



Wanyoike v Muchoki (Sued on His Own behalf and on Behalf of the Estate of Muchoki Kinyenje - Deceased) (Environmental and Land Originating Summons E003 of 2023) [2024] KEELC 5446 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5446 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023
LN GACHERU, J
JULY 18, 2024

BETWEEN

TERESIAH WANJIRA WANYOIKE APPLICANT

AND

ALEXANDER WANYOIKE MUCHOKI (SUED ON HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF MUCHOKI KINYENJE - DECEASED) RESPONDENT

JUDGMENT

1. The Applicant herein Teresiah Wanjira Wanyoike, filed this Originating Summons dated 16th February, 2023, which is anchored under Order 37 Rule 7, of the Civil Procedure Rules, and Sections 13, 37 and 38 of the *Limitation of Actions Act*, against the Respondent herein Alexander Wanyoike Muchoki, who is sued on his own behalf and on behalf of the estate of Muchoki Kinyenje, and sought for the following orders :-
 1. The Court be pleased to make an order and declaration that the applicant, Teresiah Wanjira Wanyoike, is entitled by operation of adverse possession to the transfer and registration as proprietor and owner of a portion of 0.87 (naught decimal eight seven) acres out of land parcel number LOC.17/Sabasaba/386.
 2. Further to prayer 1, a further declaration to issue that land parcel No. LOC.17/Sabasaba/386, is encumbered by a subsisting and continuing trust for the benefit of the Respondent, and the Applicant, and a further order do issue for the dissolution of trust such that the applicant gets her share of 0.87 Acres and the respondents do jointly get their share of 0.87 Acres therefrom.



3. That the Court do issue an order authorizing and empowering the Land Registrar, Murang'a to effect the order of the Court to have the suit land sub-divided and formally transferred and registered as per prayers 1 and 2 above.
 4. An order be issued authorizing and empowering the Deputy Registrar of this Court to execute all land transfer documents and forms as may be necessary for and on behalf of the respondent so as to facilitate the transfer and execution of the Court's orders.
 5. That the Court be at liberty to make any further orders as may be expedient and necessary in the matter.
 6. The costs be provided for.
2. The Originating Summons is premised on the Supporting Affidavit of the Applicant, Teresiah Wanjira Wanyoike, sworn on 16th February, 2023, who averred that she is the widow of Francis Wanyoike Ngamau (Deceased), who died on 4th September, 1989. She annexed a copy of a grant of letters of administration dated 15th July, 2016, issued in respect of the estate of Francis Wanyoike Ngamau (Deceased), naming her as the personal representative of the said estate.
 3. It was her contention that her late husband, Francis Wanyoike Ngamau, was younger brother to Muchoki Kinyenje, the father to the Respondent herein, and who died on 7th March, 2002. Further, it was her averments that the Respondent is the legal representative of the estate of the Muchoki Kinyenje (Deceased), the registered owner of LOC.17/Sabasaba/386 (the suit property), and which parcel of land is family/ancestral land.
 4. The Applicant further contended that the late Muchoki Kinyenje, was registered as the proprietor of the suit land to hold it in trust for himself and the Applicant's husband, Francis Wanyoike Ngamau (deceased), who was his younger brother. That the late Muchoki Kinyenje, consolidated his father's (Kinyenje Njoroge), land, and became its registered proprietor during the land consolidation process that took place in the early 1960s, in the then Fort Hall District, to hold the said land in trust for himself and for his younger brother, the Applicant's husband (now deceased).
 5. The Applicant annexed a Certificate of Confirmation of grant dated 25th September, 2017, wherein Alexander Muchoki & Leah Wairimu Muchoki, appear as the personal representatives of the estate of the late Muchoki Kinyenje.
 6. It was the Applicant's further allegations that during the lifetime of the late Muchoki Kinyenje, he acknowledged and respected the trust subsisting in respect of the suit land in favour of his younger brother, Francis Wanyoike Ngamau, and had commenced the process of sub-dividing of the said suit property into two equal portions wherein, the Applicant's husband was to receive 0.87 Acres, out of the suit land.
 7. For the above allegations, the Applicant annexed a copy of the letter of consent dated 11th January, 1982, which was marked as "TW6," and an Application for the Land Control Board's Consent approved on 16th March, 2018, marked as "TW7".
 8. The Applicant further alleged that her husband, Francis Wanyoike Ngamau, died on 4th September 1989, before the formal transfer of his portion of the suit property by his elder brother Muchoki Kinyenje. Further that her husband's section of the suit land was physically demarcated and occupied by himself and his family, the Plaintiff included pending transfer.
 9. The Applicant also contended that the registered owner of the suit land, Muchoki Kinyenje, died in year 2002, before dissolving the trust that subsisted in the suit land in favour of her husband. She added



- that the suit property is subject to both a customary trust and a constructive trust, as it is comprised of family/ancestral land. She asserted that she is entitled to 0.87 Acres, from the suit land which was her late husband's share.
10. The Applicant further contended that the Respondent secretly and in disregard of the trust to which the suit land is subject, mounted Thika Succession Cause No.272 of 2016, and was issued with a grant plus a Certificate of Confirmation of grant in respect of the estate of Muchoki Kinyenje.
 11. It was the Applicant's further contention that the Respondent deliberately chose to file Thika Succession Cause No.272 of 2016, away from the jurisdiction of this Court, while knowing full well that the suit property is located in Saba Saba area, so as to conceal the same details from the Applicant.
 12. She stated that the registration of Muchoki Kinyenje, as the proprietor of the suit land was not absolute as there is an existing and continuing trust on the suit property.
 13. The Applicant urged the Court to dissolve the trust that inheres in the suit property, and declare her the proprietor of 0.87 Acres from the suit land, which she has exclusively possessed, cultivated and utilized for more than 40 years. She annexed a copy of a Valuation/occupation report marked as "TW8".
 14. The suit is opposed by the Respondent herein, through the Replying Affidavit of Alexander Wanyoike Muchoki, sworn on 30th August, 2023.
 15. The Respondent refuted the Applicant's claim that the suit property was transmitted to the Respondent's father Muchoki Kinyenje from his father and therefore was family/ancestral land. He asserted that the suit land was bequeathed to the Respondent's mother Leah Wairimu Muchoki, by her father Gichuru Wa Wamai, who caused the suit property to be registered in the name of her husband Muchoki Kinyenje.
 16. He further averred that the registration of his father as the owner of the suit property was absolute because the land in question is not ancestral land. He annexed a copy of the title deed to the suit land and the Green Card thereof marked "AWM-2 a" and "AWM-2 b" respectively.
 17. It was the Respondent's further contention that the Applicant is confused and does not understand the history of the suit property. He stated that his family's ancestral land bequeathed to the brothers Muchoki Kinyenje (father to the Respondent) and Ngamau Kinyenje (husband to the Applicant) by their father Kinyenje Muturi, does not include the suit property, and comprises of land parcel numbers LOC.17/Sabasaba/419; LOC.17/Sabasaba/1334; and, LOC.17/Sabasaba/1372.
 18. The Respondent further alleged that in 1975, his family was dispossessed of their ancestral land i.e., land parcel number LOC.17/Sabasaba/1372, which his father was entitled to, while the Applicant has now transferred land parcel No. LOC.17/Sabasaba/1334, to her name and Njoroge Ngamau assumed ownership of land parcel number LOC.17/Sabasaba/419.
 19. The Respondent added that as a result of his father's side of the family being dispossessed of their ancestral land, his maternal grandfather allocated the suit property to the Respondent's mother who was his daughter.
 20. The Respondent accused the Applicant of colluding with elders at the Kigumo Land Control Board to forge the application forms for the Land Control Board's Consent dated 30th December, 1981, and letter of Consent number 212641, dated 12th January, 1982. He alleged that his late father never attended the meeting at the Land Control Board, as alleged by the Applicant. Further that the signature which is said to belong to his father was not actually his father's. He annexed copies of his father's Identity Card, the Application Form for the Land Control Board's Consent dated 16th March, 2018,



