



**Wasike & 3 others v Wakhungu & another (Sued as the legal representative of the Estate of Jafferson Wakhungu Wasilwa) (Environment & Land Case 17 of 2019) [2023] KEELC 694 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 694 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 17 OF 2019  
BN OLAO, J  
FEBRUARY 9, 2023**

**BETWEEN**

**AMINA KHATONDI WASIKE ..... 1<sup>ST</sup> APPLICANT  
ISAAC NJALALE WASIKE ..... 2<sup>ND</sup> APPLICANT  
JOHN WASILWA WASIKE ..... 3<sup>RD</sup> APPLICANT  
SIMON WANAMBISI WASIKE ..... 4<sup>TH</sup> APPLICANT**

**AND**

**GIBERT WASILWA WAKHUNGU ..... 1<sup>ST</sup> RESPONDENT  
MARTIN MAKHAPILA NJALALE ..... 2<sup>ND</sup> RESPONDENT  
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAFFERSON  
WAKHUNGU WASILWA**

**JUDGMENT**

1. Article 45 (1) of *the Constitution* provides that:

“The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”

Most family problems could easily be resolved if litigants followed the instructions found in the Book of Philippians 2:3 – 4:

“Do nothing from selfishness or conceit, but in humility count others better than yourself. Let each of you look not only to his own interests, but also to the interests of others.”



In 1 Timothy 5:8, it is written:

“If anyone does not provide for his relatives, and especially for his own family, he has disowned the faith and is worse than an unbeliever.”

The Quran extols the same virtues in 17 - Surah Al Isra 26:

“And give to the kinsman his due and to the Miskin (needy) and to the way farer! But spend not wastefully (your wealth) in the manner of spendthrift.”

2. Taking cue from *the Constitution* and the above scriptures and bearing in mind that this is a family dispute over land, I implored the parties to try and attempt an amicable settlement outside the Court. Indeed when I addressed them on 15<sup>th</sup> December 2021 in the presence of their respective counsel MR WERE for the plaintiff and MR KIARIE for the defendants, I extolled the virtues of family unity and implored them to gift me and themselves a new year present by settling this dispute at home before the next mention date which I slated for 26<sup>th</sup> January 2022 in the hope that the Christmas spirit and festivities would act as a catalyst. Unfortunately, my entreats appear to have fallen on deaf ears. None of us received a new year gift when the Court resumed on 26<sup>th</sup> January 2022. At least I didn't!!
3. AMINA KHATONDI WASIKE (the 1<sup>st</sup> plaintiff) is the mother to ISAAC NJALALE WASIKE, JOHN WASILWA WASIKE and SIMON WANAMBISI WASIKE (the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs respectively). They are also the widow and children respectively of ROBERT WASIKE NJALALE who was the son of NJALALE WASILWA ABEDNEGO.
4. GILBERT WASILWA WAKHUNGU and MARTIN NJALALE MAKHABILA (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) are the children and administrators to the Estate of JEFFERSON WAKHUNGU WASILWA.
5. By an Originating Summons dated 11<sup>th</sup> June 2019 and later amended on 2<sup>nd</sup> March 2020, the plaintiffs sought a determination of the following questions with respect to the land parcel NO SOUTH MALAKISI/SOUTH KULISIRU/133 (the suit land):
  1. That the plaintiffs be declared as the joint owners of land measuring approximately 9.0 Hectares known as land parcel NO SOUTH MALAKISI/SOUTH KULUSIRU/133 which they are in adverse possession of having occupied the same for over 50 years.
  2. An order that the Applicants herein have become entitled to be registered as the joint owners of a parcel of land measuring approximately 9.0 Hectares known as land parcel NO SOUTH MALAKISI/SOUTH KULUSIRU/133 by operation of the law vis Sections 7, 17 and 38 of the *Limitation of actions Act* (CAP 22 LAWS OF KENYA) in place of the defendants.
  3. That the defendants names to the said parcel of land be removed and cancelled on the 9.0 Hectares of the said land parcel SOUTH MALAKISI/SOUTH KULUSIRU/133 and be replaced with the names of the plaintiffs.
  4. That in the alternative and without prejudice to the averments 1, 2 and 3 a declaration that the defendants hold the title of the land measuring 9.0 Hectares known as land parcel NO SOUTH MALAKISI/SOUTH KULUSIRU/133 in trust for the benefit of the plaintiffs.
  5. That costs of this summon be borne by the defendants.
6. The Originating Summons was predicated on the grounds set at therein and also supported by the joint affidavit of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs dated 11<sup>th</sup> June 2019 and the statement of the 1<sup>st</sup> plaintiff



dated 10<sup>th</sup> April 2021, her supporting affidavit dated 11<sup>th</sup> June 2019 and her supplementary affidavit dated 2<sup>nd</sup> March 2020.

