open, exclusive, uninterrupted and with the knowledge and notice of the Respondent herein.
8. She urged the court to recognise her as the owner of the 3 acres of land of the by dint of customary trust, or adverse possession. She urged the court to allow her claim.
9. The Originating Summons is opposed by the Respondent herein, who filed a Replying Affidavit on 23rd November 2021, and averred that he has been advised by his advocates on record that the suit herein is defective in substance and ought to be struck out and/ or dismissed.
10. Further, that he was advised by his advocates that the Applicant lacks locus standi to file this suit on her own behalf and on behalf of her alleged siblings, as there is blatant non-compliance with Order 1 Rule 8 of the Civil Procedure Rules.
11. It was his contention that as it appears in the Green card, dated on 7th June 2021, the land parcel No. LOC.15/ Kangure/ 2034, was initially registered in the name of his father Ephantus Mwangi Rurung'a on 22/11/1989, and he was issued with a title deed on 24/11/1989, as the absolute proprietor. He annexed the title deed as AKM1.
12. Further, he averred that his father as the registered owner, followed the due process and caused the suit land to be transferred to the Respondent on 25th May 2007, and he was issued with a title deed, free from any encumbrances, as is evident from AKM 2.
13. It was his argument that had his father, the registered owner wanted the suit land to be registered in the name of the Respondent to hold in trust for himself and his siblings, he could have indicated so in the register.
14. It was his contention that the transfer by the registered owner to the Respondent, and the subsequent registration of the suit land in his name was by way of a gift, which was never challenged by the Applicant from the date of the registration, to 30th August, 2011, when their father, the initial registered owner died, which was a period of 4 years. He annexed the death certificate of his father as AKM3.
15. It was his allegations that he has severally used the suit land to acquire loan facility, and during all that time, the suit land was free from any encumbrances, as is evident from AKM4.



16. He denied all the averments contained in the Applicant's Supporting Affidavit, and he contended that he only allowed the applicant to occupy the suit land on humanitarian grounds, sometime in 2014, and that occupation cannot transform to adverse possession.
17. He claimed that he has always resisted the Applicant's occupation of any other part of the suit land, and he has variously reported her acts of trespass and malicious damages to property at Nyakihai Police Station as is evident from the letter written by the area chief dated 3rd October 2021, marked as AKM5. He urged the court to dismiss the Applicant's suit with costs.
18. Directions were taken on 1st February 2022, for the matter to proceed by way of viva voce evidence. Parties were also referred for Court Annexed Mediation(CAM), but they could not agree, and consequently, the matter proceeded for hearing on 22nd January 2024. The Plaintiff gave evidence for herself, and called two more witnesses. The Respondent gave evidence for himself and called no witness.

Applicant's Case

19. PW1 Mary Njeri Mwangi, from Nyakihai location told the court that she is the Assistant Chief of Nyakihai Sublocation. She testified that the Respondent is her young biological brother, and siblings of Ephantus Mwangi Rurung'a and Nancy Gathoni Mwangi, who are both deceased.
20. It was her evidence that she lives on the suit land LOC 15/ KANGURE/ 2034, which is about 10 acres. She stated that the suit land was their original home, and their parents homestead is on the suit land, and that her parents left the Respondent as the registered owner of the suit land to hold it as a trustee.
21. She told the court that she lives on the suit land, and the Respondent lives in an extension that he built next to their parents' house. That she has built a permanent house, which she built in 2011, and she moved in 2012.
22. She adopted her witness statement dated 4th March 2022, as her evidence in chief, and also produced her list of documents as P. Exhibits 1-6. She also produced the further list of documents as P. Exhibit 7.
23. It was her evidence that she has used the suit land for over 20 years, since 2004, and that the Respondent was given the land because their father was ailing, and he thus transferred the land to his only son to hold it in trust.
24. She further testified that their father had a case at the Co-operative tribunal, after an audit was done, at Murata Farmers Savings and Credit Co-operative Society Ltd. and he transferred the suit land to the Respondent to salvage it from being sold by the Society. She stated that her family was made up of four siblings, and the land is ancestral one.
25. It was her evidence that she was claiming 3 acres out of the suit land, because that is what she uses, and has lived there for long and she has also built a permanent house thereon. That she is utilizing the land that she used to utilize when her parents were still alive. Further, that their parents were buried on the suit land, and the suit land is their home, and ancestral land.
26. Upon being cross examined by counsel for the Respondent, she testified that she was given approx. 3 acres from the suit land, which she has been using. However, she did not have a Valuation Report to confirm the extent of the land that she uses.
27. It was her evidence that her father put her in possession of the said portion of land, and her father gave her permission to utilize the land in 2004, and that is where she has lived all along. She confirmed that her father died in 2011, and left him in possession of that portion of land.



