



REPUBLIC OF KENYA



Muiruri & 6 others v Murigi & another (Environment & Land Case E019 of 2022) [2024] KEELC 3638 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 3638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E019 OF 2022
LN GACHERU, J
FEBRUARY 29, 2024**

BETWEEN

**PETER MUNGAI MUIRURI 1ST PLAINTIFF
PHYLIS NYAGUTHIE MURIMI 2ND PLAINTIFF
JANE WANJIRU MUIRURI 3RD PLAINTIFF
VICTORIA MWIHAKI MATHEKA 4TH PLAINTIFF
JOHN NDUNG’U MUIRURI 5TH PLAINTIFF
JOHN KARURI MUIRURI 6TH PLAINTIFF
JOYCE NJOKI IRUNGU 7TH PLAINTIFF**

AND

**HERMAN KUNG’U MURIGI 1ST DEFENDANT
FLORENCE WAIRIMU MURIGI 2ND DEFENDANT**

JUDGMENT

1. The Plaintiffs herein moved this Court vide a Complaint dated 2nd August 2022, wherein they sought for Judgment against the Defendants herein jointly and severally for: -
 - a. A declaration that the Defendants’ father Moses Murigi Muiruri, held the suit property being land parcel number Makuyu/ Makuyu/ Block 1/921, in trust for himself and his siblings.
 - b. A declaration that the Plaintiffs are entitled by way of adverse possession having occupied Makuyu/ Makuyu/ Block 1/921, for a period exceeding 12 years.
 - c. Costs of the suit and interest thereof.



- d. Any other relief this Court may deem fit to grant.
2. The Plaintiffs averred that the Defendants have been sued in their capacity as the legal administrators of the estate of Moses Murigi Muiruri, having been issued with the Letters of Administration on 11th June 2019, at Muranga Chief Magistrate Court, vide Succession Cause No. 136 of 2019.
 3. Further, the Plaintiffs averred that the Defendants are the biological children of the deceased, while the Plaintiffs are the biological brothers and sisters of the said Moses Murigi Muiruri, who was the registered owner of the suit property. It was their averments that the suit property is land Parcel No. Makuyu/ Makuyu/ Block1/ 921, which measures approx. 2 acres and is situate at Makuyu area.
 4. It is their further allegation that the suit property was purchased by their mother Eunice Wambui Muiruri, but since she did not have an Identity Card during the time of land demarcation and consolidation, and as per the existing customs then, the land was registered in the name of their elder brother Moses Murigi Muiruri, who was to hold it in trust for himself and his siblings.
 5. That there was also an implied /Customary trust that the deceased, Moses Murigi Muiruri, would later dissolve the trust and share the suit land equally among his siblings.
 6. Further, that the said Moses Murigi Muiruri fell ill, and passed on before dissolving the trust, but the Plaintiffs have been on the suit land since the year 1989, wherein they have been in possession, occupation, have constructed permanent houses and buried their beloved kins thereon.
 7. It was their further allegations that the Defendants secretly filed a Succession Cause at the Chief Magistrates Court at Murang'a, in respect of the estate of Moses Murigi Muiruri, wherein they obtained Letters of administration, the Grant was confirmed and the suit land was included as a free property of the deceased, thus was distributed. However, the Plaintiffs have already filed an Application for revocation of the said succession proceedings, but the same is yet to be heard.
 8. The Plaintiffs claim is that the Defendants who are the legal administrators of the estate of Moses Murigi Muiruri, should dissolve the trust and transfer the rightful share to the Plaintiffs herein. They acknowledged existence of ELC NO E034/2021, which suit was struck out for lack of locus standi. They urged the court to allow their claim, with costs.
 9. The Defendants filed their Memorandum of Appearance dated 12th September, 2022, through the Law Firm of P. N Morigori and Company Advocates, who filed a Statement of Defence on 26th September 2022. In their Statement of Defence, the Defendants denied that the suit property was purchased by Eunice Wambui Muiruri, as it was not clear when the said Eunice Wambui Muiruri, purchased the suit property, since the Plaintiffs have not shown any evidence to that effect.
 10. It was their contestation that Moses Murigi Muiruri, their father was the absolute and indefeasible owner of the suit property, and there was no trust indicated in the register, which requires dissolution, and the Plaintiffs were put to strict proof.
 11. The Defendants further averred that the Plaintiffs are on the suit property as mere licensees, and hence are not entitled to any portion of the suit property. Further, that the Plaintiffs entered the suit property with permission of their father, and thus cannot claim adverse possession. They also denied having filed the succession cause in secrecy, and averred that they obtained introductory letter from the area Chief, who was satisfied of all the beneficiaries entitled to the estate of Moses Murigi Muiruri.
 12. Further, the Defendants admitted that they are the legal administrators of the estate of Moses Murigi Muiruri, and denied existence of trust due to be dissolved in favour of the Plaintiffs herein. They urged the court to dismiss the Plaintiffs suit with costs.



