

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CIVIL APPEAL NO. 184 OF 2020

BETWEEN

NANCY WAIRIMU KIBUI.....APPELLANT

AND

**PETER WACHIRA NJOROGE 1ST
RESPONDENT**

**MICHAEL GACHIRI NJOROGE 2ND
RESPONDENT**

JAMES WACHIRA WAMBUGU.....3RD RESPONDENT

JULIUS KIRUTU GACHIRI.....4TH RESPONDENT

*(Being an appeal against the Judgment of the High Court of Kenya at
Nyeri (Ombwayo, J.) dated 7th March 2016*

in

HCCC No. 141 of 2008

JUDGMENT OF THE COURT

1. A brief history of the case before us is that the respondents filed an Originating Summons (O.S.) on 18th May 2006, seeking orders: that the appellant's title, interest, or claim over **L.R. Chinga/Kiaguthu/399** ('the suit property') had extinguished, and that the title should vest in the respondents, who had been in adverse possession of the suit

property; and the Commissioner of Lands be ordered to cancel the existing title

and to register and issue a new title deed for the suit property in the names of the respondents.

2. The grounds relied upon were that respondents had occupied the suit premises for over 40 years in a manner adverse to the interests of the appellant. They have been cultivating the land and growing coffee for more than 40 years, and the appellant has been aware of the respondents' possession of the premises during this entire period.
3. The Originating Summons (O.S.) was supported by the affidavit of the 1st respondent, stating that the suit property's original title belonged to his grandfather, and upon his death, the title passed to Teresiah Wambui Gachiri (Teresiah) (the appellant's mother), by way of transmission, and eventually to the appellant. Since 1963, he and the other respondents have occupied the land, planted coffee, and established their homes without any interruption from the appellant. On his part, in 1978, he built on the land on his own right. Disputes arose over the appellant's title. After the demise of Teresiah, the appellant obtained title, aware of the respondents' occupation of the suit property. On 16th May 2006, the appellant caused coffee trees to be destroyed and evicted the respondent from the suit property. Pending determination of the O.S., the respondents sought an injunction, asserting that they had over 40 years of exclusive possession of the suit property, uninterrupted, and that the appellant's title was

extinguished,

thereby granting them rights to legal recognition and registration as owners.

4. In opposition, the appellant filed a replying affidavit sworn on 3rd October 200. She recounted the property's history, stating that her father, John Gachiri, had four wives: Wacheke, Wangui, Wanjiku, and Wambui. He shared his property with the various houses during his lifetime. During land demarcation and consolidation, their father's land was consolidated in three different places: Chinga, Kanwe, and Kagicha. The Kanwe chunk was divided into two portions; Wacheke's portion was registered in her eldest son, Peter Njoroge Gachiri's name, while the appellant's mother's portion was registered in the appellant's father's name in trust. The other two wives also had their portions registered in their sons' names as trustees for their families.
5. She further deposed that their father, John Gichiri passed away in 1968 and was buried on the appellant's mother's portion, the suit property, as that is where, during his life, he lived with his wives, and the claim that the respondents occupied the premises since 1963 is false, as the appellant currently occupies the plot and has built a house after taking over from her late mother.
6. Further, she contended that the respondents have no ascertainable interest in the suit property as grandsons, as they are not direct heirs of her father, and were not claiming

through

their fathers. As for the 4th respondent, he already received his share from the house of Waceke, and the appellant is the lawful owner of the suit property, having received it from her mother.

7. She deposed further that on 21st July 1976, her mother became the proprietor of the property through succession; on 9th April 1986, it was registered in the name of her mother and the appellant as a gift; and on 24th December 2004, it was registered solely in the appellant's name. Further, there were numerous clan meetings involving her late mother and her stepbrothers, Kanyi, Kabugu, and Kirutu, and on 8th January 1987, the three were given 3 years to remove coffee from her mother's land, which they did not do. In April 2006, they presented their case to the District Commissioner of Othaya, who issued a letter to the three brothers inviting them to a meeting to be held on 2nd May 2006. Unfortunately, her mother passed away on 15th May 2006. On 16th May 2006, the clan and the Othaya council of elders held an extensive discussion and concluded that the land belonged to the appellant, as she held the title.
8. At the High Court, the matter proceeded by way of *viva voce* evidence. **Peter Wachira Njoroge, PW1**, testified that his grandfather originally owned the suit property. The appellant is his step-aunt. PW1's father, Sospeter Njoroge Gachiri, who had the right of occupation of the suit property since 1963, died in 2004. He claimed that he was occupying the suit

property as a grandson and was evicted by the appellant on
16th May 2006,
when the coffee trees were cut, and his house was
demolished.

He was aware that the appellant's mother, Teresiah, had filed succession proceedings and had become the registered owner. He confirmed that he did not apply to revoke the grant.

