Kiamba v Kamilinchui & 6 others (Environment & Land Case 60 of 2019) [2023] KEELC 17262 (KLR) (3 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17262 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 60 OF 2019

CK NZILI, J

MAY 3, 2023

BETWEEN

JASON KIAMBA ..... PLAINTIFF

AND

FRANCIS KAMILINCHUI ..... 1ST DEFENDANT

FESTUS KINYUA ..... 2ND DEFENDANT

JAMES KAILEMIA ..... 3RD DEFENDANT

EDWARD KAIBERA ..... 4TH DEFENDANT

JOSEPH MUNGANIA RUNJU ..... 5TH DEFENDANT

JULIUS NTONGAI ..... 6TH DEFENDANT

KAYUYU M'TAKUABI ..... 7TH DEFENDANT

JUDGMENT

1. The plaintiff through a plaint dated 25.3.2014 and being the registered owner of LR No. Kianjai/Mituntu/77 measuring approximately 13.76 ha (hereinafter the suit land) sued the defendants who are his relatives for trespass to his land. He sought for a declaration that he is the sole owner of the land, vacant possession/eviction and permanent orders of injunction. The plaint was accompanied by a list of witness statements and documents among them a certificate of title, search certificate, extract of the register, correspondence and minutes between the parties. The plaintiff had also filed an application for interim orders which was compromised and a ruling delivered on 19.7.2014 to the extent that parties in occupation to continue with the same but not to carry out any permanent developments on the land.

2. Through a defence and counterclaim dated 18.12.2014, the defendants admitted that whereas the plaintiff was the registered owner of the suit land, they have rightly been in occupation of portions of

the suit land measuring approximately 15 acres for over 50 years and had therefore acquired title to it to the exclusion of the plaintiff. They termed the plaintiff's cause of action as statute-barred.

3. In the counterclaim, the defendants averred that they settled on the suit land in 1961, grew up there to adulthood and have since been in open, uninterrupted use, occupation and possession of 2.50, 2.50, 2.00, 2.00, 2.00, 2.60, 2.00 acres respectively of the suit land for a period well in excess of 12 years hence extinguishing the plaintiff's title to the cumulative 15 acres of his land.

4. In the alternative, the defendants pleaded in the counterclaim that they had occupied, possessed and developed extensively their respective portions as pleaded above, with the full knowledge and approval of the plaintiff who was therefore estopped from denying them their rights and title to land, which he holds in constructive trust for their benefit. The defendants averred that the plaintiff had breached the trust by allowing and watching them extensively occupy and develop the said portions of land without notice to vacate, by representing to them that they were free to develop the land as their own and for failing to warn them that he would claim the same from them. The prayers in the counterclaim were for the court to dismiss the suit and instead declare them as entitled to the said parcels of land through adverse possession or in the alternative, to declare that the plaintiff' holds 15 acres of the suit land in trust for them, which the plaintiff ought to transfer to them.

5. The defence and counterclaim was accompanied by a list of witness statements dated 25.7.2014, and 14.8.2014 authority to execute documents dated 15.7.2019. By a settlement dated 22.2.2015, the 6th defendant compromised his claim with the plaintiff. The court was never moved to adopt the settlement, neither is it clear if a decree to that effect was extracted and executed.

6. At trial, M'Tuambi Kimbui testified de bene esse as PW 1 on 21.7.2015 due to his advanced age. He adopted his witness statement as his evidence in chief. As a brother to the plaintiff and father to the defendants, he told the court that he never owned or raised any claim over the suit land, which exclusively belonged and was acquired solely by the plaintiff. He confirmed that the defendants were his children. His evidence was that before moving to Kalithiria area where the suitland is situated, he was living at their ancestral land in Buurindaya area, which land he had told the defendants to move to as their entitlement from him.

7. Similarly, PW 1 said that during many family meetings, he made it clear to the defendants that he had no claim over the suit land at Kalithiria. In cross-examination, PW 1 told the court that he moved into the suit land before Kenya became independent in 1963, which land was already occupied by the plaintiff from 1957 or thereabout.

8. PW 1 said that he was the one who had requested and was permitted by the plaintiff to move into his land in order to take care of it and following disagreements with their father. His testimony was that he sought permission to move into the land while the plaintiff was out of the country on studies, whereby he moved in with his three wives and two little children, while the rest of his children including the defendants were left at Buurindaya area, since they were already grown-ups.

9. PW 1 further testified that though some of his children were adults living in Nairobi and Buurindaya, the 2nd defendant recently moved into the suit land and erected a temporary structure for his wife. PW1 also admitted planting some coffee trees on the suit land over the period he had been in occupation of the same. PW 1 admitted that only the 5th, 6th and 7th defendants were living at the suit land while the rest of his children were at the ancestral land. Regarding his wives, PW 1 told the court that two of them were deceased and buried at the suit land, while the 3rd one was living with one of his children elsewhere. PW 1 admitted that their late father Kimbui was also buried on the suit land which the plaintiff never objected to.

10. Additionally, PW 1 acknowledged that the defendants alongside him had built on one side of the suit land, while the plaintiff was on the other side. He however denied that there was an access road, other than a temporary fence between the two portions. He also denied that the fence or the access road was the official boundary separating the two portions.

11. Regarding a notice to vacate the land when the plaintiff returned from overseas, PW 1 denied the same since there was an agreement between him and his brother to occupy the land. PW 1 could not remember the parcel number of his land at Buuridaya area. He however said that he had subdivided among his children including the defendants, who eventually acquired title deed of approximately 3 acres each.

12. PW 1 said that the plaintiff was all aware of the developments made by the defendants on his land. He denied ever sharing the plaintiff's land in favour of the defendants as pleaded in their defence and counterclaim, since each of them was merely cultivating the pieces of land, initially under use by their mothers.

13. In re-examination, PW 1 reiterated that the suit land belonged to the plaintiff since his land measuring approximately 15 acres was based at Buuridaya area . PW 1 told the court he only moved into Kalithira with the plaintiff's consent with no attendant ownership rights. The court also noted that PW 1 was born in 1922 as per his ID card number 2427xxx that despite his old age, he was consistent in his evidence.

14. Jason Kiamba Kiambati, the plaintiff testified as PW 2 and adopted his witness statement dated 25.3.2014 as his evidence in chief. He produced copies of certificate of title, an official search, an extract of the register and a bundle of correspondence with the defendants as P. Exh's No. 1-4, respectively. His evidence was that his elder brother in 1962 requested him to allow him stay on his land for a while, while he was in school overseas to which he agreed. PW 2 told the court that when the defendants were told to vacate, they said that they had on the suit land for long and demanded for a share contrary to the agreement with PW1. Subsequently, PW 2 told the court that he eventually gave the defendants a notice to vacate his land, since he had already surrendered his share of his ancestral or family land at Buuridaya area to his brother for the benefit of the defendants.

15. In cross-examination, PW 2 said that the suit land initially fell under a government settlement scheme which he was allocated in 1957 as one block. PW 2 said that his brother, PW 1 was illiterate, a farmer and also a herder. He could not confirm whether PW1 had also applied for a plot in the scheme adjacent to his land measuring approximately 17 acres and which he allegedly consolidated as part of the suitland.

