



**Mutunga v Mutunga & another (Environment and Land Appeal  
E008 of 2022) [2025] KEELC 676 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E008 OF 2022  
A NYUKURI, J  
FEBRUARY 19, 2025**

**BETWEEN**

**MAIMBU MUTUNGA ..... APPELLANT**

**AND**

**JOSEPH MAINGI MUTUNGA ..... 1<sup>ST</sup> DEFENDANT**

**JACKSON KIMATU MUTUNGA ..... 2<sup>ND</sup> DEFENDANT**

*(Being an appeal from the judgment of Honourable A.G. KIBIRU, Chief  
Magistrate, delivered on 9th March 2022 in Machakos CMCC NO. 102 of 2013)*

**JUDGMENT**

**Introduction**

1. The appeal before court was filed by Maimbu Mutunga against the respondents who are his brothers and sister-in-law respectively. The appeal challenges the judgment of Honourable A.G. Kibiru, Chief Magistrate, delivered on 9<sup>th</sup> March, 2022 in Machakos Chief Magistrate Court Civil Case No. 102 of 2023. In the impugned judgment, the learned trial magistrate dismissed the appellant's prayers for a claim of ownership of the suit property and orders of eviction against the respondents and consequently allowed the respondents' counterclaim thereby making orders that the suit property be held by the plaintiff in trust for himself and the 2<sup>nd</sup> defendant; for cancellation of the title thereof and subdivision as per the clan's decision. The trial court also restrained the appellant herein from interfering with the respondents' occupation thereof.

**Background**

2. By a plaint dated 30<sup>th</sup> April, 2010, the plaintiff now the appellant before this court, sued the respondents herein who were the defendants in the lower court, stating that he was the registered



proprietor of the parcel of land known as Kiteta/Ngiluni/1175 (herein referred to as the suit property) but that in August, 2009, the defendants unlawfully entered thereon.

3. The plaintiff sought the following orders;
  - a. A declaration that the plaintiff is the lawful and bona fide owner and entitled to occupation and possession of plot no. Kiteta/Ngiluni/1175.
  - b. That an eviction do issue to evict the defendants either by themselves, their agents, employees, servants and/or otherwise from plot No. Kiteta/Ngiluni/1175.
  - c. Costs of and interest of this suit.
  - d. Any other and/or other relief that this court deems fit and expedite to grant in the aid of justice.
4. In a defence and counter claim dated 10<sup>th</sup> December, 2010 and amended on 2<sup>nd</sup> December, 2013, the defendants conceded being in occupation of the suit property but denied the allegation that their occupation was unlawful. They stated that the suit property was initially registered in the name of Mutunga Musungu who was the father of the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants while the 3<sup>rd</sup> defendant was the wife of the 2<sup>nd</sup> defendant.
5. They further stated that the suit property was initially ancestral land owned by three brothers Mutunga Musungu Nzesya, Ndivo Mwasya and Muindi Muasya but the same was only registered in the name of Mutunga Musungu Nzesya the father of the parties herein, and that their father sold his portion to one Benjamin Muindi Kuinga. That Ndivo Muasya and Muindi Muasya sold their respective portions to the plaintiff, the 2<sup>nd</sup> defendant and one Mukeli Mutunga, the mother of the plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> defendants, at a total consideration of Kshs. 8,000/= with the plaintiff contributing Kshs. 4,050/=, the 2<sup>nd</sup> defendant contributing Kshs. 3,000/= and their mother Mukeli Mutunga contributing Kshs. 950/=.
6. They stated that the plaintiff obtained registration of the suit property into his name by fraud upon tricking Mutunga Musungu Nzesya who was a habitual drunkard. That in 2008, the clan subdivided the suit property with each of the three getting their respective portions. That the plaintiff refused to abide by the clan's decision and brought this suit. They accused the plaintiff of obtaining sole registration through fraud, knowing that the same was family land.
7. The defendant stated that having been on the suit property since time immemorial, they had become owners thereof by way of adverse possession.
8. They sought the following orders in their counterclaim;
  - a. A declaration that the plaintiff holds Title no. Kiteta/Ngiluni/1175 in trust for the family.
  - b. An order directing the cancellation of the Title number Kiteta/Ngiluni/1175 by the respective Land Registrar.
  - c. A permanent injunction restraining the plaintiff either by himself or his agents from interfering with the 1<sup>st</sup> and 2<sup>nd</sup> defendants quite use and enjoyment of the portions of the suit premises occupied by the said defendants.
  - d. In the alternative to (c) above, a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have by adverse possession acquired ownership of the portions of the suit premises which they occupy.
  - e. Costs of this suit.



