



**Michuki v Mutahi & another (Environment & Land Case
E20 of 2022) [2024] KEELC 425 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E20 OF 2022
LN GACHERU, J
JANUARY 25, 2024
IN THE MATTER OF THE ESTATE OF JOHN NJOROGE MICHUKI
AND
IN THE MATTER OF P&A RULE 41(3) LAW OF SUCCESSION
AND
ORDER 31 RULE 1 OF THE CIVIL PROCEDURE RULES
AND
IN THE MATTER OF PROTEST BY JANE WACHERA MICHUKI**

BETWEEN

JANE WACHERA MICHUKI PLAINTIFF

AND

ANNE WANJIKU MUTAHI 1ST DEFENDANT

FREDRICK CHEGE MICHUKI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff/Applicant herein is related to the Defendants/Respondents, who are the joint Administrators of the estate of John Njoroge Michuki (deceased), who owned several parcels of them, among them;
 - i. land parcel No. loc 12 / sub-loc 1/T.20:0.052 acres
 - ii. land parcel No. loc 12/ sub-loc 1/352: 7.7 acres.
 - iii. land parcel No. los 12/ sub loc/ T. 21-0.052 acres.



- iv. land parcel No. loc 12/ sub loc/ T. 30: 0.13 acres.
2. The Plaintiff/ Applicant brought this Originating Summons, and urged the Court to direct the Defendants/Respondents who are the Legal Administrators of the estate of the late John Njoroge Michuki, to transfer the above parcels of land to the Applicant. This Originating Summons is not supported by any grounds, but it is anchored on the Supporting Affidavit of Jone Wachera Michuki, the Plaintiff/Applicant herein, her Supporting Affidavit in support of her Protest of Confirmation of Grant of the estate of John Njoroge Michuki, dated 26th February 2019, and the annexures attached to her Affidavit in support of this Originating Summons.
 3. It was her averments that the Defendants/Respondents filed a Succession Cause over the estate of John Njoroge Michuki, being Succession Cause No. 1842 of 2012. That the Defendants/ Respondents were issued with the Grant of Representation on 18th March 2013, as per annexure JWM1.
 4. She also averred that the Defendants/Respondents filed for Confirmation of grant, on 31st January 2019, and also filed their proposed mode of distribution, and in their mode of distribution, they suggested that the Plaintiff/ Applicant should be given land parcel No. Loc 12/ Sub loc 1/ 2630, measuring 0.364 hectares, as is evident from annexure JW2.
 5. It was her further averment that she protested the proposed mode of distribution as filed by the Defendants/ Respondents, and she claimed that the above parcels of land should be registered in her name. This claim is supported by her annexure JW3.
 6. The Plaintiff/Applicant also stated that in response to her protest, the 1st Respondent Anne Wanjiku Mutahi, on 17th June 2019, confirmed that; that it is not in dispute that the protestor and her family resides on the parcel of land registered as Murang'a Loc 12/ sub loc 1/2630. However, the said deponent (Anne Wanjiku Mutahi), failed to state that the Plaintiff/Applicant and her family started to live on this suit property in the year 2010, after they were forcefully removed from their ancestral land, Loc 12/ sub loc1/ 352, by the directives and authority of the deceased, John Njoroge Michuki.
 7. It was her claim that the Defendants/ Respondents acknowledged that the Plaintiff/ Applicant and her family used to reside in the suit property, Loc 12 /sub loc 1/ 352, before they relocated to their current parcel of land, No. Loc 12/ sub loc1/ 2630, where a house was built for them by the deceased, after he forcefully removed them from land parcel No.352. Further, that the Defendants/ Respondents had also acknowledged that the Plaintiff/Applicant has claimed land parcels No. Loc 12/Sub-Loc.1/T 20, T21 and T 30, but it was their averments that the said claim was unfounded as these parcels of land were common homesteads and graveyards for the wider Michuki family, and cannot be allocated to the protestor.
 8. She also claimed that in the Confirmation of grant, the beneficiaries have sought to inherit the above parcels of land, in equal shares as per the last Will of the deceased dated 1973. However, it was her contention that these suit properties were registered in the name of the deceased, John Njoroge Michuki, in 1978, and certainly, he could not have bequeathed them to his beneficiaries through his Will of 1973.
 9. Further, that the beneficiaries should not inherit the said suit properties, as they are homesteads and graveyards for the wider Michuki's family. Again, she averred that her advocate had pointed out to the Court that her claim could only be dealt with by a different action, which action was to be taken out by the Petitioners, unless the matter could be solved through partial confirmation of grant.



10. It was her allegations that the Succession Court had urged the Petitioners to solve the Applicant's issue first, as they subsequently awaited to solve their other issues. That in an attempt to solve her issue, the parties met on 12th November 2020, and a few issues were discussed.
11. Further that on 17th December 2020, her advocate on record and one Francis Murai Michuki, visited the suit properties to confirm that indeed there were some graves on the said suit properties, and on 17th March 2021, her advocate wrote to the Petitioners advocate, about the visit and sought for the way forward. The said letter was attached as JWM5.
12. It was her allegations that the Defendants/ Respondents and beneficiaries of the estate of John Njoroge Michuki, are more concerned about certain issues relating to the estate and partial distribution of the money of the deceased, than the final conclusion of the succession cause and thus the filing of this suit.
13. She also claimed that she had applied to Court to be allowed to file the appropriate action through her application dated 21st March 2022, as per Rule 41(4) of the Probate & Administration Rules, in the event the Petitioners failed to act as per Rule 41(3), of the said Rules. That the Petitioners (Defendants herein), did not respond to her application as directed by the Court.
14. However, on 30th August 2022, the Petitioners advocate wrote to her advocate and begged him not to take any action and wrote as follows: "hold the anticipated action to allow our client's time to engage the other family members on the issue and revert to you" This was evident from Annexure JWM 8.
15. She contended that the Petitioners (Defendants) and the objectors in the succession proceedings are involved in multiple applications, and it appears the matter involving the administration of the deceased will take long time before conclusion, thus the reasons why she filed this claim as directed by the Court. She urged the Court to allow the application in the interest of justice.
16. The Originating Summons is opposed through the Replying Affidavit sworn jointly by the Defendants/ Respondents herein, Anne Wanjiku Mutahi, and Fredrick Anthony Louise Chege Michuki sworn on 24th January 2023.
17. They averred that their Late mother Josephine Watiri Michuki, who was the Executrix of the Will of their deceased father, had petitioned the Court for grant of probate, and when she died on 22nd August 2012, they sought to be substituted as authorised by all the beneficiaries of the estate.
18. That they are aware that the Plaintiff/ Applicant is seeking for a claim of beneficial ownership of the above stated parcels of land. It was their averments that their advocate has advised them that the suit herein is misconceived, and should be struck out since under the legal regime under which the suit properties are registered, the deceased is the absolute and indefeasible owner of the said parcels of land. That this suit is time barred and res judicata as there is a succession proceeding over the disputed suit properties.
19. They claimed that the grounds stated in the Affidavits in support of the Originating Summons do not support the Plaintiff/ Applicant's claim. That the grounds enumerated thereon, are in support of the claim for land parcel No Loc 12/ sub loc 1/ 2630, which is not part of this Originating Summons.
20. Indeed, the Defendants/Respondents confirmed that land parcel no. Loc 12/ sub- loc 1/ 2630, has been earmarked for allocation to the Plaintiff/ Applicant, upon conclusion of the succession proceedings, which proceedings are pending before the Probate court.
21. They also averred that the Affidavit in support of protest, which allegedly supports the allegations by the Plaintiff/Applicant that she is entitled to the suit properties, was sworn in support of another claim, and the Applicant did not seek to have said Affidavit adopted as part of the pleadings for this claim.