16. PW 2 denied that there existed an access road dividing his land with that allegedly belonging to PW 1. He however admitted that PW 1 moved into the land in 1962 while he was living in Britain. PW 2 said that the request for the land by PW 1 came to him through a friend by the name of Kiruru who had passed by the United Kingdom en-route to the USA. PW 2 told the court that when he came back from the UK in 1964, he reportedly found PW 1 together with his 3 wives and children on the land, without his consent. Additionally, PW 2 said that he could not clearly remember if he had made an application for the suit land in 1957 or 1965 from the government.

17. As to the request to vacate the land, PW 2 admitted that PW 1 had requested to be allowed to stay on the land since he was elderly. He denied that soon after PW 1 testified, he chased him away from the land. He could not confirm if the defendants were all born on the suit land. PW 2 admitted that PW 1 had helped him a lot both as a child and in his education. As to whether the two wives to PW 1 were buried on the suit land, PW 1 acknowledged the same.

18. It appears that this suit was transferred to Tigania law court at this juncture, but was eventually retransferred to this court, following a court order.

19. By the consent of parties, directions were given by this court on 2.10.2021 that the matter proceeds from where Hon. Mr. Justice P.M Njoroge left it.

20. Loice Nyegera Kimbui testified as PW 3. She stated that she was taking over the suit as the legal representative of PW2 following his death during the pendency of this suit. She adopted the evidence of her late husband, her evidence-in-chief, since he had testified before his death together with his witnesses. PW 3 produced a death certificate and a copy of the limited grant ad litem as P. Exh No's 4 & 5. It is worth noting that even though the PW3 was allowed to substitute the initial plaintiff, no pleadings were amended to reflect her status in this suit. Similarly, the defence and counterclaim was not amended to reflect her name.

21. Francis Kamilichai, the 1st defendant testified as DW 1. He adopted his witness statement dated 13.7.2019 as his evidence-in-chief. His testimony was that the suit land was initially a settlement scheme which his late father had acquired through allocation in 1957. He did not produce any letter of allocation or minutes to that effect from the Settlement Fund Trustees.

22. DW 1 told the court that he builds his first house on the suitland in 1965 after his late father showed him where to cultivate. He eventually got married on the suitland and has been living to date. Similarly, DW 1 said that when his late mother and stepmother passed on, they were all buried at the suit land without any objection from the plaintiff. DW 1 said that two of his sisters and a grandmother were also buried on the suit land by his late father as per Ameru customs and rites.

23. DW 1 said that he had lived on the land knowing that it was his home and had exclusively developed it over the years with the full knowledge, consent and approval of his uncle, the plaintiff until May 2009, when the PW2 disclosed that the land was not theirs. He confirmed that he had all along been knowing the land as belonging to his father. He urged the court to make declaratory orders in his favour on account of customary trust and or adverse possession.

24. DW 1 said that he had not conducted an official search to establish ownership of the land between 1957 and 2009. DW 1 admitted that the suit land was not ancestral in nature but was an acquisition from the government through the Settlement Fund Trustees. Further, DW 1 told the court that his siblings including the 3rd, 4th and 5th defendants have been living on the land as well as four other young ones, as per the respective portions pleaded in the defence and counterclaim.

25. Edward Kaibiria Kariuntu Nchiri, Festus Kinyua and James Kailemia. Hariet Kayuyu testified as DW 2, DW 3, DW 4, DW 5 and 6 respectively. They all adopted their witnesses statements dated 15.7.2019 and 25.7.2014 respectively. They all associated themselves with the testimony by DW 1 as to the occupation and developments in their respective portions as per the defence and counterclaim.

26. In cross-examination, DW 2 told the court that his late father allegedly wrote a letter dated 27.11.2013. He disputed the contents since it was PW1 who had initially showed the defendants where to occupy and establish their homestead on the suit land. He said that PW 1 was also the one who told him where to erect a dispensary which was eventually taken over by PW 2. DW 2 admitted that their ancestral land was at Kianjai area in another location, apart from the suit land. He denied that the plaintiff had allegedly given up his share of the ancestral land for the defendants to be settled.

27. DW 2 said that while they were young PW1 told them where to occupy as their land, away from the plaintiff's own portion. He insisted that between 1962 and 2009 none of the defendants was aware that the land under their occupation belonged to the plaintiff. DW 2 further said that it was the plaintiff

who encouraged them to develop the suit land and that at no time did he stop any of the defendants from making any permanent developments on it.

28. DW 3, a neighbour of the defendants testified that the 3rd defendant was his in-law. She also confirmed that the defendants have been occupying the suit land alongside the plaintiff for many years. DW 4 was sued as the 2nd defendant. He told the court that he had been occupying 2 ½ acres of the suit land, where he planted coffee, miraa and assorted seasonal crops, established a permanent homestead with a perimeter fence all round it. He told the court that each of the defendants had separate and distinct portions away from the plaintiff's homestead. In his view, the total acreage of the plaintiff's land was around 34 acres, half of which the defendants were claiming. His view was that the plaintiff erroneously registered the entire land as his despite their occupation. Further, DW 4 told the court that the registration in the sole name of the plaintiff was against the understanding his late father had with the plaintiff and that none of them was supposed to acquire more than 15 acres from the Settlement Fund Trustees.

29. DW 4 said that the plaintiff had erected a funeral home and a hospital on their land. Further, DW 4 said that his late grandfather was buried on the portion he was now claiming. He denied that his entry into the land was illegal since it was PW 1 who had allowed him therein. DW 4 said that his late father trusted his uncle so much since he was like his own son whom he had educated and taken care of until his adulthood.

30. On the other hand, DW 5 told the court that he had no documents to show that his late father was a beneficiary of an allocation of land by the Settlement Fund Trustees. He termed the witness statement and the evidence by his late father as not only confusing but also misleading due to his old age, sickness and senility. He stated that after the late father had testified in favour of his uncle, the plaintiff's family chased them away and stopped the burial of his late father at his initial residence, where he had lived since 1957.

31. DW 6 told the court that he was born in 1961 and her real biological father was the plaintiff which information she had gathered from her late mother. She told the court that it was her late father who showed her a portion to occupy, distinct from that occupied by the plaintiff, which land she has been tilling and had erected a permanent house.

32. Before the defendants could close their defence, Mr. Murango Mwenda learned counsel for the defendants made an application for a scene visit in the presence of the parties and the Deputy Registrar of this court. Following this, an order was made on 15.2.2023 and a report dated 10.3.2023 was filed with the court. The report covered the nature, features and size of the land under actual use and occupation of each of the parties to this suit.

33. Subsequently, parties were directed to file written submissions which the plaintiff filed dated 27.3.2023. The plaintiff submitted that a person seeking for adverse possession had to establish that he has been on the land without force, without secrecy, without permission for the statutory period of 12 years, with the sole intention of holding it for himself.

