



**Katu v Francis & another (Environment & Land Case E029 of 2021)  
[2024] KEMC 22 (KLR) (9 September 2024) (Judgment)**

Neutral citation: [2024] KEMC 22 (KLR)

**REPUBLIC OF KENYA  
IN THE MACHAKOS LAW COURTS  
ENVIRONMENT & LAND CASE E029 OF 2021  
CN ONDIEKI, PM  
SEPTEMBER 9, 2024**

**BETWEEN**

**JOHNSON F. KATU ..... PLAINTIFF**

**AND**

**KATHIMBU FRANCIS ..... 1<sup>ST</sup> DEFENDANT**

**MUENI FRANCIS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Part i: Introduction**

1. This suit is unique. It presents not only a legal conundrum, but also a moral puzzle. One of the significant signs of the last days recorded by the good Book is disproportionately ruined attitudes, including being unthankful, disloyal, not open to any agreement, slanderers, without self-control, fierce, without love of goodness, betrayers, headstrong, and puffed up with never-witnessed-before level of pride.<sup>1</sup> The good Book also records extreme breakdown of the family fabric, where children will rise against parents, family affection will be lost and prodigious disobedience of parents by children.<sup>2</sup> Although it is humanly inconceivable, the good Book did conceive that times will come when a parent will be evicted from his own property, constructively or otherwise, by his/her own blood.
2. There is an emerging trend where children harbour a misguided notion that their parent's property is their property. If it goes unchecked, this notion combined with what I call the prodigal son notion, will spell a sweeping negative economic impact, since it deprives the harbourers of the need to acquire their own, and in the long-run hamper the desired economic growth.

<sup>1</sup> See 2 Timothy 3:1-4.

<sup>2</sup> See 2 Timothy 3:2-3.



## Part ii: The Plaintiff's Case

3. Vide a Plaint dated 10<sup>th</sup> March 2021 and filed on even date, the Plaintiff brought this action against the Defendants seeking Judgment that: (a) Orders for permanent and mandatory injunction to respectively restrain the Defendants jointly and/or severally whether by themselves, their servants and/or agents from continuing with the acts of trespass complained of or in any manner whatsoever interfering with the Plaintiff's peaceful occupation of land reference number Muvuti/Kaani/1413. (b) Orders to direct and compel the Defendants to vacate, move away and cease occupation of any dwelling places as may be within land reference number Muvuti/Kaani/1413. (c) General damages for trespass on the Plaintiff's land reference number Muvuti/Kaani/1413. (d) Costs of this suit. (e) Interests at Court rates on (c) and (d) from the date of judgment to payment in full.
4. The Plaintiff claims that he is the registered proprietor of all that land known as Muvuti/Kaani/1413 (hereinafter "the suit property"). The Plaintiff claims that sometime in 2018, the Defendants embarked on harassment campaign which ended up in unlawful and forceful entry and occupation of the Plaintiff's land, the suit property. It is averred that the Defendants' acts culminated into unlawfully removing the Plaintiff from his home and property, and denying him access thereto since February 2021. It is claimed that the actions of the Defendants have left the Plaintiff to live in rented premises unsuitable to his advanced age and subjected him to lead a pauper's life, and further occasioned the Plaintiff immense financial loses, strain and embarrassment since being a farmer, he cannot access his land to till and earn income therefrom. It is claimed that the Defendants have since in forceful use and occupation of the suit property.
5. At the hearing of the Plaintiff's case, the Plaintiff (PW1) adopted his witness statement filed together with the said the Plaint as his evidence-in-chief. In his said statement, the Plaintiff largely rehashes the facts averred in the Plaint. In addition, the Plaintiff testified the Defendants are his children, all adults now. He narrated that he raised all of them well including taking all of them to school and colleges and that some are formally employed. He narrates that after the Defendant's mother died in 2007, he remarried in 2017 but the remarriage marked the beginning of his conflicts with the Defendants, who were up in arms against his new wife. He states that on diverse dates, the Defendants assaulted him and his new wife. He narrated that one day, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants came to his house and they gathered all belongings of his wife and heaped them in the living room. He narrated that he informed the chief who intervened and settled the dispute. He narrated that on another day, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants assaulted him after forcefully entering the compound and he was forced to report to the police. He narrated that after the incident, he was forced to rent elsewhere and moved out of the suit property.
6. In buttressing his claim, the Plaintiff exhibited the following documents: (i) a title deed as the Plaintiff's Exhibit 1; (ii) a P3 Form dated 28<sup>th</sup> July 2018 as the Plaintiff's Exhibit 2; (iii) a letter from the firm of J.A. Makau dated 19<sup>th</sup> June 2018 as the Plaintiff's Exhibit 3; (iv) a letter from the Assistant Chief Simon Nthenge dated 12<sup>th</sup> January 2021 as the Plaintiff's Exhibit 4; (v) a diary of assaults from 15<sup>th</sup> June 2018 and December 2020 as the Plaintiff's Exhibit 5; (vi) a sale agreement in Kikamba language over the suit property as the Plaintiff's Exhibit 6; and (vii) the English translation of the said sale agreement over the suit property as the Plaintiff's Exhibit 7.
7. In cross-examination of the Plaintiff, he stated that he bought the suit property and joined it with another piece of property, Muvuti/Kaani/1414, which he swapped with his brother who took his land Yatta. He stated that he reported the assault and he was issued with an OB extract number 64/28/7/2018. He stated that the assault occurred on 21<sup>st</sup> July 2018. He stated that he was examined in hospital on 28<sup>th</sup> July 2018. He stated that he is the proprietor of the suit property. He stated that



- the 1<sup>st</sup> Defendant also built a stone house on the suit property. He stated that his first born son, who was initially the 1<sup>st</sup> Defendant in this suit, namely Mutua Francis died before this suit was determined and was buried on the suit property. He stated that the Defendant's mother too was buried on the suit property. He stated that he is the registered owner of the suit property. He stated that he bought the suit property from his uncle. He stated that at no point did the chief summon him to resolve the dispute and he refused to cooperate. He stated that he moved out of his own house out of fear for his life.
8. In re-examination, he stated that preceding the assault, he had locked the gate and the 1<sup>st</sup> Defendant vandalized the padlock and gained entry into the compound.
  9. PW2, Jonathan Ndolo, adopted his undated witness statement which was filed on 15<sup>th</sup> November 2022 as his evidence-in-chief. In his said statement, PW2 states that he witnessed the purchase of the suit property and signed the sale agreement (PEXH 6) as a witness.
  10. In cross-examination of PW2, he stated that he knew the seller of the suit property. He stated that the suit property borders the suit of one Ngeka. He stated that both the Plaintiff and the 1<sup>st</sup> Defendant have constructed stone houses on the suit property.
  11. In his written Submissions dated 29<sup>th</sup> November 2023 and filed on 29<sup>th</sup> November 2023, learned Counsel Mr. Mwangi instructed by the Firm of Maingi Musyimi & Associates Advocates representing the Plaintiff submits that the Plaintiff has proved that she is the registered owner of the suit property and no evidence has been tendered to prove the fraud alleged by the Defendants.
  12. Counsel has proposed two questions for determination as follows: (a) Is the suit property ancestral land? (b) Whether the Defendants have any overriding interest to the suit property?
  13. Regarding the question whether the suit property ancestral land, it is answered in the negative, urging that no evidence was laid before this Court to support that claim. It is submitted that the suit property, Muvuti/Kaani/1413, has been confused with another property namely Muvuti/Kaani 1414, which property is not subject to this suit. It is submitted that all the defence witnesses who were asserting that the suit property is ancestral land, were referring to Muvuti/Kaani 1414, which is not the subject of this suit. It is thus concluded that the Plaintiff has proved on a balance of probabilities that Muvuti/Kaani 1413, belongs to the Plaintiff absolutely and it is not ancestral land. It is thus urged that this being the position, no trust can be imposed by law upon the Plaintiff, since there is no overriding interest thereon, placing reliance upon the Court of Appeal decision in *Juletabi African Adventure Ltd vs. Christopher Lockley* [2017] eKLR.
  14. It is submitted that the assertion that the suit property is ancestral land does not tick the elements of ancestral land which were laid on *Ngugi vs. Kamau & another* (Environment & Land Case 36 of 2020) [2022] KEELC 2261 (KLR) (23 June 2022), *Njenga Chogera vs. Maria Wanjira Kimani & 2 Others* [2005] eKLR, *Muthuita vs. Muthuita* [1982 – 88] 1 KLR 42, and the Supreme Court decision in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.
  15. It is urged the Defendants did not exhibit copies of succession proceedings to demonstrate that the suit property was inherited by the Plaintiff, citing the holding in *Jackson Mwiti M'Rinyiru vs. Silas M'Rinyiru Mbui* (2020) eKLR. It is submitted that the Plaintiff adduced a sale agreement and a witness who witnessed the transaction.
  16. Concerning the question whether the Defendants have any overriding interest to the suit property, it is answered in the negative, citing the holding in *Teresisa Kwamboka Mauti* (suing as the Administratrix of the estate of David Mauti Nyarango (deceased) & Another vs. Ezekiel Nyarango Mauti & 5 Others (2022) eKLR, *Oganga & another v Orangi & 3 others* (Environment & Land Case 466 of 2015)