22. The Defendants/ Respondents confirmed that the late Senior Chief Abraham Michuki Wa Kagwi, who was polygamous was the husband to one Wanja w/o of Michuki, who had one son, known as Joseph Kiarie, and a daughter named Angelica Njoki Michuki. The said Njoki had two daughters who are, Wachera, who is the Plaintiff herein and Regina, who is not a party to this suit.
23. That the said Senior Chief had decreed that in accordance with the Kikuyu Customs then, all the properties were only to devolve to the sons and no daughter was to inherit the properties. That decree was premised on the fact that daughters would be married away from the family.
24. That the suit properties as tabulated by the Plaintiff/ Applicant were registered in the name of Joseph Kiarie, who was a son to Wanja and the Senior Chief Michuki. That the said Joseph Kiarie died in 1965.
25. Subsequently after the death of Joseph Kiarie, the suit properties were registered in the name of Wanja w/o of Michuki, who later died in 1976, and a succession cause was filed in 1978.
26. That thereafter, the suit properties were registered in the name of the deceased, John Njoroge Michuki, in accordance to the wishes of the Senior Chief Michuki, as is evident from Annexure AWM 1.
27. Subsequently, the deceased John Njoroge Michuki, was registered as the sole proprietor of these suit properties on diverse dates being; Loc 12/ sub loc 1/352 on 7th December 1978 Loc 12/ sub loc 1/ T.20 Loc 12/ sub loc 1/ T.21 LOC 12/ sub loc 1/ T.30, were all registered on 8th December 1978.
28. Further, that even if the said Angelica Njoki was married, she returned home due to unknown reasons with two daughters, Wachera and Regina. However, Wanja w/o Michuki was categorical that Njoki should not inherit any properties from the properties left behind by Senior Chief Michuki, and that was according to the existing kikuyu customs then.
29. That the deceased, John Njoroge Michuki, inherited the suit properties in accordance to the wishes of Wanja w/o of Michuki and thus held the instant suit properties as the sole proprietor, with no intention of holding them in trust for anyone.
30. That even if the deceased, John Njoroge Michuki, was the sole proprietor of the suit properties, he allowed Angelicah Njoki and her two daughters to reside on land Parcel No Loc 12/ sub loc /1 /352, purely out of his benevolence. Similarly, the deceased allowed the Plaintiff/Applicant, to trade on land parcel No. Loc 12/sub loc 1/ T 30, so that she could make a living for herself.
31. The Defendants/ Respondents contended that with the full knowledge of the Plaintiff/ Applicant, and being aware of why the said land parcels could not be inherited by her, land parcel No. Loc 12/ sub-loc 1/ 2630, was purchased for Plaintiff/Applicant by the deceased; John Njoroge Michuki, and a house was built for her by the same deceased, and she was relocated to this purchased parcel of land. That the said parcel of land is earmarked for transmission to Plaintiff/ Applicant absolutely.
32. That there was no evidence adduced by the Plaintiff/ Applicant that she was forcefully evicted from land parcel 352. They further claimed that the Plaintiff filed the protest in 2019, while the deceased died in 2012, and this action was an afterthought, and which suit was filed belatedly, and is an attempt to fleece the estate of the deceased.
33. They contended that the Plaintiff/ Applicant and her daughter in a sign of showing lack of gratitude, invaded the land parcel No 352, without consent and cut down trees and illegally constructed temporary structures and therefore, the Plaintiff has come to Court with unclean hands and is underserving of the orders sought.



34. It was their allegation that the Plaintiff had an opportunity to claim the suit properties during the succession proceeding in Kangema Magistrates Court Succession Cause No.153/5/1978, so that the certificate of succession could be issued in her name and not in the name of the deceased if at all she had any legitimate interest in the suit properties. However, the Plaintiff took no action and her purported claim is now time barred and res judicata.
35. They also averred that their advocate has advised them that the Kangema Magistrates Court, Succession Cause No. 153/5/1978, having been adjudicated fully by the Court, the Plaintiff is precluded from purporting to re- open and re-litigate the same.
36. The Defendants/ Respondents also contended that the legitimacy of the deceased ownership of the suit properties following the transmission of the suit properties from Wanja w/o of Michuki to the deceased John Njoroge Michuki in 1978, was never impugned by anyone until 40 years later in 2018, when the Plaintiff/Applicant through her daughter(Angelica Njoki Wachera), filed summons for Revocation of Grant issued in Kangema Magistrates Court in Succession cause No. 153/5/1978, and which had resulted in the registration of the suit properties in favour of the deceased.
37. They also claimed that in the said Summons for Revocation of grant, by Angelicah Njoki Wachera, the daughter to the Plaintiff herein, she had deposed that the Plaintiff, was of unsound mind; she attached and produced medical records to that effect, which is evident from the documents attached to their Affidavit in support of Revocation of Grant.
38. In conclusion, the Defendants/ Respondents deposed that the Plaintiff's claim was unfounded and unmerited and they urged the Court to dismiss it.
39. The Plaintiff/ Applicant filed a further Supporting Affidavit, and averred that this suit is a continuation of the Succession Cause No. 1842 of 2012, and the decision arising from this suit will be effected in the said Succession cause.
40. It was her averments that all the beneficiaries of the estate of the late John Njoroge Michuki, have been included in the succession cause and thus, they are all aware of this suit.
41. That the filing of this suit was prompted by her filing of the protest, against the Summons for Confirmation of grant over the estate of John Njoroge Michuki, and the procedure that she took is the right one and authorised by the law.
42. That the Defendants/Respondents have not disclosed to this Court that she filed this suit after the Respondents disobeyed the orders issued by the Succession Court to take the steps that she has taken.
43. She reiterated that though the Defendants/Respondents averred that the Senior Chief Michuki, had decreed that his daughters should not inherit any properties from his vast estate, there was no reasons adduced as to why the two deceased Patriarch/ Matriarch would condemn their daughters, who were also their children to hardship and lack of land just because they were daughters. They urged the Court not to support such affairs in this era.
44. It was her contention that her suit is merited and should be dealt by this Court the soonest so that the Succession Cause at Milimani Law Courts, can be concluded, as it touches on the suit properties herein.
45. Directions were taken on 14th February 2023, wherein the parties erected to proceed by way of viva voce evidence. The Originating Summons was turned into a Plaint and the Replying Affidavit was turned into a defence. Parties filed Pre- trial bundles and the matter proceeded for hearing on 26th June 2023.



46. During the inter-parties hearing, the Plaintiff gave evidence for herself and called no witness. The Defendants/ Respondents too gave evidence for themselves and called no witness.

Plaintiff's Case.