7. In her two affidavits and statement, the 1<sup>st</sup> plaintiff states that she is the widow of ROBERT WASIKE NJALALE who was the son of NJALALE WASILWA ABEDNEGO (ABEDNEGO). That ABEDNEGO whose other son was the 1<sup>st</sup> defendant was the proprietor of the suit land which was registered in the name of JEFFERSON WAKHUNGU WASILWA to hold in trust for all the children of ABEDNEGO including her husband. However, JEFFERSON WAKHUNGU WASILWA left the suit land in the possession of her husband ROBERT WASIKE NJALALE and herself and migrated to CHERANGANI where he lived until his demise in 2004. During the LUFU CEREMONY following the demise of JEFFERSON WAKHUNGU WASILWA, the plaintiffs were recognized as the beneficiaries of the suit land where the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs were born and brought up since the 1960's to-date. That they have developed permanent and semi-permanent houses on the suit land where they also grow trees, maize, coffee and bananas peacefully, continuously and un-interrupted for a period of "over 50 years". That the suit land is clearly demarcated and ROBERT WASIKE NJALALE was buried thereon in 1984. That the title of the defendants to a portion of the suit land measuring approximately 9.0 Hectares has been extinguished by operation of the law and should be registered jointly in the names of the plaintiffs.
8. In her statement dated 10<sup>th</sup> April 2021, she adds that when she was married to ROBERT WASIKE NJALALE in 1961, he put up a hut on a portion of the suit land shown to them by JONATHAN BARASA WASILWA who also redeemed the land when it was about to be auctioned. That although she never personally met her father in law JEFFERSON WAKHUNGU WASILWA, she was recognized as a beneficiary of the land during the LUFU ceremony. She denied that each of the 5 children of ABEDNEGO had inherited their own land from their father. She added that ABEDNEGO had a sixth son JAPHETH SIMIYU born out of wedlock with one NAKUTI. She added that when ABEDNEGO died, he was buried near the FRIEND'S CHURCH BITONGE and that the defendant has never utilized the suit land as he left in 1960's never to return. She further denied that her husband ROBERT WASIKE NJALALE had moved onto the suit land with the permission and license of the defendants father. She added that due to their financial ability, they only have many semi-permanent houses and that the succession process in respect to the Estate of the late JEFFERSON WAKHUNGU WASILWA was carried out stealthily without their knowledge. She therefore opposed the counter-claim for their eviction terming it as time barred.
9. In their joint supporting affidavit dated 11<sup>th</sup> June 2019, the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs averred that they are the children of the 1<sup>st</sup> plaintiff and ROBERT WASIKE NJALALE who was the son of ABEDNEGO their grandfather who was the owner of the suit land during the time of the land adjudication process but the same was registered in the name of one of his sons JEFFERSON WAKHUNGU WASILWA to hold in trust for all the children of ABEDNEGO. That JEFFERSON WAKHUNGU WASILWA left the land in the possession of their father ROBERT WASIKE NJALALE and migrated to CHERANGANI where he stayed until his demise in 2004. That during the LUFU ceremony, the plaintiffs were recognized as beneficiaries of the suit land and it was declared that the land situated in BUTONGE be sub-divided amongst them. That they were born and brought up on the suit land from the 1960s where they have constructed semi-permanent houses and where they have lived peacefully for a period of over 50 years without interruption.
10. Apart from the replying affidavits, the plaintiffs (other than the 2<sup>nd</sup> plaintiff) filed additional statement of their witnesses JOHN WAFULA MANYONGE (PW4) and SELINA NEKESA NJALALE (PW5). In his statement JOHN WAFULA MANYONGE (PW4) simply stated that in accordance



with the customs of their BAKIABI clan, when a person loses his or her parents, the brother takes over the responsibility of taking care of the children.

11. On her part, SELINA NEKESA NJALALE (PW5) stated that she is the sister to ROBERT WASIKE NJALALE and when their father died in 1946, her uncle JEFFERSON WAKHUNGU WASILWA was given the responsibility of taking care of ROBERT WASIKE NJALALE and ESNAS NALIKA. That she was given to CHIEF BARASA as her foster father.
12. The plaintiffs filed the following documents in support of their case:
  1. Green Card for the land parcel SOUTH MALAKISI/SOUTH KULUSIRU/133.
  2. Certificate of official search for the land parcel NO SOUTH MALAKISI/SOUTH KULUSIRU/133.
  3. Minutes of family meeting held on 11<sup>th</sup> February 2004.
13. The Originating Summons is opposed and the 1<sup>st</sup> defendant deposed in his replying affidavit dated 26<sup>th</sup> October 2019 that he and the 2<sup>nd</sup> defendants are the Administrators of the Estate of their late father JEFFERSON WAKHUNGU WASILWA who was the registered proprietor of the suit land since 20<sup>th</sup> June 1972. He confirmed that the 1<sup>st</sup> plaintiff is the widow of ROBERT WASIKE NJALALE and mother to the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs. That ROBERT WASIKE NJALALE was the son of ABEDNEGO who had five brothers namely;
  1. ALFAYO NYUKURI
  2. JAPHETH SIMIYU
  3. JOZECK KAMULAMBA
  4. JONATHAN BARASA, and
  5. JEFFERSON WAKHUNGU