**Part iii: The Defendants' Case**

17. In their joint Statement of Defence and Counterclaim dated 27<sup>th</sup> July 2022 and filed on 28<sup>th</sup> July 2022, the Defendants admitted that the Plaintiff is their father but denied every material averment in the Plaintiff.
18. The Defendants aver that the suit property is their ancestral land, since it belonged to their late grandfather, the Plaintiff's father. In this connection, it is averred that the Plaintiff inherited the suit property and that they are thus entitled to occupation and use thereof. It is averred that their step-mother fomented a land dispute, with a view of evicting them from their said ancestral land. It is averred that the 1<sup>st</sup> Defendant build a stone house on the suit property as a matter of right. It is averred that until recently, the suit property was not registered in the name of the Plaintiff and the hastened registration in his name was "in unclear and suspicious circumstances" in furtherance of the scheme to evict the Defendants. It is averred that the Plaintiff and his wife voluntarily moved out of the property to foment this suit. The Defendants thus pray that this suit be dismissed with costs.
19. In their Counterclaim, the foregoing facts are reiterated and the Defendants thus pray for Judgment that: (b) A declaratory order to the effect that the suit property is ancestral land and the Defendants as beneficiaries are entitled to a share and have rights over the suit property. (c) A prohibitory injunction be issued restraining the Plaintiff by himself, servants, agents and or otherwise from evicting the Defendants or enjoyment, quiet possession, equitable and property rights and interests in respect to the suit property. (d) Any other order that this Honourable Court may deem fair and just in the circumstances of the case. (e) General Damages. (f) Costs of this suit. (g) Interest on (e).
20. At the hearing of the Defendants' case, Jackson Kasyoki Katu, DW1, told this Court that he the Plaintiff's eldest brother. DW1 adopted his witness statement dated 4<sup>th</sup> October 2022 and filed on 5<sup>th</sup> October 2022 as his evidence-in-chief. In his said statement, DW1 states that the suit property is ancestral land belonging to the Mbaa Mulei family and the Defendants are entitled to occupation and use thereof.
21. In cross-examination, DW1 stated that he is the Plaintiff's step-brother. He stated that the suit property is ancestral land. He stated that according to his knowledge, the suit property is Muvuti/Kaani/1414. He stated that the register of the suit property is in the name of the Plaintiff's mother. He stated that the Defendants live in Muvuti/Kaani/1414 and not Muvuti/Kaani/1413. He stated that the Defendants have a right to live in Muvuti/Kaani/1414.
22. The 1<sup>st</sup> Defendant, Evans Kathambu Francis, DW2, told this Court that he the Plaintiff's son. DW1 adopted his witness statement dated 4<sup>th</sup> October 2022 and filed on 5<sup>th</sup> October 2022 as his evidence-in-chief. In his said statement, DW2 states that the Plaintiff is his biological father and the 2<sup>nd</sup> Defendants his sister. He states that after the Plaintiff remarried in 2017, family disputes began. DW2 states that the Plaintiff expressed intention to sell the suit property and started looking for prospective buyers. He states that the suit property (Muvuti/Kaani/1413) is their ancestral land, which belonged to their late grandparents, over which the Defendants have a right of occupation and use. DW2 stated that Muvuti/Kaani/1414 belongs to his uncle, Ndila Nzuki who also inherited it from the same grandparents. He stated that on 28<sup>th</sup> July 2018, they came home and found the gate locked and they were forced to climb the gate to access home. He denied that they assaulted the Plaintiff.



23. In buttressing the Defendants' case, the 1<sup>st</sup> Defendant exhibited: (i) a burial permit of his brother who was initially the 1<sup>st</sup> Defendant as the Defendants' Exhibit 5; and (ii) photos of his permanent house standing on the suit property as the Defendants' Exhibit 6.
24. In cross-examination of DW2, he stated that the land in question is both Muvuti/Kaani/1413 and Muvuti/Kaani/1414. He stated that the houses stand on both Muvuti/Kaani/1413 and Muvuti/Kaani/1414. He stated that the suit is about Muvuti/Kaani/1414. When he was referred to the Plaintiff, he stated that it does not state that the subject of the suit is Muvuti/Kaani/1414. He conceded that the Plaintiff has a title deed over Muvuti/Kaani/1413. He stated that he has built his house on both Muvuti/Kaani/1413 and Muvuti/Kaani/1414. He stated that he has no survey report to demonstrate that his house stands on both Muvuti/Kaani/1413 and Muvuti/Kaani/1414.
25. In re-examination of DW2, he stated his house stands on both Muvuti/Kaani/1413 and Muvuti/Kaani/1414.
26. The 2<sup>nd</sup> Defendant, Ruth Mueni Francis, DW3, told this Court that she the Plaintiff's daughter. DW3 adopted her witness statement dated 4<sup>th</sup> October 2022 and filed on 5<sup>th</sup> October 2022 as his evidence-in-chief. In her said statement, DW3 states that the Plaintiff is her biological father and the 1<sup>st</sup> Defendant his brother. She states that after the Plaintiff remarried in 2017, family dispute began. DW3 states that the Plaintiff expressed intention to sell the suit property and started looking for prospective buyers. She states that the suit property (Muvuti/Kaani/1413) is their ancestral land, which belonged to their late grandparents, over which the Defendants have a right of occupation and use.
27. In cross-examination of DW3, she stated that the land in question is both Muvuti/Kaani/1413 and Muvuti/Kaani/1414. She stated that the houses stand on both Muvuti/Kaani/1413 and Muvuti/Kaani/1414. She stated that the suit is about Muvuti/Kaani/1414. She conceded that the Plaintiff has a title deed over Muvuti/Kaani/1413. She stated that the 1<sup>st</sup> Defendant built his house on both Muvuti/Kaani/1413 and Muvuti/Kaani/1414. She stated that she has no survey report to demonstrate that the 1<sup>st</sup> Defendant's house stands on both Muvuti/Kaani/1413 and Muvuti/Kaani/1414.
28. In re-examination of DW3, she stated the title deed over the suit property as issued last year.
29. DW4, Simon Musembi Nthenge, told this Court that he is an assistant chief in charge of Kaani Sub-Location. He testified that he summoned the Plaintiff to resolve the dispute but he refused. He stated that later, on 14<sup>th</sup> September 2020, the Plaintiff came to his office and asked him to call and a meeting which he did and he referred the matter to the chief. He stated that he did not attend the meeting again.
30. In buttressing the Defendants' case, DW4 exhibited: (i) a letter dated 2<sup>nd</sup> March 2020 as the Defendants' Exhibit 1; (ii) a letter dated 5<sup>th</sup> March 2020 as the Defendants' Exhibit 2; (iii) a letter dated 14<sup>th</sup> March 2020 as the Defendants' Exhibit 3; (iv) minutes dated 5<sup>th</sup> March 2021 as the Defendants' Exhibit 4; and (v) a report dated 6<sup>th</sup> May 2022 as the Defendants' Exhibit 7.
31. No question was put in cross-examination.
32. DW5, Muthembwa Katu, told this Court that he a village elder in charge of Ukala Village and an elder brother of the Plaintiff. His evidence mirrors that of DW4 on attempts made to resolve the dispute. He states in the statement that in the Kamba culture, once a man gets married, his home belongs to his wife and children and that in the event of remarriage, he must built a separate house for the new wife.
33. In cross-examination, DW5 stated that he is the Plaintiff's step-brother. He stated that the suit property belonged to DW5's uncle. He stated that he does not know the title number of the land in dispute.



34. DW6, Veronicah Kalondu Kavutu, told this Court that he a wife of the Plaintiff's paternal uncle called Kavutu Nzuki. Her evidence mirrors that of DW4 and DW5 on attempts made to resolve the dispute.
35. In cross-examination, DW6 stated that she does not know the particulars of the land in dispute. She stated that she could not tell whether the Plaintiff purchased it or not.
36. In her written Submissions dated 31<sup>st</sup> May 2024 and filed on 8<sup>th</sup> July 2024, learned Counsel Ms. Karuiru instructed by the Firm of Wandia Oele Munyiri Advocates, representing the Defendants, has proposed three questions for determination as follows: (a) Whether the Plaintiff holds the Land Title Number Muvuti/Kaani/1413 in trust for the Defendants? (b) Whether the Defendants were hostile to the Plaintiff? (c) Who should pay the costs of this suit?
37. For the Defendants, it is submitted that the Plaintiff has failed to prove his case on a balance of probabilities, by failing to discharge his burden of prove under section 107 of the *Evidence Act*.
38. Regarding the question whether the Plaintiff holds the Land Title Number Muvuti/Kaani/1413 in trust for the Defendants, It is submitted that the Defendants have proved that the suit property is ancestral land, having demonstrated all the elements of a customary trust in favour of the Defendants, placing reliance in *Gathiba vs. Gathiba* (2001) 2 EA 342; *Mbui Mukangu vs. Gerald Mutwiri Mbui C.A 281 of 2000*; *Isack M'inanga Kieba vs. Isaaya Theuri M'lintari & another* [2018] eKLR; *John Gitiba and Another vs. Jackson Rioba Buruna in Kisumu Civil Appeal No. 89 of 2003 (UR)*; and *Mbui Mukangu vs. Gerald Mutwiri Mbui* [2004] eKLR.
39. Regarding the question whether the Defendants were hostile to the Plaintiff, it is submitted that having established that the Plaintiff holds the parcel of land Title Number Muvuti/Kaani/1413 in trust for the Defendants, it is submitted that the allegations were not established in evidence.
40. This Court is thus urged to dismiss this suit with costs and instead grant the prayers set out in the Counterclaim.

## **PART V: QUESTIONS FOR DETERMINATION**

41. Commending themselves for determination - gleaned from the Plaintiff; the Statement of Defence and Counterclaim; and the rival written Submissions - are four questions as follows:
  - i. Whether on a preponderance of evidence, the Plaintiff has proved that he is the absolute and indefeasible owner of and/or is in or entitled to immediate possession of the parcel of land known as Muvuti/Kaani/1413 (hereinafter "the suit property") or in accordance with the Counterclaim, whether on a preponderance of evidence, the Defendants have proved that the suit property is ancestral land over which a customary trust should be imposed by law.
  - ii. Whether on a preponderance of probabilities, the Plaintiff has adduced evidence that the Defendants have trespassed to the suit property. The derivative question is whether a biological child can be held liable for trespass, in the biological parent's land and if yes, circumstances under which that can happen.
  - iii. Whether either the Plaintiff or the Defendants are entitled to the prayers sought.
  - iv. Which party should bear the costs of this suit and Counterclaim?

## **Part Vi: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination**

42. I now embark on analysis, interrogation, assessment and evaluation of each of the four questions, in turn.



- (i) Whether on a preponderance of evidence, the Plaintiff has proved that he is the absolute and indefeasible owner of and/or is in or entitled to immediate possession of the parcel of land known as Muvuti/Kaani/1413 (hereinafter “the suit property”) or in accordance with the Counterclaim, whether on a preponderance of evidence, the Defendants have proved that the suit property is ancestral land over which a customary trust should be imposed by law
43. To succeed in an action for trespass, first, the onus is on the Plaintiff to prove on a balance of probabilities that (s)he is either the bona fide owner or proprietor of the suit property or that (s)he is in or entitled to immediate possession of the suit of the suit property or both; and second, that the sued party has intruded and/or occupied and/or remained in the suit property without any justifiable cause. In *M’Mukanya vs. M’Mbijiwe* (1984) KLR 761, Kneller JA (as he then was) laid the ingredients of trespass in the following words: “The only issue in this second appeal is whether or not the Magistrate and the judge erred in law in finding M’Mukanya and Nyamu were trespassers? M’Mbijiwe could, and may be should, have asked for a declaratory judgment but he brought an action of trespass to land to determine the title to the large plot 58 in this market. He has to prove on the balance of probabilities M’Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M’Mbijiwe must prove he, and not M’Mukanya and Nyamu, had the right to immediate and exclusive possession of it which is different from ownership.”
44. Similarly, in the Court of Appeal decision in *Charles Ogejo Ochieng vs. Geoffrey Okumu* [1995] eKLR, Tunoi, Akiwumi & Lakha, JJA (as they then were) took a view that “Trespass is an injury to the possessory right, and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it, or a person who is deemed to have possession at the time of the trespass.” See also *Moya Drift Farm Ltd vs. Theuri* (1973) 1 EA 114, per Sir William Duffus P, Spry VP and Lutta JA (as they then were); *Ashby vs. White* (1703) 2 Ld Raynd 938; *Basely vs. Clarkson* (1682) 3 Lev 37; *Hewlitt vs. Bickerton* (1947) CLC 10504; *Conway vs. Wimpey & Co (No 2)*, (1951) 2 KB 266; and *PME & another vs. PNE* (2019) eKLR.
45. It is common ground that the Plaintiff is now the registered proprietor of the suit property. From the foregoing confab, the Torrens System of land registration now adopted in Kenya imported the principle of sanctity of title – now housed in section 26(1) of the *Land Registration Act* - renders the registered proprietor the absolute and indefeasible owner thereof, subject only to such encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved.
46. This Court has scrupulously examined the Plaintiff’s oral evidence plus all the totality of documents which were exhibited by the Plaintiff in support of this assertion. This Court has also carefully examined the Defendants’ oral evidence and the documents they exhibited to buttress the defence.
47. In their Statement of Defence, the Defendants have attacked the title on grounds that the Plaintiff obtained it fraudulently and illegally and that the suit property is subject to a customary trust.
48. In that context, the Torrens System of land registration now adopted in Kenya imported the principle of sanctity of title – now housed in section 26(1) of the *Land Registration Act* - renders the registered proprietor the absolute and indefeasible owner thereof, subject only to such encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved. See also *Breskvar vs. Wall* (1971) 126 CLR, per Barwick CJ; *Gibbs vs. Messer* (1891) AC 254; *David Peterson Kiengo & 2 Others vs. Kariuki Thuo* (2012) eKLR, per Prof. Ngugi, J.; *Joseph N.K. Arap Ng’ok vs. Moijo Ole*