34. Relying on *Waweru vs Richu C.A 122 of 2001 & Wanje vs Sakwa* (1984) KLR, the plaintiff submitted that the entry into the land by the defendants was permissive in nature as pleaded and supported by the evidence of PW 1 and PW 2.

35. Further given the admitted licensee's rights by PW 1 who was the father to the defendants. The defendants were unable to demonstrate to the court if such license or permission was ever terminated and if so when. Reliance was placed on *Benjamin Kamau Murima & others vs Gladys Njeri* NRB C.A No. 213 of 1996, *Leonard Otwori Juma vs Francis Ongaki Mamboleo* (2022) eKLR, Mbira vs Gachuhi

Nrb HCC No. 2826 of 1997, Ngati Farmers Cooperative Society Ltd vs Cuncillor John Ledidi & 15 others (2009) eKLR.

36. As to the concepts of dispossession and discontinuance of possession, the plaintiff submitted that the mere fact that a party did not use his land either by himself claiming through him was not sufficient to found adverse possession as held in Wanje vs Sakwa No. 2 (supra), Seventh Day Adventist Church E.A Ltd vs Isaya F.C.S Nyamira ELC NO. 42 of 2021 on the proposition that possession arising from permissive entry, occupation and use by virtue of mutual understanding and affinity did not give rise to adverse possession since adverse possession was meant to be used by people who enter or remain on another's land with no rapport or affinity.

37. The plaintiff submitted that the behaviour exhibited by the defendants was yet another case of ungratefulness gaining momentum in the Kenyan society where the concept of adverse possession was being distorted by some misguided people. The plaintiff urged the court to find that he had willingly allowed his own brother to occupy the land, earn some income and educate his children, who are now grown-ups but were turning against their uncle to bite the hand that feedeth them. Relying on Seventh Day Adventist Church (supra) the plaintiff submitted that the court should in the words of the judge in this authority not allow such ungrateful, immoral, horrifying and unconscious behaviour which is contrary to the cherished positive cultural practices and traditions aimed at providing social and economic security in times of misfortune befalling a member of the society.

38. Further, reliance was placed on Wambugu vs Njuguna (1983) KLR 172, Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR & Mbira vs Gachuki (2002) 1 EARL 137.

39. On the issue of customary trust, the plaintiff relying on Peter Murithi Wanjohi and others vs John Mwangi Wachira (2022) eKLR which was cited with approval in Peter Moturi Ogutu vs Emelda Basweti Mdotonda & others (2013) eKLR and Halsbury's laws of England 5th Edition volume 48 at paragraph 690, the plaintiff urged the court to find that the defendants were unable to plead and prove both constructive, resultant and customary trust, more so given the evidence of their own father that he had no share on the suit land, since it was neither ancestral land or acquired through his contribution.

40. The defendants on the other hand have submitted that as per their amended defence and counterclaim, they are entitled to 15 acres of the plaintiff's land which they have occupied for over 50 years hence any claim by the plaintiff for the land was already statute barred. The defendants submitted that that they have occupied and developed their land since 1965, grew up there to adulthood and which occupation and possession has not been interrupted by the plaintiff which evidence was not challenged. In the alternative, the defendants submitted that due to the foregoing undisputed facts, the plaintiff was estopped in law from denying them their rights and title to the land, which he continues to hold in constructive trust for them. Further, the defendants submitted that the scene visit report had comprehensively captured the nature, features and size of the land under their actual occupation and use.

41. Regarding computation of time, the defendants submitted that the entry into the land occurred in 1961, while the plaintiff returned to Kenya in 1965 when he was alleged to have asked PW 1 to move out alongside them, which demand was declined. So the defendants submitted that by the time this suit was filed on 25.3.2014, any action based on trespass was statute barred by dint of Sections 4 (2) of the *Limitation of Actions Act*.

42. Coming to Section 7 of the Act, the defendants submitted an action for the recovery of land had to be filed before 12 years expired in which case the latest the suit should have been filed was 1977. Therefore, the defendants submitted that any suit brought 53 years after the alleged right of action accrued was time-barred. As to adverse possession, the defendants submitted that they had established

the ingredients as per Section 38 (1) & (2) of the *Limitation of Actions Act* as held in the case of Githu vs Ndeete (1984) KLR 774. Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR & Kimani Rutere vs Swift Rutherford and Co. Ltd (1980) KLR 10. The defendants submitted that the evidence by the 1st defendant (DW 1, 2nd defendant, (DW 4) 3rd defendant (DW 5) and 4th defendant (DW 2) gave vivid particulars of both the possession and occupation with effect from 1961 as pleaded in paragraph 7 of the defence and counterclaim up to date in a continuous uninterrupted, notorious, open and with the full knowledge of the plaintiff until 2009 when the latter started asking them to vacate the land. Further, the defendants submitted that all their developments were confirmed by the scene visit report, the evidence of DW 3 and PW 1.

43. The defendants submitted that there was no evidence tendered by the plaintiff that he ever utilized the portions under their occupation and or whether the developments therein belonged to him and not the defendants.

44. As to any evidence inconsistent with the pleadings, the defendants submitted that since parties are bound by their pleadings, any evidence led by a party that was contrary to his pleadings would be unreliable and should be disregarded. Fortification of this position by the defendants was on the decision of Mary Onyango vs South Nyanza Sugar Co. Ltd (2019) eKLR. Therefore, the defendants urged the court to disregard the plaintiff's evidence that he allowed PW 1 and the defendants to occupy the land for a period of time, which even assuming that this was so, the defendants' possession and occupation of the land would be seen to have been distinct from that of PW 1, hence protectable, definable and falling on the concept of non-permissive entry without the consent or approval of the true owner.

45. Further, the defendants submitted that the evidence of PW 1 was clear that he was the one who brought them and showed them where to occupy and that if the plaintiff then ordered his brother and wives to leave, it makes no sense why he would have waited for 49 years to file the suit against them or assert his right to the title by evicting them.

46. On whether the plaintiff sought to recover the land, the defendants submitted that they only became aware of the plaintiff's claim in 2009 and 2013, going by the correspondence before the court which in law did not amount to an assertion of title. Reliance was placed on Joseph Ngahu Njigu and others vs Zakayo Mucharu Karimi and others (2010) eKLR, on the proposition that it was not enough to merely write letters for the interruption of the passage of time and that there must be eviction or ejection of the trespasser. Reliance was also placed on Kasuve vs Mwaani Investment Ltd & another (2004) eKLR.

47. As to when time started running, the defendants submitted that the registration and title in the name of the plaintiff was acquired in 1966 while the defendants were already in occupation, hence time started to run for adversity in their favour of them as held in Titus Tigoro Munyi (supra) where the court cited with approval Francis Gitonga Macharia vs Muiruri Waithaka (2005) eKLR. Therefore, by 1978, the defendants submitted that they had acquired 15 acres of the plaintiff's land by virtue of adverse possession.