28. On further cross exam, she claimed that she is claiming the suit land through adverse possession and customary trust. She confirmed that the Defendant got registered as the owner of the suit on 22rd May 2007, and there is no encumbrances. That the said transfer was done by the registered owner of the suit land to the Respondent, her brother. Further, that the registered owner did not indicate that the land is being held in trust by the Respondent, on behalf of the other family members.
29. She also testified that she knew the land was registered in the name of the Respondent, in 2007, and their father died in 2011. It was her evidence that they had agreed as a family that the land would be registered in the name of the Respondent, but she did not ask their father to change the registration from absolute to trusteeship.
30. She claimed that she was given her portion of land verbally by their father. That their mother died in 2019, and she also did not change the registration. She said she came to court because the Respondent changed on her occupation of the suit land after the death of their mother. She insisted that her occupation of the suit land has been peaceful, and although the Respondent has been taking loans using the title deed, he was not offered further loan, because she complained.
31. She alleged that her sisters are witnesses in this case, and they have not used the suit land after the death of their mother since the Respondent barred them. That the environment became violent after the death of their mother.
32. She testified that the mediation failed because the Respondent wanted to give her 1 acre instead of the 3 acres that she has been utilizing, and the Respondent refused to relent.
33. On re-exam, she confirmed that the green card shows that there is a charge over the suit land in favour of Equity Bank. That the bank had gone to value the land, so that the Respondent can take further loan, and she objected and so the Respondent could not take further loan.
34. She also stated that their mother was her protector and when she died, the Respondent threatened to evict her.
35. PW2; Salome Gachagi Mwangi, told the court that she is a businesswoman and a sister to the Applicant and the Respondent. She identified the suit land the suit land as LOC 15/ Kangure/ 2034, which was initially owned by their father. She adopted her witness statement as her evidence in chief.
36. The witness testified that the suit land belonged to their father Ephantus Mwangi, who is now deceased. It was her evidence that the Respondent was registered as the owner of the suit land to hold it in trust for the family.
37. It was her evidence that their father had a case and that is the reason he transferred the suit land to the Respondent to prevent it from being auctioned. She confirmed that her parents were buried on the suit land, and so was their elder brother.
38. She confirmed that they grew up on the suit land, and she lived there until 2006, when she got married. That the Applicant has lived on the suit land all her life, and she has built a permanent house thereon. That their parents house is still on the suit land and that the suit land is family/ancestral land, and all the siblings have beneficial interest.
39. On cross exam by Counsel for the Respondent, she responded that she was not a party to the suit, but she was a witness. She confirmed that she got married in 2006, and their father died in 2011. Further, that she has never claimed any portion of land from the Respondent, and that the portion of land that Pw1 uses was given to her by their father. She also confirmed that the land was transferred to the Respondent by their father in 2007, while his father was alive.



