



**Peter (Suing on her Behalf and on Behalf of the Late Peterson Muli Mbevi (Deceased))  
v Mutevu (Sued in his Name and as a Personal Representative of the Estate of the Late  
Mutevu Kyeva (Deceased); Malua & another (Interested Parties) (Environment and  
Land Case E023 of 2021) [2025] KEELC 7390 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7390 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND CASE E023 OF 2021**

**EO OBAGA, J  
OCTOBER 30, 2025**

**BETWEEN**

**ALICE LUTHI PETER ..... PLAINTIFF  
SUING ON HER BEHALF AND ON BEHALF OF THE LATE PETERSON MULI  
MBEVI (DECEASED)**

**AND**

**DAVID KIMITU MUTEVU (SUED IN HIS NAME AND AS A PERSONAL  
REPRESENTATIVE OF THE ESTATE OF THE LATE MUTEVU KYEVA  
(DECEASED) ..... DEFENDANT**

**AND**

**PRISCILLA BETTY MALUA ..... INTERESTED PARTY  
REGINA MUTINDI ..... INTERESTED PARTY**

**JUDGMENT**

1. Vide the Complaint dated 23<sup>rd</sup> July, 2021, the Plaintiff sought the following reliefs against the Defendant: -
  1. A declaration that the Plaintiff is entitled, by reason of the sale agreement dated 03/09/2004 or adverse possession, to ownership of the portion of land Parcel No. Ukia/Utaati/227 sold to her family by the late Nzuli Kyeva, Mbuli Nzuli and Priscilla Betty Malua and in her possession since 2005.
  2. An order revoking the certificate of title for land Parcel No. Ukia/Utaati/227 registered in the name of the Defendant's only.



3. An order compelling the Defendants jointly and severally to forthwith transfer to the Plaintiff the portion of land Parcel No. Ukia/Utaati/227 ensuring to make provision for such access roads as may be necessary for the Plaintiff to access her portion of land.
  4. Any other or further reliefs that the Honourable Court may deem fit to grant.
  5. Costs of the suit.
2. The Defendant filed a Statement of Defence and Counterclaim on 10<sup>th</sup> December, 2021. The following orders were sought: -
1. A declaration that the 1<sup>st</sup> Defendant is the owner as per title documents and lands office records and user of Ukia/Utaati/227 to the exclusion of Alice Luthi the Plaintiff and her family or anyone claiming under her.
  2. A declaration that the Plaintiff Alice Luthi is a trespasser and an order for her to remove her structures from Ukia/Utaati/227 within 30 days of judgment failure the Plaintiff be evicted and structures be demolished by a licensed auctioneer/court bailiff with assistance of OCS Makueni all at costs to be paid by Alice Luthi the Plaintiff.
  3. Mesne profits at rate of Kshs. 50,000/= per annum from the year 2008 to date of eviction.
  4. Costs of this suit and interest.
3. The Plaintiff filed a Reply to Defence and Defence to counterclaim on 28<sup>th</sup> January, 2022. He urged the court to dismiss the counterclaim with costs.
4. The Plaintiff called four witnesses at the hearing of her case. PW1, Alice Luthi adopted her statement dated 23<sup>rd</sup> July, 2021 as her evidence in chief. She went on to produce the list and bundle of documents of even date PEX 1 – 6 in support of her case.
5. PW1 testified that on 3/9/2004, she purchased land which is composed of Title No. Ukia/Utaati/227 together with her late husband, Peterson Muli and that she prays for an order of this court to be issued with a title thereof. PW1 added that she purchased the land from Mbuli Nzuli Kyevea who sold it to her together with her daughter Priscilla Betty Maluwa.
6. PW1 testified that they did not measure the land that was being purchased but they placed sisal boundaries. She asserted that the land originally belonged to Kyevea Musembi before being inherited by his sons Nzuli Kyevea and Mutevu Kyevea. It was PW1's testimony that they purchased the portion belonging to Nzuli Kyevea for Kshs.200,000/=.
7. On cross-examination by Mr. Mutua, PW1 stated that the family of Mutevu Kyevea did not sell any land to her. She reiterated that she does not know the size of the land but she knows the boundaries. She stated that before purchasing the land she did not conduct an official search and it was not until later that she discovered that the land was registered in the name of Mutevu Kyevea after conducting the search. PW1 averred that Mutevu Kyevea Musembi was registered as the owner of the suit property on 8<sup>th</sup> August, 1991.
8. She further averred that in her sale agreement dated 3/9/2004, they had indicated a different plot number for the land before they later changed it to read Plot No. 227 after realizing the mistake. PW1 however stated that they did not sign against the amendment. She insisted that the Interested parties are her witnesses who can confirm that the land belonged to Nzuli Kyevea.