48. On the concept of constructive trust and the doctrine of estoppel as pleaded in paragraph 8 (a) of the amended defence and counterclaim, the defendants submitted that they have occupied possessed and extensively developed their portions of land openly and with the full knowledge of the plaintiff, who was now estopped from denying them their rights and title to the suit land, which he holds in trust for them and has purported to breach.

49. On the veracity of the evidence of PW 1, the defendants submitted that at the time he appeared in court, he was elderly, illiterate, weak and sickly hence capable of being influenced by the plaintiff to testify in

his favour to the detriment of the defendants. It was submitted that the plaintiff also took custody of their father before his testimony and soon thereafter abandoned him to be taken care by them.

50. Further, the defendants submitted that the plaintiff was unable to explain how he was able to acquire 34 acres instead of 15 acres as was the case with settlement schemes allocation of blocks. On the aspect of an alleged notice to vacate in 1965, the defendants submitted that it was unbelievable that PW 1 was alleged to be elderly, yet he was only 43 years old going by his ID card, showing the date of birth as 1922, only for the plaintiff to await to reclaim in 2009. The defendants relying on Halsbury's Laws of England 4th edition volume 48, paragraph 690, urged the court to find it inequitable to allow the plaintiff to deny them a beneficial interest in the property, more so when the plaintiff allegedly took advantage of the illiteracy of his brother to consolidate the two blocks of land and register it under his name.

51. As to the question of why the plaintiff would allow PW 1 and the defendants to occupy the land for years without raising any claim until 2014, the defendants submitted that the only plausible explanation was that the plaintiff knew that PW 1 and his family had a beneficial interest and were occupying the land as of right, more so having stolen it from them only to start laying a claim during his old age and while PW1 he was senile, frail and manipulable.

52. The defendants submitted that given the circumstances, the law should come to their aid since the doctrine of estoppel catches up with the plaintiff for equity arises out of acquiescence, especially where a party allows the other to spend substantial sums of money developing the property in circumstances giving rise to the expectation that the occupation will not be disturbed and in this case for a period of over 50 years. Reliance was placed on Titus Muiruri Doge vs Kenya Canners Ltd (1988) eKLR.

53. The defendants submitted that a representation could in law be made through silence or inaction of the plaintiff who stood by and watched the defendants spend money and time developing and improving the suit land, in the belief that the property was theirs, hence the plaintiff was estopped from asserting his right over the property. Reliance was placed on John Mburu vs Consolidated Bank of Kenya (2015) eKLR on the doctrine of estoppel by conduct, being a principle of justice and equity, whose foundation was that law should not permit an unjust departure by a party from an assumption of fact, which he has caused another party to adopt or accept for purpose of their legal relationship. The defendants urged the court to find the circumstances of this case raising a constrictive trust as is applicable under Article 10 (2) of *the Constitution*.

54. As to whether the defendants were trespassers to the plaintiff's land as defined by Sections 2 & 3 (1) of the *Trespass Act* cap 294, since there were demonstrations of constructive trust, the land was being held in trust for them, the defendants submitted that after 1978 they acquired overriding interests on the land by virtue of Sections 25 (1) and 28 of the *Land Registration Act* hence extinguishing any claim for trespass. Reliance was placed on Meru Central Farmers Cooperative Union vs Ruth Igoki Rintari & another (2019) eKLR.

55. The court has carefully gone through the pleadings, evidence tendered and the very ingenious, well-articulated and researched written submissions by the two law firms of the parties. The issues calling for the court's determination are:

    i. If the plaintiff is properly before the court as a legal representative of the deceased plaintiff.

    ii. If the defence and counterclaim has included a proper party as a defendant to be entitled to the reliefs sought.

iii. If there are proper pleadings by the parties in support of their claims.

iv. If the suit property was solely acquired by the plaintiff for his own benefit or in trust for his late brother PW 1 and his family inclusive of the defendants herein.

v. If the defendant's entry into the suit land in 1961 alongside PW 1 was with the consent and approval of the plaintiffs.

vi. Whether the occupation, use and developments by the defendants with effect from 1965 up to 2014 were independent of the entry into the land in 1961 by their father and mothers.

vii. What is the nature, extent, features and manner of the defendants use, occupation and developments on the suit land?

viii. If the use of, occupation and developments by the defendants on the suit land amounted to trespass to land so as to entitle the plaintiff the reliefs for vacant possession or eviction.

ix. If the use of, occupation and developments on portions by the defendants amount to adverse possession.

x. If the entry, use, occupation and developments by the defendants on the suit premises was with the knowledge, approval, notice, acquiescence, authority, consent of and in furtherance of any accrued interests known by the plaintiff.

xi. If the plaintiff holds the suit property in trust of the defendants.

xii. If there was a representation by and a legitimate expectation by the defendants during the period of occupation, use and developments thereof, so as to create a proprietary estoppel in favour of the defendants that they were free to develop the land as their own.

xiii. If the settlement of the claims between the 6th defendant and the plaintiff dated 22.2.2015 is valid.

xiv. If the plaintiff rebutted by way of pleadings or otherwise, the claim on constructive trust and the doctrine of proprietary estoppel.

xv. If the defendants have proved and are entitled to the reliefs sought in the counterclaim.

xvi. What is the order as to costs?

56. The primary pleadings in this suit are the plaint dated 25.3.2014, the amended defence and counterclaim dated 18.12.2014 and a reply to the defence and counterclaim dated 19.6.2014. Additionally, it is also quite apparent from the pleadings that there was no reply to the defence and defence to the amended defence and counterclaim filed on 18.12.2014 when the defendants introduced the claim based on constructive trust and proprietary estoppel and the alternative prayers for declarations of constructive trust. The amended defence and counterclaim was also not accompanied by a verifying affidavit or an authority to plead and sign documents on behalf of the other defendants.

57. Further, following the application dated 12.9.2018, Loise Nyegera Kiamba, who testified as PW3 was allowed to substitute the deceased. There is no indication if the initial plaintiff formally sought for and

joined the suit by way of an amended plaint after the application was allowed by the then trial court in Tigania law courts, on 15.11.2018.

58. In the case of Mary Wambui Njuguna vs William Ole Nabala & 9 others (2018) eKLR at issue inte-ralia was whether after an application for substitution was allowed, the defence ought to have been amended to reflect the appellant's joinder in place of her late husband, so as to make her capable of defending the matter as a legal representative as per Orders 8 Rule 3 and 24 Rule 4 of the Civil Procedure Rules. The court held that an application to substitute the legal representative in place of the deceased defendant may be made by any party to the proceedings including the deceased's legal representative. The court on the notion that where there was substitution of a legal representative that the pleadings must be amended to reflect the name of the legal representative, said that where substitution was done, it ,was sometimes necessary for amendment of pleadings to be done to enable the new party to be brought on board and to be served with pleadings for purposes of a defence, more so particularly on substitution at the instance of the plaintiff as opposed to a defendant where no rule requires that the plaint must be amended.

59. In the case of John Kamunya & another vs John Ngigi Muchiri and others (2015) eKLR, at issue was whether parties were unprocedurely enjoined in the proceedings and judgment erroneously entered against them. The court held that since both the 2nd appellants and the and 4th respondent were never served with summons to enter appearance, they were never properly joined into the proceedings, hence could never be parties to the reliefs sought and granted at the High Court so as to be liable for any penal consequences.

