



REPUBLIC OF KENYA



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**Mutegi v Njeru (Civil Appeal 20 of 2019)
[2024] KECA 1534 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1534 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 20 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
OCTOBER 25, 2024**

BETWEEN

JULIET CIONJOKA MUTEGI APPELLANT

AND

HILDAH KARIMI NJERU RESPONDENT

*(An appeal from the Judgment and Decree of Environment and Land Court
of Kenya at Chuka (P.M Njoroge J.) dated 28th November 2018 in ELC
Case No. 301 of 2017 O.S (Formerly Meru ELC Case no. 217 of 2013 O.S)*

JUDGMENT

Background

1. The appeal before this Court relates to a parcel of land number LR Mwimbi/Murugi/504 (the suit property) measuring approximately Six decimal zero one two hectares (6.012 ha.) registered in the name of Hilda Karimi Njeru (the respondent) as at the time of the hearing of the suit. Juliet Cionjoka Mutegi (the appellant) moved the Environment and Land Court (ELC) by way of Originating Summons (OS) dated 5th August, 2013 claiming that she was entitled to the suit property by way of adverse possession. She sought orders confirming the said entitlement and registration of the suit property in her name as the proprietor thereof.
2. It was the appellant's case at the ELC that she had been in exclusive, open and uninterrupted occupation of the suit property for forty-three (43) years without the permission of the registered owner, the respondent herein. That she was married to Francis Mutegi Kanampiu (Francis) and had raised her family on the suit property. Further, that her husband, Francis, died and he was buried on the suit property. That she had developed the suit property, planted tea bushes and built permanent residential homes on 12 acres of the suit property and that she knew no other place to call home.



3. The appellant further contended that the respondent had registered herself as the owner of the suit property through fraud. Further, that the respondent was threatening her and her family with eviction with intention to sell the suit property and render the appellant homeless.
4. In the affidavit in support of the OS, the appellant averred that she is related to the respondent in that the respondent is her sister-in-law. That the respondent, Timothy Riungu (Timothy) and Francis were siblings. That the appellant got married on the suit property in 1970 and has since then lived thereon with her family. That her children are now adults, and her two sons are married and have settled on the suit property with their families. The appellant further contended that the suit property was family land initially registered in the name of the eldest son, Timothy in trust for the family members and who upon his demise in 1978 a succession cause was filed in Nairobi as No 391 of 1981 and Timothy's children, (Michael Nyaga Riungu (Michael) and Elizabeth Kangai Riungu (Elizabeth) were registered as the owners of the suit property. It was the appellant's further evidence that when Timothy died in 1978, he bequeathed the suit property to his two children, Michael and Elizabeth through a written will. Consequently, the respondent was granted a power of attorney to manage the suit property for Michael and Elizabeth as they were living in Scotland. The appellant further contended that Timothy was not buried on the suit property.
5. The respondent filed a replying affidavit in response to the appellant's claim.

The respondent averred that the suit was res judicata as well as sub-judice due to existence of another suit filed by the appellant at the ELC being Case No 54 of 2012 which was still pending before the ELC. The respondent added that in ELC Case No 54 of 2012 the appellant claimed that the suit property was family land and that the respondent held the suit property in trust for the family.
6. Regarding the proprietorship of the suit property, the respondent averred that the suit property was not family land and was owned by Timothy. That upon the demise of Timothy, the suit property was registered in the name of his two children, Michael and Elizabeth through a succession cause. That the suit property was then registered in the respondent's name through a power of attorney from the two children aimed at preserving the suit property.
7. The respondent claimed that the appellant took advantage of the absence of Michael and Elizabeth since they worked outside Kenya and entered the suit property, utilized the same including building a house therein but all these were done by the appellant at her own risk. As for the tea and coffee bushes, the respondent contended that her mother, Charity with permission and financing from Timothy planted them and not the appellant. On the issue of the burial of Francis on the suit property, the respondent averred that the same occurred as she had no instructions from Michael and Elizabeth to object to the burial. The respondent further averred that the appellant and her family were entitled to a separate parcel of land being land parcel No Mwimbi/Murugi/468.
8. After considering the averments of both the appellant and the respondent together with their witnesses and documentary evidence, the ELC (P. M. Njoroge, J.) delivered its judgment on 28th November 2018 noting that the parties were close relatives.
9. The ELC found in part as follows:
 - “ 27. From the consideration of the totality of the evidence proffered by the parties, I find that when the plaintiff and her husband started their occupation, they did so with the permission of the original registered owner of the suit land and with the acquiescence of the mother of the plaintiff's/applicant's husband. I also find that this land was not ancestral land. If it were, all the siblings of the