That therefore, ROBERT WASIKE NJALALE was a nephew to JEFFERSON WAKHUNGU WASILWA. That each of the sons of ABEDNEGO had their own land and that it is not true that ABEDNEGO ever owned the suit land. He added that JEFFERSON WAKHUNGU WASILWA was not a son of ABEDNEGO and that infact the two were brothers and there is no way that JEFFERSON WAKHUNGU WASILWA could have been registered as the proprietor of the suit land to hold it in trust for the children of ABEDNEGO. That he was informed by his cousin JAMIN WANABISI that JEFFERSON WAKHUNGU WASILWA occupied the suit land from 1953 upto 1962 or thereabout then he relocated to ELDORET with his family including the 1<sup>st</sup> defendant but continued to cultivate the suit land. That in 1966 or thereabout, JEFFERSON WAKHUNGU WASILWA requested ROBERT WASIKE NJALALE (his brother's son) to look after the land. Later on, ROBERT WASIKE NJALALE sought the permission of JEFFERSON WAKHUNGU WASILWA to put up a store and home on the suit land where he moved with his family. Therefore the plaintiffs have been occupying the suit land with the permission of JEFFERSON WAKHUNGU WASILWA and that cannot give them any proprietary rights over the land.

14. After JEFFERSON WAKHUNGU WASILWA'S demise on 3<sup>rd</sup> February 2004, the defendants found it necessary to re-establish the boundaries of the suit land and engaged surveyors. On 12<sup>th</sup> June 2017 when the County Surveyor and Land Registrar were re-establishing the boundary, the plaintiffs were present and assisted in the exercise. During the LUFU ceremony following the demise of JEFFERSON WAKHUNGU WASILWA, the plaintiffs and the larger family of ABEDNEGO acknowledged that



the suit land belonged to JEFFERSON WAKHUNGU WASILWA. On 9<sup>th</sup> October 2019, the defendants served a notice on the plaintiffs withdrawing the cultivation and occupation license which they had been given by JEFFERSON WAKHUNGU WASILWA and demanded that they vacate the suit land or be evicted.

15. The defendants therefore through this replying affidavit are counter-claiming for the eviction of the plaintiffs from the suit land. That this Originating Summons is misconceived, bad in law and should be dismissed.
16. The defendants filed the following documents in support of their case:
  1. Copy of certificate of death in respect of JEFFERSON WAKHUNGU WASILWA.
  2. Grant of Letters of Administration issued to the defendants in respect to the Estate of JEFFERSON WAKHUNGU WASILWA.
  3. Copies of receipts of payments made to the surveyor.
  4. Notices of determination of disputed boundary.
  5. Letters dated 23<sup>rd</sup> March 2019 from the CHIEF BISUNU LOCATION requesting the LAND REGISTRAR BUNGOMA to put boundaries.
  6. Report of the Surveyor dated 25<sup>th</sup> October 2019.
  7. Photographs.
  8. Withdrawal of occupation license addressed to the plaintiffs by the firm of KIARIE & COMPANY ADVOCATES dated 9<sup>th</sup> October 2019 terminating their license forthwith.
  9. Supplementary replying affidavit by one JAMIN WANAMBISI SIMIYU date 28<sup>th</sup> October 2019 associating himself with the replying affidavit of the 1<sup>st</sup> defendant.
17. The plenary hearing commenced on 3<sup>rd</sup> March 2022 and the plaintiffs called the following witnesses in support of their case:
  1. AMINA KHATONDI WASIKE the 1<sup>st</sup> Plaintiff (PW1).
  2. JOHN WASILWA WASIKE the 2<sup>nd</sup> Plaintiff (PW2).
  3. SIMON WANAMBISIS WASIKE the 4<sup>th</sup> Plaintiff (PW3).
  4. JOHN WAFULA WANYONGE (PW4) and
  5. SELINA NEKESA NJALALE (PW5).