which he disputes and a letter from the Respondent to the Directorate of Criminal Investigations (DCI) dated 8th March, 2023, requesting the DCI to commence investigations against the Applicant for forgery of documents.

21. The Respondent controverted the Applicant's assertion that she lives on the suit property and that she has been living therein for over forty (40) years. He averred that the Applicant has never been in occupation of the suit land, save for sending her proxies who included corrupt government officials to plant trees on the suit property sometimes in year 2018.
22. The Respondent opposed the Applicant's prayer that she is entitled to ownership of the suit property pursuant to the doctrine of adverse possession and he contended that the Applicant occupied the suit land only in year 2018, in the company of corrupt government officers from the District Officer's Office in Makuyu, who managed to install the Applicant onto the suit property forcefully, leading to the Respondent to make a report at SABASABA Police Station, and which was marked as OB entry number:6/30/08/2020.
23. The Respondent filed a Counter-claim dated 30th August 2023, and sought for the following prayers;
 - a. A Declaration that the suit land occupied by the Respondent LOC.17/ Sabasaba/386, among others is my rightful parcel of land.
 - b. A permanent injunction do issue against the Applicant, her servants, agents, employees or any person claiming interest through the Applicant restraining them from alienating, disposing, entering, remaining on, fencing, building on the suit land occupied by the Respondent and others described as LOC.17/Saba-saba/386 or otherwise and/or evicting or in any manner whatsoever interfering with the Respondent occupation of the suit land LOC.17/ Sabasaba/386.
 - c. A declaration that the Court should find that the ancestral family land where the Plaintiff husband Francis Wanyoike Ngamaudeceased, Kamau Ngamauand Kamande Ngamauis LOC.17/Sabasaba/1334, which is located in a different sub-location from that of the Respondent herein Alexander WanyoikeMuchokiLOC.17/Saba-saba/386, and that parcel of land LOC.17/Saba-saba/1372 was fraudulently transferred from the Respondent grandfather's name Mwangi Muturiand the same returned forthwith.
 - d. Costs of this Counterclaim.
24. Further, the Respondent filed a Notice of Preliminary Objection dated 20th September, 2023, and opposed the Applicant's Originating Summons dated 16th February, 2023, on the following grounds:
 - i. Thatthe Originating Summons as filed is incompetent, misconceived and fatally defective.
 - ii. That the Originating Summons dated 16th February, 2023, is res judicata, the Plaintiff having filed and/or participated in other cases pertaining to the same subject land in different courts some of which are still live: Thika Successuin Cause No.272 of 2016; Murang'a CMCC NO.25 of 2019.
 - iii. The Plaintiff has no locus standi to sue against the properties of the estate of Muchoki Kinyenje.
 - iv. That the entire suit is an abuse of the court process.
 - v. That the originating Summons dated 16th February, 2023 and/or the entire suit be dismissed with costs".



25. The Court directed that the Respondent's Notice of Preliminary Objection dated 20th September, 2023, be raised at the main trial.
26. There after, the Applicant filed a Notice of Motion Application dated 25th September, 2023, on even date and which was premised on Order 40 Rule 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*. The Applicant sought for the following reliefs:
 1. That the Court do issue an order restraining the respondent by himself or through any persons claiming or acting under him from entering, trespassing into and/or evicting the applicant from her portion of land possessed, cultivated, and utilized measuring 0.87 Acres in land parcel number LOC.17/Sabasaba/386 pending the hearing and determination of this application and thereafter pending the hearing and determination of the suit.
 2. That the Court be pleased to grant an order of status quo for each of the parties to remain, possess and cultivate their respective portions as they have always done till this matter is heard and determined.
 3. That the Court be at liberty to issue any further orders and directions as maybe just and expedient in the circumstances.
 4. The costs of the application be provided for.
27. The said Application was supported by the grounds appearing on its face and in the Supporting Affidavit of Teresiah Wanjira Wanyoike, sworn on 25th September, 2023. She averred that she is an elderly widow facing imminent eviction from the suit property by the Respondent who lodged a criminal report against her at the Saba Saba Police Station. She added that the Respondent had threatened her with physical harm should she set foot on the suit land.
28. She accused the Respondent of attempting to evict her from the suit property on 7th September, 2023, leading the Applicant to make a report at Saba Saba Police Station which was recorded as OB number:18/7/09/2023.
29. The Respondent opposed the Applicant's Notice of Motion dated 25th September 2023, through the Replying Affidavit of Alexander Muchoki Wanyoike dated 6th October, 2023.
30. The Respondent accused the Applicant of having served a false Court order on him, claiming that it was issued by the Court. He annexed the said fake court order marked as "AWM-1". He placed reliance on the contents of his Affidavit dated 30th August, 2023, and on his Notice of Preliminary objection dated 20th September, 2023 and urged the Court to dismiss the applicant's Application dated 25th September 2023 with costs.
31. However, the Court on its on motion observed that the suit was supposed to be concluded by 20th February 2024, and thus issued an order of maintenance of status quo, and parties were directed to prepare the main suit for hearing.
32. The matter proceeded for hearing via viva voce evidence wherein the Applicant gave evidence for herself and called on more witness to support her case. The Respondent too gave evidence for himself and called one witness to support his case.



Applicant's Case.