plaintiff's/applicant's late husband would now be staking a claim upon the land. However, it is only the applicant who is laying such a claim.

28. I also find that the suit land properly belonged to its original registered owner Timothy Riungu (deceased), the eldest brother of the applicant's/plaintiff's husband, Francis Mutege, (deceased). Having so found, I find that the plaintiff/applicant did not proffer an iota of evidence, that the process employed in having the land registered in the name of the respondent/defendant by the children of the original registered owner was fraudulent, irregular, wrongful or in any way illegal. 29. By filing a claim of adverse possession against the respondent/defendant, by dint of that conduct, the applicant/plaintiff unequivocally admits that the suit land belongs to the respondent/applicant. Otherwise, time necessary to run so that adverse possession accrues would remain static because adverse possession cannot run against a non-owner. The upshot of this finding is that, it is upon the applicant/plaintiff to prove by way of evidence that she is entitled to ownership of the suit land by way of adverse possession."

10. The ELC continued to find as follows:

"30. As I have found that the plaintiff and her deceased husband entered the suit land with the permission of the deceased original owner, I wish to point out that longevity (sic) of occupation does not count for anything as long as the original entry was with the consent and acquiescence of the said owner...

34. ...it is not controverted that the applicant/plaintiff has lived on part of the suit land since 1970...I am inclined to find that the applicant/plaintiff has been on a portion of the suit land without the respondent's/defendant's or any other person's consent from the time Timothy Riungu, the original owner of the suit land died in 1978. The court deems this date to be the cut off point when the original consent ceased to apply. The plaintiff/applicant has, however, on a balance of probabilities only proved that she deserves to be declared owner of a portion of the suit land where her homestead stands and which is the smaller portion of the suit land AND which portion is separated from the other portion of the suit land by a road of access. It is declared that the other portion of land, which is the bigger portion, and is separated by a road of access from the portion where this court has declared the applicant/plaintiff as owner through the doctrine of adverse possession, is the property of Hilda Karimi Njeru, the respondent/defendant."

11. The ELC made the following orders:-

"Judgment is entered for the applicant/plaintiff and for the respondent/defendant as follows:

- a. The Applicant/Plaintiff is entitled to be registered as proprietor of the portion of the suit land, which is the smaller portion of the suit land, on which her homestead is situated and it is clarified that this portion of land is separated from the remaining parcel of land by a road of access.
- b. The Respondent/Defendant is to remain the registered owner of the parcel of land, which is the bigger portion, separated by a road of access from the



portion this court has declared belongs to the Applicant/Plaintiff by way of adverse possession.

- c. The Deputy Registrar of this court is directed to execute all documents necessary for the implementation of the orders contained herein.
- d. Parties are at liberty to move the apposite government surveyor or any other qualified surveyor, at their cost, to establish the exact areas of their portions of land.
- e. The Land Registrar is ordered to issue two separate titles to the parties once survey and other registration processes are completed.”