9. PW1 stated that by the time she was purchasing the suit property Nzuli Kyeve was deceased and it was his wife Mbuli Nzuli who sold the land. She asserted that Mbuli Nzuli did not show her letters of administration which mandated her to sell the land. PW1 added that she did not bury her husband in the suit property because she was issued with a court order in 2014 restraining her from burying him therein.
10. In re-examination, PW1 averred that she filed objection proceedings in Machakos HCSC No. 87 of 2003 because the Defendants had refused to factor in her interest in the suit property. That the court delivered a ruling on 18/12/2018 stating that the land be held by the administrators in trust for her benefit and that of other beneficiaries. She further stated that the title of the suit property was in the name of Mutevu Kyeve and that he was holding the same in trust for Nzuli Kyeve being the elder brother. PW1 clarified that the plot number was amended in the sale agreement because Mbuli Nzuli was old and she did not remember the plot number.
11. PW2, Priscilla Betty Mutua, adopted her statement dated 23/7/2021 as her evidence in chief. It was PW2's testimony that Nzuli Kyeve and Mutevu Kyeve inherited land Parcel No. Ukia/Utaati/227 from their father Kyeve Musembi. She averred that together with her mother Mbuli Nzuli, they sold their family's portion of the suit property, which was ancestral land to the Plaintiff and her late husband Peterson Muli Mbevi. She testified that the agreed purchase price of Kshs.200,000/= was duly paid.
12. PW2 averred that at the time of sale, their family's portion of the land had already been subdivided into two portions and boundaries fixed using sisals. She added that the Plaintiff took possession of the land in 2005, put up a home and started farming and that she lives there to date. PW2 testified that the land was surveyed and recorded in the name of Mutevu Kyeve in the 1970's during demarcation. That Mutevu being the first son of the family, he was to hold the land in trust for his brother Nzuli Kyeve which was consistent with Kamba practice at the time.
13. In cross-examination, PW2 reiterated that they sold their portion of the suit property together with her mother Mbuli Musyawa Nzuli and that they received the full purchase price. She averred that when they were selling the land, the family of Mutevu Kyeve had no objection. It was her testimony that at the time they sold the land, they did not have a title deed. She added that they did not obtain letters of administration in respect of the estate of Nzuli Kyeve. PW2 insisted that the suit property was subdivided between Mutevu Kyeve and Nzuli Kyeve by clan elders.
14. On re-examination, PW2 stated that Kyeve Musembi identified the portions of the suit property where his sons would settle. She added that when the land was being subdivided, many family members were present as well as other non-family members. She insisted that they were not given any other land by her grandfather, Kyeve Musembi. She reiterated that the land was recorded in the name of Mutevu Kyeve during land demarcation to hold in trust for his sibling.
15. PW3, Mathias Kyule Mutunga adopted his statement dated 23/7/2021 as his evidence in chief. He averred that the suit property initially belonged to Kyeve Musembi and that he left it behind to Mutevu Kyeve who was to hold the same in trust for the rest of the family. PW3 stated that Mutevu Kyeve is his uncle adding that he was present when the family meeting was called to subdivide the land.
16. It was his testimony that the land was subdivided into two portions with sisal plants being planted to signify the boundary. PW3 stated that those present at the family meeting were David Kimitu Mutevu and Muli Mutevu. He further stated that the other people who were present at the time had since died. PW3 averred that when Nzuli was selling land to the Plaintiff and her husband, he was present. He added that he signed the sale agreement as a witness and that the family of Peterson Mbevi is on the land to date.



