



**Ikiugu v Mpaka (Suing as the legal representative of the Estate of
Gilbert Karagania Miringo – Deceased) (Environment and Land Appeal
E042 of 2024) [2024] KEELC 13834 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E042 OF 2024
CK NZILI, J
DECEMBER 4, 2024**

BETWEEN

NATHANIEL KITHINJI IKIUGU APPELLANT

AND

**PAULINE MPAKA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF GILBERT KARAGANIA MIRINGO – DECEASED). RESPONDENT**

*(Being an appeal from the judgment of Hon. D.W Nyambu
– CM in Meru ELC No. 108 of 2018 delivered on 24.5.2024)*

JUDGMENT

1. The appellant had been sued by the respondent at the lower court by a plaint dated 9.5.2018 as the 4th defendant for breach of trust in acquiring LR No. Ntima/Ntakira/3348, previously part of LR No. Ntima/Ntakira/1808, an ancestral land belonging to the respondent's father-in-law. She sought cancellation of the title and a permanent injunction. Alongside the plaint, the respondent had filed a notice of motion seeking temporary orders.
2. The appellant and the 3rd defendant entered an appearance on 22.5.2018 through Mwirigi Kaburu and Co. Advocates. They filed a preliminary objection that the notice of motion dated 9.5.2018 was res judicata and an abuse of the court process on account of Meru CMCC No. 744 of 1999 consolidated with 321 of 1992 and a ruling delivered on 14.4.2003, ordering the respondent to be evicted from LR No. Ntima/Ntakira/3348.
3. The preliminary objection was upheld by a ruling dated 17.7.2018. The respondent filed an appeal before this court, namely Meru ELC Appeal No. 30 of 2018, which overturned the ruling of the lower by a judgment dated 20.12.2021, paving the way for the hearing of the suit on merits.



4. The appellant, alongside the 3rd defendant, filed a joint statement of defense dated 23.6.2023. It was averred that after the 3rd defendant's father passed on, he filed Meru HC Succession Cause No. 418 of 2014, which the respondent did not object or protest to the issuance and confirmation of the grant and the distribution of the estate made on 4.10.2017 bequeathing the 3rd defendant LR No. Ntima/Ntakira/3348, which grant has never been revoked.
5. The appellant and the 3rd defendant admitted that the late father to the 3rd defendant was the absolute registered owner of the suit land on 30.1.2002 as per the issued title deed, which the appellant subsequently innocently bought for value and without any encumbrance from the 3rd defendant. They denied the alleged trust.
6. Again, the appellant and the 3rd defendant averred that during the lifetime of his late father, the respondent had been sued in Meru CMCC No. 744 of 1999 as consolidated with No. 32 of 1992, whereby an eviction order was issued against the respondent on 14.4.2003 to vacate LR No. Ntima/Ntakira/3348, hence, any stay of the respondent on the suit land was in breach of valid court orders of eviction.
7. By a notice dated 25.8.2023, it appears that the respondent withdrew the suit against the 1st defendant, who had passed on during the pendency of the suit.
8. The 2nd defendant in the suit had filed a statement of defense dated 4.6.2018 seeking for its dismissal. The plaint was, however, not amended to reflect the withdrawal or the changes.
9. At the hearing Pauline Mpaka Kwaria testified as PW 1 and called Anthony Mutwiri PW 2 as her only witness. She relied on a statement dated 9.5.2018 as her evidence in chief. PW 1 told the court that she got married to the late Gilbert Karagania M'Iringo in 1978 and settled on LR No. Ntima/Ntakira/1806 measuring 63 points, where her late husband built a homestead and raised six children.
10. PW 1 told the court that before her father-in-law, John M'Iringo, passed on, he transferred the land to the 1st defendant as the eldest son to hold in trust for himself and other family members. PW 1 told the court that the 1st defendant, after the death of the father-in-law, secretly subdivided the land, shared it among his brothers, and sold it to third parties without allocating her any portion despite request to do so. According to her, the portion under her occupation is LR No. Ntima/Ntakira/3348.
11. PW 1 relied on a copy of the grant dated 4.10.2017 demand notice dated 7.5.2018, an official search certificate dated 8.5.2018 and a limited grant ad litem issued on 31.3.2016.
12. Further, PW 1 told the court that she had brought the suit as the administratrix of the estate of her late husband which land was given to him by their late father-in-law. She said that the 1st defendant, (now) deceased left no heirs.
13. PW 1 said that the deceased father-in-law had the 1st defendant as the first born, her late husband as the 2nd born, John Mbaya as the third born, the 2nd defendant as the 4th born, and Philip Nkubi (deceased) as the fifth born. She said that they lived on parcel No. 3348 since 1978, till her husband passed on in 1989. According to PW1, the subdivisions to LR No. 1808 occurred in 1999, when the trustee the 1st defendant promised her that she would get a share, only to learn through a demand in 2018 that her share had been sold out.
14. Similarly, PW 1 said that she conducted an official search but was unable to trace the green card showing the trusteeship. PW 1 stated that this is the only land she has been occupying uninterruptedly for close to 33 -48 years to the exclusion of everyone else, including the 3rd defendant. PW 1 told the court that