13. The matter proceeded for viva voce evidence wherein the Plaintiffs called four witnesses and the Defendants called three witnesses. Thereafter, parties filed and exchanged written submissions, which the court has read and considered.

Plaintiffs Case.

14. PW1: Phylis Nyaguthie Murimi, from Makuyu area adopted her Witness statement dated 2nd August 2022, as part of her evidence. She also testified that she lives on the suit property with her children and has lived there for over forty years. That the Defendants too live on the suit property, and that each of them is on their distinct portion of land. It was her further evidence that some of their relatives have been buried thereon, and thus the Plaintiffs are entitled to a share of the suit land.
15. It was her further evidence that the suit land was subdivided by their mother, and that she had built a permanent house thereon, and that their mother was buried on the suit land.
16. She also testified that the suit land was bought by their mother, but registered in the name of their elder brother Moses Murigi, to hold in trust for them. She confirmed that the Plaintiffs are her brothers and sisters.
17. In cross exam, she confirmed that the land was bought by their mother, who did not have an ID card. However PW 1, did not have documents to show that her mother bought the said land. She also stated that there are boundaries on the land, and each portion is one acre, meaning one acre for Eunice, their mother and one acre for Moses Murigi(deceased).
18. In re exams, she stated that the other Plaintiffs do not live on the suit land, but have built their houses elsewhere, and that she was allowed to use the suit land by the late Moses Murigi, her brother and their late Mother, Eunice.
19. PW2 Peter Mungai Muiruri, adopted his witness statement dated 2nd August 2022, and also adopted the list of documents produced as exhibits. It was his evidence that the suit land was purchased by their mother Eunice, but was registered in the name of Moses Murigi, who was their elder brother.
20. He stated that his two sisters live on the suit property, and the family has lived thereon for over forty years. He reiterated that at the time the land was acquired, their mother did not have an identity card, and therefore, the suit land was registered in the name of the Moses Murigi, their elder brother, who is now deceased.
21. It was his further evidence that he lives elsewhere, at Thangira area, where he bought his own land. He further told the Court that the Plaintiffs have lived on the suit property without any interference until 2020, when the Defendants poured building material on the suit property. He urged this Court to allow their claim.
22. In cross exam, he told the court that he has a good history of the suit land, and that their mother who bought the said land is buried thereon. He further confirmed that his elder brother was registered to hold the suit land in trust for his siblings, but he had no documents to that effect.
23. He also confirmed that Moses Murigi had other parcels of land registered in his name, and that he died in 2003, but before Moses Murigi's death, the Plaintiffs did not ask him to dissolve the trust. It was his further evidence that the suit land is divided into two portions. He denied that the Plaintiffs intend to grab the land from the Defendants.
24. PW3 John Karuri Muiruri; testified that he lives at Kenol area, and is a business man. It was his evidence that the suit land was bought by their mother Eunice, but was registered in the name of their first-born



- brother Moses Murigi, because their mother did not have an ID Card. He also testified that the land is now utilized by his two sisters, who have lived on the suit land for over 35 years. Further, that the son of Nyaguthie, PW1 was buried on the suit land, and Pw1 has been utilizing the land for a long time.
25. In cross exam, he stated that he did not have documents to confirm that the land was bought by their mother. He also stated that their mother used to pay for the land in instalments, but the land is registered in the name of Moses Murigi. Further, he testified that all the Plaintiffs used to live and utilize the suit land before the death of their mother, Eunice and Moses Murigi.
 26. He denied that the Plaintiffs have intentions of grabbing the suit land from the children of their brother, Moses Murigi, though the Plaintiffs did not demand for the said land during Moses Murigi's life time.
 27. PW4 Peter Njoroge Muiruri, from Ithaaga area told the court that the Plaintiffs are his step brothers and sisters. That the Defendants are the children of his other brother called Moses Murigi, now deceased. It was his evidence that his mother was Elizabeth Wangui Muiruri, Eunice Wambui Muiruri was his step mother. He testified that suit land was bought by their mothers.
 28. He further testified that the land was registered in the name of Moses Murigi Muiruri, to hold it in trust for his siblings. He confirmed that his step mother was buried on the suit land and so was Moses Murigi. That Nyaguthie (Pw1), had lived on the suit land for long and her son was buried thereon.
 29. In cross exam, he stated that his father had two wives, and the two mothers bought the suit land. However, Moses Murigi was registered as the owner of the suit land, to hold it in trust for the others. He also stated that no one requested for the land from Moses Murigi during his lifetime. It was his further evidence that Moses Murigi did not buy the suit land, but it was purchased by their mother, Eunice, though there was no written record to that effect.
 30. In re exam, he stated that there was no dispute when the Plaintiffs lived on the suit land.