33. PW1 Teresiah Wanjira Wanyoike, testified that she is 72 years old. She adopted her witness statement as her evidence in chief together with her Supporting Affidavit. She also produced her list of documents as P. Exhibits 1-13.
34. It was her evidence that her husband was the late Francis Peter Wanyoike, who died in 1989, and that the Defendant herein Alexander Wanyoike is her nephew, as his father was a brother to her husband. That his father was called Muchoki Kinyenje, and her father in law was called Kinyenje. Further, that she got married in the homestead in 1965.
35. It was her further evidence that the suit land Loc 17/ Saba Saba/ 386, belonged to her father in law, the father to her husband and Muchoki Kinyenje. That she started to use the suit land in 1974, and her family has used the land since, together with Muchoki's family. She claimed that she uses about 1 acre of the suit land.
36. She testified that she started to use the land during the life time of her husband, and she has not stopped using it, and therefore the land is an ancestral land, which was registered in the name of Muchoki Kinyenje, during land demarcation and consolidation. That later the land was registered in the name of the Respondent, after succession proceedings.
37. It was her evidence that the land was registered in the name of Muchoki Kinyenje, in 1962, so that he can hold it in trust for himself and his brother Francis Wanyoike, husband to the Applicant.
38. Further, that during the lifetime of Muchoki Kinyenje, the suit land was subdivided into two equal portions, after obtaining the Land Control Board Consent. However, the said Muchoki Kinyenje, died before the title deeds were issued, and she has continued to use the land and no one has ever told her to move out.
39. She also testified that the family had a case at the District Land Disputes Tribunal(LDT), which tribunal advised them to file a succession cause over the estate of Muchoki Kinyenje. However, the Respondent and his mother filed a succession cause at Thika Law courts without involving the Applicant and her family. That when she realized that the Respondent was registered solely as the owner of the suit land after the clandestine succession cause, she filed this case as she is entitled to a share of the same.
40. She denied that she entered into the suit land in 2018, but claimed that she entered in 1974, and urged the court to allow her claim.
41. Upon being cross examined by the Respondent, she testified that she has built her home on the land bought by her husband, being land parcel No. 1333, which land he bought in 1982. She confirmed that she has not built her home on the suit land, although she has used the land since 1974.
42. She also confirmed that even if the surveyor went to the suit land and subdivided the land, she did not have any documents to confirm that subdivision, which was done in a year that she could not recall.
43. That according to the documents produced in court, the consent to subdivide was issued in 1981, and her husband died in 1989, but he had not been issued with the title deed by the time of his death.
44. She also testified that even if her husband was the son of Kinyenje, he was known as Francis Wanyoike Ngamau, and not Kinyenje, as he used the name Ngamau for his Primary school exams registration. She denied that her husband was the son of Ngamau, and insisted that her husband was the son of Kinyenje.



45. On re-exam, she insisted that she knew the history of this land, and that the late Muchoki Kinyenje allowed the land to be subdivided into two equal portions, and that even before the subdivision, she was still using the land. That Muchoki Kinyenje had allowed her to use the land.
46. She also confirmed to have built her house on land parcel No 1333, in 1975, and that she has never lived on the suit land, but she cultivates it. It was her evidence that when she got married, they established their home in Wathiani area, where her mother in law lived.
47. PW2 Susan Nyambura Muthee, also adopted her witness statement as her evidence in chief. It was her evidence that she was a daughter of Kinyenje Muchoki, and her brothers were Muchoki Kinyenje and Francis Wanyoike Kinyenje. That her two brothers are deceased and the Respondent, Alexander, is the son of the late Muchoki Kinyenje.
48. Further that the Applicant is the wife of her brother Francis Wanyoike, who was the youngest. That the suit land belonged to their father, but it was registered in the name of Muchoki Kinyenje but to share it with his young brother Francis Wanyoike. That the land was supposed to be shared into two equal portions, each portion belonging to each of her brothers.
49. She also testified that this land is used by Muchoki and Wanyoike's families, and she urged the court to order that the land be subdivided into two equal portions as prayed by the Applicant, one for Muchoki, and the other for Wanyoike.
50. On being cross examined by the Respondent, she stated that Wanyoike was also known as Wanyoike Kinyenje, and that their uncle was known as Ngamau. That the land was subdivided into two equal portions along time, and she was brought up on the suit land.
51. She also testified that the suit land was registered in the name of Muchoki Kinyenje, because he was the elder son, and he was to hold it in trust for his brother Wanyoike.

Respondent's Case

52. DW1 Alexander Wanyoike Muchoki, the Respondent adopted his witness statement and the bundle of documents as his evidence in chief. He testified that he lives on land parcel No. Loc 17/ Saba Saba /386, where he was born.
53. It was his evidence that the Applicant lives in Wathiani area on land parcel no 1334. That this land parcel No 386, the suit land was given to his family by their maternal grandfather. He urged the court to dismiss the Applicant's case with costs.
54. It was his further evidence that their father owned the land for himself alone, without holding it in trust for anyone even his younger brother. He denied existence of any trust.
55. Upon being cross examined by counsel for the Applicant, he confirmed that the case at the Muranga Chief Magistrates Court was stayed awaiting the outcome of this case. He insisted that Wanyoike was the son of Ngamau and not Kinyenje.
56. He also denied that the Applicant started to use the land in 1974, and that before his father died, the Applicant never used the suit land. He confirmed that the suit land is now registered in his name. He did not have any evidence of how the land is being used, but he confirmed that the Applicant has planted some trees on the suit land.
57. He also confirmed that the Applicant has planted subsistence crops on the suit land this season, but through use of force. He confirmed that the matter of the suit land had been referred to the Tribunal, but he was not aware of the award of the said tribunal, and he questioned the said award.



58. DW2; Rosemary Wanjiku Mbuthia, told the court that the mother to the Respondent was his auntie. She also testified that the suit land belonged to Gichuru Wamai, the grandfather to Alexander. That when his daughter got married to Muchoki Kinyenje, he gave her the suit land, but it was registered in the name of Muchoki Kinyenje, since women never used to have ID Cards. The registration was done during land demarcation and consolidation.
59. Upon cross exam by counsel for the Applicant, she confirmed that the Respondent was her cousin, and she never recorded any witness statement. She confirmed that the father to Alexander Muchoki was Muchoki Kinyenje, who was registered as the owner of the land in 1961.
60. That she was born in 1949, and she knew about the history of this suit land. That what she told the court is what she heard from her mother. Further, that from 1961, she did not know how the land was being used as she lives at Wathiani area.
61. That she was told the land belonged to Gichuru, and later it was given to Muchoki Kinyenje. That the Applicant started using the suit land the other day and she has planted subsistence crops.
62. After the viva voce evidence, the parties were directed to file and exchange written submissions, which directions they duly complied.
63. The Applicant filed her written submissions on 8th March, 2024, through the Law Firm of Kirubi, Mwangi Ben & Company Advocates. It was her submissions that the Respondent's Preliminary Objection dated 20th September, 2023, was meant to confuse and entangle the real factual and legal issues raised by the Applicant in her suit.
64. She further submitted that the Respondent filed Thika Succession Cause No. 272 of 2016, without informing the her, and he disregarded the Applicant's entitlement to half of the suit property as stated on page 28 of the award of the elders' tribunal, with the recommendation for the Applicant and the Respondent to jointly file for Succession, so as to share the suit land between themselves.
65. The Applicant further submitted that Murang'a CMCC No. 29 of 2019, was mounted by the Respondent pending the outcome and judgment of the present suit as evidenced by the order of the Court dated 4th August, 2023, appearing on page 60 of the Respondent's record.
66. The Applicant also submitted that the father to her husband who is the Respondent's paternal grandfather died in 1950, before the land consolidation process of the early 1960s. She added that the Respondent's father was registered as the proprietor of the suit land by virtue of being the eldest son of his father, and was registered to hold the suit property on his behalf and on behalf of his younger brother Francis Wanyoike Ngamau, who was married to the Applicant prior to his death in 1989. She further submitted that during the trial, her witnesses corroborated her claim that the suit property belonged to the family of her late husband.
67. Further that the suit land comprises of 1.74 Acres (0.70 Hectares) in total and of which the Applicant and her family has been in possession of 0.87 Acres since 1974.
68. The Applicant further submitted that the Respondent's father at one time claimed absolute ownership of the entire suit property which led to a dispute that was referred to the local District Officer. That at the tribunal, the elders gave an award which was exhibited at page 24 of the Applicant's bundle of documents.
69. She also submitted that the deceased, Muchoki Kinyenje, was registered as proprietor of the suit land, and he conceded during his lifetime that he was registered as a trustee in respect of the suit property