- she sued the 3rd defendant after he bought the land from Cyrus Kiogora. PW 1 said that the area chief was aware of her occupation on the land.
15. Equally, PW 1 denied that she was sued in Meru CMCC No. 744/99 consolidated with CMCC No. 321 of 2022. She also denied receipt of any eviction orders. She insisted that she was never served with documents relating to those previous suits; otherwise, she would have filed a defense to the claims.
 16. Asked why she had indicated the pendency of a previous suit in her plaint, PW 1 maintained that it must have been an error on the part of her former lawyers since she had no other suit before this one. PW 1 denied knowledge of a succession cause relating to the estate of Silas or any other suit filed by the 3rd defendant. As to the appellant's title, PW 1 confirmed that the title register to the suit land had no caution lodged against it.
 17. In re-examination, PW 1 said that she had not built anywhere else, nor had she been undertaking farming activities elsewhere apart from the suit land. Asked why she did not sue the other siblings of her late husband or lodge a protest in the succession cause, PW 1 stated that she relied on the advice of her lawyers; otherwise, the other brothers-in-law were not the trustees to the land.
 18. PW 1 said that no attempts have ever been made to evict her from the suit land, even if such orders were issued against her in the alleged previous suits.
 19. Anthony Mutwiri Kagania, on his part as PW 2, told the court that he was a son to the respondents, aged 45 years old, and has lived on the suit land initially parcel L.R No. 1808 as an inheritance from his late grandfather, which Mareta M'Iringo which was unfortunately, subdivided by his uncles the 1st defendant excusing them from acquiring a share. In cross-examination, PW 2 said that he could not remember the other portion number out of Parcel No. 1808, which is unless acquired after the subdivisions.
 20. Susan Gacheri Kirigia testified as DW 1. She relied on a witness statement dated 26.5.2023 as her evidence in chief.
 21. DW 1 stated that she was the daughter of the late Silas Kirigia Ntari alias Silas Kirigia who passed on 26.12.2006 before he bought LR No. Ntima/Ntakira/3348 measuring 0.15 ha and was registered as the owner on 30.1.2001. DW 1 said that after her father passed on, she filed Meru HC Succession Case No. 418 of 2014, which the respondent did not object to and which, upon distribution of the estate, she became the registered owner of the suit land, which she later on transferred to the appellant.
 22. DW 1 said that during the lifetime of her father, he had sued the respondent and obtained eviction against her to vacate the suit land. DW 1 termed the continued stay of the respondent on the land as illegal. Equally, she termed any claim by the respondent against her deceased father, who passed on on 26.12.2006, as statute-barred, based on a computation of time from the sale agreement dated 14.5.1999. DW 1 relied on a copy of the grant dated 3.11.2014 confirmation grant dated 4.10.2017 ruling in Meru CM No. 744 of 9199 official search certificate for the suit land, sale agreement dated 26.7.2014 and a copy of the title for the suit land as D. Exh No. 1-7 respectively.
 23. In cross-examination, DW 1 told the court that her late father was in exclusive occupation of the suit land after he bought it; the 2nd defendant occupied it until he died in 1999, after leaving his family at his farm in Kisima Timau to come and live on the suit land where he erected a house.
 24. DW 1 told the court that her mother passed on in 2008. She added that she even visited her father at the suit land. According to her, her father had bought the land as per P. Exh No. 6A. Equally, she said succession cause was filed in 2014, and the estate was distributed as per P. Exh No. (1) sold the land to the appellant as per P. Exh No. 6A. She denied that the respondent was among her relatives; otherwise,