12. The above finding of the ELC provoked the appellant into filing the instant appeal against the entire judgment. The appellant’s memorandum of appeal raises inter alia grounds of appeal that the ELC erred in law and in fact: in failing to appreciate the proper effect and purpose of the evidence adduced and in arriving at a decision which was not supported by or is against the weight of the evidence; by misconstruing the doctrine of adverse possession and computation of time in relation to the facts before it the result of which was that the ELC made a wrong decision; by importing in its findings the issue of permission which had not been canvassed in the proceedings or at all; in making a wrong finding that the appellant had only proved that she deserved to be declared owner of a portion of the suit property; by failing to take into account that the appellant’s occupation of the suit property was not by consent or permission of the original or subsequent registered owners and it was uninterrupted, continuous and notorious since the first registration to date; and in failing to find that the appellant’s occupation of the suit property is comprehensive and not shared with any other person or entity.
13. The appellant seeks that the appeal be allowed with costs in this Court and in the ELC.

Submissions by Counsel

14. Learned counsel, Mr. Riungu was on record for the appellant. Messrs Njiru Kithaka & Co. Advocates were on record for the respondent. Counsel for both the appellant and the respondent had filed their written submissions which they both briefly orally highlighted. Counsel for the appellant submitted that the respondent admitted in her written statement which was adopted as her evidence before the ELC that the original registered owner, Timothy (deceased) was not living in Kenya and when he returned, he found the appellant’s husband (Francis) had built structures on the suit property. That the efforts of Timothy and those of his mother, Charity, to remove Francis from the suit property failed. Further, that the original owner of the suit property, Timothy, died in 1978 and was not buried on the suit property while Francis died in 2011 and was buried on the suit property without any resistance from the respondent.
15. Counsel further submitted that the appellant lived on the suit property since her marriage to Francis in 1970 and neither the original owner, Timothy, his successors (Michael and Elizabeth) nor the respondent had ever settled on the suit property. Counsel asserted that the original owner, Timothy returned to Kenya in 1968 and failed to remove Francis from the suit property. In counsel’s opinion, it was therefore erroneous for the ELC to find that entry into the suit property by the appellant and Francis was with the permission of the registered owner. Further, that it was erroneous for the trial court to find that the appellant was entitled to a portion of the suit property where she lives when her evidence was that she was entitled to the entire portion of the suit property.
16. In opposing the appeal, counsel for the respondent submitted that from the evidence, the respondent was registered as the owner of the suit property in 2012. Counsel emphasized that for adverse



possession to occur, possession of the land must be open and continuous for twelve (12) years or more, which begins to run from the time the registered proprietor, learns of the invasion. Counsel asserted that in the instant case, the appellant is not in control of the whole portion of the suit property. That she lives on the smaller portion of the suit property, which is separated from the portion that she lays claim to by a road. Counsel further submitted that the other side of the suit property, which is the bigger portion is in control of the respondent.

17. Counsel further submitted that the ELC rightly found that as per the evidence adduced, the appellant entered into part of the suit property, the smaller portion thereof in 1978 without the permission of the original registered owner. Counsel emphasized that the appellant provided the same evidence during the hearing of the suit.
18. On the issue whether the ELC erred in law and in fact by importing into its findings the issue of permission which had not been canvassed in the proceedings or at all and whether the appellant was adverse, counsel submitted that the appellant in her statement before the ELC stated that the respondent had given her permission to bury her late husband on the suit property. Counsel asserted that this therefore meant that the appellant was in the suit property with the permission or consent to use the suit property by the first registered owner, Timothy and the respondent, which explains why she sought permission to bury her husband, Francis on the suit property.
19. Counsel further emphasized that from the record, the appellant was categorical when she stated that; “My brother-in-law died in 1978 called elders and said he had given the land to my husband...”
20. Counsel further highlighted that from the record, it is clear that the appellant in her statement before the ELC contended that: “Timothy Riungu was registered on the suit property (meaning Land Parcel No Mwimbi/Murugi/504) to hold in trust for the family.” In counsel’s opinion, this meant that the appellant all along knew that her husband, Francis was using part of the suit property having been given permission by the original registered owner (Timothy) to utilize the same.
21. Counsel submitted that the ELC was well guided by the law and facts pleaded by the parties herein and delivered a well-reasoned judgment in the spirit of Article 159 of the *Constitution*. Counsel asserted that the ELC did not therefore err in finding as it did.
22. On the question whether the ELC erred in finding that the appellant had only proved that she deserved to be declared the owner of a portion of the suit property, counsel submitted that a road, which cuts through the two portions divides the suit property. Counsel asserted that the appellant did not adduce evidence regarding how she uses or controls the larger portion of the suit property. Counsel submitted that it is not disputed that the original registered owner, Timothy, was using the suit property before his demise. Counsel further submitted that Timothy’s mother (Charity) had planted tea and coffee on the larger portion of the suit property for her son, Timothy. Counsel asserted that on the other hand, Francis had only been given permission to utilize the smaller portion of the suit property.
23. Counsel submitted that in the circumstances, the appellant had only proved that she is in control of the smaller portion of the suit property where she had built her dwelling house. Counsel reiterated that the fact that the appellant was aware that she had no power or control of the suit property was proved when she sought the respondent’s permission to bury her husband on the suit property.
24. On the issue whether the ELC erred in failing to find that the appellant’s occupation of the suit property is comprehensive and not shared with any other person or entity, counsel submitted that the larger portion of the suit property is in the respondent’s control where she had planted coffee and tea bushes which she harvests. Counsel further submitted that the respondent is in occupation of the larger portion of the suit property where she has built a permanent house thereon.