9. The plaintiff filed reply to defence and defence to counter claim dated 7<sup>th</sup> January, 2011 denying the defendants counterclaim. The suit was heard by way by viva voce evidence. The plaintiff presented his evidence as the only witness in support of his case while the defendants presented four witnesses.

### **Plaintiff's evidence**

10. PW1 was Muimbu Mutunga, the plaintiff in the suit. His testimony was that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were his brothers while the 3<sup>rd</sup> defendant was the wife of the 2<sup>nd</sup> defendant. That he was the registered proprietor of the land parcel no. Kiteta/Ngiluni/1175. That he obtained title thereof in 2009. He stated that he bought the suit property in 1978, but that the defendants entered the land in 2009 and 2010 having left their father's land parcel No. Kiteta/Ngiluni/837. Further that the defendants have no reason to enter his land as he has not consented to their entry thereon.
11. He denied the allegations that the land had belonged to his father Mutunga Muasya and maintained that he bought it from Muindi Muasya and Mutua Muasya and that during the adjudication, the land had been registered in his father's name. He produced title deeds for the suit property and for the parcel of land known as Kiteta/Ngiluni/837.
12. In cross-examination, he stated that he had not presented his purchase agreement to court. He stated that when the land was registered in his father's name, he sued him and that there were proceedings to that effect. He denied the suggestion that by 1978, the defendants were living on the suit property. He stated that he started living on the suit property in 1978 and that by then he did not have a title deed. He stated that parcel no. 837 and the suit property are separated by a river. He denied suggestions that the two parcels were originally one parcel. He stated that the suit property originally belonged to his grandfather Muasya. He denied suggestions that he purchased the suit property from Muindi Muasya and Mutua Muasya jointly with the 2<sup>nd</sup> defendant and his mother, insisting that he bought it alone. He stated that it is the defendants who called the clan over the suit property and that he did not participate in the clan's proceedings. He confirmed that the defendants had built on the suit property and stated that they built after 2009.
13. He stated that the 2<sup>nd</sup> defendant, was arrested and jailed in 1997 but denied allegations that he was jailed while living on the suit property. He stated that the 1<sup>st</sup> defendant lives on the suit property and that he did not know the homes of the defendants and could not identify their homes in photographs because he does not go near their homes which is 200 meters away.
14. In re-examination, he stated that the clan chased him from their meeting in 2009 and that he obtained the title deed for for the suit property on 7<sup>th</sup> May, 2008. That marked the close of the plaintiff's case

### **Defendants' evidence**

15. DW1 was Phylis Syombua, the 3<sup>rd</sup> defendant. She informed court that when she married the 2<sup>nd</sup> defendant, she found him on the suit property and that after her husband was arrested, the plaintiff began the dispute herein. She stated that the plaintiff filed a complaint to the clan asking that the suit property be subdivided. That the clan subdivided the land in 2008 or 2009. That the plaintiff being dissatisfied sued the parties herein.
16. She further stated that the suit property does not belong to the plaintiff but to his father that the land was bought jointly by the plaintiff, the 2<sup>nd</sup> defendant and their mother and that if the land was his, he could not have asked the clan to subdivide it. In cross-examination, she stated that the 2<sup>nd</sup> defendant was born on the suit property.