47. PWI: Jane Wachera Michuki, the Plaintiff herein adopted her witness statement dated 13th March 2023, as her evidence in chief. She also produced her bundle of documents as P.EXB 1. In her witness statement, the Plaintiff had stated that she is the granddaughter of Senior Chief Ibrahim Michuki(patriarch), and his wife Wanja. The Plaintiff also alleged that she was born in 1962, in one of the suit properties, and that the Senior Chief died in 1940; he was a polygamous man with many wives scattered all over Kangema area.
48. That during the land consolidation in 1962, various parcels of land were consolidated, demarcated and then registered. In a polygamous homestead, registration was done according to various houses, while considering those who occupied them.
49. That her grandfather, Senior Chief Ibrahim Michuki was a polygamist, and accordingly, the fragments for the house of Wanja were registered as follows;land parcel no. loc 12/Sub loc 1/ 352; 7.7 acresland parcel no. Loc 12/ sub loc 1/ T.20; 0.052 HAland parcel no. loc 12/ sub loc /T. 21. 0.052HAland parcel no. loc 12/ sub loc /T. 30;0.13HA
50. It was her claim that these fragments were registered in the name of Wanja's son, Joseph Kiarie, who later died in 1965. That by a Succession cause filed at Kangema Magistrates Court, the said parcels of land were registered in the name of Wanja w/o of Michuki.
51. Further, that Wanja later died in 1976, and the suit properties were registered in the name of her step-son, John Njoroge Michuki(deceased), as the sole owner, but the Plaintiff and her family members continued to live on land parcel no LOC 12/ SUB LOC 1/352, where, their main homestead was, but they continued to use the other parcels of land.
52. However, in 2010, their homestead was demolished and they were moved to loc 12/ sub loc1/ 2630, which was about 6 kilometres away their home. That there were tiny houses built for them, and they were informed that parcel of land was going to be their home henceforth.
53. That when the John Njoroge Michuki died, the Defendants/Respondents applied for Confirmation of grant, and included the four suit properties as some of the Assets of the deceased available to be inherited by the six children or beneficiaries of the estate of the deceased.
54. That the Defendants/ Respondents are the administrators of the estate of the estate of John Njoroge Michuki, and she testified that the suit properties were given to their father during the lifetime of Wanja w/o of Michuki, but he got them after her death.
55. That she filed a protest during the Confirmation of grant, and claimed the four parcels of land. That after attempt to solve the disputes amongst the deceased beneficiaries failed, she filed the instant suit, after taking the necessary steps. That she produced the relevant documents/ exhibits to support her claim.
56. That since the beneficiaries of the estate of John Njoroge Michuki are reluctant to complete the administration of the estate of their father, and have delayed justice for her, and also putting the suit properties in danger of being grabbed, she decided to proceed with this case. Therefore, she filed this suit so that the orders issued herein, can be filed at the succession Court for implementation.



57. In cross exam by counsel for the Defendants/ Respondents, she confirmed that John Njoroge Michuki, was the registered owner of the suit properties through transmission. She also stated that the said parcels of land, were initially in the name of Wanja Michuki, who was her grandmother.
58. She confirmed that she was born in 1960, and her grandmother was Wanja w/o Michuki, and her mother was Angelica Njoki Michuki, and she lived with her grandmother.
59. She also confirmed that the transfer to John Njoroge Michuki was done in 1978, and there was no protest by her mother. That her mother had other children, named Regina Wangare and Mary Njeri, and herself. That her grandmother had three children being Mary Njeri, Joseph Kiarie, and Angelica Njoki, who is her mother.
60. That her brother Joseph Kiarie, and her sister Mary Njeri, are deceased, but they have children who are married and are also aware that she is claiming these parcels of land, but they have not given their consents, and are not in Court, nor are they witnesses.
61. She also testified that her mother, Angelica Njoki, was not married and she is also not married. She denied that she was ever mentally unstable, because of these parcels of land.
62. She reiterated, that she was evicted from the land parcel No/ 352, by John Njoroge Michuki in 2010, who relocated them to where they live to date at Kahuhu area, on Land Parcel Loc 12/ sub loc 1/ 2630.
63. She denied ever cutting down trees that were not hers on parcel No 352. However, she claimed that she cut down trees that had been planted by her family and herself when living on the suit land, 352.
64. It was her evidence that she moved out of the suit land/ 352, about 2 years ago, but the lands she is claiming are all registered in the name of John Njoroge Michuki.
65. She confirmed that some of the parcels of land are graveyards for the wider Michuki family as their grandfather and grandmother were buried thereon. She also confirmed that she had a meeting with the elders in 2018, and the children of John Njoroge Michuki, agreed to give her the title deed for the parcel of land where she lives i.e. 2630.
66. She urged the Court to allow her claim, and she confirmed that there are three plots in Kangema and some of the Michuki's family members are buried in one of them; that is her grandfather Senior Chief Michuki, and other family members, such as her mother, were buried thereon.
67. That there is a plot with a building and she is the one who built it in a year that she could not recall, and she collects rents out the rooms built thereon for an income. It was her testimony that there is another bigger plot where she was evicted in 2010, and graves that lying thereon were destroyed. That she was moved to another land in kahuhu area, and that is where she lives, and the said land is registered in the name of John Njoroge Michuki.

Defendants' Case.

68. DWI: Anne Wanjiku Mutahi, one of the Co Administrators of the estate of John Njoroge Michuki, confirmed that she swore her Replying Affidavit and recorded a witness statement on 23rd March 2023, which she adopted as her evidence in chief. She also produced as her bundle of documents as DEXHTS 1.
69. In her witness statement, the 1st Defendant reiterated the averments contained in her Replying Affidavit in opposition to this suit/ OS.. She further stated that land parcel no. Loc 12/ sub loc 1/ 2630, has been earmarked for allocation to the Plaintiff upon the conclusion of the succession case of the estate of John Njoroge Michuki.