25. Counsel concluded by submitting that the appellant's applications, seeking to inhibit the suit property and injunct the respondent from utilizing the suit property were both dismissed. Counsel reiterated that the ELC found that the respondent was in occupation and or in control of the suit property. Counsel further submitted that the appellant did not appeal against the said ruling, as she was aware that she was not in control of the whole portion of the suit property. Counsel urged this Court to dismiss the instant appeal with costs.

Determination

26. This being a first appeal, the Court's primary duty is to re-valuate the evidence and the entire record and arrive at its own finding. Reliance is placed on the decision of this Court in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR which stated as follows:-

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

27. Upon perusal of the record, we discern the following issues for determination in this appeal:-
- i. Whether the evidence presented a claim of adverse possession in favour of the appellant;
 - ii. Whether the appellant is entitled to the entire portion of the suit property or a portion thereof; and
 - iii. What orders the Court should grant in the circumstances.
28. It is not in dispute that the respondent is the registered owner of the suit property. As per the copies of the certificate of official search and green card the respondent became the registered owner of the suit property on 26th March, 2009. The original registered owner, Timothy (deceased) was a brother to the respondent and to Francis. Timothy was registered in 1968 as the 1st owner of the suit property. The appellant was married to Francis who was a brother to the respondent and Timothy. It is also not in dispute that the appellant was married to Francis, in 1970.
29. The appellant maintained that she settled on the suit property with her husband, Francis from 1970 upon their marriage. That Francis died and he was buried on the suit property without any objection from the respondent.
30. As to the history of the suit property, the appellant's narrative is that her husband, Francis and his family including the respondent lived on their family land number Mwimbi/Murugi/422. That she and Francis moved into the suit property in 1965 and developed it and lived therein until his death. The appellant claims that the suit property was registered in the name of Timothy, as he was the eldest son at the time when her husband was in school. From the record, the copy of the green card shows Timothy became the 1st registered proprietor of the suit property in 1966.



31. It is worth noting that the appellant recognized the suit property as family land. She stated in her written statement adopted as evidence that:-

“This land is family/ancestral land. At the time of registration my husband Francis Mutegi was in school. My mother-in-law initiated the registration of the land in the name of Timothy Riungu.

During the time of demarcation my husband Mutegi was advised by his maternal uncles to go to his father's clan for land. The clan identified land for him. That on getting to the land there was already someone in occupation who had extensively developed it. This was Shadraci Mutegi Mbitira. The said Shadrack offered to purchase an alternative land which came to be registered as Mwimbi/ Murugi/504.”