Defence Case

31. DW1, Herman Kungu Murigi, told the court that the Plaintiffs are known to him and are his relatives. He adopted his witness statement filed on 26th September 2022, as his evidence in chief. He also produced his bundle of documents as D EXHIBITS1.
32. It was his evidence that he is a son of Moses Murigi Muiruri, who died in 2003, who was the registered owner of the suit land. It was his evidence that the mother to Moses Murigi, who was their grandmother, had died earlier, in 2002. He further testified that he filed the Succession Cause for the estate of his father, and the suit land is one of the property subjects of the said succession.
33. In cross exam, he told the court that his family lives on suit land, and so is the 2nd Plaintiff. He also stated that their grandmother was buried on the suit land, and he did not know if there was any objection to her burial on the suit land. It was his further evidence that their father bought the suit land in 1975, from a Society, and that he was given the history of this land by his father. That there was a share certificate, which he did not avail in court, and that it was his father who built a house for their grandmother on the suit land, and that their grandmother had other parcels of land.
34. He also confirmed that the 2nd Plaintiff started to live on the suit- land along time ago, but he could not recall the year. However, it was his evidence that the 2nd Plaintiff started to live on the suit land, after the death of their grandmother. He also stated that he has not asked the 2nd Plaintiff to move out of the suit land, and he has not sued her for trespass.



35. It was his evidence that during the succession cause, there was no objection, and that the Defendants have fenced the land, but not all of it.
36. In re exams, he confirmed that there is no dispute over the suit land, and that he only fenced one side because he ran short of funds. Further, that his father had five other portions of land in Makuyu area.
37. DW2; Florence Wairimu Murigi; told the court that she lives in Nairobi, but her rural home is in Makuyu, which is the suit land parcel No 921. She confirmed that the Plaintiffs herein are brothers and sisters of their father, Moses Murigi Muiruri, who is the registered owner of suit land, parcel No 921.
38. She adopted her witness statements as part of her evidence, and further alleged that there was no dispute over the suit property before the death of their father in 2003. That their grandmother died in 2002, and in the succession cause over the estate of their father, the suit property has been indicated as one of the properties to be distributed.
39. In cross exam, she stated that she born in 1980, and the suit land was registered in 1975. She stated that her brother lives on the suit land, but she lives on a different land. She could not confirm if the son of PW1 was buried on the suit land or not. It was her evidence that the buildings on the suit land were done by their father, and the house thereon is semi-permanent.
40. She also stated that the Plaintiffs utilize part of the suit land and that their portion of land has been fenced off, which is 1 acre.
41. In re exams, she stated that before the death of her father, the Plaintiffs had no claim, and the Plaintiffs want to grab the suit land.
42. DW3; Bernard Muiruri Murigi; told the Court that he knows the suit land and the Plaintiffs herein who are his uncles and aunts. That the Defendants are his brother and sister, and he was born on the suit land.
43. It was his evidence that the suit land is owned by his father Moses Murigi Muiruri, though deceased now, and there is a Succession Cause in respect of the estate of his father, and the suit property is one of the properties lined up for distribution.
44. He adopted his witness statement as part of his evidence and It was his allegations that the Plaintiffs want to grab the suit land from them. He confirmed that their grandmother was buried on the suit land, and thus reasons why the Plaintiffs want to grab the land. He alleged that the Plaintiffs did not claim the land during the lifetime of their father.
45. In cross exam, he alleged that he was born in 1972, and by then, the land had not been registered, as it was registered in 1975. He also stated that all their parents are deceased, but his young brother live on the suit land, together with 2nd Plaintiff. It was his further evidence that the 2nd Plaintiff started to live on the suit land over 20 years ago.
46. He further stated that the Plaintiffs live on one acre, and the family of Moses Murigi on the other one acre, and that there is a permanent house on the suit land, which land has a clear boundary demarcating the two portions of one acre each. It was his evidence that there is a protest over the Succession Cause for the estate of their father, although this succession cause had been filed openly.
47. In re exam, he stated that the 2nd Plaintiffs husband was one Murimi, who is now deceased. Further that there was no dispute over the suit land before the death of their father, and that the 2nd Plaintiff was invited to the suit land by their father after the death of her husband.