- Keiwua & 4 others (1997) eKLR, per Tunoi, Shah and Pall, JJA (as they then were); Charles Karathe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others (2013) eKLR, per Onyango Otieno, JA (as he then was), Gatembu and Mohammed, JJA; Hannah Wangui Ithebu & Other vs. Joel Nguigi Magu (2005) eKLR, per Visram, J. (as he then was); Nairobi Permanent Markets Society & other eleven vs. Salima Enterprises and NCC Appeal No. 185 of 1997; Dinshaw Byramjee & Sons Ltd vs. A.G. of Kenya (1966) E.A. 198; Frazer vs. Walker (1967) 649 ALL E.R.; Shimoni Resort vs. Registrar of Titles & 5 others (2016) eKLR (per Okongó, J); Njilux Motors Ltd vs. KP&L & Another Civil Appeal Number 206 of 1998; Russel & Co. Ltd vs. Commercial Bank of Africa Ltd (1986) KLR 633; and Wreck Motors Enterprises vs. Commissioner of Lands Nairobi, Civil Appeal Number 71 of 1997 (Unreported).
49. Having considered the Plaintiff's evidence and chiefly the title deed which reflects the Plaintiff as the absolute owner thereof (the Plaintiff's Exhibit 1), supplemented by the sale agreement in Kikamba language, over the suit property (the Plaintiff's Exhibit 6) and its English translation (the Plaintiff's Exhibit 7), this Court, in accord with section 26 of the [Land Registration Act](#), 2012, infers a rebuttable presumption in favour of the Plaintiff that the said title deed is prima facie evidence that the Plaintiff is the absolute and indefeasible owner of the suit property. In that regard, it is the finding of this Court that the Plaintiff discharged his burden of proof.
50. In this connection, the evidential burden shifted to the Defendants to prove that the said title is defeasible on account of acquisition which was unprocedural, fraudulent and/or illegal under the exception to section 26(1) of the [Land Registration Act](#), as asserted by the Defendants and/or prove an existing overriding interest known as a customary trust in favour of the Defendants, under section 28(b) of the [Land Registration Act](#).
51. What amounts to a trust? The term "trust" has not been directly defined by statute. The [Trustee Act](#) defines it by exclusion (what it is not) rather than by inclusion (what it is). Section 2 of the Act defines it that "trust": "does not include the duties incident to an estate conveyed by way of mortgage, but, with this exception, the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee."
52. Henry Black, in his magnum opus work known as *The Black's Law Dictionary*, Ninth Edition, at pages 1647-1648, defines a "trust" in the following terms: "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose. The two primary types of trusts are private trusts and charitable trusts (see below). 2. A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it. See fiduciary relationship under relationship. 3. The property so held."
53. Is a customary trust an overriding interest? It is imperative to highlight some history in this regard and how it paved the road to the current status.
54. In *Obiero vs. Opiyo* [1972] E.A. 227, Bennett, J. (as he then was) while concluding that customary trust is not among the overriding interests listed in section 30 of the Registered [Land Act](#) stated at p.



228 that “Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so.”

55. After the Obiero decision (*supra*), the High Court (rendered on 23.6.1973) in *Esiroyo vs. Esiroyo* and another [1973] 1 EA 388, Kneller, J. (as he then was) sitting in Kisumu, had occasion to consider the import and purport of section 30 of the Registered *Land Act* (now repealed) an equivalent to section 28 of the *Land Registration Act*, 2012. His Lordship came to a conclusion that the overriding interests contemplated under section 30 of the then Registered *Land Act* did not include a customary trust. In this case, the Plaintiff sued the Defendants for an injunction restraining them from trespassing on the land registered in his name under the then Registered *Land Act*. In defence, the Defendants who were the sons of the Plaintiff claimed that they were entitled to certain portions of the Plaintiff’s land and to occupy those portions and to cultivate them together with their wives and children and servant because it is the land had passed down generations from their fore-forefathers. Although the Plaintiff testified that he bought the land in 1929, the Court concurred with the Defendants that the Plaintiff inherited it from his father and grandfathers and so forth before him. The Defendants proved that under Luhya customary law they would have an interest in the land. In his Judgment, while adopting the reasoning in an earlier decision in *Obiero vs. Opiyo*, [1972] E.A. 227, His Lordship concluded and held that the Plaintiff’s title was free of all encumbrances as the rights under customary law are not over-riding interests. His Lordship reasoned as follows: - “According to the customary law, the father should indicate which part each son has to cultivate and occupy and he would have to do this before he died, of course. This right of the sons to some portion of the family’s land would, of course, be forfeited according to customary law, if their behaviour was such that their father owed no more duty to them. I am unable to find on the evidence before me that the sons by their behaviour have in any way forfeited their right under customary law to such portions of land. They probably had a very difficult father to deal with during all this. Their sole remedy against him for smashing a radio or tearing up trees and so forth was probably to report him to the local police or take him before the local Courts. I also find that 5 acres each out of the 22 acres, remembering all the other sons who have to have some land and Jones Williams who has his 0.4 hectares elsewhere, would, under customary law, be reasonable and sufficient for each of these Defendant brothers. I would also find that these customary laws, apart from an exception which I will deal with next, still obtain in that area. It may be that the Plaintiff, if he is reconciled to the two Defendants, may come to have this portion of land re-registered or, at any rate, may leave some directions in his will about this and so forth. Nevertheless, according to the law and the exception which I now turn to, he is not bound to do this any longer. The matter is taken out of the purview of customary law by the provisions of the Registered *Land Act*. The Plaintiff is the registered proprietor of the plot 309. The rights of the Defendants under customary law have been extinguished. S. 28 of the Registered *Land Act* confers upon a registered proprietor “a title free from all other interests and claims whatsoever”, subject to the lease, charges and encumbrances shown in the register and such over-riding interests as are not quoted in the register. There are no encumbrances noted on the land certificate. The Plaintiff’s title is free of encumbrances. Rights arising under customary law are not among the interests listed in s. 30 of the Act as over-riding interests...So, in effect, the facts in that case and in this one are almost on all fours. Bennett, J. decided that in *Obiero v. Opiyo* the Defendants had made no serious attempt to prove that the Plaintiff widow obtained registration by fraud or mistake. He was not satisfied on the evidence that the Defendants ever had any right to the land under customary law. In this case, I have decided that the Defendants had rights under customary law. One further point of distinction is that the Defendants in this case never went to any Land Adjudication committee or authority to ask for any decision in their favour. Bearing in mind these distinctions which I do not find material, I propose to follow, with respect, the decision of Bennett, J. The Plaintiff has proved, on the balance of probabilities, that he is entitled to the relief which he seeks. There will be an order for the eviction of each Defendant from plot 309. If they do not remove themselves, their wives or children



or agents within the next 60 days from the date of this order, there will be a perpetual injunction to restrain them, their wives and children or servants from continuing or repeating any acts of trespass on the land in dispute with effect from 60 days from the date of this order. One point that always arises in cases like this, and I think I had better make provision for it, is the right of the members of the family of each Defendant to re-enter on the land for harvesting over a period of two days any crop that may mature on that land. This will be restricted, of course, to crops which they have planted themselves. It will be subject to arrangement with the Plaintiff and will only arise if the Plaintiff does not harvest the crops himself and hand them to each Defendant or his family. This will terminate at the end of 90 days from the date of this order. The assessment of damages will be on the basis that for each acre, 10 bags of maize can be harvested by a diligent labourer each year. There were two years which the Plaintiff could not use this land for the planting of this maize. The profit on each bag of maize was Shs. 20/-. Each Defendant was cultivating, occupying and harvesting 5 acres or they were doing 10 between them. None of this was controverted by any Defendant. Bearing in mind all the circumstances of this case and doing the best I can, I would calculate the damages at Shs. 4,000/- for trespass on this land from the date set out in the Plaint, namely, 19 May 1970, up till the time of this judgment. There will be judgment for the Plaintiff for that sum and costs together with interest and there will be orders that I have already set out.” {Emphasis supplied}