17. On cross-examination by Ms. Kisui, PW3 averred that his father Mutunga Nzioka and Mutevu Kyevea are cousins. He further averred that the suit property was subdivided in 2004 and that the subdivision was done by Mutevu Kyevea together with his family. He averred that the search certificate does not indicate that the suit property is registered in the name of Mutevu Kyevea to hold in trust for the family. He averred that the Plaintiff was barred from burying her child in the suit property.
18. On re-examination by Mr. Muumbi, PW3 reiterated that he was called to the suit property by Mutevu Kyevea when the land was being subdivided into two. He added that he was also present when the land was sold by the family of Nzuli Kyevea to the Plaintiff. PW3 maintained that if the suit property belonged to Mutevu Kyevea alone, then he couldn't have involved the family of Nzuli Kyevea in the subdivision exercise.
19. PW4, Regina Mutindi Nyamai adopted her statement dated 23/7/2021 as her evidence in chief. She averred that the suit property was initially owned by Kyevea Musembi who was her grandfather. She further averred that her grandfather had two sons namely Mutevu Kyevea and Nzuli Kyevea, her father. It was her testimony that she was not present when the land was subdivided between the two brothers. She maintained that her mother sold their portion of the suit property to the Plaintiff and Peterson Muli. She asserted that the Plaintiff is still residing in the land.
20. On cross-examination, PW4 averred that the land was sold to the Plaintiffs in 2004 despite her not being present.
21. On re-examination, PW4 insisted that it was her mother who authorized the sale of a portion of the suit property to the Plaintiff adding that they have no problem with their mother's decision.
22. The Defendant called three witnesses at the hearing of his case. DW1, David Kimitu Mutevu adopted his statement dated 20/12/2021 as his evidence in chief. He also produced the list and bundle of documents dated 1/12/2021 as DEX 1 – 4 in support of his case.
23. It was DW1's testimony that the suit property, Ukia/Utaati/227 belonged to his father, Mutevu Kyevea, who died in the year 2001. He averred that the Plaintiff entered into the suit property in 2008. On being shown the sale agreement dated 3/9/2004 between the Plaintiff and Mbuli Nzuli, DW1 stated that had already died in the year 2001. He added that none of his eight siblings signed the sale agreement.
24. DW1 stated that the Plaintiff is residing on the suit property and that they issued a demand letter to her requesting that she moves out which she has refused. He further stated that he is not related to the Plaintiff and that even her husband's remains are not buried in the suit property. He urged the court to issue the orders sought in the counterclaim.
25. On cross-examination by Mr. Muumbi, DW1 stated that he had not availed a valuation report on how he had arrived at Kshs. 50,000/= mesne profits per year against the Plaintiff. DW1 stated that he did not know how his father acquired the suit property. Upon being referred to his statement, DW1 confirmed that he had recorded that the land was inherited by his father from his father before him. He averred that Nzuli Kyevea was given land at Masimba by his father but he could not tell the plot number.
26. DW1 refuted the claim that the suit property is partitioned with sisal plants or that there is a boundary between him and the Plaintiff. He contended that the first demand letter was written to the Plaintiff in 2011 and that she refused to go to the chief's office.
27. On re-examination by Mr. Mutua Makau, DW1 stated that the nature of interest held by Mutevu Kyevea was absolute ownership of the suit property. He added that there was no indication that the suit property was held in trust for any other person. DW1 stated that he had never seen Musyawa Kyevea on the suit property. DW1 further stated that Nzuli Kyevea was his father's brother and that he had