eviction orders had been obtained against the respondent in the ruling dated 14.4.2003, though she had declined to comply by vacating the land. DW 1 admitted that the respondent registered a caution against the title on 19.9.2002, claiming an interest in the land.

25. Nathaniel Kithinji Kiugu, the appellant, testified as DW 2. He relied on his witness statement dated 26.5.2023. He told the court that he did an official search of the suit land and established the owner as Silas Kirigia Ntari, but which was under the occupation of the respondent who was the vendor. It had a semi-permanent house and a shamba. According to DW 2, no one raised interest in the land save for the caution that the respondent had registered in 2002. DW 2 said that the respondent knew about the intended sale but never objected to it; otherwise, the land was not ancestral.
26. Again, DW 2 told the court that he purchased the land from Susan Gacheri Kiriga, a beneficiary of the estate of Silas Kirigia Ntari, the 3rd defendant in the suit, and became the registered owner as per the sale agreement produced as P. Exh No. (6A).
27. After the close of the defense case, the trial court rendered its judgment dated 24.5.2014, allowing the respondent's case. The appellant, by an appeal dated 10.6.2024, urges this court to find that the trial court erred in fact and the law given that the respondent (a) had not met the ingredients of customary trust (b) ignored rulings and judgment in previous suits over the subject matter (c) failed to establish that the appellant was an innocent purchase for value and lastly failed to consider his evidence.
28. With leave of court and by an order dated 23.10.2024, the appellant was allowed to adduce avail and rely on new evidence on appeal, namely Meru ELC 70 of 2006, witness statement of the respondent in the aforesaid suit and a ruling in Meru CMCC No. 321 of 1992.
29. This appeal was canvassed through written submissions. The appellant relied on written submissions dated 19.11.2024. It was submitted that the evidence on record and the additional one filed before this court with leave shows there was earlier litigation over LR N. Ntima/Ntakira/3348 involving the respondent who was ordered to vacate the suit land, which order she never challenged, vacated or appealed against. Reliance was placed on AG & another vs E.T. (2012) eKLR, Hunderson vs Handerson (1843 – 60) ALLER 378.
30. On customary trust, the appellant submitted that the respondent did not meet the elements to establish it as set out in Kiebia vs M'Lintari SCOK No. 10 of 2015, by adducing evidence to show the intent of the parties or family members.
31. The appellant submitted that the documents on pages 59-61 of the record of appeal and those on pages 165 – 193 of the additional evidence the respondent had been staking claims on literally all parcels of land that were resultant subdivisions of the parent parcel L.R No. Ntima/Ntakira/1808.
32. For instance, on pages 165 up to 174, it was about adverse possession over LR No. Ntima/Ntakira/3349 based on trust and further giving totally different particulars of developments based on each of the claims.
33. The appellant submitted that after her suit was dismissed with respect to LR No. Ntima/Ntakira/3349, the respondent would not turn again and stake a claim of customary trust on LR No. Ntima/Ntakira/3348.
34. The appellant submitted that the parties are bound by their pleadings and the evidence shows that the respondent has been on a fishing expedition filing suit on customary trust on all subdivisions of parcel LR No. Ntima/Ntakira/1808 without disclosing to the court the whereabouts of other proceedings, as can be seen on pages 189 – 190 of the record of appeal where the respondent had been sued over LR