9. He stated further that Teresiah permitted him to live on the land, but he did not know how the suit property was transferred to the appellant. He admitted that the issue was previously arbitrated between his father and an old lady. He claimed that hired goons destroyed his coffee, and by the time he filed the suit, he had been forcibly evicted. In cross-examination, he stated that he built a semi-permanent house on the suit property in 1978. He also stated that when the land was transferred to Teresia through succession, his father was still alive and did not contest the succession.
10. **Jerald Mwangi Kuguria, PW2**, testified that he knew the parties and the family. Gachiri had four wives. Teresia had no sons, and land was traditionally given to boys. The respondents and Teresia lived on the same land, which was divided in 1978 and Gachiri continually did cultivation on the suit property. Gachiri had three sons; Peter Kanji, Kabuyu Gachiri and Kivuthi Gachiri. The 1st respondent is Peter Kanji's son. After the division, a large parcel went to Peter Kanji. The bigger part was cultivated by the three sons' wives and Gachiri's wife, while the appellant's mother had no other land. After Gachiri's passing, a succession case was filed at the Othaya Law Courts. A dispute arose between his

three sons and their stepmother
(Teresia). At the hearing of the succession cause, Kanji

expressed his desire to have the suit property registered in his name, but the others opposed him. Ultimately, they decided that their stepmother would act as their trustee. The grant was confirmed, as such, and Teresia registered as the proprietor. In 2006, the respondents were forcibly evicted from the land. PW2 observed several young men cutting down and destroying the coffee plantation and everything else on the property. PW2 concluded that these individuals had been hired to do this.

11. **PW3, Remigius Nganyi Watieri**, the Land Registrar, testified that on 21st April 1986, a caution was registered by Kenyi Gachiri, claiming beneficial interest in the suit property and gave several reasons in support of the caution. He claimed that he had built a permanent house and had planted 900 coffee trees on the suit property; he heard from multiple reliable sources that Teresiah, their stepmother, intended to sell the entire land, leaving them homeless.
12. The witness further testified that documents in the file indicate that a transfer was registered on 9th April 1986, in favour of Teresiah Warui Gachiri and Nancy Wairimu Kibui. The land certificate was issued on 21st April 1986, but was later cancelled on 30th October 1986 without an explanation. The cancellation lacked a counter signature and had numerous anomalies, as it was not possible to register a transfer when there was a caution. Notably, the caution was registered before the transfer but was dated afterwards.

13. **Nancy Wairimu Kibui (DW1)**, the appellant, testified that her father, John Gachiri Thiongo, had four wives, including her mother, Teresiah Wambui Gachiri. The other wives were Waceke, Wangoi, and Wanjiku Gachiri. All respondents are children of the first family. The property at Chinga was given to Wangui Gachiri (the second wife) and registered under her son, Kariuki Gichiri, and the property at Kagicha was given to Wanjiku Gachiri (the third wife) and registered in the name of her son, Thiongo Gichiri. The suit property, Chinga/Kiaguthu/399, measuring 5.1 acres, originally measured 10 acres but was subdivided into two portions for the 1st and 4th families. The portion for the first house was registered in the name of Njoroge Gachiri (the father of the 1st and 3rd respondents) to share with his brother. The other half was for the appellant's mother, registered in her father's name because her mother had no son.
14. She deposed further that all four wives lived together on the Chinga/Kiaguthu/399 property. Later, the first wife passed away. In 1963, the appellant's father wanted to subdivide the two parcels of land, but wanted the portion with arrowroot, which he had given to the first family. He continued to cultivate the first family's portion with arrow roots, and they managed to coexist until the demarcation in 1958. After demarcation, a large portion of the land was allocated to Njoroge Gichiri. In 1968, the appellant's father passed away, and the three wives relocated to their respective portions of land. The first wife had

already died; the second wife moved to the other land in Chinga; the third wife went to Kagicha; and the fourth wife stayed on parcel No. 399. During this time, the appellant was still in school.

15. After the succession of her father's estate, the suit property was transferred to the appellant's mother, who had no son. Despite this, the family disputed her rights. She received a letter of administration and a caution from Kenyi Gachiri, registered on 21st April 1988, indicating her role as a trustee of the land. The appellant's mother succeeded to have her portion after a long dispute.
16. Further, she asserted that by the time the respondents filed suit, they were not actually occupying the suit property as they ceased using the plot on 16th May 2006. Further, numerous meetings were held to persuade them to stop using the land, but they refused to comply. In response, an angry mob went to the plot, cut down the coffee trees, and no one compensated them for this action. Following this, the appellant took possession of the land.
17. **Jesse Kiiru Thiomi, DW2**, testified that he was the chairman of his clan and knew the respondents, including Ephantus Wachira Njoroge, a clan member. He was aware of the dispute. After a meeting held on 13th June 1986, it was decided that the land belonged to the appellant's mother. On 8th January 1987, the clan decided to transfer the land to the

appellant and

allowed the respondents three years to remove their coffee trees. The respondents' father hesitated to remove the coffee due to fear of a curse. Since Teresa, the appellant's mother, had no son, the appellant inherited the suit property, despite the respondents' desire for it, on the grounds that a daughter should not inherit her mother's land. He was aware that the appellant's father had continued to grow arrow roots in the respondents' portion in exchange for a portion in 399.