60. In Nicholas Arap Korir Salat vs IEBC & another (2013) eKLR, the held that lapses in form and procedure not going into the jurisdiction of the court or the root of the dispute or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to attract punishment on the offending party. See Gladys Njeri Ndirangu vs Edward Kamau Muhindi (2022) eKLR.

61. Order 1 Rule 10 (2) of the Civil Procedure Rules grants the court power at any stage of the proceedings either upon or without the application of either party and on such terms as are just to order that the name of any party improperly joined whether as plaintiff or defendant struck out and that the name of any person who ought to have been jointed to be joined.

62. In this suit, it appears that the initial trial court allowed for substitution but did not direct the pleadings to be amended to reflect the changes. As a consequence, the name of the legal representative PW 3 was not included in any of the primary pleadings. The ends of justice require that the court balances against the injustice and hardship of refusing to determine the suit on merits. As a matter of fact, the legal representative in this suit was not formally joined by way of an amended plaint or an amended defence and counterclaim.

63. The question is whether this court in exercise of its inherent jurisdiction can on its own motion allow the amendments under Section 100 of the *Civil Procedure Act* see Rubina Ahmed and 3 others vs Guardian Bank (2019) eKLR.

64. The court in Anthony Francis Wareham t/a Wareham and 2 others vs Kenya Post Office Savings Bank 2004 eKLR said that it makes no sense to order for the amendments touching on issues of any attack or defence after the trial. The court went on to say that in an adversarial system, a court acts as an umpire who should not descend into the arena of the conflict by forcing on parties' amendments that in their own self-interest did not ask for.

65. The court held that it was a cardinal principle of procedural law that amendments should not be ordered or allowed if they would cause an injustice to the other side. The court overturned the trial

court's order allowing an amendment at the judgement stage which otherwise would have changed the nature of the cause of action and the capacities under which the parties were litigating. The court was empathic that a court should not exercise its powers to order suo moto any amendments after the trial, except to correct minor slips or omissions aimed at perfecting the record.

66. Whereas leave was granted to amend the defence and counterclaim, it appears that the amended defence and counterclaim filed on 18.12.2014 the requisite prayers required filing fees which was not paid for. The counterclaim was also not verified by an affidavit with a duly signed authority to plead by the defendants. Any amendments of pleading such as a plaint and a counterclaim require a verifying affidavit. Additionally, after the initial plaintiff was substituted, the counterclaim, which in law is a cross-suit, was not amended to reflect the new changes and so was the plaint. Further, the plaintiff failed to file an amended reply to the defence and defence to the counterclaim, other than the initial reply to defence dated 19.6.2014. The implications of this have already been determined above.

67. To my mind the anomalies in the respective pleadings go to the very root of this dispute. They were foreseeable by both parties if at all they had exercised due diligence. Parties as masters of their respective claims are bound by their pleadings. It is not the duty of the court to fashion the parties' respective claims and pleadings in the manner that they present their suits. The upshot is that I find PW3 is not a proper party to either the plaint, the amended defence and counterclaim, or the reply to the defence and counterclaim. On the other hand, also there exists no proper amended defence and counterclaim for nonpayment of the requisite filing fees chargeable for a counterclaim over and above other anomalies pointed out in this judgment. This settles issues no's (i) (ii) and (iii) above.

68. The second issue is whether the suit land was acquired by the plaintiff for his own benefit or in the trust of his late brother and by extension his family, including the defendants. The plaintiff pleaded that he acquired the land from the Settlement Fund Trustees upon an application he had made to the government subsequent to which a certificate of title was issued on 7.1.1966. He testified that his ancestral home was in Buurindaya village within Machaku location, where he had left in 1957 and established a permanent home at the suit land situated at Mituntu area. He said that his late father subdivided the ancestral land among his siblings among them PW 1 and that he surrendered his own share to PW 1 for the settlement of use by the defendants. Further, the plaintiff testified that he left to the UK in 1961 to further studies only to come back and find that his brother, his three wives and young children had moved into the suit land, following reported disagreements with his late father. PW 2 said that upon requesting PW 1 to vacate his land, the two agreed that there would be no permanent structures on the land and that the defendants would eventually move out. The plaintiff's evidence was corroborated by PW 1, who confirmed the circumstances under which he moved into the suit land. In support of the acquisition, registration and ownership processes, PW 2 produced the land certificate, a copy of the records, a certificate of the official search, demand notice to vacate to the defendants dated 10.10.2013, a reply by the defendants' advocate's letter dated 18.11.2013, a letter dated 18.12.2013 by the plaintiff in response to the defendant's letter giving a three months' notice to vacate the land, a letter dated 27.11.2013 by PW 1 clarifying that the suit land was not ancestral land and acknowledging that the plaintiff indeed had surrendered his ancestral land's share for purposes of the defendants relocation in 1964 and telling the defendants to move out to the said ancestral land, and lastly a response by the defendants to their father's letter. All these documents were produced as P. Exh's No's 1, 2, 3, & 4 (a), (b), (c), (d), (e) respectively.

69. In their defence and counter-claim, the defendants while admitting at paragraph 3 thereof that the plaintiff was the registered owner of the suit land denied his alleged sole proprietorship or occupation with effect from 1957, his developments thereof, the manner of allotment in 1965, the issuance of a title deed in 1966, his move to UK for further studies, the entry into the land by PW 1 and family

during his absence, his return to Kenya and the demand to PW 1 to vacate the and an undertaking by PW 1 to call out the defendants to move out of his land. Similarly, the defendants also denied any alleged agreement and or an undertaking for to PW1 and his wives to solely occupy the land with no permanent houses. The defendants also denied any alleged taking part of meetings and discussions over the eviction involving family, elders and the local administration. Further, the defendants specifically denied the contents of paragraph 12 of the plaint as to the alleged notices issued to them to vacate the land. To the contrary, the defendants averred in paragraph 4 of the defence and counterclaim that they were on the suit land as of right, were entitled to 15 acres of the suit land due to the 50 or so years of occupation based on adversity. By way of a counterclaim, the defendants averred that each of them was entitled to a distinct share of the suit as itemized in paragraph 7 thereof by virtue of adverse possession.

70. In paragraph 8 (a) thereof, the defendants in the alternative averred that due to the occupation, possession and developments pleaded above, with the full knowledge, consent and or acquiescence of the plaintiff, the latter was estopped from denying their accrued rights and that a constructive trust in favour of them had been established. The defendants prayed for a declaratory order of ownership of the said portions by virtue of adverse possession, and in the alternative based on trust.