17. DW2 was Johnson Kimatu the 2<sup>nd</sup> defendant. He stated that he was serving sentence on a robbery with violence charge. He stated that in 1979, his father sold land and bought another parcel at Kambu. That the remaining portion was sold to him, the plaintiff and his mother where they paid Kshs. 3,000/=, Kshs. 4050/=, and Kshs. 950/= respectively. He stated that he remained on the suit property where he was born, married and arrested. He stated that after his arrest there were attempts to chase his wife from the land. That the plaintiff took elders to the land who planted sisal boundaries for the 3 portions.
18. In cross-examination, he stated that the three of them purchased the suit property but he had no record of purchase. He stated that after he was jailed, the plaintiff transferred the suit property to himself.
19. DW3 was George Kibulio who stated that he was from the same clan as the parties herein. He stated that on 29<sup>th</sup> August, 2008, at the plaintiff's behest, the clan went to solve a complaint by the plaintiff who stated that he bought land with his brother and mother at Kshs. 8,000/=. That the plaintiff stated that he had issues with his mother and brother over the suit land. That he told them that he paid Kshs. 4050/=, the 2<sup>nd</sup> defendant paid Kshs. 3.000/= and his mother paid Kshs. 950/=. That the clan went back to the land with the area Assistant chief and subdivided the land in accordance with each person's contribution, with the plaintiff getting the biggest portion and his mother the smallest.
20. In cross-examination he stated that the clan kept records and that he was the clan chairman. That at the time they were subdividing the land, the plaintiff did not tell them that he had a title deed. In re-examination, he stated that it is the plaintiff who called the clan because he wanted the suit property to be shared as per each person's contribution.
21. DW4 was Joseph Muli Kimanga the area Chief of Kiteta Location. He stated that he was made aware that there was a dispute in the Mutunga family over land and that the clan heard the case in 2008 and subdivided the land into 3 portions. He stated that he was informed that the land had been purchased with contributions of Kshs. 4050/=, Kshs. 3,000/= and Kshs. 950/= and that the subdivision was done by the clan as per each person's contribution. In cross-examination he stated that he was present during the clan meeting in August, 2008 and stated that the land was registered in the plaintiff's name. He also stated that the plaintiff had no other land. That marked the close of the defence case.
22. Parties were ordered to file their respective submissions, and the plaintiff filed his submissions. Upon consideration of the pleadings evidence and submissions, the trial court found that the plaintiff failed to prove evidence of purchase of the suit property and evidence leading to registration of the suit property including application for consent and consent to transfer as well as executed transfer form. Consequently, the trial court held that the plaintiff had failed to prove that the process of registration of the suit property met the threshold set out in section 26 of the Land Registration Act. Therefore, the trial court found that the plaintiff had failed to prove his case and dismissed it. On the defendants' counterclaim the trial court found that the defendants had tendered overwhelming evidence to prove that the suit property was jointly purchased by the plaintiff, 2<sup>nd</sup> defendant and their mother and that the plaintiff failed to challenge that evidence and called the clan to subdivide the suit property. The trial court hence found that the defendants had proved the counterclaim and the court entered judgment for the defendants as per the counterclaim.
23. Aggrieved with the decision of the trial court, the appellant before court filed the appeal herein vide the Memorandum of Appeal dated 1<sup>st</sup> April, 2022 citing the following eight grounds:
  - a. The learned magistrate erred in law and in fact when he determined that the Appellant had not proved his case to the required standard notwithstanding overwhelming evidence on the contrary.