18. In its determination, the trial court found that by the time the respondents filed their suit, they had already been evicted and therefore their claim for adverse possession did not lie. The court further noted that the respondents had occupied only a small portion of the suit property, where they had planted coffee trees, yet they had claimed the entire property.
19. The court, however, found that the exchange of the portion of the respondents' land containing arrow roots with a portion that was occupied by the respondent's father, and later by the appellant's mother, before the evictions in 2006, created an implied trust in relation to the portion occupied by the respondents. The court went ahead and declared that the appellant's father held the suit property in trust for both the respondents and the appellant. The court found that the trust was not extinguished by the succession cause in the estate of Gachiri's son, Thiong'o, and subsequently, in

respect of the estate of Teresiah.

20. In the end the court ordered that the trust be dissolved, and that the portion of land measuring 3 acres occupied by the respondents be registered in the names of the respondents or their beneficiaries in equal shares. The remaining 2.1 acres was to be registered in the names of the appellant.
21. Aggrieved by the judgment, the appellant has raised three (3) grounds of appeal in her memorandum of appeal dated 16th December 2020, stating that the learned Judge erred in law and fact; by attempting to determine a trust when the case before the court was based on adverse possession; by failing to dismiss the claim despite concluding that adverse possession did not apply because possession was permissive; judgment contradicts the weight of the evidence, pleadings, and the law, and therefore should not be allowed to stand. She sought for the appeal to be allowed as prayed.
22. Learned counsel for the appellant has filed submissions dated 12th March 2025. Counsel argues that the respondents' claim was based on adverse possession rather than a trust. He contends that once the Court determined that the claim for adverse possession had failed, it should not have examined a trust that was neither pleaded nor proven in evidence. He points out that the respondents had the right to appeal this specific finding and could have filed a cross-appeal. However, they chose not to appeal, as they were satisfied that the claim of adverse possession had failed and that the land was awarded

to them based on the basis of an unpleaded and unproven trust.

23. Additionally, counsel maintains that the occupation of the land was by consent from the appellant's father, and since the appellant obtained her title deed and evicted the respondents before they brought the case to court, the current suit should fail. He argues that the property has been passed down through generations to her, meaning that adverse possession cannot exist. He states that a party seeking to challenge the transmission of property can only do so through revocation of grant proceedings. Counsel adds that the respondents are bound by their own pleadings as held in **Mellen Mbera vs. James Wambugu [2020] eKLR**.
24. Learned counsel for the respondents on his part has filed submissions dated 2nd April, 2025. On whether the trial court erred in determining the question of trusts despite the claim before it being one of adverse possession, counsel submits that the appellant disputes the court's findings on the ground that the issue of trusts was not pleaded, and hence the court went beyond its jurisdiction. Counsel referring to the definition of an implied trust as defined by the ***Black Laws Dictionary 4th Edition*** at **page 1757** as; a trust raised or created by implication of law; a trust implied or presumed from circumstances, argues that a court of law has the power to determine an unpleaded issue and in support thereof relies on **Kenya Agricultural and Livestock Research Organization vs. Okoko & Another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR)**, where the court held that as a general rule,

courts should determine a case on the issues that flow from the pleadings. Counsel argues that both the appellant and the respondents herein opened up the issue of trust during proceedings and in their evidence.

25. Counsel further submits that the finding of the trial court was necessary to meet the ends of justice. In support of this assertion he relies on **Wachira Karani vs. Bildad Wachira [2016] eKLR** and **Republic vs. Kithure Kindiki, Cabinet Secretary Interior & Coordination of National Government & Another; Katiba Institute (Exparte); Office of Data Protection Commissioner & 3 Others (Interested Parties) (Judicial Review Application E194 of 2023) [2024] KEHC 1649 (KLR)**, where the court held that the court is not powerless to grant relief when the ends of justice and equity demand, because the powers vested in the court are of a wide scope and ambit.
26. On the issue of whether the trial court erred in failing to dismiss the claim before it, learned counsel argues that the duty of the court is to do justice. The evidence presented to the court indicated that Gachiri wa Thiongo, the family patriarch and original owner of the suit premises, intended for the property to be used by his family, including all parties involved in this matter. Counsel argues that agreeing with the appellant would disregard the wishes of the patriarch and owner of the land and would unilaterally deprive the respondents of their family

property. Therefore, the court was correct not to dismiss the claim before it, and the appeal should be dismissed.