32. The respondent's testimony is that the suit property was bought by her mother (Charity) for her eldest son, Timothy. The evidence of the appellant's witness one Shadrack Mutegi (Shadrack) is crucial regarding the history of the suit property. Shadrack stated in his written statement that:-

“I do remember during demarcation of land which was around 1963 one Kuura Joseph who was uncle to Francis Mutegi sold to me a parcel of land measuring about 9 Acres. When Francis Mutegi became of age he sought to be shown their family land from his uncles. He sued his uncle Joseph Kuura before the elders. The elders determined that the land that had been sold to me belonged to Francis Mutegi's family. By then I had extensively developed the land I asked Francis Mutegi to look for an alternative land so that I can buy for him. I gave them money about kshs, 6,500/=. This was in 1964. They used the money to purchase the land where they are living. This money I gave to Charity Ibrahim - Mother to Francis Mutegi and Joshua Mugwika her brother. This time Francis Mutegi was away in school.”

33. The evidence of the appellant and the respondent is consistent that the entire family initially lived on their land number Mwimbi/Murugi/422 although no document was produced to show who was the registered owner of this land. From the record, the suit property was registered in the name of Timothy, the respondent's elder brother. According to the appellant, the registration in the name of Timothy was because her husband, Francis was in school.
34. On the other hand, according to the respondent, the suit property was registered in the name of Timothy because Francis was given family land parcel number Mwimbi/Murugi/468 while another brother, John Riungu was given land No Mwimbi/Murugi/422. According to the appellant, in view of the fact that Timothy had no land, their mother registered the suit property in his name. At the time of registration of the suit property in his name, Timothy was living abroad and came back to Kenya in 1968 only to find that the appellant's husband, Francis had built structures on the suit property.
35. The respondent, despite admitting that the appellant's husband, Francis, occupied the suit property way before 1968, in her opinion, the appellant's husband, Francis only occupied a small portion of the suit property while Timothy utilized the other portion under the supervision of their mother since he lived out of the country.
36. The trial court found that there was no evidence of fraud in respect of the registration of the suit property in the name of the respondent. From the evidence adduced, including the copy of the green card, upon the demise of Timothy, the suit property was inherited by his 2 children, Michael and Elizabeth and later transferred to the respondent in 2009. All this happened when the appellant and Francis were in occupation of a portion of the suit property.



37. The respondent contended that the appellant's family were cultivating on another family parcel of land number Mwimbi/Murugi/468. She did not however tender any evidence to support the allegation and/or show who the registered owner of the said land was.
38. The issue of claims of adverse possession raised against family members has been discussed in several decisions of the courts of law. A claim for adverse possession requires proof that there was no consent to occupy the land. A determination of whether or not there was consent in a claim of adverse possession against close family members is therefore central in the determination of the instant appeal.
39. Section 7 of the Limitations of Actions Act provides as follows regarding adverse possession:-
“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”
40. Further, Section 38(1) & (2) Limitations of Actions Act provides:
“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
41. The effect of the above provisions of law was stated by this Court in the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR in the following terms:-
“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use.”
42. The above provision of law envisages a situation where the applicant is not entitled to the land under all circumstances but enters the same and dispossesses the registered owner. The evidence of the respondent, as reproduced in the impugned judgment, was that:-
“At the time this land was registered in the names of Timothy Riungu he was living with his family in Scotland. My mother planted the coffee and tea bushes for Timothy until when he returned to Kenya in 1968 upon which he personally took over the management of the land from my mother. When he came back to Kenya he found that our brother Francis Mutegi had built a structure on his farm and he tried to get him to leave but he refused. My



mother also tried to advice (sic) Francis Mutegi to leave Timothy's land but he refused and continued to occupy a small portion.”

43. With this in mind, the trial court found that the occupation of the appellant and her husband, Francis on the suit property was by permission of the original registered owner, Timothy and with the acquiescence of their mother, Charity. The appellant faults the said finding and submits that the respondent's evidence confirms that there was no permission granted to occupy the suit property. This Court's view, as previously said, is that consent need not be in writing. It may be oral. It may also arise through express or implied licence to use the land.