GILBERT WASILWA WAKHUNGU the 1<sup>st</sup> defendant testified on behalf of the defendants. And although both parties listed and filed statements and/or affidavits of other witnesses, they were not called to testify and therefore those statements and/or affidavits are not considered as evidence in this case.
18. All the witnesses adopted as their evidence their respective statements and/or affidavits. The parties also produced as their documentary the documents listed above. This court has already summarized the contents of the said statements and/or affidavits.
19. The Plaintiffs have made a two-pronged claim to the suit land being adverse possession and in the alternative, trust. It is the defendants' case however that infact the plaintiffs are mere licencees whose



permission to remain on the suit land has been terminated. They therefore seek in their counter-claim the eviction of the plaintiffs from the suit land.

20. As the parties are family, I shall first consider the plaintiffs' claim to the suit land on the basis of a trust.

21. It is common knowledge that the suit land was first registered in the names of one JAFASON WAKHUNGU on 20<sup>th</sup> June 1972 as per the copy of the Green Card. On 3<sup>rd</sup> June 1977 he obtained the land certificate and on 3<sup>rd</sup> January 1984, that land certificate was destroyed and a new land certificate was issued in the name of JEFFERSON WAKHUNGU WASILWA. I have no doubt in my mind that the JAFASON WAKHUNGU who was the first registered proprietor of the suit land in 1977 is the same JEFFERSON WAKHUNGU WASILWA the deceased father to the defendants and in whose name the suit land is still registered. A copy of the land certificate was not availed during the trial but it is clear from the certificate of Official Search in respect to the suit land and dated 6<sup>th</sup> June 2019 that as at the time of filing this suit on 12<sup>th</sup> June 2019, the suit land was still registered in the names of JEFFERSON WAKHUNGU WASILWA. It is also common knowledge that the defendants are the joint Administrators to the Estate of JEFFERSON WAKHUNGU WASILWA having been issued with a Grant of Letters of Administration on 10<sup>th</sup> April 2017 vide BUNGOMA CHIEF MAGISTRATE'S COURT SUCCESSION CAUSE NO 479 of 2016. The defendants are therefore clothed with the requisite locus standi to evict the plaintiffs and any other trespassers from the suit land.

22. As the registered proprietor of the suit land, JEFFERSON WAKHUNGU WASILWA enjoyed all the rights and privileges stipulated under Section 24(a) of the Land Registration Act which reads:

24: "Subject to this Act -

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ..."

Section 25 (1) and (2) of the same Act states that:

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register."

There is however a proviso under sub-section (2) which provides that:

(2) "Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

Section 28(b) of the same act provides that:

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



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

The provision of Sections 24 and 25 of the *Land Registration Act* are a replica of what was contained in Sections 27 and 28 of the repealed Registered *Land Act* which was the applicable law when JEFFERSON WAKHUNGU WASILWA obtained the title to the suit land in 1972. And as I have already stated above, both him and, following his demise on 3<sup>rd</sup> February 2004, the defendants as his legal representatives have the right, indeed the responsibility to evict any trespassers or, as the defendants claim, licencees such as the plaintiffs. However, the holder of that title or his representative is always subject to any obligation as a trustee. It is the plaintiffs’ case that in fact the title to the suit land is held in trust for them. That is what I shall now interrogate.

23. It is now well settled that the registration of land in the name of a party does not extinguish the rights of other parties who are entitled to it by way of a trust including a customary trust. And although the plaintiffs herein did not identify the nature of trust upon which they were relying, it is clear from the thrust of their evidence that they were relying on a customary trust. In the case of *KANYI -V- MUTHIORA* 1984 KLR 712, it was held that the registration of 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 a trustee .... The trustees referred to in Section of the Act and 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.

See also *GATHIBA -V- GATHIBA* 2001 2 EA [KLR E&LI] and *MUKANGU -V- MBUI* 2004(2) KLR 256 among other cases.

24. As the plaintiffs pleaded a trust in their favour in respect to the suit land, it was their duty to lead evidence to prove that trust. This is because a Court will not presume a trust save only in clear cases. In *PETER NDUNGU NJENGA -V- SOPHIA WAITIRI NDUNGU* 2000 eKLR, the Court of Appeal said:

“The concept of a trust is not new. In case of absolute necessity but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

See also *GICHUKI -V- GICHUKI* 1982 KLR 285 and *MBOOTHU & OTHERS -V- WAITIMU & 11 OTHERS* 1986 KLR 171.