40. She also stated that the green card does not show that the Respondent is holding the suit land in trust for himself and his siblings.
41. On re-exam, she claimed that the Defendant had barred them from visiting her parents' graves, which are on the suit land.
42. PW3 Virginia Waithera Mwangi, from Juja told the court that the parties herein are her sister and brother. She confirmed that their father was Ephantus Mwangi Rurung'a, who owned land parcel no LOC 15/ KANGURE/ 2034, and that it was an ancestral land. That his father inherited the suit land from his father, Rurunga Manyara. However, the land now is registered in the name of the Respondent, Antony Kimani Mwangi as their father had a case and he feared that the said land might be auctioned, as the case involved loss of money at a Cooperative Society. Then their father transferred the suit land to the Respondent to protect it from being auctioned.
43. It was her further testimony that even with the said transfer, the Respondent was to hold the suit land in trust for himself and his siblings. She adopted her witness statement as her evidence in chief.
44. Further, she claimed that their father used to tell them that the suit land was for the family, and was not only for the Respondent. That the Respondent lives in Membley Estate in Nairobi, and only the Applicant lives on the suit land. It was her further evidence that the land belongs to all Mwangi's children.
45. On cross exam by counsel for the Respondent, she stated that the Applicant is entitled to 3 acres that she uses, and she is a witness. It her evidence that together with her other sister, they are both married, but the Applicant has lived on the suit land since 2004, but she did not know the size of the land that she occupies.
46. Further, she testified that the land got registered in the name of the Respondent in 2007, and she agreed with her father that the suit land should be registered in the name of the Respondent, but to hold it in trust for himself and his siblings.
47. However, the Green card shows that the Respondent is holding the land as an absolute owner.

Respondent's Case

48. DW1 Antony Kimani Mwangi, adopted his witness statement dated 21st April 2022, as his evidence in chief. He confirmed that the Applicant is his sister, and that he has two other sisters who are married.
49. Further, it was his evidence that their father was Ephantus Mwangi Rurung'a who owned the suit land from 1989, to 2007, when he transferred it to the Respondent.
50. He confirmed that initially the suit land was in the name of their father Ephantus Mwangi, who later transferred it to the Respondent in 2007 as a gift. It was his evidence that by then, the Applicant was married at Mariani, near Saba Saba area. However, she returned home in 2004, and she asked her parents to allow her put up a place to stay on the suit land.
51. That later their mother requested the Respondent to give the Applicant son a portion of land. That the Applicant lived on one acre of the suit land, and he showed her where to occupy. That he has not had any problem with her occupation of one acre of the suit land.
52. He alleged that his sister Virginia is married, and has never returned home since she got married. That the Applicant stays on a one acre land and he is ready to give her that one acre, that she occupies and nothing more, because he was given the whole land as a gift by their father. However, their father had



- also asked him to accommodate his sisters in the event that they leave their matrimonial homes, and that is what he has done with the Applicant.
53. It was his evidence that they could not agree at the Mediator, because each of his sister wanted to be given land, and he could not agree to that. He admitted that he can only give the Applicant one acre of the suit land.
 54. Upon cross exam by counsel for the Applicant, he responded that he was given the land by their father as a gift, and his father had gotten the land from the government, and he got his titles in 1989.
 55. He confirmed that they were all born and brought up on the suit land, and the family has no other land apart from the suit land. He also confirmed that their parents and a brother were buried on the suit land.
 56. It was his evidence that he lives in Membley estate Nairobi, and visits the suit land after every two weeks, but the Applicant lives on the suit land. That the Applicant has built a house and cultivates thereon, but the other sisters do not live on the suit land.
 57. Further, he confirmed that he had taken loans using the suit land as security. However, when the valuer went to the suit land, the Applicant objected because of her house. Further, he alleged that even if his father had a case at the Cooperative Tribunal, they were not involved, and he was not even aware that his father was ordered to pay one million shillings. Further, he stated that his sisters are free to go to the suit land and build their houses thereon.
 58. In re exam, he stated that there is no land in the name of Ephantus Mwangi, as he transferred the same to him in his lifetime. He denied that his father transferred the land to him because the said land was targeted to be auctioned. However, he confirmed that the Applicant is entitled to one acre of the suit land.
 59. After the viva voce, evidence parties filed and exchanged written submissions. The Applicant filed her written submissions on 29th Feb 2024, through the Law Firm of R. M. Njiraini & Co Advocates. Further, the Respondent filed his submissions through Kirubi Mwangi Ben & Co Advocates, and submitted on various issues, which the court has considered.
 60. In her submissions, the Applicant submitted that there is enough evidence that the parties herein are siblings, and that the Respondent was registered as the proprietor of the suit land, which parcel of land was an ancestral land, and that the parties have no other land.
 61. The Applicant relied on the case of Selly Jepchumba Samoei & 3 others vs Kimwei Arap Samoei (2020) eklr, where the court held: proof of trust is a matter of evidence”.
 62. Further reliance was placed on the case of re Estate of James Muiruri Kamau(2018) eklr, where the court observed:

“it matters not that the land was registered in the name of the alleged trustee without his description as a trustee in the register as his capacity as trustee could be established by way of cogent evidence”.
 63. It was also submitted that the suit land is a family land, and the Applicant and her siblings belong to the said family, and therefore the suit land is an ancestral land, wherein the Applicant and her siblings live and grew up from. It was her further submissions that even if their father transferred the suit land to the Respondent, he transferred it so that he can hold it in trust for himself and his siblings. That even



if the Respondent did charge the suit land, that did not remove the fact that a customary trust exists, and the intention of their father was quite clear that the Respondent was to hold the suit land in trust.

64. On his part, the Respondent submitted that the dispute herein is between a brother and sister, and the suit land is LOC 15/ Kangure/ 2034, which is approx. 10 acres.
65. He submitted that the suit land was transferred to the Respondent by his father Ephantus Mwangi Rurung'a, during his lifetime, and during that transfer, the Applicant and her sisters did not raise any complaint. Further, that it was not indicated in the register that he was holding the suit land in trust.
66. It was his submissions that had the original owner so intended to have the suit land registered in the name of the Respondent as a trustee for his three siblings, nothing would have prevented him from so indicating in the register.
67. He submitted that the transfer from his father to himself on 25th May 2007, was not encumbered with any trust. Further, that the original owner died in 2011, and the Applicant and her sisters did not raise any issue as regard the said transfer during the lifetime of his father.
68. On adverse possession, it was submitted that a claim of adverse possession cannot arise against a member of a nuclear family, and against a brother in favour of a sister. Reliance was placed on the case of Samuel Kihamba vs Mary Mbaisi (2015) eKLR, where the court held as follows:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner.

69. It was his submissions that a person seeking to acquire title to land by way of adverse possession one must prove non-permissive or non-consensual actual open, notorious, exclusive and adverse use/ occupation of land in question for an uninterrupted period of 12 years.
70. On customary trust, it was submitted that land parcel LOC 15/ KANGURE/ 2034, was transferred to the Respondent by his father in 2007, in his lifetime. That the green card did not indicate that the Respondent is holding the suit land in trust for the Applicant and her sisters. Then as provided by section 24(a) of Land Registration Act, then he is an absolute owner. See section 24(a) of Land Registration 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;”
71. Reliance was placed in the case of Stephen Wahome Muchiri vs Iregi Gichohi [2016] eKLR, relied with approval in the case of Salesio M' itonga v. M'ithara & 3 Others (2015)e KLR where the Court of Appeal stated:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust... In this case, the appellant filed suit claiming existence of a trust therefore, the burden of proof lay with him to prove the existence of the same... We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. Mere utilization of the land is not proof of the existence of a trust.”



72. Further reliance was placed in the case of *Susan Mumbi Waititu & 2 others v Mukuru Ndata & 4 others* [2008] eKLR, where the Court held;

“As for trust, the Plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus a family land”.

73. It was his evidence that the Applicant has failed to prove with cogent evidence that the original owner owned the suit land as an ancestral land and passed the same in the same capacity to the Respondent. He relied in the case of *Juletabi African Adventures Limited & another v. Christopher Michael Lockey* (2017) eKLR.

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

74. The Respondent also submitted that the Applicant did not discharge her duty of proof of the case on the required standard as provided by section 107 and 108 of the *Evidence Act*, which states:

“Section 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.”

Section 108

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

75. Further, it was submitted that even though the Applicant is in occupation of a portion of the suit land, the said occupation is not on 3 acres as alleged by the Applicant, and that acreage is disputed by the Respondent, who alleged that the Applicant only occupies 1 acre. That the Applicant did not furnish the court with any occupation and user report, to enable the court make a determination on the portion she is occupying.