48. He alleged that the Plaintiffs want to grab the suit land from them, although the Defendants have allowed 2nd Plaintiff to utilize the suit land, and that is why they have not evicted her.
49. After the viva voce evidence, the court directed the parties to file and exchange written submissions.
50. The Plaintiffs filed their written submissions on 12th September, 2023, and reiterated their testimonies and attached a copy of a title deed issued on 2nd February 1988. The Plaintiffs raised two issues for determination, being: -
 - i. whether the Plaintiffs have proved customary trust;
 - ii. whether the Plaintiffs claim of adverse possession is merited.
51. On customary trust, the Plaintiffs submitted that customary trust was created when the Defendants' father was registered as the owner of the suit land to hold it in trust for himself and his siblings who are the Plaintiffs herein. That it was implied trust that the Defendants' father would later dissolve the trust and transfer a share to his siblings.
52. It was further submitted that trust is an overriding interest on land, which does not need to be expressly stated in the title deed as provided under Section 28 of the Registered *Land Act*. They submitted that they have led evidence as required by the Court in the case of *Njenga Chogera vs Maria Wanjiru Kimani and 2 Others*, (2005) eLKR, where the Court held that a party claiming customary trust must lead evidence on the history of the suit property and the custom therein.
53. Again, the Plaintiffs submitted that they have established that they have been in physical possession of the suit land as was held in the case of *Mbui Mukanga vs General Mutwiri Mbui*. CA No.281 of 2000.
54. On adverse possession, the Plaintiffs submitted that they have satisfied the principles for grant of the orders as they have proved possession and occupation for a period of over 12 years. To buttress this claim for adverse possession, the Plaintiffs submitted that while some Plaintiffs have set up permanent houses, some have been doing farming on the suit property. It was submitted that the 2nd Plaintiff has lived on the suit land all her life, and has buried her child thereon, during the lifetime of Moses Murigi, the registered owner, and none of the parties objected.
55. They urged this Court to find that they have established the principles for grant of orders of adverse possession as was established in the case of *Kasuve vs Mwaani Investment Limited & 4 others/KLR 184*.
56. The Defendants filed their written submissions through P.N Morigori & Co Advocates, and submitted that the Plaintiffs merely tendered evidence that their mother purchased the suit property, but did not produce evidence to that effect. That there was no evidence tendered to show that Eunice Wambui Muiruri, the mother to the Plaintiffs demanded for her parcel of land from the late Moses Murigi Muiruri, the registered owner. It was submitted that the Plaintiffs did not prove their case on the required standard as provided by section 107 of the Evidence Act.
57. It was their further submissions that customary trust cannot subsist herein, since the basis of inferring customary trust has failed as there was no evidence that the Plaintiffs' mother purchased the suit property.
58. The Defendants further submitted that under Kikuyu customary law, the eldest son can hold land on behalf of his siblings, but the land in question must be family land and evidence tendered must prove family land for one to hold in trust as a Muramati. However, it was submitted that no such evidence



was tendered by the Plaintiffs herein, to show that the suit property was registered in the name of Moses Murigi as Muramati.

59. Further, it was submitted that the Plaintiffs have not met the principles or threshold set out in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, where it 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. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

60. The Defendants submitted further that the Plaintiffs failed to prove that before registration, the suit land was a family land. Therefore, it was their submissions that the registered owner is not holding the suit land in trust for his siblings.

61. On adverse possession, it was submitted that the 2nd Plaintiff entered into the suit property with express permission of Moses Murigi(deceased), the registered owner. Therefore, the entry of 2nd Plaintiff was not hostile, but was by permission of the registered owner. They relied on the case of *Rodgers Mwamboje vs Douglas Mwamboge*(2014) eKLR, where the court held that a person staying on his brother's land for more than 12 years, could not claim under the doctrine of adverse possession.

62. It was also the Defendants' submissions that the Plaintiffs had confirmed in their evidence that not all of them live on the suit property. Further, they submitted that the Defendants adduced evidence that they live on the suit land and therefore, the late Moses Murigi and / or his beneficiaries have not been dispossessed of the suit land.

63. Reliance was placed on Article 40 of the Constitution, which gives protection to the owners of their property, and therefore, Moses Murigi ownership is protected and this right to own property cannot be taken away by any person including his siblings.