56. A litany of decisions of the superior Courts which adopted the construction of section 30 read with 28 of the Registered *Land Act* in Esiroyo and Obiero cases. For instance, in Joseph Karisa Musonga vs. Johnson Nyati [1984] eKLR, Kneller, J. (as he then was) was at it again indicating that unless the legislature specifies a customary trust as one of the overriding interest, it will for as long it is not so enacted remain that it is not. His Lordship rendered himself thus: “The Defendant as the registered proprietor has a title free from all interests and claims whatsoever, but subject to any lease, charge and encumbrance shown in the register together with such overriding interests that exist and are not required to be noted in the register under Sections 28 and 30 of the Registered *Land Act*. Rights arising under customary law are not among the rights listed in Section 30 of the Act as overriding interests. Bennet J ... pointed this out and added ‘had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have easier than for it to say so.’ And 12 years later, it still has not done so.” Even the Court of Appeal in Muriuki Marigi vs. Richard Marigi & 2 Others (Nyeri C.A No. 189/96: unreported) restated the holding in Obiero and Esiroyo cases. It stated thus: We earlier set out the provisions of Sections 27 and 28 of the Registered *Land Act*, which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in Section 30 of the Act....The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interests recognizable under that Section. The issue was considered in the following two reported cases of Obiero v. Opiyo and Esiroyo v. Esiroyo and in both cases it was held that they are not. The Court in both cases was bound to come to that conclusion because of the clear language of Section 30 above...” In Gathiba vs. Gathiba [2001] 2 EA 368, Khamoni, J. (as he then was), concluded too that “rights under customary law, are not overriding interests under Section 30 of the Registered *Land Act*.”
57. However, in some decisions, superior Courts departed from the Obiero and Esiroyo jurisprudence. For instance, in Kanyi vs. Muthiora [1984] KLR 712, while departing from the Obiero and Esiroyo school of thought, Nyarangi Ag. J.A (as he then was) flipped the Bennett, J. reasoning in the Obiero case and reasoned that had legislature intended that customary law rights were to be extinguished by registration of some person as a proprietor, nothing would have been easier than to say so. His Lordship rendered himself as follows: “I doubt like Madan J.A did in Kiama v. Mathunya..., if rights under customary law



are excluded by Section 30 of the Act. Had the legislature intended that customary law rights were to be excluded, nothing would have been easier than for it to say so. I would say any valid rights are included in Section 30 of the Act just as a trustee referred to in Section 28 of the Act could not fairly be interpreted and applied to exclude a trustee under customary law. Be that as it may, the trust, in favour of Maritha is a resulting one by virtue of Section 163 of the Act. Besides, having been in occupation of a portion of the suit land and no inquiry having been made, Maritha had created rights of an overriding nature under Section 30 (g) to which the appellant as proprietor was subject.” In this decision, where Kneller J.A (as he then was) sat with Nyarangi, Ag. JA after rising to the Court of Appeal seems to have loosened his rigid reasoning which he had earlier deployed in *Esiroyo vs. Esiroyo* and *Joseph Karisa Musonga vs. Johnson Nyati* (both discussed supra) gleaned from the following statement: “Furthermore, the Respondent under the trust which arose between her and the appellant in the circumstances of this case had rights against the appellant stemming from her possession and occupation of part of Muthiora’s land though it was registered in the name of the appellant. This is an overriding interest which is not required to be noted on the register and the appellant’s proprietorship is subject to it.” In the same case, Chesoni J.A (as he then was) took a view that: “The registration of the suit land in the name of Kanyi under the Registered *Land Act* did not extinguish Nyokabi’s rights under the Kikuyu customary law, Kanyi was not relieved from her duty or obligation to which she was as a trustee to Muthiora’s land: see proviso to Section 28 of the Act...”

58. In the Court of Appeal decision in *Mbui Mukangu vs. Gerald Mutwiri Mbui* [2004] eKLR, O’kubasu, Githinji & Waki, JJA (as they then were) embraced the concept of a customary trust and stated that “It cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from possession and occupation of part of the registered land which strictly it (sic) may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act.”
59. A tectonic shift was precipitated by *the Constitution* of Kenya, 2010 and the *Land Registration Act*, 2012. In a bold move that expels all doubt which ruled the judicial airwaves since the Obiero case, the Act makes provision, under section 28 thereof introducing two new categories of overriding interests. First, “spousal rights over matrimonial property” and second, “trusts including customary trusts.” Unless the contrary is expressed in the register, all registered land shall be subject to overriding interests without being noted on the register which interests are trusts including customary trusts; rights of way, rights of water and profits subsisting at the time of first registration under this Act; natural rights of light, air, water and support; rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; charges for unpaid rates and other funds; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law and any other rights provided under any written law. Section 28 of the Act on the other hand provides for overriding interests. It states that “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) deleted by *Act No. 28 of 2016*, s. 11(a); (b) trusts including customary trusts; (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support; (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (f) deleted by *Act No. 28 of 2016*, s. 11(b); (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; (h) rights acquired or in process of being acquired by virtue of any written law relating



to the limitation of actions or by prescription; (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and (j) any other rights provided under any written law, Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.” {Emphasis supplied}

60. Courts have since made it trite that all registered land is subject to overriding interests without being noted on the register. Included in this catalogue of overriding interests are all forms of trusts; rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law. In the Court of Appeal decision in *Willy Kimutai Kitilit vs. Michael Kibet (Civil Appeal No. 51 of 2015)*; [2018] eKLR, while interpreting section 28 of the *Land Registration Act*, 2012, E. M. Githinji, Hannah Okwengu and J. Mohammed, JJ.A expressed themselves that “Under Section 28 of the *Land Registration Act*, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.” In addition, the Supreme Court of Kenya decision in *Isack M’inanga Kiebia vs. Isaaya Theuri M’lintari & another* [2018] eKLR, has since (in black and white) removed all doubt by enunciating that customary trusts are overriding interests.
61. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. Shedding light on the transition to the *Land Registration Act* from the Registered *Land Act* (now repealed), the Supreme Court in *Isack M’inanga Kiebia vs. Isaaya Theuri M’lintari & another* [2018] eKLR, expressed itself as follows: “[57] With the repeal of the Registered *Land Act* (Cap 300), Parliament enacted the *Land Registration Act* No. 3 of 2012. The provisions of Section 28 of the former, including the proviso thereto, were re-enacted as Section 25 of the latter; while the provisions of Section 30 of Cap 300 were re-enacted as Section 28 of the *Land Registration Act*. However, Parliament introduced two new categories of overriding interests, the first category is what are now called “spousal rights over matrimonial property”; while the second category is what are, rather curiously called “trusts including customary trusts”. Even more curious, is the fact that “the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation,” as earlier provided for under Section 30 (g) of the Registered *Land Act*, are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*. [58] What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land...”
62. What are the ingredients of and indicators to a customary trust? Since the introduction of the Torrens System of Registration of rights in land in Kenya, a state of improbability characterized the law on customary trusts, principally driven by the contradictory precedents thereon, as discussed supra. It can be discerned from the foregoing analysis that for donkey’s years, the law on first, whether or not a customary trust is an overriding interest and second, the ingredients necessary to prove a customary



trust, was characterized with both imprecision and uncertainty. Gladly, the two thorns in the flesh were settled by the Supreme Court of Kenya (SCORK) on 5<sup>th</sup> October 2018. While the question of customary or inter-generational trust has been determined from time to time, until 5<sup>th</sup> October 2018, the resulting body of precedent was contradictory on whether a claimant of a customary law trust needed to prove actual physical possession or occupation. Whereas it was hoped that the overhaul of the previous land laws and the enactment of the *Land Registration Act*, 2012, aimed at consolidating and rationalizing the registration of titles was to put the issue to rest, it didn't. In its decision, the SCORK's decision in *Isack M'inanga Kiebia vs. Isaaya Theuri M'lintari & another* [2018] eKLR, the Petitioner sought clarity in this regard by designing the question in a manner which obliged the SCORK to harmonize the contradictory precedents. In brief, the Respondents claimed that they were members of the Athimba clan, which owned a large parcel of ancestral land in Njia Location, Nyambene District and that during the process of land adjudication in 1963, it had been agreed that the land would be sub-divided and each portion registered in the name of an appointed member who would then hold the land in trust on behalf of a specific household. The Respondents averred that pursuant to this agreement, two land parcels No. Njia/Kiegoi Scheme 86 and Njia/Kiegoi Scheme/70 were allocated to their grandfather's household (M'Kiebia Baithambu) and registered in the names of two of his three sons (Respondents' uncles) to hold in trust on behalf of the entire household of M'Kiebia Baithambu. In this context, it was the Respondents' case that the appellants held one third of the land in trust on behalf of their deceased father, Musa Lintari (who was one of their grandfather's three sons). The Respondents asserted that they had lived on the said property, were in possession of it and had made substantial developments on the same which assertion was denied by the appellants. In the High Court, Kasango J. held that the Plaintiffs (Respondents in the SCORK) had established the existence of a trust in their favour on the basis of their being in actual occupation and also as bona fide members of the household. The High Court, accordingly, entered Judgment for the Plaintiffs (turned Respondents in SCORK) by declaring that the 1<sup>st</sup> Respondent held 3 acres of L.R. No. Njia/Kiegoi Scheme/86 in trust for the Plaintiffs and the 2<sup>nd</sup> Respondent held 3 acres of L.R. No. Njia/Kiegoi Scheme 70 in trust for the Plaintiffs. Aggrieved by the decision of the High Court, the petitioners appealed to the Court of Appeal. The Appellate Court (constituted of visram, Koome & Otieno-Odek, JJA) held that the evidence on record was sufficient proof that the Respondents had been born and raised on L.R. No. Njia/Kiegoi Scheme/86 and had been in possession and occupation of the said parcel of land. With regard to parcel No. Njia/Kiegoi Scheme/70, the appellate Court held that the evidence on record was contradictory and thus could not provide conclusive proof that the Respondents had been in possession and occupation of the said parcel. As such, the Respondents could not found their claim upon Section 30(g) of the Registered *Land Act* (now repealed). However, the Court opined that if the Respondents were basing their claim on the existence of a customary trust, they could be protected, as long as the said trust was proved. The clincher by the Court of Appeal came when they departed from the long held jurisprudence on actual possession and occupation as one of the key elements to prove by declaring that "to prove a trust in land (read customary trust), one need not be in actual physical possession and occupation of the land...Unless a trust is proved, the Respondents have neither possessory nor occupational rights that can be protected as overriding interests... We hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land." The Court found that the trial Judge did not err in finding that a trust existed in relation to L.R No. Njia/Kiegoi Scheme/86 (Plot No. 86) and L.R No. Njia/Kiegoi Scheme/70 (Plot No. 70). It proceeded to dismiss the appeal in its entirety. For ease of contextualization, in extenso, I wish to quote Maraga, CJ. (as he then was); Ojwang, SCJ (as he then was); Ibrahim, Wanjala and Ndungú, SCJJ who rendered themselves as follows: "[22] On its way to dismissing the appeal and affirming the High Court's Judgment, the Court of Appeal made what we consider a pronouncement of jurisprudential import. The Court stated thus: "Unless a trust is proved, the Respondents have neither possessory nor



occupational rights that can be protected as overriding interests... We hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land.” In so asserting, the Appellate Court was echoing (and therefore affirming) an earlier holding by the High Court in *James N. Kiarie v. Geoffrey Kinuthia & Another* (2012) eKLR wherein the Court stated: “...While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not ... a necessary ingredient for a trust to be established.” [23] The foregoing declaration forms the basis of the appeal before us, for in strenuously disagreeing with the appellate Court, Mr. Nowrojee, Counsel for the appellant, argues that a customary trust in relation to registered land can only be founded upon the actual physical possession or occupation of the land by the claimant. In other words, absent the possession or occupation of the land, or part of it by an unregistered claimant, there can be no customary trust to which the registered proprietor would be subject. Herein lies the conundrum that has characterized disputes between registered and unregistered claimants to land... [52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. 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 belongs 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. [53] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered *Land Act*, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v. Opiyo and Esiroyo v. Esiroyo*. Once it is concluded, that such rights subsist, a Court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests. [54] In the foregoing premises, it follows that we agree with the Court of Appeal’s assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*. Although the Respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior Courts were satisfied that indeed elements of a customary trust in favour of the Respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions. ... [57] With the repeal of the Registered *Land Act* (Cap 300), Parliament enacted the *Land Registration Act* No. 3 of 2012. The provisions of Section 28 of the former, including the



proviso thereto, were re-enacted as Section 25 of the latter; while the provisions of Section 30 of Cap 300 were re-enacted as Section 28 of the *Land Registration Act*. However, Parliament introduced two new categories of overriding interests, the first category is what are now called “spousal rights over matrimonial property”; while the second category is what are, rather curiously called “trusts including customary trusts”. Even more curious, is the fact that “the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation,” as earlier provided for under Section 30 (g) of the Registered *Land Act*, are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*. [58] What are we to make of these changes” Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land...” {Emphasis supplied}