76. The Respondent urged the court to dismiss the Applicant case with costs.

77. The above is the summary of the Pleadings, available evidence, exhibits produced and the rival written submissions, which this court has carefully read and considered and the court renders itself as follows:

78. There is no doubt that the Applicant herein Mary Njeri Mwangi, and the Respondent Antony Kimani Mwangi, are sister and brother, and the children of Ephantus Mwangi Rurung’a, who was the initial owner of the suit land LOC 15/ Kangure/ 2034, from 22nd November 1989, and a title deed was issued on 24th November 1989. Further, from the Green Card, this parcel of land was a subdivision of Land parcel No. 94. The Applicant’s witness Virginia Waithira Mwangi, alleged that this suit land is an ancestral land, which belonged to their grandfather Rurung’a Manyara.



79. Further, there is no doubt that the suit land was later transferred to Antony Kimani Mwangi, the Respondent on 25th May 2007, as a gift. A title deed was issued to him on the same date. He thereafter charged the suit land on 6th May 2010, 18th March 2011, and 24th July 2014 to Equity Bank, for loans of different amount.

80. It is evident that the suit land was registered in the name of the Respondent on 25th May 2007, as an absolute owner under Cap 300. As an absolute owner, section 27 of the said Cap 300, gave the Respondent all rights appurtenant thereto. See

“Section 27: (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;

81. Further, as an absolute and indefeasible owner, the rights of the Respondent can only be defeated as provided by Section 28: of the said Act, Cap 300 which states as follows:

“The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

82. Section 30 of Cap 300 provides instances when rights of a registered owner can be defeated through overriding interests. The Applicant has alleged that she is entitled to a portion of the suit land through customary trust, or adverse possession. Section 30(g) of Cap 300, provides as follows:

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on register; (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;”

83. The above provisions of section 30 of Cap 300, are now mirrored in section 28 of the [Land Registration Act](#), specifically section 28(b) & 28(h) which provide as follows:

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

28(b) trusts including customary trusts;

28(h) rights acquired or in process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription”.



84. Therefore, the Applicant herein who has claimed to be entitled to a portion of the suit land by virtues of the overriding interests as provided by the above provisions of the law, had a duty to call sufficient evidence to prove her case on the required standard of balance of probabilities.
85. With the above background in mind, this court, finds the issues for determination are:
- i. Whether the Applicant has proved existence of customary trust and or acquisition of a portion of 3 acres of the suit land through adverse possession,
 - ii. Whether the Applicant is entitled to the prayers sought,
 - iii. Who should pay costs of the suit.
 1. Whether the Applicant has proved existence of customary trust and/or acquisition of a portion of 3 acres of the suit land through adverse possession?
86. From the pleadings herein, it is evident that the Applicant, who is a sister to the Respondent is seeking to be declared as being entitled to ownership of 3 acres of the suit land LOC 15/ Kangure/ 2034, which parcel of land is approx. 10 acres, and registered in the name of the Respondent as from 25th May 2007.
87. What came out in evidence is that this parcel of land was owned by the father to the parties herein Ephantus Mwangi Rurunga upto 2007, when he transferred it to the Respondent.
88. It is also not in doubt that this parcel of land hosts the matrimonial home of the parties' parents. This is where the parties herein and their siblings were born and brought up. To the parties, this is their family home, where they have lived all their childhood lives.
89. As can be confirmed from the Green card, the suit land was transferred to the Respondent on 25th May 2007, as a gift. The Applicant alleged that the said transfer was done because their father was ailing and also he had a case at the Co-operative tribunal, wherein he had been ordered to pay millions of shillings. It was her evidence that for her father to salvage the family land from being sold in a public auction, he transferred the land to the Respondent to hold it in trust for the family.
90. It was her further evidence that even at the time of this transfer, she still lived on the suit land, and she built her permanent house in the year 2004, and she did not object to this transfer of the suit land to the Respondent, as their father explained to her reasons for the said transfer, and also reminded them that the land was for the family.
91. This evidence of PW1, was supported by her sisters PW2, and PW3, who insisted that the suit land belonged to their family and it is thus an ancestral land, and their father only transferred it to the Respondent to protect it from being auctioned due to the case that had been decided against him by the Cooperative Tribunal.
92. The Respondent denied that he held the suit land in trust for his sisters, but alleged that the suit land was given to him as a gift. However, he did not dispute that his father had a case at the Cooperative Tribunal, and thus the reasons why their father chose to transfer the suit land to his only son, to protect it from being sold in a public auction.
93. With the transfer of the suit land to the Respondent, he became the absolute owner, but subject to the overriding interests, and customary trust and/ or adverse possession are some of the overriding interests.