- as evidenced by the application which he submitted for the Land Control Board's consent dated 30th December, 1981, appearing on pages 23 and 24 of the Applicant's bundle of documents.
70. She refuted the Respondent's contention that the suit property was bequeathed to the Respondent's mother by her father (the Respondent's maternal grandfather). Reliance was placed on the contents of the Green Card in respect of the suit land, for a history of the property as well as the award of the elders.
 71. The Applicant also submitted that the Respondent failed to demonstrate that either the elders' award or the Land Control Board consent provided by the Applicant were products of fraud. She described the evidence of DW2, as having no probative value as DW2, who is a cousin to the Respondent was unable to prove that the suit land emanated from her mother's side of the family.
 72. On the question of the suit land being the subject of a trust, the Applicant submitted that the Respondent's father and predecessor-in-title Muchoki Kinyenje, was the first registered owner thereof and was so registered in 1961, during the land consolidation process by virtue of his position as the eldest son and on account of the death of his father in 1950.
 73. Reliance was placed on the decision in the cases of *Justus Maina Muruku v Jane Waithera Mwangi* [2018] eKLR; and, *Ngugi v Kamau & Another* (ELC Case no. 36 of 2020 [2022] KEE:C 2261 KLR (23 June 2022) (Judgment), to anchor the proposition that registration does not oust or cancel the trust subsisting to the land in question under the Kikuyu Customary Law.
 74. Further reliance was also placed on the holding in the cases of *Mbui Mukangu v Gerald Mutwiri Mbui* E.A. 281 of 2000, to support the argument that customary land rights constitute overriding interests, which cannot be taken away by registration. The Applicant cited the decision of the Court in the cases of *Patrick Mbasa v Meshack Odhiambo Mbasa & Another* [2020] eKLR; *Kareu Ndibu v Ndege Ndebu* [2020] eKLR; and, *Macharia Kihari v Ngigi Kihari* [1994] eKLR, on the conditions that an applicant seeking title to land on the basis of trust is required to satisfy. Reliance was also placed in the case of *Njuguna & Others v Njuguna* [1983] eKLR, on the role of a "Muramati" under the Kikuyu Customary law.
 75. With regard to the claim that the Applicant is entitled to 0.87 Acres, from the suit property on the grounds of adverse possession, it was her submission that she entered onto the said portion of land during the early 1970s, and she openly cultivated the said land, and that PW2 corroborated the above assertions, which was also supported by the report authored by Upcountry Valuers.
 76. Further that the registered proprietor of the suit property had opposed her husband's claim to half of the suit land, but later changed his mind following the intervention of the elders, who rendered an award on the same.
 77. She submitted that by sub-dividing the suit property, it is evident that the Respondent's father had accepted his younger brother's claim to half of the suit land. She added that at the time of her husband's demise in 1989, they had occupied the suit property for about 14 years since 1974, while the Applicant herself had resided thereon for a period of over 40 years.
 78. Further reliance was placed on the holding of the court in the cases of: *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Muranga ELC Case No.7 of 2021)*; *Wilson Njoroge Kamau v Nganga Mucheru Kamau* [2020] eKLR; and; *Rose Akello Otieno v Joseph Odote & Another* [2022] eKLR.
 79. The Respondent filed his written submissions on 2nd April, 2024, drawn by himself, and submitted that the Applicant failed to respond to or challenge his Counter-claim dated 30th August, 2023. He stated that the Applicant's Notice of Motion dated 25th September, 2023, was an attempt to block his Notice of Preliminary Objection dated 20th September, 2023, from being heard.



80. He further submitted that the Applicant participated in Thika Succession Cause no.272 of 2016, and on sensing defeat in regard to that suit, opted to lodge Murang'a CMCC ELC No. 25 of 2019. The Respondent identified two (2) issues for resolution by the Court as follows:
- “(i) whether the Plaintiff is entitled to a share as a heir in the estate of Muchoki Kinyenje?
 - (ii) whether the Plaintiff is related to the Defendant as she alleged.? If yes, at what contents?”
81. The Respondent refuted the Applicant's claim that her husband and the Respondent's father were brothers. It was his submissions that the Applicant's husband Francis Wanyoike Ngamau, is the son of Ngamau Muturi, who was the brother of Kinyenje Muturi. That Kinyenje Muturi, sired Muchoki Kinyenje, the Respondent's father.
82. Further, he submitted that the Applicant's husband and the Respondent's father were cousins, not brothers. That the family of Ngamau Muturi, disinherited the family of Kinyenje Muturi, from the ancestral lands belonging to their common father Muturi Ngamau, leading his maternal grandfather to allocate the suit property to his daughter (the Respondent's mother), who proceeded to register the same in the name of her husband Muchoki Kinyenje, as women were not being registered as title deed holders at the time according to the Kikuyu customary law.
83. It was further submitted that during cross-examination, the Applicant was not able to explain how her husband did not share the same family name as the Respondent's father, in light of her claim that the two were brothers. Further, that the Applicant did not understand the relationship between her departed husband and the Respondent's father, as she is married in the family and lacks an understanding of her husband's family lineage.
84. The Respondent urged the Court to disregard the evidence of one Susan Nyambura Muthee, a sister to the Respondent's father, because she failed to recall the names of her father and brother whom she referred to as Kinyenje Njoroge and Muchoki Njoroge whereas their real names are Kinyenje Muturi and Muchoki Kinyenje respectively.
85. The Respondent asserted that his father was registered as the absolute owner of the suit property, without holding the suit land in trust for Francis Wanyoike Ngamau. He urged the Court to dismiss the Applicant's claim and also grant his prayers contained in his Counter-claim.
86. The court has summarized the pleadings of the parties herein as above, together with the evidence adduced in court, the exhibits produced therein and the rival written submissions, which has been carefully read and considered. This court finds the issues for determination are as follows:
- I. Does the present suit raise issues which are already res judicata?
 - II. Whether the Applicant is entitled to the Orders suit?
 - III. Whether the Respondent is entitled to the orders sought in the Counter-claim?
 - IV. Who shall bear the costs of the suit and Counter-claim?
87. Before the court embarks in consideration of the above issues, it will highlight the issues which are not in dispute. There is no dispute that the parties herein are related. Though there is a dispute as to whether Francis Wanyoike Ngamau, now deceased the husband to the Applicant was a biological



brother of Muchoki Kinyenje, deceased and father to the Respondent, there was an agreement, that they share a common ancestor.