64. The Defendants urged the court to find that the Plaintiffs have failed to prove their case on the required standard, as there was no evidence that the Plaintiffs' mother (Eunice), had purchased the suit land. They urged the court to dismiss the Plaintiffs' suit with costs.

65. This court has considered the available evidence and the rival written submissions and finds that and there is no doubt that the Plaintiffs are siblings of the late Moses Murigi Muiruri, and the Defendants are his biological children. Further, there is no doubt that the Defendants are the legal administrators



of the estate Moses Murigi Muiruri, as is evident from the Letters of administration produced by the Plaintiffs herein.

66. Further, from the attached title deed, the suit land is registered in the name of Moses Murigi Muiruri (Deceased), as from 2nd February 1988. The said registration is under the Registered Land Act, Cap 300(repealed). While it is not in dispute that the Defendants are children and legal administrators of the estate of the deceased, this Court finds that the Plaintiffs herein have filed an application to revoke the said grant in favor of the Defendants, but the matter is not yet finalized. Since the said grant had not been revoked, then the court finds and holds that the Defendants herein are the Legal administrators of the estate of Moses Murigi Muiruri, as per the copy of Letters of Administration attached.

67. Though the suit land is registered in the name of Moses Murigi Muiruri, the Defendants have been sued as the legal representatives of his estate as provided by Section 82(a) of the Law of Succession Act, which provides as follows:

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

68. Having found that the Defendants are properly sued as the legal representatives of the Defendants, the court finds that the issues for determination;

i. whether the Plaintiffs have proved existence of customary trust in respect to the suit property?

ii. Whether the Plaintiffs have acquired the suit property by virtue of adverse possession?

iii. Are the Plaintiffs entitled to the prayers sought?

iv. Who should bear costs of the suit.?

i). Whether the Plaintiffs have proved the existence of customary trust in respect of the suit property.

69. From the pleadings herein, it is evident that the Plaintiffs are seeking a declaration to the effect that the Defendants father, Moses Murigi Muiruri, now deceased, is holding the suit Property Makuyu/ Makuyu/ Block 1/921, in trust for himself at his siblings, who are the Plaintiffs herein.

70. It is clear that the late Moses Murigi Muiruri, and the Plaintiffs are brothers and sisters, being the children of the late Eunice Wambui Muiruri. The Defendants are the children of the late Moses Murigi Muiruri, and the legal administrators of his estate. Therefore, the parties herein are related or are family members.

71. From the available evidence, the estate of the deceased- Moses Murigi Muiruri, has been distributed to the beneficiaries of estate vide a confirmed Grant dated 6th February 2020. In the said confirmed Grant, the suit property Makuyu/ Makuyu/ Block 1/ 921, was distributed among all the beneficiaries of the Moses Murigi Muiruri(deceased) and each of the beneficiary is entitled to 0.844Ha. What is not clear is whether this parcel of land has been surveyed and subdivided as per the confirmed Grant. There were no copies of title deeds to these distributions attached or produced as exhibits.

72. With the above evidence of distribution of the estate, it may look like the suit land is not available any more for allocation to any other person. However, the Plaintiffs claim is on customary trust, which is



never extinguished by the death of the title holder. See the case of *Kanyi vs Muthiora*(1984) KLR 712 CA, where the Court held that;

“the registration of land in the name of a proprietor under the Registered *Land Act*, did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as a trustee.”

73. The Plaintiffs have alleged existence of customary trust over the suit land, which allegation has been denied by the Defendants herein. Since the claim is disputed by the Defendants, the Plaintiffs who have alleged had the onus of proving the case on the required standard of balance of probabilities, as provided by section 107 of *Evidence Act*, which states;

“107.

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

74. The Plaintiffs herein have the onerous task of discharging that duty as provided by section 109 of the *Evidence Act*, which provides;

“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.”

75. Therefore, the Plaintiffs needed to call sufficient evidence to prove their allegations/claim of customary trust. Have the Plaintiffs herein managed to discharge that duty?

76. As submitted by the Plaintiffs, it is not in doubt that the customary trust is one of the overriding interests, which subsist on the land. It is attached to the land, and need not be entered on the register. This can be discerned from the provisions of section 30(g) of the repealed Cap 300; Registered Land Act, and section 28(b) of the *Land Registration Act*, 2012.

77. The title deed attached to the Plaintiffs claim was issued on 2nd February 1988, in the name of Moses Murigi Muiruri, and the suit land was registered under Cap 300(repealed). The parcel of land is Makuyu/ Makuyu/ Block 1/921, and it is the Plaintiffs claim that they have lived thereon since its purchase. The parties had alleged that Moses Murigi Muiruri, got registered as a proprietor of the suit property in 1975, but the title deed produced is dated 2nd February 1988. This court will go by the date given in the title deed.