70. The 1st Defendant also stated that the Plaintiff did not give reasons as to why she had not taken a step earlier to lodge a claim over the suit properties and it was her right to assert her right instead of blaming the Defendants for the delay. That she should have moved to Court earlier instead of interfering with the succession proceedings. She urged the Court not to order the Defendants/ Respondents to transfer the stated suit properties to the Plaintiff.
71. In cross exam by counsel for the Plaintiff, the 1st Defendant confirmed that there is a succession cause pending in Nairobi over the estate of John Njoroge Michuki, and that the Plaintiff has filed a protest, against the Confirmation of grant and mode of distribution of the deceased assets. She also confirmed, that her grandfather Senior Chief Michuki, had many wives.
72. It was her testimony that her grandmother was Miriam Wanjiku Michuki and the Plaintiff's grandmother was Wanja Michuki. She confirmed that during demarcation, the land was registered as per the houses, and the household of Wanja, had its land registered in the name of Joseph Kiarie. That the said Joseph Kiarie, died in 1965, and these lands were registered in the name of Wanja w/o Michuki, who was his mother.
73. That Wanja w/o Michuki died in 1976, and the parcels of land that had been registered in her name were subsequently registered in the name of John Njoroge Michuki(deceased), who was their father and the said registration was through transmission. She confirmed that the children of Wanja continued to live on the suit land, and the three plots are in the name of her father, who had allowed the Plaintiff to use the said plots. That Jane, the Plaintiff and her family have now invaded the suit lands.
74. It was her claim that the process of distribution of the estate of John Njoroge Michuki, is not finalised and no one has been using the land claimed by Wachera (Plaintiff), which was registered in 1962, and Wachera lived thereon until 2010, when they were moved to another parcel of land, which is 6kms away and there was a house built for them by John Njoroge Michuki. She alleged that her late father bought and built a house for the Plaintiff and her family, so that he could fulfil the wishes of Wanja w/o Michuki, that unmarried daughter should be given land elsewhere.
75. However, the Plaintiff went back to land parcel No. 352, and she is still living on the suit land. It was her claim that her father had decreed that the daughters should not inherit any of the properties, and the Plaintiff should not be given the suit land as that would be against the decree of her grandfather.
76. She alleged that her grandfather died in 1940, but the issue of the decree has been passed down from one generation to the other. However, their late father wrote his Will and gave the land to his daughters too to inherit.
77. In re exam, she confirmed that the Plaintiff lives on the land bought by her father (b John Njoroge Michuki), and she just filed her protest recently. That they have been maintaining the suit land, but Wachera (Plaintiff) has cut down some trees, and has also fenced the land together with other invaders.
78. DW2: Fredrick Chege Michuki, also one of the Administrators of the estate of the late John Njoroge Michuki, confirmed that he swore a joint Affidavit with his Co- administrator dated 24th January 2023. He adopted his witness statement dated 23rd March 2023, as hi evidence chief. He told the Court that he had filed a Notice of Motion Application, seeking to stop the Plaintiff from interfering with the suit property.
79. In cross exam by counsel for the Plaintiff, he confirmed that the plots in Kangema township have no trees. That no trees were cut on those plots, and that the trees were only cut in the bigger plot, and fencing was done by the Plaintiff who is occupying one of the suit properties. That the Plaintiff had been moved to a bigger plot in the year 2012, which is 6kms away, and the said plot is in the name of



their father. It was his evidence that he was born in 1971, and he does not know how succession process was done before 1981. That the Chief had written a letter to indicate the beneficiaries.

80. After the viva voce evidence, parties filed and exchanged written submissions. The Plaintiff filed the submissions through the Mindo & Co Advocates, on 2nd August 2023, and reiterated most of the averments made in her Supporting Affidavit. It was submitted that the Defendants/ Respondents are among the sons and daughters of the late John Njoroge Michuki, whose succession proceedings are ongoing.
81. It was her further submissions that among the 47 properties listed for distribution to the beneficiaries of the estate, the Plaintiff/ Applicant is only listed to get only one of them being Loc 12/ sub loc 1/ 2630, which is listed as item No 31.
82. It was her further submissions that she was entitled to the four other properties as listed in her Affidavit of Protest, against Confirmation of grant, as the said properties belonged to the house of Wanja w/o Michuki, who was the Plaintiff/Applicant's grandmother. However, after the death of her grandmother, the suit properties were registered solely in the name of John Njoroge Michuki, although the Letter from the Chief dated 26th September 1978, showed that the deceased had other relatives, being Shadrack Njuki, Kefa Njoroge and Samuel Githinji, together with J.N. Michuki, who were all step sons of Wanja w/o of Michuki.
83. She submitted that it was not clear why only John Njoroge Michuki, among the step sons was ultimately the one registered as the sole proprietor of all the four parcels of land that belonged to his step mother, and it was not clear why Wanja's daughters were not entered as her close relatives.
84. It was her further submissions that the only reasons why John Njoroge Michuki, was registered so, was to hold the suit land in trust for the house of Wanja, and perhaps that is why the other step sons were disinherited. She went on to submit that could be the reasons why the Defendants/ Respondents had in their Affidavit in support of Confirmation for grant had stated in para 12, that they knew their father was holding land parcel no. loc 12/ sub loc 1/ 2630, in trust for Jane Wachera Njoki, and they were ready to transfer the same to her.
85. She also submitted that none of the Defendants/ Respondents claims to the Originating Summons make sense, both in law and in fact. That though the Defendants alleged that their grandfather, Senior Chief Ibrahim Michuki, had decreed that none of his land should be inherited by daughters, the deceased in his Will had bequeathed these parcels of land to all his children, including his sons and daughters.
86. Further, it was submitted that the duty to take this action after the protest is filed, is provided for under the P&A Rule 41(3)(4) of the Succession Act, and this duty is to the Administrators, who in this case are the Defendants/ Respondents herein, but since they did not comply with the court order, and so she filed the action herself, which is this claim.
87. That the succession Court has not completed the succession proceedings as it is awaiting the outcome of this case, and it is surprising why the Defendants/ Respondents would allege that land parcel No. Loc 12/ sub loc 1/ 2630, was held in trust for the Plaintiff, yet deny that the other four were also held in trust for her too. Therefore, the question sent to this Court by the succession Court should be answered in favour of the Plaintiff herein.
88. The Plaintiff in her submissions reiterated that in her Affidavit of Protest, she had brought out the issue of Customary trust in para 31 as follows: that the properties listed in items 35, 36, 37 and 38 were registered in the name of Joseph Kiarie in trust for his mother's (Wanja) house hold and upon his



- death, the same were registered in his mother's name in trust for her household, and the deceased later acquired the same under the same condition i.e. in trust for Wanja's household and consequently, in trust for the Applicant.
89. Further, the Plaintiff relied on Section 25(2) of the *Land Registration Act*, which provides;
- “ 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”
90. Therefore, the Plaintiff submitted that the Defendants/ Respondents as the Personal Representatives of the estate of John Njoroge Michuki, have duty and obligation to transfer the named properties to the Plaintiff. That there is delay in concluding the succession cause filed in 2012, due to numerous applications by the beneficiaries of the estate which delays contravenes Article 159(2)(b) of *the Constitution*.
91. On their part, the Defendants/ Respondents filed their written submissions on 25th August, 2023, through Njoroge Regeru/& Co Advocates, and set out several issues for determination. They urged the Court to dismiss the instant Originating Summons, with costs.
92. On whether the suit properties were registered in the deceased name absolutely and thus forming part of the deceased's estate or in trust for the Plaintiff, it was submitted that the deceased was registered as a sole proprietor of the suit properties and was not holding the said properties in trust for anyone, let alone the Plaintiff herein and her family.
93. They also submitted that the Plaintiff failed to prove existence of trust in relation to the suit properties herein and they urged the court to dismiss her claim. That the Plaintiff did not plead the particulars of trust or give evidence to prove the same, and that the available evidence contravenes, the existence of a trust.
94. Reliance was placed in the case of *Juletabi African Adventure Limited & Another vs Christopher Michael Lockley* (2017) eklr, where the Court held:
- “ 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”
95. It was also submitted that though the suit lands were initially in the name of Wanja w/o of Michuki, her intention was to transfer the suit properties to the deceased, John Njoroge Michuki, as an absolute and indefeasible owner and not as a trustee for the benefit of the family of the Plaintiff.
96. For the above, reliance was placed in the case of *Isack M'inanga Kieba vs Isaaya Theuri M'linturi & another* (2018) eklr, where the Supreme Court held:
- “ Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land will qualify as a Customary trust. In this regard, we agree with the High Court in *Kiarie vs Kinuthia*, that what is essential is the nature of the holding of land and intention of the parties”
97. It was further submitted that the nature of the holding herein and the intentions of Wanja w/o of Michuki, was clear that the suit properties were to be registered in the name of John Njoroge Michuki,