88. The Applicant averred that Kinyenje Muturi, was the father to Muchoki Kinyenje , and Francis Wanyoike Ngamau, and he was the original owner of the suit land.
89. However, the Respondent alleged that their fore father was Muturi Ngamau, who sired Ngamau Muturi, and Kinyenje Muturi, who are his grandfathers. He also alleged that Ngamau Muturi had two wives and was the father to Francis Wanyoike Ngamau, the husband to the Applicant. He also averred that Kinyenje Muturi was the father to Muchoki Kinyenje, the father to the Respondent.
90. According to the Respondent's assertion, Muchoki Kinyenje and Francis Wanyoike Ngamau, were not biological brothers, but cousins, since they shared a common grandfather.
91. What is also not in dispute is that the Applicant does not live on the suit land, but on another parcel of land at Wathiani area. However, she at the moment, she has planted some subsistence crops on the said land.
92. In her evidence, the Applicant alleged that she has utilized the suit land since 1974, and has been in continuous occupation of the same. However, the Respondent has disputed this claim, and alleged that the Applicant only got into the suit land around 2018, by force, through the help of the administration.
93. What is not in dispute is that the suit land was initially registered in the name of Muchoki Kinyenje, as from 16th January 1961. This was during the land demarcation and consolidation within Fort hall region. According to the Green card, the land was registered under the regime of Registered [Land Act](#) Cap 300, Laws of Kenya.
94. Under the said regime, as provided by section 27 of Act, the said Muchoki Kinyenje, was deemed to be the absolute and indefeasible owner. However, such right of a registered owner could be defeated as provided by the Act, See section 28 of the said Cap 300, which provides;
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.
95. Further, it is evident that the registration of an absolute owner is also subject to the overriding interests as provided by Section 30 of the said Registered [Land Act](#).
96. Further, there is no doubt that this suit land was later registered in the names of Alexander Wanyoike Muchoki and Leah Wairimu Muchoki, after the succession proceedings of the estate of Muchoki Kinyenje, who died in the year 2002.
97. The Applicant alleged that this succession proceedings were done fraudulently, and thus she was shut out of the suit land. She alleged that the family of Francis Wanyoike Ngamau, was entitled to half share



of the suit land, since Muchoki Kinyenje was registered as the owner of the suit land, but to hold it in trust for his brother, the said Francis Wanyoike Ngamau.

98. It is evident that the Respondent has denied existence of such customary trust, and alleged that the suit land was given his father by his maternal grandfather, Gichuru Wa Wamai.
99. The Applicant also alleged that even if customary trust cannot be proved, she has acquired the suit land through adverse possession, since she has used, and utilized the suit land since 1974. That the late Muchoki Kinyenje had even attempted to subdivide the suit land into two equal portions in 1981, but her husband Francis Wanyoike Ngamau, died before registration could be done. Francis Wanyoike died in 1989.
100. The above are the undisputed facts. The court will now consider the issues framed for determination, and arrive at a conclusion on whether the suit land is an ancestral land, and thus bound by customary trust, whether the Applicant has acquired the portion sought through adverse possession, and /or whether the Respondent is entitled to the prayers sought in his Counter- claim.

i.) Does the present suit raise issues which are already res-judicata?

101. In his Preliminary Objection dated 20th September 2023, the Respondent herein contended that the suit herein is Res-judicata, as the Applicant had fully participated in the Succession Cause filed at Thika Law Courts, and in Muranga CMCC No. 25OF 2019, which suits pertains to the same issues and same suit property.
102. He further alleged that the Applicant did not have Locus standi to sue against the properties of the estate of Muchoki Kinyenje, and thus the suit herein is an abuse of the court process, and should be dismissed/ or should be struck out entirely with costs.
103. The Applicant objected to this Preliminary Objection. However, the court directed that it will determine the Preliminary Objection while determining the main suit.
104. The doctrine of Res judicata has its foundation in section 7 of the *Civil Procedure Act*, which states;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
105. For a matter to be declared that it is Res judicata, it must be one on which the court previously exercised its judicial mind, and the parties and issues were the same. See the case of Samuel Kiiru Gitau v John Kamau Gitau HCCC No. 1249 of 1998 [1998] KLR, I where the Court held that:-

“For a matter to be res-judicata it must be one on which the court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to have been heard and finally decided”.



106. In the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, the court held:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.”

107. Further, the Respondent alleged that the Applicant did not have Locus Standi to sue on behalf of the estate of Muchoki Kinyenje.

108. It is trite that locus standi is the capacity or standing for a party to bring a claim or defend it. It goes to the core of the suit, and without Locus standi, a party would have no standing in a suit. See the case of [*Julian Adoyo Ongunga v Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015*](#), where the Court held;

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

109. Why did the Respondent aver the suit is Res judicata? He claimed that the Applicant participated in the succession cause at Thika Law courts, and that there is another suit pending at the Muranga CMS Court, being case No 25 of 2019.

110. However, it is very clear that the issue at Thika Law Court was a succession issue, that dealt with the distribution or inheritance of the suit land, or transmission of the estate of Muchoki Kinyenje. Though the Applicant had filed for Summons for revocation of the grant issued to the Respondent and his mother, she later withdrew the said Summons for revocation of grant. No decision was ever made on the issue of revocation of grant in issue.

111. Further, the claim herein is for ownership of the suit land through adverse possession or through customary trust. These issues were not before the probate court, and could not even have been determined in a succession court. Issues of customary trust and adverse possession are effectively heard and determined in an Environment and Land Court. See the case of *In Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, where the Court held that;

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the [*Law of Succession Act*](#) is limited. It does not extend to determining issues of ownership of property and declaration of trusts (Emphasize added). It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the [*Law of Succession Act*](#) and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust. In this case therefore, the only



path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

112. In the case of *Leonard Indiazi vs Fimsta Omukama Kami Atinga, Civil Appeal No. 169 of 1996*, the court held;

“for res judicata to apply, parties and issues must be the same, and therefore, a decision in succession cause which does not touch on title is not res judicata in a claim by adverse possession.”

113. Similarly, the suit at Thika Law Courts, dealt with succession issues, specifically revocation of grant, and therefore, the said suit at Thika Law Courts was not similar to this one, and thus not res judicata to a claim of adverse possession, or on customary trust. Further, no final decision was made on the issue of revocation of grant, as the Applicant herein withdrew her summons for revocation of grant issued to the Respondent and his mother the late Leah Wairimu Muchoki.

114. In the case of *Samuel Kiru Gitau v John Kamau Gitau Nairibi HCCC No, 1249 of 1998*, the court held:

“for a matter to be res judicata, it must be one on which the court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason, a matter is said to have been heard and finally decided notwithstanding that the former suit was disposed of by a decree or award.”