78. The suit land is registered under Cap 300, and section 27(a) of the said Act, provides as follows;

27. Subject to this Act –

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

79. As a registered proprietor, Moses Murigi Muiruri(deceased) is deemed to hold the said land absolutely, and his title is indefeasible, and his rights as an absolute owner can only be defeated as provided by section 28 of the said Act, which states the Registered *Land Act*.



- “28. 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) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (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.”
80. Therefore, the rights of Moses Murigi Muiruri, shall only be defeated as provided by the Act, (Cap 300, repealed) or Section 25 of the [Land Registration Act](#), which states;

Rights of a proprietor.

“25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
81. Further, Section 30 of the Registered [Land Act](#)(repealed), which provision of law is reiterated in section 28 of the [Land Registration Act](#), provides that overriding interests which are encumbrances to land can defeat the rights of a registered proprietor. The said section provides;
- “30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –
- (a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
 - (b) natural rights of light, air, water and support;



- (c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;
- (e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
- (h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:

Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.”

82. Customary right is one of the overriding interests and if the Plaintiffs herein are able to prove existence of such right, and then the rights of Moses Murigi Muiruri(deceased) and/ or his beneficiaries can be defeated. See section 30(g) of Cap 300 and 28(b) of [Land Registration Act](#).

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register

- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

28 of the [Land Registration Act](#):- Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (b) trusts including customary trusts”

83. It is trite that customary trust can only be proved by calling of sufficient evidence and courts do not imply customary trust, unless the intention to create a trust in the first place is clear. See the case of Susan Mumbi Waititu vs Mukuru Ndale & Others (2007) eKLR, where the Court held: -

as for trust, the Plaintiff must prove with cogent evidence that the suit premise was an ancestral land and thus family land”.

84. The principles to be considered in determination of customary trust were set out by the Supreme Court in the case of Isack M’inanga Kieba vs Isaaya Theuri M’lintari & Another (Supra), as follows;

- i. The land in question was before registration, family, clan or group land.
- ii. The claimant belongs to such family, clan, or group.



- iii. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 - iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - v. The claim is directed against the registered proprietor who is a member of the family, clan or group.
85. This court being guided as above proceeds to consider the available evidence in order to determine whether the claimants or Plaintiffs herein have proved their case on the required standard.
 86. It is the Plaintiffs claim that the suit land herein was purchased by their mother - Eunice Wambui Muiruri, but because she did not have an ID CARD, the suit land was registered in the name of Moses Murigi Muiruri (deceased), to hold it in trust for himself and his siblings.
 87. This allegation has vehemently been opposed by the Defendants, the children of the deceased, who alleged that there was no evidence that the suit land was purchased by the mother to the Plaintiffs. It was their allegations that the Plaintiffs herein want to grab the suit land from the Defendants, who are the beneficiaries of deceased's estate, and a brother to the Plaintiffs.
 88. It is trite that customary trust is proved by facts, which facts can only be discerned from calling evidence. The Plaintiffs gave evidence for themselves and alleged that the suit land was purchased by their mother, who is now deceased, but was registered in the name of Moses Murigi Muiruri, because he was the elder son, who had an ID Card, which their mother did not possess, and so the land is family land.
 89. It was also adduced and submitted that the Plaintiffs, especially 2nd Plaintiff has lived on the suit land for long, wherein she had built a permanent home and has buried her kin thereon.
 90. The Defendants in their evidence did confirm that indeed the 2nd Plaintiff lives on the suit land in the house that was occupied by their Mother. They also admitted that their grandmother/mother to the Plaintiffs was buried on the suit land. It was the Defendants allegations/ evidence that the suit land was not purchased by Eunice Wambui Muiruri, but by their father, Moses Murigi Muiruri, to hold it as a sole proprietor, but not as a trustee for his siblings. The Defendants stated that they got this history from their late father.
 91. There was evidence of Pw4, Peter Njoroge Muiruri, who was 82years old then, and a step brother to the Plaintiffs and a step son of the late Eunice Wambui Muiruri, He gave evidence as an independent witness, wherein he testified that their mothers, Elizabeth Wangui his mother, and Eunice Wambui, the mother to the Plaintiffs purchased parcels of land in Makuyu area. He further testified that their mothers did not have ID cards and therefore, they caused the purchased parcels of land to be registered in the names of their elder sons to hold the said land in trust of their siblings.
 92. Pw4 testified that he is registered as a proprietor for his mother's parcel of Land and he is holding it in trust for the house of Elizabeth Wangui. Further that the suit land was registered in the name of Moses Murigi Muiruri, now deceased to hold it in trust for the house of Eunice Wambui Muiruri.
 93. This evidence of Pw4 was not shaken during cross exam, and given that he was an older member of the Muiruri's family, the court finds that he had a better history of the suit land, than the Defendants, who were born after the process of buying this land had commenced.