25. What then is the evidence led by the plaintiffs in this case to support their claim based on trust? While it is the plaintiff’s case that the suit land belonged to ABEDNEGO prior to its registration following the adjudication process and that ROBERT WASIKE NJALALE the late husband to the 1<sup>st</sup> plaintiff and father to the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs was one of his sons including the 1<sup>st</sup> defendant as pleaded in paragraph 4 of the joint affidavit by the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs, the 1<sup>st</sup> defendant has denied that ABEDNEGO owned the suit land. In paragraph 13 of his replying affidavit, the 1<sup>st</sup> defendant has deponed:

13. “That it is not true that ABEDNEGO NJALALE WASILWA ever owned the land comprised in title NO S. MALAKISI/S. KULIRIRU/133”

He then goes on to state in paragraph 14 of that affidavit as follows:



14. “That JEFFERSON WAKHUNGU WASILWA (my father) was not a son of ABEDNEGO NJALALE WASILWA. The two were brothers and there is no way he (JEFFERSON WAKHUNGU WASILWA) could have been registered as the proprietor of parcel NO 133 (suit land) in trust for the children of ABEDNEGO NJALALE WASILWA and who had his own four sons and whose names are in paragraph 11 herein.”

In paragraph 11 of the affidavit, the 1<sup>st</sup> defendant stated:

11. “That ABEDNEGO NJALALE WASILWA had his own land and when he died, he was buried in that land. Upon his death his four sons namely AYUB WASILWA, DAUDI WANASWA, ROBERT WASIKE and WANAMBISI NJALALE retained the said land. Whereas AYUB WASILWA and ROBERT WASIKE his younger brother retained one portion of the land, DAUDI WANASWA and his younger brother WANAMBISI NJALALE took the other portion. DAUDI WANASWA sold their share (with WANAMBISI NJALALE) and bought another land and which he shared with WANAMBISI NJALALE.”

Earlier in paragraph 9 of his replying affidavit, the 1<sup>st</sup> defendant said:

9. “That ROBERT WASIKE was therefore a nephew to my father JEFFERSON WAKHUNGU WASILWA.”

It is clear to me that no matter how much distance the 1<sup>st</sup> defendant attempts to create between the plaintiffs herein and the suit land, they are in fact part of a family and it is in that respect that the plaintiffs continue to be in occupation and possession of the suit land. A family is defined in BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION as:

“1: A group of persons connected by blood, by affinity or by law especially within two or three generations 2: A group consisting of parents and their children 3: By extension, a group of people who live together and usually have a shared commitment to a domestic relationship. See RELATIVE.”

An extended family is defined in the same DICTIONARY as:

“1: The immediate family together with the collateral relative who make up a clan 2: The immediate family together with collateral relatives and close family friends.”

In his replying affidavit, the 1<sup>st</sup> defendant admitted that JEFFERSON WAKHUNGU WASILWA relocated to Eldoret in 1962 and left the suit land to ROBERT WASIKE NJALALE – see paragraph 17. Then in paragraphs 19, 20 and 21 of the same replying affidavit, the 1<sup>st</sup> defendant deposes thus:

19. “That ROBERT WASIKE subsequently sought my father’s permission to put up a store and a home in the suit land and which permission was granted.”
20. “That ROBERT WASIKE and his wife and children moved into the suit land with the permission and licence of my father, and the applicants have no permanent homes as crops in the suit land.”
21. “That the occupation and cultivation of the suit land by the applicants has all through the years been with the permission of my father.”

I have no doubt in my mind that the plaintiffs are in occupation and possession of the suit land because JEFFERSON WAKHUNGU WASILWA allowed them to do so.



Indeed what the 1<sup>st</sup> defendant has deponed in the paragraphs cited above confirms the same. In paragraph 6 of the joint supporting affidavit by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs, it is stated:

6: “That however, JAFFERSON WAKHUNGU WASILWA left the land in the possession of ROBERT WASIKE NJALALE our father and migrated to CHERANGANI where he stayed until his demise in the year 2004.”

The only reason why JEFFERSON WAKHUNGU WASILWA left the suit land to ROBERT WASIKE NJALALE was because he appreciated that it was family land and that ROBERT WASIKE NJALALE and his family which include the plaintiffs had an interest thereon and the title thereto was held by JEFFERSON WAKHUNGU WASILWA in trust for all the members of the family. Although the 1<sup>st</sup> defendant denies that the suit land was never owned by ABEDNEGO, he did not inform the Court how his father JEFFERSON WAKHUNGU WASILWA acquired ownership of the suit land in his name. Certainly, there is nothing to suggest that JEFFERSON WAKHUNGU WASILWA acquired the suit land as private property including through a purchase. The evidence shows that it was registered in his names by virtue of being part of the family of ABEDNEGO to hold in trust for members of that family which include the plaintiffs.