- No. 3350 (1987- 188) over 3349. Reliance was placed on *M'Mboroki vs M'Mboroki* (2024) KEELC 600 (KLR), *Dominic Otieno Ogonyo & others vs Helida Akoth Walori* (2022) eKLR.
35. The respondent relied on written submissions dated 20.11.2024. It was submitted that this court must accord deference to the trial court's conclusion of fact and only interfere with those conclusions if the trial court failed to take into account any relevant facts or circumstances, based the conclusions on no evidence at all or misapprehend the evidence or acted on wrong principles as held in *Sonko vs County Assembly of Nairobi City & others* Petition 11 (E008) of 2022 and *Mbogo & another vs Shah* (1968) E.A 93.
 36. The respondent submitted that her suit was not res judicata going by the caselaw of *IEBC vs Maina Kiai & others* (2017) eKLR & *James Maina Kinga and another vs Gerald Kwendaka* (2018) eKLR.
 37. The respondent points out that in the ruling delivered on 14.4.2003, she was not a party to the primary suit, and the court recommended that the only recourse was to file a fresh suit. In any event, the respondent submitted that there was no execution of the alleged eviction order before it became time-barred after 12 years. Reliance was placed on *Black's Law Dictionary 9th Edition Section 4 (4) of the Limitation of Actions Act* and *M'Rinkanya and another vs Gilbert Kabeere M'Mbijiwe* (2007) eKLR.
 38. The respondent submitted that the issue of customary trust has never been canvassed in any of the referred previous suits; otherwise, in *Meru CMCC No. 744 of 1999, as consolidated with CMCC No. 92 of 1992*, she was only enjoined as a party at the tail end of the execution.
 39. On customary trust, the respondent submitted that customary trust was an overriding interest under Section 28 (b) of the *Land Registration Act*, which need not be noted in the register, but is an encumbrance on the land. The respondent submitted that her evidence was clear that the original land owner was her father-in-law, who registered it in the name of *Marete M'Iringo*, as the 1st born son under Meru customary law to hold in trust and which she was occupying after her marriage to one of the sons of the deceased.
 40. The respondent submitted that the subdivision and transfer occurred in breach of that trust, which is intergenerational equity. Reliance was placed on *Mbui vs Maranya C. A No. 281 of 2000* and *Kiebia vs M'Lintari* (2008) KESC 22 (KLR) all of which elements she had met through her testimony.
 41. The respondent submitted that the appellant did not fit the discretion of an innocent purchase for value as defined in *Black Laws Dictionary 8th Edition, Katende vs Harindar and Co. Ltd* (2008) 2 E. A 173 and *Lawrence Mukiri vs AG & others* (2013) eKLR, since he conducted no due diligence by visiting the land and inquiring who the owner of the development on it was; otherwise, there was no good faith. Reliance who also placed on *Alice Chemutai Too vs. Nickson Kipkurui Koriri and others* (2015) eKLR, that the sale was hurriedly done to keep her away from the land; hence, the title held by the appellant should not enjoy the protection of the law as held in *Esther Ndegi Njiru & another vs Leonard Gatei* (2014) eKLR and *Eunice Grace Njambi Kamau & another vs The Hon AG & others Civil Suit No. 976 of 2012*. The respondent urged the court to dismiss the appeal with costs under Section 27 of the *Civil Procedure Act*.
 42. An appellate court of the first instance has to reconsider or reevaluate the evidence of the court below and draw its conclusions on both facts and the law while giving credit to the trial court that saw and heard the witnesses testify.
 43. The court has no room to introduce extraneous matters not dealt with by the parties in the evidence. See *Kenya Ports Authority vs Kuston (K) Ltd* (2009) 2 EA 212.