94. Though the burden of proof was upon the Plaintiffs, once Pw4 adduced evidence to the effect that the suit land was purchased by Eunice Wambui Muiruri, and that he knew the history of the suit land, then the burden of proof shifted and the Defendants herein, who then needed to disapprove that evidence, by calling sufficient evidence. See the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR, where the Court expressed itself as follows:

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

See also section 108 of the *Evidence Act*, which provides;

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.”

95. This court finds that the Defendants herein did call any evidence to dispute or rebut the evidence on the history of the suit land as given by Pw4. Since customary trust is proved by calling evidence, the court finds that the evidence of Pw4, was not shaken and this court believes the same.

96. Further for one to prove customary trust, intention to create a trust must be clear. From the available evidence, Eunice Wambui Muiruri, the mother to the Plaintiffs lived on the suit land. She was buried thereon in the year 2002, during the lifetime of Moses Murigi Muiruri, the registered owner. There was evidence that the deceased son of 2nd Plaintiff, by the name of Moses Murigi, was also buried on the suit land. Further, there was evidence that the Plaintiffs have built permanent homes on the suit land.

97. Further, the Defendants in their evidence stated that the suit land is divided into two portions of 1 acre each with distinct boundaries. It was their evidence that the family of Eunice Wambui Muiruri, or rather the Plaintiffs uses one portion and the Defendants uses the other portion. Therefore, it is evident that the intention to create a customary trust is very clear from the actions of the parties herein, the registered owner who is now deceased included.

98. The Defendants alleged that the Plaintiffs were allowed on the suit land as licensees, and not as beneficiaries of the suit land. However, it was the evidence of the Plaintiffs and their witness that the Plaintiffs have lived on the suit land for over 40 years. The Defendants did not dispute this piece of evidence, and also, they did not avail evidence to prove that Plaintiffs are indeed licensees on the suit land.

99. Considering the principles set out by the Supreme Court in the *Isaack Kieba* case(supra), wherein it was held that each case should be decided on its own merit and circumstance, this court finds and holds that the suit land herein was purchased by Eunice Wambui, the mother to the Plaintiffs as adduced by Pw4. The suit land was registered in the name of Moses Murigi Muiruri, to hold it in trust for the family of Eunice Wambui, which family comprises of the Plaintiffs herein. Therefore, the suit land is family land which could have been registered in the name of Eunice Wambui, the Plaintiffs mother, but she chose to have it registered in the name of her elder son, as was the tradition then.

100. The Defendants are children of the registered owner, who was a brother to the Plaintiffs, and thus the Defendants are family members of the Plaintiffs. The Defendants are the legal administrators of the estate of Moses Murigi Muiruri.



101. Having found that Moses Murigi Muiruri, was registered as a proprietor of the suit property Makuyu/ Makuyu/ Block1/921, but to hold it in trust for himself and his siblings, then the court finds that the suit land is encumbered by customary trust, and Moses Murigi Muiruri cannot be said to have held that land absolutely. Therefore, this parcel of land was not a free property available for distribution to the beneficiaries of the estate of Moses Murigi Muiruri, but was subject of customary trust. Consequently, the court finds and holds that the Plaintiffs have proved their claim of customary trust on the required standard.

ii) Whether the Plaintiffs have acquired the suit property by virtue of adverse possession.

102. It is trite that for one to prove a claim for adverse possession, one must prove that they have been in actual and continuous possession of the said land for at least 12 years, and that during this time, they had intention to possess the land as if they were the true owners. See the case of Gabriel Mbui v Mukindia Maranya [1993] Eklr, where the Court held:

"The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown"

103. Further, a claim for adverse possession is attached to land and not the tittle. See the case of Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR, where the Court held that:

"Adverse possession is a fact to be observed upon the land. It is not to be seen in a title".

104. The Plaintiffs have averred that they have been on the suit property for over 40 years, wherein they have built permanent homes and buried their deceased kins thereon. It was their evidence that even if the land was registered in the name of the Moses Murigi Muiruri(deceased), they have been in possession and occupation of the suit land with the knowledge of the registered owner, and he never asserted his right by evicting them or asking them to vacate the suit land.

105. The Defendants confirmed that the Plaintiffs have occupied and used the suit land for a long time, although they alleged that the said entry was with consent of Moses Murigi, their father, and therefore the Plaintiffs' occupation and possession cannot be said to be adverse. However, it is evident that the said Moses Murigi died in 2003, and 12 years lapsed in 2015, and even if the initial entry was by consent, when Moses Murigi passed on, the Plaintiffs continued to occupy the suit land, without force, without secrecy and to the exclusion of the owner.

106. By their long occupation of the suit land for period of over 12 years, the Plaintiffs dispossessed the owner, the Defendants who are the Legal administrators of the estate of Moses Murigi Muiruri included. The nature of occupation by the Plaintiffs is open, continuous and exclusive, a fact that was also admitted by the Defendants herein.

107. The principles for adverse possession were elaborately set out in the case of Wambugu vs Njuguna [1983] KLR 172, where the Court held that:

"In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it."



And that:

"The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years."

108. It is evident that the Plaintiffs have openly occupied and possessed the suit property without force or secrecy and their occupation dispossessed, the registered owner, who never asserted his right as against the Plaintiffs. The Plaintiffs have been in exclusive possession of their portion of land, and they produced photographs of permanent homes and graves. This is evidence of the fact that the Plaintiffs were in possession of their distinct portion of one acre with intention of owning it.
109. The parties admitted that the boundaries of the two portions are distinct and that Moses Murigi Muiruri, was buried on the part that is owned by him, and Eunice, the mother to the Plaintiffs, was buried on the part occupied by the Plaintiffs.
110. Having considered the available evidence, this court finds and holds that the Plaintiffs have proved on the required standard that they have occupied the suit property for over 12 years, and thus have acquired their distinct portion of land as occupied by them by adverse possession.

iii) Are the Plaintiffs entitled to the prayers sought?

111. The Plaintiffs have sought for two distinct prayers. One for declaration of trust and the other for declaration that they have acquired a portion of land Parcel Makuyu/ Makuyu/ Block 1/ 921, by way of adverse possession.
112. This court has found that indeed there is a trust in existence, and that Moses Murigi Muiruri was registered to hold the suit land in trust for himself and his siblings.
113. Further, the court has found that there is evidence that the Plaintiffs have been in open, continuous and exclusive possession of suit land for over 12 years, and their occupation did dispossess the registered owner Moses Murigi Muiruri, of the use of that portion of land occupied by the Plaintiffs. Adverse possession and customary trust are overriding interests which are capable of defeating a registered owner's absolute right to his property.
114. With prove of the two issues by the Plaintiffs, this court finds and holds that the Plaintiffs herein are entitled to the prayers sought in the Plaint.

iv) Who should bear costs of the suit.

115. Section 27 of the *Civil Procedure Act* is clear that costs are granted at the discretion of the court. Further, it is trite that costs follow the event, and are granted to the successful litigant, unless there are special circumstances that would warrant the court to deviate from norm. See the case of Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted that;

The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that "Costs follow the event" was driven by the fact that there could be no "one-size-fit-all" situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by



and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

116. Furthermore, this discretion must be exercised judiciously and courts should not deprive a Plaintiff/ Defendant of his or her costs, unless it can be shown that they acted unreasonably. The Halsbury’s Laws of England, 4th Edition (Re-issue), {2010}, Vol.10. para 16, notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

117. There are no reasons advanced herein that would warrant this court not to award costs to the successful litigants. The Plaintiffs are the successful parties and are thus awarded costs of the suit.

118. Having carefully considered the available evidence, the Court finds and holds that there is no evidence that the Defendants herein allowed the Plaintiffs on the suit land as licensees. That allegation by the Defendants is dismissed entirely, and further the court finds and holds that the Plaintiffs have proved their case against the Defendants on the required standard of balance of probabilities.

119. For the above reasons, judgement is entered for the Plaintiffs against the Defendants herein jointly and severally in terms of prayers No (a) & (b), of the Plaint dated 2nd August 2022, with costs to the Plaintiffs.

120. Further, the subsisting trust is dissolved and the suit land should be subdivided as utilized by the parties herein.

121. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 29TH DAY OF FEBRUARY, 2024.

L. Gacheru

Judge

In the presence of; -

Joel Njonjo – Court Assistant

M/s Macharia for the Plaintiffs

Mr P. Morigori for the Defendants

L. Gacheru

Judge

29/2/2024.