- to hold them absolutely. That a trust cannot be presumed and it was not the intention of the parties to assume one.
98. Reliance was placed in the case of *Peter Ndungu Njenga vs Sophia Watiri Ndungu* (2000) eklr, where the Court held:
- “the concept of trust is not new, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived 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”
99. On whether the deceased title is indefeasible, it was submitted that the rights of property are clearly set out in Section 24 of the *Land Registration Act*, 2012, which states as follows;
- “the registration of a person as proprietor of land shall vest in that person the absolute ownership of that together with all rights and privileges, belonging or appurtenant thereto”
100. It was their further submissions that the registration of the suit properties in the name of the Defendants’ father (now deceased) should not be disputed unless there is prove that the said registrations were obtained through fraud or misrepresentation, which is not the case herein.
101. It was also submitted that the Plaintiff having failed to prove the issue of trust or that the suit properties were acquired illegally, unprocedurally or through corrupt scheme, then the said suit properties should be administered according to the deceased’s wishes as per his last Will.
102. On whether the Plaintiff has locus standi to claim a beneficial interest in the deceased estate, it was submitted that the suit properties form part of the estate of the deceased’s estate as he was the sole registered owner. That the Plaintiff is not a beneficiary of the estate as provided by Section 29 of the *Law of Succession Act*. Reliance was placed in the case of *Beatrice Ciamutua Rugamba vs Fredrick Nkari Mutegi & 5 others* (2016) eklr, where it was held:
- “a dependant under section 29(b) and (c) of the Succession Act ,must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not mere relationship that matters, but proof of dependency”
103. It was submitted that the Plaintiff did not proof that during the lifetime of the deceased, she was his dependant and therefore, she has no locus standi or capacity in this suit. Further, that the Plaintiff testified that there were other siblings who were not before Court, and since she is not the Administrator of the estate of Wanja w/o Michuki, then she has no capacity to claim for the estate.
104. On whether the Plaintiff was resettled by the deceased prior to his death, it was submitted that the deceased had instructions to settle the unmarried daughters elsewhere, and accordingly, he bought land and built a house for the Plaintiff in Loc 12/ Sub loc 1/2630, at Kahuhu Muguru area. Therefore, the Defendants intend to transfer this parcel of land to the Plaintiff upon conclusion of the succession proceedings.
105. On whether the suit is time barred, it was submitted that at the time the suit properties were registered in the name of the deceased, the Plaintiff mother was alive and was the one with locus to protest, but



she did not. They relied on Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya; which provides that:

“Any action may not be brought to recover land after the end of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims to that person”

106. That even if the Plaintiff allegations had some basis, the said action to recover land in respect of land parcel No. Loc 12/ sub loc 1/ 352, is time barred and the Plaintiff's right is extinguished. That it has been 20 years, since the deceased was registered as the sole proprietor of the suit properties, and the Plaintiff did not dispute that the deceased's titles during his lifetime, and therefore, the suit herein is time barred.
107. For this submissions, the Defendants/ Respondents relied on a number of decided cases among them; *Naitore M'iburi & another vs Attorney General & 2 others*; *Sebastian Kaaria(Interested Party); Popat Kotecha Property vs State Bank of India Staff*, SC, Civil Appeal No.3460 of 2000; *East Africa Court of Justice*, Appeal case No. 2 Of 2012, *Attorney General of Uganda & Another vs Omar Awadh & 6 others* (2013) eKlr; where the Court held:
- “both justice and equity abhor a claimant indolence or sloth. Stale claims prejudice and negatively impact the efficiency of the administration of justice. The overarching rationale for statute of limitation is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely; affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future”
108. In conclusion, the Defendants/ Respondent submitted that it is 40 years since the deceased, John Njoroge Michuki, was registered as the proprietor of the suit properties, and 12 years since the Plaintiff was allegedly removed from their alleged land parcel of land No 352, and therefore the suit herein is time barred.
109. The court has considered the available evidence, the rival written submissions and the exhibits produced thereto and finds as follows:
110. There is no doubt that the parties herein are related. They are the descendants of Senior Chief Ibrahim Michuki, who allegedly was polygamous, and had many wives. Among these wives was; Miriam Wanjiku, the mother to the deceased John Njoroge Michuki, and grandmother to the Defendants/ Respondents herein. The other was Wanja w/o Michuki, who is a grandmother to the Plaintiff/ Applicant herein.
111. There is also no doubt that these patriarch and matriarchs passed on awhile back. In particular, Wanja w/o Michuki passed on in 1976, and succession proceeding over her estate was finalised in the year 1978, at Kangema Law Courts.
112. It is also evident that all the suit properties that were initially in the name of Wanja w/o Michuki, were transmitted to John Njoroge Michuki, vide the said Succession Cause filed at Kangema Court. Wanja w/o of Michuki, had a daughter by the name of Angelica Njoki, the mother to the Plaintiff, and there is no evidence that she objected to this transmission.
113. It is also evident that John Njoroge Michuki, is now deceased, having passed on in 2012, and he left behind a number of assets and a written Will, on how his estate is to be distributed. It was alleged that the said Will was written in 1973.



114. Further, it is evident that there are pending succession proceedings over the estate of the said John Njoroge Michuki, and the Defendants/Respondents are the Legal Representatives of his estate. It is also not in doubt that the Plaintiff/ Applicant herein has filed a Protest against the Confirmation of grant. The said proceedings in respect of Confirmation of grant are on going before the Probate Court.
115. Subsequently, the Plaintiff filed this Originating Summons on 27th October, 2022, seeking for orders that the Defendants/ Respondents be directed to transfer the four parcels of land to her. She did not state the grounds upon which her said prayers are based on. In her Affidavit in support, she dwelt so much on her Protest over the Summons for confirmation of grant, and the happenings at the Probate Court, but she not explicitly states the reasons as to why the four parcels of land should be transferred to her.
116. However, in her Affidavit in support of protest which is an annexure to her Supporting Affidavit, and in her submissions, she stated that there exist a Customary trust and thus the reasons for her protest and this Suit.
117. It is also evident that on 16th November 2018, one Angelica Njoki Wachera, who is a daughter to the Plaintiff herein had filed Summons for Revocation or Annulment of Grant, that had been issued to John Njoroge Michuki, over the estate of Wanja w/o of Michuki on 2nd December 1978. The said Summons was filed under Section 76 of the *Law of Succession Act*. She had alleged that Wanja w/o Michuki was her great grandmother, who died in 1976. That the said Wanja w/o Michuki, left behind two daughters, one of them being her grandmother, Angelica Njoki Michuki. However, in the succession proceedings over the estate of Wanja w/o of Michuki, her grandmother, Angelica Njoki, was not named as one of Wanja's dependants and thus eligible to inherit her properties.
118. Therefore, Wanja w/o Michuki's suit properties were transmitted to John Njoroge Michuki, who was a step son, instead of her immediate daughters, and thus this action disinherited the said daughters. She alleged that it was fair and just for the said Certificate of Succession and subsequent registration of the suit properties to John Njoroge Michuki, be annulled/ and or revoked as provided by the Succession Act.
119. It is not clear what happened to the said Summons for Revocation, but it is clear that subsequent to that, the Plaintiff filed a protest at the Probate Court and later she filed this suit.
120. This Court has considered the available evidence, the Affidavits attached to the pleadings, the annexure thereto, the relevant provisions of law, the rival written submissions and the cited authorities and finds the issues for determination are:
1. Whether the Originating Summons herein is properly framed?
 2. Whether the suit herein is parallel to the succession proceedings and thus sub- judice and or res judicata.
 3. Whether the suit property is time barred.
 4. Whether there is proof of Customary trust?
 5. Is the Plaintiff entitled to the prayers sought?
 6. Who is entitled to costs of this Originating Summons?
121. Whether Originating Summons as filed by the Plaintiff is properly framed?