63. Further and in relation to ingredients of a customary trust, in circumstances where the Defendant is the original allottee of the suit land, there is no basis for a customary trust since the element of inter-generational hand-down is absent. See *Eunice Kemunto Nyaundi & 6 others vs. Charles Nyangai* [2018] eKLR, per JM Mutungi, J.; and *Alice Wairimu Macharia vs. Kirigo Philip Macharia* [2019] eKLR, per J.G. Kemei, J. In *Eunice Kemunto Nyaundi & 6 others vs. Charles Nyangai* [2018] eKLR, the Plaintiffs were all children of the Defendant and the Defendant was the registered owner of land parcel number Gesima Settlement Scheme/71 measuring 7.2 hectares or thereabouts. The Plaintiffs claimed that the Defendant was registered as such proprietor in trust for them and their late mother Hellen Mandere Nyangai. The Plaintiffs claim the Defendant in 2015 attempted to subdivide the said land with the intention of transferring the same to third parties which would have prejudiced the Plaintiffs’ interest in the said land. They thus sought a declaration that the Defendant held the land in trust and for their benefit and a permanent injunction restraining the Defendant from in any manner dealing with the suit property. On the other hand, the Defendant denied that he held the said land in trust and for the benefit of the Plaintiffs arguing that he was allocated the suit land following application to the Settlement Fund Trustees (SFT) who after he repaid the loan it had advanced to him secured a transfer of the land to his name as the sole owner and not as trustee for the Plaintiffs. The Defendant further denied that he had breached the imaginary trust. The Defendant lodged an application under Order 2 Rule 15; Order 37 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the *Civil Procedure Act* seeking orders that the Court strikes out the suit on grounds that the suit is frivolous, scandalous, vexatious, an abuse of the Court process and discloses no cause of action since he is the registered proprietor of the suit land and that he has absolute and exclusive rights over the same to the exclusion of all and sundry, the Plaintiffs not excepted and that any further delayed dispensation of the matter herein summarily is a slap on the proprietary rights of the Defendant/ applicant over the suit land. Concurring with the Defendant that this suit was frivolous, scandalous, vexatious, an abuse of the Court process and discloses no cause of action and thus summarily dismissing it, J.M. Mutungi, J. had the following to say and I wish to quote his Lordship in extenso for clarity: - “9. In the present suit the Defendant who is the Plaintiffs’ father has not denied the Plaintiffs’ right of occupation of the suit land and neither does he deny that the Plaintiffs have an entitlement to the land as beneficiaries. As per the pleadings it is apparent the Plaintiffs want to be



the ones to determine how the suit property and/or indeed the Defendant's properties ought to be shared out and/or distributed. The issue for the Court to ponder is whether the Defendant's children would legally be entitled to restrain him from dealing with his property as he deems fit during his lifetime provided he does not deal with the properties in such a manner as would result in disinheriting them. The Law of Succession Act, Cap 160 Laws of Kenya which comes into operation once a person is deceased, under Part III Sections 26 to 30 makes provisions for dependants of a deceased person. Under Section 29(a) the Plaintiffs qualify as dependants of the Defendant in the event of his death. In my view it is only in the event of the Defendant's death would the Plaintiffs be entitled to participate in the distribution of the Defendant's estate as his dependants and beneficiaries and that would have to be in succession proceedings as envisaged under the Law of Succession Act, Cap 160 of the Laws of Kenya. 10. The evidence available establishes the Defendant was allocated the suit property by the Settlement Fund Trustees (SFT) in 1964 and after repayment of the SFT loan he was registered as the absolute owner of land parcel Nyamira/Gesima Settlement Scheme/71 on 4<sup>th</sup> December 2007. The rights of a registered owner of property are clearly set out under Sections 24, 25 and 26 of the Land Registration Act, 2012. Section 24(a) provides:- 24. Subject to this Act- (a) The registration of a person as 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) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by Section 28 of the Act as not requiring noting in the register. In the event a registered owner holds the property as a trustee, the rights conferred by registration would be subject to the duty or obligation placed upon him as such trustee. 11. In the instant matter it is necessary therefore to determine whether the Defendant held the title subject to any overriding interests and/or as a trustee as asserted by the Plaintiffs. The evidence is in abundance that the Defendant is the registered owner of the suit property and that the Plaintiffs are indeed his children. There is also ample evidence that the Defendant has all along acknowledged the Plaintiffs have a beneficiary interest over the suit property. The Plaintiffs claim the Defendant is holding the suit property in trust for them. There can be no basis for the Defendant to be said to hold the suit land in trust for the Plaintiffs when in fact he may even have acquired the land before some of the Plaintiffs were born (back in 1964). While the Defendant cannot deal with the suit property in total disregard of the Plaintiffs interest as beneficiaries my view is that the Plaintiffs cannot equally prevent the Defendant being the registered owner of the property from dealing with the suit property in any manner he chooses including determining how to distribute the same amongst the beneficiaries. If a father who is registered as owner of property was to be held to hold such property as a trustee of his children, such position would create confusion and uncertainty which would make it virtually impossible to carry out any transactions affecting land as practically the bulk of land would be subject to trust. There is no basis upon which the Court can hold that the Defendant holds the suit property in trust for the Plaintiffs... 13. In the instant case, the Defendant was the original allottee of the suit land. The Plaintiffs are his children and he has a right to determine how he wishes to deal with and/or distribute his estate during his lifetime. The Plaintiffs have not sought to have the trust they claim discharged which begs the question what happens if the Court were to declare the Defendant holds the suit property in trust for the Plaintiffs. Does it mean they would still have to wait until the Defendant dies before they distribute his estate" The Defendant is alive and wishes to settle the affairs of his estate to obviate the obvious wrangles that would be there once he exits the scene. The Plaintiffs should not place unnecessary hurdles on his path. The best option would be for the Plaintiffs and their father to agree on the distribution of his estate now that he has shown a willingness to actually distribute the land he owns when he is still alive, otherwise after he dies there is bound to be protracted litigation as the Plaintiffs' action shows, which can be avoided. 14. From my foregoing discussions, it must have



become apparent that I am not persuaded the Plaintiffs have any reasonable cause of action against the Defendant. The suit amounts to an abuse of the Court process and accordingly I order the suit commenced by the plaint dated 30<sup>th</sup> October 2015 struck out for being incompetent and an abuse of the Court process.”

64. It follows that one of the cornerstone pillars of a customary trust is the fact the land in question is an ancestral land or handed down generations. In *Mbui Mukangu vs. Gerald Mutwiri Mbui* [2004] eKLR, it was held that in inferring a customary trust, the fact that the subject land was ancestral land that devolved to the Defendant from his late father was a clear testament of existence of a customary trust and that this kind of trust serves intergenerational equity where the land is held by one generation for the benefit of succeeding generations. See also *Douglas Macharia Waitthaka vs. Samuel Mugo Njoki* [2018] eKLR, where J.G. Kemei, J. reasoned as follows: “21. Further the Court does not find for the determination of the trust of the suit property at this stage save to find that the suit land is encumbered by a trust. The land is ancestral land having devolved from the Plaintiff’s father and it is expected that it will so devolve to his children in similar manner in accordance with the concept of intergenerational trust. 22. Having found that the suit land is trust land, this Court does not find any justification in the caution remaining on the title. It is hereby ordered to be removed.”
65. The intention of the family is also key and a customary trust can then be implied from the intention of the family. In *James N. Kiarie vs. Geoffrey Kinuthia & Another* [2012] eKLR, which echoed by the Supreme Court in *Isack Kieba M’Inanga vs. Isaaya Theuri M’Lintari & Another* [2018] eKLR, P. Nyamweya, J. held that the intention of parties and not possession or occupation is the key in determining whether there is a customary trust so that if the intention pointed to the direction that the holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Similarly, in *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR, Kwach, Shah and O’Kubasu, JJA (as they then were) held that a trust can never be implied by the Court unless there was intention to create a trust in the first place. In their words, they said thus: “The concept of 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 to 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.”
66. In determining such a claim, a Court should then conduct a deep excavation of the root of the title and discern the intention of the family. In *Alice Wairimu Macharia vs. Kirigo Philip Macharia* [2019] eKLR, while unpacking the matrix laid down by the Supreme Court in *Isack Kieba M’Inanga vs. Isaaya Theuri M’Lintari & Another* [2018] eKLR, by converting the matrix into pertinent questions to be posed by a Court, J.G. Kemei, J. laid down the practical steps to be undertaken by a Court before drawing inferences in the following words: “23. Going by the decision of the SCOCK referred to in para 20, it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as; how was the land first registered? Was it clan, communal or family land before registration? Was the land inherited or passed down from the family lineage of Mr Macharia? How did Macharia acquire this land? Did he inherit or he acquired by way of purchase or a gift? From the evidence led by both parties they agree that the land was registered and owned by their father and husband respectively and upon his death it devolved to the two mothers as per the 2 houses that he had as a polygamist. There is no evidence tendered before this Court to show that the land is such as is a customary land that is to say is land that was encumbered with a trust.”