26. It is also instructive to note that from the time he vacated the suit land in the 1960's and relocated to Eldoret, at no time did he evict the plaintiffs from the suit land upto the time he died in 2004. And even after his death, the 1<sup>st</sup> defendant made no attempt to evict the plaintiffs from the suit land. The belated notice issued by the defendants on 9<sup>th</sup> October 2019 purportedly withdrawing the plaintiff's license to occupy the suit land could only have been a reaction to try and pre-empt any orders that may have been issued by this Court after the plaintiffs had filed this suit four (4) months earlier in June 2019. And the plaintiffs' suit was of course triggered when the defendant stated taking action on the suit land which no doubt would have interfered with the plaintiffs interest therein. For instance, whereas the defendants have produced as part of their documentary evidence notices issued by the Land Registrar Bungoma inviting some persons to attend the correction of a boundary, no evidence was led to suggest there was any boundary dispute involving the suit land.
27. As stated earlier, the defendants suggest that the plaintiffs are mere licencees on the suit land. However, it is also clear that when the LUFU ceremony was held after the death of JEFFERSON WAKHUNGU WASILWA, the plaintiffs' interest in the suit land was recognized. In paragraph 6(a) of the minutes of that meeting held on 11<sup>th</sup> February 2004, it is noted as follow:

“It was decided that in principle late WASIKE NJALALE should be a beneficiary of a piece when the Bitonge land is sub-divided amongst the children of late JEFFERSON WAKHUNGU by immediate family.”

The Bitonge land is no doubt the suit land herein because in paragraph 2 of the said witness under LAND, it is stated:

“LAND

- a. Bitonge – 22 acres
- b. Kahuho – 50 acres”



The certificate of official search in respect of the suit land shows that it's approximate area is 9.0 acres which translates to (9.0 x 2.471) 22.239 acres. In his submissions, counsel for the defendant has made the following submission regarding the LUFU minutes:

“It was not decided that the suit land was to be owned by the family of ROBERT WASIKE contrary to what was pleaded by the plaintiffs. The decision was that the land still belonged to JEFFERSON WAKHUNGU WASILWA and that when land gets subdivided among his children, the family of ROBERT WASIKE could be considered.”

It is implicit, through that submission, that the plaintiffs were more licensees who could be ejected from the suit land at any time. A licensee never has any proprietary interest whatsoever on the land which he occupies. His interest is limited to the terms of the licence. As is now clear, the plaintiffs occupation and possession of the suit land which they have occupied for over 50 years was obviously because it is family land to which they are entitled as part of the family of JEFFERSON WAKHUNGU WASILWA the registered owner thereof. And that is why the plaintiffs were being considered. That consideration was certainly not a favour. It was a matter of right. The title to the suit land was held by JEFFERSON WAKHUNGU WASILWA but it was held in trust for the family of ROBERT WASIKE NJALALE and indeed other members of the family.

28. The SUPREME COURT OF KENYA provided guidance as to what the Court should consider while determining a dispute founded on trust in the case of ISACK M'INANGA KEBIA -V- ISAAYA THEURI M'LINTARI & ISACK NTONGAI M'LINTARI SCOK PETITION NO 10 of 2015 [2018 eKLR]. It said:

QUOTE{startQuote “}

Some of the elements that would qualify a claimant as a trustee are:

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

Applying the above guidelines to this case, I am persuaded that the plaintiffs have made a valid claim to the suit land in trust. They have been in occupation and possession of the suit land from the 1960's long before it was registered in the name of JEFFERSON WAKHUNGU WASILWA on 20<sup>th</sup> June 1972. Indeed the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were born thereon. The plaintiffs occupied it as family land and their relationship with the defendants cannot be described as “tenuous” as to render their claim “idle or adventurous”. No doubt they could have been entitled to be registered as owners and indeed that is why they have approached this Court for it's intervention in a claim directed towards the defendants being the Administrators to the Estate of the registered proprietor thereof.

29. The defendants' counsel has submitted at page 3 of his submissions that the plaintiffs cannot plead a claim based on adverse possession and trust at the same time. Further, that the claim for trust should have been commenced by way of a plaint and the particular of trust pleaded as per Order 2 Rule 4 of



the Civil Procedure Rules. There is no merit in that submission because on 2<sup>nd</sup> February 2021 in the presence of counsel, directions were taken that the Originating Summons be the plaint and the replying affidavit be the defence and counter-claim. Previously, courts have been firm in up-holding the rules of procedure but there is abundant case law that it is not fatal to adopt the wrong procedure so long as the other party is not prejudiced. For example, in *NGATI FARMERS CO-OPERATIVE SOCIETY LTD -V- JOHN LEDIDI & 15 OTHERS C.A. CIVIL APPEAL NO 64 OF 2004*, the proceedings had been commenced by way of a plaint and a defence was filed introducing a counter-claim by way of adverse possession. The Court of Appeal addressed the issue of wrong procedure as follows:

“We have anxiously considered the authorities cited by MR KAHIGA in urging us to fault the procedure adopted by the respondents in mounting the counter-claim but we are satisfied that it was not fatal to the claim. In reaching this conclusion, we are guided by the decision of the predecessor of this Court in *BOYES -V- GATHURE 1969 E.A 385* in which it was held that the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the Court and no prejudice was caused to the appellant.”