115. On the issue of locus standi, that the Applicant cannot sue against the estate of Muchoki Kinyenje, it is very clear that the claim by the Applicant is a claim of ownership of the suit property through adverse possession and/ or customary trust. The Applicant is not claiming ownership of the suit land through inheritance, but through adverse possession and/ or customary trust.

116. It is trite that adverse possession attaches to land and not title. 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”

117. From the above decision of the court, it is clear that it does not matter who has inherited the land and obtained title to the same, so long as the claimant has proved that she/ he has been on the suit land for the required period, and has fulfilled the requirements for a claim on adverse possession, then he has a right to file the suit even against the beneficiaries of the estate of the original owner. See the case of *Titus Kigoro Munyi v. Peter Mburu Kimani [2015] eKLR*, where court held;

“It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors. (See *Peter Thuo Kairu v Kuria Gacheru, [1988] 2 KLR 111*).”

118. Further, a claim of customary trust does not extinguish, when the title changes hand during succession. This claim subsists on the land, and is an overriding interest. The Applicant has locus to file a claim of customary trust against the beneficiaries of the estates of Muchoki Kinyenje, whom she claimed he



held the suit land in trust for himself and his brother Francis Wanyoike Ngamau deceased). See the case of Kanyi v Muthiora [1984] KLR 712 CA, where the Court held that;

“the registration of land in the name of the Appellant under the Registered Land Act (Cap 300), did not extinguish the Respondent’s right under Kikuyu Customary law and neither did it relieve the Appellant of her duties or obligations under section 28 of the said Act”

119. Having analyzed the issue of Res judicata and Locus standi, as above, this court finds and holds that the instant Preliminary objection cannot stand. The same is dismissed entirely.

ii). Whether the Applicant is entitled to the Orders sought on her suit?

120. The Applicant’s claim is basically a claim of ownership through adverse possession and / or customary trust. In her evidence, she dwelt at length on the existence of customary trust, and adverse possession was like an alternative claim. This court, will therefore deal at length on whether the Applicant has proved a claim of customary trust.

121. Customary trust is an encumbrance on the land, and these are non- registrable rights which run with the land: they are overriding and they subsist with the land. See the case of Ngugi v Kamau & Another [2022] KEELC 2261 (KLR) 23 June 2023) (JDGT).

122. On whether the Applicant has established existence of customary trust over the suit land, she contended that her late husband Francis Wanyoike Ngamau, and Muchoki Kinyenje, the original registered owner were brothers, and during land demarcation and consolidation, the suit land was registered in the name of Muchoki Kinyenje, the elder of the brothers to hold it in trust for himself and his young brother.

123. To buttress this position, she produced Application Form to the Land Control Board for consent to subdivide, and the consent itself was issued in 1981. However, the said transfer was never effected, as the Applicant alleged that Francis Wanyoike Ngamau, died in 1989. However, that was approximately 8 years after the consent to subdivide was allegedly issued.

124. The Respondent alleged that the Application for consent to subdivide and the consent from the Land Control Board was a forgery. He denied that the said Application was ever done in 1981, and consent issued. He questioned why the transfer was never done from 1981 to 1989.

125. The Applicant is the one who has alleged, and therefore the burden of proof lies squarely on her. See sections 107 and 108 of the Evidence Act.

“ 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.

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.”

126. It is not in dispute that the suit land was initially registered in the name of Muchoki Kinyenje, as from 16th January 1961. As noted early, the registration was under Cap 300(now repealed). Section 27 of the



said Act provided that such registration gave the registered owner absolute ownership with all rights and privileges appurtenant thereto.

127. Therefore, Muchoki Kinyenje, had such absolute ownership, but these rights were subject to overriding interests as provided by section 30 of the said Act. One such right is right to occupation as captured in Section 30(g) of the said Cap 300. Which state;

“ 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;

128. These rights are also provided for in Section 28 of the *Land Registration Act*, specifically Section 28(b) of *Land Registration Act*, which provides;

28. 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;

129. The suit is now registered in the name of the Respondent, after succession proceedings at Thika Law courts. On the face of it, the Respondent and Leah Wairimu Muchoki, are the absolute and indefeasible owners of the suit land as provided by section 24(a) of *Land Registration Act*, which states;

“ (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; and”

130. However, if the Applicant can prove existence of customary trust, which is an overriding interest as provided by section 28(b) of *Land Registration Act*, then the Respondent’s absolute ownership, can be defeated.

131. The principles to be considered in a claim of Customary trust were well set out by the Supreme court of Kenya 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.”
132. The Applicant herein has pleaded customary trust over the suit land, now registered in the name of the Respondent and Leah Wairimu Muchoki(deceased), pursuant to succession proceedings at Thika Law court, which the Applicant alleged that she was not made aware of it. The Customary trust pleaded by the Applicant need not be noted in the register.
133. It is trite that registration of a person as a proprietor of land does not preclude him/her from holding an interest in trust for another. See the case of *Kanyi v 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.”
134. As noted by the court, the legal burden of proving existence of customary trust lies with the person asserting it, and in this case the Applicant herein.
135. The Court of Appeal in the case of *Njenga Chogera vs Maria Wanjira Kimani & 2 Others* [2005] eklr, which referred to the case of *Muthuita v Muthuita* [1982-88] 1klr 42, held that;
- “Customary trust is proved by the person claiming it under, by leading evidence and trust is a question of fact which is proven by evidence. Further that a trust is never implied by the Court, unless there was an intention to create a trust in the first place.”
136. Further, in the case of *Peter Ndungu Njenga vs Sophia Watiri Ndungu* (2000) eklr, the Court held:
- “the concept of trust is not new, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied”
137. Courts have severally held that the law never implies or presumes a trust. see the case of *Juletabi African Adventure Limited & Another Vs Christopher Michael Lockley* [2017] eKLR, held that;-
- “The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
138. Having been guided as above, and going by the decision of the Supreme Court in the case of *Isaack Kieba*(supra), on the principles to be considered in a case of customary trust, the court will consider the available evidence in order to determine whether a case of customary trust has been established.
139. The suit land herein is Loc 17/ Saba Saba/ 386, which the Applicant has claimed belonged to the father of the Muchoki Kinyenje and Francis Wanyoike Ngamau, her late husband, and though registered in the name of Muchoki Kinyenje, it ought to be shared equally between the two brothers.