67. Finally, as the Supreme Court of Kenya said in its obiter dictum in *Isack Kieba M’Inanga vs. Isaaya Theuri M’Lintari & Another* [2018] eKLR, each case has to be determined on its own merits and quality of evidence since not every claim of a right to land that will qualify as a customary trust.
68. I have applied my mind to the law, facts and evidence presented by the Defendants in support of their assertion that the suit property is ancestral land over which the law imposes a customary trust.
69. My exposition of the law on customary trusts is that it is now – without doubt – an overriding interest recognized and protected by section 28(b) of the *Land Registration Act*.
70. Regarding ingredients necessary to prove a customary trust, although Courts have for donkey’s years held that the ingredient of actual physical possession and occupation of the land is necessary to prove this kind of trust, the Supreme Court has now settled this cloud of dust by taking a stance to the effect that unless a trust is proved, prove of possession and occupation in itself cannot pass as an overriding interest protectable by law and that while possession and occupation is a relevant fact, in concluding that a trust exists, this is not a necessary ingredient for a customary trust to be established. Instead, it is the customary law and practice of that particular community which clothes the rights of a person who is in possession or actual occupation, with legal validity and as such, if a customary law and practice does not recognize such possession or actual occupation, then it cannot be a right to which a person is entitled. Put differently, mere possession and occupation without recognition is and cannot be a protectable right and that the only way a person can claim a customary trust is to prove that the possession and/or actual occupation of the land is recognized and/or permitted by customary law and practice.
71. Distilled are the five key ingredients which ought to be proven for a Court to infer a customary trust. First, the land in question was before registration, family, clan or group land. Second, the claimant belongs to such family, clan, or group. Third, 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. Fourth, the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. Fifth, the claim is directed against the registered proprietor who is a member of the family, clan or group. In other words, possession and/or occupation which has been held as a key ingredient for many years is not a necessary ingredient although it is relevant. Further, a Court shoulders the obligation to satisfy itself that it was the intention of the parties that one of them holds the suit land for the benefit of other members of the family whether or not the claimant is in possession or actual occupation of the land. This intention may be inferred from inter alia evidence that the suit land has been handed down generations and/or is ancestral land. Equally important, a Court must satisfy itself that the current registered owner (the Defendant) is not and should not be the original allottee in which case the concept of trust does not apply.
72. To prove a customary trust, the onus is on the shoulders of the Defendants to prove on a preponderance of evidence: (i) that the suit property was before registration a family land; (ii) that the Plaintiffs belong to the said family; (iii) that the relationship of the Plaintiffs and the said family is not so remote or tenuous as to make her claim idle or adventurous; (iv) that the Plaintiffs could have been entitled to be registered as owners or other beneficiary of the suit land but for some intervening circumstances; and (v) that the claim is directed against the registered proprietor who is a member of the said family.
73. This Court bears the obligation to cast its net wide and far to detect the intention of the parties which is supreme and in this regard, the guiding ray will whether it was the intention of the parties that the subject land be held for the benefit of other members of the family whether or not the claimant is in possession or actual occupation of the land including whether the land in question has been handed down generations and/or ancestral land. In this connection, before a Court infers a customary trust,



it should be satisfied to standard that the circumstances point to an intention to create a trust for the coming generations. In addition, and not derogation, the current registered owner is not and should not be the original allottee.

74. The surest way to the destination of establishing whether or not a customary trust exists is to trace the root of the suit property (Muvuti/Kaani/1413). Without this, it will be difficult to unravel the intention of the parties and further, it will be arduous to infer whether a customary trust exists.
75. Having considered the Defendants' mere oral assertions that the suit property is ancestral land in the context of the said Plaintiff's documentary evidence (namely the title deed which reflects the Plaintiff as the absolute owner thereof, the Plaintiff's Exhibit 1, and the sale agreement thereon in Kikamba language, the Plaintiff's Exhibit 6, and its English translation, the Plaintiff's Exhibit 7, this Court reaches a conclusion that the Defendants' evidence generated diminutive persuasion in the mind of this Court, on a preponderance of evidence, that the suit property was before registration a family land.
76. Nothing would have been easier than to exhibit copies of succession proceedings to demonstrate that the suit property was transmitted from the Defendants' grandparents or that the title was acquired fraudulently or illegally. See Jackson Mwiti M'Rinyiru vs. Silas M'Rinyiru Mbui (2020) eKLR.
77. It is not enough to merely assert that the suit property is ancestral land. In Jackson Mwiti M'Rinyiru vs. Silas M'Rinyiru Mbui (2020) eKLR, the Court considered a similar situation and held as follows: "Thus, it was not sufficient for the appellant to state that the suit land belonged to his grandfather. He was duty bound to adduce evidence to support his claim, which evidence did not meet the threshold of a customary trust on a balance of probabilities." The mere fact that the land neighbours some owned by the uncles of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants does not make the land ancestral land and subject to customary tenure." And in dismissing the Defendants' Counterclaim, the Court held that "It is despicable, if not outrageous, for a child to assert that his father or mother must subdivide his land in a particular way and proceed to sue his parent because he/she does not wish to deal with the land in the way proposed by the child."
78. Further, the Defendants failed to place material before this Court in the direction of assisting this Court to reach a conclusion that the Plaintiff's title is defeasible on account of any of the vitiating grounds enacted in the Land Registration Act namely fraud and/or misrepresentation and/or illegality and/or unprocedural process in acquiring the title and/or a corrupt scheme, as enunciated in the said Supreme Court decision in Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).
79. Consequently, this Court reaches the inevitable conclusion that beyond assertions of a customary trust and fraud, the Defendants failed to effectively assault the registration of the Plaintiff as the absolute owner thereof.
80. Concerning the assertion by the Defendants that the 1<sup>st</sup> Defendant's house straddles both Muvuti/Kaani/1414 and Muvuti/Kaani/1413, beyond mere assertion which is worsened by the fact that it was an afterthought having not been pleaded in the Counterclaim, this Court finds this assertion unsupported by evidence. It's now a settled principle of procedure that a party is bound by his pleadings and evidence cannot be led on an unpleaded fact.
81. The foregoing findings lead this Court to the firm conclusion that this Court is persuaded - on a preponderance of evidence - that the Plaintiff is the absolute and indefeasible owner of and entitled to immediate possession of the parcel of land known as Muvuti/Kaani/1413 (the suit property).
82. Conversely, the Defendants have failed to present evidence – on a balance of probabilities – that the suit property is ancestral land over which a customary trust should be imposed by law.



**(i) Whether on a preponderance of probabilities, the Plaintiff has adduced evidence that the Defendants have trespassed to the suit property. The derivative question is whether a biological child can be held liable of trespass, in the biological parent's land and if yes, circumstances under which that can happen**

83. Further to demonstrating that the Plaintiff is either the bona fide owner or proprietor or entitled to immediate possession thereof, to succeed in an action for trespass, the Plaintiff has to prove trespass. And once a person proves that (s)he is the bona fide owner or proprietor of a parcel of land, then subject to the encumbrances; easements; wayleaves; airways; restrictions; conditions contained or endorsed in the certificate; overriding interests and matrimonial rights, the proprietor attains proprietary rights including the right to admit or licence any person thereunto. See section 25 read with sections 7(4) (c); 26; 36(10); 47; 56(2); 62; 67; 76; 77; 78; 94; 98; 99; 100 and 104 of the Land Registration Act. See also sections 20; 21; 23; 24; 26; 28; 32; 35; 36; 133C (6); 143; 144 and 148 of the Land Act. See also the Wayleaves Act.
84. The Trespass Act, Cap 294 of the Laws of Kenya, does not directly define trespass. The general meaning of trespass can be gathered from sections 3; 4; 5; 6 and 8 of the Trespass Act. Gathering from the said sections, it amounts to trespass if any person, unlawfully, without a reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on that land without the consent of the proprietor. The term “occupier” as applied in the Trespass Act means the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively. And “private land” as applied by the Trespass Act means land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or land in respect of which a claim to an estate in fee, or to a lease, has been made but disallowed or refused; or cultivated land or enclosed land; or any forest area; or railway land.
85. Further, the general meaning thereof can be gleaned from section 152A of the Land Act which prohibits unlawful occupation of land by providing that “A person shall not unlawfully occupy private, community or public land.” In addition, the general meaning of trespass to land according to Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, at page 923, is “any unjustifiable intrusion by one person upon the land in the possession of another.”
86. Besides, the scholarly text of the learned authors Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, at Paragraph 18-01, defines trespass to mean “Any unjustifiable intrusion by one person upon land in possession of another.”
87. In *La Nyavu Gardens Limited vs. Wilson Munguti Mbithi alias Kavuti & 2 others* [2012] eKLR, Makhandia, J. took a view that any unauthorized entry into another person's land constitutes trespass.
88. Originally trespass *quare clausum fregit* in Latin, trespass is a Latin terminology which loosely means ‘why he broke the close’ but now anglicized. Henry Black, in his magnum opus work known as *The Black's Law Dictionary*, 8<sup>th</sup> Edition, at page 173 defines it as follows: “...1. A person's unlawful entry on another's land that is visibly enclosed. This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another's unlawful entry on one's land that is visibly enclosed...”
89. Besides, there is another typology of trespass, *eiusdem generis*, known trespass *ab initio*. This arises when a person was granted access to land but abused the right in which case the trespass is deemed to run from the date the trespasser was allowed access. In *The Six Carpenters' Case* (1572) 77 ER 695, six



carpenters entered a tavern and served wine for which they paid. They were afterwards, at their request, served bread and more wine, which they refused to pay for. An action for trespassing was brought against them. It was held that when an entry, authority or licence is given to anyone by the law and he abuses it, he shall be trespasser ab initio, but not where entry, authority or licence is given by the party. The elements of a trespass ab initio are: (a) the authority abused must be an authority granted by law and not by an individual; and (b) there must be some positive act of misconduct, and not a mere omission or neglect of duty. In *McGuire vs. United States*, 273 U.S. 95 (U.S. 1927), a search warrant was issued to revenue agent officers to enter and search the premises possessed by McGuire. The officers acting under the warrant searched the premises, discovering several gallons of intoxicating liquor which they seized. They destroyed the liquor without the Court order or other legal authority except one quart of whisky, which they retained as evidence. The Court held that the officers by destroying the seized liquor became trespassers ab initio. Thus, they lost the protection and authority conferred upon them by the Warrant of Search. In the USA, the tort of trespass ab initio has been held in the following decisions also: *Sheftall vs. Zipperer*, 133 Ga. 488 (Ga. 1909); *Louisville & N. R. Co. vs. Barte*, 204 Ala. 539 (Ala. 1920); *Brite vs. Pfeil*, 334 S.W.2d 596 (Tex. Civ. App. San Antonio 1960); *Tubbs vs. Tukey*, 57 Mass. 438 (Mass. 1849); and *Gibson vs. Holmes*, 78 Vt. 110 (Vt. 1905). Locally, see *George Mburu Koigi vs. Francis Kienjoku Koigi* (2006) eKLR.