By the same token, it cannot be fatal that the plaintiffs sought orders of trust through an Originating Summons which in any case as stated above, was converted into a plaint. And even if that had not been done, that would be no basis to declare it fatal as the courts are guided by the provisions of Article 159 (2) (d) of *the Constitution* to administer justice “without undue regard to procedural technicalities.” The particulars of trust may not have been pleaded but the defendant knew all along that the plaintiffs’ claim in trust was based essentially on the parties family relationship and long occupation and possession of the suit land. The defendants were not in any way prejudiced and they were able to robustly respond to the claim through the 1<sup>st</sup> defendant’s replying affidavit. In any event, the defendants were themselves guilty of the same flaw by filing a counter-claim for eviction through a replying affidavit.

30. Counsel for the defendant made the following submission at page 3 with regard to the alternative causes of action pleaded by the plaintiffs:

“But in the present case, the plaintiff has pleaded two different causes of action. One is ownership through adverse possession. The other one is a declaration of a trust in favour of the plaintiffs. The plaintiffs needed to elect one of the two causes of action. It would not be legally right to plead the two in the alternative.”

In support of that submission, counsel for the defendants cited the decision of *MUNYAO J* in the case of *KIMOJI RUTO & ANOTHER -V- SAMUEL KIPKOSGEI KEITANY & ANOTHER 2014 eKLR*. I have looked at paragraph 23 of that judgment where the judge said:

“In this suit, the applicant asserts that they are entitled to title by way of adverse possession. I do not have any other claim before me, and although there have been various averments in the pleadings and indeed in the evidence that the land was unprocedurally sold and irregularly acquired by the 1<sup>st</sup> respondent, the case of the applicants is not one in which they want to cancel the title of the respondents as having been acquired by fraud. Their case is brought under the provisions of the law seeking land by way of adverse possession and it follows that the contention that the land was transferred to the 1<sup>st</sup> respondent by way of fraud, are irrelevant and are not the subject matter of this suit. The main issue is this suit is whether or not the applicants are entitled to the suit land by way of adverse possession.”



That case does not aid the defendants at all because MUNYAO J was dealing with a situation where the applicants had only pleaded adverse possession but in the course of the trial, they led evidence of the land having been irregularly acquired. In this case as I have already set out in the preceding paragraph of this judgment, the plaintiffs have pleaded a claim founded on both adverse possession as well as trust.

31. On the submission by counsel for the defendants that the plaintiffs could not plead a case of adverse possession and trust in the alternative, no authority was cited for that proposition. However, it is not fatal for a party to plead a claim in adverse possession and in the alternative a claim in trust. That issue was considered by the Court of Appeal in the case of TERESIA WACHUKA GACHIRA -V- JOSEPH MWANGI GACHIRA C.A. CIVIL APPEAL NO 325 of 2003 and it said:

“MR WACHIRA submitted, and he was right on this, that there was no impediment in urging a claim on land on the basis of ‘trust’ as well as ‘adverse possession.’ The decision of this Court in MUTHUITA -V- MUTHUITA (1982-88) I KAR 42 which approved the decision of MADANJ (as he then was) in GATIMU KINGURU -V- MUYA GATHANGI 1976 KLR 253, makes the point clear that in this country the two may well go hand in hand. The issues must nevertheless be properly pleaded and adequately proved on a balance of probabilities.”

32. In my view, and having considered all the evidence herein, I am satisfied that the plaintiffs have proved as required in law that they are entitled to the suit land on the basis of a trust. The defendants cannot therefore evict them and their counter-claim is for dismissal.
33. Having determined the dispute on the basis of a trust, I find that a consideration of the plaintiffs’ claim on the basis of adverse possession will be merely superfluous and an academic exercise. Nonetheless, the view I take of that claim is that parties herein are family. Their occupation and possession of the suit land has always been with the consent of ABEDNEGO and thereafter with the consent of JEFFERSON WAKHUNGU WASILWA after he acquired ownership of the same in 1972. The issue of consent is conceded by both parties. In the circumstances, it cannot be said that the plaintiffs’ occupation and possession of the suit land became adverse to the right and interest of JEFFERSON WAKHUNGU WASILWA or indeed the defendants herein. But of course such right and interest of JEFFERSON WAKHUNGU WASILWA and thereafter the defendants was all along always subject to the plaintiffs’ overriding interests based on trust and for which I have already found in favour of the plaintiffs’. All I can say is that a Court must treat with utmost circumspection a claim to land by way of adverse possession involving family. This Court is not saying that there can be no claim for land by adverse possession involving family especially where it is demonstrated that the land being claimed was in fact the defendant’s private land and any consent that had been previously granted was subsequently withdrawn. In the circumstances of this case, the plaintiffs’ claim based on adverse possession does not muster the threshold for proving such a claim. It must therefore be rejected.
34. Having found in favour of the plaintiffs on the basis of a trust, this Court must go further and determine the trust and also make further orders. Certainly, the plaintiffs cannot acquire the whole suit land taking into account that it is family land. They cannot also be evicted from the whole land and left with nothing. This Court also takes cue from the minutes of the LUFU dated 11<sup>th</sup> February 2004 and



which was held to determine the status of the property of JEFFERSON WAKHUNGU WASILWA at paragraph 6(a) that:

“It was decided that in principle late WASIKE NJALALE should be a beneficiary of a piece when the Bitonge land is sub-divided amongst the children of late JAFFERSON WAKHUNGU by immediate family.”

I did not hear the defendants challenge those minutes of the “LUFU” indeed they were affirmed by the 1<sup>st</sup> defendant who in paragraph 28 of his replying affidavit averred as follows:

28. “That even during the “LUFU” of our late father the applicants and the large family of ABEDNEGO NJALALE acknowledged that the suit land do belong to JEFFERSON WAKHUNGU WASILWA.”

That is not in dispute. The registration of the suit land in the name of JEFFERSON WAKHUNGU WASILWA has never been contested. But in the same minutes, it was acknowledged that “in principle,” ROBERT WASIKE NJALALE “should be a beneficiary of a piece.” That “principle” can only be the trust which this Court has already up-held. Those who presided over the meeting could not have had any other principle in mind and this Court must commend them led by their “PATRON OF THE OCCASION” one JUSTO SIKWATA.

35. That takes me back to where I commenced this judgment. The parties herein would have been the best judges to determine what should be the appropriate “piece” to award the plaintiffs out of the suit land. And because of their firm stand in refusing to negotiate, this Court was starved of any evidence to assist it in determining what would be the best share of each of the parties. In making it’s decision, however, this Court will be guided by the fact that apart from the suit land which measures 22.239 acres, there is another parcel of land at KAHUHO measuring 50 acres. There are other parcels of land at ELDORET and ZIWA whose details were not available as per the “LUFU” minutes. There is no evidence that the plaintiffs have any other land and the 1<sup>st</sup> defendant conceded during cross-examination by MR WERE that:

“I confirm that the plaintiffs live on the suit land. They started living there in 1960.”

There is also no evidence that the defendants live on the suit land. They are therefore the beneficiaries of other parcels of land belonging to their late father. Doing the best I can in the circumstances, I will share the suit land equally between the parties who appear to be the only ones laying a stake thereto.

36. Hopefully, this judgment shall bring this dispute to an amicable end. However, should it escalate, there is no end to conflict management. I will therefore leave the parties with the following verse from the Book of MATHEWS 18: 15–17:

“If your brother sins against you, go and tell him his fault between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you that every word may be confirmed by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the Church, and if he refuses to listen even to the Church, let him be to you as a Gentile and a tax collector.”

37. Ultimately therefore this Court makes the following disposal orders:

1. The defendants’ counter-claim is dismissed.
2. There shall be judgment for the plaintiffs against the defendants as follows:



- a. A declaration be and is hereby issued that the land parcel No South Malakisi/South Kulisiru/133 is registered in the name of Jefferson Wakhungu Wasilwa in trust for the plaintiffs and the defendants in equal shares.
  - b. That trust be and is hereby determined.
  - c. An order is made that the defendants do within 30 days of this judgment surrender for cancellation the original title deed for the land parcel No South Malakisi/South Kulisiru/133 by the Land Registrar Bungoma.
  - d. Thereafter, the County Surveyor and Land Registrar Bungoma to demarcate the land parcel No South Malakisi/SOUTH Kulisiri/133 into to equal portions one to be registered in the joint names of the plaintiffs and the other in the joint names of the defendants.
  - e. The parties shall meet the respective costs of survey and registration of their portions.
  - f. In default of (c) above, the Land Registrar Bungoma shall proceed and cancel the title deed to the land parcel No South Malakisi/South Kulisiru/133 notwithstanding the absence of the original title deed.
  - g. The defendants shall jointly execute any documents that may be necessary to facilitate the sub-division and registration of the two parcels as above and in default, the Deputy Registrar shall be at liberty to do so on their behalf upon request.
3. As the parties are family, each shall meet their own costs.

**BOAZ N. OLAO**

**JUDGE**

**9<sup>TH</sup> FEBRUARY 2023**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA BY WAY OF ELECTRONIC MAIL  
ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023. RIGHT OF APPEAL.**

**BOAZ N. OLAO**

**JUDGE**

**9<sup>TH</sup> FEBRUARY 2023**