94. If the Applicant can prove existence of a customary trust, then the same can defeat the right of the Respondent as an absolute owner. See the case of *Kanyi vs Muthiora* (1984) KLR 712 CA where the Court held:

“The registration of the land in the name of the appellant under the Registered *Land Act* (Cap 300) did not extinguish the respondents rights under Kikuyu Customary law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee. ... The Trustee referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

95. The Applicant did allege existence of customary trust, in that the Respondent though registered as the absolute owner of the suit land, is holding it in trust for his siblings, the Applicant being one of them. The claim is disputed by the Respondent, and therefore the Applicant had the onerous task of calling evidence to prove her case on the required standard of balance of probabilities. See section 107 of the *Evidence Act* which provides as follows:

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

96. Though the Respondent alleged that the Green card did not indicate that the suit land is held in trust, it is evident that customary trust is an overriding interest, which subsists on the land, and does not need to be entered in the register. Therefore, customary trust being an overriding interest, if the Applicant is able to prove existence of such trust, then the rights of the Respondent as an absolute owner can be defeated.

97. It is trite that customary trust is proved by calling of evidence, and courts cannot infer or imply customary trust, unless the intention to create a trust in the first place is clear. See the case *Juletabi Africa Adventures Ltd & Another vs Christopher Michael Lockley* (2017) eKLR, where the Court, while citing the holding in *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171 held as follows:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because the law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

98. On whether the Applicant proved existence of customary trust, this court will be guided by the principles set out by the Supreme Court in the case of *Isaack M’ Kieba vs Isaaya Theuri M’Lintari & Another* (2018) eKLR, where the court held as follows:

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

i. The land in question was before registration, family, clan, or group land.



- ii. The claimant belongs to the such a family, clan, or group.
- iii. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- v. The claim is directed against the registered proprietor who is a member of the family, clan, or group”.

99. Being guided as above, this court proceeds to look at the available evidence in order to determine whether the Applicant has proved her case on the required standard.
100. The Applicant alleged that she lives on the suit land, a portion of 3 acres, wherein she has built a permanent house. The Respondent also admitted that the Applicant lives on the suit land, but on a portion of 1 acre. That he was ready and willing to allow her the use and occupy that one acre, but nothing more. Further, he testified that when his father transferred the suit land to him as a gift, he told him to also take care of his sisters in the event they get out of their matrimonial homes. However, he also confirmed that at the time of transfer of the suit land to him by their father, the Applicant still lived on the suit land.
101. From the history of this the suit land, it is a subdivision of land parcel no 94, which PW3 told the court belonged to their grandfather. Therefore, the genesis of this suit land is the ancestral land. If the father to the parties did inherit this parcel of land, then it is an ancestral land too.
102. The parties were in agreement that they were all born and brought up on the suit land. Their parents’ house, where the parties were brought up is on the suit land. Further, their parents and one of the brothers were all buried on the suit land.
103. The Applicant and her witnesses testified that the Respondent has been preventing them from visiting their parents graves and house. Further, the Respondent testified that he lives in Membley estate Nairobi, but visits the suit land once in two weeks. However, the Applicant permanent house is on the suit land, where she has lived since 2004. The Respondent has never asked her to move out.
104. It is also evident that the Respondent has been taking loans from Equity Bank, using the title of the suit land as his security. This case came about because the Applicant could not allow valuation of the portion she occupies, when the Bank sent its valuers to the suit land.
105. This suit land being the parcel of land, where the Applicant and all her siblings were brought up, and being the place, that she put up her permanent house, even during the life time of their parents, and before the transfer of the suit land to the Respondent, is indeed a family land and or ancestral home for all the parties herein, together with the other siblings.
106. The Applicant told the court that their father who was facing imminent execution and attachment of his property due to the Co-operative Tribunal Case No 39 of 2007, which was produced as exhibit, decided to transfer the suit land to the Respondent, to protect it from such attachment and sale by public auction.
107. This court has seen the Appeal lodged by Ephantus Mwangi, against the ruling if the Co-operative tribunal. Indeed, the said Memorandum of Appeal id dated 8th May 2007, and the suit land was transferred to the Respondent on 22nd May 2007. It is probable, that the late Ephantus Mwangi



Rurung'a, the father to the parties herein did transfer the suit land to the Respondent, due to the imminent danger of execution and attachment of the suit land.