- also never seen him on the suit property. He reiterated that the suit property was being used by his siblings and himself. He further stated that he did not know the basis upon which Musyawa Mbuli put a restriction on the suit property.
28. DW2, Jonathan Muli Mutevu adopted his statement dated 20/12/2021 as his evidence in chief. He averred that Mutevu Kyeve was his father and that the Defendant is his brother. He further averred that the Plaintiff and the Defendant have no blood relations. It was his testimony that the Plaintiff entered the suit property in 2008 which is owned by Mutevu Kyeve. He asserted that when they were pursuing succession, the Plaintiff was nowhere to be seen.
  29. DW2 explained that his family had been having disputes with the Plaintiff. That when the Plaintiff planned to inter her husband's remains in the suit property, the court stopped the burial. When shown the Plaintiff's sale agreement for the suit property, he contended that neither his father nor his siblings had signed the agreement.
  30. In cross-examination, DW2 averred that his father inherited the suit property from his grandfather and that Nzuli Kyeve was given the land at Masimba. DW2 stated that he did not have any evidence showing that his grandfather had any land at Masimba. DW2 further stated that it was the objection proceedings filed by the Plaintiff in the succession cause which prompted the proceedings herein. DW2 contended that the suit property is not divided using sisal plants.
  31. He further contended that the Plaintiff did purchase any land from them and that she refused to honour summons which were issued by the area chief. DW2 refuted the claim that his family wanted to defraud the estate of Nzuli Kyeve because he had no sons.
  32. On re-examination, DW2 averred that the family of Nzuli Kyeve did not file any objection proceedings in the succession cause and that they have never had a claim to land within the suit property.
  33. DW3, Stephen Muoki Mutevu adopted his statement dated 20/12/2021 as his evidence in chief. He averred that Mutevu Kyeve was his father and that he has no blood relations with the Plaintiff. It was his testimony that the Plaintiff came to the suit property in 2008 and that before succession proceedings were done, the suit property was registered in the name of his father.
  34. DW3 insisted that none of his siblings were involved in the sale of a portion of the suit property. He further contended that the family of Nzuli Kyeve was staying at the suit property before relocating to Masimba. He averred that the land in Masimba was given to Nzuli Kyeve by his grandfather.
  35. On cross-examination, DW3 stated that Nzuli Kyeve was staying at the suit property before relocating to Masimba. He further explained that it was his grandfather who had purchased the land in Masimba. However, DW3 could not state the parcel number for the land in Masimba. DW3 averred that there is a sisal boundary which was put in place by the Plaintiff when she came to the suit property. He contended that he was not present when the sisal boundary was put in place and neither was he aware that the said boundary separated the land of Nzuli Kyeve from that of Mutevu Kyeve. DW3 averred that he was aware that land was being registered in the name of first-born male sons during land demarcation. He further averred that he was not aware how his father had acquired the suit property.
  36. At the close of the Defendant's case, the parties agreed to a site visit of the suit property. At the locus in quo, it was observed that the two mature sisal plants marked the boundary between the Plaintiff's side of the land with the Defendant's side. It was observed that the said sisal plants were the ones planted when the Plaintiff and her husband purchased the suit property. It was further observed that within the Plaintiff's compound, there was a huge mango tree, three permanent houses and a blue gum tree. The Plaintiff informed the court that the blue gum tree was there when she purchased the suit property with her husband. Again, it was observed that the compound was fenced with chain link wire.