44. In my assessment of the pleadings, evidence tendered the ground of appeal and the adduced evidence on appeal, the issues for determination center on:
- i. Whether the suit was res judicata and or an abuse of the court process.
 - ii. If the respondent adduced enough evidence to prove the title to the suit land was subject to customary trust.
 - iii. If the appellant was an innocent purchaser for value without notice of any existing overriding interests in favor of the respondent.
 - iv. Whether the appeal has merits.
 - v. What is the order as to costs?
45. The respondent had brought the suit as a legal representative of the estate of Gilbert Karagania M'Iringo, who she said was her husband by virtue of marriage in 1978 and who settled her on the suit land till he passed on in 1986, which parcel is alleged as ancestral land initially owned by her father in law John M'Iringo (deceased).
46. It was pleaded that the late father-in-law registered the suit land under the name of the firstborn son Marete M'Iringo to hold in trust for the rest of the family members but unfortunately was shared leaving out the respondent husband's estate even though she had been occupying 63 points of the initial L.R No. Ntima/Ntakira/1808. The respondent urged the court to find that the resultant subdivisions and transfers of the suit land, particularly the one later on registered in the name of the appellant, were subject to overriding interest.
47. The appellant, in his preliminary objection dated 22.5.2018 and a statement of defense dated 26.5.2023 raised the issue of res judicata in view of an eviction order dated 14.4.2003 in Meru CMCC No. 744 of 1999 consolidated with 321 of 1992 and Meru ELC No. 70 of 2006.
48. The doctrine of res judicata is invoked in a civil matter where the following elements are demonstrated:
- i. There was a former judgment or order which was final.
 - ii. The judgment or order was on merit.
 - iii. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.
 - iv. In the first and the 2nd actions, the party's subject matter and the cause of action are identical.
49. The purpose of invoking the doctrine is to ensure that the principle of finality, which is a matter of public policy, is complied with since one of the pillars of judicial systems to prevent multiplicity of suits that ordinarily clog the courts apart from occasioning unnecessary costs to the parties and to ensure that there is an end to litigation and the verdict duly translated into fruits for one party and liability for another party is conclusive. See *John Florence Maritime Services Ltd and another vs Cabinet Secretary Transport & Infrastructure and others (Petition 17 of 2015) (2021) KESC 39 (KLR) (Civ) (6th August 2021) (Judgment)*.
50. In *IEBC vs Maina Kiai & others (supra)*, the court observed that the issues must be the same in the former and subsequent suits and must have been heard and determined to finality in the previous suit. The test, as held in the *Hon. AG & another vs E.T (supra)*, is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which a court of competent jurisdiction has resolved.



51. In *Henderson vs Henderson* (supra), the court said that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires all parties to that litigation to bring forward their whole case, otherwise, they would not be allowed to open the same subject on a matter which might have been brought forward as part of the subject in the contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case.
52. In *Machange Investments Ltd vs Safaris Unlimited (Africa) Ltd & others* (2009) eKLR, the court defined abuse of court process where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for extraneous purposes to that objective. Abuse of court process includes pursuing the same remedies in two parallel courts. See *DT Dobie vs Muchina* (1982) KLR 1 and in *Nishitha Yogendra Patel vs Pascale Mireille Baksh and another* (2009) eKLR.
53. In *Pauline Mpaka vs Marete & others Meru ELC Appeal No. 30 of 2018*, the court observed that all the pleadings and rulings relating to its previous suits were critical for the trial court to analyze and establish if the parties, issues and the subject matter also were similar and if courts of competent jurisdiction had determined the same issues to finality and on merits.
54. The question is whether, after the suit was remitted for re-hearing by the trial court, the appellant discharged that burden to demonstrate res-judicata. The appellant relied on a list of documents dated 2.5.2023, listing a copy of the ruling in Meru CMCC No. 744 of 1997.
55. The statement of defense dated 26.5.2023 did not allude to any other previous suits or decisions of courts of competent jurisdiction over the subject matter and issues. In a further list of documents dated 26.5.2023, the appellant did not include previous judicial proceedings, pleadings, rulings, or decrees in the previous suits other than the eviction order; the respondent was not cross-examined on any such issues. Equally, in the parties' written submissions dated 1.2.2024 and 30.1.2024, the issue of res-judicata was not addressed, relying on copies of previous decrees, rulings and judgments relating to the subject matter.
56. Before this court, the appellant relied on Meru ELC 70 of 2006 (OS) *Pauline Mpaka vs Mark Mungira Muguna*, witness statement by the respondent in Meru HC CC 70 of 2006 and ruling in Meru CMCC No. 321 of 1992 dated 15.10.2003 to demonstrate res judicata and abuse of the court process after losing on a claim based on adverse possession over based LR No. Ntima/Ntakira/3349 on 18.10.2018.
57. From the court record, it appears that this suit was filed on 18.5.2018 during the pendency of Meru HC ELC No. 70 of 2006.
58. The respondent obtained a temporary order of injunction on 11.5.2018. One of the defendants, Susan Gacheri Kirigia, swore a replying affidavit on 22.5.2018 and attached to the same rulings dated 14.4.2003, 6.10.2003 and orders dated 20.11.2003 and 4.12.2003. In the ruling dated 14.4.2003, the respondent participated in the application and swore on oath that she had filed Provincial LDT No. 4 of 2003 and that she had lived on LR No. Ntima/Ntkaira 3348 for over 30 years.
59. The record shows that the respondent's contention of ownership was determined on merits and dismissed. She was ordered to vacate the land within 90 days; otherwise, she would face eviction. In the ruling dated 15.10.2003, it shows that the respondent had been joined as a party to the suit by an order dated 19.12.1999. She had sought for review of the eviction order in the previous ruling. The court said that it could not review the orders; otherwise, it would be legalizing a trespasser to the land unlawfully staying on the land. The court confirmed that the orders had been made after hearing the respondent.