- b. The trial magistrate erred in law and in fact in finding that there was no averment in the plaint to show that the plot forming the cause of action had been allocated to the Appellant when the said averment was indeed clearly captured in the plaint.
  - c. The trial magistrate completely misapprehended the evidence pertaining to unlawful and/or illegal occupation of the property forming the cause of action by the Respondents when the said allegations by the Appellant had not been denied by the said Respondents during the hearing on the part of the Defence.
  - d. The trial magistrate erred in law and in fact when he found and determined that there was nothing produced by the Appellant to demonstrate the plot forming the cause of action existed on the ground when actually the Appellant had adduced a search certificate from the relevant land registry as an authentic exhibit during the hearing.
  - e. The trial magistrate erred in law and in fact when he concluded that what the Appellant claim as their plot was part of the wide parcel of land whereat the Respondents had interest when there was no single evidence adduced by the Respondents to support that land was held in trust of them.
  - f. The trial magistrate erred in law and in fact when he wrongly determined that the Appellant had irregularly procured the land parcel forming the cause of action when there was no evidence whatsoever to back that finding.
  - g. The trial magistrate erred in failing to apply and/or ignored relevant and pertinent judicial comparables, precedents and trends regarding to similar Judicial decisions pertaining to similar causes of actions as the one brought by the Appellants and descended on arena of litigation when he ventured into issues that were never prayed for by the Respondent nor addressed during trial.
  - h. The trial magistrate misapprehended the evidence pertaining to ownership of the plot forming the cause of action thus arriving at a completely wrong, grossly, erroneous and therefore an unfortunate determination when she determined that the Appellant claim was tenuous notwithstanding the evidence tendered during trial and all the exhibits produced by the Appellant.
24. Consequently, the appellant sought the following orders;
- a. That this appeal be allowed and the court do order that the respondents solely responsible for the incident in issue and accordingly grant the prayers sought by the appellant in the lower court.
  - b. That the lower court's judgment be quashed and the Honourable Court do find in favour of the appellant to the extent that the respondent did not prove their case to the required standard or at all.
  - c. In the alternative the Honourable Court do proceed to freshly examine the evidence on record and accordingly determine the issues raised in the lower court for proper determination.
  - d. Costs of the suit in the lower court and the instant appeal be awarded to the appellant.
25. The appeal was canvassed by way of written submissions. On record are submissions filed by both parties herein.



## **Appellants Submissions**

26. Counsel for the appellant submitted that the trial magistrate misapprehended the evidence as the appellants assertion of unlawful occupation by the respondents was not denied by the latter. Further that the appellant's claim as the registered proprietor of the suit property was not controverted. Counsel argued that the appellant having proved that he had registered ownership and the respondents unlawful occupation, it was incumbent on the respondents to explain the basis of their occupation, which they failed.
27. Counsel also submitted that the trial court failed to appreciate that under Section 17 of the Limitation Actions Act, an action to recover land must be brought within 12 years.
28. It was further submitted for the appellant that the trial court failed to distinguish the two properties being parcel Number 1175 and parcel Number 837. Counsel insisted that the suit property has never been registered in the name of the appellants father. Counsel argued that the cause of action was in regard to parcel 837 which is still ancestral land. Reliance was placed in Section 24 of the [Land Registration Act](#). Counsel argued that as the respondents are cultivating on the appellant's parcel, they have violated Section 24 of the [Land Registration Act](#).
29. Counsel faulted the trial court's finding that the respondents' witnesses were consistent on the contribution made by each person for the purchase of the suit property, when there was no evidence to back such findings. Counsel argued that there was no proof of fraud by the respondent since the respondents failed to prove false representation on the part of the appellant on the required standard.
30. Counsel also submitted that the trial court failed to appreciate the fact that the concept of trust must be proved. Counsel argued that the appellants argument was that there was a constructive trust which was breached by the 1<sup>st</sup> respondent was not proved. Counsel submitted that the existence of trust was a matter of evidence which was lacking in this case and that the court cannot imply or presume.