108. The suit land being an ancestral land, though transferred to the Respondent was bound by the overriding interest of customary trust. The court finds that the intention of Ephantus Mwangi, when he transferred the suit land to the Respondent, was to protect it from imminent attachment, given that it was the only family land as testified by the parties. The suit land is still a family and/ or ancestral land, and the Respondent is holding it in trust for himself and All his siblings.
109. Customary trust protects the land in question, so that it runs in the family for posterity. See the case of Mbui Mukangu vs Gerald Mutwiri Mbui C.A no 281 of 2000, where the Court of Appeal stated that;

“customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court further held that possession and occupation are key elements in determining the existence of a customary trust.
110. In the instant case, the parties share a common father Ephantus Mwangi Rurung'a. The Applicant lives on the suit land, and has lived there for long to an extent of putting up a permanent house thereon, where she lives. This land was registered in the name of the Respondent to protect it from being attached due to their father's tribunal case which was against him.
111. Therefore, this court finds and holds that there is sufficient evidence to prove that the Respondent was registered as a sole proprietor of this family land to hold it in trust for himself and all his other siblings, the Applicant included.
112. Having found that the Respondent is holding the suit land in trust for himself and his siblings, then this court finds no reasons to make a determination on adverse possession, since the said prayer is an alternative one.

II Whether the Applicant is entitled to the prayers sought?

113. The Applicant sought for a declaration that the Respondent is holding the suit land in trust for the family of Ephantus Mwangi Rurung'a. This court has found that he is holding the suit land in trust. The Applicant had sought for dissolution of the existing trust, so that the Respondent can be directed to transfer a portion of 3 acres to the Applicant.
114. The Respondent testified that he was ready to give 1 acre to the Applicant. However, it is evident that the suit land is approx. 10 acres. By asking for 3 acres, this is not asking for too much. Though the other two sisters of the Applicant alleged that they were also entitled to the suit land, they were only witnesses, and not parties to the suit. They never filed a claim against the Respondent.
115. Parties are bound by their pleadings, and this court cannot give what was not sought. See the case Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinda Mule & 3 Others [2014] eKLR where the Court held:

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averment of the pleadings goes to no issue and must be disregarded....In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”



116. Consequently, this court finds that the Applicant is entitled to the prayers sought in the Originating Summons. The existing trust is dissolved and the Respondent to transfer 3 acres of the suit land to the Applicant herein.

III Who should bear costs of this suit?

117. As provided by section 27 of the *Civil Procedure Act*, costs are granted at the discretion of the court. Further costs follow the event and are granted to the successful litigant, unless special circumstances exist to warrant the court divert from the above.

118. This court has taken note of the fact that the parties herein are brother and sister. The court had even referred them to Court Annexed Mediation (CAM), which mediation failed. For the above reasons, the court directs each party to bear his/ her own costs.

119. Ultimately, this court finds and holds that the Applicant has proved her case on the required standard of balance of probabilities. Consequently, judgement is entered for the Applicant against the Respondent in the following terms; -

- i. The Respondent herein Antony Kimani Mwangi the registered owner of the land parcel No Loc 15/ Kangure / 2034, is holding it in trust for himself and his siblings, the Applicant herein Mary Njeri Mwangi , included.
- ii. The existing trust be and is hereby dissolved, and the Respondent herein Antony Kimani Mwangi, is directed to transfer 3 acres of the suit land to the Applicant herein Mary Njeri Mwangi.
- iii. Each of the parties herein to bear his / her own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 11TH JULY OF 2024.

L. GACHERU

JUDGE 11/7/2024

Delivered online in the presence of: -

Mr R. Njiraini for the Applicant

Mr. Kirubi for the Respondent

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE 11/7/2024