140. It is not in doubt that this registration is a first registration, which was done during land demarcation and consolidation. The Applicant had alleged that the suit land belonged to Kinyenje, and thus is an ancestral land.
141. The Respondent alleged that the suit land belonged to his maternal grandfather, who gave it to his daughter, the mother to the Respondent, and thus is not an ancestral land of the Kinyenjes. Further, he claimed that Francis Wanyoike Ngamau, was not a son of Kinyenje Muturi, but the son of Ngamau Muturi, and thus he was a cousin to Muchoki Kinyenje, initial registered owner.
142. The allegations by the Respondent that the suit land belongs to his maternal grandfather who gave it to his daughter, but the said land was later registered in the name of Muchoki Kinyenje, the husband got the said daughter was far fetched, and there was no clear evidence to support that allegation.
143. However, the suit herein is by the Applicant, and the burden of prove was upon her. Failure to call sufficient evidence, the Applicant was the one who would lose the case. See the case of *In re Estate of Job Ndunda Muthike (Deceased) [2018] eKLR*, Justice Odunga in quoting the case of *Central Bank of Kenya v Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998* where the court held;
- “It is trite that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of a fact which he asserts, must prove that those facts exist and that 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. Further the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person”
144. Though the Applicant alleged that she started using the suit land in 1974, on cross exam, she confirmed that she does not live on the suit land, but at Wathiani area. She testified that her family and herself have been utilizing a portion of the suit land, but have not put up any homestead thereon.
145. If the Applicant does not live on the suit land, then it is clear that her family and herself have another piece of land. The Respondent alleged that the Applicant entered into the suit land in 2018, by force with the help of Provincial Administration.
146. It is trite that customary trust is a matter of facts, and is proved by calling of sufficient evidence. The Respondent having disputed that the Applicant entered the suit land in 1974, then she ought to have called credible witnesses like the local Administration or area Chief who would have confirmed whether the family of Francis Wanyoike Ngamau has been utilizing the suit land from 1974.
147. Further, though the Applicant alleged that the two brothers, Muchoki Kinyenje, and Francis Wanyoike Ngamau, had agreed on the subdivision of the suit land, and they applied for the Land Control Board Consent to subdivide, and the consent was granted, the Respondent alleged that the said Application Forms and consent were a forgery.
148. Since the Application to subdivide was done in 1981, and no transfer was done until the two alleged brothers passed on, then the Applicant should have ensured that the authenticity of the said documents was done. This could have been done by calling witnesses from the relevant Land Control Board to confirm that indeed those documents emanated from their office.
149. Further, the Respondent alleged that the husband to the Applicant, the late Francis Wanyoike Ngamau, was not the son of Kinyenje Muturi, but his father was Ngamau Muturi, a brother to Kinyenje Muturi. Therefore, the late Francis Wanyoike Ngamau, was a cousin to Muchoki Kinyenje,



and thus Muchoki Kinyenje could not hold the suit land in trust for his cousin, whose family had its own land in Wathiani area.

150. The Applicant tried to explain why her husband was known as Francis Wanyoike Ngamau, and not Kinyenje. The explanation given was not plausible. Unless credible witnesses were availed, this court finds that it is more probable that Francis Wanyoike Ngamau, was the son of Ngamau Muturi, a brother to Kinyenje Muturi, and certainly Muchoki Kinyenje, could not hold the suit land in trust for his cousin, whose family had its own parcel of land in Wathiani area, where the Applicant resides and has a parcel of land registered in her name.
151. The Respondent alleged that the Applicant entered the suit land in 2018, by force, and with the help of the Provincial Administration. The Applicant did not dispute that allegation, and this court finds and holds this is the true position on the ground.
152. Having found that there is no evidence that the Applicant entered the suit land in 1974; that the suit land was subdivided by the two deceased patriarchs Muchoki Kinyenje and Francis Wanyoike Ngamau in 1981, and that it is doubtful the Francis Wanyoike Ngamau, was the son of Kinyenje Muturi, but more probable that he was the son of Ngamau Muturi, this court finds and holds that the late Muchoki Kinyenje, the initial registered owner of the suit land was not registered as such, so as to hold the said land in trust for himself and for Francis Wanyoike Ngamau.
153. The Applicant had also urged the court to find and hold that she is entitled to a portion of 0.87 acres, out of the land parcel no Loc 17/Saba Saba/ 386, by virtue of adverse possession. It was her claim that her family and herself got into the suit land in 1970s and have been in possession, occupation and use of the said portion of land since then. She further claimed and testified that her occupation has been open, exclusive and without interference from the Respondent and his family.
154. It has been found and held in various decisions of the court that adverse possession is the legal process whereby a non- owner occupant of a piece of land gains title or ownership of that land after a certain period of time, through occupation and dispossessing the real owner and in Kenya, such a period is 12 years.
155. For a claim of adverse possession to crystalize, there are several elements that must be fulfilled, these are; one must have occupied the land in exclusion of the others; the occupation must be without the consent of the owner; the occupation must be for a continuous period of at least 12 years.
156. Therefore, Applicant herein needed to avail sufficient evidence to prove that she has acquired the said portion of land through adverse possession. No doubt, adverse possession is an overriding interest recognized in law. The suit land was initially registered under the regime of Registered Land Act, Cap 300, Laws of Kenya, and thus adverse possession as an overriding interest is provided for in section 30 of the said Cap 300.
157. After the succession proceedings, the suit land got registered in favour of the Respondent herein and his mother Leah Wairimu Muchoki, now deceased, and section 28(h) of the Land Registration Act, comes into play.
158. The principles to be considered in a case of Adverse possession were clearly set out in the case of *Wambugu vs Njuguna 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.”

159. Further, in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, where the Court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

160. The Applicant alleged that she has been in occupation of the suit land from 1974, and has gained ownership of the suit land through prescriptive rights or adverse possession, and thus she is entitled to the said portion of suit land.

161. The Respondent denied the Applicant’s claim and alleged that the Applicant only got into the suit land in 2018, through force, while using the local administration. The Applicant did not vehemently deny this claim.

162. The Applicant is the one who has alleged, and so the onus was upon her to call sufficient evidence to discharge her duty, as the burden of proof was upon her.

163. Taking into account the elements of adverse possession that is, the Applicant should have gotten into the suit land without permission of the owner: should have had continuous use; the occupation is hostile to the owner; is open exclusive and notorious; actual possession and exclusive use, then the court will juxtapose them with the available evidence to determine whether the Applicant herein has proved her case on the required standard. See the case of *Mbira v Gachuhi* [2002] 1 EALR 137: the Court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

164. The Applicant testified that her husband the late Francis Wanyoike Ngamau, was a brother to Muchoki Kinyenje, who was registered as the owner of the suit land in 1961, as the elder son of Kinyenje Muturi. However, this court has found and held that it was doubtful that Francis Wanyoike Ngamau, was the son of Kinyenje Muturi, the father to Muchoki Kinyenje.

165. However, if the Applicant took possession of the suit land with the consent of the registered owner Muchoki Kinyenje, then that entry was not non- permissive, but was with the permission of the owner.