## **Respondents Submissions**

31. Counsel for respondent supported the findings by the trial court and argued that the appellant did not give evidence in support of his case and hence the trial court was right in its decision. Counsel argued that although the appellant alleged that he purchased the suit property no sale agreement was exhibited.
32. On the second ground of appeal, counsel submitted that the said ground is misleading as the trial court did not hold that there was no averment to show that the suit property had been allocated to the appellant. Counsel submitted that the trial court rightly held that there was no evidence to show how the appellant obtained registration of the suit property.
33. On the appellant's ground of appeal to the effect that the respondent had not denied unlawful occupation, counsel submitted that the said ground was misleading because the denial was in the defence and evidence.
34. Counsel also submitted that ground 4 of appeal was misleading as no such findings were made by the trial court. They argued that the trial court held that there was no evidence of purchase, transfer, consent or registration to meet the threshold set out in Section 26 of the [Land Registration Act](#). Counsel further submitted that the respondents adduced evidence to support their claim. Counsel argued that there was no evidence that the learned magistrate ventured into non-issues. Counsel argued that there was no merit in ground 8 of appeal and argued that Section 17 of the Limitation Actions Act was never raised in the lower court and cannot be brought up in submissions, as there was no objection



on jurisdiction. On the appellants argument that the trial magistrate could not distinguish the two properties, counsel argued that the same was not an issue raised in the Memorandum of Appeal.

### **Analysis and determination**

35. The court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-evaluate, re-analyze and re-assess the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.

36. The duty of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, where the Court of Appeal stated as follows;

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

37. Having considered the grounds of appeal raised in the Memorandum of Appeal, my view is that the same raises three main issues for this court's determination;

- a. Whether the appellant's registration as proprietor of the suit was obtained by fraud.
- b. Whether the respondents' occupation of the suit property is lawful.
- c. Whether the respondents proved existence of trust on the part of the appellant.

38. It is not disputed that the suit property is registered in the name of the appellant in this case and that the respondents are in occupation of a portion thereof. Section 26 of the [Land Registration Act](#) provides for conclusiveness of title as follows;

Certificate of title to be held as conclusive evidence of proprietorship

(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.

39. Therefore, registration vests in a proprietor of land, absolute and indefeasible rights, unless there is evidence that the acquisition of such title was by fraud, misrepresentation, illegality or corruption, whether or not the registered proprietor was party thereto.

40. In the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the court held that:

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured



by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.

41. Similarly, in the case of *Munyu Maina v Hiram Gathiba Maina, Civil Appeal No.239 of 2009*, the Court of Appeal held that:-

We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.

42. It is trite that fraud ought not only be pleaded but must be strictly proved, and the standard of proof for fraud in civil cases is higher than the standard required in ordinary civil matters of the balance of probabilities but slightly lower than the standard of proof required in criminal cases of beyond reasonable doubt.

43. In the case of *Kinyanjui Kamau vs George Kamau [2015] eKLR* the court stated that:

It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo (2008)1KLR (G & F) 742* wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..” In case where fraud is alleged it is not enough to simply infer fraud from the facts.

44. In the instant suit, the respondents accused the appellant of obtaining registration of the suit property by fraud and alleged specifically that the suit property was initially registered in the name of their father *Mutunga Musungu Nzesya*, although jointly owned by three brothers; namely *Mutunga Musungu Nzesya*, *Ndivo Muasya* and *Muindi Muasya*. Further that their father *Mutunga Musungu Nzesya* sold his share to one *Benjamin Muinde Kuinga*. That the share that remained belonging to *Ndivo Muasya* and *Muindi Muasya* was sold by the two to the Appellant, the 2<sup>nd</sup> Respondent and their mother one *Mukeli Mutunga* at a sum of Kshs. 8,000/=; with their contributions being Kshs. 4050/=; Kshs.3000/= and Kshs. 950/= respectively. In their particulars of fraud, they accused the appellant of



colluding with their father Mutunga Musungu to obtain registration; taking advantage of and tricking their father Mutunga Musungu who was allegedly a habitual drunkard to obtain registration; and clandestinely obtaining registration despite the fact that the suit property was purchased by the three of them.

45. I have considered the evidence of both parties. The respondents alleged that the appellant tricked their father Mutunga Musungu to transfer the suit property to him. However, the respondents did not produce a copy of the register of the suit property or any other evidence or record to demonstrate their allegation that their father Mutunga Musungu Nzesya was initially registered as proprietor of the suit property and that the same was fraudulently, or by collusion or trickery transferred to the appellant. In addition, no evidence was presented by the respondents to show that the plaintiff obtained registration by tricking the said Mutunga Musungu or by fraud whatsoever. Besides, on the allegation that the suit property was purchased jointly by the appellant, the 2<sup>nd</sup> respondent and their mother was not proved. The respondents did not present any sale agreement. Therefore, with respect, although the trial court found that there was consistent and overwhelming evidence to show that the respondents jointly purchased the suit property, the evidence on record did not demonstrate proof of joint purchase by the 2<sup>nd</sup> respondent. This is because the evidence of DW1 who is the wife of DW1 and that of DW3 and DW4 was merely hearsay as none of them claimed to have witnessed the disputed joint purchase, while the evidence of DW2 was not supported by any sale agreement. It is therefore the finding of this court that the respondents did not prove joint purchase of the suit property. That being the case, the assertion that the appellant acted fraudulently by obtaining sole registration of the suit property, when the same was jointly purchased, was not proved. In addition, the question as to whether there was application for consent; consent to transfer the suit property and transfer form, as found by the trial court, did not arise in the pleadings or evidence. The respondent did not raise the same as the basis of his accusation of fraud on the part of the appellant and therefore, the trial court was wrong to make a finding that failure of the appellant to produce those documents demonstrated fraud on his part. I therefore find and hold that the respondent failed to prove that the appellant obtained registration of the suit property by fraud.

46. The respondents also claimed the suit property on the basis of adverse possession. Adverse possession is a situation where a person takes possession of another's land, asserting ownership rights over it, while the title holder of the land neglects to take action against such person in assertion of his or her title, for a period of 12 years. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] e KLR the court held that;

The essential prerequisites (of adverse possession) being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

47. The basis for the claim of adverse possession is in the provisions of the *Limitation of Actions Act*. Sections 7, 17, 37 and 38 of the *Limitation of Actions Act* provides as follows;

Section 17 provides that;

Actions to recover land

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

Section 17 provides that;

Title extinguished at end of limitation period



Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished

Section 37 provides that;

#### Application of Act to registered land

This Act applies to land registered under the Government Lands Act (Repealed), the Registration of Titles Act (Repealed), the Land Titles Act (Repealed) or the Registered Land Act (Repealed), in the same manner and to the same extent as it applies to land not so registered, except that—

- a. Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;
- b. An easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it.

Section 38 provides that;

#### Registration of title to land or easement acquired under Act

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.
48. Therefore, to prove a claim for land under the doctrine of adverse possession, the claimant must demonstrate continuous and uninterrupted possession of another person's land openly, as of right and without the owner's permission for a continuous period of twelve years. There must be clear evidence of dispossession of the real owner by the adverse possessor for an uninterrupted period of twelve years.
49. In this case the appellant stated that the respondents entered his land in 2009, prompting him to file suit in the lower court in 2010. On their part, the respondents stated that they had been in occupation from time immemorial. No evidence was presented to show the nature, extent and duration of possession by the respondents. The allegation that they had been on the suit property from time immemorial, without giving any cogent evidence of when they entered the suit property, in my view is not sufficient evidence for adverse possession. In the premises, I find and hold that the respondents' claim for the suit property under the doctrine of adverse possession was not proved by the respondents.



50. The last claim by the respondents was that the suit property had been held by the appellant in trust for the family.

51. Section 28 of the *Land Registration Act* which is a reflection of Section 30 of Cap 300(repealed)provides for overriding interests on registered land which includes trusts, as follows:

“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—

(a) .....

(b) Trusts including customary trusts;”

52. Therefore, trusts including customary trusts are overriding interests which, although not noted in the register, all registered land is subject to.

53. Allegations of a trust including customary trust must be proved. In this case the respondents argued that the appellant was registered as owner of the suit property in trust for the family. It is not disputed that the appellant is the registered proprietor of the suit property. In his evidence in cross examination, the appellant confirmed that the suit property originally belonged to his grandfather Muasya and stated that later it was owned by his grandfather’s three sons being Mutunga Musungu Nzesya; Ndivo Muasya and Muindi Muasya. That he bought the land alone, while the respondent alleged that they contributed on the purchase of the land. I must observe that in this case parties made many allegations but made no effort to back up those allegations with evidence. The appellant produced titles to parcel known as Kiteta/Nguluni/1175 and 837, while the respondents produced an alleged decision of the clan elders for subdivision of the land among the parties herein. Although the appellant stated that he purchased the suit property from his two uncles, no evidence of purchase was presented. Similarly, the respondents’ allegations that they purchased the suit property was also not proved. In the premises I find and hold that none of the parties proved having purchased the suit property. That then leaves us with the appellant’s evidence that the suit property belonged to his grandfather Muasya. Indeed, this position is not contested but affirmed by the respondents.

54. The respondents maintained that the suit property was ancestral land. In my view they were imputing that customary trust existed between them and the appellant. To prove customary trust they were obligated to demonstrate that the suit property before registration was family land; that they belong to the stated family, that their relationship with the family is not remote and that they were also entitled to be registered as owners thereof and that the claim is directed against the registered proprietor who is a member of the family in issue.

55. In the case of *Isack Kieba M’ninga v Isaaya Theuri M’Lintari & Another* [2018] e KLR, the Supreme Court of Kenya explained customary trust 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<sup>3</sup>.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.<sup>4</sup>The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.<sup>5</sup>The claim is directed against the registered proprietor who is a member of the family, clan or group.”

56. From the evidence on record, it is clear that the appellant is the registered proprietor of the suit property and a member of the family of the late Muasya who is the grandfather of the parties herein and the respondents are also members of that family in the same proximity as the appellant as they are both grandchildren of Muasya. Therefore, there is no remoteness in the respondents’ relationship with the family in comparison with the appellant. As the suit property belonged to the respondents’ grandfather, just like the appellant, they too were entitled to be registered as proprietors thereof. The appellant did not provide evidence to justify why he was the only one registered as owner of the suit property when the same was initially belonged by his grandfather Muasya, who is also the grandfather of the respondents.
57. As the appellant failed to justify the basis for his sole registration of the suit property, when the same originally belonged to his grandfather Muasya, who is also the respondents’ grandfather, I find and hold that the appellant holds the suit property in trust for the respondents and other family members within the larger Muasya Family. Therefore, respondents being from the family of Muasya, are justified to live on the suit property and therefore I find and hold that their occupation thereof does not amount to trespass. In the premises, I find and hold that the appellant is not entitled to orders sought in the plaint as the suit property is family land which he holds in trust for the family.
58. It is trite that parties are bound by their pleadings. The respondents did not seek orders to have the suit property re-surveyed, subdivided or transferred to them. Therefore, the trial court had no basis to order that the Land Registrar resurveys the suit property as subdivided by the clan and the respective portions be registered accordingly as no such prayer was made by the respondents. In any case, the suit property belongs to the whole family of Muasya, the grandfather of the parties herein and not just the parties herein. In addition, the suit property being family property of the larger Muasya family, orders of injunction cannot issue as the respondents herein do not have exclusive rights over the same. The prayer for cancellation of title is not supported with a prayer for subsequent registration in any other person’s name, and therefore orders for cancellation of title will not serve the interests of justice, as the suit property having been titled and registered must have the name of a registered owner. Therefore, that prayer is incapable of being granted and therefore this court declines to grant the same.
59. In the premises, I find and hold that the respondents’ appeal partially succeeds. I set aside the decision of the trial court and substitute the same with an order that the a declaration is hereby made that the appellant holds Title Number Kiteta/Ngiluni/1175 in trust for the Muasya Family. As the parties herein are from one family, each party shall bear its own costs of the appeal.
60. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Kilonzi holding brief for Mr. Kimeu for the appellant



Mr. Kituku for the respondent

Court Assistant: M. Nguyai