27. This being a first appeal, it is our duty, in addition to considering submissions by the appellants and the respondents, to analyse and re-assess the evidence on record and reach our own independent conclusions in the matter. This approach was adopted in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR** where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows; -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

28. We have considered the record, submissions by the parties, case law cited, and the law and are of the view that the

issues for determination are: whether adverse possession was proved;
whether an implied trust and/or customary trust could be

implied in the circumstances of the case; and finally, who is the rightful owner of the suit property.

29. It is not disputed that upon the respondents being evicted from the suit property, they moved the court seeking a finding that:

“That the respondent’s title, interest or claim over Chinga/Kianguthu/399 have extinguished and the legal title shall vest in Peter Wachira Njoroge, Michael Gachiri Njoroge, James Wachira Wambugu & Julius Kirutu Gachiri.”

30. The trial court was clear in its analysis that the claim before it was for adverse possession. The trial Judge said so severally in the judgement and indeed went ahead to analyse the attributes of adverse possession, which he stated includes: open and notorious use of land; continuous use; actual possession; non- permissive, hostile or adverse use, arriving at a determination as follows; -

“I do find that though the plaintiffs have been in open, notorious, continuous and exclusive use of a portion of the property under dispute, the plaintiffs’ father was allowed to occupy the parcel of land in dispute by his father, hence the principle of adverse possession does not apply as the possession was permissive.”

31. As seen above, the respondents’ case was straightforward; they sought a declaration of adverse possession and the trial court rightly found that although the respondents’ father

and, thereafter, the respondents themselves had cultivated
a portion
of the suit property over time, they did so with the permission

of their grandfather and, thereafter, his successor in title, their stepmother. We resonate with the trial court's finding. For adverse possession to succeed, certain parameters must be met. This Court has set the principles in several cases, including the case of **Mtana Lewa vs. Kahindi Ngala Mwangandi [2015] eKLR**, where the court stated; -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it, and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

32. It is also not disputed that all the 4 homes of Gachiri had a portion of their own land, and the suit property(399) belonged to Teresiah. The judge ably dealt with this issue by stating as follows:

“...it is important that this court loudly states the lawful position that the mere fact that a family constitutes(sic) of daughters only, does not per se, disentitle them from the land. It is an archaic belief that has no foundation in law as it is clearly discriminatory and unconstitutional to say the least.”

33. This Court has said variously that parties are bound by their own pleadings. Agreeing with the trial Judge that the respondents failed to prove the necessary attributes of a claim for adverse possession, we are of the view that the learned Judge ought to have penned off. There was no claim of the existence of a trust; no evidence led to that effect, nor did the parties address the issue even remotely. An interest in land, such as an implied or customary trust, must not only be pleaded but must be proved. This was not the case in this instance. In ***TMG & Another vs. AP (Civil Appeal 138 of 2019) [2022] KECA 612 (KLR) (6 May 2022) (Judgment)***, which we resonate with, this Court stated; -

“In the case of Peter Ndungu Njenga vs Sophia Watiri Ndungu[2000] eKLR, the Court succinctly observed, “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.”
Emphasis added.

We have evaluated and analyzed the evidence adduced by the parties. We also read the Plaint led by the appellants. It is significant that the claim of a resulting trust was neither, pleaded, specifically particularized or proved. The appellants having failed to specify the particulars of the resulting trust raises doubt as to whether a trust existed or indeed, whether the

respondent intended to create a trust.”

34. In ***Mohamed vs. Sheikh (Civil Appeal 14 of 2019) [2024] KECA 1211 (KLR)***, this Court extensively dealt with the issue of an unpleaded issue and stated inter alia; -

***“It is trite law that the court will not grant a remedy which has not been pleaded and prayed for, and that it will not determine issues which the parties have not pleaded. See Alba Petroleum Limited vs. Total Marketing Kenya Limited [2019] eKLR. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. It is for this purpose that each party is bound by its own pleadings. For this very reason, a party cannot be allowed to raise a different case from that which it had pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial, as each knows the other’s case as pleaded.*”**

The court, too, is bound by the pleadings of the parties. Its duty is to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. The court would be out of order were it to pronounce on any claim or defence not made out by the parties as that would be tantamount to descending into the realm of the dispute and ceasing to be an independent arbiter. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and would amount to denial of justice.”

35. It is equally our view that since the issue of an implied trust

was neither pleaded nor pursued, the trial Judge was out of order to have considered the same, as we totally associate ourselves with

the finding above in ***Mohamed vs. Sheikh*** (supra). In the end, we allow the appeal and set aside the judgment with costs to the appellant.

Dated and delivered at Nyeri this 25th day of March, 2026.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....
**JUDGE OF
APPEAL ALI-**

ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR