



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 585 OF 2013**

**NJENGA KIMANI**

**HENRY KAROKI NGUMO**

**FRANCIS KIMANI NGUMO** (Suing both as the legal representatives of the

Estate of KAMAU KIMANI alias SAMWEL NGUMO).....**PLAINTIFFS**

**VERSUS**

**KIMANI NGANGA K. WAINAINA**.....**DEFENDANT**

**JUDGMENT**

*(Suit by the plaintiffs claiming that certain land is held by the defendant in trust for them; alternative claim for adverse possession; land previously held as a share in a land buying company; share registered in the name of the defendant who was then 6 months old, plaintiffs claiming that the defendant was to hold the share on behalf of his father and his uncles; resulting trust; proof of purchase or contribution for the share; no documentary proof placed by the plaintiffs to prove any contribution; not sufficient evidence to rebut presumption that minor holds property as a gift and not trustee; claim for trust dismissed; adverse possession in cases pitting one close relative against another; not uncommon for relatives to be permitted to live in the other's land; evidence leaning more towards a licence; claim for adverse possession dismissed; suit dismissed with costs).*

**PART A: INTRODUCTION AND PLEADINGS**

1. This suit was commenced on 7 November 2013 by way of a plaint. The first plaintiff has filed suit on his own behalf, whereas the 2nd and 3rd plaintiffs, have filed this suit as the legal representatives of the estate of Kamau Kimani alias Samwel Ngumo (deceased). It is pleaded that in the year 1964, the 1st plaintiff and his two brothers, namely Kamau Kimani alias Samwel Ngumo (deceased), and Nganga Kimani (deceased), equally contributed and bought a share in Nyamathi Farmers Cooperative Society and caused that share to be registered in the name of the defendant, who was then a minor aged 1 year old, to hold in trust for the three brothers. The defendant is the son of Nganga Kimani (deceased) one of the three brothers. It is pleaded that on 5 February 1991, the three brothers paid Kshs. 450/= each for the title deed to be issued in their names, but the title deed was issued on 13 November 2008 in the name of the defendant, identifying the land as Naivasha/Mwicingiriri Block 2/72 (hereinafter referred to as the land parcel No. 72). It is pleaded that during their lifetime, the three brothers enjoyed quiet possession of the suit land and that the defendant has never been in possession of it. It is contended that after the defendant collected the title deed, he asserted that the suit land belongs to him, and that the plaintiff and his two late brothers, had no share in it. It is pleaded that on 9 February 2009, the defendant subdivided the land parcel No. 72 into two portions, namely Naivasha/Mwicingiriri Block 2/1211 measuring approximately 5.12 Ha and Naivasha/Mwicingiriri block 2/1212 measuring approximately 2.6 Ha (hereinafter referred to as parcel Nos. 1211 and 1212). It is contended by the plaintiffs that the land parcel No. 1212 is the share of Nganga Kimani, the defendant's father, and the remaining portion is the share of the 1st plaintiff and Kamau Kimani. It is averred that in the year 2011, the defendant sold the land parcel No. 1212 and has threatened to evict the plaintiffs and their relatives from the land parcel No. 1211 or dispose it off. It is claimed that the 1st plaintiff has been in occupation and use of the land parcel No. 1211 without interruption since the year 1964 and that the beneficiaries of Kamau Kimani, have been on the said land continuously without interruption since the year 1989.

2. In this suit, the plaintiffs wish to have the following orders :-

(a) A declaration that the defendant is registered as the owner of the land parcel Naivasha/Mwicingiriri Block 2/1211 in trust for the 1st plaintiff and the beneficiaries of the Estate of Kamau Kimani alias Samwel Ngumo (deceased).

(b) A permanent injunction restraining the defendant by himself, his employees, agents, servants etc, from leasing, charging, selling and or interfering in any manner with the land parcel Naivasha/Mwicingiriri Block 2/1211

(c) An order that the defendant transfers the land parcel Naivasha/Mwichiringiri Block 2/1211 to the 1st plaintiff and the Legal Administrators of the Estate of Kamau Kimani alias Samwel Ngumo (deceased) in default the Deputy Registrar of this Honourable Court to sign the transfer forms on his behalf.

(d) In the alternative, an order that the plaintiffs have acquired title over the land parcel Naivasha/Mwichiringiri Block 2/1211 through *adverse possession and the defendant's title over the said land has been extinguished*.

(e) Costs of the suit.

(f) Any other relief that this Honourable Court may deem fit to grant.

3. In his statement of defence, the defendant denied that the 1st plaintiff and his two deceased brothers, equally contributed to the purchase of the share at Nyamathi Farmers Cooperative Society. He contended that it is only his father, Nganga Kimani, who bought the said share and had it registered in his (the defendant's) name. He denied any agreement entered into on 8 December 1983 allegedly between the three brothers and denied any transfer agreement. He further denied that the 1st plaintiff has been in occupation of the land parcel Naivasha/Mwichiringiri Block 2/1211 since the year 1964 and pointed out that the said title only came into existence in the year 2009. He has claimed that it is him who has been in occupation of the said land. He put the plaintiffs to strict proof and asked that the suit be dismissed.

#### **PART B : EVIDENCE OF THE PARTIES**

4. The 1st plaintiff, Mr. Njenga Kimani, testified that of the three brothers, he is the eldest, followed by Kamau Kimani, then Nganga Kimani. He testified inter alia that he together with his said brothers purchased the suit land through Nyamathi Farmers Cooperative Society (Nyamathi FCS). The land was previously a white settler farm and they were squatters in it. He stated that the three brothers raised money and that he is the one who paid the money to the company. He could not however recall how much he paid. He testified that the share was written in the name of the defendant but was actually meant for the three brothers. He stated that it was Kamau Kimani, one of his brothers, who registered the name of the defendant as shareholder. 5. At that time, the defendant, who is son to Nganga Kimani (the other brother), was about 6 months old. In total they got 18 acres of land. They were shown the land and he took possession of it. Later, one Samwel Ngumo, the grandson of Kamau Kimani, came to settle there as well. He testified that the share certificate, and later the title deed, were issued in the name of the defendant since he was the registered member. He stated that the land was subdivided into three portions and beacons were put by a surveyor to demarcate the said portions. He could not however recall the year when this was done. At some point, the three brothers met and made a record of their deliberations but he stated that these documents got destroyed when a fire gutted his house. They also went to the Land Control Board to subdivide the land but they did not proceed with the transaction since one of the sons of his brothers died. He testified that none of his other brothers had any objection to him occupying the land and that he has been residing on the land all these years. He stated that the three brothers had balloted for their share.

6. In cross-examination, he testified inter alia that it is Kamau Kimani who went to purchase the shares at Nyamathi FCS. He conceded that he is not the one who went to pay this money. He stated that the money came from the dowry of their sister, Waithera, who had sent Kshs. 1,000/= to their father. Their father advised that the money would buy land but this land was not to be owned by their father. He stated that Kamau Kimani had sons of his own even when he registered the name of the defendant as shareholder. He denied that the money was raised by the defendant's father and that he instructed Kamau to register the name of the defendant. When he took possession of the land, the father of the defendant was still alive. He testified that Kamau never lived on the land and neither did the defendant's father. The children of Kamau have also not lived on this land. The 2nd and 3rd plaintiffs also do not live on the land. He however lives with Samwel Ngumo, whom he invited to stay with him, after his father died. He was not aware that the father of the defendant asked him to allow him to live on the land and instructed him not to evict him. He stated that he has never been married and has no children.

7. PW-2 was Kinyanjui Nganga Kamuri. He stated that he is among the founders of Nyamathi FCS and served as its Secretary from 1964, when the Society started, to the year 1968. He testified that in the year 1964, the three brothers came with the sum of Kshs. 900/= which was in the hands of Kamau Kimani and they wished to purchase shares. The money had been given to them by their father and they were asked to buy land with it. He stated that the Committee recorded that the land belongs to the three of them and they were issued with a receipt. They asked that the share be recorded in the name of their son, the defendant. He stated that there was an agreement that was written and each of them took a copy. They had to make additional contributions since a share was worth Kshs. 1,500/=, and some additional money, being Kshs. 20/= as office expenses, and Kshs. 1,200/= as survey fees. He stated that he left office when they were still making payments in installments. They were also advised to get somebody to work in the farm, as the Society had taken a loan and therefore needed persons to work the farm, so that they could raise money to repay the loan. The three brothers availed the 1st plaintiff as their worker and he worked for 2 years. Later the land of the Society was distributed to members, and their share entitled them to 18 acres of land. This was registered in the name of the defendant. He stated that in the year 2009, the defendant subdivided the land and sold 6 acres. He considered this to be his share and that what remained was therefore the share of the other two brothers. He testified that the 1st plaintiff has been living in the farm since the year 1964 and that Kamau Kimani also brought one of his sons, now deceased, to the land. He had a wife and children, and when the wife died, she was buried on the land.

8. In cross-examination, he testified that he moved into his land, which neighbours the suit land, in the year 1987. He stated that the other two brothers never lived on the land. He testified that he was told that it is Kamau who brought his children on the land and not the 1st plaintiff. He stated that Kamau (one of the three brothers) had two wives. One of his sons was Kimani Kamau, who died on this land and was buried in it. He stated that after paying the Kshs. 900/= the brothers paid the balance, with each brother bringing his own money separately on different occasions, and getting a receipt. He could not tell what the intention of the brothers was, in registering the name of the defendant, as shareholder. They never came back asking that the name of the defendant be removed. He denied that it was the father of the defendant who brought the 1st plaintiff to the land and permitted him to live on it. He stated that when the land was subdivided in the year 1989, the 1<sup>st</sup> plaintiff was present, and he stated that his share be lumped up with that of Kamau Kimani. He was therefore of the view that the suit property, belongs to the 1st plaintiff and Kamau Kimani. He agreed that it was not unusual for a person to accommodate his brother.

9. PW- 3 was Francis Kimani Ngumo, the third plaintiff. He is brother to the 2nd plaintiff and they are both sons of Kamau Kimani, and

administrators of his estate. He gave evidence based on information that he said was received from his late father. He testified that his father and his brothers, in the year 1964, together contributed to purchase the land and that they had an agreement. The share purchased was registered in the name of the defendant who was then about one year old. He himself had not been born at this time as he was born in the year 1965. He testified that his father handed over to him the documents relating to this land. Among them was an agreement dated 18 February 1985, said to have been signed by the three brothers, and a Land Control Board (LCB) consent, which he said, indicates that the three brothers had agreed to subdivide the land into three. The agreement was produced in evidence but the alleged consent of the LCB was not. He testified that the land was subdivided in the year 2009 although he himself was not present. He stated that the of the two subdivisions, parcel No. 1212 was of the defendant, and the parcel No. 1211, is to be shared equally between the 1st plaintiff and Kamau Kimani. He contended that the 1<sup>st</sup> plaintiff has been on the land even before the year 1963. He stated that his father resided in Mwea, but that he took Samwel Ngumo to the land after his father, Kimani Ngumo, died. This was on request by the mother of Samwel Ngumo. The mother of Samwel Ngumo was also told to stay on the land and take care of the 1st plaintiff and her children. He stated that the mother and father of Samwel Ngumo are buried on the land.

10. In cross-examination, he testified that his father, Kamau Kimani had two wives. His first wife died after giving birth to one Kimani Ngumo. Kimani Ngumo (father to Samwel Ngumo) used to live in Limuru but was buried on the suit land. He stated that his father told him that he is the one who made the initial payment for the land, but he never told him how much he paid, nor the source of the money. He averred that his father registered the share in the name of the defendant, so as to convince the father of the defendant to contribute. He agreed that at that time, his father already had a son, that is Kimani Ngumo. He did not have receipts from the Society, as he claimed that these got burnt. He stated that before the year 1989, the 1st plaintiff used to live on the land alone. He himself has never lived on this land, and his brother, the 2nd plaintiff, only lived on it briefly but never erected a house. His own mother lives in Mwea and has never lived on this land. He stated that his father, Kamau, built a house on the land in the year 1989 and left it for the wife of Kimani Ngumo. He testified that the father of the defendant has never lived on this land. His children also never lived on the land, save for one (Kinuthia), who lived on it briefly. He testified that in the year 2008, when the land parcel No. 72 was subdivided, his father was still alive and was aware of the subdivision. He died in the year 2011. He did not agree that the father of the defendant demanded that the defendant allows the 1st plaintiff to live on the land for the duration of his lifetime since he was unmarried and had no children. He was questioned on the alleged consent of the Land Control Board and stated that he had no application for consent, nor a transfer form, drawn after issuance of the said consent. Neither did he have the minutes of the Land Control Board.

11. PW-4 was Samwel Ngumo Kimani. He is son to Francis Kimani Ngumo, and grandson to Kamau Kimani, one of the three brothers in issue in this suit. He testified that he lives on the suit land with his wife and children and with the 1st plaintiff. He was born in the year 1981 and moved into this land in the year 1989. His father died in the year 1986 and was buried on the disputed land. They later moved into the land with their mother and sisters. It is the 1st plaintiff and their grandfather, Kamau, who moved them into this land. His mother died in the year 2004, and was buried on the disputed land. He testified that he was present when the defendant divided the original parcel No. 72 into two portions. He had no problem with the fact that the defendant sold off the one portion measuring 6 acres, since according to him, this was the share of his father. To his understanding, the remaining portion, that is the land parcel No. 1211 comprised of 12 acres, constitute the share of his grand-father and that of the 1st plaintiff. He stated that when he asked the defendant for the share of his grand-father (Kamau), the defendant claimed that the whole land belongs to him. He stated that neither the defendant nor any of his family has ever lived on this land and the defendant has never threatened to evict them. He testified that it is them (presumably him and the 1st plaintiff) who cultivate on the land.

12. In cross-examination, he testified that the defendant has never tried to evict them nor evict the 1st plaintiff owing to their close family relationship. He denied that after his father died, they were moved from Limuru, to the suit land, because they were suffering. He stated that his father used to reside on the suit land and that he lived on it between the years 1982 and 1984. His father had two wives, one who lived in Mwea, and his mother, who lived in Limuru. He stated that his grandfather had built a mud house on the land, which fell apart on its own owing to age, while he was still alive. He had by then moved to Mwea. When they moved into the land in the year 1989, the 1st plaintiff used to live alone. At the moment, he stated that it is the 1st plaintiff, and himself and his family, who are on the suit land. He testified that he was present when the defendant brought the surveyor to subdivide the land but before bringing the surveyor, the defendant did not consult them. He stated that earlier, the defendant had taken the 1st plaintiff to Mwea, so as to seek permission from Kamau Kimani, to subdivide the land. He has never heard of any complaint from any of the defendant's brothers that he has sold part of the land. When he buried his mother on the land in the year 2004, he never informed the defendant. He stated that the defendant however attended her burial. He testified that they never had a house in Limuru.

13. With the above evidence, the plaintiffs closed their case.

14. In his defence, the defendant testified inter alia that the disputed land was purchased on his behalf by his father and that he started paying for it in the year 1964. His father did not reside on this land since he used to work in Njabini. At the time the share was purchased, the land had not been distributed to members of Nyamathi FCS but a member could live on the land. He stated that his father permitted the 1st plaintiff to reside on the land. The distribution of the land was done in the 1970s and he was called to ballot. He was underage at the time, and had no ID card, but the elders present acknowledged that he is the owner of the share and allowed him to ballot. He picked the ballot No. 126. At the time of balloting, the 1<sup>st</sup> plaintiff was present. After the balloting, he went together with the 1st plaintiff to the ground, and he went back to his father in Njabini, and handed over to him the ballot. The 1st plaintiff then moved into the land that he had balloted. He was still underage and could not get a title deed. He started processing it in the year 1988 and eventually got it. The title issued was to the land parcel No. 126. Around this time, his uncles, the 1st plaintiff and Kamau Kimani, started laying claim that they are also entitled to the land and that he was only registered as trustee. They went to see the defendant's father who refuted their claims. His father died in March 1996, and before his death, no suit had been filed to claim the land. Later, the land parcel No. 126 was given a new number, No. 172 and he returned the title for amendment. This took time as the original title had gotten lost and was gazetted. He eventually got title now registered as No.172 and he decided to sell a portion of the land. He therefore subdivided it into two portions and sold one. There was no objection when he sold this portion despite the 1st plaintiff and Samwel Ngumo being present. They also never sought to be given any portion of land when he was subdividing. He stated that if indeed the land was held by the three brothers, his father would have subdivided it when he was still alive. He stated that his father only allowed the 1st plaintiff to reside on the land. He himself has no intention of evicting him as he is like a father to him. He stated that his uncle can continue residing on the land for as long as he wishes. However, he stated that Samwel Ngumo has no right to live in the land. According to him, he was invited to live on it by the 1st plaintiff. He denied that the agreement produced by PW-3 was a genuine agreement. He stated that he never signed the agreement, and was not present, and neither did his father

inform him of the agreement. He testified that his father had other brothers who have no interest in the land. He denied that any of the wives of Kamau lived on the disputed land, or even Kamau himself. He wondered why he would be chosen to hold land in trust, as Kamau had a child who was older than him.

15. In cross-examination, he agreed that Francis Kimani Ngumo, son of Kamau, died in 1989 and was buried on the land in dispute. Therebefore, he was living in Limuru. After his death, his wife (Magdaline) was brought to live on the land and was built for a temporary house. He was not involved in these arrangements, and was in fact not aware, since he does not live on the land. He agreed that Magdaline died in the year 1984 and was buried in this land. He stated that he did not attend the funeral as he was not immediately aware of her death. He agreed that the family of Kamau have lived on the land since the year 1989 and he has not chased them away from the land. He stated that when his father was alive, there was a dispute over the land as his uncles claimed to be entitled to a portion of the land. He was not aware of any subdivision into three portions embarked on by his father and his two uncles. He denied that his father did a lot on the land without informing him because he was merely a trustee.

16. With the above evidence, the defendant closed his case.

#### **PART C : SUBMISSIONS OF COUNSEL**

17. I invited counsel to submit and they both filed written submissions. I have taken note of the same alongside the authorities annexed. In his submissions, Mr. Mutonyi, learned counsel for the plaintiffs, inter alia submitted that this is a case of a resulting trust, as the purchase money was not contributed by the plaintiff. He relied inter alia on the case of *L.N vs SMM (2013) eKLR* and *Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171*. He submitted that the evidence of the 1st plaintiff was direct on this point and that this has not been controverted. He further submitted that his evidence was corroborated by PW-2. He was of the view that there was clear intention to create a trust. He also referred me to the agreement dated 18 February 1985, as evidence of intention by the three brothers to subdivide the land amongst themselves, and further submitted that Land Control Board consent was sought to subdivide the land. He submitted that they need not have involved the defendant in their agreement. He also pointed out that the defendant was not involved when the family of Francis Kimani Ngumo was moved into the land and when their family members were interred on the land. He submitted that there was no objection to the defendant subdividing the land into two portions as there was understanding that he was only selling the share of his father and the rest was the share of the other two brothers.

18. On the alternative claim for adverse possession, he submitted inter alia that the plaintiffs have proved actual and exclusive possession; that their possession has been open and notorious; and that their possession has been continuous and uninterrupted. He submitted that time began to run in the year 1989 and thus 12 years have been attained. He submitted that there has not been any sort of dispossession by the registered owner. He submitted that the only defence to the claim for adverse possession is the allegation that the defendant became registered in the year 2009 but submitted that this new registration could not affect the running of time. He asked that the plaintiffs' suit be allowed.

19. On his part, Mr. Waiganjo, learned counsel for the defendant, inter alia submitted that there was no evidence that the land in dispute belonged to the father of the three brothers. He also submitted that there was no evidence of contribution by the plaintiffs towards purchase of the share and no evidence of any further payments for the share. He pointed at contradictions in the evidence of PW-1 and PW-2 on how the money was paid. He further submitted that a minor cannot hold property in trust as he lacks legal capacity. He questioned why the property was not registered in the name of the son of Kamau Kimani, who was older, if the intention was to have a child hold the property in trust. He submitted, that where property is registered in the name of a minor, the presumption is that he should take it as beneficiary and not trustee. He referred me to various texts on this point. On the issue of adverse possession, he submitted that the 2nd and 3rd plaintiffs do not reside on the land. He further submitted that if there was possession, the same was interrupted when the defendant subdivided the land and sold part of it. He submitted that the 1st plaintiff has always been on the land with the permission of the defendant's father. He relied on the case of *Mwambonje vs Mwambonje (2014) eKLR*; *Samuel Kihamba vs Mary Mbaisi* and *Mbui vs Muraya (1993) KLR 726* to support the argument that it is not unusual for a person to permit his relatives to reside on his land.

#### **PART D : ANALYSIS AND DECISION**

20. The case of the plaintiffs is that the defendant holds the suit land in trust for them, and in the alternative, they have claimed that they are entitled to the said land by way of adverse possession. I will first start with the claim under trust, and if the same does not succeed, I will determine whether the alternative prayer is tenable.

21. In summary, it is the claim of the plaintiffs that the 1st plaintiff and his two brothers, Kamau and Nganga, jointly purchased the share that resulted in the land in dispute, and that they had it registered in the name of the defendant to hold the same in trust for them. It was said that the money that formed the initial deposit, a sum of Kshs. 900/=, came from their father, who had received some money as dowry, and that he asked his sons to purchase land. In his evidence in Chief, the 1<sup>st</sup> plaintiff testified that it was him, who took the money to the company and paid for the share. He could not recall how much he paid. He also testified that it was Kamau Kimani who had the share registered in the name of the defendant. This evidence is not what he gave during cross-examination, for he testified that it was Kamau Kimani who went to purchase the shares. He could not tell how much money he paid to Nyamathi FCS and claimed that he was not given receipts for the payments that he made. He also said that some documents got burnt with his house. In his evidence, PW-2 stated that when payment of the sum of Kshs. 900/= was made, it was made in the presence of the three brothers and that the money was in the hands of Kamau Kimani. He also testified, that later, the three brothers made separate payments to finish payment for the share.

22. I am unable to reconcile the contradictions between the evidence of PW-1 during examination in chief and in cross-examination, and further unable to reconcile it with the evidence of PW-2, on who exactly paid the money. No other witness was called to clear the air on these contradictions. It is not therefore clear to me, whether it was PW-1 who paid the money alone, or whether the money was paid by Kamau Kimani alone, or whether the money was paid by Kamau Kimani when he was together with his two brothers. No receipts were produced to show when and who exactly paid this alleged initial amount of Kshs. 900/=. Neither were any other receipts produced, to show that there were further payments for the share, which were made by the 1st plaintiff and his brother Kamau. It was said that these documents got burnt,

but I suppose that the company, Nyamathi FCS, does have documents in relation to this land. If the plaintiffs wished to call for documents from the said company, to support their allegation that the purchase price was contributed by the three brothers, they would easily have done so. It was not said by PW-2 that the records in relation to this transaction are not with the company. Where that leaves me is that I have absolutely no evidence, save for the oral contradictory evidence of PW-1 and PW-2, that there was any contribution made by the 1st plaintiff and his brother Kamau, towards purchase of the share which was registered in the name of the defendant.

23. Proof of contribution is critical for any person attempting to rely on the doctrine of a resulting trust. Mr. Mutonyi relied on the case of *LN vs SMM* to support his clients' case for a resulting trust, but the facts of that case are radically different from the facts of this case. In that case, there was clear evidence that the plaintiff in the suit, transferred money to the defendant to purchase the property in dispute in that case. Indeed, bank statement showing transfer of the said monies were produced in evidence. I have nothing of that sort in this case and this case is therefore clearly distinguishable from the facts in the said suit.

24. The plaintiffs also placed reliance on an agreement allegedly made on 18 February 1985 and on an alleged consent from the Land Control Board that was said to have given consent for the subdivision of the whole land, then comprising of 18 acres, into three portions. I cannot give much weight to that agreement even assuming that it was actually signed by the three brothers. The trustee, would have been the defendant, but the defendant never signed that agreement. The said agreement could not be properly executed without the input of the trustee, who stated that he was not aware of it and never signed it. The alleged Land Control Board consent was not produced, and neither was there produced any application for Land Control Board consent, or the minutes of the said Land Control Board, to authenticate the claim that there was issued a consent from the Land Control Board to have the land subdivided into three equal portions amongst the brothers.

25. I also think that the act of registering the defendant, who was then a person only of 6 months old, to hold the share as trustee for the three brothers was rather unusual, if indeed the idea was to have him hold the property as trustee for the three brothers. The general law on resulting trusts, as noted in *Snell's The Principles of Equity, 27th Edition at pg 177*, is that when a father buys a property and puts it in the name of his son or daughter, prima facie, it is a gift to the child. There is therefore a presumption that when property is registered in the name of a child by his parent, the property is not held in trust but is property that is meant to be owned by that child. I note that in this case, the three brothers were adults and they could easily have registered the share in the name of one of them, or indeed in the name of all the three of them, if the share was being purchased jointly by them. I have not been given any special circumstance which would have made them have the share registered in the name of a 6 month old child to hold in trust for them. There are instances where a person is registered as trustee but usually you would be given a reason why this is so. Sometimes it is because the person registered is the first born, or more educated than the rest, as happened in the case of *Gatimu Kinguru vs Muya Gathangi (1976-80) KLR 317*. In that case, the land in dispute was registered in the name of the plaintiff, who filed suit for trespass against the defendant, who was his younger brother. The defendant argued that the land was family land, but registered in the name of the plaintiff when he (the defendant) was in detention, and was therefore land held in trust. The court held inter alia that the defendant was entitled to succeed in his claim under trust given the circumstances of the case. In our case, I am afraid that the plaintiffs have not been able to rebut the presumption in equity that the property herein was gifted to the defendant when he was a child.

26. In this case, no reason was given to me as to what was so special about the defendant so that the three brothers would decline to register the share in their own names or in the name of a person who was older than the defendant. I have evidence that Kamau Kimani had a child who was much older than the defendant, and no reason was given to me, why it was thought that the defendant was a better candidate. I also observe that none of the three brothers, save for the 1st plaintiff, ever took a very keen interest in the land, despite it being a fairly sizable land. I have little evidence that they lived on it or cultivated it. It was said that at some point Kamau built a grass thatched house, and even assuming that this was true, I have no evidence that he lived in it, or that he made any other use of the suit land. The 2nd and 3rd plaintiffs, themselves, have never lived on this land. Neither of the siblings of the defendant, being children of one of the alleged beneficiaries, that is the father of the defendant, have ever laid claim over the land or shown any keen interest in it. In fact, for all intents and purposes, they do not act as if their father held any share in the said land.

27. The plaintiffs also attempted to place some weight on the fact that Samwel Ngumo resides on the land and that some of the family members of Kamau Kimani have been buried on the land. There is indeed evidence that Francis Kimani Ngumo, a son to Kamau Kimani, was buried on the land after his demise in the late 1980s. But it is apparent that he never had any other land and it was probably found convenient to bury him on this land. The evidence shows that his wife was brought to live on this land together with her family, including her son Samwel Ngumo. To me, it seems as if they were merely being assisted, as they had no other place to call home. As was pointed out by Kuloba J, in the case of *Mbui vs Maranya (1993) KLR 726*, it is not unusual in our African societies for one to allow his relatives to live in land that he owns. The fact that a relative lives on another's land, and even has kin buried there, does not by itself prove that the registered proprietor holds the land in trust. A lot more is needed which I am afraid I do not have in this case.

28. In his submissions, Mr. Waiganjo also argued that a minor cannot hold property in trust. I find it unnecessary to determine that argument in the context of this case, as clearly, I am not persuaded that I have evidence to support the allegation that the suit land is held in trust for the 1st plaintiff or for the estate of Kamau Kimani (deceased). I dismiss the claim that the suit land is held in trust for the 1st defendant and the estate of Kamau Kimani.

29. What I need to now determine is whether the plaintiffs can succeed in their claim for adverse possession. It is trite law, and I need not cite any authority, that to succeed in a suit for adverse possession, one needs to demonstrate that he has been on land *nec vi, nec clam, nec precario*, that is, without violence, without secrecy and without permission of the registered owner, for a continuous, uninterrupted period of 12 years. The person also needs to demonstrate the necessary animus possidendi, or intention to acquire the land.

30. From the outset, the claim for adverse possession cannot succeed in respect of the 2nd and 3rd plaintiffs. The 3rd plaintiff himself admitted that neither he, nor the 3rd plaintiff, have ever been in any serious possession of the suit land at any one time. Neither was their father, Kamau Kimani. The evidence on record shows that the persons who have been in possession of the land are the 1st plaintiff and PW-4. But I have no independent suit by PW-4 to claim that he is entitled to ownership of the land by way of adverse possession. That leaves only the 1st plaintiff and I need to determine if he is entitled to the land by way of adverse possession.

31. The evidence on record does not dispute that the 1st plaintiff has been in open possession of the suit land for a period in excess of 12

years. In fact, his possession started in the late 1970s when the actual ground where the suit land is located was balloted for and identified to the defendant. Previously, the 1st plaintiff used to live on a different area of the land as the same had not yet been distributed to members of the Society. Possession of the land is therefore not an issue in this case. What is in issue is whether that possession was with the permission of the defendant or whether it was a possession that was without permission and accompanied by the requisite animus possidendi.

32. The case of the plaintiff is hinged on the claim that he entered into possession as he was entitled to a share of the land. I have already dismissed that argument. My own assessment of the evidence shows that the 1st plaintiff has been in possession of the land with the permission of the defendant, first through the intervention of the defendant's father, and later directly by the defendant. The defendant is not married and does not have any children. The defendant testified that because of this, his father allowed him to reside on the suit land and eke out a living. This is indeed not unusual in our African set up as explained in the case of *Mbui vs Maranya (supra)*. A person living in this sort of arrangement cannot claim to be entitled to the land by dint of the doctrine of adverse possession because such possession is under licence from the registered proprietor.

33. The Court of Appeal in the case of *Samuel Kihamba vs Mary Mbaisi (2015) eKLR* grappled with the question whether a close relative could sustain a claim for adverse possession. The court held that this is a determination of fact and the burden of proof lies on the claimant. In the said case, the issue was whether a step mother to the appellant, had acquired the subject land by way of adverse possession. The appellant in the suit maintained that he had allowed his step mother licence to occupy the land. The court of appeal stated as follows on this point :-

*"We are persuaded by various dicta which we have quoted and relied upon in this judgment and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives."*

34. A lot more is indeed needed for a close relative to prove a claim for adverse possession because of the reason that it is common for relatives to allow each other possession and one would not expect them to be kicked out before expiry of every period of 12 years merely to defeat any claim for adverse possession. On my part, I am persuaded by the evidence of the defendant that he permitted his uncle, the 1st plaintiff to occupy the land. Indeed, the defendant stated in his evidence that he has absolutely no intention of evicting him, and he can continue living on the land for as long as he wishes. I wonder what purpose would serve the 1st plaintiff by claiming the land by way of adverse possession yet he has a lifetime licence to live on it.

35. On the facts of the case, I am not persuaded on a balance of probabilities that the 1st plaintiff has acquired title to the land by way of adverse possession.

36. The upshot of the above is that I am not persuaded that the plaintiffs have proved either the principal prayer based on trust or the alternative prayer based on adverse possession. I have no option but to dismiss this suit with costs to the defendant.

37. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 16<sup>th</sup> day of November 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr Mutonyi instructed by M/s Mutonyi, Mbiyu & Company Advocates for the plaintiff.

Ms. B. Wangari instructed by M/s Waiganjo Mwangi & Company Advocates for the defendant.

Court Assistant: Carlton Toroitich.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**