37. The parties elected to file written submissions at the close of their respective cases.
38. In the Plaintiff's submissions dated 26/6/2025, Counsel identified two issues for determination namely: -
- i. Whether the Plaintiff has proved her case against the Defendant?
  - ii. Whether the Defendant has proved his counterclaim against the Plaintiff?
39. Submitting on the first issue, Counsel contended that the Defendant did not adduce any proof to support his argument that the suit property belonged to Mutevu Kyeve. Counsel contended that it was incumbent on the Defendant to demonstrate how the suit property became private property because it had already been claimed that it is ancestral land. It was further contended that the Defendant was unable to provide particulars in support of the argument that Nzuli Kyeve was given any other land since neither the parcel number nor independent witnesses could confirm the allegations.
40. Counsel submitted that the Plaintiff had demonstrated the existence of a customary trust in accordance with Section 28 (b) of the Land Registration Act. Counsel asserted that the Plaintiff's testimony was corroborated by all her witnesses.
41. Submitting on the second issue, Counsel asserted that the Plaintiff was put in possession of the suit property by the family of Nzuli Kyeve pursuant to an agreement for sale that was executed between the Plaintiff and the family of Nzuli Kyeve.
42. Counsel further submitted that the prayer for mesne profits was not supported with evidence. Counsel urged the court to allow the Plaintiff's claim as sought. It was further submitted that since the Defendant's counterclaim is unsubstantiated, it ought to be dismissed with costs. To buttress his submissions, Counsel placed reliance on the list and bundle of authorities dated 26/6/2025.
43. The Defendant filed his submissions dated 17<sup>th</sup> July, 2025. On his behalf, Counsel identified six issues for determination namely: -
- a. Whether the Plaintiff has a valid purchase and contract of suit land;
  - b. Adverse possession;
  - c. Whether the Plaintiff has locus standi to sue;
  - d. Whether the Plaintiff has trespassed upon the land;
  - e. Whether a permanent injunction should issue against the Plaintiff;
  - f. Whether the Plaintiff has denied the Defendant's use of the suit land and should pay the Defendant's mesne profits.
44. Submitting on the first issue, Counsel contended that the Plaintiff was basing her case on the sale agreement dated 3/9/2004 whereas the suit was filed on 3/8/2021 which is seventeen years after the agreement was executed. Counsel was of the view that Section 4 (1) of the Limitation of Actions Act bars any action based on contract after the end of six years. Counsel further contended that the sale agreement produced as PEX 1 did not indicate the parcel number for the land being sold. Counsel concluded the sale agreement was a sham as it did not correctly indicate the registered owners as party to the sale and hence the purchase price was paid to a stranger.
45. Submitting on the second issue, Counsel contended that there had been continuous interruption from the Defendant to the Plaintiff's possession of the suit property. Counsel also made reference to the