71. Sections 24, 25 and 26 of the *Land Registration Act* provides that a title deed or certificate of title is to be taken as a prima facie ownership document by a court in the absence of any fraud, illegality and unprocedural acquisition or if procured through corrupt means. A title deed is also subject to any overriding interests as provided under Sections 25 (1) and 28 of the *Land Registration Act* as read together with Sections 7, 37 & 38 of the Limitations of Actions Act. See Githu vs Ndeete (supra), Titus Kigoro Munyi vs Peter Kimani Mburu (supra) Kimani Ruchire vs Swift Rutherfold & Co. Ltd (supra), Mary Onyango vs South Nyanza sugar Co. (supra), Joseph Ngahu Njigu and others vs Zakayo Macharu Kariuki & others (supra).

72. Other than pleading and testifying that the plaintiff alongside PW 1 acquired the land jointly; that the plaintiff took advantage of the illiteracy of PW 1; that the land occupied by the defendants was allotted to PW 1 by the Settlement Fund Trustees and lastly that a constructive trust was envisaged, no material was placed before the court to the effect that the defendants collectively or individually made a follow up to the regularization of their claim on behalf of PW 1 on the 15 acres share alleged to have belonged to their father. The source or the basis of those averments, evidence and or the claims was also not substantiated, be it from the allotting authority or any other relevant body which was involved in the process of allocating blocks of land in the settlement schemes at the time. See E.M Ngure vs DLASO Nyandarua & others (2017) eKLR.

73. Apart from this, the defendants urged this court to find that the evidence of their father, PW 1 was unreliable, unbelievable and or unduly influenced by the plaintiff to deny the obvious facts out regarding their occupation and possession since PW 1 was the one who had showed them where to live and establish their homes in the first instance.

74. In the case of John Kanyungu Nyogu vs Daniel Kimani (2000) eKLR it was held that a court could only decide a case on a balance of probability if there was evidence to enable it to say that it was more probable than not on a given fact. The onus was on the defendants to raise a rebuttable presumption of any trusteeship of the suit land by the plaintiff in the manner in which he acquired. The defendants had to establish as a matter of fact, that the plaintiff's land was inclusive of the portions allegedly belonging to PW 1. The input of the allocating authority on who applied for and succeeded in the allotment between PW 1 & PW 2, in my view was paramount to lead any credence to the assertions by the defendants on this point. In the absence of a rival or a credible version, the history of the root of the title as given by the plaintiff and supported by PW 1 appears more probable than that given by the defendants and their witnesses.

75. In the case of John Mwangi Ngania vs Mary Mukiru (2017) eKLR, the court held that settlement schemes were ordinary set up for the needy people, mostly displaced from elsewhere. Further, in Chege Mbuthia vs Mary Nyawira (2019) eKLR as cited with approval Sally Mbogo vs John Mugeni Gitau (2023) eKLR, where the court said that there was nothing before court showing that the plaintiff was ever in the list of the squatters and or was actually allocated the land. See also Stephen Nyaparaf & 2 others vs Provincial Director of Settlement and others (2019) eKLR, Sarah Jelangat Siele vs AG and others (2016) eKLR.

76. In this suit, PW 1 never testified that he was either a squatter or an applicant to the suit land alongside the plaintiff. Similarly, PW 1 did not testify on whether he applied for a plot allocation from the settlement scheme and perhaps told the plaintiff to make a follow-up for the same on his behalf alongside his own application for a share. PW 1 did not testify if he ever harboured any interest over any portion of the settlement scheme land apart from the suit land.

77. The plaintiff's evidence that the ancestral land was available after he had surrendered his share to PW 1, so as to settle the defendants was not challenged at all. As much as the defendants have urged the court to ignore the evidence of PW 1, unfortunately, his letter produced as P. Exh No. 4 (e) was not subjected to any forensic analysis to form a basis, that it was not authored by him or prove that its contents were false or unbelievable on account of any alleged mental infirmity. No medical records were availed to make the court doubt the mental capacity of PW 1. Even in his testimony before the court, PW 1 did not appear as if suffering from any lapses of his memory. The defendants also failed in their defence and counterclaim or through evidence before the court, to deny that they were not parties to or were not beneficiaries of the ancestral land at the Buurindaya area, part of which belonged to the plaintiff and PW 1.

78. Even assuming that PW 1 had told the defendants that he had been allocated the suit land by the Settlement Fund Trustees next to the plaintiff's land, nothing has been produced to show that the defendants ever sought to ascertain the truthfulness of the alleged assertions from the Settlement Fund Trustees. Instead, all the defendants testified that it came as a shock to them when in 2009 and 2013 the plaintiff ordered them to vacate the suit land. If that be so, it is quite apparent that the defendants were not vigilant enough to assert their rights over the suit land before this by either confronting the plaintiff to surrender the share alleged to be belonging to their father and or the earliest opportunity possible in 1978 to file a suit based on adverse possession and or breach of trust.

79. Further, to assert that the plaintiff unduly influenced PW 1 to denounce his rights against them, the defendants did to tender any evidence in support of the assertion that the land had always belonged to PW 1 and by extension themselves since the time of the allocation. An intention or an inference based on trust must have basis for this court to make a presumption of its existence. The court never infers or presumes trust unless in cases of absolute necessity. The whole documentation leading to the allocation, registration and acquisition of a suit land must point to an intention to found a trust.

80. In the case of Loise Wanjiru Kinuthia vs Johnson Muigai Njami (2017) eKLR, the issue revolved around a brother to the defendant and the registered owner of the land on a settlement scheme, said to have been a tenant at will, with no attendant rights or interests thereon. It was expected upon termination of the tenancy vacant possession shall be given. His defence was that a trust had been created in his favour or in the alternative the occupation amounted to adverse possession. Evidence tendered by the District Settlement Officer did not point out any intended trust during the allocation or any objection to the allocation to his brother. The claimant had also admitted that he was an invitee to the land, as he looked for money to buy his own land. The court held that as a tenant at will, he was occupying the property with the landlord's permission. The court cited with approval Eunice

Karimi Kibunja vs Mwirigi M'Ringera Kibunja (2013) eKLR, on the circumstances to consider and the principles to apply for a claim for adverse possession. It held that a tenant at will could not claim ownership of the land since no time had started to run in his favour. The court there was interruption of time once a request to vacate was made and a suit filed for eviction. Further, the court held that had the defendant entered the land as a trespasser or demonstrated the type of his occupation, what he did on the land, other than stating that he was invited on the land by his brother, the position would have been different. The court said that the onus was on the defendants to tender actual evidence of any occupation on the suit land. The court cited with approval Mwangi and another vs Mwangi (1986) eKLR where it was held that registration of a title to land was a creation of law and one must look into the circumstances surrounding the registration in order to determine whether any creation of a trust was envisaged. Eventually the court held that it was not persuaded that a constructive trust was created or arose during the registration as per Section 28 (b) of the *Land Registration Act*.

81. Applying the foregoing principles and analysis to the circumstances of this case, I take the view that the defendants have completely failed to establish that there was an envisaged or intended trust at the time the land was registered in favour of the plaintiff. Further, I find that the defendants were unable to substantiate their claim that their occupation and that of PW 1 was independent of the land owned by the plaintiff. Similarly, I find no material produced to make an inference that either PW 1 or the defendants were the intended beneficiaries to the suit land as at the time a title deed was issued in 1966, in favour of the plaintiff. These findings, therefore, settle no's (iv), (v), (vi) and (xi) above.