60. The respondent then moved to the High Court Meru in Civil Appeal No. 123 of 2003 and obtained a stay order of the orders given on 6.10.2003 on 20.11.2003. An order of status quo by consent was issued on 4.12.2003. In the replying affidavit dated 4.10.2024, before this court, the respondent admitted knowledge of the previous suits, but insisted that she was never evicted as per the decree. So she has, in her written submissions, urged the court to find that the decree became stale and hence her suit was not res judicata or abuse of the court process. Reliance was placed on M'Rinkanya vs Kabeere (supra) and Section 4 (4) of the [Limitation of Actions Act](#).
61. As indicated above, the appellant brought the suit as a legal representative of the estate of her late husband. She does not dispute that the suit land was subject to a Meru HC Succession Cause No. 418 of 2014 in the estate of Silas Kirigia Ntaari/Silas Kirigia. The deceased had obtained a title deed for the same on 30.1.2002 after the register was opened on 20.12.1999, as a subdivision of LR No. Ntima/Ntakira/1808.
62. The respondent did not represent the estate of the late husband until a limited grant was issued on 31.3.2016.
63. It is not clear why she did not apply for the same immediately after her late husband passed on 8.6.1989. There is no record that her late husband had staked a claim over LR No. Ntima/Ntakira/1808, before it was subdivided into 12 portions LR No's. Ntima/Ntakira/3348 – 3359. There is evidence that she moved to LR No. Ntima/Ntakira/3356, going by an affidavit sworn by Jacob Murithi M'Tugo on 21.5.2018.
64. Equally, there is evidence that the grant was issued and confirmed in Meru HC Succession Case No. 418 of 2014, which the respondent did not seek to have revoked or canceled on account of non-disclosure of material facts concealment of facts, fraud, illegality and or a corrupt scheme.
65. In the caution placed against the suit and on 19.2.2002, the respondent's interest is indicated as a mere licensee. There is no evidence that the respondent had raised a counterclaim on account of customary trust in the previous suits alluded to above, where she was a substantive party.
66. Between 1999 and 2018, it is not clear why, while aware of her occupation rights, the respondent did not raise her claim for declaratory orders.
67. The respondent had pleaded that the person who was registered as owner of the land from his father-in-law to hold in trust was Marete M'Iringo. She withdrew her claim against him by a notice of withdrawal dated 25.8.2023.
68. After the death of the 1st defendant in the primary suit, the plaint was not amended. The particulars of breach of trust under paragraphs 6, 7, 8, 9, and 12 of the plaint dated 9.5.2018 remained against the two defendants. The legal representatives of their estates were not joined. In paragraphs 11 and 12 of the plaint, the respondent did not plead any breach of trust against the 3rd and 4th defendants, and now the appellant herein, who was merely a purchaser of the land and not part of the family of the initial owner.
69. The nexus between the claimant under elements enshrined in Kiebia vs M'Lintari (supra) and the owner of the land must be proximate and not tenuous to make the claim adventurous. Trust is a matter of fact to be pleaded and proved to the required standards. Other than the limited grant, the respondent did to produce her ID card, copy of her marriage certificate and or call independent witnesses to corroborate her evidence that the late John M'Iringo and, by extension that, she was the wife of the late Gilbert M'Iringo, who was a son of the late John M'Iringo.