90. What are the ingredients of trespass? There is no statutory clarity on the ingredients of trespass. According to the said Black's Law Dictionary, 8<sup>th</sup> Edition, at page 173, the tort of trespass has two ingredients as follows: (a) entering upon land in the possession of another; (b) remaining on the land or placing or projecting any object upon it. Therefore, in instances where the Plaintiff is entitled to possession only, but the Plaintiff is not the owner thereof, trespass in this context is a violation of the right to possession, the Plaintiff should prove on a balance of probabilities two ingredients. First, that the Defendant entered the suit property while it was in possession of the Plaintiff. Second, that the Plaintiff had the right to immediate possession. In this connection, in *M'Mukanya vs. M'Mbijiwe* (1984) KLR 761, Kneller JA (as he then was) laid the ingredients of trespass in the following words: "... He has to prove on the balance of probabilities M'Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M'Mbijiwe must prove he, and not M'Mukanya and Nyamu, had the right to immediate and exclusive possession of it which is different from ownership."
91. However, in instances where the Plaintiff is the owner, trespass in this context is the violation to the right to ownership and in this case, possession is irrelevant. If possession was to be asserted in such a case, then the principle of indefeasibility of title will be defeated since an owner who does not occupy his property will be dispossessed thereby. In *Moya Drift Farm Ltd vs. Theuri* (1973) 1 EA 114, the Appellant sued the Respondent claiming that it was the registered owner of certain land on which the Respondent was trespassing and who had refused the Appellant entry. The Appellant claimed eviction and a perpetual injunction restraining trespass by the Respondent. At the trial Court (High Court), Miller, J. held that although the Appellant was the registered owner of the suit property, the Appellant had failed to prove that it was in possession of the suit property and thus the claim of trespass was unsustainable. The Appellant proffered an appeal to the Court of Appeal contending that possession was unnecessary in view of the Registration of Titles Act. Sir William Duffus P, Spry VP and Lutta JA (as they then were) held that the Appellant was the absolute and indefeasible owner of the land and was entitled to take proceedings in trespass and in the context of a dispute between neighbouring landowners, a perpetual injunction would be granted. Spry VP (as he then was) had this to say in his leading Judgment and Sir William Duffus P (as he then was) & Lutta, J.A. concurred: "These remarks appear to have arisen from a submission by the Advocate for the Respondent in the High Court before



evidence was called, that no cause of action was shown in the Plaint as amended, because the Appellant company had to show that at the time of the “alleged act” it was in lawful occupation, which was not the case, as according to the Plaint the alleged wrong was in August 1966, while the Appellant company obtained title to the land in October 1967... The Plaint recites the Respondent’s entry on the land in 1966, but it is quite clear, reading the Plaint as a whole, that it is complaining of a continuing trespass and relates to the period from 25 October 1967, when the Appellant company informed the Respondent that it was the registered owner of the land and ordered him to vacate it, to the filing of the suit. As regards the present proceedings, the date of the Respondent’s entry on the land is immaterial, since it was before the Appellant company had any interest in it, but if the Appellant company is correct in its submission that the Respondent entered as a trespasser, he continued to be such, since it is not suggested that he acquired any lawful title or right to the land... I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has taken physical possession.”

92. For a richer contextualization of the elements of trespass, a few prototypes can suffice. The tort of trespassing to land is actionable per se (meaning that it is actionable notwithstanding absence of actual loss or damage or harm). For this proposition, see *Ashby vs. White* (1703) 2 Ld Raynd 938. However, it must be proved that the intrusion was voluntary or negligent. It amounts to trespass if when mowing your land, you heap grass by mistake on the Plaintiffs adjoining land. See *Basely vs. Clarkson* (1682) 3 Lev 37. It amounts to trespass if you enter another’s land to repair your own buildings. See *Hewlitt vs. Bickerton* (1947) CLC 10504. Knowledge or lack of knowledge that you’re a trespasser is immaterial. Negligence may count in this case. See *Conway vs. Wimpey & Co* (No 2), (1951) 2 KB 266). After divorce, although not registered as the proprietor, a former spouse cannot be liable of trespass since she holds an interest in matrimonial property. See *PME & another vs. PNE* (2019) eKLR.
93. In support of this averment, the Plaintiff adduced oral evidence to the effect that the Defendants have without colour of right or reasonable or justifiable cause, illegally constructively evicted him from the suit property and forcefully occupied.
94. In their evidence, the Defendants did not deny this averment and the attendant evidence. Instead, the Defendants justified the occupation on an overriding right namely a customary trust and further, that they are biological children of the Plaintiff who cannot be found liable of trespass.
95. Falling for determination now is the derivative question is whether a biological child can be found liable of trespass in the parent’s land, in circumstances where the land was acquired by way of purchase?
96. Dissimilar to trespass actions against absolute strangers, in determining a trespass action pitting a parent and child, the Court should proceed with extreme caution. In this connection, the mode of acquisition of the land in dispute by the parent is determinative. For instance, it would present a different cattle of fish if the land in dispute was acquired by inheritance and/or transmission handed down from the parents of the parent who lodged the trespass action, in which case the trespass action may not succeed on account of overriding interest, particularly a customary trust, in favour of the Defendants, under section 28(b) of the [Land Registration Act](#) as construed in *Isack M’inanga Kiebia vs. Isaaya Theuri M’lintari & another* [2018] eKLR.
97. It’s instructive to briefly highlight some history around this thorny issue. Before the [Land Registration Act](#), 2012 was enacted, there used to be an overriding interest catering for the rights of the persons who were in possession or actual occupation before registration under section 30(g) of the Registered [Land](#)



Act (RLA), Cap 300 (Repealed), which provided as follows: “Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register – (a) ... (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where enquiry is made of such person and the rights are not disclosed.”

98. It's little wonder that when the court was faced with a similar question in *Jane Wanjiru Kiarie & another vs. Maria Wanjiku & another* [2008] eKLR (hereinafter “the Wanjiru case”), where a father wanted to evict his two daughters land he had acquired by purchase and he was desirous of selling it, the court took a position that it was impermissible on basis of an overriding interest of the persons (the two daughters) who were in possession or actual occupation. M. Koome, J. (as she then was, now CJ) held: “... My own reading of Section 27 and 28 of the Registered Lands Act the property is held by the registered proprietor subject to the overriding interest provided for under Section 30. Section 30 (g) of the Registered Land Act provides as follows: “unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register – (a) ... (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where enquiry is made of such person and the rights are not disclosed.” The 1st defendant’s title was transferred to her by the 2nd defendant in April 1997. The plaintiff’s mother passed away in 1989. From the evidence on record I find that by the time the title was issued to the 1st defendant the plaintiffs were in occupation of the suit premises. If as at the time, the title was issued to the 1st defendant, the registrar of titles had conducted an inquiry over the persons in occupation of the suit premises, certainly he would have discovered that the plaintiffs who are daughters of the 2nd defendant were in occupation of the suit premises and perhaps their interest would have been noted in the title...Having established the above facts are the plaintiffs entitled to the orders sought? I would respond to the above in the affirmative. Based on the above findings the plaintiffs have a beneficial interest over the suit premises being the daughters of the first registered proprietor and his late wife. This is the only home the plaintiffs knew. It is alleged that they were at one time married but the defendants could not tell who had married them. The fact is that they are living at the suit premises and they are children of the defendants. The defendants are categorical that the plaintiffs should be evicted. In my humble view this would be unconscionable and against the letter and spirit of the law that guarantees fundamental rights to life. Evicting the plaintiffs from their father’s original parcel of land which was transferred while they were in occupation perhaps to defeat their claim will not only perpetuate an injustice but contribute to the increase of poverty.”
99. Faced with a similar question around the same time, where the father wanted to evict his 5 sons in *Godfrey Kagia Githire vs. George Ndichu Kagia & 4 others* [2008] eKLR (hereinafter “the Kagia case”), the same learned Judge (M. Koome, J. as she then was, now CJ) restated the position in the Wanjiru case and in further, found that the law had imposed a constructive trust upon the plaintiff, the sons having proved that they contributed to servicing of the loan which was used to purchase the subject land.
100. Needless to mention, upon repeal of the RLA, the Land Registration Act was enacted and the successor of section 30 RLA is section 28 of thereof which provides as follows: “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (a) deleted by Act No. 28 of 2016, s. 11(a); (b) trusts including customary trusts; (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support; (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (f) deleted by Act No. 28 of 2016, s. 11(b); (g) charges for unpaid rates and other



funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and (j) any other rights provided under any written law, Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.”

101. Upon examination of the said successor (section 28 of the [Land Registration Act](#)), the overriding interest which was in section 30 RLA namely “the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where enquiry is made of such person and the rights are not disclosed”, seems to have been intentionally and purposely abandoned.
102. I must underline that this would have been the saving grace for the defendants, as was the case in the Wanjiru and Kagia cases.
103. It follows that the holding in the Wanjiru and Kagia cases, is no longer good law and is thus significantly distinguishable from the current circumstances, having been anchored an overriding interest which is absent in the current Act.
104. This Court finds it instructive to point an emerging trend and its legal and economic ramification. There is an emerging trend which this Court would wish to highlight, where children of certain generations have harboured a misguided notion that their parent’s property is their property. If it goes unchecked, this notion combined with what I call the prodigal son notion, will spell a sweeping negative economic impact, since it deprives the harbourers of the need to acquire their own, and in the long-run hamper the desired economic growth. It is high time children respected their parents and ceased to treat their parents’ property as theirs.
105. In *MMG vs. JG & another* [2018] eKLR, the mother sought an eviction order against her foster children. In granting the order, J.G. Kemei, J. stated as follows: “27. The defendants have not shown any legal and justifiable reason why they should be interfering with the plaintiff’s suit land. The Defendants being able bodied men should express their gratitude to their former foster mother for taking care of them and strive to acquire their own land. As regards the suit land they have not demonstrated any right over it. All the rights therein are vested in the plaintiff.28. In the end the Plaintiff’s suit succeeds...”
106. The following persuasive precedents, to wit *Teresisa Kwamboka Mauti (suing as the Administratrix of the estate of David Mauti Nyarango (deceased) & Another vs. Ezekiel Nyarango Mauti & 5 Others* (2022) eKLR; *Oganga & another vs. Orangi & 3 others* (Environment & Land Case 466 of 2015) [2023] KEELC 16348 (KLR) (22 March 2023) (Judgment); *Muriuki Marigi vs. Richard Marigi Muriuki & 2 Others* [1997] eKLR; *Stephen Maina Kinyua vs. Rosemary Njoki Maina* (2008) eKLR; *Edward Kipkosgei Chemurbu & another vs. Charles K. Kosgei & Another* [2014] eKLR; *Gathinji Gachoki Njoka vs. Peter Muriithi Githinji & 2 others* [2018] eKLR; *Paul Kirinya vs. Delfina Kathiri* [2019] eKLR, et alia, are crucial in depicting the premium sections 24 and 25 of the [Land Registration Act](#)- the interest conferred by registration and the rights of a proprietor - has been accorded by superior courts.
107. Section 24 thereof provides that “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; and (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and



- expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”
108. Section 25 provides 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. (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.”
109. The question of children seeking to succeed their parents while alive is not novel. In *Teresisa Kwamboka Mauti (suing as the Administratrix of the estate of David Mauti Nyarango (deceased) & Another vs. Ezekiel Nyarango Mauti & 5 Others (2022) eKLR*, the Plaintiff sued her father-in-law (father to her deceased husband) to compel him to subdivide his land and give her purported share and in dismissing the suit, Mugo, J. had this to say: “It is very shameful, sickening, disgusting, dishonourable and disgraceful that the First Plaintiff has the audacity to urge this Court to grant orders: Restraining the 1<sup>st</sup> Defendant from entering or interfering in any manner with the 14 Acres comprised in L.R. NO. North Mugirango/Nyankono Settlement Scheme/1 on the misguided and misinformed basis that she has acquired “equitable interest” over the same. Section 24(a) of the [Land Registration Act](#) states as follows: -“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”. No one can deny any proprietor of land such rights and privileges... I find it as spiting a parent when one goes to Court to have him ordered not to enter his legally acquired land, from his hard-earned labour and that he be ordered to distribute it among some of his children and more so when such children are living and earning a living out of the said land... It is a sign of insensitivity, selfishness, thoughtlessness, heedlessness and ungratefulness.”
110. Similarly, the question where children imagine that their parent’s property is their own is also not novel. In disapproving this emerging notion in *Oganga & another vs. Orangi & 3 others (Environment & Land Case 466 of 2015) [2023] KEELC 16348 (KLR) (22 March 2023) (Judgment)*, Munyao Sila, J. rendered himself as follows: “33. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of course complain that they were not involved in the sale. Was the 1<sup>st</sup> Defendant under any legal obligation to involve them in such a sale? I do not think so, and Mr. Nyamurongi did not refer me to any law or any authority which asserts that a parent must consult and obtain consent of his children before disposing of his/her free land. In fact it is despicable, if not outrageous, for a child to assert that his father or mother, must subdivide his land in a particular way, and proceed to sue his parent because he/she does not wish to deal with the land in the way proposed by the child... 34... It is time that children stopped having a notion, that what belongs to their parents also belongs to them in equal measure, and that their parents must subdivide and distribute land to them in a particular manner. In this case, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, children of the registered proprietor, attempted to bully and cajole their father to distribute his land in a way that they themselves wanted. I have mentioned that it does appear that their father was overwhelmed by this pressure, and also pressure from his relatives, that he did go to the land and make proposals on subdivision. He had proposed to subdivide the land to his two wives and leave a portion for himself but this was rejected by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who thought that the old man was keeping too much land for himself and subdividing to his wives too little (from the tribunal proceedings, it appears the 1<sup>st</sup> Defendant wanted to keep 8 ‘mirabas’ and share 5 ‘mirabas’ to his wives, but this was rejected, with



the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, supported by some clan members, insisting that he should share it in the reverse, that is 5 ‘mirabas’ for himself and 8 ‘mirabas’ for his two wives). The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants brought in the Chief and clan elders who had the audacity to go to the land and subdivide it as they thought best, as if this land did not have an owner who could make independent decisions. I think it is this which made the 1<sup>st</sup> Defendant decide to sell the land and have it out his hands. The fact that he had at some point conceded to subdividing his land, in some proportion, does not mean that he had no right to change his mind and not decide not to share the land at all. It was his land and he could do whatever he wanted with it; he could as well change his mind from distributing the land to selling it, which is precisely what he ended up doing.”

111. Also, in *Muriuki Marigi vs. Richard Marigi Muriuki & 2 Others* [1997] eKLR (also reported as (2008) I KLR 1073), the sons and grandson of the Appellant wanted the Appellant to distribute land in a certain way. The Court of Appeal held that since the Appellant as owner of the property was still alive there was no law which he could be compelled to distribute his property. The Court of Appeal held that his property is not available for subdivision and distribution among his wives and children except if he personally on his own free will decided to subdivide and distribute it. He could not be urged directed or ordered to do so against his will. The rights of the Plaintiff to the suit land could only be extinguished on death. The Court stated as follows: “This was a suit by sons and grandsons to the Appellant, who wanted the Appellant to distribute his land in a certain way. The Court of Appeal held that since the Appellant as owner of the property was still alive, there was no law upon which he could be compelled to distribute his property. The Court of Appeal held that his property was not yet available for sub-distribution among his wives and children except if he personally in his own free will decided to subdivide and distribute it. He could not be urged, coerced or ordered to do it against his own will. The rights of the Respondents to the property could only accrue after the death of the proprietor”.
112. Also, in *Stephen Maina Kinyua vs. Rosemary Njoki Maina* (2008) eKLR, Asike Makhandia, J. held as follows: “To my mind, the issue for determination before the learned magistrate was simple and clear cut. The appellant was able to demonstrate by production of title documents that he was the sole registered owner and or proprietor of the suit premises. That evidence was neither challenged and or controverted. In the absence of any other evidence to the contrary, the learned magistrate had no other choice but to act on the same. Unlike in Criminal matters, the standard of proof in civil matters is on the balance of probability and not beyond reasonable doubt. Once the appellant showed that he is the sole proprietor of the suit premises, he had discharged his obligation of proving his case on the balance of probability and was therefore entitled to a judgment. The trial Court however proceeded to hold and declare that the respondent had some proprietary interest in the suit premises. This holding is erroneous in the sense that the respondent herself had in the caution claimed a “Licensee’s interest” and not some unknown proprietary interest. Further it is my understanding of the law that a licensee only stays and retains possession of the land at the mercy of the owner. Once the registered proprietor of the land claims it back, his licence is once and for all terminated. From the evidence on record it is clear.”
113. Again, in *Edward Kipkosgei Chemurbu & another vs. Charles K. Kosgei & Another* [2014] eKLR, Sila Munyao J. held as follows: “..... I have looked at the [Land Registration Act](#) and the [Land Act](#), and I have not seen any provision stating that parents hold land in a general trust for their children ..... without there being any proven trust or any other overriding interest in favour of the Defendants, how the 1<sup>st</sup> Defendant decides to arrange the affairs of his home must be left to his discretion as absolute proprietor of the suit land. The Defendants cannot be heard to complain that their father is not allowing them to use the land as they wish”.
114. See also *Gathinji Gachoki Njoka vs. Peter Muriithi Githinji & 2 others* [2018] eKLR, where Cheronon, J. held as follows: “I am of the same persuasion that unless a party proves the existence of a customary



law, trust or any other trust recognized in law, a proprietor of land cannot be directed or advised on how he wants to use his land including disposing the same. I find that the decision by the learned magistrate was not supported by the evidence adduced by the Respondents. I also find that the learned magistrate misdirected himself on the applicable law. I therefore find the appeal merited and do hereby allow the same as prayed with costs to the Appellant.”

115. See also Paul Kirinya vs. Delfina Kathiri [2019] eKLR, where the Plaintiff, the defendant’s son, unsuccessfully sought a permanent injunction and a declaration to that effect, claiming entitlement to user rights and occupation of 0.40 acres out of the one acre suit land, on the basis of customary trust.
116. Accordingly, the thorny derivative question whether a biological child can be found liable of trespass in the parent’s land, in circumstances where the land was acquired by way of purchase, is firmly answered in the affirmative.
117. This Court thus reaches the conclusion that the Plaintiff has proved - on a preponderance of probabilities - that the Defendants have trespassed to the suit property.

### **(iii) Whether either the Plaintiff or the Defendants, are entitled to the prayers sought**

118. Their assertions having failed, it follows that the reliefs sought by the Defendants cannot be granted.
119. In respect to the Plaintiff, what are the appropriate remedies for trespass? In Judith Julia Wanjiro Njoroge vs. Samuel Ngeru Mwangi [2019] eKLR, J.G. Kemei reasoned that “15. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to land has a right to possession, occupation and use of the suit land. The Plaintiff conducted evidence that shows that the Defendant has unlawfully taken possession of the suit land and is damaging trees, grass, tilling the land and erecting a house; those actions of the Defendant amount to violation of the Plaintiff’s right to property as guaranteed in Article 40 of *the Constitution* and must be stopped.” In this connection, the learned Judge declared the ownership right of the Plaintiff and proceeded to issue a vacation order crowned with a permanent injunction. The same remedies were granted in Moya Drift Farm Ltd vs. Theuri (1973) 1 EA 114, discussed supra but in addition, general damages and mesne profits were granted.
120. The principal befitting reliefs in trespass are thus a notice for voluntary vacation failing which an eviction will follow coupled with a perpetual injunction to boot and in appropriate cases, general damages for trespass.
121. In this case, considering the history of the matter elaborating how the Defendants came into possession and the family ties of the parties involved, this Court does not find expedient the relief of damages for trespass sought by the Plaintiff. However, the Court finds the rest the reliefs sought appropriate. The reliefs befitting the current circumstances are thus a notice for voluntary vacation failing which an eviction will follow coupled with a perpetual injunction to boot.

### **(iv) Which party should bear the costs of this Suit and Counterclaim?**

122. Upon considering the cause of action and circumstances unique to this case including but not limited to the history of the matter and the blood family ties of the parties, this Court has found a good cause to depart from the general proposition of the law that costs follow the event.

## **PART VI: DISPOSITION**

123. Wherefore this Court finds the Plaintiff’s claim meritorious and accordingly enters Judgment for the Plaintiff as follows:



- i. A declaration is hereby issued that the Plaintiff is the absolute and indefeasible owner of the parcel of land known as Muvuti/Kaani/1413 (the suit property).
- ii. A declaration is hereby issued that the Defendants are trespassers on the suit property.
- iii. The Defendants are granted 90 days from the date of this Judgment to (voluntarily) vacate from the suit property. For avoidance of doubt, the vacation in this context shall include removal from the suit property goods (if any), personal property (if any), harvesting crops (if any), removal of livestock (if any), removal of structures (if any) and removal of materials the said structures are made of (if any). Further, the vacation in this context shall be construed to mean that except accessing the suit property, the Defendants shall stop any further activities which amount to development on the suit property effective from the date of this Judgment.
- iv. In the event the Defendants fail to vacate within the 90-day vacation notice, the Plaintiff shall be at liberty, without further recourse to this Court, to appoint an Auctioneer or Court Bailiff to evict the Defendants. In this regard, the Officer Commanding the Police Station serving the area where the suit property is located, is directed to provide security during the eviction exercise.
- v. An order of permanent injunction is hereby issued against the Defendants, their agents, servants, employees and/or any other person claiming under their title, restraining them from continued trespass, re-entry, dealing and/or in any other way interfering with the suit property, with effect from the date of expiry of the 90-day vacation notice issued under order (iii) supra.
- vi. Each party shall bear his own costs of both the Suit and the Counterclaim.

124. It is so ordered.

**VIRTUALLY DELIVERED, SIGNED AND DATED THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2024**

.....

**C.N. Ondieki**

**Principal Magistrate**

Advocate for the Plaintiff: Mr. Mwangi

Advocate for the Defendants: Ms. Karuiru

Court Assistant: Mr. Ndonye