82. The next issues are numbers (vii), (ix), (x) whether the occupation by the defendants was and is adverse to the rights of the registered owner. Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, the court cited with approval Mwinyi Hamis Ali vs A.G & another Civil Appeal No. 125 of 1997, that adverse possession would not apply where the possession was by consent or permission of the true owner and that in a court of law, sympathy took a second stand since a court is governed by statutes. Further, the court cited with approval Wambugu vs Njuguna (supra) that where a claimant was in exclusive possession of the land with leave and or on license by the true owner, time would only begin to run and adversity would only start once the license was terminated.

83. In the case of Albert Fred Ekirapa vs Nyongesa Sirari & 5 others (2017) eKLR, the court cited with approval Mbira vs Gichuhi (2003) 1 EALR 137 that a person seeking adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period of 12 years without interruption. The court further cited with approval Wambugu vs Njuguna (supra) that the key concept of dispossession and the discontinuance of possession by the actual owner, through acts inconsistent with his enjoyment of the soil for the purpose of which he intended to use it, have to be proved.

84. Regarding claims based on both the breach of trust and adverse possession, the court in John Murigi vs Joseph Muiruri & others (2015) eKLR cited with approval Salesio M'Itunga vs M'Ithara & others (2015) eKLR, on the proposition that trust was a question of fact and had to be proved by evidence on a balance of probability. Further, in Mount Elgon Beach Properties Ltd vs Kalume Mwanogo Mwangaro & another (2019) eKLR, the court cited with approval Kilimo Shutu & others vs Godfrey Karume (2017) eKLR, that exclusive possession for 12 years alone could not find a claim on adverse possession. The court also cited with approval Ramco Investments Ltd vs Uni-drive Theater Ltd (2018) eKLR that the demonstration of any existence of possession and the control of the disputed portion the dispossession of the true owner, the intention to possess and the assertion of rights inconsistent with those of the true owner were the key consideration in adverse possession. The court also reaffirmed the principle in Wambugu vs Njuguna (supra) that the proper way of assessing any proof of adverse possession was whether or not the title holder had been dispossessed or had discontinued his possession

and not whether or not the claimant had been in possession of the land for the statutory period of 12 years. The court went on to state that an adverse possessor had to prove when he came into possession, the nature of his occupation, if the true owner knew of the possession, for how long he had possessed the land and if the possession has been open and undisturbed for a period of 2 years.

85. In this suit, the houses said to exist on the suit land belonged to the three wives of PW 1 and not the defendants. Two of the defendant's late mothers were said to be buried on the suit land alongside some of their deceased children. While admitting those facts, the plaintiff and PW 1 testified that the burial of the deceased's per se could not amount to an acknowledgement of the defendants' rights to own the land as of right or amount to an inference of advance possession.

86. No evidence was adduced by the defendants that they possess any capacity to sue for and on behalf of the estates of their deceased mothers. In the absence of letters of administration, they cannot advance a claim based on adverse possession on behalf of their mothers.

87. On the aspect of an alleged gift of the land by PW 1, acquiescence and any alleged independent claim to adverse possession the court in Songoi vs Songoi (supra) cited with approval Losa Abdul Gaffer (1996) ICC 639, a decision by the Supreme Court of India, that an appellant could not found his claim to possession of the land as a gift from his father and at the same time assert a claim on the land founded on adverse possession. It held that the claim was unsustainable since the claimant's father had no proprietary interest in the land worthy gifting to him. The court found no evidence the applicant had been on the land with the intention to dispossess he had no knowledge that the respondent was the registered owner and that any developments thereof were made while aware that his entry and occupation of the land was under challenge.

88. In this suit the court has already made a finding that the defendants came to know that the land belonged to the plaintiff in 2009 and 2013 respectively. The plaintiff and PW 1 had told the defendant to vacate the land by 2009 and 2013. Therefore, by the time this suit was filed in 2014 the statutory 12 years had not elapsed. The assertion of the rights of the true owner had occurred. An effective entry to the land had occurred by the true owner hence interrupting any occupation thereof. Any occupation from 1961 to 2009 or 2013 per se did not prove adverse possession since PW 1 knew as early as 1965 that the land he was occupying the land together with his wives and the family amounted ot tenancy. This subsisted until 2009 and 2013. Coupled with this is the known concept among Africans that they occasionally accommodate relatives to their parcels of land in the spirit of the African milk of generosity and kindness. In Peter Muchoki vs Elias Mwororo Kamau (2018) eKLR the court cited with approval Mbui vs Maranya (supra) the words of Kuloba J as he then was, that there were many people who by a gentleman's agreement all over the country were actually living on the land of their friends or relatives and would not think of claiming or losing title by adverse possession, and that a court of law should not lose sight or lack knowledge of this customary practice. Customary law forms part of the Kenyan state.

89. In Muchoki (supra) the court said such a concept was relevant today and that there was a presumption of consent, where relatives were allowed to occupy another's land, absence of which the burden lies with who was claiming adversity to the title.

90. Applying the foregoing case to the facts of this suit, I find no basis to doubt the gentleman's agreement that had existed between PW 1 & PW 2 whose relationship, the defendants have acknowledged in their testimony and have not denied the circumstances under which PW 1 left the ancestral home and sought custody or accommodation from the plaintiff. The defendants also have acknowledgement that PW 1 after his demise was interred outside the suit premises.

91. To my mind and as held in Elvis Kosgey and another vs Gilbert Kosgey and 2 others (2016) eKLR, the version by the defendants as to gift from PW 1 to find the adverse possession has been refuted by the

PW 1 & PW 2. More importantly, a mere fact that the defendants were born in the suit land does not entitle them on that basis alone to adverse possession.

92. The dates of birth of the defendants further show that by 1961 they were already adults. Therefore, they should have not cling on their parents to assert any adverse rights and or gifting to the land. In my considered view even if the plaintiff accommodated the defendants on the suit land alongside their parents, that by itself did not reasonably qualify them to purport to destroy such a cherished customary ideal based on a sound cultural foundation.

93. As to the demonstration of acts inconsistent with those of the true owner of the land, none of the defendants produced any cogent and tangible evidence of the exclusive ownership and developments inconsistent with the rights of the true owner. No photographic evidence or agricultural officer's report on farming activities or reports from coffee factories on any cherries delivered by the defendants, some approved building plans for any developments, licenses or permits to operate the hospital or a land surveyor's reports showing the exact sizes and distinct developments made by each of the defendants on the portions claimed were tendered before this court. The scene visit report contradicts the defendant's evidence that they have permanent homesteads on their respective portions. What was found on the ground by the Deputy Registrar was materially different from what was pleaded and oral evidence in court.