- demand letters that were written to the Plaintiff's husband before his death. Counsel inferred that the Plaintiff had not established adverse possession.
46. On the third issue, Counsel contended that the Plaintiff was the wrong party to be suing over suit property insisting that it ought to have been the relative who claims issues of trust. Counsel submitted that the Plaintiff is not related to the Defendant and therefore she cannot claim any issue of trust. It was further contended that there was no contract for sale of land between the parties herein and thus she is a trespasser.
  47. Fourthly, Counsel was of the view that since adverse possession had not been proved in addition to the Plaintiff's claim of trust, it makes her a trespasser.
  48. Submitting on the fifth issue, Counsel contended that since the Defendant had established that the Plaintiff is a trespasser, he was entitled to mesne profits of Kshs.50,000/= per year from 2008 when the Plaintiff took occupation of the land.
  49. Urging the court to issue the orders sought in the counterclaim, Counsel made reference to the listed authorities in the submissions dated 17<sup>th</sup> July, 2025.
  50. After a perusal of the pleadings, the evidence and submissions herein, the following particulars are not in dispute: -
    - i. The suit property land Parcel No. Ukia/Utaati/227 is jointly registered in the names of Lawrence Norman Mutava Mutevu (deceased) and David Kimitu Mutevu by virtue of the certificate of confirmation of grant dated 3<sup>rd</sup> July, 2006.
    - ii. The suit property measures approximately 12.6 hectares.
    - iii. The Plaintiff purchased a portion of the suit property from Mbuli Nzuli by virtue of the sale agreement dated 3<sup>rd</sup> September, 2004 and has remained in possession to date.
    - iv. Mbuli Nzuli was the wife of Nzuli Kyevea.
    - v. Nzuli Kyevea was a younger brother to Mutevu Kyevea.
    - vi. Prior to the Defendant's registration as joint owner of the suit property, the land was registered in the name of his late father, Mutevu Kyevea on 8<sup>th</sup> August, 1991.
  51. The apparent issues for determination are as follows: -
    - i. Whether the suit property is ancestral land?
    - ii. Whether the sale agreement dated 3<sup>rd</sup> September, 2004 is valid and enforceable by this court?
    - iii. Whether the Defendant is entitled to the reliefs sought in the counterclaim?
    - iv. Whether the Plaintiff is entitled to the reliefs sought in the plaint?
  52. At paragraph 4 of the Plaint, the Plaintiff contends that the suit property is ancestral land having been inherited by Mutevu Kyevea (deceased) and Nzuli Kyevea (deceased) from their deceased father Kyevea Musembi. The Defendant denied the Plaintiff's contention at paragraph 3 of his defence insisting that the land is private property and that Mutevu Kyevea is the absolute proprietor thereof.
  53. To support her claim, the Plaintiff called PW2 who is the daughter of Mbuli Nzuli and the niece to Mutevu Kyevea. She corroborated the Plaintiff's evidence that the suit property belonged to Kyevea Musembi and that the land was registered in the name of Mutevu Kyevea in 1991 because Kyevea died in



- 1983 and as per Kamba customs, land was registered in the name of first-born sons to hold in trust for the rest of the family. PW3 averred that his father Mutunga Nzioka and Muteva Kyeva were cousins and as part of the clan, he was present when the land was subdivided between the families of Nzuli Kyeva and Mutevu Kyeva.
54. Even though DW1 refuted the claim that the suit property is ancestral land in his oral testimony, his witness statement which was duly adopted in his evidence states that the land was acquired by Mutevu Kyeva from his forefathers. DW1 had no alternative explanation for the process and history which led to his father being registered as sole owner of the suit property.
55. DW3, Stephen Muoki Mutevu who is the brother of DW1 confirmed that the suit property belonged to their forefathers. He even confirmed that the family of Nzuli Kyeva was staying on the land before relocating to Masimba.
56. It is also noteworthy that in PEX 2 which is the ruling of the court in Machakos HCSC No. 87 of 2003, DW1, DW2 and DW3 averred that the suit property was inherited by their late father from their late grandfather. Even though they DW1 and his witnesses claimed that the land in Masimba also belonged to their grandfather and was inherited by Nzuli Kyeva in place of the suit property, no evidence was adduced to substantiate the said assertions. Neither the Defendant nor his witnesses could even provide land reference number for the land in Masimba.
57. A customary trust is a valid claim to land as noted under Section 28 of the *Land Registration Act*, 2012 and being an overriding interest, it affects the rights of a registered proprietor of land under Section 25 (1) (b) thereof. Section 25 (1) (b) provides as follows: -
- (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) .....
    - (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.
58. Section 28 (b) of the *Land Registration Act*, 2012 outlines 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) ... ..
  - (b) trusts including customary trusts;
59. The burden of proving a customary trust falls on the party alleging it. This position was reaffirmed in the case of *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR where the Court of Appeal also weighed in on what entails a customary trust in the following terms:-
- “It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered *Land Act*. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.” [emphasis added]



60. In respect of the foregoing, it is undoubtedly clear that the suit property is family land that was initially owned by Kyeva Musembi. That following his death in 1983, Mutevu Kyeva was registered as the proprietor thereof subject to a customary trust which subsisted for the benefit of the family of his younger brother Nzuli Kyeva.
61. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court articulated the elements which a person must prove to demonstrate the existence of a customary trust when the Court held as follows:-

“(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.”