It is evident that the Plaintiff/Applicant brought her suit through an Originating Summons. Further, the Plaintiff has brought the suit under Rule 41(3)(4) of the Probate and Administration rules, on a question arising in respect of identity or share of any person claiming to be a beneficially interested in the estate of a deceased person, and the estate herein is that of John Njoroge Michuki(deceased).

122. The said rule provides that such a suit shall be brought by way of Originating Summons. Indeed, Originating Summons is one of the ways of commencing a suit and it sets out the question the Court is being asked to settle. Further, it is well settled that an action can be commenced through Originating Summons, when the statutes requires so, or where a dispute which is concerned with matters of law, is unlikely to be any substantial dispute of facts, that is when the facts in a case are not disputed, but the interpretation of the law needs to be resolved. Further, Originating Summons is used where the Civil Procedure Rules provide for it or some other statutes permit the method of approaching court as Originating Summons.
123. The suit herein is brought under Rule 41(3) of the Probate & Administration Rules, and these rules provide that the determination of the question in proceedings under these rules shall be brought under order xxxvi rule 1 of the Civil Procedure Rules, which is the current Order 37, of the Civil Procedure Rules 2010. Therefore, this action is brought to Court vide an OS as the Statutes so provides.
124. In compliance with the said description of what an Originating Summons is, the Plaintiff framed the question: - Let the Defendants enter appearance for determination of the following question: whether the Respondents who are Administrators of the estate of John Njoroge Michuki should be ordered to transfer to the Plaintiff/ Applicant the parcels of land tabulated....
125. After the above question, the Plaintiff went straight to file her Supporting Affidavit. She did not set the reasons and/ or Grounds as to why the Court should order the transfer of the named suit properties to her. Order 2 rule 1 of the Civil Procedure Rules provides as follows: every pleading in civil proceedings shall contain information as the circumstance in which it is alleged that the liability has arisen and, ...
126. Therefore, the Originating Summons herein needed to contain the information which informs the Plaintiff to set the above question, and such information would also help the Defendants to prepare their defence. The said information brings out the issues between the parties. See the case of World Explorer Safaris Ltd vs Cosmopolitan Travel ltd & another (2021) eklr, where the Court held:

“although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the Court or tribunal of facts precisely what issues are before it for determination.”
127. By failing to state the reasons for setting the question posed on the face of the Originating Summons, the Plaintiff failed to meet the above standard. Further, Order 2 Rule 10, provides that every pleading shall contain necessary particulars of any claim or of matters pleaded and the said section of law provides that such particulars are required in certain cases, and breach of trust is one of them. In the case of World Explorers Safaris Ltd(supra), the Court further held:

“the function of pleadings in civil proceedings is to alert the other party the case they need to meet and hence satisfy basic requirements of procedural fairness and further to define the precise issues for determination so that the Court may conduct a fair trial.”



128. The Plaintiff/ Applicant did not set out the particulars of such breach of Customary trust and thus the Originating Summons is not properly framed. In the Case of *Kenya Commercial Bank Ltd vs Sheikh Osman Mohammed*, CA No. 179 of 2010, the Court of Appeal expressed itself as follows:

“it is not the function of a Court in civil litigation to speculate or surmise as to the nature of the Plaintiffs claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the Court with sufficient clarity what the case is so that the other party may have a fair opportunity, so that the issues for determination by the Court are clear”

129. Having found that the Originating Summons was not properly drawn, the question that the Court proceeds to pose is whether the said omission is fatal to this case? Though the Plaintiff did not frame the Originating Summons properly by giving the necessary particulars, this Court finds that due to the fact that the parties had a history of the issues in controversy herein, then the Defendants / Respondents were able to understand the Plaintiff’s claim; thus, the Defendants proceeded on, and filed their response to the claim. In fact, it is the Defendants who pointed out that the Plaintiff’s claim was a claim for Customary trust.

130. Further, this Court takes account of the provisions of Article 159(2)(d) of *the Constitution*, that obligates the courts not to sacrifice substantive justice at the altar of procedural technicalities, and also sections 1A and 1B of the *Civil Procedure Act*, on the overriding objective of the Act which is to do justice to the parties, and finds that the said omission is not fatal. See the case of *Harit Sheth vs Shamas Charania*, Court of Appeal at Nairobi Civil Appl No.68 of 2008(2010) eklr.

131. It is evident that a case should be heard, tested and determined on evidence at a full hearing. In the case of *Dyson vs Attorney General* (1911) 1 KB 410, Fletcher Moulton L.J, stated as follows:

“to my mind, it is evident that our judicial system would never permit a Plaintiff to be driven from the judgement seat, in this way without any Court having considered his right to be where the cause of action was obviously and almost incontestably bad.”

132. Notwithstanding the fact that the Originating Summons as drafted by the Plaintiff is not properly drafted, the Court will not strike out the suit herein on that basis, but will proceed to determine the instant suit on merit.

133. Whether the suit herein is parallel to the succession proceedings and thus sub- judice and/ or res-judicata

The parties were all in agreement that there is a succession proceeding ongoing before the Probate Court, at Milimani Law Courts, being succession Cause No. 1842 of 2012, wherein the Defendants/ Respondents are the Legal Administrators of the Estate of John Njoroge Michuki. It is also not in doubt that the Plaintiff herein is a Protestor in the said proceeding, objecting the mode of distribution. The Plaintiff alleged that the beneficiaries of the deceased estate are not interested in fast tracking the succession proceedings, but are only interested in sharing certain benefits, and thus the reasons why she filed this suit.

134. The Plaintiff alleged that the Probate Court issued an order allowing her to file the instant suit. In fact, the Plaintiff/ Applicant’s Affidavit in support of the Originating Summons is headed pursuant to the order issued by the high court on 12th July 2022.

However, this Court has not been furnished with the said Order, allegedly issued by the High Court. The said order was alluded to in the Supporting Affidavit of the Applicant, and she alleged that the suit herein is brought under rule 41 sub rules (3)(4) of the Probate rules. This rule allows the Court to



issue an order to appropriate and set aside the particular share or estate to abide the determination of the question in the expected separate proceedings. Further, it is also clear that in such proceedings, the Court will give necessary directions in regard to the expected proceedings and safeguard the shares so appropriated or set aside, awaiting determination of the question.