70. Equally, the respondent failed to produce a copy of the record showing that as of 1978, when she is alleged to have been married and put in occupation of the LR No. Ntima/Ntakira/1808, the suit land was ancestral and was registered at the time in the name of the alleged father-in-law. The respondent claimed that the land was transferred during the lifetime of her father-in-law to the firstborn son, Marete M'Iringo, to hold in trust for the rest of his brothers.
71. From the court record, I have not come across a copy of the records to show when the late father-in-law became the owner of the ancestral land and transferred it to the name of his firstborn son Marete M'Iringo, who likewise subdivided it and transferred the same to the 3rd defendant in the primary suit contrary to the intention to found a trust.
72. The respondent did not produce a paper trail to prove her claim. It is trite law that he who pleads must prove Under Sections 107 – 113 of the *Evidence Act*. The respondent failed to produce documentary and oral evidence to connect her to the family of the late John M'Iringo and prove how he intended the land to belong to his son Gilbert M'Iringo. None of her brothers-in-law were called to prove when their brother passed on and where he was living before he passed on.
73. Equally, the respondent did not provide evidence why the late husband and herself would be on the land with effect from 1978; her late husband passed on in 1989, and the land would be subdivided into 12 portions among the beneficiaries and transferred to them, without them staking a claim only to await until 2018, when the appellant became registered owner to launch the suit, yet she was a party in the previous suits.
74. The defense of customary trust was available to the respondent in the previous suits. She failed to raise it. Equally, the respondent raised a claim based on adverse possession against LR No. Ntima/Ntakira/3249 and lost it. I agree with the appellant that this was a classical case of a party on a fishing expedition and out to abuse the court process in forum shopping for a favorable outcome. Pleadings bind a party. The doctrine of estoppel applies. A Party must not be on an evidence fishing expedition by changing goalposts in their cause of action, after losing one suit and lodging another, by adding new or changing to a new outfit. See *Raila Odinga & another vs IEBC (2017) eKLR*.
75. The claim by the respondent appears mischievous and out to defeat the accrued claim of who was the owner of the land by 2018. Evidence was led that the appellant bought the land with the assistance of the respondent who even introduced him to the recorded owner. The respondent did not object to the evidence that she assisted the appellant in identifying the registered owner of the land. The respondent, if at all she was in occupation at the time, should have staked her claim by resisting the sale. There is no evidence that the caution that the respondent had placed on the title in 2002 was removed irregularly.
76. Equally, there is no evidence that the respondent filed an objection before the land control board or the land registrar to stop both the transfer and registration of the land in favor of the appellant. The 3rd defendant, who sold the land to the appellant, was not demonstrated to have been holding the land as a trustee for the respondent by dint of Section 28 (b) of the *Land Registration Act*.
77. Her late father had already obtained eviction orders against the respondent during his lifetime. The respondent remained an illegal occupant on the land. If any rights on account of adverse possession had accrued in her favor, then the said interests had not crystallized or been declared by the time the land came to the name of the 3rd defendant in the primary suit and, by extension, the appellant herein.
78. It is not every claim on land that amounts to customary trust as held in *Kiebia vs M'lintari (supra)*. There must be circumstances showing the claimant has interests stemming from his or her possession and occupation linked with the intention to found a trust by the initially registered owner. The court



in Mukangu vs Maranya (2004) eKLR, held that it all depends on the quality of the evidence tendered. My finding is that the respondent failed to substantiate her claim against the appellant. The appeal is allowed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4TH DECEMBER, 2024

In presence of

C.A Kananu

Mr. Muriuki for the appellant

Respondent in person

HON. C K NZILI

JUDGE