62. A claim to land based on a trust must be supported with compelling evidence as stated in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] KECA 118 (KLR)

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

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

See *Gichuki v Gichuki* [1982] KLR 285 and *Mbothu & 8 Others v Waitimu & 11 Others* [1986] KLR 171.”

63. Accordingly, in answer to the first issue, it is the finding of this court that the suit property is family land and that the title thereof is registered in the name of the Defendant in trust for the families of Mutevu Kyeve and Nzuli Kyeve.
64. Regarding the second issue, it is the Plaintiff’s case that she is the bona fide purchaser for value of a portion of land Parcel No. Ukia/Utaati/227 which she purchased from Mbuli Nzuli vide the sale agreement dated 3<sup>rd</sup> September, 2004 (PEX 1). In her evidence, the Plaintiff stated that she paid the full purchase price amounting Kshs.200,000/= which was duly paid in cash and acknowledged by the vendor.
65. A perusal of the sale agreement shows an avid description of the land the Plaintiff was purchasing. The Defendant and his witnesses faulted the agreement for not showing the correct parcel number, having alterations to the parcel number et al. Nonetheless, the area of the suit property being sold was accurately depicted with geographical features marking area limits. The sale agreement sets out that the land borders Kaiti River. It also borders the homesteads of Mutevu Kyeve on one side and Musau Musembi on another side. The land also borders the homesteads of Nyamai and Mathias Kyule Mutunga and that the boundaries are demarcated by mature sisal plants as well as other thorny indigenous trees.
66. A sketch map of the suit property was also drawn within the sale agreement showing the area of land that was sold to the Plaintiff by Mbuli Nzuli. PW2 who is a daughter to Mbuli Nzuli (deceased) attested the signing of the sale agreement as a witness on the vendor’s side. PW4 who is also a sister to PW2 confirmed that indeed her mother sold her part of the suit property. PW3 also attested the sale agreement as witness.
67. The essentials of a valid contract for the sale of land are stated in the [Law of Contract Act](#). Section 3 (3) of the [Law of Contract Act](#) outlines as follows: -
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
    - (i) is in writing;
    - (ii) is signed by all the parties thereto; and
  - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:



68. In the case of Nelson Kivuvani v Yuda Komora & Another, Nairobi HCCC No. 956 of 1991 (LLR 7670 (HCK), the court aptly held that:-

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amounts to a valid contract.”

69. Similarly, in JK Patel v Spear Motors Ltd. Supreme Court of Uganda, Civil Appeal No.4 of 1991(1993) 1 KALR 40, the Court observed as follows: -

“Under the rules of the Law of Contract, particularly relating to offer and acceptance, if there has been an offer to enter into legal relations or definite terms and that offer is accepted, the law considers that a contract has been made, whether there has been an acceptance of an offer or documents that have been passed between the parties or from their conduct.”

70. It is evident from the case herein that the terms of the offer to purchase the suit property from Mbuli Nzuli were performed. It was the Plaintiff's evidence that after executing the sale agreement in 2004 and duly paying the purchase price, she took possession thereof in 2005. Thereafter, she constructed three permanent houses which this court had the benefit of viewing during the site visit that was conducted on 28<sup>th</sup> May, 2025.

71. Section 107 (1) of the *Evidence Act* outlines as follows: -

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

72. On the contrary, even though the Defendant disputed the validity of the sale agreement, it is undoubtedly clear that all the terms of the sale between the vendor and purchaser were performed. It is also undoubtedly clear that the issue of statutory limitation on the contract does not arise since the contract was completed and all that remained was transfer of title to the Plaintiff which was impeded by the fact that that the title deed was in the name of a third party, Mutevu Kyevea holding the same in trust for the vendor.