135. It is not clear whether the High Court, before which the Succession matter is pending, did appropriate and set aside these properties identified in this suit, awaiting the determination of the question herein. This Court states as above because the said order was not attached to the Plaintiff's Affidavit in support of the instant Suit. Without the said order, then it would be difficult for this Court to find and hold that indeed this suit has been filed pursuant to the High Court of 12th July 2021.
136. Further, sub rule 4 states that it is the Personal Representative of the estate who should be the Applicant seeking determination of the question, unless the Court otherwise directs. The Personal Representatives are not the ones who have brought this suit as the Plaintiffs/ Applicants, and as stated earlier, the Court order alleged by the Plaintiff was not produced in Court. Though the Plaintiff produced the Application wherein she had sought to file a suit under rule 41(3)(4) of the Probate rules, she did not produce the said Court order, which allowed her to file this suit, and with directions from the said Court on the expected proceedings.
137. In the case of *in Re Estate of Julius Ndubi Javan (Deceased)* (2018) eklr, the Probate Court faced with a similar issue had this to say: -

“Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation Whereas I agree with the advocates for the Petitioners that the Applicant's claim should be dealt with under Order 37 of the Civil Procedure Rules (previously Order XXXVI, rule 1 of the Civil Procedure Rules), but the decision to pack or appropriate and set aside the property or portion thereof in dispute for determination under order 37 of the Civil Procedure Rules is made by the Probate Court under rule 41(3) of the Probate and Administration Rules.”

Accordingly, the Plaintiff/Applicant herein needed to prove that the Probate Court did appropriate or set aside the suit properties herein awaiting determination of the dispute herein. Failure to avail that evidence means that these proceedings are parallel to the succession matter pending at Milimani Law Courts.

138. The Plaintiff also alleged that she filed this suit because the succession cause was taking too long. That is not a good reason for filing parallel proceedings in a separate Court, because by doing so, there is a danger of been seen like she is forum shopping, and which action might cause issuance of contradictory orders by two Courts of concurrent jurisdiction, thus causing an embarrassment to the judicial institution. Indeed, this Court finds that there is no stay of the Probate proceedings, to await the outcome of this case. Therefore, the Court finds this suit is sub judice, in absence of the order from the Court allowing the filing of this suit.
139. According to Blacks Law Dictionary 9th edition; it defines sub judice to mean: before Court for determination... The doctrine of res sub judice prevents a Court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with previously Instituted suit between the same or another Court with jurisdiction to determine it. There is a Protest pending before the Probate Court over the four stated suit properties herein, and thus the issues are directly and substantially the same.



140. From the above definition, and without clear evidence of the order from the High Court allowing the Plaintiff to file another suit over the same properties that she has filed a protest over, this Court finds that the instant suit contravenes the sub judice rule, and is thus a parallel proceeding. However, the said issue was never raised during the trial, and this Court cannot stay this matter at this tail end, but will proceed to determine the main issue herein, notwithstanding the above observations by the Court.
141. The Defendants also alleged and submitted that the suit herein is re-judicata, by dint of the fact that the issues of these parcels of land were settled in the succession case over the estate of Wanja w/o Michuki, 1978. It was there submissions that at the time the suit properties were registered in the Deceased's name, after the succession proceedings at Kangema court, the Plaintiff's mother (Angelica Njoki), was alive, and she was the one who had locus to protest the said registration of the suit properties in favour of the deceased. She did not, and the judgement of Kangema succession court was enforced by having the suit properties registered in the name of John Njoroge Michuki. Therefore, this suit is re- judicata.
142. Generally, the doctrine of res judicata is the principle that a cause of action may not be re-litigated once the said cause of action, involving the same parties has been heard and a final decision has been made over the said cause of action. The doctrine is a bar to subsequent suits by the same parties, over the same subject matter, and it applies to cases where decisions have been made. For this doctrine to apply, there must be a prior Judgement by court of competent jurisdiction, and the decision was final, the same cause of action and same parties. This doctrine stops a second trial of the same dispute between the same parties. See the case of IEBC vs Maina Kiai & 5 others (2017) eKLR.
143. The suit as filed by the Plaintiff/Applicant is a claim that the deceased was registered as a proprietor of the four suit properties to hold them in trust for the house of Wanja. The suit that was before Kangema court was a succession matter. This is a claim for determination of a customary trust, and thus the issues are different. There is no evidence of existence of another suit between the parties herein involving the suit properties, which has been heard and determined by Court of competent Jurisdiction. Consequently, the court finds and holds that the suit herein is not Res- judicata, as submitted by the Defendants.
144. Whether the suit herein is time barred.
- The Defendants alleged and submitted that this Originating Summons is time barred and is contrary to the provisions of section 7 of the Statutes of *Limitation of Actions Act*, Cap 22 LOK. It was alleged that the suit properties were registered in the name of the deceased in 1978, and thus by the time this suit was filed, it was over 40 years, and thus the suit is time barred.
145. However, it is clear that the Plaintiff's claim is for determination of a customary trust. Section 20(1) of the *Limitation of Actions Act* provides that such limitations do not apply to case of breach of trust. This section 20(1) of *Limitation of Actions Act*, provides;
- (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—
 - (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.



146. In the case of *Macharia Kihari vs Ngigi Kihari C.A*, Civil Appeal No. 170 of 1993, the court held as follows;

“we are unable to accept Mr Thiongo’s contention that the suit was time barred. Limitation prescribed in section 20(2) of the *Limitation of Actions Act*, will not apply to trust coming in existence under customary law. Under customary law, the land- even after the right has accrued is held in trust even for decades before any step is contemplated for formal transfer...”

147. From the above provision of law and the decided case law, it is clear that a claim falling under customary trust cannot be caught by limitation of actions or be time barred. The suit herein is such a claim for determination of a customary trust, and thus this court finds and holds that this suit is not time barred.

148. Whether there is proof of Customary trust?

Though the Plaintiff in her submissions, pointed out that her claim is on Customary trust, this was not set out clearly in her Originating Summons. The claim of Customary trust had been alluded to in her Affidavit in support of her Protest for Confirmation of grant in Succession Cause No 1842 of 2012. However, since the Defendants/Respondents are parties in the said Succession cause, they did respond to the instant Originating Summons, and opposed the Plaintiff’s allegations of existence of a Customary trust. The Defendants submitted that the Plaintiff has not proved existence of any Customary trust to the required standard, and they urged the Court to dismiss the Plaintiff’s suit.

149. It is trite that Customary trust is proved by way of evidence. Customary trust is an encumbrance on the land and these are non- registrable rights which run with the land. However, the existence of trust must be proved by way of evidence, as the Court does not imply an existence of trust. The Court of Appeal held as follows in the case of *Juletabi African Adventure Ltd & Another vs Christopher Michael Lockley* (2017) eklr: -

“it is settled that the onus lies on the party relying on the existence of 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”.

150. From the above holding, it is evident that the burden of proving existence of Customary trust lies with the person asserting that right. In this case, the burden of prove is upon the Plaintiff herein. In the case of *Njenga Chogera vs Maria Wanjira Kimani & 2 Others* (2005) eklr, which referred to the case of *Muthuita vs Muthuita* (1982-88) 1klr 42, the Court of Appeal held that;

“Customary trust is proved by the person claiming it under, by leading evidence and trust is a question of fact which is proven by evidence. Further that a trust is never implied by the Court, unless there was an intention to create a trust in the first place.”