44. This Court dealt with the issue of consent in such circumstances in the case of *John Baraza Ojiambo v Veronica Auma Ojiambo & 3 others* [2013] eKLR in the following terms:-

“...But would failure to verbalize his consent be construed as absence of consent given his relationship with the respondents? Would he in reality evict his own father, step mother and step brothers merely to prevent time running against him under the *Limitation of Actions Act*? In those premises would the respondents' claim to the suit property by adverse possession lie?

... On our part however we have our doubts whether the respondents demonstrated the prerequisites for a claim to the suit property by adverse possession.”

45. This Court in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR in a similar claim of adverse possession by a mother against her step son, held:-

“Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We ... 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.”

46. Having made the above finding and noting that the appellant's claim was for adverse possession, should the appellant be evicted? Is the appellant's long occupation on the suit property without a remedy? We think not. This case is distinguished from the case of *Samuel Kihamba (supra)* in that in the instant case, the evidence before the trial court was that the suit property was family land and we have found so. From the record, the suit property was bought as compensation for the family's ancestral land that had been sold. We find solace in Article 159(2)(b) of the *Constitution* of Kenya, 2010 and in the holding of this Court in *Gulam Mariam Noordin v Julius Charo Karisa*, [2015] eKLR which in similar circumstances held:-

“When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding...”

47. Regarding the appropriate orders from the above finding that the suit property was family land of both the appellant and the respondent, we accept this Court's view in *John Baraza Ojiambo* case (*supra*) that:-

“... The respondents demonstrated that the suit property is family land to which they are entitled. They occupied the suit property during the life time of the deceased and even after his demise. They have been in such occupation for 28 years. The evidence at the



trial therefore demonstrated, in our view that the appellant held the portion they have so occupied under a trust under customary law in their favour. They did not expressly plead the trust in their favour but the facts established at the trial clearly proved, on a balance of probabilities, that the appellant held the said portion in trust for them. In *Odd Jobs v Mubia* [1970] EA 476, it was held as follows:-

“A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

48. Similarly, in as much as trust was neither pleaded nor argued by the appellant, nonetheless, we find that the respondent is holding the suit property in trust for the family including the appellant and her family on the basis of proved facts. We are guided by the Supreme Court decision in the case of *Isack M’Inanga Kiebia v Isaaya Theuri M’Lintari & another* [2018] eKLR on elements of land held under customary trust, at paragraph 52 of the decision, that is:-

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

The Supreme Court went further on the issue of trust at paragraphs 57 and 58 of the decision that:-

“(57) ... The fact that “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,” as earlier provided for under Section 30 (g) of the *Registered Land Act*, are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*.

58. ... The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the *Registered Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*.”

49. From the foregoing, the conclusion is that despite the evidence appearing as though the appellant’s possession of the suit property was adverse to the registered owners’ title, the finding is that the appellant’s possession of the suit property was by right as a member of the family by virtue of her marriage to the respondent’s brother. The respondent therefore holds the title to the suit property in trust for the family, which includes the appellant. In view of the foregoing, we find that both the appellant and the respondent are entitled to a share of the suit property by virtue of being members of the same family.

50. Reliance is also placed on the ELC decision in *Joel Kipkorir Koech v Rachel Ngeno & 2 others* [2018] eKLR although persuasive, which in similar circumstances held that:-

“(20) ... it is my finding that the suit herein is not one of adverse possession.



21) ... it is common ground that the suit property is family land which ought to be divided equally ...

22. In the interest of justice and guided by Article 159 2b which enjoins the Court to administer substantive justice, it is my finding that the suit property ought to be divided between the plaintiff whose father was the 1st Defendant's brother-in-law and the 1st defendant. Upon visiting the suit property, the surveyor confirmed that it measures 17.5 acres. I therefore direct that the same be surveyed and sub- divided equally between the plaintiff and the 1st defendant.”

51. To that extent we find that the ELC did not err in finding as it did. The upshot is that the appeal has no merit and it is dismissed.

52. This being a family matter, the order that commends itself to us is that each party will bear their own costs in the ELC and of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