166. The occupation should also be actual occupation and possession, and exclusive. The Applicant confirmed in cross examination that she does not live on the suit land, and her homestead is elsewhere. Further, the Respondent alleged that the Applicant only entered into the suit land in 2018, by force.
167. The Applicant is the one who would lose if no sufficient evidence is availed, see section 108 of the *Evidence Act*. Therefore, she needed to marshal sufficient evidence to dispute this allegation. How could she do that? She could have called witnesses from the local administration or their officials, her neighbors, and elders from this area, where the suit land is situate, who know this parties well to confirm whether indeed the Applicant and her family have been in actual and exclusive possession of this portion of land.
168. For now, the available evidence is the allegations by the Applicant, which allegations have been denied by the Respondent. Given the character of the claim of adverse possession, which is proved by facts, then sufficient evidence ought to have been availed. See the case of *Jandu v Kirplal & Another* [1975] E.A 225. Where the court held:”
- “to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession, possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious”
169. Were all the above ingredients proved by the Applicant herein? The court finds that the available evidence was not sufficient to prove that the Applicant has been in continuous use, occupation and possession of the portion of land claimed by her from 1974, and not from 2018, as alleged by the Respondent.
170. The parties herein are related, and maybe the Applicant did enter the suit land by consent of the owner, as testified by herself. But was her occupation hostile and adverse to the interests of the owner? Did her possession dispossess and discontinue the owners use of the suit land? Was her possession, and occupation open. notorious and obvious? All these elements could have been proved by calling sufficient evidence.
171. In the case of *Samuel Kihamba v Mary Mbaisi*(*Supra*), the court held :
- “The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. 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 are persuaded by various dicta which we have quoted and relied upon in this judgement 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.”
172. Having carefully considered the available evidence, the court finds that the Applicant did not prove sufficiently all the elements of adverse possession. For the above reasons, the court finds and holds that the Applicant is not entitled to a portion of 0.87 acres out of the suit land by dint of adverse possession.
173. On the second issue, this court finds and holds that the Applicant herein is not entitled to the orders sought in her Originating Summons, as she failed to prove the existence of customary trust and entitlement of the alleged portion of land by adverse possession, and thus court cannot order the land Registrar Murang’a to subdivide and transfer any portion of the suit land to the Applicant nor direct



the Deputy Registrar of this court to execute any transfer documents to facilitate transfer of the any portion of the suit land .

iii. Whether the Respondent is entitled to the orders sought in the Counter- claim?

174. In response to the Applicant Originating Summons, the Respondent filed Defence and Counter- claim dated 30th August 2023, and sought for the following orders;
- i. a declaration that the suit land LOC 17/ SABA SABA/ 386, as occupied by the Respondent is his rightful parcel of land;
 - ii. a permanent injunction to issue against the Applicant, her agents, servants, agents or employees to restrain her from alienating, disposing entering, remaining on, fencing or otherwise evicting or interfering with the Respondents occupation of the suit land,
 - iii. a declaration that the ancestral land where the Applicant husband Francis Wanyoike Ngamau deceased, and others were buried, that is LOC 17/ SABA SABA/ 1334, is located in a different sublocation, and that Land parcel LOC 17/ SABA/ 1372, was fraudulently transferred from the Respondent's grandfather name Mwangi Muturi, and the same should be returned forthwith,
 - iv. costs of the counter claim.
175. Having found that the Applicant is not entitled to the orders sought in her claim, the only issue for determination is whether the Respondent is entitled to prayers sought in the counter- claim.
176. It is trite that a Counter- claim is a separate claim by the Defendant/ Respondent, and it provides a rebuttal of the Plaintiff's claim.
177. The Respondent herein has sought for various declarations and a permanent injunction to restrain the Applicant from interfering with the Respondent's occupation of the suit land.
178. The court has dismissed the Applicant's claim in totality. There is no doubt that the Respondent and one Leah Wairimu Muchoki, are the registered proprietors of the suit land as from 5th December 2017. They obtained this registration through transmission, to hold the suit land Loc 17/ Saba Saba/ 386, in trust for themselves and Esther Muthoni Muchoki, James Mwangi Muchoki, Rosemary Wanjiku and Samuel Muiruri Muchoki.
179. The Grant over the Estate of Muchoki Kinyenje, was confirmed on 25th September 2017, and the suit land was shared as above stated. However, Leah Wairimu Muchoki later died on 24th September 2018, and the court has not seen any succession proceedings for her estate.
180. What is clear is that the confirmed Grant has not been revoked, and the thus the suit land is registered in the name of the Respondent and his deceased mother, Leah Wairimu Muchoki. As provided by section 24(a) of the [Land Registration Act](#), they have all the rights and privileges appurtenant thereto. Enjoying quiet possession is one of such right.
181. Further as provided by section 26 of the [Land Registration Act](#), the certificate of title is deemed to be prima facie evidence that the person so registered is the absolute and indefeasible owner. See Section 26 of [Land Registration Act](#).

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission



by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

182. The Respondent certificate of title has not been cancelled and or revoked. Therefore, he is deemed to be the registered proprietor, but with an overriding interest of customary trust in favour of his immediate family members, as per the Confirmed Grant of 25th September 2017.

183. As a registered owner, he is entitled to occupation of the suit land, as that is one of the rights provided by Section 24 of *Land Registration Act* and also guaranteed by Article 40 of *the Constitution*. For these reasons, the Respondent is entitled to prayer No 1 of his Counter-claim.

184. In respect of the prayer for Permanent Injunction which is an equitable remedy, is issued by the court requiring a person to cease doing specific actions that are harmful to the Applicant, the court finds as follows; A permanent injunction is issued as a final order of the court after taking of evidence. See the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR,

“A permanent injunction fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

185. This court has held and found that the Respondent is the registered owner of the suit land. The court has found too that the Applicant’s claim over the suit land is not merited. There is evidence that the Applicant has been utilizing the suit land, which this court finds belong to the Respondent.

186. There is need to restrain the Applicant and her servants and or agents from interfering or dealing with the suit land which belongs to the Respondent and his family.

187. On the third prayer of declaration that land parcel No Loc 17/ Saba Saba/ 1334, is the ancestral land for the Applicant husband Francis Wanyoike Ngamau, and is located in a different location, this court finds and observes that the said prayer raises a different cause of action, which cannot be determined in a counter- claim.

188. Consequently, this court finds and holds that prayer No iii, of the Counter- claim is not tenable and is dismissed entirely.



189. On costs, it is trite that costs are granted at the discretion of the court. See section 27 of the [Civil Procedure Act](#). Further costs ordinarily follow the event, and are normally granted to the successful litigant. The Respondent is the successful litigant, but given that the parties herein are related, and have been involved in various other litigations, the court directs that each party to bear its own costs of the counter claim herein.

iv. Who shall bear the costs of the suit and Counter-claim?

190. On the issue of costs of the main suit, and in the Counter-claim, since the court had observed, found and held that the parties are related, and it will proceed to direct that each party to bear his or own costs.

191. Ultimately, having considered the Pleadings herein, available evidence, the rival written submissions and the relevant provisions of law, this court finds and holds that the Applicant has failed to prove her claim as contained in the Originating Summons dated 16th February 2023, on the required standard of balance of probabilities. For the above reasons, the Applicant claim/Oriinating Summons is dismissed entirely with an order that each party to bear his/ her own costs.

192. On the Counter-claim dated 30th August 2023, filed by the Respondent, the court finds and holds that he has proved the same on the required standard in terms of prayers No. 1 and 2, with an order that each party to bear his/ her own costs.

It is so ordered.

Dated, Signed and Delivered Virtually this 18th Day of July 2024.

L. Gacheru

Judge

18/7/2024.

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Mr. Mwangi Ben for the Applicant

Alexander Wanyoike, the Respondent in person.

L. Gacheru

Judge

18/7/2024.