151. The Plaintiff/Applicant herein is the one who alleged existence of Customary trust, and so the burden of proof squarely lies upon her as is provided by Sections 107, to 109 of the *Evidence Act*, which state.

“107. Whoever desires any Court to give judgment as to any legal right or liability
(1) dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

152. Therefore, the Plaintiff/ Applicant needed to call sufficient evidence to prove that the suit properties were registered in the name of John Njoroge Michuki(deceased), to hold them in trust for the Plaintiff herein. It is not in doubt that the suit properties were registered in the name of the deceased in 1978, through transmission. The said parcels of land are registered under The Registered Land Act, Cap 300(now repealed), and disputes herein are governed under the above regime pf law.

153. Under Section 27 of the above Cap 300, which is now mirrored under section 24 of the Land Registration Act, 2012, it states;

“ the registration of a person as the proprietor of land shall vest in that person the absolute ownership of all that land together with all rights and privileges belonging or appurtenant thereto”.

Then it is clear that the registration of the suit properties in the name of deceased, meant that he was the absolute owner thereof. See the case of Mbui vs Mbui E.ALR (2005)1 EA(CAK), where the Court of Appeal held:

“ that the rights of a registered proprietor of land are absolute and indefeasible and are only subject to the rights and encumbrances noted on the register and overriding interests set out in section 30 of the Registered Land Act....”

154. However, as provided by Section 28 of Cap 300(now repealed) as an absolute owner with indefeasible rights, such rights can only be defeated by the provisions of the Act. This provision of law is reiterated in Section 25 of the Land Registration Act, 2012. Section 28 of Cap 300(repealed), reads as follows;

“The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

155. The provision of law that can defeat the rights of a registered proprietors are rights under Section 30 of Cap 300(repealed) and now Section 28 of the Land Registration Act, 2012, which are overriding interests. It is evident that overriding interest as provided by Section 30(g) of the Registered Land Act,



has been held to include Customary trusts. (see Isack M’Innga Kieba vs M’lintari & Another (2018) eklr.

156. Thus, it is clear that once a person proves existence of Customary trust over a registered land, then the rights of such a registered owner would likely be defeated by existence of the said Customary trust. Therefore, in the event the Plaintiff herein is able to avail sufficient evidence to prove that the deceased held the suit properties in trust for her, then his absolute and indefeasible rights over the suit properties as tabulated by the Plaintiff would be defeated by existence of the said trust.
157. From the available evidence, it is clear that the deceased, got registered as the owner of the suit properties in 1978. This was done after the matter went through a succession proceeding at Kangema Law Courts. It was the evidence of the Plaintiff that in 1978, her Mother Angelica Njoki Michuki was alive. She did not object to the said registration of the suit properties in favour of the deceased. Further, there was no evidence that the said transmission was done through misrepresentation or fraud. It is therefore not clear why the Plaintiff waited for more than 40 years after the registration of the suit properties in the name of John Njoroge Michuki, for her to assert her claim of Customary trust.
158. The Plaintiff also gave evidence to the effect that there are other relatives or off springs of Wanja w/o Michuki, who are still living, but are not parties to this suit. None of them was called as a witness to corroborate the evidence of the Plaintiff herein. At least the other siblings should have come to give evidence and add credence to the Plaintiff’s claim that the deceased was registered as a proprietor of the suit properties to hold them in trust for the Plaintiff. Further, it is evident that the Plaintiff herein is not bringing this suit on behalf of the house of Wanja w/o Michuki, but on her own behalf.
159. The suit properties having been registered in 1978, at least the Plaintiff should have called evidence from other relatives to confirm that indeed the deceased was holding the suit properties in trust for the house of Wanja w/o Michuki. As the Court stated earlier, the question of Customary trust is an issue of fact, which is proven by evidence. The Plaintiff in her Supporting Affidavit and evidence in Court concentrated so much on the happenings at the Probate Court. She did not avail evidence to prove the existence of the alleged Customary trust. She never availed evidence of the intention of the parties to create a trust. See the case of Gichuki vs Gichuki (1982) klr 285, and Mbothu & Others vs Waitimu & 11 Others (1986) klr 171, where the Court held: -

“the law never implies, the Court never presumes a trust, but in case of absolute necessity. The Court 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 clearly be determined before a trust will be implied.”

160. The law of Evidence in Section 108, is very clear that the burden of proof is upon the person who would fail if no evidence was given by either side. This Court has noted that this issue of Customary trust was only advanced in the Plaintiff’s submissions, but not through calling of sufficient evidence in Court. It is trite that evidence is not adduced through submissions. Submissions are only supposed to persuade a Court, but they are not evidence.
161. This position was emphasised in the case of Robert Ngande Kathathi vs Francis Kivuva Kitonde (2020) eklr: where the Court held:-

“Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:



“Submissions simply concretize and focus on each side’s case with a view to win the Court’s decision that way. Submissions are not evidence on which a case is decided.”

162. Further, in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 the same Court expressed itself as follows:

“Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this Court’s view, are a course by which counsel or able litigants focus the Court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a Court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

163. The Court of Appeal also stated in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

164. It is evident herein that the mother to the Plaintiff did not object when the suit properties were registered in the name of the deceased. It was the Defendants’ submissions that grandchildren do not inherit from their grandparents automatically. They relied on the case of Cleopa Amutala Namayi vs Judith Were (2015) eKLR, where the Court had held that:- grandchildren should inherit from their own parents and only inherit indirectly from their grandparents through their own parents, the children of the grandparents....

165. It is clear herein that though the Plaintiff alleged existence of trust, she did not call any other witness/ witnesses to support her claim, especially from her other relatives. Not every claim of trust qualifies to be a Customary trust and every case has to be determined on its own merit. The Supreme Court in Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR held as follows:

“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.....

166. Having analysed the available evidence, this Court holds and finds that in the instant case, the Plaintiff/ Applicant failed to avail sufficient evidence to prove existence of Customary trust, and there was not enough evidence to warrant this Court to order and/ or direct that the Plaintiff should be registered as the proprietor of the named suit properties. It is evident that the Plaintiff/ Applicant has filed Protest against the Summons for Confirmation of grant before the Probate Court. The Plaintiff/ Applicant should proceed on with her Protest.

167. This Court finds and holds that the Plaintiff has failed to prove her case against the Defendants/ Respondents herein on the required standard of balance of probabilities, and this Court has no option, but to proceed and dismiss the instant Originating Summons entirely.

168. Who is entitled to costs of this Originating Summons?



On the issue of costs, it is trite that costs are granted at the discretion of the Court, but ordinarily, costs follow the event and are awarded to the successful litigants. This is provided for in Section 27 of the *Civil Procedure Act*. The Defendants are the successful parties. However, this Court takes into considering that the parties are related and they still have another litigation before the Probate Court. Consequently, the Court will direct each party to bear its own costs.

169. Ultimately, the Court finds that the Plaintiff/Applicant herein has failed to prove her case on the required standard. For the reasons given, the instant suit is dismissed entirely with an order that each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANGA THIS 25TH JANUARY 2024.

L. GACHERU

JUDGE.

Delivered online in the presence of;

Mr Mindo for the Plaintiff/ Applicant

Ms Mathagani H/B for Ms Ngonde for Defendants/ Respondents

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE.

25/1/2024