73. In answer to the second issue, it is the finding of this court that the sale agreement dated 3<sup>rd</sup> September, 2004 is valid and enforceable.

74. On the third issue, it is the Defendant's counterclaim that the suit property is private land having been first registered in the name of Mutevu Kyevea as the absolute owner. For that reason, the Defendant contends that the Plaintiff is a trespasser who ought to be evicted.

75. Has the Defendant established a case of trespass to land? Black's Law Dictionary (9<sup>th</sup> Edn) page 1643 defines trespass to land (trespass quare clausum fregit) 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.



76. Correspondingly, Section 116 of the *Evidence Act* outlines as follows:-

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

77. The Court of Appeal in *Charles Ogejo Ochieng v Geoffrey Okumu* [1995] eKLR held as follows: -

“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury’s Laws of England 3rd edition Volume 38 at pg 744. In the instant case the appellant has no right to sue in trespass since the respondent was lawfully in possession of the title to the suit land at the time of the alleged trespass.

Moreover, under section 23 (1) of the Registration of Titles Act the certificate of title in respect of LR 8530/130 and in possession of the respondent shall be taken by all Courts as conclusive evidence that the respondent is the proprietor of the said land as the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

78. This court has already established that the Mutevu Kyeva could not have absolute and indefeasible title to the suit property which was already encumbered by a subsisting customary trust in favour of the family of Nzuli Kyeva. The Plaintiff was lawfully in possession of the suit property having purchased a portion thereof from Mbuli Nzuli who was a beneficiary of the land with the registered owner being the trustee. The Defendant’s title deed to the land must therefore be canceled so as to cure the default of failing to transfer title to land that was lawfully meant for the family of Nzuli Kyeva as a beneficiary.

79. Section 80 (1) of the *Land Registration Act*, 2012 gives this court power to order rectification of the land register in the following terms:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

80. Therefore, on a balance of probabilities, the Defendant has not demonstrated a case of absolute ownership of the suit property. Additionally, he has not demonstrated trespass to land by the Plaintiff and is therefore not entitled to mesne profits.

81. On the last issue, the Plaintiff has demonstrated that she is entitled to the reliefs sought there on a balance of probabilities. She is in lawful occupation of her portion of the suit property by virtue of her sale agreement with Mbuli Nzuli.

82. The only issue that remains is costs. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR, Mativo J. (as he then was) observed as follows: -

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in



which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*. In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

83. The Defendant is the cause of the litigation in this matter. When the court visited the suit property, it was evident that the Plaintiff has no proper access to her property. Her son who has a vehicle cannot access their land. The Plaintiff is entitled to costs.
84. In the end, the Plaintiff’s suit against the Defendant succeeds whereas the Defendant’s counterclaim fails. Judgement is hereby entered for the Plaintiff as follows: -
1. A declaration is hereby issued that the Plaintiff is entitled, by reason of the sale agreement dated 03/09/2004, to ownership of the portion of land Parcel No. Ukia/Utaati/227 sold to her family by the late Mbuli Nzuli and Priscilla Betty Malua and in her possession since 2005.
  2. An order is hereby issued revoking the certificate of title for land Parcel No. Ukia/Utaati/227 registered in the name of the Defendant only.
  3. An order is hereby issued compelling the Defendant to forthwith transfer to the Plaintiff the portion of land Parcel No. Ukia/Utaati/227 in 2her possession ensuring to make provision for such access roads as may be necessary for the Plaintiff to access her portion of the land.
  4. The Plaintiff shall have costs of the suit and counterclaim.

.....  
**HON. E. O. OBAGA**

**JUDGE**

**JUDGMENT DATED SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF OCTOBER, 2025.**

IN THE PRESENCE OF:

Ms. Munyao for Mr. Muumbi for Plaintiff.

Ms. Kisui for Mr. Mutua Makau for Defendant.

Court assistant Steve Musyoki