94. The defendants acknowledged that the plaintiff had existing permanent buildings on the suit land. They also admitted that the plaintiff blocked a road of access to their land and enclosed some of the portions allegedly belonging to them. The defendants have been unable to substantiate the claim that the plaintiff abandoned possession of the portions under their occupation and failed to assert ownership. Assertion of ownership in law takes various forms including an effective entry into the land. Evidence was tendered that though the one of defendants put up a hospital, the plaintiff took it over and has been the one leasing it out to third parties. The scene visit report confirmed this. In Chevron (K) Ltd vs Harrison Charo wa Shutu (2016) eKLR, the court held that a clear mind and the intention of dealing with the land as if it was exclusively his and in a manner that was in clear conflict with the owner's right must be manifest to found adverse possession. Possession alone without a clear intention to own must be established to the required standards. Acts in hostility to the true owner and the world followed by dominion over the suitland has not been established. From the scene visit report, the 1st, 2nd and 7th defendants' only activities on the suit land were farming activities while for the 3rd and 6th defendants are said to occupy wooden and mud structures said to belong to the 1st, 2nd and 3rd defendants' mothers.

95. In Songoi vs Songoi (supra) the court said that adverse possession must start with a wrongful possession. PW 1 said that the entry to the land was permissive in the first instance and that he had called upon the defendants to move out to his ancestral land. That admission by PW 1 amounted to an acknowledgement that he has been a tenant at will as held elsewhere in this judgment.

96. In Songoi vs Songoi (supra) the court reaffirmed Alfred Welimo vs Mulaa Sumba Barasa E.A No. 186 of 2011 that adverse possession is not established merely because of an abandonment of possession by the true owner, without the same being coupled with the taking of possession. The Preamble of our Constitution 2010 is based on the values our communities living in peace, unity and to preserve their cultural heritage. Culture should not be used to destabilize the existing societal harmony. PW 1 knew that all along he was a permitted tenant at will and his arrangement with his brother the plaintiff was in existence. The year that the defendants alleged planted trees, miraa and coffee plants was not tendered.

97. As held in Kosgey vs Kosgey (supra) the defendants should not have assumed that because they were on the and that their parents used to be on the land, then their claim for adverse possession was open

and shut yet the fest for such a claim must be met in full. This, therefore, settles issue No's (c) (d), (e), (g) and (h).

98. The last issue No. (xiv) then is whether the defendants have proved their claims based on the doctrines of constructive trust, proprietary estoppel, legitimate expectation and on acquiescence. In the case of Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR the court cited Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri (2014) eKLR, the doctrines of constructive trust and estoppel overrides the provisions of the Land Control Acts and that equity having been elevated to constitutional principles or values that courts have to protect and promote.

99. In the case of Baron Mathenge Munyoki vs Dedan Mbangula Kithusi (2022) eKLR, the court cited with approval Twalib Hatayan & another vs Said Saggar Ahmed Al-Heidy & others (2015) eKLR, that trust refers to a right enforceable solely in equity to the beneficial enjoyment of property to which another holding a legal title. Under the *Trustee Act* trust has two categories, namely; constructive and resulting trust. The latter is imposed by a court against one who has acquired property by wrong doing or in circumstances that would demand that equity treats the legal owner as a trustee. Under Sections 28 of the *Land Registration Act* trusts are are listed as overriding interests. The court in Macharia Mwangi Maina (supra) affirmed the rights of the appellants who were in possession and had been put into such possession, as bonafide purchasers for value and therefore could not be said to be licensees or trespassers since there was an intention to complete the transaction. The court further said that justice was conscience, not merely a personal, one but the conscience of the whole of humanity which dictated that constructive trust and proprietary estoppel shall apply where an individual received a purchase price only to turn around and plead that the agreement was void ab initio. Therefore, the court held that whenever justice and good conscience required it, the court could enable an aggrieved party to obtain restitution.

100. In Lloyds Bank PLC vs Rosset (1991) 1 AC 107 132, the court held that constructive trust was based on a common intention which exists out of an arrangement or an understanding actually reached between parties, relied on and acted upon by the claimant.

101. Further in Steadman vs Steadman (1976) AC 536 & 540, the court said that if a party to an agreement stood by and let the other incur an expense or take a position on the faith that the agreement was valid, he should not then be allowed to turn around and assert that the agreement was unenforceable. See Gatimu Kingaru vs Muya Gathangi (1976) KLR 253.

102. In this suit, the defendants have pleaded that the plaintiff allowed their occupation, use and development of the suit land witnessed and or encouraged their use or developments thereon acquiesced to them and hence created a legitimate expectation on them, that the suit land was theirs and should therefore not be allowed to renege on that situation.

103. In the case of Kazungu Fundo Shutu and another vs Japhet Noti Charo and another (2021) eKLR, a half-brother was said to hold the property in trust for the family the court cited with approval Mumo vs Makau (2002) 1 E.A 170 that trust was a question of fact to be proved through evidence. Further the court cited with approval Juletabi African Adventure Ltd and another vs Christopher Michael Lockley (2017) eKLR, that the law never implied and a court never presumed a trust unless in cases of absolute necessity, in order to give effect to the intention of the parties, so as to avoid unjust enrichment.

104. In this suit, the onus under Sections 107, 109 & 111 of the *Evidence Act* was on the defendants to prove not only the intention, the circumstances for inferring trust but also the salient features of the alleged intended trust, from the time PW 1 entered the suit land, to the registration of the title and the continued occupation, use and developments of the suit land by them up to 2014.

105. In the case of Aliaza vs Saul Civil Appeal 134 of (2017) (2023) KECA 583 (KLR) 24th June 2022 (Judgment), the court cited with approval Wiliam Kipsoi Sigei vs Kipkoech Arwei and another (2017) eKLR and Kiplagat Kotut and Rose Kipsok (2019) eKLR on the circumstances a court could apply and enforce the doctrines of constructive trust and as well proprietary estoppel.

106. In this suit, the defendants have completely failed to discharge the burden of proof by bringing material which point at an intention of a trust, representation by the plaintiff that the suit land could be developed as if it was theirs. No evidence of material expenditure or any investments on the suit land and or the nature of the legitimate expectation created to them that such an investment on the land would not count for nothing was tendered.

107. The extent of the investments in monetary terms was proved. Similarly, as said elsewhere in this judgment, the scene visit report captures the alleged houses as belonging to the defendants' mothers and not themselves. The evidence of the actual occupation and the individual developments on the suit land was also lacking. No land valuation report was brought before this court to support the defendants' alleged capital investments towards the addition of the value to the suit land. Further, no special damages were pleaded in the amended defence and the counterclaim. Lastly, the 6th defendant did not confirm the settlement agreement or seek for its endorsement by the court.

108. In absence of the foregoing my finding is that there was no constructive trust, proprietary estoppel or legitimate expectation proved to the required standard.

109. In view of the earlier finding that there is no proper plaintiff. The plaintiff's suit is likewise dismissed. The same applies to the defence and the counterclaim.

110. There would be no order as to costs this being a matter involving close relatives.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 3RD DAY OF MAY, 2023

In presence of:

C/A: John Paul

Miss Aketch for the plaintiff

Murango Mwenda for the defendant

HON. C.K. NZILI

ELC JUDGE

ELC 60 OF 2019 - JUDGMENT	0